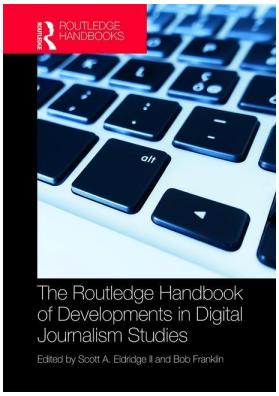

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Law Defining Journalists

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LAW DEFINING JOURNALISTS
Who's who in the age of digital media?

Jane Johnston and Anne Wallace

Like journalism, the law is a profession built around language. This chapter focuses on one critical example of how legal institutions and lawmakers globally are grappling with language as they quite literally redefine the terms 'journalist', 'journalism' and 'news media'. Where, not so long ago, journalists, and undoubtedly members of the public, could confidently assert "we all know what a journalist is, and it's silliness to argue about it" (cited in Ugland and Henderson, 2007: 242), few journalists would argue this today. Certainly, the legal profession has moved beyond any simple understanding. Instead, as the New Zealand Law Commission (NZLC) has pointed out, law and policymakers (including judges, politicians, and public administrators) are being challenged to adequately and fairly summarize journalism and news media positioned within a "digital ecosystem [in which] there is a growing symbiosis between new and old media" (Law Commission, 2013: 54). As it explains (2013: 29):

> In the pre-digital era identifying the target of media regulation and determining the boundaries of intervention were relatively straightforward matters. However, determining what to regulate and how to calibrate, target, and enforce that regulation has now become far more complex as bright line distinctions . . . become increasingly blurred.

Within its remit, the NZLC was tasked with determining how to define 'news media' for the purposes of the law. Other countries, including Australia, Canada, the United States, and Britain, have also been compelled to face the questions of who and what should be afforded privilege and responsibilities once provided to the more predictable institutions in newspaper, radio, television, and other 'mainstream' news media and their employees. The complexity of determining clearly worded definitions and the rifts that have resulted are highlighted in the debate that surrounded the Free Flow of Information Act (2013) in the United States, which sought to ensure journalism's claim to a free flow of information within federal law. This debate provides an example of the deep division surrounding the definition and its impact on the legal process. Central to the division is whether bloggers and new media users – as one scholar writes, "bloggers, dilettantes, and do-it-yourselfers" (Ugland and Henderson, 2007: 241) – should be part of the definition; whether "A-list" (Singer, 2007: 80) bloggers might be included; or, whether definitions should

be limited to those who are in employed or paid work within a recognized media organization, have completed media training, and adhere to a professional code of ethics.

This chapter will examine the key arguments raised in relation to this vexed issue, drawing from legal and media scholarship as well as legal practice, political and policy environments, and case law. It will provide examples of new definitions and, importantly, the contexts in which they have been framed. For journalism practice, the issues and challenges faced by lawmakers and, ultimately, the definitions that emerge from their determinations will provide important signposting and some clarity for the future direction of the news media and its workers as definitions are adopted and enshrined in law and policy.

Approaches to deciding 'Who is a journalist?'

The questions of 'Who is a journalist?' and 'What is the news media?' have been closely examined from a variety of perspectives by media and legal scholars who have sought to better understand how changing practices and media ecosystems translate into new definitions and clearer understanding (see, for example, Alonzo, 2005; Gleason, 2015; Johnson and Kaye, 2004; Johnston and Graham, 2013; Johnston and Wallace, 2017; Reese et al., 2007; Shennan, 2011; Singer, 2007; Ugland and Henderson, 2007; West, 2014). Many of these arguments will be examined in other chapters in this book, so we will focus our attention on the development of legal contexts and frameworks. Shennan (2011) has criticized a so-called divide in scholarship between the sociology of journalism on the one hand and the law on the other; a 'dis-united' approach that arguably has undermined a deeper understanding of the changing shape of journalism and the media. We see the inclusion of this chapter in a journalism collection as evidence of a more united approach, incorporating a diverse range of perspectives and literature.

Peters and Tandoc (2013: 39) identify the following indicators in determining who is and is not a journalist: *medium*, *activities*, *output, employment, social roles*, and *intent*. Ultimately, their analysis of journalism gives rise to the following definition:

> A journalist is someone *employed* to *regularly* engage in gathering, processing, and disseminating (*activities*) news and information (*output*) to serve the public interest (*social role*).
>
> *(Peters and Tandoc, 2013: 61)*

We agree that such a definition provides a strong conceptual base; however, it also presents significant inherent problems by incorporating elements that are themselves in need of definition – notably 'news' and 'the public interest'. So, while the definition adds to the discursive examination of who is a journalist and what is media, it also raises questions and may be of limited application in practice. Alternately, the NZLC's analysis provides a more pragmatic response to the question, proposing the following criteria for defining news media:

- a significant element of their publishing activities involves the generation and/or aggregation of news, information, and opinion of current value;
- they disseminate this information to a public audience;
- publication is regular and not occasional; and
- the publisher must be accountable to a code of ethics and to the NMSA.[1]

(2013: 16)

In calling for a uniform approach to all New Zealand statutes that provide privileges or exemptions relating to the news media, they note that most of the existing legislation of this type was drafted in the pre-digital era, when the inclusion of such definitions was not considered necessary

(2013: 34). This observation speaks to the essence of why legal definitions have emerged as necessary in the past few decades and why they deserve close consideration. While journalism and the news media have, by necessity and due to their daily practice, become both highly informed and articulate about the changed media landscape, changes to legal statutes and policy and the language needed to drive this have followed more slowly, in part because it is not central to the day-to-day practice of the law. As a result, attention to definitions has only recently gained a foothold in legal literature, policy, and legislative development as an issue for policy-makers, regulators, and courts.

