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**Copyright, Privilege and
Members of Parliament**

by

Gareth Griffith

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CONTENTS

EXECUTIVE SUMMARY

INTRODUCTION	1
COPYRIGHT AND MPS – VARYING PERSPECTIVES	1
COPYRIGHT AND THE CROWN.....	2
COPYRIGHT AND PARLIAMENTARY PRIVILEGE.....	3
COPYRIGHT AND PARLIAMENTARY LIBRARIES.....	8
COPYRIGHT AND PERSONAL LIABILITY	11
CONCLUSIONS.....	12

APPENDIX A:

UK Parliament, Joint Committee on Parliament Privilege, Parliamentary Privilege –First Report, March 1999 –Memorandum by the Librarian of the House of Commons

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EXECUTIVE SUMMARY

The purpose of this paper is to comment upon the relationship between MPs and copyright law and to analyse the impact of the law of parliamentary privilege upon it. That relationship can be approached from at least three perspectives which can be categorised as the 'governmental', 'parliamentary' and 'private'.

- Under the 'governmental' category, when in government and acting in a ministerial capacity, an MP can claim the immunities granted to the Crown under the *Copyright Act 1968* (Cth) (pages 2-3).
- Under the 'parliamentary' category, an MP will also be able to claim the immunities which flow from parliamentary privilege, but only in relation to those activities which come under the umbrella of 'proceedings in parliament' (pages 3-8).
- Under the 'private' category, an MP can be taken to be a private individual and therefore subject to the normal application of the copyright law (pages 11-12).
- A potential fourth category is also discussed. This refers to the exemptions under the *Copyright Act 1968* for copying by parliamentary libraries for MPs (pages 8-11).

INTRODUCTION

Little, if anything, has been written on the question of the distinctive relationship between MPs and the law of copyright. The purpose of this paper is to comment on that relationship and, in doing so, to analyse the impact of parliamentary privilege upon it. An illustration of the relevance of this issue is a report in *The Sydney Morning Herald* of 4 August 2000, referring to a NSW Coalition Web site, which was said to show a simulation of a railway destination board with running messages about the rail system which were satirical and party political in nature.¹ According to the report, in a letter to the Leader of the Opposition, the Hon Kerry Chikarovski MP, CityRail complained that the Web site had used a CityRail logo without permission. The assumption behind the paper is that issues of this kind may arise more often in future, thereby bringing the relationship between MPs and the law of copyright into sharper focus. It is also the case that the Commonwealth *Copyright Act 1968* has recently undergone substantial revision, with the enactment of the *Copyright Amendment (Digital Agenda) Act 2000*.

COPYRIGHT AND MPS – VARYING PERSPECTIVES

The relationship between MPs and copyright law is a question of context. More particularly, it is a question which can be approached from at least three, but possibly four, perspectives. First, when in government and acting in a ministerial capacity, an MP can claim the immunities granted to the Crown under the *Copyright Act 1968*. Secondly, from a parliamentary perspective, an MP will also be able to claim the immunities which flow from parliamentary privilege, but only, it must be noted, in relation to those activities which come under the umbrella of 'proceedings in parliament'. This term is notoriously hard to define but it would include, for example, the incorporation into Hansard of a substantial portion of a journal article. Thirdly, in those situations when neither of the above exceptions apply, an MP can be taken to be a private individual and therefore subject to the application of the copyright law. As a rule, unless the protection of parliamentary privilege can somehow be invoked, personal liability for breach of copyright will be incurred for activities associated with an MP's party political and electoral work. These three perspectives on the relationship between MPs and copyright law can be categorised, in turn, as the 'governmental', 'parliamentary' and 'private'.

Before looking at each of these categories separately and in more detail a potential fourth perspective can also be noted. This refers to the exemptions under the Commonwealth *Copyright Act 1968* for copying by parliamentary libraries for MPs. Under the relevant provisions, the immunity is not limited to activities associated with 'parliamentary proceedings' but refers, instead, to the apparently broader field of the performance of an MP's duties. The issues and questions raised by these provisions, notably the question of the extent, if any, to which they expand the immunities available to MPs, are discussed below.

