

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

Applicant: TE

Respondent: Commissioner of Police
(*Represented by Ms Gracie Beck 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: 8 April 2022

Determination: The Application for Review is dismissed, and the Barring Notice is affirmed.

Authorities considered in the determination:

- *DJB v Commissioner of Police* (LC05/2017)
- *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
- *SVS v Commissioner of Police* (LC19/2011)
- *AC v Commissioner of Police* (LC01/2018)

Background

1. On 15 October 2021, an Incident (the **Incident**) involving the Applicant occurred in the vicinity of licensed premises, namely [REDACTED] (the **Premises**).
2. As a result of the Incident the Applicant was charged with assault occasioning bodily harm, contrary to section 317(1) of the *Criminal Code*.
3. Following the Incident, the Commissioner of Police (the **Respondent**) issued a Barring Notice dated 3 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 7 months, expiring 15 July 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 29 December 2021.
5. On 11 January 2022, 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 to expire on 15 March 2022, and also seeks that it be varied to allow her to enter licensed premises including premises with restaurant licences issued under section 50 and liquor store licenses issued under section 47 of the Act. She does not seek that the Barring Notice be quashed.
7. The Applicant grounds her application on the fact that she has not been convicted of the assault offence and has not pleaded guilty to it. She also submits that the Barring Notice is overly harsh in banning her from every licensed premises in Western Australia until 15 July 2022.

8. The Applicant explains that the incident leading to the charge of assault was out of character for her and the result of extenuating circumstances in her personal life. She submits that she is not a threat to the public, and a more appropriate Barring Notice would be to bar her from the Premises or any bar/tavern in Western Australia and explains the impact of the Notice on her, including that she cannot attend [REDACTED] in May.
9. The Respondent submits that the Barring Notice should be affirmed because: the Applicant's conduct was violent and/or contravened a provision of a written law (being section 317(1) of the *Criminal Code* (WA)); there is a risk the Applicant will behave in a similar manner in the future given she instigated violence against a previously unknown victim, and displayed no remorse immediately afterwards; and matters personal to the Applicant do not alter the objects of the Act, particularly the need to minimise instances of antisocial behaviour in the vicinity of license premises.

The Incident

10. The Incident took place in evening of 15 October 2021 in the vicinity of the Premises. The statement of material facts explains the incident as follows:
 - a) between 6.25pm and 6.35pm on Friday 15 October 2021, the Applicant was outside of the [REDACTED];
 - b) she had just been involved in a verbal argument with the victim, who was walking away when the Applicant and another female followed her for approximately 10 meters;
 - c) the victim turned around and the Applicant punched her to the left eye socket, causing her to fall to the ground;
 - d) the victim attended Royal Perth Hospital on Sunday 17 October 2021 as a result of her injuries and later reported the matter to police; and
 - e) the Applicant was arrested on Friday 5 November 2021.
11. The above description is consistent with the three angles of CCTV footage from outside the Premises which collectively show an interaction between the Applicant and the victim in the vicinity of the Premises (in the carpark adjacent to it), and then ultimately the victim retreating from the Applicant, who along with another woman, follow her for approximately 10 meters including across a road. Once across the road and on the footpath outside the Premises, the Applicant strikes the victim with a clenched fist to the face, causing her to stumble backwards and fall to the ground. The Applicant then advances towards the victim who remains sitting on the ground, and along with the other woman, continues to confront and point at her in an aggressive manner for a period of approximately 30 seconds before turning and walking away while the victim remained on the ground.

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

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

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 pursuant 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 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].

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].

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 caused 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; 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) Statement of material facts dated 30 November 2021;
 - b) Offence details for the Incident;
 - c) Witness statement of [REDACTED] (Victim);
 - d) Photographs of the injuries to the Victim;
 - e) 3 x labelled stills taken from the CCTV footage from the Premises;
 - f) Photograph of the Applicant;
 - g) 3 x CCTV footage from various angles outside the Premises; and
 - h) the Applicant's criminal history (showing [REDACTED] [REDACTED] dated 30 November 2021.

