How much is the rule of law under threat in Australia?

Listen for the bell as it tolls for defenders of civil liberties to speak up

By Keith McEwan*

In an informative article in *The Australian* newspaper (April 25-26, 2009), Mark Le Grand argues that the rule of law in Australia is under threat with the recent enactment of anti-gang legislation in South Australia and NSW, with similar laws foreshadowed in Queensland.

Le Grand, who has spent most of his professional life investigating organised crime groups as a member of the National Crime Authority, the Criminal Justice Commission and various organised crime task forces, says that this legislation represents the most complete abrogation of the citizen`s right to a fair trial he has witnessed in four decades of practice.

Accepting that coercive powers, such as acquiring documents and examining witnesses compelled to answer under oath, was needed to combat organised crime, Parliament has swept aside 400-year-old common law protection against compulsory interrogation, abrogating the “right to silence”.

Now this arbitrary exercise of state power is widening after State Parliaments have been called on to intervene and deny protection to witnesses against self-incrimination because the customary right stood in the way of the investigators.

Thus the “use” immunity (ie, the evidence obtained under compulsion could not be used directly against the witness) has been rendered useless as investigators can use the information gained as a means of discovering other evidence to prove the charges, thus nullifying the “trade off” protection.

At the same time, matters of lawyer-client privilege (another long-standing protection under the common law) have been over-ridden. Under the crime commission regime, other extraordinary powers have crept into the system:

- not being bound by rules of evidence;
- operations take place under a regime of secrecy;
- people are prevented from revealing they have been forced to attend a hearing;
- witnesses are charged if they tell their partners, relatives or friends anything about their dealings with the commissions.

The author maintains that these powers are necessary when investigating organised crime...but over the years matters prosecuted by crime commissions could have been done just as effectively by the police without these excessive powers, leaving the basic protections applying to honest citizens in place.

In his opinion, the high-water mark of the erosion of basic rights is the recent anti-gang legislation in South Australia and NSW, with Queensland likely to follow. The NSW legislation, the *Crimes (Criminal Organisations Control) Act 2009*, is a bad law that alters the balance between the state and its citizens, between investigator and suspect and between prosecutor and defendant.

Thus, the issue of gang criminality is not dealt with by the accepted process of adducing evidence at trial but by a quasi-administrative process of prohibition of an organisation by declaration and the imposition of control orders. Severe penalties are then visited on controlled members who continue any form of contact, even by post, fax, phone or email.

He claims that these laws are unprincipled and counter productive: they abrogate legal rights that have been central to the operation of the common law system for hundreds of years as a proven bulwark against tyranny. Moreover, these laws will force criminal activity underground, so making it more difficult to investigate. Police corruption will be encouraged by the reinstatement of thoroughly-discredited consorting laws.

The mode of proof of an alleged criminal conspiracy is based on proceedings that permit the police commissioner to apply for a declaration proscribing an organisation suspected of “serious criminal activity”. On such an application, the rules of evidence do not apply: the standard of proof is on the balance of probabilities rather than the standard of “beyond reasonable doubt”. The application can be founded on criminal intelligence dealing with merely suspected criminal activities.

As Le Grand explains, the act of “associating with” covers any contact no matter how removed or unsubstantial. The expression “criminal intelligence” includes suspected criminal activity. “A member of an organisation” includes a prospective member. ‘Evidence’ is by way of affidavit sworn by police officers.

The NSW legislation denies basic precepts of the common law for the fair trial of persons accused of criminal offences. Some of these precepts are:

- a person`s right to know the case against them;
- the right to be heard in response;
- the right of a person to be present and to test the evidence adduced against them; and
- citizens are equal before the law.

He concludes by saying that the passing of the NSW bikie legislation is instructive. The processes of debate and review were displaced by populism and political grandstanding. Legislation was introduced and passed within the day.

With this revealing article Mark Le Grand is tolling the bell which we must answer if we treasure our civil liberties.

– Keith McEwan is a CLA member from Victoria