

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: NS

Respondent: Commissioner of Police
(Represented by Ms Amelia Westerside of the State Solicitor's Office)

Commission: Kate Pedersen (Chairperson)

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

Date of Hearing: On Papers

Date of Determination: 29 March 2022

Determination: The term of the barring notice is varied pursuant to section 115AD(7) of the Act to a period ending 25 August 2022

Authorities considered in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618
- *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) 228
- *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261
- *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205
- *Barrington v Austin* [1939] SASR 130, 132
- *Nadebaum v Police* [2019] SASC 102
- *Trajkov v Pryce* [2000] NTSC 16
- *Scanlon v Bove* [2008] WASC 213
- *DJB v Commissioner of Police* (LC05/2017)
- *SVS v Commissioner of Police* (LC19/2011).
- *AC v Commissioner of Police* (LC01/2018)
- *CRM v Commissioner of Police* (LC01/2013)
- *BM v Commissioner of Police* (LC44/2014)

Background

1. On 13 September 2021 an Incident (the Incident) involving the Applicant occurred at licensed premises, namely the [REDACTED] (the Premises).
2. As a result of the Incident the Applicant was issued an infringement notice for disorderly behaviour in public, contrary to section 74A(2)(a) of the *Criminal Code* with a modified penalty of \$500.
3. Following the Incident, the Commissioner of Police (the Respondent) issued a Barring Notice dated 13 December 2021 (the Barring Notice) pursuant to section 115AA(2) of the *Liquor Control Act 1988* (the Act), prohibiting the Applicant from entering the following specified licensed premises in Western Australia for a period of approximately 10 months, expiring 25 October 2022:
 - 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 licence 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*.
4. The Barring Notice was served on the Applicant on 15 December 2021.
5. On 22 December 2021, the Applicant lodged an Application for Review of the Barring Notice under section 115AD of the Act. The Applicant requested to have the review determined on the papers.

Overview of parties' positions

6. The Applicant seeks that the Barring Notice be varied in length. He does not seek that the Barring Notice be quashed.
7. The Applicant explains that he has changed his habits and drinking attitude to prevent such an incident happening again and has learnt from the experience. He also explains the consequences of the Barring Notice on him, being that he is losing the opportunity to attend monthly events with the [REDACTED], because the events are held at licenced premises. The Applicant says the people he has met at these events have had a positive influence on his life and he does not want to lose the

physical interactive support associated with the group. In effect, the Applicant submits that the consequences of the Barring Notice are punitive upon him.

8. The Respondent submits that the Barring Notice should be affirmed because: the Applicant's conduct was disorderly, indecent and contravened a provision of a written law (being section 74A(2)(a) of the *Criminal Code (WA)*); there is a risk the Applicant will behave in a similar manner in the future; and matters personal to the Applicant are of minimal significance to the exercise of the discretion to impose a barring notice.

The Incident

9. The Incident took place in the late afternoon of 13 September 2021 at the Premises. The offence details explain the incident as follows:
 - a) at about 5.15pm on Monday 13 September 2021, the Applicant was at the Premises;
 - b) he was part of a 'fancy dress' event and was wearing a 'onesie' type outfit;
 - c) he undid the zip on the front of his outfit, pulled it down to below his waist and walked around the premises with his penis fully exposed to patrons;
 - d) management immediately intervened and removed the Applicant from the Premises; and
 - e) the Applicant was identified on 25 October 2021.
10. The above description is confirmed by the CCTV footage from both inside and outside the Premises. The footage from within the Premises shows that in a period of around 22 seconds:
 - a) the Applicant has his onesie around his waist exposing his naked chest;
 - b) he then proceeds to pull his onesie lower, exposing his penis and buttocks and walks while holding his clothes down around his thighs;
 - c) he walks around the Premises, in which other members of the public are present, until management can be seen physically intervening to pull the Applicant's clothes over his shoulders and remove the Applicant from the Premises (approximately 10 seconds after the Applicant exposed himself); and
 - d) the Applicant's genitals are exposed for a period of approximately 13 seconds.
11. The CCTV footage from outside the Premises shows:
 - a) management and the Applicant stepping out of the Premises;
 - b) management escorting the Applicant off the crowded balcony of the Premises in which many members of the public are present; and
 - c) the Applicant pulling up his onesie over his waist and starting to put his onesie on properly to cover his upper body.

Statutory Framework

The power to issue a barring notice

12. The Commissioner of Police (or the Commissioner's delegate under section 115AB) has a discretionary power¹ to give a notice to prohibit a person from entering specified licensed premises, or a specified class of licensed premises, for a period of up to twelve months if the Commissioner (or the Commissioner's delegate) believes on reasonable grounds that the person has, on 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: section 115AA of the Act.

