

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

Applicant: TJC

Respondent: Commissioner of Police
(represented by Mr Clinton Arnold, State Solicitor's Office)

Commission: Sandra Di Bartolomeo (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: 16 October 2021

Date of Determination: 3 December 2021

Determination: The barring notice is quashed in accordance with section 115AD(7) of the Act.

Authorities considered in the determination:

- *Liquor Control Act 1988* (WA) Sections 5, 115AA(2), 115AB, 115AD(3), 115AD(7), 115AD(7)(a) and (7)(b)
- *SVS v Commissioner of Police* (LC19/2011)
- *KRB v Commissioner of Police* (LC33/2011)
- *GML v Commissioner of Police* (LC58/2011)
- *LMC v Commissioner of Police* (LC05/2012)
- *ZUW v Commissioner of Police* (LC12/2021)
- *MJI v Commissioner of Police* (LC2/2020)
- *JJ v Commissioner of Police* (LC23/2020)

Background

- 1 This is an application for the review of a barring notice pursuant to section 115AD(3) of the *Liquor Control Act 1988* (WA) ("**Act**") made by [REDACTED] ("**Applicant**").
- 2 On 30 July 2021 in the vicinity of licensed premises, namely [REDACTED] ("**Premises**"), it is alleged that [REDACTED] was violent ("**Incident**").
- 3 As a result of the Incident, a delegate officer for the Commissioner of Police issued a Barring Notice on 15 September 2021 ("**Barring Notice**") under section 115AA(2) of the of the *Liquor Control Act 1988* ("**Act**") prohibiting the Applicant from entering licensed premises within Western Australia of the following licence classes:
 - 3.1. All hotel licences issued under section 41 (includes hotel, hotel restricted, tavern and tavern restrict licences);
 - 3.2. All small bar licences issued under section 41A;
 - 3.3. All nightclub licences issued under section 42;
 - 3.4. Casino licence issued under section 44;
 - 3.5. All liquor store licences issued under section 47;
 - 3.6. All club licences issued under section 48;
 - 3.7. All restaurant licences issued under section 50;
 - 3.8. All producer's licences issued under section 55;
 - 3.9. All wholesaler's licences issued under section 58;
 - 3.10. All occasional licences issued under section 59; and
 - 3.11. 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 22 September 2021 and is for a period of approximately 9 months expiring on 30 July 2022.

Incident

- 5 The following allegations regarding the Incident were considered by the Respondent, as set out in Detected Incidents Report incident no. [REDACTED]:

- 5.1. During the evening of Friday [31] July 2021, [REDACTED] ("**Victim**") was standing outside of the Premises.
 - 5.2. At approximately 9:30 PM, the Applicant and [REDACTED] attended the Premises and saw the Victim drinking.
 - 5.3. The Applicant grabbed a golf club from her car.
 - 5.4. [REDACTED] approached the Victim without his knowledge and punched him to the right temple.
 - 5.5. The Victim fell to the ground and [REDACTED] continued to punch him to the head.
 - 5.6. The Victim got up and the Applicant hit him from behind with a golf club in the left-hand shoulder blade.
 - 5.7. Both parties yelled abuse and general threats at one another before leaving the area in different directions.
 - 5.8. The Police attended the scene and located the Victim nearby with a large lump on his forehead and bruising to his face. He also had a golf club iron imprint and swelling on his back where [he'd] been hit.
 - 5.9. The Victim was conveyed to hospital by the Police.
 - 5.10. Police attended [REDACTED] and spoke to the Applicant and [REDACTED] who said they had flogged him as pay back due to him throwing a brick at the Applicant that morning.
- 6 The Incident giving rise to the Barring Notice is referred to in the following documents:
- 6.1. 115AD Application for review of Barring Notice dated 16 October 2021.
 - 6.2. The evidential material relied upon by the Commissioner of Police being:
 - 6.2.1. Police Detected Incidents Report incident no. [REDACTED]
 - 6.2.2. Incident Report (Incident Number [REDACTED]);
 - 6.2.3. Incident Report (Incident Number [REDACTED]);
 - 6.2.4. Incident Report (Incident Number [REDACTED]);
 - 6.2.5. witness account at the scene;

6.2.6. Victim's roadside account of the Incident;

6.2.7. photographs of the injuries of the Victim;

6.2.8. body worn camera video of Police interview with the Applicant and [REDACTED] ("**BWC Video**");

6.2.9. the Criminal and Traffic History of the Applicant.

