

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: MJB

Respondent: Commissioner of Police
(represented by Mr Michael McIlwaine of the State Solicitor's Office)

Commission: Ms Emma Power
(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: 20 October 2021

Date of Determination: 20 December 2021

Determination: The application for review is dismissed.

Authorities referred to in Determination:

- *Van Styn v Commissioner of Police* (LC19/2011)
- *Batty v Commissioner of Police* (LC 33/2011)
- *Quartermaine v Commissioner of Police* (LC 46/2011)
- *Piscopo v Commissioner of Police* (LC 55/2011)
- *Lewer v Commissioner of Police* (LC 58/2011)

Review of Barring Notice

- 1 On 25 July 2021 an incident occurred in the vicinity of licensed premises, namely the [REDACTED] [REDACTED] ("the Incident") involving the Applicant aged [REDACTED].
- 2 As a result of such Incident, the Applicant was charged with endangering life, health or safety of a person contrary to section 304(1)(b) of the *Criminal Code (WA)* on 13 January 2019.
- 3 The Applicant had not been convicted at the time of the Application.
- 4 As a further result of the Incident, the Commissioner of Police ("the Police") issued a barring notice under section 115AA(2) of the of the *Liquor Control Act 1988* ("the Act") prohibiting the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - a. All hotel licences issued under section 41 (includes hotel, hotel restricted, tavern and tavern restricted licences);
 - b. All small bar licences issued under section 41A;
 - c. All nightclub licences issued under section 42;
 - d. Casino licence 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 licences issued under section 55;
 - i. All wholesaler's licences issued under section 58;
 - j. All occasional licences 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 was served on the Applicant on 22 September 2021 to expire on 25 July 2022, being for a total period of just over 10 months.
- 6 On 20 October 2021 the Applicant appealed to the Liquor Commission ("the Commission") for a review of the barring notice.
- 7 The Applicant has elected to have the review determined on the papers pursuant to section 115AD of the Act.
- 8 The Incident giving rise to the barring notice is referred to in the following documents:
 - a. the Applicant's application for review dated 20 October 2021;
 - b. the evidence presented before the Commissioner of Police's Delegate including:
 - i. Statement of Material Facts, Brief No: [REDACTED]
 - ii. Western Australian Police Incident Report [REDACTED]

- iii. Incident Reports from the Premises, dated 25 July 2021;
- iv. Witness Statement of the Victim, dated 26 July 2021;
- v. Photographs of the Victim's injuries;
- vi. Witness Statement of [REDACTED] (Security Guard), dated 5 August 2021;
- vii. Witness Statement of [REDACTED] (Security Guard), dated 5 August 2021;
- viii. Witness Statement of [REDACTED] (Manager), dated 5 August 2021;
- ix. Stills from CCTV Footage of Premises, 25 July 2021, Camera 6;
- x. Police photograph of Applicant;
- xi. Copy of Disclosable Court Outcomes – Criminal and Traffic for the Applicant; and
- xii. CCTV Footage of Premises, 25 July 2021, Cameras 6 & 7.

c. The Commissioner of Police's outline of submissions dated 13 March 2019.

Submissions by the Applicant

9 The Applicant has made submissions requesting the Commission to review the barring notice on the following grounds:

- a. The Applicant is a [REDACTED] and moved to [REDACTED] because he [REDACTED].
- b. This is the first time the Applicant has ever been charged for fighting outside of a hotel or inside a hotel. The Applicant has been attending counselling every fortnight because of this incident and how it has affected him socially and mentally.
- c. The Applicant's work colleagues and friends attend the local two hotels on a regular basis, mostly about twice a week. These catch ups and connecting with friends and work colleagues have been very important to the Applicant's wellbeing, social life, and mental health.
- d. The Applicant has been isolated from his friends because of the banning and he just sits at home all the time. The Applicant doesn't play sport and he is not a member of any other social organisations.
- e. The impact of this banning has caused the Applicant to develop symptoms of depression. He constantly feels very sad, can't sleep well, his energy levels are low, smoking has increased, and his self-esteem and confidence is not good. The Applicant has started to seek counselling because of the depression.
- f. The Applicant would like to apologise for his actions to the venue owners and other patrons, and he will try his best to never be involved in any violence or aggression towards patrons at any taverns or hotels that he attends in [REDACTED].
- g. The Applicant will practice walking away from violence or disruptions happening at the premises that he may be attending.