Applications for review

13. If a person is dissatisfied with the decision of the Commissioner of Police to give a barring notice for a period exceeding one month, the person may apply to the Commission for a review of the decision: section 115AD(2),(3).
14. An application for review must be made within one month after an applicant is served with the notice or such longer period as the Commission allows: section 115AD(4). In this case, the Application was made within one month of the Applicant being served with the Barring Notice.
15. On review the Commission may affirm, vary or quash the decision of the Respondent to issue the barring notice. A barring notice remains in force during the review process: section 115AD(7).
16. When conducting a review, the Commission:
 - a) may make its determination on the balance of probabilities: section 16(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: section 16(7)(a);
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms: section 16(7)(b); and
 - d) is to act speedily and with as little formality and technicality as is practicable: section 16(7)(c).
17. When considering an application for a review of a barring notice, the Commission is to conduct a review of the decision on its merits, effectively by way of a rehearing.² Accordingly, the Commission is required to consider whether there are reasonable grounds for a belief under section 115AA(2) that the barred person has, on or in the vicinity of a licensed

¹ *Interpretation Act 1984* (WA), section 56(1).

² In *Hancock v Executive Director of Public Health* [2008] WASC 224, [53]-[54] (Martin CJ) found that the same phrase used elsewhere in the Act required merits review by way of rehearing, requiring the Commission to undertake a full review of the materials before the Director and to make its own determination on the basis of those materials. It is accepted that the words 'affirm, vary or quash' should be construed consistently throughout the Act: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J); *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) 228 A Crim R 201; [2013] WASC 75 [26].

premises, been violent or disorderly; engaged in indecent behaviour; or contravened a provision of a written law.

18. Section 115AA(2) does not specify or require that the person to whom a barring notice may be issued must have been charged or convicted of an offence. Nor does the section 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. A single incident can establish the belief required by section 115AA(2): *DJB v Commissioner of Police* (LC05/2017)[5].
19. If there is sufficient material on which to be satisfied on reasonable grounds of one of those three matters, the Commission must then decide whether it should exercise its discretion to affirm, vary or quash the Barring Notice. In exercising its discretion, the Commission is to have regard to the objects and purpose of the Act: *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261 [44]-[46] (Martin CJ, Wheeler and Pullin JJA agreeing).

Objects and purpose of the Act

20. The objects of the Act are plain from its express terms. The long title of the Act refers to minimising harm or ill-health caused to people due to the use of liquor. Similarly, the primary objects of the Act include to minimise harm or ill-health cause to people, or any group of people, due to the use of liquor: section 5(1)(b)). The secondary objects include to provide controls over the sale, disposal and consumption of liquor: section 5(2)(d)).
21. The purpose of the Act is to be derived from its text, having regard to context and purpose: *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205, [32], [35]. Context includes the existing state of the law, the history of the legislative scheme and the mischief to which the statute is directed: *Paula Susan Chappell as Executor of the Estate of Robert Hastings Hitchcock v Goldspan Investments Pty Ltd* [2021] WASCA 205, [33] citing *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408.
22. The relevant provisions of the Act were inserted to address the mischief of antisocial behaviour in and around licensed premises. The Minister for Racing and Gaming explained:

The Commissioner of Police will be provided with the power to issue barring notices to patrons of licensed premises who engage in antisocial behaviour. Licensees will be encouraged to request the Commissioner of Police to issue barring notices to patrons engaging in antisocial behaviour on their premises (Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2010, 5715).
23. The Minister later further explained:

This legislation seeks 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. The whole idea of this legislation is to protect the general public, the licensee...and also the person (Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 2010, 7925).
24. The purposes enunciated by the Minister closely accord with the primary object of the Act to minimise "harm or ill-health caused to people, or any group of people, due to the use of liquor". The primary and secondary objects of the Act also reveal that parliament intended to minimise

instances of antisocial behaviour in and around licensed premises and protect the general public from people who have engaged in disorderly or offensive behaviour.

25. Barring notice provisions are designed to protect the public from people who engage in disorderly or offensive behaviour on licensed premises, rather than to punish an individual for their antisocial behaviour. While a barring notice may have a detrimental effect on the recipient, it is a protective and not punitive mechanism: *SVS v Commissioner of Police* (LC19/2011). Accordingly, when determining a review application, as well as considering the appropriateness of issuing a barring notice, the Commission should consider its punitive effect, and whether the length and terms of the barring notice uphold the objects of the Act (which are not to punish individuals for their behaviour): *AC v Commissioner of Police* LC01/2018.
26. In light of all of these factors, in determining whether to quash the Barring Notice, it is necessary to take into account:
 - a) the nature and circumstances of the incident giving rise to the Barring Notice;
 - b) whether there is a degree of probability or possibility that the applicant will behave in a similar manner in the future on licensed premises and, if so, if there is a need to protect the general public or the applicant himself; and
 - c) whether the length and terms of the barring notice are sufficient to uphold the objects of the Act.

