HISTORICAL HOMOSEXUAL CONVICTIONS EXPUNGEMENT BILL 2017

EXPLANATORY MEMORANDUM

Overview of the Bill

The Historical Homosexual Convictions Expungement Bill 2017 seeks to establish an administrative scheme for the expungement of convictions for a select number of historical offences under now repealed sections of *The Criminal Code* involving homosexual activity.

The Bill provides that an eligible person, an appointed guardian or enduring guardian, or a relative or partner of a deceased eligible person, may apply to the Chief Executive Officer of the Department of Justice to have a conviction for a historical homosexual offence expunged. The effect of expungement will be that the person will no longer be required to disclose that conviction, including under oath. Government agencies identified in the Bill as holding official criminal records relating to the expunged conviction will be required, upon notification of an expungement from the CEO, to annotate the records relating to that conviction. The annotation must indicate that the records relate to an expunged conviction. Unlawful disclosure of records relating to an expunged conviction constitutes an offence.

The Bill also confers jurisdiction on the State Administrative Tribunal for the review of decisions regarding expungement and provides that where a conviction has been expunged on the basis of false or misleading information, that conviction can be revived.

The Bill provides that employment discrimination on the ground of an expunged conviction is unlawful, modelled on the approach taken in the *Spent Convictions Act 1988* (WA) and that Act's relationship with the *Equal Opportunity Act 1984* (WA). This provides that a complaint of discrimination on the grounds of an expunged conviction may be lodged with the Equal Opportunity Commission and allows for the matter to be investigated.

Finally, the Bill amends the *Working with Children (Criminal Record Checking) Act 2004* (WA) to provide that an expunged conviction is deemed a "non-conviction charge" for the purposes of section 4 of that Act.

Part 1 – Preliminary

Clause 1 Short title

Clause 1 provides that the Bill, once enacted, will be known as the *Historical Homosexual Convictions Expungement Act 2017*.

Clause 2 Commencement

Clause 2 provides for the commencement of the Act.

Part 1 comes into effect on the day the Act receives Royal assent. The rest of the Act will come into operation on a day fixed by proclamation. Different days may be fixed for different provisions of the Act.

This is to ensure that any required administrative arrangements (such as the design and development of application forms, information pages on the Department of Justice website for potential applicants, etc.) can be put in place before the scheme commences.

Clause 3 Terms used

Clause 3 sets out the defined terms used throughout the Bill.

Clause 3(1) provides that:

- applicant means a person referred to in clause 5(1) who may make an application for their own conviction for a historical homosexual offence to be expunged, or a person referred to in clause 5(2) who may make an application on behalf of an eligible person;
- application means an application for expungement made under clause 5;
- Australian Crime Commission, CEO and Commissioner of Police mean the bodies or persons known by those names or holding such offices;
- conviction means a finding of guilt or acceptance of a plea of guilty by a court, whether on indictment or summarily, and whether or not a conviction has been recorded. The definition also confirms that, regardless of sections 13 and 25-27 of the *Spent Convictions Act 1988* (WA), a spent conviction as defined in section 3 of that Act is included within the definition of conviction;
- data controller in relation to official criminal records means the person holding the position listed in paragraphs (a) to (f) of the definition, being the Commissioner of Police, the Director of Public Prosecutions, Principal Registrars of the District, Magistrates, and Supreme Courts and a registrar of the Children's Court, as that Court does not have a Principal Registrar. Paragraph (g) of the definition provides that additional data controllers may be prescribed in regulations. Data controllers have a responsibility under the Bill to annotate official criminal records relating to expunged convictions;
- Department means the department principally assisting the Minister in the administration of the Act – in this case, the Department of Justice;
- DPP means the Director of Public Prosecutions as appointed under the *Director of Public Prosecutions Act 1991* (WA);
- eligible person means a person who has been convicted of a historical homosexual offence as that term is defined in clause 3(1);
- expunged conviction means a conviction that has been expunged in accordance with clause 11(3), with a meaning affected by clause 3(2);
- historical homosexual offence means an offence listed in Schedule 1, an offence prescribed by regulations for the purposes of the defined term, or an

offence of attempting, conspiring with or inciting another person to commit an offence listed in Schedule 1 or prescribed by regulation;

- official criminal record means a record – including an electronic record - held by the WA Police Force, the DPP, a court of Western Australia, or another body prescribed in regulations, containing the outcome of criminal proceedings as they relate to a conviction under the Bill;
- personal information takes its meaning from clause 1 of the Glossary to the *Freedom of Information Act 1992*. That Act defines personal information to be:

> *information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent and can reasonably be ascertained from the information or opinion; or*
> *(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.*

The definition of personal information has been included due to the obligations placed on the CEO when providing information under clauses 11(5) and 12(3) of the bill.

