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**Vision Australia Submission on the Exposure Draft of Copyright Amendment (Disability and Other Provisions) Bill 2016**

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**Submission to: Copyright Law and Policy Section**

**Department of Communications and the Arts**

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**Introduction**

Vision Australia again congratulates the Australian Government for its leadership in being among the first 20 countries to ratify the Marrakesh Treaty. The Treaty has the potential to make books and other reading materials much more widely available to people with a print disability, both in Australia and in other countries around the world. We welcome the opportunity to submit feedback on the Exposure Draft of the Copyright Amendment (Disability Access and other Measures) Bill 2016, which will give legislative effect to Australia's ratification of the
Treaty. In our view, the relevant changes to the Copyright Act contained in the proposed Bill are absolutely essential in order for the Treaty to be implemented effectively in Australia. This applies especially to the proposed changes to the commercial availability test, which we discuss elsewhere in this submission.

We commend the Department on the thoroughness and inclusiveness of the consultation process.

We have provided our responses to the Guiding Questions that were developed by the Department of Communications to assist the consultation process. We have only commented on those questions that we believe are relevant to our library services and production activities, or the needs and interests of our clients who are blind or have low vision. We have also provided comments on several aspects of the proposed amendments that are not captured in the guiding questions.

We are happy to provide further details about any of our comments in this submission, and we are keen to be involved in any further discussion on the proposed amendments.We are also able to arrange actual demonstrations to provide the Department or other stakeholders with a more detailed understanding of the benefits of accessible formats and the limitations of commercial formats.

# Comments on the Guiding Questions

Q 1: Do you think the proposed provisions are sufficiently clear and will operate effectively to meet the objective of ensuring access to accessible format copies of works?

Overall, we believe that the proposed provisions are essential for the effective implementation of the Marrakesh Treaty and for helping to remove some of the entrenched copyright-related barriers that people who are blind or have low vision experience when attempting to access books and other copyrighted materials. The provisions offer a more flexible and contemporary definition of disability, recognising that people with a disability have individual format requirements for accessing information. In doing so, it further acknowledges that their needs are not adequately met by a prescriptive, exhaustive approach that imposes onerous and unhelpful burdens on organisations producing materials in accessible formats.

We also welcome the increased flexibility in the definition of copyright material, to include musical works (such as sheet music) and audio-visual content. Technological developments are likely to give rise to new content formats in the future, and we believe that the emphasis of the proposed amendments on the content itself, rather than the particular format of the material will allow organisations such as Vision Australia to provide a greater range of content to our clients who are blind or have low vision.

We do, however, believe that the proposed provision in relation to fair dealing will not result in certainty for people who are blind or have low vision if they convert inaccessible content to an accessible format for their personal use. For example; scanning a book into a computer and then converting it to braille. This belief is consistent with comments we have made previously and which we reiterate later in this submission.

We also have lingering concerns about whether the proposed provisions will make it possible for Bookshare and other overseas repositories of material in accessible formats to make their materials available in Australia. We hope that these concerns will be addressed through the regulations foreshadowed in the Stakeholder Consultation document.

## Q 2: Do you prefer the terminology ‘organisation assisting a person with a disability’?

We prefer this terminology, because it is more consistently reflects the language used in the disability sector. The term "organisation" is a more accurate description of corporate structures in the disability sector. There has always been some uncertainty about the exact meaning of "institution" in the context of the Copyright Act. In any case, it is not clear whether international bodies involved in producing or sharing materials in accessible formats under the Marrakesh Treaty would meet, or consider themselves as meeting, the definition of an institution. "Organisation" is much less likely to result in confusion or uncertainty.

Similarly, we prefer "person with a disability" because it is consistent with concepts of person-centeredness and individualised needs and services that have become important foundations of the National Disability Insurance Scheme. This person-centred approach also emphasises that individuals with a disability require different formats to provide them with access to books and other reading materials, and that one format cannot be substituted for another. Finally, the proposed definition of disability is entirely consistent with that contained in the Marrakesh Treaty.