Material for review

27. The Commission may have regard to the material that was before the Commissioner of Police when making its decision as well as any information or documents provided by the Applicant: section 115AD(6).
28. The following evidence was before the Commissioner of Police's delegate in making the decision to impose a Barring Notice:
 - a) Infringement notice [REDACTED] dated 25 October 2021;
 - b) Offence details for the Incident;
 - c) Incident report from the Premises dated 16 October 2021;
 - d) 6 x labelled stills taken from the CCTV footage from the Premises;
 - e) 2 x CCTV footage from inside and outside the Premises; and
 - f) Disclosable court outcomes for the Applicant (showing no data) dated 10 December 2021.
29. The Application for review is accompanied by a letter from the Applicant. The Applicant also emailed the Commission on 6 January 2022, 25 January 2022, 3 February 2022 (by way of responsive submissions having received the Respondent's primary submissions) and again on 4 February 2022 (by way of amended responsive submissions).

Applicant's Submissions

30. The Applicant's submissions deal primarily deal with his request for a reduction in the length of the barring notice. They explain his characterisation of the Incident; his subsequent conduct

(namely that he has changed his habits and learnt from the experience); the impact of the barring notice on him, and his desire to prevent such an incident happening again.

Applicant's characterisation of the Incident

31. The Applicant acknowledges that his behaviour was inappropriate, vulgar and offensive. He explains that it did not come from a malicious place, and he did not mean to cause any harm, discomfort or offence to other patrons. He says that he was under the influence of others and behaved in a way that he normally wouldn't. The Applicant explained that growing up in [REDACTED], he was subjected to bullying and that his past school mates still pressure him into doing things when they have been heavily drinking.
32. The Applicant also explained he was at a function for sporting teams and saw it as being a private function but recognises that he was in the public eye. He submits that he would not want to offend anyone within or visiting his community.

Applicant's subsequent conduct

33. The Applicant explained that he has changed his habits and drinking attitude to prevent any further incidents. It is understood therefore, that the Applicant was drinking alcohol at the time of the Incident. He says that he has since limited his socialising to [REDACTED].
34. The Applicant has also left the [REDACTED] community to start a new life and has moved to [REDACTED] to live with his [REDACTED]. He is attempting to find a councillor to provide him with support, including to address his past behaviour and improve his interactive skills.

Impact of barring notice

35. The Applicant explains that the people he has met at [REDACTED] events have had a positive influence on his life and have shown him he can socialise and talk without needing to constantly drink alcohol. He says that he does not want to lose the physical interactive support associated with the group if he cannot attend events which he says are usually held at licensed premises. The Applicant has not provided any detail or evidence as to the frequency and location of such events.

Public interest considerations

36. The Applicant does not seek to quash the Barring Notice, but rather to reduce its term. He acknowledges that his behaviour in public was offensive. The Applicant therefore implicitly acknowledges that the threshold criteria for the issuing of a barring notice have been met.
37. The Applicant's submissions about the length of the Barring Notice and its impact upon him can be taken as a submission that it has an unnecessary and punitive effect on him preventing him from participating in social gatherings with the [REDACTED] group.

Respondent's Submissions

38. The Respondent's Submissions are comprehensive, and:
- a) explain the background to the Barring Notice and the Incident;
 - b) explain the review process under s115AD of the Act;
 - c) assert that the Barring Notice should be affirmed because:
 - a. there are reasonable grounds for granting the Barring Notice because there are reasonable grounds to believe the Applicant's behaviour was disorderly and indecent and contravened provisions of a written law on licensed premises;
 - b. the discretion should not be exercised to quash or vary the Barring Notice because the Applicant was disorderly and indecent at the Premises and there is a risk he will behave in a similar manner in the future, and the public needs to be protected from such behaviour; and
 - c. the Commission should pay minimal, if any, heed to matters personal to the Applicant, such as the impact of the Barring Notice on his social life.
39. The Respondent also filed responsive submissions dealing with what it understood to be the Applicant's admission about having attended at licensed premises during the term of the Barring Notice. By further submission dated 4 February 2022, the Applicant explained that he has not attended licensed premises since the imposition of the Barring Notice. Having regard to the fact that the Applicant has explained he is [REDACTED] and not good at writing, and that the Barring Notice was imposed in December 2021, some 3 months after the Incident which gave rise to the Notice, I accept the Applicant's explanation.
40. The Respondent filed no further submissions in response to the Applicant's 4 February 2022 email.