¹ 'Column 8', *The Sydney Morning Herald*, 4 August 2000, p 22. The messages included: *CityRail apologises for the delay and for the Labor Minister Carl Scully. Under the Liberals trains reached an on-time record of 93 per cent. Instead Labor has achieved 34 serious derailments in one year.*

COPYRIGHT AND THE CROWN

Part VII of the Copyright Act deals specifically with the Crown. As a preamble to that, section 7 provides that the Act binds the Crown (in the right of the Commonwealth and the States),² but adds that nothing in the Act renders the Crown liable to be prosecuted for an offence. Section 8A (1) then provides that, subject to sub-section (2), the Act does not affect any prerogative right or privilege of the Crown.³ These preliminaries over, Division 1 of Part VII then sets out the nature and scope of Crown copyright in certain materials, including statutes and court judgments.⁴ It can be noted in this regard that, historically, printing was deemed to be a matter of state and that the Crown claimed the right to authorise all publications. When this prerogative was lost the Crown still claimed the exclusive right to print certain works, including Acts of Parliament.⁵

More relevantly, Division 2 of Part VII then sets out the law governing the use of copyright material for the Crown. In particular, section 183 provides for a form of statutory licence for government use of copyright material (but excluding a literary work that consists of a computer program)⁶ in circumstances which would otherwise constitute an infringement. Where the use of copyright material is for the services of the Crown it will not infringe copyright in that material. However, unless it would be contrary to the public interest, as soon as possible after the act is done the Commonwealth or State must inform the owner of the copyright of it, as well as provide the owner with any information he/she may reasonably require. Precisely what is meant by the phrase for the services of the Crown may not be entirely clear, but it can be taken to include the copying by a Minister of materials for the purposes of his/her governmental duties. In other words, an MP acting in a governmental capacity can be said to enjoy a wide immunity from the operation of the copyright law. Certain conditions are attached to that immunity, however. In addition to those mentioned above, before or after the act is done, the terms under which it is done must be agreed between the Commonwealth and the State and the owner of the copyright; or, in default of agreement, the terms for the doing of the act are to be fixed by the

⁷ Normally, the terms involved would include payment to the owner of

² Section 10 (1) - the Crown in the right of the Northern Territory and Norfolk Island are also covered.

³ *A-G for NSW v Butterworths & Co (Australia) Ltd* (1937-8) 38 SR NSW 195 held that it was the prerogative of the Crown to print the statutes of NSW; C Crawford, 'Caselaw and legislation databases and copyright issues in Australia' (2000) 8 *Australian Law Librarian* 53 at 58-63.

⁴ Relatively wide access to legislative materials is allowed under section 182A of the Copyright Act 1968 (Cth), which permits the making of a single copy of the whole or part of such materials as statutes and court judgments. In the interest of encouraging access to court decisions, in NSW Crown copyright is not enforced in unreported judgments – 'Waiver of Crown Copyright in Unreported Judgments in NSW', *NSW Government Gazette*, 3 March 1995.

⁵ EP Skone James et al, *Copinger and Skone James on Copyright*, 12th edition, Sweet and Maxwell 1980, p 962

⁶ Section 182B (2).

the copyright.

Note that under the *Crown Proceedings Act 1988* (NSW) Ministers of the Crown in the right of NSW can be sued, thus confirming the point that MPs in their capacity as Ministers do not, in their official executive role, enjoy immunity from civil proceedings. At the same time, however, the Act also provides that any order made against Ministers must be met from public moneys.⁸

A further point to make is that Ministers, when acting in their capacity as MPs, are not included within the definition of the Crown under the *Crown Proceedings Act 1988* (NSW). The result is that the immunity from civil proceedings enjoyed by an MP, acting in a parliamentary capacity, is not affected by that Act.⁹

COPYRIGHT AND PARLIAMENTARY PRIVILEGE

Writing in 1966, Enid Campbell defined parliamentary privilege in the following terms:

The privileges of parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a parliament and the Houses of parliament acting in a collective capacity.

A distinction is often made in this context between powers and immunities.¹⁰ The further point is also made that those privileges which are collective in nature (possessed by each House) are generally powers; whereas those enjoyed by individual members are generally immunities.¹¹ It is in relation to these immunities from the ordinary law that the relationship between parliamentary privilege and the law of copyright is to be understood.

Before looking at that relationship the point can also be made that, unlike copyright law itself where one Federal piece of legislation applies to all Australian jurisdictions, in the case of parliamentary privilege there is no equivalent nation-wide regime. Thus, although it is the case that the privileges of the Houses of the Australian Parliaments have a common source, deriving as they do from the privileges of the UK House of Commons, the precise nature of the law of parliamentary privilege can vary from one Australian jurisdiction to another. For example, at the Federal level the source of parliamentary privilege for the Parliament is section 49 of the Australian Constitution which must be read alongside the *Parliamentary Privileges Act 1987*. In NSW, on the other hand, no such legislation

⁷ Section 183 (5).

