

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: LFO
(represented Mr Stephen McGrath, Barrister & Solicitor)

Respondent: Commissioner of Police
(represented by Ms Emma Salsano of State Solicitor's Office)

Commission: Ms Elanor Rowe (Presiding Member)

Matter: Application seeking review of a barring notice pursuant to section 115AD of the *Liquor Control Act 1988*.

Date of lodgement of Application: 17 May 2019

Date of Determination: 15 July 2019

Determination: The application for review is dismissed.

Authorities referred to in determination:

- *SVS v Commissioner of Police* (LC19/2011)
- *KRB v Commissioner of Police* (LC 33/2011)
- *ARQ v Commissioner of Police* (LC 46/2011)
- *MRP v Commissioner of Police* (LC 55/2011)
- *GML v Commissioner of Police* (LC 58/2011)

Background

- 1 On 13 December 2018, an incident (“the Incident”) occurred on licensed premises namely [REDACTED] (“the Venue”) involving the Applicant (aged 28).
- 2 As a result of such Incident, the Applicant was charged with:
 - a. one count of Grievous Bodily Harm, contrary to section 297 of the *Criminal Code* (WA);
 - b. one count of Assault Occasioning Bodily Harm, contrary to section 317(1) of the *Criminal Code*, (“Charges”).
- 3 The Applicant has entered a plea of not guilty to both Charges. The Charges are yet to be determined.
- 4 As a further result of the Incident, a delegate of the Commissioner of Police (“the Respondent”) issued a barring notice (“Barring Notice”) pursuant to section 115AA(2) of the *Liquor Control Act 1988* (“the Act”) prohibiting the Applicant from entering specified licensed premises in Western Australia, namely:
 - a. all hotel licences issued under section 41;
 - b. all small bar licences issued under section 41A;
 - c. all nightclub licences issued under section 42;
 - d. casino licences issued under section 44;
 - e. all liquor store licences issued under section 47;
 - f. all club licences issued under section 48;
 - g. all restaurant licences issued under section 50;
 - h. all producer’s licenses issued under section 55;
 - i. all wholesaler’s licenses issued under section 58;
 - j. all occasional licenses issued under section 59; and
 - k. all special facility licences issued under section 46 and regulation 9A of the *Liquor Control Regulations 1989*.
- 5 The Barring Notice is in place from the date of service on 18 April 2019, until 28 March 2020, a period of just under 12 months.
- 6 On 17 May 2019, the Applicant lodged an Application for Review in respect of the Barring Notice pursuant to section 115AD(3) of the Act. The Application was filed within the time specified in section 115AD(4) and the Applicant has elected to have the review determined on the papers.
- 7 In conducting a review of the decision in this case, I have had regard to the following material (pursuant to section 115AAD(6) of the Act):
 - a. The material relied upon by the Respondent’s delegate when issuing the Barring Notice;
 - b. The Barring Notice;

- c. The Application and the outline of submissions filed on behalf of the Applicant dated 17 May 2019; and
- d. The Respondent's outline of submissions dated 10 June 2019.

The Incident

8 The following is taken from the Statement of Material Facts relating to the Incident:

"On Thursday the 13th of December 2018 the Accused was at [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

During the prolonged attack the victim has suffered severe facial injuries with a preliminary medical examination revealing a large depressed fracture of his right orbital floor (eye socket), a fractured nasal bone complex, fractured cheek bone, contused nose, deep lacerations to the left eyebrow, and multiple bruises and contusions to his face and body. The victim is due to undergo surgery on Thursday the 20th of December for a full facial reconstruction.

At the time of the attack there were customers and staff present in the family restaurant who were extremely concerned, scared, and fearful for their safety.”

- 9 The evidential material (including the incident reports and the CCTV material) is consistent with the Statement of Material Facts as set out above.