Determination

41. It is for the Commission to determine, on the balance of probabilities, whether the Applicant's behaviour warrants the issue of a Barring Notice.
42. The Applicant's behaviour falls within the description of disorderly as defined in the *Macquarie Dictionary*, including 'contrary to public order or morality', as well as the more stringent definition applicable in the criminal context of 'any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, a street or public place:' *Barrington v Austin* [1939] SASR 130, 132.
43. Indeed, the Respondent cited several cases in which people with exposed genitals were convicted of behaving in a disorderly manner, including *Nadebaum v Police* [2019] SASC 102 [13]; *Trajkov v Pryce* [2000] NTSC 16 [2]-[3]; and *Scanlon v Bove* [2008] WASC 213 [75].
44. There are also reasonable grounds for believing that the Applicant's conduct was indecent, noting that similar behaviour was described in *CRM v Commissioner of Police* (LC01/2013) as "inappropriate and offensive by any reasonable standard and something patrons of such premises should not have to endure" (at [31]).
45. Having considered all the evidence before me, I am therefore satisfied that there were reasonable grounds to conclude that the Applicant was disorderly, engaged in indecent behaviour and contravened a provision of a written law in the vicinity of the Premises.
46. Indeed, the Applicant does not question the power to impose a Barring Notice in this case.

47. Accordingly, I find there is a clear and proper basis for the Respondent's Delegate to exercise the power conferred by section 115A of the Act and impose a Barring Notice.
48. It is also for the Commission to determine in the relevant circumstances, whether the length and terms of the Barring Notice are sufficient to uphold the objects of the Act. 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.
49. The Applicant has explained the circumstances of the Incident and has expressed remorse about the potential impact of his behaviour on the community. He explains the changes he has made in his life, including leaving [REDACTED], trying to find a councillor and limiting his social circle. The Applicant explains that he has changed his habits and drinking attitude to prevent such an incident happening again and has learnt from the experience. From the Applicant's submissions about alcohol, it is evident that he had been consuming alcohol at the time of the Incident.
50. I take into account the Applicant's previous good record and the fact that he has moved away from [REDACTED] where he had a peer group which he says had an unfortunate influence on him.
51. However, it appears to me that there is some risk that the Applicant will behave in a similar manner in the future if intoxicated and that risk can be minimalised by the terms of the Barring Notice.
52. It is acknowledged that barring notices are not intended as punishment. Instead they serve as a measure to protect the public from anti-social behaviour in and around licensed premises. Barring notices are also a mechanism to protect a licensee and in some cases the Applicant from his or her own actions.
53. Members of the public must be able, when they frequent licensed premises, to be assured that they are in safe environments and not become victims of, or witness, anti-social behaviour or disorderly or indecent conduct. On the afternoon in question that could not be said to be the case. Rather, the Applicant engaged in inappropriate and indecent behaviour around members of the public.
54. The Applicant has made submissions about the impact of the Barring Notice on him and his attempts to change his social life for the better. While this is a relevant factor to the exercise of discretion, I accept that the impact on the Applicant is a lesser consideration to the object and purposes of the Act, particularly the need to minimise antisocial behaviour around licensed premises.
55. I note the potential impact on the Applicant of him being unable to attend social events with a group he has found to be beneficial to his efforts to improve his life. Unfortunately, the Applicant's submissions are unsubstantiated, and he has not provided evidence in support of his assertions. It is unclear for example, when and precisely where the group meets, and whether the Applicant could participate in events at unlicensed premises.
56. However, in my view the 10-month length of the term of the notice is excessive and accordingly can be seen to be punitive in its effect.
57. While a term of 12 months was imposed in the matter of *BM v Commissioner of Police* (LC44/2014), that was a case in which the applicant had a history of binge drinking (at [13]), and there were a series of incidents the subject of the barring notice in which the applicant exposed his genitals on more than one occasion, refused to obey staff who asked him to leave, and resisted restraint (at [5]). Here there was a single incident, and the Applicant

complied immediately when asked to leave the Premises. Indeed, in *CRM v Commissioner of Police* (LC01/2013), a 12-month period of barring was varied to 8 months in circumstances where an applicant progressively removed his clothes and walked around a dance floor naked and was in full view of the public when removed from the premises. The facts of *CRM* are more closely aligned to the facts of this case.

58. In all of these circumstances, the Barring Notice stands and is varied pursuant to section 115AD(7) of the Act to a period ending 25 August 2022.



KATE PEDERSEN
PRESIDING MEMBER