Interview: Larina Alick

CAMLA Young Lawyers representative and lawyer at Banki Haddock Fiora, Antonia Rosen, catches up with Larina Alick, Editorial Counsel at Nine Publishing and Australian Community Media, for a chat about defamation reform and suppression orders - the age old issues and the heralds of change.

ANTONIA ROSEN: 2019 feels like an exciting time to be a media lawyer. There have been murmurs of change, particularly with the defamation law reform. Do you have hope that change is coming?

LARINA ALICK: I think change has to happen. The fact that this process has begun has surprised even me. We hoped for it, but I don't think anyone really thought it would happen because we've been waiting for it for so very long – and yet here we are! So I think there will be changes. I hope that a lot of them will be in favour of freedom of expression, which of course means in favour of the media just by the nature of the beast. The way the Defamation Act has been interpreted for the past 14 years is distinctly in favour of the plaintiff. There has been a real sense that the media are being held to a standard that no one could possibly meet particularly with qualified privilege, but also when it comes to truth. The justification defence refers to "substantial truth", but that adjective has been pretty much thrown out the window. We've been held to a standard of proof which is almost impossible for any publisher to meet, particularly when you're talking about personal circumstances and personal conduct that only the plaintiff knows about.

ROSEN: It's interesting that the objectives of the *Defamation Act 2005* in New South Wales and the terms of reference refer to freedom of expression and discussion of matters of public interest and importance. Do you think we've lost sight of those objectives?

ALICK: Absolutely. I haven't looked at section 3 since law school. I initially skipped over it when I saw it in the terms of reference for the defamation law reform, but I decided to have another look at it. Lo and behold there is a reference to freedom of expression which I don't think appears anywhere else in any kind of legislation. That's the closest we have to a human right (in section 3 of the Defamation Act) which is slightly ironic. There's also a reference in there to protection for the discussion of matters of public interest. So, it's not just about informing people of those matters, but discussing them, and we don't have that the way the Act is currently being interpreted. I'm hoping that Australia's Right to Know coalition on behalf of all the media organisations, as well as many other voices chiming in on this review, will really effect some substantial changes that could help reinforce those rights that are simply just being disregarded.

ROSEN: Do you think the same change is coming for statutory qualified privilege?

ALICK: I think so. I certainly hope so. I personally don't know how I would rewrite it but it has to be rewritten and I trust that people wiser than me can work out how to get this right because as it stands it does not work. It is a pointless defence.

ROSEN: Another potential reform that has been raised is a single publication rule. What are your views on this?

ALICK: As the law currently stands, every time an online story is accessed by a reader another act of publication occurs. Where that really bites is when we have a limitation period that runs for 12 months from the act of publication. So a story that's been sitting on the Sydney Morning Herald website since 2010 would normally have the limitation period expire in 2011, but if someone reads it today we have another act of publication and the limitation period begins again starting from today. What that means in real terms is that, as the Sydney Morning Herald's lawyer, I have to work out whether a story from 2010 was true at the time. Can I prove it true now? Who are the witnesses I can call? Where are the documents that can prove it true? We've had some instances where crucial witnesses have passed away from old age. It's incredibly difficult. At any given time, I have about half a dozen of these cases and they just don't feel genuine – you do wonder if a plaintiff was defamed nine years ago why are they suing now.

ROSEN: One of the rationales for the one year limitation period is that most of the damage is done in the period immediately following publication. One could see how this might be slightly different in the Internet age. Do you think the responsibility of publishers in the Internet age is any different? If we have a single publication rule, would you settle for a discretionary component with respect to the limitation period like the UK?

ALICK: I think the responsibility is greater. I think that is because of the "searchability" of these records now. For example, if someone commits a crime and that crime is reported in a local newspaper and sits on the website that person's name can be searched online for the rest of their lives. So from that perspective, the circumstances are different in the online age. As for the limitation period, when it comes to online publications I would accept a single publication rule with a discretionary component as to the limitation period as is the case with the *Limitation Act 1980* (UK) – you do need the ability to have things taken down in certain cases.

ROSEN: In other news, the Open Justice Review was announced earlier this year. Are there any areas of change that you are hoping for in that review?