Submissions by the Applicant

- 10 The Applicant submitted the following in the grounds for the Application (“Grounds”):

- a. The Applicant denies the Charges and has pleaded not guilty to them.
- b. The Applicant is of good character, as demonstrated by his criminal and traffic records, and six character references.
- c. If the Applicant has not yet been found guilty of the Charges, there is insufficient evidence that there are reasonable grounds for the Barring Notice. The Applicant should be presumed innocent of the Charges until matters are determined in Court and if the Applicant is acquitted, he would have been unjustly subjected to the Barring Notice. The Barring Notice is for such a length of time as to be unjust in the circumstances, and the majority of it will run before a determination of the Charges by a Court.
- d. The Applicant resides in [REDACTED] Given the Applicant’s place of residence, the Barring Notice is too wide, as it severely restricts his ability to attend eateries and other restaurants in the region both socially and [REDACTED] he regularly takes to family restaurants. The majority of the venues he attends are within the specified premises of the Barring Notice.
- e. The Applicant is [REDACTED] [REDACTED]. The Applicant often travels as part of his work requirements and needs to stay at hotels and attend places that are licensed premises subject to the Barring Notice. The Barring Notice has meant the Applicant has lost work as he has not been able to perform certain jobs, and he will be unable to perform part of his work duties during the term of the Barring Notice.
- f. The Applicant has been a registered player for the [REDACTED] [REDACTED] [REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- h. The facts that form the subject of the Charges indicate an alleged issue between the [REDACTED]. It is submitted that it is a very narrow set of circumstances that gave rise to the altercation and the general public is not in any danger or harm.
- i. The Applicant is subject to protective bail conditions and other conditions that should be sufficient to protect the public from any further possible disturbances arising from possible contact with the Complainant. The Applicant is also subject to an interim Violence Restraining Order (which he has objected to). This provides further protection for the community and the Complainant.
- j. There is no suggestion that the Applicant was intoxicated at the time of the alleged Incident and therefore alcohol is unlikely to have played a role in the Charges being brought against him.
- k. There is no evidence that there is a likelihood of the Applicant behaving in a similar manner as alleged again, such that the safety of the public may be jeopardised. There is no reason to think that the Applicant will enter into any further altercations when he enters licensed premises.

Submissions on behalf of the Respondent

- 11 The Respondent submits that the circumstances of the case warrant the exercise of the Respondent's discretion to issue a Barring Notice. The decision of the Respondent should not be quashed or varied, and the Barring Notice should be affirmed.

Reasonable grounds on which decision was made

- 12 The evidence before the Respondent, especially the CCTV footage, established that a reasonable person would have been inclined to assent to the proposition that the Applicant had been disorderly and violent whilst on licensed premises:
 - The Applicant participated in the attack on the Victim, holding the Victim down while his brothers continued to strike and punch him. The Victim fell to the ground and the Applicant then kicked the Victim to the head and body several times.
 - The Applicant has pleaded not guilty to the charges however the Applicant has not provided any evidence upon which the Commission could assess the availability of a defence to the Charges.

The nature of the incident giving rise to the Barring Notice

- 13 In this case, the Incident was aggravated by the following circumstances:
 - The Applicant involved himself in the altercation, initially holding the Victim so that his brothers could punch and kick the Victim. The Applicant proceeded to kick the Victim himself whilst the Victim was on the ground, and thus in a particularly vulnerable position.

- The Incident occurred at a family-friendly restaurant and disrupted other patrons at the Venue. Violent behaviour on licensed premises is not conduct that the public should be exposed to; that is the whole purpose of the barring notice regime.
- The Victim's injuries were significant, requiring the Victim to travel to Perth and stay overnight in hospital after reconstructive surgery to his face.
- The absence of intoxication does not prevent the imposition of a barring notice.

The risk of the Applicant behaving in a similar manner and the need to protect the general public

14 The Applicant submits that there is a risk of the Applicant behaving in the same or a similar manner in the future.



15 The Applicant submits that it was a narrow set of circumstances that gave rise to the Incident and therefore the general public is not in any danger of harm. However, the Applicant does not contend it is unlikely that he will behave in a similar manner in the future, and indeed appears to accept that future instances of violence against the Victim are likely. Accordingly, there is a real and not insubstantial risk that the Applicant will engage in similar behaviour again.

Protective bail conditions and violence restraining order

16 Little weight can be given to the protections afforded by the protective bail conditions and the interim violence restraining order. In any event, the bail conditions and violence restraining order do not prevent a barring notice from being appropriate in the circumstances.