Historically, as Shennan notes, the rise of mass communication resulted in "a concept of journalism, however defined" that was to claim distinction from other forms of communication (2011: 134). However, in time, "[t]he gradual accumulation of legal rights attaching to journalists [. . .] left unanswered the question of who can call himself or herself a journalist" (Shennan, 2011: 135). And, as the necessity to answer that question became more pressing, with digital media channels increasingly enabling most anyone to publish online, lawmakers have been forced to consider more closely who and what practices should be protected and privileged. As Shennan further observed (2011: 134), the evolving definition of journalist in Europe is therefore a recent trend, emerging in cases where legal protection has been in question. We now move to some of the specific legal domains in which this has occurred, both in Europe and elsewhere.

Legal domains and definitions

As we have previously noted (Johnston and Wallace, 2017), there are two principal ways in which journalists, however defined, come into contact with the legal process. The first of these occurs when a journalist is *part of the process*, most commonly as a defendant or other actor in a legal case – for example, seeking shield law protection for confidential sources; the second type of contact occurs when a journalist is *observing or reporting on the process*, performing a court-reporting role. This chapter builds on these two intersections, expanding earlier work to consider other contexts in the first category, where the law is considering how to define journalists in cases of national security and privacy laws. We find that the question of defining journalism – and its inherent challenges – has become a major focus for politicians, law and policymakers, judges, and legal commentators in many countries. We examine examples, drawn from several countries, that are intended to provide contextualized understanding of the issue. These are in no way intended to suggest uniform debate or legislative change; rather, they are to provide insights into the complex and varied discussion and debate that surround the issue of defining journalist and news media.

Journalists as participant

Shield laws

In the United States, where shield laws (or similar protections) exist in 49 states (Johnston and Wallace, 2017), it has been said that they provide "almost absolute protection from prosecution for contempt in situations where an individual refuses to disclose their confidential sources, documents or other information that could identify those sources" (Shennan, 2011: 133). In fact, the degree of protection varies; some states confer an absolute privilege, in some it is qualified, and other shield laws contain exceptions that remove the shield in certain circumstances (Reporters Committee for Freedom of the Press, n.d.). Other countries – New Zealand, Britain, and some Australian jurisdictions – also have shield protections. Our particular interest in shield laws rests with the intersection these laws bring to definitions, and the way changing media practices have impacted within this space.

The debate around the U.S. Free Flow of Information Act (2013) is instructive for the breadth of analysis on this issue. First proposed in 2009 as a federal shield law to provide journalists with

a right to refuse to testify in criminal proceedings about confidential sources (Peters and Tandoc, 2013), the bill was negotiated between a coalition of 60 media organizations and the U.S. federal government. In its original form, it defined a journalist as someone entitled to invoke legal protection, with:

> "primary intent to investigate events and procure material", to inform the public by "regularly" gathering information through interviews and observations, and then disseminating that information to the public. In addition, the person must intend to disseminate the information at the start of the newsgathering process.
>
> *(Peters and Tandoc, 2013: 37)*

However, the legislation stalled at the definitional stage (Johnston and Wallace, 2017; Durity, 2006; Greene, 2013). On one hand, the draft form of the legislation was said to grant a special privilege to people who were not "real reporters" and had no professional qualifications; on the other hand, it was argued that a more inclusive definition was needed to encompass new media workers, people "who do real journalism in different ways" (Peters and Tandoc, 2013: 38). A compromise was sought, with an amendment defining a journalist as a person employed by, or in contract with, a news organization for a designated period of time; who had substantially contributed to a publication as an author, editor, photographer, or producer; or was a journalism student (Free Flow of Information Act, 2013). However, this has yet to be enacted. Thus, the question of definition was a fundamental component of the lengthy discussion and debate and ultimately became a stumbling block for the legislation itself; a conceptual issue that called for a pragmatic determination was not resolved.

Canada, possibly the most recent country to move to implement shield laws and journalistic definitions, did not have the same difficult in determining a definition. Bill 231, the Journalist Sources Protection Act, was introduced to Federal Parliament in late 2016 in the wake of revelations that the Montreal police and the Sûreté du Québec had been conducting surveillance operations on various journalists and media organizations (Bellavance, 2017). The Canadian Senate adopted the amendment in April 2017 prior to the bill going to the House of Commons, where it was passed in October 2017.

During the consultation process the news media strongly supported the proposed changes, arguing that they were long overdue, listing those countries with shield laws in place, including the United States at state level.