The term "prescribed" has also been defined to clarify that this means a matter that is prescribed by the regulations.

Clause 3(2) expands on the defined term expunged conviction to clarify that it also applies to references to charges to which that conviction relates. This provides that ancillary records relating to the conviction which expungement has been applied for will also be captured by the annotation requirement where those convictions are expunged.

Clause 4 Act binds Crown

Clause 4 provides that the Bill, once enacted, will bind the Crown.

Part 2 – Applications and determinations

Division 1 – Making an application

This Division sets out the process of making an application, specifies who may apply, and establishes a requirement to produce further information in support of an application where requested to by written notice issued by the CEO. It also provides for the withdrawal and reinstatement of applications.

Clause 5 Application for convictions for historical homosexual offences to be expunged

Clause 5 in its entirety sets out the classes of people who may apply to have a conviction for a historical homosexual offence expunged.

Clause 5(1) enshrines the right of an eligible person to apply to the CEO.

Clause 5(2) provides for a range of others to make application on behalf of an eligible person. In all cases, the applicant must have reached the age of 18 years.

Clause 5(2)(a) and (b) provide that, where the eligible person (as that term is defined in section 3) is under an enduring power of guardianship under Parts 9 and 9A of the *Guardianship and Administration Act 1990* (WA), or is a represented person as defined in section 3(1) of the *Guardianship and Administration Act 1990* (WA) with a guardian, these appointed representatives may make application on the eligible person's behalf.

Clause 5(2)(c) provides that where the eligible person has died, their spouse or de facto partner, parent, child or sibling, executor of their will or administrator of their estate, or a person who was in a close personal relationship with them immediately prior to their death, may make application on their behalf. Clause 5(2)(c) also provides that, where the conviction involved another person, that other person may also apply to have the conviction expunged. The term "close personal relationship" takes its meaning from section 110ZD(5) of the *Guardianship and Administration Act 1990* (WA), which is:

> "*…a person maintains a close personal relationship with the patient only if the person –*
>
> *(a) has frequent contact of a personal (as opposed to a business or professional) nature with the patient; and*
> *(b) takes a genuine interest in the patient's welfare.*"

Clause 5(3) provides that an application must be in a form approved by the CEO, contain the information required by clause 6 (see below) and must be lodged in a manner that is either prescribed by regulations or, if not applicable, in a manner approved by the CEO.

Clause 5(4) provides that where the CEO has refused an application, a further application in respect of the same conviction can only be considered where the CEO is satisfied that further supporting information necessary to the application only became available following the CEO's refusal of the initial application. This will effectively mean that, should new information in support of an application for expungement come to light, a person can reapply in respect of the same conviction. Clause 5(4) applies despite clause 5(1), which enshrines the right to apply for expungement.

Clause 6 Contents of application

This clause sets out the information which must be included in an application for expungement. This includes the full name, residential address and telephone number of the applicant and the eligible person and the eligible person's date of birth, together with historical information which will assist the CEO and data controllers to locate

official criminal records in respect of the conviction. This includes the residential address of the eligible person at the time of the conviction, the name and location of the court they were convicted in, the date and name of that conviction, and details of the conduct engaged in that constituted a historical homosexual offence. Clause 6(1)(g) provides that additional required information may be prescribed in regulation; whilst 6(1)(h) allows that the CEO may require any additional documents or information.

Under clause 6(2)(a), an application for expungement made by an eligible person must be lodged together with a consent which authorises data controllers to disclose any records relating to the historical homosexual offence to the CEO, regardless of who those records are held by. Under clause 6(2)(b), where an application is lodged by a person other than the eligible person (as is provided for by clause 5(2)), the making of the application is itself taken to include the consent of the eligible person.

Finally, clause 6(3) provides that an application can be accompanied by supporting statements and written evidence given by the applicant themselves or any other person, including any other person involved in the conduct constituting the offence for which the conviction was made. This supporting information can address the matters the CEO is required to be satisfied of before approving an application for expungement, as set out in clause 10 (see below).

Clause 7 Providing further information

The provision of further information in support of an application for expungement is governed by clause 7 of the Bill.

Clause 7(1) provides that where an application does not contain the mandatory information specified in clause 6, the CEO may issue a notice to the applicant requiring the production of that information within 28 days – or a longer period if such period is specified by the CEO. The requirements of giving notice are detailed in clause 24 of the Bill.

Clause 7(2) links back to clause 6(3) in that it provides that the statements and written evidence permitted to be supplied under that clause may be submitted to the CEO at any time between the lodgement of the application and the making of a determination by the CEO.