Character of the Applicant

17 The Respondent accepts that the Applicant's criminal history and the six character references provided in support of the Application, indicate he is of a prior good character. However, none of the character references provide an explanation for the Applicant's conduct during the Incident and therefore offer only limited assistance for the Applicant's case. Furthermore, one particular reference seems to support the conclusion that there is a risk that the Applicant will behave in the same or a similar manner in the future where his family is involved.

Response to Applicant's Grounds

18 A barring notice may be imposed where there are "*reasonable grounds*" for one of the stipulated beliefs. The presumption of innocence that applies in the criminal context has no application or relevance to the present context. The evidence was sufficient to meet the "*reasonable grounds*" threshold. Furthermore, the Applicant's submission that he should be presumed innocent until proven guilty is misconceived.

Interference with employment of the Applicant

- 19 As a consequence of the statutory exception in s115AA(7A) of the Act, it is neither necessary nor appropriate to vary the Barring Notice to make allowance for the Applicant's employment. However, even if the Commission is nonetheless minded to vary the Barring Notice to allow for the Applicant's employment, the Applicant has not produced sufficient evidence to justify doing so.

Volunteer activities

- 20 The Applicant is still able to undertake volunteer activities at the Club because only part of the premises is licensed.

Limited eateries and social venues in Karratha

- 21 Quashing or varying the Barring Notice to enable the Applicant to attend specified eateries and other social venues would be wholly inappropriate and would subvert both the protective and rehabilitative purposes underpinning the barring notice regime. For the duration of the Barring Notice, the Applicant can take his son to unlicensed premises, which in any event, are more likely to be child-friendly.

- 22 Counsel for the Respondent makes further comprehensive written submissions regarding the applicable law, which are referred to as necessary during the course of the determination below.

Statutory Framework

- 23 The Commissioner of Police has the power to prohibit people from entering specified licensed premises, or a specified class of licensed premises, for a period of up to twelve months pursuant to section 115AA of the Act if the Commissioner believes on reasonable grounds that the person has, on licensed premises:
- a. been violent or disorderly;
 - b. engaged in indecent behaviour; or
 - c. contravened a provision of any written law.
- 24 The Commissioner may delegate the power conferred by section 115AA of the Act on any member of the police force of or above the rank of Inspector pursuant section 115AB of the Act.
- 25 Section 115AD(3) of the Act provides that where a person is dissatisfied with the decision of the Commissioner of Police to give the notice, the person may apply to the Commission for a review of the decision.
- 26 Section 115AD(6) of the Act provides that when conducting a review of the decision, the Commission may have regard to the material that was before the Commissioner of Police when making the decision as well as any information or document provided by the Applicant.

- 27 Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 28 Section 16 of the Act prescribes that the Commission:
- a. may make its determination on the balance of probabilities [subsection (1)(b)(ii)];
 - b. is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection 7(a)]; and
 - c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].
- 29 In 2010, the Act was amended “*to give protection to the general public from people who have engaged in disorderly or offensive behaviour, who threaten people and who put people in dangerous situations*” (Minister’s statement to the House, Western Australia, Parliamentary Debates, Legislative Assembly 19 October 2010, 7925).
- 30 The Minister further stated that the legislation gave the Police the power to issue Barring Notices to persons engaging in antisocial behaviour at licensed premises.
- 31 Section 5 of the Act sets out the objects of the Act. In subsection 5(1)(b) one of the primary objects of the Act is to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. Section 5(2) provides for various secondary objects including to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor.
- 32 In light of the primary and secondary objects of the Act, the effect of a barring notice on a recipient, whilst it may have a detrimental effect on the recipient, is not meant to be seen as a punishment imposed upon them but is to be seen as a protective mechanism (*SVS v Commissioner of Police (LC19/2011)*).

Determination

- 33 The Commission, in considering an application pursuant to section 115AD, is to review the decision and determine whether to affirm, vary or quash a decision.
- 34 The questions to be determined on a review therefore are whether:
- a. there are reasonable grounds for believing that the barred person has, on licensed premises, been violent or disorderly; engaged in indecent behaviour; or contravened a provision of a written law; and
 - b. the period and terms of the barring notice reflect the objects and purpose of the Act and are not punitive in nature.