> This privilege is [. . .] explicitly recognized by specific laws in Australia, Argentina, Germany, Belgium, El Salvador, France, Great Britain, Mexico, Norway, New Zealand, Sweden, and Switzerland, to name but a few. Privilege even exists in the legislation of countries known to have a more tense relationship with the media, such as Russia.
>
> *(Cooke in Bellavance, 2017: 5)*

A report tabled to the Senate Committee by the Canadian Media Coalition went to great lengths to examine the definition of journalist for the purposes of this protection, opting for a broad definition in the following terms, which was adopted by the drafters of the legislation:

> ***journalist*** means a person who, in connection with his or her primary paid occupation, contributes or contributed directly and regularly or occasionally, to the collection, writing or production of information, editorials or columns for dissemination to the public by the media, or anyone who assists such a person.
>
> *(2017: 7)*

The coalition rejected the idea that a broad definition of journalist could be used to shelter from prosecution people who used social media or websites occasionally, noting that the "definition limits its application to individuals who are unquestionably career journalists. Moreover, it must be borne in mind that a judge could always refuse to apply the definition in borderline situations or clear cases of abuse" (2017: 7). Because it was difficult to accurately foresee all possible scenarios, it recommended adopting a clause that would give a judge discretion to "recognize that a person was acting as a journalist in a specific instance, notwithstanding that the person in question may not qualify under the general definition" (2017: 7). In short, it was argued:

> If a person does not qualify as a journalist under the foregoing definition, that person may nevertheless be recognized as being a journalist within the meaning of the Act if it is demonstrated that the person has the usual characteristics of a journalist.
>
> *(Canadian Media Coalition, 2017: 7)*

However, the proposed act does not incorporate this broader provision.

Shield laws have also provided the New Zealand courts with a reason to consider how broadly to define a journalist and media organization. In the case of *Slater v Blomfield* the New Zealand High Court had to determine whether a blogger was entitled to the "journalist privilege" contained in the New Zealand Evidence Act, which contained the following definitions:

> ***journalist*** means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium;
> ***news medium*** means a medium for the dissemination to the public or a section of the public of news and observations on news.
>
> *(Evidence Act, 2006, NZ)*

In deciding that Slater, the author of the blog *Whale Oil*, qualified as a journalist under this definition, on the basis that he worked for his blog, Justice Raynor Asher noted that the definition did not impose quality requirements, nor did it require the dissemination of news to be in a particular format: "Slater's reports contain genuine new information of interest over a wide range of topics . . . while criticisms can be made of Mr Slater's style and modus operandi, [his blog] . . . is not of such low quality that it is not reporting news" (*Slater v Blomfield*, 2014: par 62). In his finding, the judge strongly emphasized the policy reason behind the journalist privilege: "It is to promote the free flow of information, a vital component of any democracy" (*Slater v. Blomfield*, 2014: para 136).

Australian shield laws, in the Commonwealth and a number of States and Territories, generally contain broad definitions similar to section 68 of the New Zealand Evidence Act (*Evidence Act, 1995* (Cth) s 126J, *Evidence Act, 1995* (NSW) s 126J, *Evidence Act 1906* (WA) s 20G). Notably, the Victorian legislation also requires the court to consider, in determining whether someone is a journalist, whether "the person or the publisher of the information, comment, opinion or analysis is accountable to comply (through a complaints process) with recognized journalistic or media professional standards or codes of practice" (*Evidence Act, 2008* (VIC) section 126J). The ethical obligations associated with journalism have been considered a relevant factor in at least one case (*Madafferi v Age Company Ltd* [2015] VSC 687: para 127). However, the extent to which that may be an influential factor in interpreting the definition of journalist has not yet been tested by any individual *not* employed by a traditional media organization.

As Australian legislators were rethinking the definition of journalist in the context of shield laws, they took a different approach when considering the field of national security and terrorism law.

National security and terrorism law

Journalistic freedoms have been challenged by restrictions imposed in the name of national security following the terrorist attacks on the World Trade Center in New York in September 2001 (Johnston and Pearson, 2008). New legislation potentially impacting journalists has seen challenges to:

> chasing security-related stories, by exposing them to detention and questioning, bugging their communication, seizing their notes and computer files, breaching the confidence of their sources, banning them from covering some court cases, suppressing facts in trials, banning them from some newsworthy locations, rendering discussions with some sources illegal, and restricting their publication of quotes from sources deemed to be encouraging terrorism.
>
> *(Johnston and Pearson, 2008: 80)*

As time has moved on, legislators have needed to consider how journalists are defined for the purposes of this legislation. For example, the Australian Parliament's *Review of Security and Counter Terrorism Legislation* in 2006, included terms such as 'media interest', 'media coverage', and 'media bias', without defining them. In contrast, less than a decade later, in 2014, when the Australian Government reviewed its *National Security Legislation Amendment Bill* (No. 1), it spent considerable time on the issue of definitions – ultimately deciding that the difficulty of defining journalism made it inadvisable to provide an exemption for journalists from the proposed offense provisions. It stated:

> The Committee considers that it would be all too easy for an individual, calling themselves a 'journalist', to publish material on a social media page or website that had serious consequences for a sensitive intelligence operation. It is important for the individual who made such a disclosure to be subject to the same laws as any other individual.
>
> *(Parliament of Australia, 2014: 62)*

The failure to grapple with the issue of definition was implicit in media criticism that the review had failed to provide avenues for legitimate journalistic activity in reporting terrorism, effectively relegating journalists to *anyone* status and providing no defined privilege. Notably, the journalists' union, the Media Entertainment and Arts Alliance (MEAA), responded that the review did not address issues raised about the role of journalists or whistle-blowers (Warren, 2014).