ALICK: In my experience, suppression orders are being made excessively and out of an abundance of caution which flies in the face of the legislative requirements of the orders. Section 8 of *Court Suppression and Non-Publication Orders Act 2010* has five grounds for making suppression orders. Each one of those grounds is prefaced with the requirement that the order be "necessary" for the purpose. The test of necessity is repeated five times in the section alone and yet it is completely ignored the vast majority of the time. I have heard prosecutors seek suppression orders "out of an abundance of caution", which has been rejected by appellate courts as a basis for making a suppression order. Defence lawyers have also been known to seek suppression orders on this basis – I have even seen defence lawyers try to seek suppression orders for the benefit of the victim. I understand that judges hearing criminal proceedings have an enormous workload, but open justice and the public's right to know are being trampled on by these applications.

ROSEN: So you are known in certain circles as the "queen of suppression orders", do you get any time these days to make the case for open justice on your feet?

ALICK: Unfortunately I don't get to fight suppression orders these days. I was very fortunate when I was at News Corp as in-house counsel to be able to engage in that advocacy and it was a great experience and one which I wish I had more time for at Nine. It is an incredibly rewarding part of the job fighting for the public's right to know. In my previous role, I used to turn up to court routinely to fight suppression orders and I would win – not because I'm good, but because I turned up and took the time to take the judge through the material and apply the necessity test. Time and time again I would win because the applications for suppression orders should never have been made in the first place.

ROSEN: I hear you have quite an impressive track record – how many suppression orders have you been involved in as an advocate?

ALICK: Over a hundred and I have won every single one. I became very confident at it, not because I am a genius – it's not brain surgery – it's about applying the authorities and looking at the wording of the section and applying it. These orders are wrongly made because the lawyers and the judges don't have time to go through them. If someone from the media has the time and the money to turn up and oppose them, we win every time. Of course, it takes time and money to launch a review or appeal of a suppression order. As media organisations we frankly just don't have the resources anymore to have these kind of fights regularly.

ROSEN: You hear about the number of suppression orders that are made by the courts (Victoria wins by a mile), how do you keep on top of them?

ALICK: It's practically impossible. At least in Victoria there is a three day notice for the media prior to the orders being made. In NSW, we have ad hoc notification after the fact. If a judge remembers to tell the media officer of a court to inform media organisations of a suppression order, we will then get an email. Often the suppression orders are meaningless to us. For example the order will be made in respect of the individual named in an affidavit to which we don't have access.

ROSEN: Do you think suppression orders have a place in this day and age when publishers beyond the jurisdiction take no heed of them?

ALICK: The internet poses many challenges for the law and this is just one of them. We have orders being made by courts, often baselessly, to suppress information. The internet hates suppressing information.

It has always had a mantra that information should be free. We have seen Wikileaks publish suppression orders where the order, which contained a list of names, was itself suppressed in the Reserve Bank Securency and Note Printing Australia case. I was part of an application, on behalf of News Corp, to have the order revoked on the basis of futility, which was successful. Justice Hollingworth of the Victorian Supreme Court agreed that the internet publication had made the order futile.

ROSEN: It seems that we have in the past respected suppression orders made beyond our shores – for example in the English PJS v News Group Newspapers ([2016] UKSC 26) case, the Americans took the story and ran with it, but the Australian press seemed to respect the privacy injunction (at least online). As in house counsel what is your approach to these kinds of issues?

ALICK: We respect them notwithstanding that they are made in another jurisdiction The threat of going to jail, as we all know, in these types of cases is very real. I also think the legislative framework in Australia operates to create a certain degree of self-censorship.

ROSEN: Speaking of which, the most recent AFP raids have come as quite a shock. What are your thoughts in the wake of the scandal which has made headlines around the world?

ALICK: The raids by the AFP are extraordinary. Previously, the AFP raided Seven Network in relation to allegations that Chappelle Corby had sold her story to the network. But the recent raids are on a completely different level. This is raiding a media organisation and the homes of journalists to seek documents relating to stories that are in some cases three years old where the source of the material appears to be a government employee who leaked the material to the journalist. This intimidates whistle-blowers and journalists. I do not see what the purpose of the raids could have been. Why on earth would a journalist have confidential documents in her underwear drawer, in her house, years after the story ran? These are raids by authorities that can presumably check their own employees' email records and have a fair idea of which employees had access to the leaked documents. The suggestion that they had nowhere else to begin than raiding the ABC years after the story ran is ridiculous. It has made Australia a laughing stock around the world. There is nothing more embarrassing than reading the BBC coverage of this. And it is little attacks like this (which we as Australians try to downplay and be cool about) that will slowly erode what little rights we have to free speech and to know when governments are involved in wrongdoing.

ROSEN: On behalf of CAMLA and the Young Lawyers Committee, thank you Larina.

Antonia Rosen is a CAMLA Young Lawyers representative and lawyer at Banki Haddock Fiora.