- 10 The Applicant also provided a signed letter from Hope Community Services in respect to therapy being undertaken by the Applicant.

Submissions on behalf of the Commissioner of Police

- 11 The circumstances upon which the decision of the Police to issue the barring notice is based are contained within those items set out in paragraph 8(b) above.
- 12 The Police made the following submissions.

Reasonable grounds for believing the Applicant has been violent or disorderly or contravened a written law on licensed premises

- 13 On the evidence before the Respondent, a reasonable person would be inclined to agree with the proposition that the Applicant engaged in violent or disorderly conduct on or in the vicinity of the Premises, and/or contravened a provision of any written law, being the *Criminal Code* ("the Code"). Specifically, the Applicant has contravened section 304(1)(b) of the Code by committing an act which endangers or is likely to endanger the life, health or safety of a person.
- 14 The various witness statements on file provide support for the belief that the Applicant has, in the vicinity of licensed premises, committed an act which or was likely to endanger the life, health or safety of the Victim and has contravened a written law, namely section 304(1)(b) of the Code.
- 15 The Applicant also indirectly acknowledges his alleged offending, stating that he "would like to apologise for [his] actions".
- 16 The Applicant's Counsellor and Prevention Officer, [REDACTED], states that the Applicant "has serious remorse for his actions on the night in question".
- 17 It is understood that, at this stage, the Applicant has been charged with but not convicted of an offence contrary to section 304(1)(b) of the Code. However, a conviction is not a pre-requisite for the Commissioner to consider a person's conduct for the purposes of a barring notice.
- 18 Collectively, the above evidence establishes reasonable grounds for the belief the Applicant has, in the vicinity of licensed premises, committed an act which, or was likely to, endanger the life, health or safety of the Victim and has thus contravened a written law.

Exercise of discretion

- 19 The Applicant provoked a violent altercation with the Victim outside the Premises. The Applicant and his associate outnumbered the Victim. When the Victim retreated, the Applicant followed him. When the Victim was down, the Applicant kicked him. The Applicant only desisted after 'king-hitting' the Victim, rendering the Victim unconscious.
- 20 The Respondent submits that the Barring Notice is warranted in order to protect the general public from the conduct of the Applicant on licensed premises.

Risk of Applicant behaving in a similar manner

- 21 A number of factors point to a risk that the Applicant could behave in a similar manner:
- a. The Applicant instigated the violence at the premises;
 - b. The Victim was not known the Applicant, and there is no suggestion that the violence was provoked by him;
 - c. The Applicant sustained his attack despite the Victim backing away and security intervening; and
 - d. The Applicant has a relevant criminal record, including multiple breaches of a VRO, possessing a prohibited weapon and disorderly conduct.
- 22 The Applicant submits he will try not to engage in violence, and that he will practice walking away from violence or disruptions. These statements are markedly equivocal. His engagement with counselling, though positive, does not adequately counter the risk that the Applicant would act in the same violent way in the future.
- 23 There is a real and not insubstantial risk that the Applicant is likely to engage in similar behaviour again in the future.
- 24 The Respondent submits that the Barring Notice should not be quashed. Rather, the imposition of the notice will serve as an important reminder to the Applicant of the importance of behaving appropriately on licensed premises, and will provide a level of protection to the public from this type of behaviour.

Conclusion

- 25 For the above reasons, the Respondent submits that the Commission should not exercise its discretion to quash the notice.
- 26 If the Commission is satisfied that the Respondent had the requisite basis for its belief that the Applicant has contravened a written law on a licensed premises, the order should only be varied where the terms of the Barring Notice do not give effect to the objects and purposes of the Act.
- 27 In considering whether to vary a barring notice, the Commission may have regard to all the circumstances of the case, including the effect of the barring notice on the Applicant. However, the primary consideration for the Commission should remain the objects and purposes of the Act, and in particular the need to minimise instances of antisocial behaviour in licensed premises and protect the general public from harm.
- 28 The risk that the Applicant could behave in a similar manner once again if he is intoxicated at a licensed premises is not a risk limited to the Premises, or indeed only a particular class of licensed premises. It is a risk that could arise at any licensed premises, particularly a tavern, pub, or club, where the Applicant could have the opportunity to become intoxicated.

