**Press Freedom Policy Papers** Reform Briefing 3/2021

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CREATE CHANGE



# **SUMMARY**

## → KEY POINTS

- The digital revolution has radically altered the way we understand and define journalism.
- Definitions of 'journalist' and 'journalism' fall into four categories we call the 'four Ps':
  - The person, defined by an individual's employment, training or source of income;
  - The product, focusing on the output of a journalist, such as a news story, documentary or feature article that 'has the character' of news or current affairs;
  - The purpose, which considers the democratic role that journalism plays, often focussing on its 'public interest' function;
  - The process, which considers journalism as a way of gathering, handling and presenting interest in line with recognised professional standards.
- While an appropriate definition may have elements of many or all of the above approaches, a
  principle focus on the last of those the process of journalism is both legally workable, and
  appropriate in a modern digital environment.

#### **∂** REFORM CONSIDERATIONS

- Given the crucial role that journalism plays in Australia's democracy, and the extent of change that the industry has gone through in the digital revolution, it is essential that legislation be updated to include a more appropriate definition.
- For the sake of consistency, the definition should be amended throughout Australian statutes, wherever they refer to 'journalist' or 'journalism'.
- Such a definition should accurately describe journalism in a way that will survive future changes to technology or work practices.
- The following definition is recommended:

#### Journalism means:

a. the practice of investigating, collecting, verifying and/or preparing, or editing, for dissemination of information, commentary, opinion, or analysis, including but not limited to news or current affairs;

*b. for the purpose of making that information, commentary, opinion, or analysis available to the public, or a section of the public; and* 

c. in respect of which a relevant person or persons abides by a journalists' code of practice, or the organisation for which they work is governed by, or submits to, a journalists' code of practice.

# DEFINE JOURNALISM; NOT JOURNALIST

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This paper is the second in a two-part series looking at the meaning of 'journalist' from a legal standpoint.

In this Policy Paper I look at how the digital revolution has rendered meaningless old understandings of what a *journalist* is. I then go on to propose a new approach to a legal definition by focussing on the *process of journalism*. Such an approach is likely to survive any changes to the technological or professional environment, provide positive pressure on the industry to raise its standards, and help restore a degree of public trust in the media. Part 1 of this series is a Background Briefing examining existing definitions of 'journalist' under Australian law.

In the debates around press freedom, a lot of the media's critics tend to dismiss journalists as pleading for special privileges.

'No one is above (the law), including me, any journalist or anyone else', the Prime Minister Scott Morrison said in 2019,<sup>1</sup> amidst the howls of protest over a pair of raids by the Australian Federal Police on journalists from two news organisations.<sup>2</sup>

The then Home Affairs Minister Peter Dutton said the same thing when news organisations demanded he drop prosecutions against the journalists under investigation.

'Nobody is above the law and the police have a job to do under the law', the Minister told Channel 9.<sup>3</sup>

That might be true, but the politicians' language is also a form of **misdirection**. It seeks to portray journalists as some kind of self-appointed elite who anoint themselves with rights and privileges over and above ordinary citizens. The comments invite scorn, focusing our attention on the individuals rather than the issue.





# Why Journalism Matters

The danger of that approach – pointed out in a 2014 Harvard Law Review paper by academic Sonja West – is that it undermines the special watchdog *function* that a free press plays in our **democracy**.<sup>4</sup> In the common understanding of democracy, journalists act as the 'fourth estate', standing as guardians of the public interest, and watchdogs on the activities of government.

In making her case, West calls on the First Amendment to the US Constitution which says, 'Congress shall make no law... abridging the freedom of speech, or of the press.' West argues that even though press freedom is a subset of free speech, the constitution makes special mention of the press because it has a particular democratic purpose above and beyond the right to speak one's mind what she calls 'press exceptionalism'.<sup>5</sup> The classic model of democracy *requires* a group of people who are devoted to monitoring, reporting on, and analysing those we elect to run our governments thus fuelling public debate with high quality information and analysis. Further, they need to do so with a professional, ethical commitment to widely accepted practices like accuracy, fairness, and balance.

But how does the law make a **meaningful distinction between journalists** who are fulfilling their democratic role, and others who might be hiding behind the label, producing *journalism-like* content designed to look like the real thing but without any of those professional commitments?

- How do we distinguish between a hacker posting secret government documents on **social media**, and a journalist publishing documents to expose corruption?
- Should a blogger enjoy the same rights to protect their sources in court, as a journalist working for the ABC?
- When securing the site of a terrorist incident, how do the police decide whether to let a journalist exercise press freedom by live tweeting, and kick out a bystander doing exactly the same thing?
- And what should the courts make of someone publishing stories that claim, without evidence, that the COVID virus was manufactured in a conspiracy?