⁸ Section 7, *Crown Proceedings Act 1988* (NSW).

⁹ B Selway, *The Constitution of South Australia*, The Federation Press 1997, p 148. Selway's discussion is in relation to the *Crown Proceedings Act 1992* (SA).

¹⁰ H Evans ed, *Odgers' Australian Senate Practice*, 7th edition, AGPS, p 27.

¹¹ G Carney, *Members of Parliament: Law and Ethics*, Prospect 2000, pp 160-161.

comprehensively defining the Parliament's powers and privileges exists.¹² In its absence, each House of the NSW Parliament can be said to have the following powers and privileges: (a) such as are reasonably necessary for the proper exercise of its functions;¹³ (b) such as were imported by the adoption of the Bill of Rights 1688, Article 9 of which is in force by operation of the *Imperial Acts Application Act 1969* (NSW);¹⁴ (c) such as is conferred by the *Defamation Act 1974* (NSW); and (d) such as is conferred by other legislation, notably the *Parliamentary Evidence Act 1901* (NSW).¹⁵ In any event, the point to bear in mind is that parliamentary privilege and, therefore, its relationship with the law of copyright may not be exactly the same across all Australian jurisdictions.

The impact of parliamentary privilege on copyright law is rarely, if ever, discussed, in all probability for the good reason that immunity from prosecution can be assumed to be granted under Article 9 of the Bill of Rights 1689.¹⁶ That Article provides:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The legal immunity granted by Article 9 is both wide and absolute. It can be assumed, therefore, to protect MPs from any action, so long as it is covered by the terms of the Article, which might otherwise constitute a breach of copyright. Moreover, Article 9 is not confined to MPs. As the UK Parliament's Joint Committee on Parliamentary Privilege commented in its 1999 report:

Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of one of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purpose of or incidental to, any proceedings in Parliament.¹⁷

¹² Of the other States, only Tasmania has not passed legislation incorporating wholesale the privileges of the UK House of Commons. As Carney explains (*Ibid*, p 169), 'In Tasmania, the *Parliamentary Privilege Act 1858* (Tas) confers on both Houses powers to summon witnesses and to punish specified contempts. No adoption occurs by s 12 of that Act, which merely affirms any pre-existing privileges'. In both the ACT and the Northern Territory, the privileges and immunities of the House of Representatives apply until altered by ACT law or, in the case of the Northern Territory, except to the extent that they have been altered by the *Legislative Assembly (Powers and Privileges) Act 1992* (NT).

¹³ *Kielly v Carson* (1842) 4 Moo P C 63.

¹⁴ Section 6 and the Second Schedule. Carney comments that Article 9 of the Bill of Rights 1688 also applies under the common law principle of necessity – G Carney, n 11, p 168.

¹⁵ G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Briefing Paper No 4/1997, pp 18-20.

¹⁶ In force in NSW under the *Imperial Acts Application Act 1969*.

¹⁷ UK Parliament, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege – First*

But if the immunity granted by Article 9 is wide and absolute, it is often said that its exact boundaries are not clearly defined. Article 9 gives rise to a number of specific questions of interpretation concerning the meaning of: 'proceedings in Parliament', 'impeached or questioned', 'in any court or place out of Parliament'. In particular, there is considerable debate about what are 'proceedings in Parliament' in a modern context and whether they are, or should be, confined to parliamentary business which is conducted within the precincts of parliament. This last consideration gives rise to a number of difficulties for, as Erskine May states, 'not everything said or done within the precincts forms part of proceedings in

¹⁸ For example, it is likely that party political activities conducted within the precincts would in most circumstances fall outside the scope of 'proceedings in Parliament'. More definitely, copies of works distributed for party political purposes from an electoral office, either in hard copy or in an electronic format, would almost certainly fall outside the protection of Article 9.

It has been suggested that the test which should determine whether particular proceedings are proceedings in Parliament should be functional and not geographical.¹⁹ In other words, the question to be asked should be 'Are the proceedings the transactions of parliamentary business?'; not 'Were the proceedings held inside the Houses of Parliament?' Consistent with this approach, the Commonwealth *Parliamentary Privileges Act 1987* defines 'proceedings in Parliament' in a way that emphasises that the transactions in question must be relevant to the business of a House or of a committee.²⁰ This suggests, in turn, that the protection afforded by parliamentary privilege is only concerned with the transaction of parliamentary business, which may or (possibly) may not be conducted within the precincts of parliament.²¹ Everything turns, therefore, on what is meant by 'words spoken and acts done in the course of, or for the purpose of or incidental to, the transacting of *the business of a House or of a committee*' (emphasis added). The Commonwealth *Parliamentary Privileges Act 1987* offers some limited guidance:

For the purposes of the provisions of Article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

Report, March 1999, para 38.

