



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

Dear Sir

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

The NSW Parliamentary Library (the Library) welcomes the opportunity to provide a submission to the above ALRC Discussion Paper.

The Library, which operates within the organisational context of the Department of Parliamentary Services, has been in continuous existence since 1840. Its key function is the provision of information and research services for Members, their staff, parliamentary committees and parliamentary staff. The Library supports the parliamentary process by providing clients with quality information services which are affordable, timely, objective and up to date.

Current position

Currently, ss 48A and 104A of the *Copyright Act 1968* provide parliamentary libraries with broad copyright exemptions or exceptions to infringement. Section 48A applies to the copying of 'works', whereas s 104A applies to copyright in subject matter 'other than works', notably sound recordings, cinematograph films, sound broadcasts or television broadcasts. Both sections provide that copyright 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.

The scope of the immunity is in broad terms, defined by the words 'by anything done', which would encompass printing, downloading, saving to disk, e-mailing and long term electronic storage. Its operation, however, is limited both in respect to the fact that it is only to be exercised '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'. What may appear to be a wide immunity is in fact restricted therefore to the immediate parliamentary context in which library officers assist members in the performance of their parliamentary duties. As such, the financial implications arising from this immunity for copyright owners are, in reality, very limited.

Further immunity is provided by s 50 of the *Copyright Act 1968* which permits other libraries to supply (including by electronic means) parliamentary libraries 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 a member.

The rationale behind the immunities and exceptions granted to parliamentary libraries can be readily understood in terms of facilitating the operation of representative democracy, be it at the Commonwealth, State or Territory level. The duties an MP has in this respect include the many activities associated with legislation, inquiry and questioning, plus the more general responsibilities concerned with the representation of either a particular constituency or, where this does not apply, the public interest in a wider sense. It is imperative that parliamentarians in a representative democracy should pursue these many duties on an informed basis.

ALRC Discussion Paper

The ALRC Discussion Paper contemplates the repeal of the express immunities and exception outlined above. Instead, it proposes the introduction of a broad, flexible exception based on fair use, the application of which is to be determined on a case by case basis and by reference the following non-exhaustive list of fairness factors:

- 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.

In addition, it is proposed that (para 4.157):

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.

As 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 to the “public administration” category of fair use. It was said at para 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.

Comment on the ALRC discussion paper

The Library strongly supports the clarification of the current legislation, which is overly complex. It does not, however, support the repeal of the current exemptions for parliamentary libraries. We emphasise that this is not from any desire to undermine the general principles upon which copyright law is based. Rather, it derives from our long experience of providing information and research services to members of Parliament.

Provision of those services fall into two categories. First, it is often the case that information is required at very short notice, when a member asks for a journal article or media source for example, which they intend to use for a speech on that day, or even in that hour. At present, Library staff are able to respond to these requests in the certain knowledge that they are not breaking copyright law. Under the proposed reform that certainty would be lost. In its place would be something less than a presumption that the use is fair. There would always be a doubt, a question mark, a need to seek advice at a busy time when information is wanted here and now. Second, in such areas as media monitoring the Library creates databases by systematically collecting material which is of general relevance to members in the performance of their parliamentary duties. An example is our press clippings database, which can be accessed by members at any time, as the need arises. Broadly, therefore, the concern is that parliamentary libraries would be compromised in their capacity to respond to confidential, time dependent requests, to create databases and to monitor developments in the print and electronic media.

We acknowledge that different interests are involved here, as between the creators and users of copyright, but in our view there is an overriding public interest in favour of retaining the exemptions that currently apply to parliamentary libraries. Essentially, the reasoning that led to those exemptions being established in the first place still hold good. It is also the case that those exemptions have operated smoothly and without controversy over many decades.

We acknowledge too that, in the ALRC’s view, the “public administration” exception would in all probability “generally” apply to the Library’s work, as set out in para 14.64 of the Discussion Paper. “Generally” but not always, or not necessarily so would seem to be the position as proposed in the Discussion Paper, leaving the matter to be decided on a case by case basis.

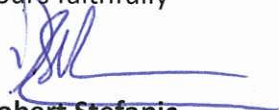
Government use

We have had an opportunity to read APLA’s submission and fully endorse its comments in respect to the risks involved in bundling judicial proceedings and parliamentary libraries in with

the varied activities of executive government. As explained in the APLA submission, these risks arise in part from the legal complexities that attend the operation of the doctrine of the separation of powers, a doctrine that encompasses the difficult and distinctive area of law associated with parliamentary privilege. Any reform of the copyright law relating to parliamentary libraries and judicial proceedings alike must take serious account of the many legal and practical differences and distinctions at issue under what the ALRC Discussion Paper presents under the rubric of "public administration".

The NSW Parliamentary Library's view is that certainty and clarity as to the position of parliamentary libraries in respect to copyright law is essential to their successful and efficient operation. The importance of the need of parliaments as a democratic institution, and parliamentarians, for unimpeded access to information is currently recognised by the parliamentary library exceptions in the *Copyright Act 1968*.

Yours faithfully



Robert Stefanic

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