31 July 2013

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Ms Wynn

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

The Western Australian Parliament welcomes the opportunity to make a submission in response to the ALRC discussion paper, *Copyright and the Digital Economy,* to provide feedback and suggestions on this important issue.

The Western Australian Parliamentary Library was established in 1889 and is responsible for providing information services to members of the Western Australian Parliament in a timely, effective and efficient manner. The library functions as a central point in the collection, documentation, coordination and dissemination of information to members. The responsibilities of members of Parliament are twofold; to support their constituents and to support the legislature by debating and passing laws and participating in Parliamentary Committees.

The Parliamentary Library supports members of Parliament by providing research and information services. It is imperative that the library is able to provide information to members, often within very short timeframes and which may be difficult to find, in complete confidence. Any proposed changes to the *Copyright Act 1968* must be considered in light of this and must not dilute the exceptions or reduce the level of immunity currently provided to Parliamentary Library Officers by ss48A and 104A of the *Copyright Act 1968*.

The Western Australian Parliament welcomes the discussion paper on *Copyright and the Digital Economy* as there is an increasing need for members of Parliament to access digital material provided via either the library's digital collection or the Internet.

Current Position

Sections 48A and 104A of the *Copyright Act 1968* provide Parliamentary Libraries with broad copyright exemptions or exceptions from infringement. Section 48A applies to the copying of 'works' and s 104A applies to copyright in subject matter 'other than works', notably sound

recordings, cinematograph films, sound broadcasts or television broadcasts. Both sections provide:

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.

The current immunity is defined by 'anything done', which covers printing, downloading, saving to disk, emailing and long-term electronic storage. The operations of these processes are limited to 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 a member'. While these exemptions may appear to provide wide-ranging immunity, it is in fact restricted to the immediate parliamentary context of library officers assisting members in the performance of their parliamentary duties.

There is further immunity under sections 50, 7A and 7B of the *Copyright Act 1968* (fair dealing provisions), which permit 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.

Because of these exceptions, 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.

These exceptions are critical to the Western Australian Parliamentary Library in providing affordable, timely and relevant information to members of Parliament and to ensure that access is unimpeded.

ALRC Discussion Paper

The ALRC Discussion Paper proposes that the expressed immunities and exceptions discussed above be repealed, and that a broad, flexible exception be introduced instead based on 'fair use', which is to be determined on a case-by-case basis and by reference to the following non-exhaustive list of fairness factors under 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 contain a non-exhaustive list of illustrative uses or purposes of fair use, and 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.

These may be thought of as examples of the broad types of use that may be fair. Under this list, the illustrative purpose of "public administration" would replace the existing exceptions under ss48A and 104A. However, the fair use exception in the parliamentary environment is eroded by the non-presumptive nature of the proposal. Paragraph 14.64 of the discussion paper states:

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.

The Western Australian Parliamentary Library supports the clarification of the current legislation, which is long and complex. However, it does not support the repeal of the current exemptions for Parliamentary Libraries as they provide surety and clarity of the legal framework within which information can be provided to members of Parliament. Copyright owners are not unduly disadvantaged by the application of these exemptions, as there is minimal commercial impact due to the relatively small number of Parliamentary members.

We expect the 'fair use' proposal to be tested in court in years to come, at considerable cost to Parliamentary Libraries, as it is vague and does not offer clear and concise direction for Parliamentary Officers. It is also likely to create a great deal of added administrative oversight for Parliamentary Libraries, increasing the cost burden in providing information services to Parliamentarians.

Extension of existing exceptions under ss 48A and 104A

The Western Australian Parliament believes that the existing immunities provided under ss48A and 104A of the Copyright Act 1968 should be extended to include the capture of digital forms.

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

The other difficulty in a digital environment is that the copyright infringement exception under section 48A 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, a library wishes to archive these electronic documents for inclusion in its in-house database.

The proliferation of electronic information has led to members of Parliament demanding access to an ever-widening range of electronic material. The increasing number of electronic newspapers and journals available by subscription or free on the web 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. Further clarification needs to be given to this growing area of demand by extending the current exceptions to include digital ‘copies’ of ‘works’.

Chapter 14 - Government Use

A major concern for the WA Parliamentary Library is that the discussion paper bundles parliamentary proceedings with administrative government within a general list of illustrative factors under the heading ‘public administration’, and then applies a general ‘fair use’ exception to copyright infringement without any explanation or discussion. There is very little supporting commentary or examples to illustrate why this blanket exception should be applied. There are also no examples of where the current exceptions have been abused in the past or any impact they have had on any aspect of the copyright provisions. The discussion paper makes it quite clear that not all aspects of public administration would qualify as ‘fair use’ and would need to be clarified by the courts.

The Western Australian Parliament believes there are risks associated with bundling judicial proceedings and the activities of Parliamentary Libraries with the activities of the executive and administrative government in a ‘public administration’ category. Some parts of the executive government do have a commercial focus and compete against private companies; certain aspects of judicial proceedings attract absolute privilege; 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 determined.

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’; other State Parliaments, such as the Western Australian Parliament, relying on a combination of statutory definition and common law definition of ‘parliamentary privilege’; and yet other Parliaments, such as the New South Wales Parliament, relying for the most part on the common law.

The Western Australian Parliament does not support the proposal under Chapter 14 as it will add an unnecessary level of complexity and because it is envisaged that ‘fair use’ by public administration will need to be tested in court. The current exceptions for Parliamentary Libraries under ss48A and 104A of the *Copyright Act 1968* are clear and concise and provide a framework within which Parliamentary Libraries can provide information services to members of Parliament without confusion.

Proposal 17-1– Contracting out

Contracting out has become an issue for Parliamentary Libraries as there is a trend in the digital environment for online information service contracts to limit or negate the copyright exceptions for Parliamentary Libraries. This trend compromises the intended function of the exceptions, which is to provide members of Parliament with unimpeded access to quality information. There is a need for the exceptions to be broadened to provide immunity from infringement when using these services and/or copying from electronic and online services.

Thank you for the opportunity to provide a submission in response to this discussion paper, and any queries arising from this discussion paper can be addressed to Judy Ballantyne, Library and Information Services Manager, on (08) 9222 7312, or jballantyne@parliament.wa.gov.au.

Yours sincerely

Russell Bremner
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