## Q 3: Will the proposed exception allow providers of print disability radio to continue operating as they currently do?

We believe that the proposed exception will have a positive impact on the operations of Radio for the Print Handicapped (RPH) and similar broadcasters. In fact, the greater flexibility in the definition of "broadcast" will make it possible for these services to extend their operations. For example, by being able to broadcast copyright material via the internet, RPH stations will be able to make more material available to a larger audience of people with a disability than they can at present.

While internet streaming falls within the scope of the proposed general exception, we are uncertain the exception will also extend to "on demand" listening, which allows people to listen to programs again for a certain period of time after the original broadcast. "on demand" listening is becoming increasingly popular among mainstream broadcasters, but RPH stations have been unable to incorporate it into their broadcast services because it is not covered by the current S47 of the Copyright Act.

"On demand" listening has the potential to make more material available to people with a disability, and it is therefore important that it is covered by the proposed exception. In any case, we would welcome further guidance material on the implications of the proposed new exception so that organisations will have a greater understanding of the increased flexibility that the exception provides for the development of enhanced content for people with a disability. For example, our understanding is that the proposed exception will allow an organisation assisting a person with a disability to add audio description to a copy of an existing broadcast so that people who are blind or have low vision can access it.

# Other Issues

## Definition of Disability

We support the consolidated definition of disability in the proposed amendments. Its functional emphasis will allow Vision Australia and other organisations greater flexibility in meeting the needs of people who require material in different accessible formats.

We would, however, suggest that further clarification be provided about the inclusion of "comprehension" as an element of reading, so as to allow for the conversion of content into formats such as Easy English. This clarification could be provided in the Explanatory Memorandum, other guidance material, or by including the word "comprehension" in the definition of disability in the Bill.

## Fair Dealing

In our 2014 submission on the Marrakesh Treaty Implementation Options Paper, we acknowledged concerns about the interpretation of Section 200AB of the Copyright Act, but were reluctant to support the transfer of provisions in S200AB(4) to sections of the Act relating to Fair Dealing.

The proposed amendments replace the provisions of S200AB(4) with a Fair Dealing exception for individuals with a disability (S113E). We strongly support the removal of S200AB in general, because ambiguities and difficulties in interpretation have caused significant practical problems for libraries and educational institutions.

However, while we support the removal of S200AB, we do not believe that the replacement Fair Dealing exception is satisfactory, even though the matters to be taken into account when determining Fair Dealing are somewhat more intuitive than those required by S200AB(4). Our view remains that a person with a disability should have the same level of certainty when reading in an accessible format as a person without a disability does when they read print, and that reliance on a Fair Dealing exception does not provide this equivalent level of certainty.

As an illustration: a sighted person can purchase a print book (or borrow it from a library) and read it with absolute certainty that they are doing so legally. A person who is blind can purchase the same print book (or borrow it from a library), but will be unable to read it unless it is converted into an accessible format. However, as soon as they convert the print book into an accessible format, for example, by scanning it into the computer and using OCR software to convert it into synthetic speech or braille, they lose the absolute certainty that they are acting legally. This is because they have to rely on a Fair Dealing exception that is open to interpretation and ultimately is subject to determinations of the Tribunal.

While the use of Fair Dealing exceptions is well established for educational and related purposes, there is no existing guidance on how a Fair Dealing exception should apply in the context of disability access. When a person who is blind converts a print book into an accessible format for their own personal use, they generally want to read the entire book, and not just a portion of it. This is not how Fair Dealing is usually understood. We have found that many publishers have a very limited understanding of accessible formats and of the needs of people with a print disability, and we have little confidence that a Fair Dealing exception would be interpreted beneficially if relied upon by a person who is blind.