It also calls to mind West's distinction between professional and amateur journalists, or what she calls "press-like" others, and her caution that:

> Pretending that the press is no different than an army of individual speakers with megaphones is a dangerous road to travel [. . .]. Treating the press like all other speakers obstructs the public's right to know and impedes an important check on the government.
>
> *(West, 2014: 2445)*

A comprehensive discussion of anti-terrorism laws is outside the scope of this chapter; however, the Australian example is instructive of how legislators may choose to overtly *avoid* definitions, even arguing strongly against attempting them. Ironically, then, the increasing attention given by lawmakers to terms such as journalist, journalism, or news media, once assumed and understood as not in need of definition, may not result in any actual clarification of how they are to

be understood for the purposes of legislation. We now consider this in another legal context, in which the issue of journalistic definition has come under focus – that of privacy and data protection law.

Privacy and data protection

Since the 1970s, concerns about infringement on personal privacy associated with the growth of information technology, increased government powers, and the development of new and more intrusive business practices, such as credit reporting, direct marketing, and electronic surveillance, have prompted consideration of new forms of legislation designed to protect privacy rights in many Western countries (ALRC, 1983: xli–xliii). An examination of some more recent legislative initiatives directed to data protection illustrates a general lack of clarity as to how exemptions for privacy legislation, designed to assist the legitimate reporting of news in the public interest, will be applied in the age of 'new media'.

For example, section 32(1) of the UK *Data Protection Act1998* provides that the processing of data will be exempt from the restrictions under the Act where several conditions are satisfied, the first being:

(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material.

'Journalistic' is not defined in the legislation and does not appear to have been the subject of any court interpretation, so it is unclear whether, for example, the activities of a blogger would enjoy exemption from the Act.

Canada has also legislated privacy rights at the federal level. The Canadian legislation exempts information collected for 'journalistic' purposes (*Personal Information Protection and Electronic Documents Act*, 2000 (Canada); *Privacy Act, 1985*); however, like the UK, 'journalistic' is not defined. In a recent 2017 Canadian case, the Federal Court endorsed a broad approach by the Office of the Privacy Commissioner, adopting a 2012 definition by the Ethics Advisory Committee of the Canadian Association of Journalists. The case of *A.T. v. Globe24h.com* set out three criteria to be satisfied for an activity to be classified as journalism:

1 ***Purpose:*** An act of journalism sets out to combine evidence-based research and verification with the creative act of storytelling. Its central purpose is to inform communities about topics or issues that they value.
2 ***Creation:*** All journalistic work – whether words, photography or graphics – contains an element of original production.
3 ***Methods:*** Journalistic work provides clear evidence of a self-conscious discipline calculated to provide an accurate and fair description of facts, opinion, and debate at play within a situation.

(Ethics Advisory Committee, 2012)

Australian privacy legislation also uses a functional definition, focusing on the *activities* carried out. It provides, in effect, that the legislation does not apply to acts and practices of media organizations undertaken 'in the course of journalism' at a time when that organization has a public commitment to privacy standards (*Privacy Act, 1988 (Cth)*). Journalism is not defined in the Act; however, 'media organization' is defined broadly as "an organisation (which includes an individual) that collects, prepares or disseminates to the public, news, current affairs, information or documentaries, or commentaries and opinions on, or analyses of, such material" (*Privacy Act,*

1988, section 6(1)). As Waters (2002) notes, the breadth of this definition appears to be intentionally designed to include, for example, issues-based community groups.

The Australian Law Reform Commission noted concerns that the scope of the definition of news activity, particularly when coupled with the absence of a definition of journalism, could enable any individual to claim the exemption by setting up a "publishing enterprise" (ALRC, 2008: para 42.26; f34). It recommended that the legislation be amended by including a definition of journalism to more clearly limit the scope of the exemption to acts and practices that are associated with a clear public interest in freedom of expression and focus on the character of the publication rather than the nature of the organization carrying it out, and it proposed the following criteria for journalistic activity:

> The collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:
>
> (a) material having the character of news, current affairs or a documentary;
> (b) material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary; or
> (c) material in respect of which the public interest in disclosure outweighs the public interest in maintaining the level of privacy protection afforded by the model Unified Privacy Principles.

The criteria recognized the difficulty of confining 'journalism' to traditional types of news dissemination activities, while nevertheless defining "news organisation" as "an organisation whose activities consist of or include journalism" (ALRC, 2008, Recommendations 42–1 and 42–2). To date, those recommendations have not been adopted by government.