Notwithstanding the CEO's ability to issue a notice requiring further information under clause 7(1), clause 7(3) provides that the CEO may consider an application that does not provide all of the mandatory information required under clause 6, at the CEO's discretion. However, clause 7(3) also provides that, where an applicant has not complied with a notice requiring further information issued under clause 7(1), the CEO may treat the application as having been withdrawn.

Given the passage of time since the historical homosexual offences contained in Schedule 1 to the Bill were repealed from *The Criminal Code*, clause 7(4) allows that

an applicant may be taken to have complied with a clause 7(1) notice requiring further information if the applicant has satisfied the CEO that they are unable to comply with it. The practical implication of this clause is that statements from the applicant outlining the steps taken to locate the requested information and the reasons why it could not be located or was not available may satisfy the CEO that all reasonable steps have been taken to fulfil the requirements of a notice issued under clause 7(1).

Clause 8 Withdrawal of application

Clause 8 allows for the applicant to withdraw an application for expungement.

Clause 8(1) provides that an applicant may withdraw their application at any time before that application has been determined by the CEO.

Clause 8(2), similarly to clause 7(3), provides that the CEO may consider an application to be withdrawn in circumstances where an applicant has not complied with a notice to provide information issued under clause 7(1) or additional information requested by a notice issued under clause 9(3).

Despite this, clause 8(3) allows the CEO to reinstate an application where the CEO is satisfied that the applicant wishes to proceed with it, provided that the additional information requested by written notice issued under either clause 7(1) or 9(3) is submitted.

Division 2 – Determination of applications

This Division outlines how applications are to be investigated and determined, including requirements for the CEO to take certain matters into consideration.

Clause 9 – Investigation of application

This clause outlines how the CEO may investigate the matters raised in an application for expungement.

Clause 9(1) empowers the CEO to take all steps and make all enquiries that are reasonable and appropriate to properly consider the application. However, given the sensitivities involved, clause 9(2) provides that the CEO must not hold an oral hearing to determine the application. Convictions for historical homosexual offences carry great stigma for those affected and can result in years of discrimination and shame. Given that applying could in itself reawaken difficult memories, the risk of re-traumatising an eligible person through an oral hearing process is too great.

Clause 9(3) provides that the CEO may by notice require an applicant to provide additional information or documents if, in the CEO's view, that additional information is necessary to determine the application. The information must be provided within 28 days or such longer period as specified by the CEO in the notice.

Similarly to clause 7(1), clause 9(4) empowers the CEO to require a person, by notice, to provide information relevant to an application, within a time and in a manner specified in that notice. The CEO can also require that person to answer specific questions and provide the information in a manner and within a time determined by the CEO. Clause 9(5) provides that it is an offence not to comply with a notice issued under clause 9(4) without reasonable excuse, attracting a penalty of $2,000.

Clause 9(6) places an obligation on the CEO to only use information or documents obtained under Part 2 for the purposes of administering the Act.

Clause 10 – Matters to be considered in determining application

As set out in clause 10, an application for expungement must satisfy a mandatory test before it can be approved.

Clause 10(1) provides that the CEO must be satisfied that the offence for which the application is made is a historical homosexual offence as defined in clause 3. Additionally, the CEO is required to be satisfied, on the civil standard of the balance of probabilities, that:

- the eligible person would not have been charged with the offence, but for the fact that the person was suspected of engaging in the conduct that constituted that offence in connection with or for the purposes of sexual activity of a homosexual nature; and
- if that same conduct were to be engaged in, at the time of making the application, it would not constitute an offence under the laws of WA.

Under clause 10(2), the CEO must consider the ages or respective ages of those involved in the conduct at the time of the offence and whether the people involved consented to that conduct.

Where consent is or may be an issue in determining an application, clause 10(3) provides that the only way the CEO can be satisfied is through written evidence. That written evidence must be obtained from either the official criminal records (as that term is defined in clause 3) or from a person (other than the eligible person) who was involved in the conduct that constituted the offence. Barring locating the other person involved as set out at clause 10(3)(b), a person (other than the applicant) who has knowledge of the circumstances in which the conduct occurred may supply written evidence in their place.

Clause 10(4) provides that in addition to the above mandatory considerations, the CEO may have regard to any other matters which could reasonably be considered relevant in the circumstances of each particular application.

Clause 11 – Determination of application

This clause establishes how the CEO is to determine an application for expungement and builds procedural fairness provisions into that determination process.

Firstly, clause 11(1) provides that an application must be determined by the CEO as soon as practicable after it is received. Clause 11(2) provides that there are two determinations available to the CEO, being to either approve, or refuse, the application.