In the **pre-digital world**, those questions were relatively straight forward. Only people working as journalists for licensed news organisations could publish in what we now think of as the 'legacy' media – traditional newspapers, radio stations and TV networks – where the systems of editorial oversight and accountability maintained a degree of professionalism and public trust. The *Broadcasting Services Act 1992*, for example, says a broadcast journalist is:

'a person engaged in the profession or practice of reporting, photographing, editing, recording, or making a) television or radio programs or b) datacasting content, of a news, current affairs, information or documentary character.'<sup>6</sup>

At the time the law was drafted, that would have neatly described a traditional TV or radio reporter and few others. Now though, a YouTuber producing spoof news stories designed to look like the real thing would be 'engaged in the practice' of making television programs that have that critical 'news character'. But any law intended to protect the role of the press is rendered meaningless if it treats the YouTuber the same way as a legitimate reporter.

The Prime Minister also has a point – nobody should be above the law – so the idea that a **self-described 'journalist'** should have special rights and privileges is an uncomfortable contradiction. Equally though, we need to protect the crucial watchdog function those journalists play, and that West is concerned about. So, how do we achieve both things at once?

#### Journalism as a Process; not a Person

The answer lies in shifting our focus away from the *person* - the individual's professional affiliation so often described in law – and instead pay attention to the *process* used to handle and present information.

Over the years, journalist's unions and media companies have developed work flows and professional practices, codes of conduct and ethics that might vary at the margins, but that all recognise a **common set of core principles**. They will have mechanisms for fact-checking, standards that demand balance, systems of editorial oversight, and means for handling complaints. Most will declare a commitment to a code of ethics similar to the one set out by the Australian journalists' union, the **Media, Entertainment and Arts Alliance ('MEAA')**.<sup>7</sup> Its 12-point Code begins by urging its members to 'report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis...'.<sup>8</sup>

The MEAA then goes on to articulate the kinds of professional conduct that most people would recognise as essential to ethical, responsible journalism.

While plenty of bloggers, satirists, and YouTubers might produce content that looks very similar to journalism, only legitimate journalists are going to demonstrably work to those **professional standards**, and if they deviate there should be clear mechanisms to hold them to account.

That being the case, it makes sense to think of journalism as a process for gathering, organising and presenting information in a way that supports its core democratic function, rather than trying to ring-fence a group of individuals.

While that approach is unusual, the concept already exists in our legislation, buried in section 126J of the *Victorian Evidence Act 2008*. The Act starts traditionally, by focussing on employment:

#### "(J)ournalist" means a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium.<sup>9</sup>

The Act then goes on to set out a series of tests the courts can use to determine if a person is a legitimate journalist. Most of the tests are rooted in traditional if frustratingly vague thinking such as, 'the practice of collecting and preparing information having the character of news or current affairs'.<sup>10</sup> But the final test then says: 'the person or the publisher of the information, comment, opinion or analysis is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice'.<sup>11</sup>

The line explicitly acknowledges that what sets journalism apart from other content is both fealty to a set of professional principles, values and methodologies, and a mechanism of accountability for deviations from that code. Note that the law doesn't prescribe what those principles should be; it leaves it open to 'recognised' standards and codes, leaving it up to the industry to define them.

Crucially, it is highly unlikely that anybody using 'journalism' as a screen to gain special privileges – a blogger posting fake news stories, for example – is going to be part of a system that holds them to account if they fail to meet those professional standards.

## The Impact of Changing the Defintion

If we simply set aside any requirement that a journalist is engaged in a professional capacity, what would it change in the way the law works?

In practical terms, it widens the pool of people who might be considered as journalists to include those like **volunteers** at a community radio station, or academics who occasionally produce works of journalism, but who might not be full-time professionals, or **amateurs** who run a local news website in their spare time. It implies that anybody who meets the standards can use the defence, thus satisfying the Government's concerns about a particular group of people somehow being above the law. Nobody is prevented from exercising their freedom of speech either. The satirists and YouTubers are free to continue their work, and if they too make themselves accountable to a recognised code of conduct, they are free to claim a journalist's defence.

That approach is likely to have other positive effects too. If journalists know they enjoy a degree of protection when they are working to a professional code, they are far more likely to ensure they uphold those standards in their daily practice. It would protect others who are part of the **journalistic process**, such as editors, photographers, researchers and so on, but who might fall outside narrower conventional definitions. And it applies equally to both individuals and companies.

Finally, while the conventional definitions suggest that anything a 'journalist' produces should be protected purely because of their professional affiliation, a process approach recognises that people are perfectly capable of producing good journalism one day, and dangerous or illegal content the next.





#### The New Process-Based Definition

The editor of the online publication *The Conversation*, Misha Ketchell, agrees that while the law shouldn't prescribe those standards, they could be written into explanatory memoranda as 'indicators of journalism'.<sup>12</sup> They could include a set of tests, asking whether the information was gathered with the **intent to publish**, whether the person has a mechanism for **checking facts and information**, whether they are accountable to a **code of ethics** and so on.