New Zealand has also taken a broad approach to interpreting news activity that is exempt from restrictions in that country's privacy legislation (Roth, 2010: 555–557; Law Commission, 2011). In a 2011 report, the New Zealand Law Commission decided against attempting a more specific definition of that term, deciding that it was better to leave it to be decided on a case-by-case basis (Law Commission, 2011: para 4.30.) However, concern about the proliferation of unregulated forms of new media led it to recommend including a definition of 'news medium' so that media that are not subject to a code of ethics that deals expressly with privacy and to a complaints procedure administered by an appropriate body would not enjoy the protection of exemption from the *Privacy Act* (Law Commission, 2011). These recommendations, also, have not been adopted by government.

A very different approach has been taken in Europe to the interpretation of the 1995 EU Directive on data protection (European Parliament, 1995: Article 9), which exempts from its provisions the processing of personal data that "is carried out solely for journalistic purposes or the purpose of artistic or literary expression", where the derogation is "necessary to reconcile the right to privacy with the rules governing freedom of expression". In a 2008 case, the European Court of Justice adopted a wide approach to defining "journalistic purposes", holding that it depends on whether "the sole object of processing the personal data is to disclose to the public information, opinion or ideas" (*Satakunnan Markkinapörssi Oy and Satamedia*, cited in Roth, 2010: 553). The exemption can apply to individuals as well as organizations and does not depend on the medium of publication (for example, newspaper, radio, internet) (cited in Roth, 2010: 553–554). In an earlier case, the court noted that the drafters of this provision deliberately chose not to use wording that restricted its application to institutional media and declined to adopt definitions based on the medium of publication or whether or not there was inappropriate editorial oversight involved (*Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia,*

Oy C-73/07, 2008). It further found that the essential question was whether the disclosure of personal data aimed to impact information and ideas on matters of public interest.

The Swedish Supreme Court has adopted a similarly broad definition, holding that the exemption could apply to material published by persons who were not professional journalists or part of the established media. It focused on the purpose of journalism, that is: "to inform, exercise criticism and provoke debate about societal questions that are of larger significance for the general public" (Bygrave, 2001: para 8). So, for example, a member of the public who published a website of material to further a campaign about alleged malpractice in the Swedish banking system has been found to be entitled to the exemption (Bygrave, 2001).

We now turn to an entirely different context in which the law and journalism intersect: the role of the journalist as observer – the court reporter.

Journalist as observer – court reporting

The court reporter has traditionally provided 'a window' into the courtroom; a space that is (in most cases) open to the public, but that, in practice, few individuals attend. Introduction of technology in courts and the development of digital media practice have caused the courts to reevaluate how court reporters are recognized and privileged. In a world where, as the Chief Justice of Canada has pointed out, "Anyone with a keyboard and access to a blog can now be a reporter" (McLachlin, 2012: 33), courts have had to decide who should be permitted to tweet or blog from court and in what circumstances. In dealing with this issue, courts are devising criteria and processes to manage how journalists will be recognized (Wallace and Johnston, 2015).

Much attention to the issue has focused on the use of live text-based communication (LTBC) from court, with courts accepting that tweeting and blogging were now part of reporting. But who should have access? In the United States and United Kingdom, developments began in 2010. In that year the Massachusetts Supreme Court restricted the use of electronic devices in the courtroom to journalists registered with the court's public information office (PIO) (Davidow, 2010). This policy enabled the PIO to assess whether the organization or individuals "regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic" (Supreme Judicial Court Rule, 1.19, 2012: part 2). This broad approach focused on the nature of the function performed rather than the employment relationship or the status of the organization. It was also concerned with ensuring that those so accredited familiarize themselves and comply with limitations imposed by the court (Supreme Judicial Court Rule, 1.19, 2012: part 2). Other U.S. states that have allowed LTBC, including California, Colorado, Florida, Iowa, Kansas, Michigan, Pennsylvania, and Washington, DC, also require journalists to seek access via the PIO or judge. Requests should outline:

- The nature and public benefit of the blogging or tweeting;
- The public interest in the case;
- The reporter's professional experience or credentials; and
- An explanation of how the technology works

(Digital Media Law Project, n.d.)

The United Kingdom followed a similar line. The Chief Justice of England and Wales opened a consultation process on the issue in 2010, commenting that:

> Non-accredited members of the media cannot be presumed to have the same appreciation of the legal framework surrounding court reporting, or the industry standards set

> out by the Press Complaints Commission, as accredited media representatives. . . . The combination of instant reporting without the self-restraint presumed to be exercised by accredited members of the media might lead to a great likelihood of prejudicial reporting, and must be considered.
>
> *(Judge, 2010: 11)*

The guidance that followed the consultation allowed lawyers and representatives of the media the automatic right to LTBC from court, whereas members of the public are required to seek permission (Judge, 2011). While 'representative of the media' is not defined, the presumption "that a representative of the media or a legal commentator using live, text-based communications from court does not pose a danger of interference to the proper administration of justice in the individual case" (Judge, 2011: para 10) suggests a restriction to representatives of traditional media, who can be assumed to understand the laws of contempt and other restrictions on court reporting. A Scottish review of this issue subsequently recommended a similar approach to England and Wales (Judicial Office of Scotland, 2013: 3; Dorrian, 2015: 30–31).