¹⁸ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, Butterworths 1997, p 98.

¹⁹ BK Winetrobe, *Defamation Bill [HL], Bill 127 of 1995-96: Parliamentary Privilege*, Research Paper 96/61, House of Commons Library, p 32. Winetrobe discusses the recommendations of the Joint Committee on the Publication of Proceedings in Parliament of May 1970.

²⁰ Section 16 (2), *Parliamentary Privileges Act 1987* (Cth).

²¹ PM Leopold, 'The application of the civil and criminal law to members of Parliament and parliamentary proceedings' in *The Law and Parliament* edited by D Oliver and G Drewry, Butterworths 1998, pp 72-73.

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

On this basis, those activities associated with the preparation and publication of a parliamentary committee report would have immunity from copyright law.²² So, too, would the content of a speech which forms part of the debates in either House of Parliament. However, absolute immunity may not extend to the publication of such a speech outside Parliament. Certainly, as Erskine May explains, if a Member publishes separately from the rest of the debate a speech made by him (in either House), his printed statement becomes a publication, unconnected with any proceedings in Parliament.²³ Erskine May is concerned to show that, in such circumstances, a Member would be personally liable for any libellous matter the speech contained. By extension, it can be presumed that the Member would also be personally liable for any breach of copyright associated with this separate publication.

In another grey area of the law, it may not always be clear to what extent, if any, the activities associated with the formulation and preparation for such a speech would be protected by parliamentary privilege. Take, for instance, the situation where copies of a work were made at an MP's electoral office as part of the preparation for a parliamentary speech by the member. Would parliamentary privilege extend beyond the precincts of parliament in such an instance, thereby granting immunity from copyright law? The decision of the Queensland Court of Appeal in *O'Chee v Rowley*²⁴ suggests that parliamentary privilege may well apply in such circumstances. In that case it was held that paragraph (c) of section 16 (2) of the Commonwealth *Parliamentary Privileges Act 1987* covers documents sent by strangers to Federal MPs but only if the Member chooses to keep the documents for the purpose of transacting parliamentary business. On the interpretation of the section, McPherson JA stated:

By s 16 (2) of the 1987 Act proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with

²² That paragraph (c) may have extended the concept of proceedings in Parliament, at least for the purposes of Article 9 of the Bill of Rights, is discussed below.

²³ Erskine May, n 18, p 86. For a comment on where qualified privilege may apply to a statement made by an MP beyond the confines of Parliament, see – *Stephens and Others v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 268-269 (McHugh J). Justice McHugh went on to observe that the doctrine of qualified privilege should not be extended 'to defamatory comments made by elected representatives when those comments are not published in the course of providing factual information to the general public'. The defences of fair comment or justification may also apply in certain circumstances.

²⁴ (1997) 150 ALR 199.

any acts that are incidental to them. Bringing documents into existence for such purpose; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to proceedings in Parliament.²⁵

This indicates that any document that comes into the possession of a Federal MP at this preparatory stage, which the Member then chooses to keep for the purpose of transacting parliamentary business, would be protected by the doctrine of parliamentary privilege. Moreover, anything copied or reproduced for this purpose would be protected in the same way and therefore shielded from the operation of the copyright law.

A note of warning must be sounded at this point, however, for the Commonwealth *Parliamentary Privileges Act 1987*, and its definition of 'proceedings in Parliament', only applies to Federal MPs. The interpretation favoured in *O'Chee v Rowley* cannot be assumed therefore to extend to State MPs. Nor, it seems, can paragraph (c) of section 16 (2) of the Commonwealth Act be assumed to be merely declaratory of Article 9 of the Bill of Rights 1688. Emeritus Professor Enid Campbell has said in this regard that the sub-section may well have extended the concept of proceedings in Parliament, at least for the purposes of Article 9 of the Bill of Rights.²⁶ In other words, the expansive approach to the interpretation of 'proceedings in Parliament' adopted in may be peculiar to those Australian jurisdictions which have adopted similar statutory regimes to that found in the Commonwealth Act. In fact, of the other States, it appears that only Queensland has enacted a substantially identical definition of 'proceedings in Parliament',²⁷ which suggests that the scope of the protection afforded under the *O'Chee* doctrine may only extend to Federal and Queensland MPs.²⁸

Further guidance as to what is meant by 'proceedings in Parliament' may be found in the observations of the UK's Joint Committee on Parliamentary Privilege on the question of immunity for assistance by personal staff. In its March 1999 report the Joint Committee commented:

Members frequently employ personal staff and research assistants of their own to assist with their parliamentary duties. The material produced for members by their staff and assistants may sometimes

²⁵ Ibid at 215.