- 29 There is also evidence that the Applicant has already disregarded the terms of his Barring Notice by returning to the Premises on two occasions. This suggests that an unambiguous, categorical ban on all licensed premises is prudent to discourage the Applicant from eschewing the terms of his Barring Notice.
- 30 Further, the effect of the Barring Notice on the Applicant's personal circumstances (discussed below) does not warrant a variation of the Barring Notice.
- 31 The Applicant seeks to have his ban 'reduced or lifted', and points to a number of factors in support of his application:

This is the first time the Applicant has been charged for fighting outside or inside a hotel.

- a. Recurring or frequent conduct is not the test for a barring notice. A single incident is sufficient to establish the belief based on reasonable grounds required by section 115AA(2). Further, there is nothing in the Act that requires a decision-maker to be satisfied of repeated conduct before issuing a barring notice.
- b. Additionally, while it may be the first time the Applicant has been charged for violent conduct in these precise circumstances, it is not the first time he has been convicted of an offence which endangers or could endanger others. As noted above, the Applicant has a number of criminal convictions, including multiple breaches of a VRO, possessing a prohibited weapon and disorderly conduct. The Applicant's criminal history demonstrates a disregard for the safety of others which further supports the imposition of the Barring Notice.

The Applicant has been isolated from his friends because of the ban and has developed symptoms of depression.

- c. Given the object of a barring notice is protective, the Commission should pay minimal, if any, heed to matters personal to the Applicant such as the impact that the Barring Notice may have on the Applicant's social life. Nothing in the Act suggests the Commission is required to balance the Applicant's personal interests with the purposes of the Act. Rather, the purposes of the Act are paramount.
- d. Nevertheless, the Respondent submits that the personal matters raised by the Applicant in his application do not lead to the conclusion that an order applicable to all licensed premises is not justified.
- e. The Barring Notice is due to expire on 25 June 2022. Any effect on the Applicant's personal circumstances will be confined to that date. Precluding the Applicant from entering licensed premises until 25 June 2021 provides him with an opportunity to continue attending counselling and improve his self-regulation during this time.
- f. Further, the only independent evidence of the Applicant's mental health is provided by Prevention Officer/Counsellor Alisha Carroll, who states that the Applicant's mental health has begun to worsen over the past month due to social isolation. The Respondent accepts that the Barring Notice has made the Applicant feel isolated. It is not evident, however, that the Applicant has made any attempts to overcome his social isolation other than by attending licensed premises.

- g. The Applicant implicitly acknowledges that if he played sport or was a member of other social organisations, the impact of the Barring Notice on his social life and interrelated wellbeing would be alleviated. The Respondent submits that this supports the view that the Barring Notice is a reasonable measure to achieve its protective aims; and that the Applicant could avail himself of opportunities outside licensed premises to connect with friends and colleagues.
- h. The Barring Notice in its current form is warranted to provide some protection to members of the public attending licensed premises.
- i. For these reasons, together with those discussed above, the Respondent submits that there is no basis for varying the terms of the Barring Notice.

The Applicant is attending counselling and will try his best to avoid violence or aggression towards patrons.

- j. The Applicant's recent engagement with counselling and promises to reform do not adequately counter the risk that the Applicant may act in the same violent way in the future.
- k. There is sufficient material before the Commission to establish that there are reasonable grounds for believing that the Applicant has, on or in the vicinity of licensed premises, engaged in violent or disorderly behaviour or contravened a written law. The circumstances of the alleged offending are such that the Commission's discretion should not be exercised to quash or vary the Barring Notice. Therefore, the decision of the Respondent should be upheld.

32 Counsel for the Commissioner of Police also made comprehensive written submissions regarding the applicable law, which are referred to as necessary below.

Statutory Framework

33 The Commissioner of Police has the power to ban people from licensed premises pursuant to section 115AA of the Act if he believes on reasonable grounds that the person has, on licensed premises or in the vicinity of licensed premises:

- a. been violent or disorderly;
- b. engaged in indecent behaviour; or
- c. contravened a provision of any written law.