- 35 The Applicant had entered a plea of not guilty to both Charges, however, he does not provide the Commission with any further information as to what occurred during the Incident or explanation as to his conduct.
- 36 The Incident was recorded on CCTV, and while the verbal exchange between the parties cannot be heard and part of the Incident occurs off camera, the footage is of good quality and clearly shows the Applicant involved in the Incident and acting aggressively and violently.
- 37 In examining the material before me in this Application I am satisfied that there was a clear and proper basis for the delegate of the Commissioner to exercise the power conferred by section 115AA of the Act and that there were reasonable grounds to conclude that the Applicant was violent or disorderly on licensed premises.
- 38 Therefore, it remains for me to consider, whether the length and terms of the Barring Notice are sufficient to uphold the objects of the Act and are not punitive in nature. The public interest must be balanced against the impact of the Barring Notice on the Applicant.
- 39 In determining whether to quash or vary the Barring Notice, it is relevant to take into account the nature and circumstances of the incident giving rise to the barring notice; the risk of the Applicant behaving in a similar manner again; and the need to protect the general public, the licensee and the Applicant himself: *KRB v Commissioner of Police (LC 33/2011)*; *ARQ v Commissioner of Police (LC 46/2011)*; *MRP v Commissioner of Police (LC 55/2011)*; and *GML v Commissioner of Police (LC 58/2011)*.
- 40 The Incident was extremely serious in nature and the Victim suffered significant injuries including a sunken eyeball and problems with his vision as a consequence of a fracture to his right eye socket:

[REDACTED]

[REDACTED]

[REDACTED]

- d. It is clear from the CCTV footage that staff and other patrons who were dining at the time, witnessed the Incident and were affected by it. They can be seen watching from inside the Venue looking out to the Courtyard.

e. The Incident was a prolonged and violent attack on an individual dining at a family friendly restaurant. [REDACTED]

The actions of the Applicant were dangerous and demonstrative of the very type of behaviour which the amendments to the Act were designed to overcome, that being anti-social and disorderly behaviour within the vicinity of licenced premises. The argument that the Applicant was not intoxicated is not compelling; it does not make his involvement in the Incident any less serious.

41 In relation to the risk of the Applicant behaving in a similar manner again, I accept that there is no prior criminal record against the Applicant and the witness evidence certainly supports the proposition that the Applicant is of good character and a valued member of the community. However, it is clear from the wording of section 115AA that a single incident is sufficient to give rise to a barring notice. [REDACTED]

[REDACTED]

[REDACTED] I do not accept the Applicant's proposition that the protective bail conditions and interim violence restraining order mean the imposition of the Barring Notice is inappropriate; the Barring Notice operates independently, and the perceived risk can be minimised by its terms [*KRB v Commissioner of Police (LC 33/2011)*].

42 In relation to the impact of the Barring Notice on the Applicant, I find:

[REDACTED]

[REDACTED]

iii. The exception under section 115AA(7A) allows persons subject to a barring notice to enter premises contrary to a notice if the person enters the premises solely for the purpose of performing duties relating to the person's work. The exception under section 115AA(7A) is sufficient to mitigate the impact of the Barring Notice on the Applicant in this respect.

iv. The Applicant states that he regularly travels as part of his work requirements and needs to stay at hotels that are licensed, however there is insufficient information provided by the Applicant to justify varying the terms of the Barring Notice on that basis.

43 Furthermore, the purpose of the Barring Notice is not intended as a punishment. Rather, it serves as a measure to protect the public from anti-social behaviour, such as the Applicant's, in and around licensed premises.

44 In balancing the above considerations, the punitive effect of the Barring Notice is relatively low when balanced with the protection of the general public. The terms and length of the

Barring Notice are appropriate to assure the public that they are in safe environments and can expect that they will not be exposed to disorderly behaviour. It will also allow the applicant the opportunity for serious introspection in assessing his behaviour and actions and to consider his future conduct on licensed premises.

45 Therefore, the Application for Review is dismissed, and the Barring Notice is affirmed.

A handwritten signature in black ink, appearing to read 'Elanor Rowe', written in a cursive style. The signature is positioned above a horizontal line.

ELANOR ROWE
PRESIDING MEMBER