



12 July 2021

New South Wales Law Reform Commission
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By Email: nsw-lrc@justice.nsw.gov.au

To Whom It May Concern

Submission on New South Wales Law Reform Commission's (NSWLRC) open justice review draft proposals

I write to make a brief submission with respect to the draft proposals of the NSWLRC with respect to its open justice review. The submission primarily concerns the special treatment of 'journalists' under the proposals and the laws they concern.

I challenge the rationale of provisions predating this review that provide 'journalists' and certain other 'media representatives' with certain privileges in relation to open justice (cf p 19 of the draft proposals). The rationale for media's ability to attend court and report on proceedings is that they are the eyes and ears of the public (see *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46, [101]). But if a member of the public wishes to engage with the material directly, and is motivated enough to seek permission to access to certain documents, then they ought to be treated as not materially different from those journalists who do so as part of for-profit enterprises.

Proposal 3.7 to define 'journalist' 'as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium' is undesirable. It does not align with the manner in which thousands of Australians disseminate news via social media. Persons employed as 'journalists' often turn to the work of these unpaid 'citizen journalists' to populate headlines. Moreover, to characterise a person as a journalist or otherwise based on the quality of the material they share online may exclude a great number of employees of certain media organisations from characterisation as 'journalists'. (I am not a fan of the recent decision in *Kumova v Davison* [2021] FCA 753).

The categories of persons with standing to challenge departures from open justice should be broad, and should include those participating in emerging modes of journalism. The same breadth should apply to the category of persons entitled to challenge a departure from open justice; cf proposal 4.18. On the issue of standing, see Michael Douglas, 'The Media's Standing to Challenge Departures from Open Justice' (2016) 37(1) *Adelaide Law Review* 69.

This law reform process should serve the broader ends of encouraging a healthier media environment in Australia. In a situation where media power is increasingly concentrated in the hands of a few, it is desirable that laws encourage diverse voices wherever possible. Taking a more neutral approach to the issue of those who may obtain certain open justice privileges could indirectly encourage media diversity.

In relation to proposals 11.1 and 11.2: I think that the default position ought to be that any person may share their view of the subject matter of court proceedings in real-time. For example, a journalist should be able to live-tweet proceedings unless there is a decent reason for that to not occur. In the 21st century, open justice ought to be enhanced with technology wherever possible. Courts and contradictors should shoulder the burden of explaining why a departure from modern open justice is warranted.

Thank you for your consideration.

Yours faithfully

A solid black rectangular box used to redact the signature of Michael Douglas.

Michael Douglas
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