34 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 to section 115AB of the Act.

35 Section 115AD(3) 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.

36 Subsection 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.

- 37 Subsection 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 38 Section 16 of the Act also prescribes that the Commission:
- a. may make its determinations on the balance of probabilities [subsection(1)]; and
 - 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)];”
- 39 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).
- 40 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.
- 41 Section 5 of the Act set out the objects of the Act. In subsection 5(1)(b) one of the primary objects of the Act are to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. Subsection 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.
- 42 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 the recipient but is to be seen as a protective mechanism (*Van Styn v Commissioner of Police* (LC19/2011)).

Determination

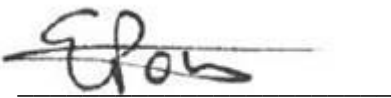
- 43 From the wording of section 115AA of the Act it is clear that a single incident is sufficient to give rise to a barring notice and does not require that the person to whom the barring notice is issued must have engaged in habitual or repetitious behaviour of the type specified in the section.
- 44 The Applicant does not dispute the Incident occurred, although the agreed facts now indicate that hit by the Applicant which caused the Victim to lose consciousness was not from behind, but to his face.
- 45 The Commission is satisfied that there are sufficient grounds for believing that the Applicant had been violent or disorderly and/or contravened a provision of a written law and there was a proper basis for the delegate of the Commissioner to exercise the power conferred by section 115AA of the Act.

- 46 The review application must therefore be decided on whether the period and terms of the barring notice reflect the objects and purpose of the Act and are not punitive in nature. The public interest must be balanced against the impact on the barring notice on the Applicant.
- 47 The Incident was serious in nature being a persistent attack (by more than one party) with the Applicant kicking the Victim in the face when he was rising from the ground, and punching the Victim which ultimately caused the Victim to lose consciousness. The Applicant further did not check on the welfare of the Victim once he was clearly unconscious.
- 48 As a result of the Incident, the Victim suffered serious injury including a fractured skull with bleeding and swelling to the brain. He was kept in hospital for three days for observation and was unable to return to work for at least 6 weeks. It was fortunate that the Victim's injuries were not more severe.
- 49 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. *Batty v Commissioner of Police (LC 33/2011)*; *Quartermaine v Commissioner of Police (LC 46/2011)*; *Piscopo v Commissioner of Police (LC 55/2011)*; and *Lewer v Commissioner of Police (LC 58/2011)*.
- 50 It is noted that the Applicant shows remorse and he has voluntarily sought counselling for his actions.
- 51 Despite this, the Commission considers that, due to the circumstances of the Incident, there is a risk to the public in relation to possible future antisocial behaviour by the Applicant.
- 52 The Victim was not known to the Applicant and the fight was sudden and severe. The Incident did not appear to have any particular connection to the licensed premises, or even a particular type of licensed premises, but rather related to the Applicant's interaction with alcohol.
- 53 Further, the Incident is exactly the type of behaviour the 2010 changes to the Act were put in place to address.
- 54 The Applicant's argument that attending licensed premises is his only form of social interaction is not compelling. The Commission does not accept that social wellbeing is entirely contingent on attending licensed premises. It is up to the Applicant to seek out other appropriate social interactions.
- 55 The Commission considers that the punitive effect of the barring order is relatively low when balanced with the protection of the public and the Applicant himself.
- 56 The Commission acknowledges that the Applicant has actively sought out counselling and is addressing emotional regulation and coping strategies, however, due to the seriousness of the Incident the Commission is not minded to reduce the term of the Barring Order in this instance.

57 In the circumstances, the barring notice for the period ending 25 July 2022 appears justified in order to:

- a. assure the members of the public who frequent licensed premises or areas in which licensed premises are present, that they are in safe environments and can expect that they will not become victims of, or have to witness, violence or antisocial and disorderly behaviour; and
- b. allow the Applicant the continued opportunity for introspection regarding his behaviour on, and in the vicinity of, licensed premises and his interactions with alcohol.

58 The application for review is dismissed.

A handwritten signature in black ink, appearing to read 'E Power', written over a horizontal line.

Emma Power
PRESIDING MEMBER