Clause 11(3) provides that if an application is approved, the conviction is expunged.

Clause 11(4) requires the CEO to take steps to notify an applicant and if possible the eligible person (where the applicant is not the eligible person) prior to refusing an application. If the CEO intends to refuse an application, they must first, under clause 11(4)(a), give the applicant (and if practicable the eligible person, where the eligible person is not the applicant) notice of this intention (clause 11(4)(a)(i)) and give the applicant (and if practicable the eligible person, where the eligible person is not the applicant) 14 days to submit further documents or information to show cause why the application for expungement should not be refused (clause 11(4)(a)(ii)). In addition, under clause 11(4)(b), the CEO must provide the applicant (and if practicable the eligible person, where the eligible person is not the applicant) with copies of the official criminal records in the CEO's possession relating to the conviction at the time the notice of the intended determination was given, and have taken into account any further documents or information submitted in response to the notice issued under clause 11(4)(a)(ii).

In the interests of privacy and confidentiality, under clause 11(5), it is the responsibility of the CEO to ensure any personal information, (as that term is defined in clause 3 by reference to the *Freedom of Information Act 1992* (WA) and being personal information about someone other than the eligible person) in the official criminal records provided in accordance with clause 11(4)(b), is withheld.

Clause 11(6) requires the CEO to give the applicant, and if practicable the eligible person (where the applicant is not the eligible person), written notice of a determination as soon as possible after that determination is made. Where the application has been refused, the notice given by the CEO must set out the reasons for refusal (clause 11(6)(a)) and give information about the right to seek review of that determination to the State Administrative Tribunal (clause 11(6)(b)).

Division 3 – Determination that conviction is no longer expunged

This division provides an avenue for the revival of an expunged conviction where it is found that the expungement was approved on the basis of false or misleading information.

Clause 12 – Determination that conviction is no longer expunged

Clause 12(1) allows the CEO to determine that a conviction is no longer expunged if the CEO is satisfied that the application for expungement which was approved, resulting in the conviction being expunged, included false or misleading information or documents.

Clause 12(2) outlines the steps the CEO must take prior to making a determination to revive an expunged conviction. The CEO is required to give notice to the applicant (and the eligible person if practicable where the applicant is not the eligible person) that it is intended to revive that conviction and give 14 days to submit further written information or documents to show cause why that determination should not be made. As is similarly required under clause 11(4), in these cases the CEO is also required to provide the applicant (and if practicable the eligible person, where the applicant is not the eligible person) with copies of any documents or information, including official criminal records, in the CEO's possession which relate to that proposed determination to revive an expunged conviction. The CEO must also take into account any further written information or documents submitted in accordance with clause 12(2)(a)(ii).

The CEO has an obligation under clause 12(3) to withhold personal information from any documents and information provided under clause 12(2)(b). Similarly as at clause 11(5), this means personal information of people other than the eligible person.

Under clause 12(4), an expunged conviction ceases to be expunged on and from the date of the CEO's determination of the same.

Clause 12(5) requires the CEO to provide written notice of a determination that an expunged conviction is revived to the applicant (and the eligible person if practicable, where the applicant is not the eligible person) as soon as possible after that determination is made. That notice must include reasons for the determination and information about the right to seek review of the determination by the State Administrative Tribunal.

In cases where an expunged conviction is revived, the Bill places an obligation on the CEO under clause 12(6) to notify any relevant data controllers, in writing, that the conviction is no longer expunged. That notification must occur within 28 days after the determination having been made.

Clause 12(7) obliges the data controllers notified under clause 12(6) to annotate any entry contained in the official criminal records about the previously expunged conviction to indicate that the conviction is no longer expunged. A 28 day timeframe applies.

Part 3 – Consequences of conviction being expunged

This Part outlines the practical effect of a conviction being expunged, including requirements for data controllers to annotate official criminal records to reflect the expungement, and the consequences for an eligible person if their conviction is expunged.

Clause 13 – Annotation of official criminal records

Clause 13 outlines the requirement to annotate official criminal records following the expungement of a conviction.

Clause 13(1) obliges the CEO to notify any relevant data controllers within 28 days of the CEO's determination that a conviction is expunged under clause 11(2)(a). The data controllers are to be notified in writing.

Clause 13(2) places a duty on data controllers which must be discharged within 28 days of receipt of written notice of an expungement determination under clause 13(1). Data controllers must annotate any entry relating to the expunged conviction contained in the official criminal records under the control or management of the data controller. That annotation must contain a statement to the effect that the entry relates to an expunged conviction.