It is unfair, unreasonable and discriminatory that a person who is blind or has low vision must rely on an uncertain Fair Dealing exception in order to read a book, whereas a sighted person can read the same book with absolute certainty and is not required to rely on a Fair Dealing exception to do so. The opportunity afforded by the Bill must be used to provide absolute certainty for people with a disability when converting content into accessible formats that they can read. Our preferred approach for doing this is to replace S200AB(4) with a specific exception, similar to that provided in the UK Copyright (Visually Impaired Persons) Act 2002. This exception allows a person who is blind or has low vision to produce a "one for one" accessible copy of anything to which they have legitimate access. Further there is no requirement to rely on a Fair Dealing exception that will be subject to interpretation.

Another, less preferred option, would be to provide examples of how the Fair Dealing provision is intended to apply to disability access. This could be done in the Explanatory Memorandum or in other guidance material.

## Commercial Availability Test

Vision Australia is the largest provider of library materials in accessible formats in Australia, with 16,000 borrowers who are blind or have low vision. We produce around 500 titles per year in a number of accessible formats, including DAISY (structured) audio and braille.

At present the requirement to apply the commercial availability test is a significant barrier to the efficient production of materials in accessible formats, results in excessive production delays, squanders resources, and greatly restricts the range of materials that we are able to make available to borrowers in accessible formats.

A major flaw in the current commercial availability test is that it prevents us from producing a title in an accessible format if it is commercially available in any other accessible format. For example, if a title is commercially available in audio format, we are prevented by the commercial availability test from producing the same title in hardcopy braille, even though the hardcopy braille version will never be available commercially. In practice, this restriction undermines braille literacy and completely excludes certain groups of borrowers, such as people who are deafblind and who therefore cannot listen to books in audio format.

Even when a title is commercially available, the format almost never provides equivalent access for a person who is blind or has low vision. For example:

* The CDs of a commercial audio book have no braille or other tactile labelling, which means that they cannot be identified by a person who is blind;
* The individual tracks on the CDs do not correspond to natural divisions of the book such as chapters, sections or parts, which means that a person who is blind cannot locate a particular chapter, and cannot easily resume reading once the CD is stopped;
* There is no information provided about the spelling of proper names, which denies a person who is blind or has low vision basic information that is available to every print reader and can cause feelings of embarrassment or humiliation when writing to friends or colleagues about the books they are reading;
* There is no information given about page numbers in the original print version, so it is impossible for a person who is blind or has low vision to make meaningful references in discussions with others or when quoting from the book as part of a school essay or university assignment.

No print reader would accept this degraded quality of access as their only means of reading recreational or educational material. But the commercial availability test means that people who are blind or have low vision are often given no other choice. It is hardly surprising that many people who are blind or have low vision choose not to read commercially-available audio.

So in practice the commercial availability test does nothing to promote the interests of authors and copyright holders, and actually makes their works less available.

Another major flaw in the current commercial availability test is that it prevents us from producing a title in an accessible format even if a publisher only have plans to make the title commercially available at a future time. In some cases, publishers have advised us that they will be producing a title in an audio format, but then, a year later, they advise that they no longer have plans to make the title commercially available. Such a delay means that people who are blind or have low vision are excluded from reading books that the rest of the community have been able to read for the past year.

Recently Vision Australia’s library had completed 80% of the production of a title in DAISY audio format when the publisher of the print version advised the library that they had given the audio rights to another publisher, and that they therefore must cease production. The library contacted the other publisher and was told that they had no plans to produce the title in DAISY audio format. Nevertheless, the library was required by the original publisher, pursuant to the commercial availability test, to cease production. This meant not only that several thousand dollars of our staff time and resources had been completely wasted, but also that people with a disability will now be unable to read that particular title in an accessible format that gives them equal access. In this case, the commercial availability test again created an insurmountable barrier to access, and did nothing to promote the interests of the copyright holder.