The one problem with that system is that it saddles journalists with the burden of proving they are working legitimately, giving prosecutors a huge advantage. In Ketchell's view, to avoid that problem there ought to be a presumption that anybody working for companies widely recognised as news outlets (with all the requisite codes and practices) is **operating ethically**. It would then be up to the prosecution to show why they had failed in their professional obligations and should not enjoy legal protection.

With that in mind, the following definition could satisfy all the above requirements, in a way that fundamentally protects the democratic role that journalism plays:

#### Journalism means:

a. the practice of investigating, collecting, verifying and/or preparing, or editing, for dissemination of information, commentary, opinion or analysis, including but not limited to news or current affairs;

b. for the purpose of making that information, commentary, opinion or analysis available to the public, or a section of the public; and

c. in respect of which a relevant person or persons abides by a journalists' code of practice, or the organisation for which they work is governed by, or submits to, a journalists' code of practice.

Trying to define a concept as slippery as 'journalist' or 'journalism' is always going to be tricky but given the central role that the press plays in our democracy, we shouldn't use that as an excuse to avoid protecting its role in law.

As Sonja West pointed out in her Harvard Law Review Paper, 'it is neither elitist nor discriminatory to separate the press from other types of speakers. Our equality principles are satisfied as long as we ensure that all speakers have a fair opportunity to attain this status'.<sup>13</sup>

#### TAXONOMY OF DEFINITIONS

A taxonomy of definitions suggests four broad approaches to describing who is a journalist, or more importantly, *what is journalism*? They fit loosely into what can be described as the 'Four Ps'. Although some definitions use one single approach, most combine several:

**1. THE PERSON.** This is the most common approach, defining 'journalist' according by employment or occupation, as in the *Broadcasting Services Act* above. As we have already seen that approach is now out of date and inappropriate in a digital environment.

**2. THE PRODUCT.** This focuses on the journalism itself – the *thing* that journalists produce rather than the individual's professional status. The second half of the definition in the *Broadcast Services Act*, talks of 'television or radio programs of a news, current affairs, information or documentary character'.<sup>14</sup> But as we have already seen, a lot of online content is designed to look like works of journalism, without meeting its standards.

**3. THE PURPOSE.** Often definitions refer to the 'public interest' that the journalist is supposed to serve. It assumes that the journalist must be honouring that essential watchdog role to qualify for legal protection. The most recent version of the Queensland Government's proposed shield law says a person is a journalist if they are engaged in 'gathering and assessing information about matters of public interest...<sup>115</sup> But the 'public interest' is a notoriously slippery and subjective concept. Is publishing embarrassing details about the private life of a politician 'in the public interest'?

**4. THE PROCESS.** This approach thinks of journalism as a way of gathering, processing, and presenting information. It assumes that if information has been handled according to generally accepted standards and ethics, it counts as 'journalism' that fulfills its purpose as a natural consequence.

To operate ethically and professionally, news organisations and journalists' associations have developed technical methods, professional standards, and codes of conduct designed to make sure that the journalism they produce is generally trustworthy, balanced, accurate, and fair. The system is clearly imperfect. Plenty of content on our screens claiming to be journalism fails those tests. But for all its flaws, a free, vigorous media has been an integral part of the political system that has made Australia one of the most successful, stable, peaceful, and prosperous places on earth.

If we can't make the distinction, the inclination for legislators has been to err on the side of secrecy, assuming that anyone publishing unauthorised material must be trying to undermine the state and its security.

Since 9/11, Australia has passed over 90 separate national security laws – more than any other country on earth – and many of them limit or criminalise what previously would have been considered legitimate journalism. They grant extraordinary powers to investigators to dig into a journalist's mobile phone and their metadata, to find out who they've been speaking to. That makes it almost impossible for journalists to protect their sources, dramatically undermining the core principle behind shield laws designed to make sure whistleblowers have the option to use journalists as a whistle-of-last-resort without risking their careers or their lives.

The laws don't explicitly target journalists, but the net effect is to undermine press freedom, and seriously limit their ability to perform those 'fourth estate' duties by digging into the inner working of government. In several cases, there are defences for journalists, but the definitions are outdated and weak.

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So how do we protect the crucial role that journalism plays in our democracy, without giving a 'selfappointed elite' some kind of special legal status?

The key is not to focus on those individuals, but as Sonja West has hinted, we should be protecting journalism's function.



## About the Author

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Professor Peter Greste is a press freedom researcher, with a particular interest in the intersection between journalism and national security. In 2018, he was appointed UQ's UNESCO Chair in Journalism and Communication, after a 30 year career as a journalist and foreign correspondent. He is now a freelance researcher, consultant and film-maker.

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