Canadian courts, except for the province of Quebec, have generally followed the lead of England and Wales in allowing the media, along with lawyers, to use LTBC from court (Canadian Centre for Court Technology, 2013). There also appears to be a general trend to require media to be accredited or approved by the court for this purpose (Canadian Centre for Court Technology, 2013).

Some Australian courts have also adopted accreditation policies for court reporters. For example, the Supreme Court of Victoria allows LTBC from court by regular court journalists accredited by the court (Supreme Court of Victoria, 2016). Accreditation requires a form signed by the court's media team (journalists and the news director or chief of staff), implying employment by a traditional media organization. It signifies "that the journalist has an understanding of court proceedings, legislative requirements, suppression orders and the procedures and policies as set out in the court's Media Policies and Practices document" (Supreme Court of Victoria, 2016). A similar approach has been adopted in Queensland. From 2014, the Queensland Courts allowed journalists employed by media organizations and accredited by the courts to use LTBC in the courtroom (de Jersey, 2014, Part A Schedule, para 8). Other individuals can apply for accreditation if they can "identify any ethical code of conduct to which the applicant subscribes as a journalist" (para 66), a requirement that, in effect, appears to restrict the policy to traditional media. In 2017, the policy was tightened by introducing an accreditation pass with photo identification and accreditation clearance, following issues that arose during several high-profile trials. The pass – or Queensland Courts security access card – can be issued to applicants who are regular or occasional journalists in the courts and, like Victoria, signed off by the employer organization. This move further consolidates access to mainstream media – dedicated court reporters, or those trained in the field – who understand the laws of contempt and other related laws and protocols (Queensland Court, 2017).

In contrast, courts that do not hear criminal cases or rely on juries are less concerned by accreditation for LTBC usage. The Federal Court of Australia, for example, does not prohibit any person from using electronic devices to transmit text from court, provided it does not create a disturbance, cause concern to a witness or other court participant, or result in a person outside the courtroom receiving information about the proceedings to which they are not entitled (Federal Court Rule, 6.11(3)). The UK's highest appeal court, the Supreme Court, has taken a similarly liberal approach because the concerns about reporting in ways that could prejudice a trial do not arise (Luft, 2011). Canadian appeal courts in Nova Scotia and British Columbia also allow anyone to tweet and blog from court (Canadian Centre for Court Technology, 2013). Nova Scotia has extended this policy to all court levels (The Courts of Nova Scotia, 2014), as has the Hong Kong Judiciary (Ma, 2014).

Conclusions

The past decade has seen unprecedented attention given to the questions of 'Who is a journalist?' and 'What is the news media?' Far from being "silly" (in Ugland and Henderson, 2007: 242) or taken for granted as they may have been in the past, these questions have become challenging and vexing for courts, legislators, policymakers, and media organizations. While courts and other authorities must get on with the business of doing and managing the law, and in doing so try to keep abreast of technological change, the practical ends and the functional tests need to be considered within the deeper conceptual elements; that complex layer that has emerged within the new digital media world. And so, while legal definitions may present pragmatic solutions, they also need to be flexible and reflexive enough to respond to and reflect constantly changing contexts. Ultimately, media coalitions and media organizations (old and new) as well as policymakers and legislative developers all bring their own language, understanding, experience, and contexts to the changing definitions of 'Who is a journalist?' and 'news media' in the digital age.

Further readings

The literature and documentation that has informed this chapter is a diverse mix of journalism, media and legal scholarship, legislation, case law, and policy, drawn from many countries. We find that not only are questions surrounding 'who is a journalist' and 'what is the news media' mercurial and complex, but the diversity of views from different disciplines and countries provides a dialectic that moves the discourse in various directions. For more on the issues raised in this chapter, Tim Gleason's 2015 article "If We Are All Journalists, Can Journalistic Privilege Survive?" in *Javnost – The Public*, Jonathan Peters, and Edson C. Tandoc's 2013 article "People Who Aren't Really Reporters at All, Who Have No Professional Qualifications," in *New York Journal of Public Policy Quorum*, and Sonja R. West's 2014 article in the *Harvard Law Review*, "Press Exceptionalism," offer extended discussions of the debates in this chapter.

Note

1 The Law Commission proposed a News Media Standards Authority (NMSA) which would assume the collective functions of the Press Council, the Broadcasting Standards Authority (BSA), and the Online Media Standards Authority (OMSA) (Law Commission 2013: 15).

References

Alonzo, J. (2005) "Restoring the ideal marketplace: How recognizing bloggers as journalists can save the press." *NYU Journal of Legislation and Public Policy*, 9, 751–780.

A.T. v. Globe24h.com, 2017, FC 114 (CanLII). Retrieved from http://canlii.ca/t/gx6b

Australian Law Reform Commission. (1983) *Privacy: Report No. 22.* Canberra: Australian Government Publishing Service.