²⁶ E Campbell, *Parliamentary Privilege*, Commonwealth Parliamentary Library, Research Paper No 1/2000-01, p 9; S Walker, 'The courts, parliamentary privilege and the media' (1999) 1 *The UTS Law Review* 82 at 85-86. Professor Walker argues that reliance should not be placed on this 'extended' interpretation 'Until what falls within the ambit of "proceedings in Parliament" is resolved in Australia...'.

²⁷ Section 3, *Parliamentary Papers Act 1992* (Qld); G Carney, n 11 at p 217.

²⁸ It would apply, in addition, to Members of the Northern Territory Legislative Assembly under section 6 (2) of the *Legislative Assembly (Powers and Privileges) Act 1992* (NT), as well as to Members of the ACT Legislative Assembly which has adopted the privileges which operate in relation to Members of the House of Representatives.

be protected by parliamentary privilege, as material directly related to proceedings in Parliament.²⁹

The Joint Committee emphasised that material which has no direct connection with proceedings in Parliament is not protected.³⁰ That rule would also apply to the extension of parliamentary privilege to Members' drafts and notes, of which it was said:

Drafts and notes frequently precede speeches and questions, and members often need assistance and advice in preparing them. By necessary extension, immunity accorded to a speech or question must also be available for preparatory drafts and notes, provided these do not circulate more widely than is reasonable for the member to obtain assistance and advice, for instance from a research assistant. It would be absurd to protect a speech but not the necessary preparatory material. The same principle must apply to drafts of evidence given by witnesses. This principle must also apply to drafts of speeches, questions and the like which in the event are not used. A member cannot always catch the Speaker's eye, or he may change his mind.³¹

The implications for immunity from copyright law for the preparation of such material, as long as it is directly relevant to parliamentary business, are considerable. This may be especially relevant to the work of research assistants involved in the collection of background material for an intended parliamentary speech or, indeed, for the doing of any intended act by an MP which constitutes parliamentary business.

COPYRIGHT AND PARLIAMENTARY LIBRARIES

The Joint Committee on Parliamentary Privilege also discussed in its 1999 report the question of immunity as this relates to assistance by House staff. The issue had been raised in a memorandum to the Joint Committee by the Librarian of the House of Commons, Jennifer Tanfield. On the particular subject of copyright, she noted that the Library, which is the repository (sometimes the sole or main repository) of much of the documentation used by the House and its Members, as well as a producer and publisher of much material in printed and electronic form, had continuing concerns in this field. The Librarian continued:

Working under a loose cloak of privilege (legal and Parliamentary) it may be that we, and Members, do not always give full regard to all the provisions of copyright law in our daily work. In particular, the Copyright, Designs and Patents Act provides that copyright is

²⁹ Joint Committee on Parliamentary Privilege, n 17, para 113.

³⁰ Ibid, para 115.

³¹ Ibid, para 113.

not infringed by anything done for the purposes of parliamentary or judicial proceedings.' Although the scope of this exemption appears not to have been tested in the courts, it seems likely that any change to the definition of proceedings in Parliament might affect the way in which this provision could be interpreted.³²

It is probably fair to say that these concerns are not shared in Australia. This is because the immunity granted to parliamentary libraries from copyright law is defined in such a way as not to restrict it to activities associated with parliamentary proceedings. Specifically, in 1984 the *Copyright Act 1968* was amended to provide special immunity for copying by parliamentary libraries for MPs. This immunity applies to both the copying of works (literary, dramatic or musical works) and what the Act defines as subject-matter other than works (for example, television broadcasts and sound 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.³³