Clause 13(3) places a duty on data controllers to report back to the CEO, in writing, as soon as is reasonably practicable, that the official criminal records have been expunged in accordance with the notification issued under clause 13(2). Alternatively, if the official criminal records could not be located and therefore could not be annotated, data controllers must, under clause 13(3)(b), notify the CEO of this.

Clause 13(4) provides that the CEO must notify the applicant (and where practicable the eligible person, where the eligible person is not the applicant) as soon as is reasonably practicable once the CEO is satisfied that official criminal records have been annotated in accordance with the requirements of clause 13(2).

Clause 14 – Effect of expunging

This clause explains the practical effects of expungement for the eligible person who has had a conviction expunged under clause 11(3). These practical effects are stated in paragraphs (a) to (e) of clause 14:

- the person is not required to disclose the expunged conviction to anyone else, including when giving evidence under oath;
- the expunged conviction is taken not to form part of the person's official criminal record;
- questions about the person's criminal history, including questions to be answered under oath, are taken not to refer to the expunged conviction;
- when applying the provisions of any legislation, agreements or arrangements to that person, any reference to a conviction – however expressed – is taken not to refer to the expunged conviction and a reference to the person's character – however expressed – is not taken to allow, or require, anyone to take account of the expunged conviction; and
- the expunged conviction and nondisclosure of it are not proper grounds for refusing the person any appointment, office, status or privilege, or revoking any

appointment, status or privilege held by that person or dismissing them from any office.

Clause 15 – Disclosure of expunged records

This clause outlines the requirements around, and exceptions for, non-disclosure of official criminal records relating to an expunged conviction.

Clause 15(1) provides that it is an offence for any person with access to official criminal records to disclose any information about a person's expunged conviction without lawful authority and the consent of the person against whom the conviction was made. This applies equally to both direct and indirect disclosure. An offence against this provision attracts a penalty of $10,000.

There remain some exceptions to this duty of non-disclosure, and these are outlined in clause 15(2). This clause specifically provides that clause 15(1) does not apply to archives and libraries, or authorised officers thereof, who make available material for public use that refers to an expunged conviction, where that material would ordinarily be available in line with ordinary procedure. Clause 15(1) also does not apply to the CEO or any person acting under the CEO's direction in informing a data controller in relation to the expunged conviction, nor to the Commissioner of Police or anyone acting under the Commissioner's direction disclosing such information to the Australian Crime Commission for the purpose of updating the National Police Reference System.

Clause 15(3) provides that these non-disclosure obligations apply despite sections 77(4), 79(3) and 135(3) of the *Health Practitioner Regulation National Law (Western Australia)* and any other Act which provides that information relating to spent convictions may be disclosed.

Sections 77(4), 79(3) and 135(3) of the *Health Practitioner Regulation National Law (Western Australia)* relate to the powers of health practitioner registration boards to seek criminal history checks for people seeking registration as a health practitioner under that Act.

Clause 16 – Improperly obtained information about expunged convictions

Clause 16 provides that it is an offence to obtain, or attempt to obtain, information about another person's expunged conviction from official criminal records in a fraudulent or dishonest manner. Such actions attract a penalty of $10,000.

Clause 17 – Discrimination on grounds of expunged conviction

This clause provides that Part 3 Division 3 of the *Spent Convictions Act 1988* (WA) applies to and in respect of expunged convictions in the same manner that that Part applies to spent convictions. For the purposes of that Division of the *Spent Convictions Act 1988* (WA), a reference to a "spent conviction" is also taken to be a reference to

an expunged conviction. The intention is not to equate a spent conviction with an expunged conviction in all circumstances; only for the purposes of clause 17 and the application of Part 3 Division 3 of the *Spent Convictions Act 1988* (WA).

Part 3 Division 3 of the *Spent Convictions Act 1988* (WA) refers to discrimination from employment on the grounds of a spent conviction. In effect, the Division provides that a person discriminates against another person if, on the grounds of a spent conviction, they treat a person less favourably than they would a person without a spent conviction, in what are the same or not materially different circumstances. It is unlawful for an employer to discriminate against a person on the basis of the person having a spent conviction.

The effect of clause 17(1) is that the references to a "spent conviction" in Part 3 Division 3 of the *Spent Convictions Act 1988* (WA) equally apply to an expunged conviction for the purposes of the Bill.