Australian Law Reform Commission. (2008) *For Your Information: Australian Privacy Law and Practice*: *Report No. 108.* Canberra: Australian Government Publishing Service.

Bellavance, J.D. (2017, February 16) "Major media want legislation to protect journalistic sources." *La Presse+.* Retrieved from http://plus.lapresse.ca/screens/295c150f-70b6-4d42-ba50-d51dd35a9898%7C_0.html

Bygrave, L. A. (2001) "Balancing data protection and freedom of expression in the context of website publishing – Recent Swedish case law." *Privacy Law and Policy Reporter*, 8(4), 83. Retrieved from www.austlii.edu.au/cgi-bin/sinodisp/au/journals/PrivLawPRpr/2001/40.html?stem=0&synonyms=0&query=cth%20consol_act%20pa1988108%20s7b#fn2

Canadian Media Coalition. (2017) *Brief Submitted to the Special Consultations and Public Hearings on Bill S-231, to Act to Amend the Canada Evidence Act and the Criminal Code (Protection of Journalistic Sources) Presented to the Standing Committee on Legal and Constitutional Affairs*, February 15, 1–12.

Canadian Centre for Court Technology. (2013) *Canada-Wide Summary of Court Policies on Live Text-Based Communications From the Courtroom*. Retrieved from http://wiki.modern-ourts.ca/images/5/57/Policies_on_Live_Text_Based_Communications.pdf

Data Protection Act 1998 (UK).

Davidow, J. (2010, December 10) "Massachusetts to allow live twittering, blogging in courts." *Mediashift*. Retrieved from www.pbs.org/idealab/2010/12/massachusetts-to-allow-live-twittering-blogging-in-courts337/

de Jersey, P. (2014) *Practice Direction No. 8 of 2014, Electronic Devices in Court*. Supreme Court of Queensland. Retrieved from www.courts.qld.gov.au/__data/assets/pdf_file/0004/225553/sc-pd-8of2014.pdf

Digital Media Law Project (n.d.) *Live Blogging and Tweeting From Court*. Retrieved from www.dmlp.org/legal-guide/live-blogging-and-tweeting-from-court

Dorrian, L. (2015) *Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the use of Live Text Based Communications from Court*. Available at: www.scotland-judiciary.org.uk/25/1369/Report-of-the-Review-of-Policy-on-Recording-and-Broadcasting-of-Proceedings-in-Court-and-Use-of-Live-Text-Based-Communications.

Durity, L. (2006) "Shielding journalist-'Bloggers': The need to protect newsgathering despite the distribution medium." *Duke Law & Technology Review*, 5, 1–19. Retrieved from http://scholarship.law.duke.edu/dltr/vol5/iss1/8/

Ethics Advisory Committee of the Canadian Association of Journalists. (2012) *What Is Journalism*? Retrieved from http://caj.ca/images/downloads/Ethics/caj_whatisjournalism.doc_1.pdf

European Parliament. (1995) *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data* (OJ No L 281, 23 November 1995, 31).

Evidence Act 1906 (WA).

Evidence Act 1995 (Cth).

Evidence Act 1995 (NSW).

Evidence Act 2006 (N.Z.).

Evidence Act 2008 (VIC).

Federal Court of Australia, *Federal Court Rules 2011* (Cth).

Free Flow of Information Act 2013 (USA) S.987 (1113th).

Gleason, T. (2015) "If we are all journalists can journalistic privilege survive?" *Journal of the European Institute for Communication and Culture*, 22(4), 357–386.

Greene, D. (2013, September 20) "State revises media shield law for the better, but it's still imperfect." *Electronic Frontier Foundation*. Retrieved from www.eff.org/deeplinks/2013/09/senate-revises-media-shield-law-better-its-still-imperfect

Johnson, T. and Kaye, B. (2004) "Wag the blog: How reliance on traditional Media and the internet influence credibility perceptions of weblogs among blog users." *Journalism & Mass Communication Quarterly*, 81(3), 622–642.

Johnston, J. and Graham, C. (2013) "Shifting patterns in Australian newspaper writing styles: Results of a longitudinal study." *Australian Journalism Review*, 35(2), 117–131.

Johnston, J. and Pearson, M. (2008) "Australia's media climate: Time to renegotiate control." *Pacific Journalism Review*, 14(20), 72–88.

Johnston, J. and Wallace, A. (2017) "Who is a journalist? Changing legal definitions in a de-territorialised media space." *Digital Journalism*, 5(7), 850–867.