Section 104A, which deals with the copying of subject-matter other than works, is in substantially the same terms. In addition, under section 50 (7A) a parliamentary library can receive from another library a copy of the whole of a work, a book for instance, without infringing copyright.³⁴ This part of the legislation has been extensively revised under the *Copyright Amendment (Digital Agenda) Act 2000* which was assented to on 4 September 2000 and is to commence on 4 March 2001. The effect of these revisions on parliamentary libraries is to expressly extend their immunity into the electronic environment. The current sub-section 50 (7A) would be repealed and substituted with a provision which continues to permit other libraries to supply a hard copy reproduction of a work to parliamentary libraries for the purpose of assisting MPs in the performance of their duties as members. A new sub-section 50 (7B) has also been inserted to permit other libraries to supply a reproduction of a work, including an article, in electronic form to parliamentary libraries, again for the purpose of assisting MPs in the performance of their parliamentary duties.

The point to make is that both section 48A and 104A of the Copyright Act do not restrict the scope of the immunity to activities associated with proceedings in Parliament. Instead, the immunity granted to parliamentary librarians is formulated in wide terms to include assisting an MP in the performance of his or her duties as such a member. It can be assumed to include the copying of a whole book, for example, for the purpose of assisting

³² J Tanfield, 'Memorandum by the Librarian of the House of Commons', UK Joint Committee on Parliamentary Privilege, 9 April 1999 - the memorandum is set out at Appendix A.

³³ Section 12 of the Copyright Act makes it clear that the provision applies to the Parliaments of the Commonwealth and the States, plus the legislatures of the Territories.

³⁴ Provision for the copying of articles from periodical publications is made under section 50 (4).

an MP in any activity which might conceivably be said to be part of his/her duties, be they related to the House or to constituency work, or indeed to any 'representative' or legislative activity where a member sought to inform him or herself on a matter of relevant interest. It may not grant immunity to, say, the copying of a complete novel for a member's leisure-time reading, but even then it may be hard to draw a clear boundary between a member's private life and public responsibilities.

The one restriction on the statutory immunity is that the copying must be done by a parliamentary library officer; the immunity does not extend therefore to any other parliamentary officer or, indeed, to an MP's research assistants. It would not, for example, protect the making of multiple copies of a work by a research assistant for distribution to the world at large, even though the original copy of the work was made by a parliamentary library. As ever, marginal cases may arise, especially in relation to the copying of information in an electronic form. One example may be the copying by a library officer of an electronic image which an MP then posts on his or her own electoral office Web site. The initial copying would be protected. But what of any subsequent use of the image and/or text? Would such an activity involve a second and discrete copying of the material? If so, presumably it would not have the statutory protection provided by the Copyright Act. On the other hand, the shield of statutory protection may remain in place if it is held that no second copying was involved and it can be shown that the activity was related to the performance of the MP's duties as a member. As in the UK, the issue has never been tested before the courts and must remain a matter of conjecture, hopefully of an informed kind.

The Second Reading speech which introduced the relevant amendments to the Copyright Act was silent on the rationale behind the immunity they granted. However, that rationale can be readily understood in terms of facilitating the operation of representative democracy, be it at the federal, 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, of the public interest in a wider sense. On one view a member's party political activities may lie outside the protective shield afforded under the Copyright Act; on another, it may again be hard at times to draw clear boundary lines between a member's party political and parliamentary duties. In fact, the definition of 'parliamentary duties' inserted in 1998 into the *Parliamentary Remuneration Act 1989* (NSW) includes 'participation in the activities of recognised political parties'.³⁵ This may suggest, by extension, a generous interpretation of the protection offered under the copyright legislation,³⁶ although it must be added that this interpretative method is weakened by the

³⁵ Sections 3 and 10 (1)(b).

³⁶ The distinction between party political and parliamentary business was discussed at length by the Independent Commission Against Corruption in its First and Second Reports into *Parliamentary and Electorate Travel* in April and December 1998 respectively. ICAC's view was that the definition of 'parliamentary duties' under the *Parliamentary Remuneration Act 1989* (NSW) was 'problematic' (Second Report, p 27). The same report was also critical of the definition of 'duties as a Member of Parliament' under clause 6 of the Members' Code of Conduct (as adopted by the NSW Legislative Assembly on 5 May 1998 and by the NSW Legislative Council on 1 July 1998), stating that it 'has the effect of enabling public resources to be diverted for party political activities...' (page 49).

fact that the *Parliamentary Remuneration Act 1989* is a NSW statute whereas the *Copyright Act 1968* is a Commonwealth law.

