



The Executive Director  
Australian Law Reform Commission  
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Dear Executive Director

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

The Parliamentary Library welcomes the opportunity to provide a submission on the Australian Law Reform Commission's Discussion Paper, *Copyright and the Digital Economy*, June 2013 ('Discussion Paper') and to engage once again in the consultation process for this important inquiry.

*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 Library's previous submission to the ALRC's Issues Paper 42 ([submission no. 107](#)) provides a more detailed account of the parliamentary library copyright infringement exceptions and how they are operating in the digital environment. This submission does not duplicate that material but refers to it where appropriate.

While the ALRC Discussion Paper contains important questions of broader interest to the Library community as a whole, the Parliamentary Library's submission focuses mainly on the proposals that would affect the parliamentary library exceptions. Accordingly, the submission addresses Proposals 14-3 and 17-1 in some detail and more briefly refers to Proposals 4-1 and 11-7.

*Proposal 14-3(b) Copying for members of Parliament*

Proposal 14-3 paragraph (b) proposes that the *Copyright Act 1968* be amended to repeal sections 48A and 104A, the parliamentary library copyright infringement exceptions. The Discussion Paper justifies this repeal on the grounds that copying by parliamentary libraries would usually fall within a more general fair use exception.

The Parliamentary Library strongly opposes this proposal and disputes that a fair use exception would provide a suitable alternative to the existing parliamentary library exceptions.

As the Library's previous submission states:

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*, (emphasis added) 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.

The rationale for these provisions, when enacted in 1984, was a realisation that the copyright obligations on parliamentary libraries were having an increasingly problematic impact on the ability of those libraries to fulfil their function of providing parliamentarians with unimpeded access to quality information. The onerous record keeping requirements, the heavy restrictions on copying, the inability to provide audio visual services and build current affairs data bases, and issues of timeliness and confidentiality, were all part of the impetus that led to amendment of the Copyright Act in 1984 to provide a wide copyright infringement exception for parliamentary libraries. These exceptions were also seen as complementing the existing protection afforded to members of parliament by parliamentary privilege. Parliamentary privilege provides protection against liability in cases where a member of parliament reproduces copyright material, providing that it comes under the umbrella of 'proceedings in parliament'.

The protection afforded by sections 48A and 104 is extremely broad. The phrase 'anything done' encompasses printing, downloading, saving to disk, e-mailing and long term electronic storage. In practical terms, these exceptions are critical for the provision of affordable and timely services by the Library. Unlike other libraries, parliamentary libraries are not required to keep extensive document copying records, seek signed declarations from clients, seek permission from copyright owners prior to copying and are not required to pay fees to copyright collection agencies.

These copyright privileges match other benefits given to members of Parliament on the basis that their task as elected representatives charged with the responsibility of administering Australia's legislative and governmental framework requires access to all relevant resources.

The Parliamentary Library disputes that a fair use exception could adequately replace these provisions. Fair use is a flexible concept to be determined on a case-by-case basis and the need to delve into the finer questions involved in the practical application of such provisions is inappropriate in a parliamentary environment. As the Discussion Paper notes, even where a use may fall into one of the named illustrative purposes, it does not necessarily mean that the use will be fair. In every case, the fairness factors must be explored, and the results weighed together, in light of the purposes of copyright. In contrast, the parliamentary library exceptions provide the necessary certainty with no need for a case-by-case assessment of the facts.

I am also concerned that removal of the parliamentary exceptions, and their replacement with the concept of fair use, could impact on my ability to perform my role in accordance with legislative requirements. The office of Parliamentary Librarian is created by section 38A of the *Parliamentary Service Act 1999*. The functions of this office are set out at section 38B of that Act, which provides that the functions of the Parliamentary Librarian are 'to provide high quality information, analysis and advice to Senators and Members ... in support of their parliamentary and representational roles'. These functions must be performed in 'a

confidential manner'. However, in the absence of the Parliamentary Library exceptions, and the necessity of establishing fair use on a case-by-case basis, will records need to be kept of all copyright material provided to Senators and Members, or declarations as to their intended use of that material sought, to ensure that the Library is protected in the event that its use of the material is challenged? If so, how could these records be employed to defend the Library's position, without compromising the statutory requirement to maintain confidentiality?

The Library also notes that the list of purposes that may qualify as fair use as proposed in the Discussion Paper, fails to include one that would be specific to parliamentary libraries. Instead, a parliamentary library exception for fair use would come under the general heading of 'administrative purposes' which would deal with copyright in relation to the three arms of government, namely the executive, judiciary and legislature. The Paper does not provide an explanation of why the ALRC thinks these three arms of government would have the same needs in relation to copyright. The Library questions this approach and argues the three arms of government are quite distinctive, each requiring a different set of privileges. In our view the more generic term of 'public administration' fails to take account of the very specific and distinctive needs of parliamentary libraries when providing services to members of parliament.

Indeed, it is only a small clientele with specialised and unique needs that benefits from the parliamentary library exceptions, although arguably there is also an indirect wider public benefit flowing from these exceptions. The provision of unlimited access to high quality information and research in a timely and confidential manner is directed at ensuring a well-informed parliament, with members who are more able to perform their parliamentary and representational duties. A fair use exception, the Library submits, would not deliver this benefit with the same degree of certainty.