Judicial Office of Scotland. (2013) *Cameras and Live Text-based Communication in the Scottish Courts: A Consultation*. Retrieved from www.scotland-judiciary.org.uk/24/1159/Consultation-on-cameras-in-court

Law Commission. (2011) *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4*. Report no. 123, Law Commission, New Zealand, Wellington. Retrieved from www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R123.pdf

Law Commission. (2013) *The News Media Meets the 'New Media'*. Report no. 128, Law Commission, New Zealand, Wellington. Retrieved from http://r128.publications.lawcom.govt.nz/

Lord Judge. (2010) *A Consultation on the Use of Live Text-based Forms of Communications for Court for the Purposes of Fair and Accurate Reporting*. Retrieved from www.scribd.com/document/48347019/Consultation-on-the-use-of-live-text-based-forms-of-communications-from-court-for-the-purposes-of-fair-and-accurate-reporting

Lord Judge. (2011, December 14) *Practice Guidance: The Use of Live Text-based Forms of Communication (including Twitter) From Court for the Purposes of Fair and Accurate Reporting*. Retrieved from www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf

Luft, O. (2011) "Supreme court allows reporters to use Twitter." *Press Gazette: Journalism Today*. Retrieved from www.pressgazette.co.uk/node/46644

Ma, G. (2014, January 21) *The Use of Information Technology and Text-based Communications in Courtrooms*. Practice Direction no. 32. Retrieved from http://legalref.judiciary.gov.hk/doc/npd/eng/PD32.htm

Madafferi v Age Company Ltd [2015] VSC 687.

McLachlin, B. (2012) "The relationship between the courts and the news media." In P. Keyzer, J. Johnston and M. Pearson (eds.), *The Courts and the Media*. Sydney: Halstead (pp. 24–35).

Parliament of Australia. (2006, December) *Review of Security and Counter Terrorism Legislation*. Canberra: Commonwealth of Australia.

Parliament of Australia. (2014) *Review of National Security Legislation Amendment Bill* (No. 1). Canberra: Commonwealth of Australia. Retrieved from www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s969

Parliament of Canada, Bill 231, *The Journalist Sources Protection Act*. Retrieved from https://openparliament.ca/bills/42-1/S-231/

Personal Information Protection and Electronic Documents Act 2000 (Canada).

Peters, J. and Tandoc, E. C. (2013) "'People who aren't really reporters at all, who have no professional qualifications': Defining a journalist and deciding who may claim the privileges." *New York Journal of Public Policy Quorum*, 34, 34–63.

Privacy Act 1985 (Canada).

Privacy Act 1988 (Cth) (Australia).

Queensland Court. (2017) *Queensland Court Security Access Card Application Form*.

Reese, S., Rutigliano, L., Hyun, K. and Jeong, J. (2007) "Mapping the blogosphere: Professional and citizen-based media in the global news arena." *Journalism*, 8(3), 254–280. doi:10.1177/1464884907076459

Reporters Committee for Freedom of the Press. (n.d.) *Shield Laws and Protection of Sources by State*. Retrieved from www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws

Roth, P. (2010) "Data protection meets Web 2.0: Two ships passing in the night." *UNSW Law Journal*, 32(2), 532–561.

Shennan, F. (2011) "Who are you calling a journalist – can one form of communication command special protection?" In N. Carpentier, H. Nieminen, P. Pruulmann-Venerfeldt, R. Kilborn, E. Sundin and T. Olsson (eds.), *Critical Perspectives on the European Mediasphere*. Ljubljana: ECREA European Media and Communication Doctoral Summer School (pp. 133–145).

Slater v Blomfield. 2014. NZHC 2221 (12 September 2014) (N.Z.)

Singer, J. (2007) "Contested autonomy." *Journalism Studies*, 8(1), 79–95.

Supreme Court of Victoria. (2016) *Media Policies and Practices*. Retrieved from http://assets.justice.vic.gov.au//supreme/resources/6ebfaf77-d0b8-4c35-bb9c-a78f0699d3bc/mediapoliciespractices2016_v1.pdf

Supreme Judicial Court Rule. (2012) *Supreme Judicial Court Rule 1:19: Electronic Access to the Courts, Massachusetts Courts System*. Retrieved from www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc119.html

The Courts of Nova Scotia. (2014) "The Use of Electronic Devices in Courthouses." *The Courts of Nova Scotia*. Available at: www.courts.ns.ca/Media_Information/electronic_devices_policy.htm.

Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy And Satamedia Oy C-73/07. (2008) Retrieved from http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d6713372345ad94fc5be5d911840e7b9f2.e34KaxiLc3eQc40LaxqMbN4Pax4Me0?text=&docid=67007&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=301473

Ugland, E. and Henderson, J. (2007) "Who is a journalist and why does it matter: Disentangling the legal and ethical arguments." *Journal of Mass Media Ethics*, 22(4), 241–261.

Wallace, A. and Johnston, J. (2015) "Tweeting from court: New guidelines for modern media." *Media & Arts Law Review*, 20(1), 15–32.

Warren, C. (2014, September 23) "Interview With Ben Grubb." *Sydney Morning Herald*. Retrieved from https://soundcloud.com/en_grubb/ben-grubb-interviews-chris-warren

Waters, N. (2002) "Can the media and privacy ever get on?" *Privacy Law and Policy Reporter*, 8(8), 149. Retrieved from www.austlii.edu.au/cgi-bin/sinodisp/au/journals/PrivLawPRpr/2002/1.html?stem=0&synonyms=0&query=cth%20consol_act%20pa1988108%20s7b#fnb15

West, S. R. (2014) "Press exceptionalism." *Harvard Law Review*, 27, 2434–2462.