Unlike the immunities granted under Article 9 of the Bill of Rights, the protections offered under the Copyright Act are not absolute. However, they are very wide and can be said to offer a unique safe haven from copyright law for MPs and parliamentary libraries alike.³⁷

COPYRIGHT AND PERSONAL LIABILITY

One result of the Copyright Act is that in Australia the protection afforded to parliamentary library staff is stronger than it is in the UK. Moreover, it is made of different stuff than the loose cloak of privilege which shields the staff of the House of Commons Library. Indeed, it would seem that in Australia there is very little a parliamentary library cannot copy if it is for use by a member, or even where the material is reproduced in a parliamentary library publication which is distributed amongst members.

However, it may not follow that the grounds upon which an MP may be personally liable for infringement of copyright are narrower in the UK than Australia. Courtesy of the immunity afforded to parliamentary librarians, Australian politicians may be the recipients, with legal impunity, of more copied or reproduced works than their UK counterparts, but it would seem that the broader immunity itself belongs to the copiers or reproducers of the material (the parliamentary librarians) and not the MPs. Viewed in this way, the scope of an MP's personal liability is not directly affected by the Copyright Act. On the other hand, the Act does permit MPs to be in possession of material which may otherwise find them in breach of copyright law.

A similar observation can be made about an MP's research assistants. The Copyright Act does not allow them any direct immunity, but it does permit them to receive material from parliamentary librarians in circumstances which they can be confident do not infringe copyright.

It can also be mentioned that both MPs and their research staff enjoy the same fair dealing rights which exist under the Copyright Act as anyone else. These rights permit the free use of copyright material in the following limited circumstances: research or study;³⁸ criticism

³⁷ Note that the Copyright Law Review Committee recommended in 1998 that the protections under sections 48A and 104A of the Copyright Act should be extended so that parliamentarians, whether federal or State and Territory, should have access to copyright material at any parliamentary library – Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1 – Exceptions to the Exclusive Rights of Copyright Owners*, September 1998, p 133.

³⁸ Sections 40 and 103C. Where fair dealing for research or study is concerned, the Act sets out certain factors which are to be taken into account in determining fairness, including 'the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price'. Furthermore, notwithstanding these factors, the Act also provides a quantitative test which provides that, subject to certain qualifications, the copying of the whole or part of an article in a periodical publication or the copying of not more than a 'reasonable portion' of a work or adaptation is deemed to be fair. What is meant by the expression 'reasonable portion' is defined under sub-section 10(2) of the *Copyright Act*

or review;³⁹ reporting of news;⁴⁰ and in relation to professional advice given by a legal practitioner or patent attorney.⁴¹

CONCLUSIONS

Some may argue that the immunities granted to MPs from the operation of copyright law, particularly those afforded indirectly under the Copyright Act are too broad. Indeed, such an argument may be mounted as part of a more general assault against parliamentary privilege, a doctrine which does not find universal approval. The opposite case can also be made, perhaps with significantly greater force, for it is imperative that parliamentarians within a representative democracy should pursue their many duties – legislative, inquisitorial and otherwise on an informed basis.

1968, with the *Copyright Amendment (Digital Agenda) Act 2000* inserting a further subsection 10 (2A) to cover works in an electronic form.

³⁹ Sections 41 and 103A.

⁴⁰ Sections 42 and 103B.

⁴¹ Section 43 (2).

APPENDIX A

UK Parliament, Joint Committee on Parliament Privilege, Parliamentary Privilege -First
Report, March 1999
Memorandum by the Librarian of the House of Commons

Memorandum by the Librarian of the House of Commons

1. The Joint Committee, in its review of Parliamentary Privilege, may wish to be aware of the impact which issues relating to privilege have on the House of Commons Library's work on behalf of Members and others, and the possible effects on that work of any changes it may propose.

2. Much of the Library's work for Members is done in confidence to individual Members, in order that they can be provided with assistance and information as fully and freely as possible so as to help them reach a considered view on an issue or problem. While we accept that not all our work is given direct protection by Parliamentary privilege as such,^[43] any changes to the scope and application of Parliamentary privilege might make more transparent any inherent legal uncertainties as to the application of Parliamentary or qualified privilege to our work for Members. For example, if the Committee were to recommend a detailed definition of Parliamentary proceedings, we would hope that it would not be so restrictive as to exclude work done for Members contingent upon those proceedings, and would take account of Members' other activities such as constituency work. We would not wish any changes to require us to become more circumspect in our work for Members, to add disclaimers to much of what we write or send to them, or try to insist that material we produce is not passed on to constituents and others by Members (experience suggests that this last requirement would not be enforceable). Such changes would restrict our ability to be as helpful and useful as possible to Members, and thereby reduce the quality of the service that we provide. We would, in short, be less able than at present to discharge the responsibilities that the House has given us. These are issues not only for the Library as a provider of services to the House and its Members but also as a department of the House which is in a position of employing staff who have to operate under a legal regime that is at present of some uncertainty. We have been informed by the appropriate trade unions that their members share these concerns.

