Legislative Council Hansard – 10 August 2017 – Proof

CHARITABLE FUNDRAISING AMENDMENT (INQUIRIES) BILL 2017

Second Reading

The Hon. SCOTT FARLOW (11:36): On behalf of the Hon. Sarah Mitchell: I move:

That this bill be now read a second time.

I am pleased to introduce the Charitable Fundraising Amendment (Inquiries) Bill 2017. The object of this bill is to amend the Charitable Fundraising Act 1991 and to put consumers first by enhancing the existing powers in the Act to inquire into fundraisers. I am please to say that the vast majority of charities act with complete integrity, without any concerns of fraud or non-compliance, and continue to deserve our confidence as they provide critical support and service to our fellow citizens, including to our most vulnerable citizens. I am sure members of this House are aware of high-profile cases in this State and other jurisdictions that have raised significant concerns in the community about the alleged misused of funds raised for charity. In some of these cases, allegations have been made that are so serious that they threaten the integrity of the charitable sector and damage the high level of trust bestowed by the donating public.

There are more charities operating in New South Wales than in any other jurisdiction in Australia. These wonderful charities, run by hardworking and honest people, contribute in a significant way to the fabric of our community. Take, for example, beyondblue, which does so much to promote good mental health. The Australian Bureau of Statistics estimated that 3 million Australians are currently experiencing anxiety or depression. Beyondblue gives people the confidence to support others, and tackles the stigma and prejudice surrounding mental health. Beyondblue places the community at the centre of its work to reduce the impact of mental health conditions and improve access to support services. In addition, beyondblue consistently rates highly in the AMR Charity Reputation Index.

However, accusations of financial impropriety by charities or persons involved in charities are increasingly coming to the attention of the public. In fact, allegations made against former councillors, office bearers, and directors of RSL entities, including RSL NSW, RSL LifeCare, and the RSL Welfare and Benevolent Institution, otherwise known as DefenceCare, were so serious that on the 15 May this year the Hon Patricia Bergin, SC, was appointed to inquire into these RSL entities.

The RSL NSW has long been a highly regarded and respected organisation in our community and I am sure that all members of this House acknowledge the important work it does to support the men and women of our defence force—men and women who deserve not only our support but also our enduring respect for the sacrifice they make for our nation. Many of us choose to acknowledge the important contribution of those who serve and to pay our respects by donating money for the delivery of the most appropriate support programs and services. It is important that the public can have confidence that those who hold fundraising authorities have the necessary governance and oversight of their fundraising activities.

We must put consumers first on this issue—and I am talking about both the consumers who donate and those who are in desperate need of the help that comes from donations. If the money we donate is not used to support that organisation's activities and is instead used to line the pockets of a contemptuous few, then our trust has been well and truly breached. The New South Wales donating public and the beneficiaries of our charities deserve to be put first. Indeed, with the integrity of such well-known charities in question, there is a real danger that public confidence and trust in all charities in New South Wales has already diminished, and a substantial drop in donations across the charity sector could easily occur after this loss of trust.

This could have a disastrous impact on charities that do incredibly important work for people in this State. Take, for example, the Royal Flying Doctor Service and the amazing job it does in providing medical services to people who live in rural and remote parts of the country. The service plays a critical role in ensuring that all Australians and New South Wales citizens living in rural locations have the same services and high standards of care as those of us who live in metropolitan areas. It is vital that the confidence of the public to donate to such a worthy charity is not eroded as a result of malfeasance of a few in other charities. We need to strengthen the Act to give people confidence that the money they donate will go to its intended purpose. This Government wants to make sure people who do the right thing are protected and that consumers are put first.

Since that time we have announced the inquiry into the New South Wales RSL and related entities under section 26 of the Charitable Fundraising Act to investigate alleged financial irregularities that may involve millions of dollars. That inquiry will be able to take advantage of these new enhanced powers. The amendments contained in the bill will broaden and strengthen the inquiry powers under the Charitable Fundraising Act, making sure that current and future inquiries of high significance and public importance can be conducted thoroughly and in public. The bill proposes to improve the inquiry powers of the Act by providing an alternative for an inquiry to be held as a "public inquiry", providing a robust framework to inquire into cases of importance and of public interest. This is a very important point. It is envisaged that these new powers and protections will be used for only the most serious of cases.

The bill also contains a framework of crucial safeguards so that the enhanced powers are used appropriately. The ability to hold a "public inquiry" will only occur when, in the opinion of the Minister of the day, it is in the public interest to do so, and the Premier is also satisfied. By holding a public inquiry transparency is assured, the public has greater visibility over the conduct of the inquiry and confidence that no stone will be left unturned, and that any issues and behaviour of concern and the consequences of that behaviour will be revealed. The powers contained in this bill do not derogate from the existing powers of inquiry in the current Act. This means that inquiries that do not meet the high threshold of the level of importance required for a public inquiry can continue to be carried out as they currently are.