Applicant's Grounds & Submissions

Applicant's characterisation of the Incident

29. In the Application for Review, the Applicant raises the appropriateness of a barring notice being issued before conviction. The Applicant's grounds include that:
- a) she has not yet been convicted of any offence;
 - b) she has not had the opportunity to respond to the allegations yet;
 - c) it is an ongoing criminal matter; and
 - d) the barring notice should not be issued where there is no conviction or plea.
30. Notably, in the Applicant's submissions, she appears to accept the facts relating to the Incident, including that she assaulted the Victim. She says that the Victim intimidated [REDACTED] [REDACTED] in the car, and they began arguing which led to the punch.

31. The Applicant expresses remorse and explains the Incident was a one-off occurrence, and only happened due to extenuating circumstances in her personal life. While the Applicant is not precise about what those personal circumstances are, it is clear from the references she provided in support of her application that her relationship had broken down.

Applicant's subsequent conduct

32. The Applicant explains that she has been taking necessary steps by way of anger management (having been referred by her GP), although the Applicant does not explain in any detail what those steps entail. No evidence was provided in support of that submission.

Impact of barring notice

33. The Applicant says that the impact on her of the Barring Notice includes that she is restricted from attending family and friend birthdays, family or work gatherings, and her local sporting club, and she cannot attend [REDACTED] in May. The Applicant does not explain her involvement, if any, in her local sporting club, or indeed provide any details as to the nature of the club.

Public interest considerations

34. The Applicant does not seek to quash the Barring Notice, but rather to reduce its term and the premises to which it applies. The Applicant therefore implicitly acknowledges that the threshold criteria for the issuing of a barring notice have been met.
35. The Applicant's submissions about the length of the Barring Notice and its impact upon her can be taken as a submission that it has an unnecessary and punitive effect on her by preventing her from participating in various social gatherings.

Respondent's Submissions

36. The Respondent's Submissions are comprehensive. They:
- a) explain the background to the Barring Notice and the Incident;
 - b) explain the review process under section 115AD of the Act;
 - c) assert that the Barring Notice should be affirmed because:
 - i. there are reasonable grounds for granting the Barring Notice because there are reasonable grounds to believe the Applicant's behaviour was violent or contravened a written law in the vicinity of licensed premises;
 - ii. the discretion should not be exercised to quash or vary the Barring Notice because the Applicant was violent and aggressive at the Premises and there is a risk she will behave in a similar manner in the future, and the public needs to be protected from such behaviour; and
 - iii. while the Commission may have regard to all of the circumstances of the case, including the effect on the Applicant, the primary consideration should remain the objects and purposes of the Act, and in particular the need to minimise instances of antisocial behaviour in the vicinity of licensed premises.

37. The Respondent's Submissions also deal with the Applicant's grounds, including that she has not yet been convicted of an offence, and that she was not given an opportunity to respond to the allegations. As to the conviction issue, the Respondent submits that conviction for an offence is not a prerequisite for the Commissioner issuing a barring notice, rather the relevant criteria is whether the Commissioner has formed the requisite state of mind, being a belief based on reasonable grounds. As to the Applicant's opportunity to respond to the allegations against her, the Respondent submits that consistent with previous Commission decisions (being *MB, GM, EH and CE v Commissioner of Police* (LC06/2021) at [27]) and on the proper construction of the Act, there is no obligation on the Commissioner of Police to provide the Applicant with the opportunity to comment on the evidence. Further, the Respondent submits that even if the Applicant was entitled to an opportunity to comment on the evidence, any procedural defect can be cured by the availability of de novo merits review.
38. The Respondent also filed Responsive Submissions with respect to the two references provided by the Applicant, which explain the relevance of her asserted prior good character and the life stressors that the Applicant was under at the time of the Incident. In short, the Respondent's submission is that the matters raised in the references do not change its submission that the Barring Notice should be affirmed. In particular, the Respondent submits that if life stressors were the catalyst for the Applicant's violent behaviour, then the risk of further behaviour cannot be excluded as a real possibility.