On a related matter, I also point out that the Library takes all of its copyright obligations seriously and does not abuse the broad and generous exceptions in sections 48A and 104A. For example, a departmental governance paper on copyright provides guidance to library staff on copyright matters; staff are required to advise senators and members that the parliamentary library exceptions do not flow to the individual members and senators for any private purpose; and at all other times the normal copyright obligations apply. There are copyright notices displayed near photocopying machines in the Library advising users of their obligations and the full text of the Library's databases is blocked to wider public access on the Parliamentary internet site. Similarly, the Library's publishing program, which is publicly available, complies with copyright and respects third parties' rights. Finally, the Library's substantial collection development budget and expensive subscriptions to various media services are evidence that the parliamentary library exceptions are not used to deny publishers and rights holders their proper remuneration.

*Proposal 4-1 The Copyright Act should provide a broad flexible exception for fair use*

The Parliamentary Library has no quarrel with the principle proposed— we simply feel that the existing parliamentary library exceptions also need to be maintained.

While broadly supporting the concept of fair use, the Parliamentary Library suggests care needs to be taken in drafting such legislation. Clear legislation, rather than reliance on common law, is more likely to give the certainty and clarity that all libraries need in their dealings with copyright. We support the Law Council's view that if a more flexible fair use provision is introduced into the Copyright Act, it is also appropriate to provide clear criteria and guidance to Australian courts to remove or reduce the uncertainty that may arise from a general fair use exception.

With regard to a special exception for parliamentary libraries, we note that the Discussion Paper explains that where copyright legislation includes an exception for fair use, there will also be other more specific exceptions that operate in addition to fair use. The ALRC

considers that the public interest is served by delineating clearly what libraries and archives are permitted to do with copyright material in fulfilling their core public service missions. It argues that retaining some specific exceptions for libraries and archives would be consistent with the approach taken in other jurisdictions, including those that have fair use. In this regard, the Discussion Paper therefore proposes just two special exceptions, namely exceptions relating to preservation and document supply by libraries and archives.

The Parliamentary Library reiterates its view that a further special exception is required, namely an exception specific to parliamentary libraries. Such an exception enables parliamentarians to be provided with information and research appropriate to support them in their unique and vital position as elected representatives determining Australia's legislative and governmental well-being.

#### *Proposal 17-1 Contracting out*

In its submission to Issues Paper no 42 the Parliamentary Library raised concerns about the trend in the digital environment for private contracts to override the parliamentary library exceptions. This trend, we argued, compromises the intended function of the exceptions in providing members of Parliament with unimpeded access to quality information.

The Library is pleased therefore that the Discussion Paper at chapter 17 acknowledges these concerns, but is disappointed with the qualified support that Proposal 17-1 offers.

Proposal 17-1 supports amendment of the Copyright Act to provide that contractual terms excluding or limiting the operation of certain exceptions would have no effect. The proposal would only apply in the case of the libraries and archives exceptions and in the case of certain fair use or fair dealing exceptions (for example exceptions relating to the use of material for research or study, or criticism or review).

The ALRC argues that this proposal should be limited to the extent that the group of exceptions subject to protection from contracting out should only be those exceptions which are clearly for a 'defined public purpose'.

The Library questions the approach of providing protection from contracting out for some fair use exceptions but not for others. It would appear to be an arbitrary and subjective demarcation and may imply that some categories of fair use are more worthwhile than others.

The Parliamentary Library also seeks clarification on how Proposal 17-1 would apply in relation to the parliamentary library exceptions. It appears that the proposed limitation on contracting out would not apply in the case of a fair use exception for an 'administrative purpose' and therefore would not apply in the case of exceptions for parliamentary libraries. Given that the parliamentary library exceptions are founded on a strong public purpose principle, their exclusion from the benefit of Proposal 17-1 would appear to be contrary to the rationale of that proposal.

On another interpretation, the Library asks if the parliamentary library exceptions are meant to fit within the libraries and archives exceptions that are given protection against contracting out under Proposal 17-1? However, it is our understanding that the libraries and archives exceptions relate only to preservation and document supply.

The Parliamentary Library submits that Proposal 17-1 should be broadened to provide protection from contracting out of a much greater range of copyright exceptions. In particular it requests that, for the reasons explained in its previous submission, the Copyright Act be amended to prevent contracting out of the parliamentary library exceptions. Although specifically excluded from the terms of reference for the ALRC's inquiry, the Library submits that the increasing potential for technological protection mechanisms to impact on the utility of legislated exceptions should properly be considered in any future recommendations.

*Proposal 11-7 Provision of material in electronic format*

The Parliamentary Library is concerned that the approach proposed in relation to the provision of copyrighted material in electronic format, as set out in Proposal 11-7, would be unduly onerous on libraries and archives. The Library considers that an appropriate alternative approach would be to require the library or archive, when providing copyrighted material, to mention the need to comply with the requirements of the Copyright Act, and for the user to be responsible for such compliance. We envisage that this could operate in a similar way to the notices displayed near photocopying machines, which advise users of their obligations under copyright legislation.

*Amendment of section 48A of the Copyright Act to encompass copies of 'works'*

Finally I wish to raise again a matter concerning the wording of section 48A and the need for redrafting this provision so that the parliamentary library exception would apply not just to 'works' but also to copies of 'works'.

This problem with section 48A was described in the Library's previous submission to the Issues Paper but appears not to be addressed in the Discussion Paper. I submit again that the Committee should consider this issue. A summary of the problem is provided here and a fuller account can be found in the Library's previous submission.

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.

Based on the increased frequency with which this issue is arising, the Library considers it appropriate that section 48A of the Copyright 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.

Yours sincerely



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1 August 2013