I will address the amendments in turn. The amendments confer on the Minister of the day the power to cause a public inquiry into any matter under section 26, including any matter associated with the conduct of a fundraising appeal under the Act. As per the existing powers, these matters would include matters such as the governance of the charity, whether funds raised in an appeal are being applied as represented, and whether those who are associated with the conduct of fundraising appeals are fit and proper persons. Section 41 (2) of the Charitable Fundraising Act currently allows the Minister of the day to recover the costs incurred by an authorised inspector who is not an employee of the Crown from the person or organisation related to the inquiry. This is an existing power within the Act.

The amendments in the bill seek to clarify how the existing power would apply in circumstances in which a number of entities are the subject of the inquiry, whether an inquiry under section 26 of the Act or a public inquiry. This will provide certainty to all parties involved. The amendments seek to clarify how the remuneration and expenses of the authorised inspector, public inquirer or their agents would be apportioned when two or more parties are subject of the inquiry, by providing that the Minister can direct those costs to be paid in proportions. These amendments will improve the certainty of the operation of this existing power. To strengthen these provisions and provide additional protections, the Government has moved amendments in the other place to provide that the Minister must have regard to the financial viability of the relevant parties when making directions as to costs.

To ensure that only a person with the appropriate experience, qualifications and capacity can be appointed to undertake an inquiry and use the enhanced powers contained in this bill, the appointed person must be a current or former Judge of the Supreme Court of New South Wales or any other Australian State, the Federal Court of Australia or the High Court of Australia. Allowing the inquiry to be conducted only by such an appointee provides assurance to the Government, charities and donors of New South Wales that the enhanced powers are being exercised in a responsible and judicious way. In addition, to ensure complete impartiality and to mirror the prohibitions in the Special Commissions of Inquiry Act, the amendment specifically provides that, despite such experience and qualifications, a serving member of a Parliament cannot be appointed to the position of public inquirer. The enhanced powers contained in this bill provide the necessary framework for the appointed person to be afforded appropriate powers, immunities and protections to conduct an inquiry properly.

The bill provides a public inquirer with the same protections and immunities as a Judge of the Supreme Court in the exercise of their functions as a public inquirer. Given the importance and public nature of a public inquiry the bill provides the Minister with the authority to require the public inquirer to report on the inquiry—as prescribed in the instrument of appointment. This includes allowing the Minister to table a copy of the report in both Houses of Parliament—when the Minister considers this is the most appropriate way of publishing the report under the circumstances. There may be public inquiries where tabling the report will provide the necessary transparency and accountability for the persons or organisations being inquired into.

As I have said, the existing RSL inquiry is one that can benefit from the proposed powers. An inquiry already commenced under section 26 of the Charitable Fundraising Act will be able to be reconstituted as a public inquiry—when the Minister and the Premier consider it is in the public interest for a public inquiry to be conducted. A number of complaints have been received over the years about alleged misappropriation of funds by persons involved in charitable organisations. Inquiries into those allegations have experienced some limitations. When RSL National commissioned KordaMentha to report on the alleged financial irregularities affecting RSL entities, there were claims by some of those requested for information that certain documents could not be provided.

The powers contained in the bill will ensure this can not happen in a public inquiry. Those wishing to escape being held to account for their conduct will no longer be able to do so. It is vitally important that when an inquiry is meritorious enough to be held as a public inquiry, the public inquirer has the necessary powers to compel the attendance of witnesses, the production of documents and other things. To ensure the authority of the public inquiry and the public inquirer is respected, the bill also provides that those who are guilty of contempt or disobedience with directions, orders or summons of the public inquirer will be able to be punished. The public inquirer will be allowed to issue a summons to a person to appear before the public inquiry and issue a warrant for the apprehension of a witness who has failed to attend a hearing. Witnesses who may have information that is relevant to the inquiry must provide all answers, documents and other things deemed relevant.

The bill provides the ability for the public inquirer to issue a search warrant if they have reasonable grounds for believing that documents relating to any matter in question are being held in a residence. This will make certain that all relevant evidence can be examined and considered, and will ensure that any serious or systemic issues can be inquired into properly and all wrongdoings unearthed. This power will ensure the integrity of the public inquiry is not frustrated by witnesses failing to provide relevant evidence that may be highly probative. The bill also confers the power on the public inquirer to control how the inquiry, examinations and hearings will be conducted. This is an important provision as it allows the judicial officer to create the ideal environment for the giving of evidence.

This Government has moved amendments in the other place to further enhance these powers by requiring the public inquirer to take into account the effect of a public hearing on the reputation of any persons appearing before the public inquiry and to require the public inquirer to issue procedural guidelines relating to the public inquiry where it is in the public interest to do so. Such guidelines would cover matters of procedural fairness and the public inquirer would be required to publish them. To provide witnesses with representation where it is appropriate, the bill allows the public inquirer to allow witnesses and affected persons to be represented by an Australian legal practitioner. This provision has been amended by the Government in the other place to clarify that the provisions afford witnesses this representation and to ensure that a person giving evidence has been given reasonable opportunity to be represented legally.