Clause 17(2) provides that powers conferred by the *Equal Opportunity Act 1984* (WA) apply as if they were set out in the Bill. Specifically:

- in relation to discrimination on the ground of an expunged conviction (or the charge to which it relates), the Minister has the powers conferred by sections 81 and 107(1) of the *Equal Opportunity Act 1984* (WA) – providing that the Minister may refer a matter to the Equal Opportunity Commissioner (section 81) and may refer a matter to the State Administrative Tribunal for inquiry as a complaint (section 107(1));
- the Equal Opportunity Commissioner has a range of functions as set out in the *Equal Opportunity Act 1984* (WA), specifically:
    - section 80(a), (b)(i), (c), (e) and (h), which provide that the Commissioner may carry out investigations relating to unlawful discrimination, may acquire and disseminate knowledge on all matters relating to the elimination of discrimination, arrange and coordinate consultations, inquiries, discussions, seminars and conferences, undertake consultation with a variety of groups – including government – to determine how to improve services for people subject to discrimination, and do anything else conducive or incidental to the performance of the Commissioner's functions under section 80;
    - section 81, which as noted above provides that the Minister may refer matters of discrimination to the Commissioner; and
    - section 95, which provides that an annual report must be made regarding the work of the Commissioner.
- sections 155, 159, 160, 161, 162 and 163 of the *Equal Opportunity Act 1984* (WA) also apply as if they were set out in the Bill. These sections provide that:
    - obstruction of the Commissioner is an offence attracting penalties of $1,000 or $5,000 (the higher penalty applies to a body corporate);

- providing false or misleading information is an offence attracting penalties of $2,500 or $10,000 (the higher penalty applies to a body corporate);
- persons who cause, instruct, induce, permit or aid another person to do an act that is unlawful under the *Equal Opportunity Act 1984* (WA) are taken to have also done the act;
- vicarious liability applies for the purposes of unlawful acts;
- acts done by people on behalf of a body corporate are taken to have been done by the body corporate; and
- references to "employer" in the *Equal Opportunity Act 1984* (WA) in relation to a department within the meaning of the *Public Sector Management Act 1994* (WA) are to be construed as relating to the Chief Executive Officer of that department (or, where the employment relates to the Police Force, the Commissioner of Police).

Part 4 – Miscellaneous

This Part deals with miscellaneous matters not earlier addressed by the Bill. These matters include the conferral of jurisdiction on the State Administrative Tribunal for review of decisions, confidentiality requirements, powers to delegate and a head of power to make Regulations.

Clause 18 – Review by State Administrative Tribunal of CEO's decisions

Through this clause, the Bill confers jurisdiction on the State Administrative Tribunal (the Tribunal) for review of decisions made by the CEO. Clause 18(1) provides that an affected person is either the person who made the applicant to which a decision relates, or the eligible person, where that person did not make the application.

A reviewable decision is defined in clause 18(1) as meaning a decision of the CEO to refuse an application under clause 11(2)(b) (see clause 18(1)(a)) or a decision under clause 12(1) that a conviction is no longer expunged (see clause 18(1)(b)).

Clause 18(2) provides that an affected person may apply to the Tribunal for review of a reviewable decision. Under clause 18(3), that application must be made within 28 days from receipt of a notice from the CEO of a determination under either clause 11(6) (not to expunge a conviction) or clause 12(5) (to revive an expunged conviction).

Clause 18(4) requires the Tribunal to hold any reviews of a reviewable decision in private. The Tribunal may also order that no person is to be in the room or place where the decision is reviewed without the Tribunal's permission. This clause operates despite section 61 of the *State Administrative Tribunal Act 2004* (WA), which provides that hearings of the Tribunal are to be held in public unless exceptions or orders are made.

The Bill also addresses the sensitivities involved in the review of a reviewable decision relating to the expungement of a conviction for a historical homosexual offence.

Clause 18(5) provides that any evidence given or documents produced to the Tribunal or identifying information of a person is "protected matter" for the purposes of the *State Administrative Tribunal Act 2004* (WA). That Act provides that protected matter is not to be published or made publicly available and must be returned to the person who provided it when it is no longer required by the Tribunal.

Clause 19 – No entitlement to compensation

Clause 19 explicitly provides that a person is not entitled to compensation as a result of a conviction for an historical homosexual offence becoming an expunged conviction, in respect of the fact that the person was charged with or prosecuted, convicted or sentenced for, or served a sentence for the offence, was required to pay any fines or monies – including compensatory or restitution funds – as a result of being convicted of or sentenced for the offence, has incurred any loss or suffered any consequences as a result of the offence, or has an expunged conviction.

Clause 20 – Royal Prerogative of Mercy not affected

Clause 20 provides that having an expunged conviction does not affect the operation of the Royal Prerogative of Mercy. The Royal Prerogative of Mercy is established in the *Sentencing Act 1995* (WA) and provides that the Governor may, on advice of Executive Council, exercise discretion to grant mercy to an offender through the means of a pardon, the making of a parole order, the remittal of orders to pay fines, and related matters. A pardon in respect of a conviction does not set aside or quash that conviction.