Determination

39. It is for the Commission to determine, on the balance of probabilities, whether the Applicant's behaviour warrants the issue of a Barring Notice.
40. The Applicant's behaviour was plainly violent. While the verbal exchange between the parties cannot be heard and the interaction between the parties begins off camera, the footage is of good quality and clearly shows the Applicant acting aggressively and violently.
41. There is no question that the Applicant struck the Victim in the face with enough force to cause the Victim to stumble backwards and ultimately to fall. The Applicant did not stop there, she continued to advance toward the Victim and to behave in an aggressive manner towards her while the Victim remained on the ground.
42. Having considered all the evidence before me, I am therefore satisfied that there were reasonable grounds to conclude that the Applicant was violent and/or contravened a provision of a written law in the vicinity of the Premises. Indeed, the Applicant does not question the power to impose a Barring Notice in this case.
43. Further, I accept the Respondent's submissions with respect to the significance of the Applicant's asserted grounds that she had not been convicted of an offence and was not given an opportunity to respond to the allegations prior to the imposition of the Barring Notice. That is, the Commissioner of Police did not require proof of conviction and was not obliged to provide the Applicant with the opportunity to comment on the evidence in order to form a belief on reasonable grounds as to the Applicant's conduct during the course of the Incident.
44. Accordingly, I find there was 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.

45. Furthermore, I also accept the Respondent's submission that even if (which I do not accept) the Applicant was entitled to comment on the evidence before the Commissioner, any procedural defect could be cured by the availability of merits review. Here, I find that the Applicant has not provided any comment which disturbs the reasonable grounds for a belief that the Applicant was violent and committed an offence in the vicinity of the Premises. Her violent behaviour is plainly shown on the CCTV footage collected from outside the Premises. Further, the Applicant appears to admit that she struck the Victim by her expression of remorse.
46. 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.
47. The Applicant has explained that the Incident was out of character and took place at a time where she was experiencing difficult personal circumstances. Since the Incident, she has expressed remorse about her behaviour and says that she has taken steps to address her anger management issues.
48. Nonetheless, the Incident was serious in nature, and the Victim suffered injuries which required medical treatment.
49. I take into account the Applicant's character references which speak to her work ethic, good character, her remorse, and the stress and depression caused by her relationship breakdown, and also allude to professional treatment to deal with being "provoked again" in the future. However, while these references are a credit to the Applicant, they are of little assistance in ascertaining the risk of her behaving in a violent way again in the future. There is a lack of particularity as to the steps the Applicant has taken to ensure she does not behave with violence in the future again.
50. Ultimately, I accept the Respondent's observation that if life stressors were the catalyst to the Applicant's behaviour, there is some risk that the Applicant will behave in a similar manner in the future and that risk can be minimised by the terms of the Barring Notice.
51. It is acknowledged that barring notices are not intended as punishment. Instead they serve as a measure to protect the public from antisocial 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.
52. When visiting licensed premises, members of the public must be able to be assured that they are in safe environments and will not become victims of, or witness, antisocial behaviour or violent conduct. Here, that was not the case because the Applicant engaged in violent behaviour around members of the public.
53. The Applicant has made submissions about the impact of the Barring Notice on her social life. 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.

54. I note the potential impact on the Applicant of her being unable to attend social events, her local sporting club, and [REDACTED]. Unfortunately, the Applicant's submissions are unsubstantiated, and she has not provided evidence in support of her assertions. The Applicant has provided no explanation as to the nature of her involvement in her local sporting club, or the details with respect to [REDACTED].
55. Finally, given the serious nature of the Applicant's violent conduct, it cannot be said that the length of the term of the Notice is excessive.
56. In all of these circumstances, the imposition and terms of the Barring Notice are protective rather than punitive in nature. Accordingly, the Application for Review is dismissed, and the Barring Notice is affirmed.



KATE PEDERSEN
CHAIRPERSON