For those who are required to attend at hearings, the amendments to the bill also include the ability for financial assistance to be provided where appropriate, in particular where there is a prospect of hardship without the assistance and the significance of the evidence the witnesses is giving or likely to give. This provides fairness in the process and will assist in ensuring that hearings are run professionally and proficiently. For the same reason the bill allows, with leave, for witnesses to be examined or cross-examined on behalf of affected persons. Leave will need to be granted in accordance with the dictates of procedural fairness. Witnesses will have the same protections and be subject to the same liabilities as if they were being examined by the public inquirer.

The bill also puts in place powers that will assist the public inquirer in obtaining the most accurate and reliable evidence possible. To that end, the bill allows the public inquirer to take evidence on oath or affirmation. To facilitate a robust inquiry, the suite of powers contained in this bill allows for the abrogation of the privilege against self-incrimination while including protections for witnesses when the privilege is abrogated and the witness is required to answer the question or furnish the information. Where it is determined that a public inquiry is appropriate, the primary objective is to uncover what is going on and whether the organisation can clean up the mess, and to restore and maintain public confidence in giving donations for charitable purposes. That cannot be achieved if crucial witnesses decline to answer questions because they are concerned about breaching matters that might be commercial in confidence or being potentially complicit in what might be the criminal conduct of others.

The bill confers on the public inquirer the power to compel witnesses to give evidence and provide documents or oral answers, even if the evidence is self-incriminating.

To protect witnesses, such evidence is inadmissible in evidence against the person in civil or criminal proceedings, with the exception of offences under the public inquiry provisions or fundraising authority decisions. The purpose of those exceptions is to protect an inquiry's integrity and to ensure that the Minister of the day is able to clean up any charities found to have done the wrong thing by imposing new conditions on a fundraising appeal authority or by cancelling or refusing such an authority.

The Government recognises that the abrogation of the privilege of self-incrimination should be used only when it is necessary and in the public interest to do so. I note that the Casino Control Act 1992, Combat Sports Act 2013 and the Fisheries Management Act 1994 provide admissibility protections similar to those proposed in this bill. The Government has moved amendments in the other place to how these provisions will apply to existing non-public inquiries. The amendments ensure that a warning about the risk of self-incrimination extends to all evidence gathered in an existing non-public inquiry, where it is reconstituted as a public inquiry.

Section 30 of the Charitable Fundraising Act makes it an offence for a person or entity to not comply with a requirement made by a notice in the course of an inquiry. Section 30 offence provisions will be extended to cover public inquiries. The bill also makes it an offence to fail to comply with a direction about attendance. The maximum penalties for these new offences are consistent with, and do not exceed, those set out in the Special Commissions of Inquiry Act. I will address the framework provisions contained in this bill that will allow the appointee to undertake their role with the necessary support and resources.

The bill limits liability for public servants, or other people engaged to assist the public inquirer when performing the functions of the public inquiry in good faith. In addition, the bill provides an Australian legal practitioner who assists the public inquirer, or represents a person, with the same immunity as a barrister appearing in proceedings in the Supreme Court. Finally, the bill also ensures that there is no criminal or civil liability, other than under the Act, for a person who complies with any of the public inquiry requirements. The new public inquiry powers contained in this bill will give the community confidence that the Government has the power to inquire properly into wrongdoing in the charitable sector. I cannot stress how important it is that the confidence of the community in donating to our worthy charities is maintained.

People who think they can get away with destroying the reputation of the charitable sector will be put on notice with this bill. If a public inquiry is held, you will be found out. People in positions of trust must not take their responsibilities lightly, the provisions in this bill will put on notice those who would endanger the reputation of worthy charities. Take, for example, the former chief executive of a children's cancer charity who was sentenced to 18 months jail to be served by way of an Intensive Correction Order for misappropriation of almost $70,000. Money that could have been used for the benefit of children with cancer. That action had the potential to ruin 30 years of meaningful and important work in our community.

This Government has built and maintained a cohesive and mutually beneficial relationship with charities operating in New South Wales. The importance of and need for the hard work that charities undertake cannot be understated. Guide Dogs New South Wales-ACT is a leading provider of guide dogs and mobility services that assist people with impaired vision to get around their communities safely, providing valuable independence to our vision-impaired citizens. Charities like this should be supported by a robust regulatory framework that includes the power to inquire properly into allegations of misappropriation of charitable funds.

NSW Fair Trading will consult actively with New South Wales charities and their representative bodies to identify innovative solutions to red tape while maintaining the important donor and community protections that put consumers first. NSW Fair Trading continues to work with the Commonwealth Government and colleagues from across the States and Territories to harmonise the reporting requirements for charities, especially for those incorporated associations that are charities registered with the Australian Charities and Not-for-profits Commission. This work aims to remove duplication of administrative effort for charities as reports will have to be submitted to one government agency only and shared with regulators through a direct data transfer governed by strict privacy controls.

There is more work to be done. For example, it is recognised that fundraising regulation has not kept pace with new forms of fundraising, particularly as online campaigns for funds have grown through the use of third party websites. Future proofing the regulatory system remains a high priority. The powers contained in this bill establish a future-proof framework for the holding of public inquiries to ensure that non-compliance, malfeasance and wrongdoing are revealed, deterred and discontinued at the earliest opportunity. This in turn will help ensure that the public can be confident in donating to the many worthy New South Wales charities. I commend the bill to the House.