The practical effect of this clause is that it is still open to a person with an expunged conviction to also seek the exercise of mercy in respect of that conviction, regardless of it having already been expunged, or revived, or reviewed by the State Administrative Tribunal.

Clause 21 – Integrity of official criminal records

Clause 21 clarifies that the Bill does not authorise or require anyone to destroy, cull or edit any official criminal records. This is so despite clauses 12(7) and 13(2), which require that, where a conviction has been expunged or an expunged conviction has been revived, the official criminal records relating to that conviction are to be annotated to that effect.

Clause 22 – Prior lawful acts not affected

This clause provides that no actions lawfully undertaken prior to the expungement of a conviction are affected by the operation of this Bill.

Clause 23 – Confidentiality

Clause 23 sets out strict confidentiality requirements in relation to information obtained as a result of the Bill, save for the recording of de-identified statistical information.

Clause 23(1) provides exceptions to the requirement to maintain confidentiality in respect of any information gathered as a result of the Bill. These exceptions are:

- for the purposes of or in connection with performing a function under the Bill;
- as required or allowed by the Bill or another written law;
- for the purposes of proceedings before a court;
- under the order of a court or other person or body acting judicially;
- with the written consent of the person to whom the information relates; or
- in other circumstances as prescribed.

Contravention of this clause is an offence attracting a penalty of $10,000.

Clause 23(2) clarifies that subsection (1) does not apply to the recording, disclosure or use of de-identifying statistical information, where that information could not reasonably be expected to lead to the identification of a person. This will allow the Department of Justice to collate statistical information about the usage of the scheme to evaluate its effectiveness in the future.

Clause 24 – Giving notice

This clause outlines the methods of giving notice where the CEO is able or obliged to give notice to an applicant or eligible person – being clauses 7, 9, 11, 12 and 13. Notice may be given by delivering it personally to the applicant or person as relevant (clause 24(a)) or, alternatively, by sending it to the address given by the applicant for this purpose in their application (clause 24(b)).

Clause 25 – Evidentiary provisions

This clause sets out the evidentiary value of a document certifying whether an application for expungement has been approved or refused. Clause 25(1) provides that it applies to a document purporting to be given by the CEO or their delegate – being the decision maker under this Bill.

Clause 25(2) provides that such a document is admissible in evidence in any proceedings and is proof of the matters stated within it, absent any contrary evidence.

Clause 25(3) establishes a presumption that such a document was indeed given by the CEO or their delegate, as the case may be, in the absence of any contrary evidence.

The intention of this clause is to provide for an alternate method of proof of an expunged conviction in those rare cases where official criminal records may not be able to be located and annotated, yet the CEO was convinced that the application satisfied the mandatory test and an expungement was approved.

Clause 26 – Protection from liability for wrongdoing

This clause provides that a person doing anything in good faith for the purposes of the Bill is protected from liability. This includes an omission of doing anything.

Clause 27 – Delegation

Clause 27 provides that the CEO may delegate their functions under the Bill to a senior executive officer employed in the Department. Senior executive officer is given its meaning by section 3(1) of the *Public Sector Management Act 1994* (WA), which provides that a senior executive officer is a member of the Senior Executive Service other than the CEO. The practical intention of this clause is to provide that the CEO may delegate their function to a senior executive within the Department. Limiting the delegation power to this level provides that any delegated decision maker under the Bill has the necessary experience and judgment to apply the mandatory tests required under clause 10 to determine whether a conviction should be expunged.

Clause 28 – Offence to give false or misleading information

This clause establishes that it is an offence to knowingly make a statement that is false or misleading in a material particular, to knowingly omit anything from a statement which would render that statement misleading in a material particular, and to knowingly give or omit information which is false or misleading or renders the information given false or misleading.

An offence against this clause attracts a penalty of $10,000.

Clause 29 – Regulations

Clause 29 provides a head of power for the Governor to make regulations prescribing certain matters for the purposes of the Bill. Under clause 29(1), regulations may prescribe matters required, permitted, necessary or convenient to be prescribed. These matters include, but are not limited to, the identification of additional historical homosexual offences for which an expungement application may be made, prescribing additional data controllers and agencies holding official criminal records, and prescribing particular requirements for making an application.

Clause 29(2) ensures that the regulations may also explicitly indicate that a particular provision of the Bill does not apply to a specified conviction, person or class of persons, or specified circumstances.

Part 5 – *Working with Children (Criminal Record Checking) Act 2004* amended

This Part provides for a consequential amendment to be made to the *Working with Children (Criminal Record Checking) Act 2004* (WA) (WWC Act) as a result of the Bill.