3. Many of the Library's dealings with Members of the House, their staff, and others involve the provision or use of documentation and information that could, in certain circumstances, form the basis of legal action, ultimately in the courts. Although the Library has not often been threatened with litigation, cases have very occasionally occurred and are not inconceivable in the future. Some examples of the areas that could lead to litigation follow:

- Some of the Library's Research Papers might quote or reproduce extracts from published sources, such as the press, which contain references to which organisations or individuals might take exception.
- It is not unknown for Members to send copies of the Library's replies to their enquiries to the relevant constituents or other correspondents, in full, with the author's name included. Members often hand to the Library's research staff a dossier in connection with a constituency or similar case and ask for the researcher's views on the merits of the case. Constituents and other correspondents, and third parties who have become aware of such correspondence, have been known to take exception to passages in the Library's letters, or at the forwarding of what they might regard as personal or confidential material, and have protested or even threatened litigation.
- The Library's Public Information Office might, on request, provide members of the

public with text from a Parliamentary paper or document such as an Early Day Motion which could be regarded outside the House as being defamatory or otherwise potentially actionable.

4. Some questions related to the subject of privilege, and concerning the Library's work and holdings, have no clear answers at present. For example, the Library sometimes holds books and other documents including those available in electronic form that subsequently become the subject of injunctions and the like, occasionally leading to their withdrawal from sale. An example is Peter Wright's book *Spycatcher*, which was banned from sale but partly available in electronic form through databases used by the Library (extracts were published in the *Washington Post*). On this occasion advice was sought and, with the Speaker's authority, the Library made available extracts from the book to many Members. Cases of this sort are, however, often not clear-cut, especially with different legal jurisdictions in the UK and the availability of material through the Internet, as the recent case of the "Minister's son" demonstrated. The Library has, though, generally retained such books or documents both to assist the Speaker when they are discussed in the House and more generally as sources for Members who require as full a service as possible to support them in their Parliamentary duties and who wish to be informed of the policy issues involved in those legal proceedings. Recently, the development by the Library of a press comments database has encountered a related problem. In seeking permission from individual newspapers for their articles to be included in the database, the Library has been asked by some (both in the UK and overseas) for assurances that any articles that become the subject of a court case should be withdrawn from the database. It is a moot point as to whether such assurances can or indeed should be given, in the light of the Library's role in informing Members. The examples given here demonstrate both the existing ambiguities relating to the Library's work in relation to privilege and the possible need, should there be changes to the scope of privilege, for the Department to reconsider its current practices.

5. In situations such as those alluded to above, it may be that the Library, in conjunction with the Information Committee, will have to develop and codify guidelines so that both the department and Members can be clear about the status of documentation and the Library's work for individual Members. These would need to take account of existing guidance, such as the Speaker's ruling that all documents placed in the Library, which relate to their work in the House, should be made available to Members.[\[44\]](#)

6. A related issue is that of copyright. The Library, which is the repository (sometimes the sole or main repository) of much of the documentation used by the House and its Members, as well as a producer and publisher of much material in printed and electronic form, has continuing concerns in this field. Working under a loose cloak of privilege (legal and Parliamentary) it may be that we, and Members, do not always give full regard to all the provisions of copyright law in our daily work. In particular, the Copyright, Designs and Patents Act[\[45\]](#) provides that "copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings". Although the scope of this exemption appears not to have been tested in the courts, it seems likely that any change to the definition of "proceedings in Parliament" might affect the way in which this provision could be interpreted. More generally, greater transparency introduced by any changes the Committee proposes may require alterations in our work practices that could have a detrimental effect on the nature and quality of our service to Members.

7. The Department of the Library would be happy to supply more information to the committee, in writing or orally, if requested.

Jennifer Tanfield

Librarian

22 January 1998

43 Our understanding is that qualified (legal) privilege would normally apply to the Library's work for Members. [Back](#)

44 Erskine May, *Parliamentary Practice*, 22nd edition (1997) page 206. [Back](#)

45 Section 45(1). [Back](#)