In view of the burdensome, inequitable, wasteful and discriminatory nature of the current form of the commercial availability test, we very much welcome the changes that are proposed in the Bill. Once the changes have been legislated, the commercial availability test will apply to the specific accessible format required by a person with a disability, and not to accessible formats in general. So, for example, if a title is not commercially available in hardcopy braille, Vision Australia will be able to produce that title in hardcopy braille even if the title is commercially available in audio format. This change will have substantial benefits for us as a provider of library services, and also for people with a disability. Failure to make the proposed changes will result in the continuation of a significant and long-standing barrier to equivalent access, and will be incompatible with the principles of equality of access that underpin the Marrakesh Treaty.

Our extensive experience interacting with publishers has shown that publishers often have a very limited understanding of the needs of people with a disability, the characteristics and benefits of the various accessible formats, and of why formats such as commercial audio rarely provide equivalent access for people with a disability. We therefore believe that more guidance and illustrative material would be valuable as an accompaniment to the proposed changes.

It is also important to note that even if a title is commercially available in a format that is usable by a person with a disability, it still may not provide equal access because of the high cost of purchasing it. For example, a person without a disability may be able to purchase the print version of a title for $25, but the audio version available may cost a person with a disability $100. Equal access is not just about access to the content, but also includes the terms on which that access is provided.

In our 2014 submission we drew attention to the possible negative impact of the commercial availability test on international and legitimate organisations such as Bookshare, who have substantial collections of electronic books. At present Bookshare is the largest organisation of this kind, with a collection of 290,000 books that are available to US citizens who have a print disability. Bookshare is only able to make titles available to other countries where publishers have given specific permission. Currently, people with a print disability in Australia can access 193,000 Bookshare titles; the lowest number of any country.

The Marrakesh Treaty will clear the way for Bookshare to make its entire collection available to people in Australia who have a disability. However, the commercial availability test may prevent this international sharing of accessible books. Bookshare have told us that they cannot reasonably comply with the requirements of the commercial availability test, and so may be unable to make their entire collection available. Moreover, Bookshare may have to withdraw access to those titles which are currently available in Australia once the Marrakesh Treaty comes into effect. If this were to occur, people with a disability in Australia would have access to fewer books than they do at present. This would certainly thwart the purpose of the Treaty, and we strongly recommend that the Department give further consideration to this matter, with a view to ensuring that Bookshare and similar organisations are able to make their collections available in Australia, without the need to comply with the commercial availability test.

## Expansion of the "Safe Harbour" Scheme

The ongoing development of the internet and its associated technologies, the increasing convergence of telecommunications, broadcasting and publishing, and the deployment of high-speed delivery channels such as the National Broadband Network, combine to offer unprecedented opportunities for Vision Australia, and other organisations assisting people with a disability, to develop new online services and distribute existing library materials in more efficient and cost-effective ways. A significant number of books, magazines, newspapers and sheet music titles are now available for download in DAISY audio format or electronic braille from the Vision Australia library, and we are in the process of developing an online Client Portal that will facilitate communication among clients and between clients and Vision Australia.

A key concern for us in the development of our online services is that they do not infringe copyright law, and that our secondary liability is limited as far as reasonably possible. The "Safe Harbour" scheme contained in Part V, Division 2AA of the Copyright Act 1968 does offer some protection in this area, by providing some limitation of remedies available against carriage service providers, but it is based on a definition of "Carriage Service provider" contained in S87 of the Telecommunications Act 1997. The online services that are or will be provided by Vision Australia may not meet the requirements of this definition.

We therefore welcome the proposed expansion of the definition of a service provider, including the removal of the word "carriage". We believe this expanded definition will offer greater protection as we take advantage of new technologies and develop our online services.

At the same time, the alignment of the proposed definition of "service provider" with those contained in the Trans Pacific Partnership Free Trade Agreement, and the Australia-United States Free Trade Agreement, is likely to facilitate greater collaboration and sharing of accessible materials between Australia, the US, and other countries in the region. These activities will promote the objects of the Marrakesh Treaty by making more reading materials available to people with a disability.