Clause 30 – Section 4 amended

This clause provides that section 4 of the WWC Act is affected by new section 8A, which is inserted by clause 31 of the Bill. Section 4 of the WWC Act sets out the terms used in that Act, including the term "non-conviction charge". For the purposes of the WWC Act, a non-conviction charge means a charge of an offence that has been disposed of by a court otherwise than by way of a conviction.

Clause 31 – Section 8A inserted

Clause 31 inserts a new section 8A into the WWC Act. New section 8A, at (1), provides that a reference to a non-conviction charge in the WWC Act includes a reference to an expunged conviction as that term is defined in the Bill. Section 8A(2) provides that 8A(1) applies despite anything in the Bill.

It is standard practice across jurisdictions for information sharing arrangements to be in place between justice agencies and Working with Children units to allow for non-conviction charges and spent convictions to continue to be taken into consideration when assessing a person's suitability for a working with children card. Working with Children units are able to consider such charges to assist them in determining whether there is a pattern of behaviour which would potentially present a risk to children.

Given the mandatory test which an application must satisfy before a conviction for a historical homosexual offence is expunged – that the conduct would not constitute an offence today, taking into account the relative ages of the people involved and issues of consent – it is highly unlikely that an expunged conviction alone would impact negatively on a person's suitability for a Working with Children card.

Schedule 1 – Offences

The Schedule outlines historical homosexual offences as the term is defined in clause 3 of the Bill. A historical homosexual offence is one for which an application for expungement may be made:

- an offence against *The Criminal Code* section 181(1) or (3) as in force before 23 March 1990;

Sections 181(1) and (3) of *The Criminal Code* as in force before 23 March 1990 were offences of having "carnal knowledge of any person against the order of nature" (181(1)) and permitting "a male person to have carnal knowledge of him or her against the order of nature" (181(3)). Both offences were repealed by the *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA). For the purposes of this Bill an offence against section 181(3) would have to involve homosexual activity between two males to be eligible for expungement.

- an offence against *The Criminal Code* section 184 as in force before 21 September 2002;

Section 184 of *The Criminal Code* prior to 21 September 2002 was described as "any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years, with or without whipping". It was repealed by the *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA).

- an offence against *The Criminal Code* section 186(1)(a) as in force during the period beginning 23 March 1990 and ending 21 September 2002;

During the relevant period, an offence against section 186(1)(a) of *The Criminal Code* was described as "any person who, being the owner or occupier of any premises, or having or acting or assisting in the management or control of any premises, induces or knowingly permits any person of such age as in this section is mentioned to resort to or be in or upon such premises for the purpose of being unlawfully carnally known by any man, whether a particular man or not is guilty of a crime"… "if the person is a girl under the age of 16 years or a male under the age of 21 years, is liable to imprisonment for two years". It was discriminatory in that it applied a higher age threshold for males than females. It was repealed by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

- an offence against *The Criminal Code* section 187(2) as in force during the period beginning 23 March 1990 and ending 1 August 1992;

An offence against section 187(2) of *The Criminal Code* during the relevant period was described as unlawful carnal knowledge of a "child under 16 and male under 21", specifically "any male person who has or attempts to have carnal knowledge of a male under the age of 21 years is guilty of a crime and is liable to imprisonment for 5 years or, if the offender's age does not exceed 21 years, 2 years". As with the section 186(1)(a) offence above, this section also applied a discriminatory higher age threshold for males. It was repealed by the *Acts Amendment (Sexual Offences) Act 1992* (WA).

- an offence against *The Criminal Code* section 189(2) as in force during the period beginning 23 March 1990 and ending 1 August 1992;

Section 189(2) of *The Criminal Code* during the relevant period also applied a discriminatory age threshold for males. It was described as "any male person who unlawfully and indecently deals with a male under the age of 21 years or who procures such a male person under the age of 18 years to so deal with him or another male child, or who permits such a male person under the age of 21 years to so deal with him, is guilty of a crime and is liable to imprisonment for 4 years or, if the offender's age does not exceed 21 years, 2 years". It was repealed by the *Acts Amendment (Sexual Offences) Act 1992* (WA).

- an offence against *The Criminal Code* section 322A as in force during the period beginning 1 August 1992 and ending 21 September 2002.

This offence, against section 322A of *The Criminal Code* for the relevant period, related to sexual offences against a "juvenile male", being a male between the ages of 16 and 21 years. It too was discriminatory in its imposition of a higher age threshold for males and was repealed by the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

As indicated in the definition of historical homosexual offence contained within clause 3, further offences may be prescribed by regulations.