6.3. The Respondent's Primary Outline of Submissions dated 11 November 2021.

Applicant's Submissions

7 On 16 October 2021, the Applicant applied to the Liquor Commission for a review of the Barring Notice.

8 The Applicant has elected to have the review determined on the papers pursuant to section 115AD of the Act.

9 Primary Submissions of the Applicant are contained within the application made by the Applicant on 16 October 2021.

10 The submissions of the Applicant are summarised as follows:

10.1. The Applicant is not a violent person, and not the type of person who assaults others.

10.2. On the morning of the Incident, the Victim threw a rock at the Applicant's head when she was waiting at the bus stop for a bus to take her to work at 5.20AM.

10.3. The Applicant went home and contacted the Police in relation to the incident.

10.4. Throughout that day, the Victim continued to harass the Applicant by driving past her house at dangerous speeds and trespassed onto her property, doing damage.

10.5. On the evening of the Incident, the Applicant was advised that the Victim was at the Premises.

10.6. The Applicant attended the Premises and due to a perceived lack of support by the Police, she felt that she had no other option but to take matters into her own hands to protect her safety.

10.7. The Applicant expressed regret for the Incident and states that she understands that there is more that she could have done to avoid the situation.

10.8. On the basis of the submissions outlined above, the Applicant requests that the Commission reconsider the Barring Notice.

10.9. The Applicant has provided three separate witness statements in relation to her interaction with the Victim on the morning of 30 July 2021.

Respondent's Submissions

11 The Respondent provided Primary Outline of Submissions dated 11 November 2021.

12 The Respondent's submissions are summarised as follows:

Why there are reasonable grounds to believe the Applicant has been violent or disorderly or contravened a provision of any written law

12.1. On the evidence before the Respondent, a reasonable person would have been inclined to assent to, and not to reject, the proposition that the Applicant engaged in violent or disorderly conduct on or in the vicinity of the Premises, or contravened a provision of any written law, being the *Criminal Code* (Code), including s 317 of the Code, assault causing bodily harm.

12.2. In addition to the Police Detected Incidents Report narrative, during the BWC Video, the Applicant relevantly acknowledged that:

12.2.1. She had travelled to the Premises with the golf club because she believed [the Victim] would be present;

12.2.2. Upon finding [the Victim], she swung the golf club 'aim[ing] for his head' but missed and instead hit his arm.

12.3. The photographs of [the Victim] taken while in hospital show, amongst other injuries, significant swelling and bruising on his left shoulder blade.

12.4. None of the matters set out above are disputed by the Applicant in the Application. Instead, the Applicant – at least implicitly – accepts that she had travelled to the Premises for the purposes of assaulting [the Victim].

12.5. The circumstances recorded by the Police and as recited by the Applicant are largely consistent in terms of the material details. The Applicant does not dispute the underlying facts in her Application.

- 12.6. The evidence indicates that the Applicant deliberately struck [the Victim] with a golf club causing bodily harm. Accordingly, there were reasonable grounds for the Respondent to determine that the Applicant engaged in violent conduct that was also a contravention of the Code.
- 12.7. It is accepted that the Incident did not take place on licensed premises. Accordingly, it is necessary to determine whether the relevant conduct occurred in the vicinity of licensed premises.

Whether the Applicant was in the “vicinity” of licensed premises

- 12.8. The Barring Notice states that the incident occurred 'in the vicinity of licensed premises, namely [REDACTED] There is no CCTV footage of the Incident, however, the Applicant has stated in her Application that the Incident occurred in [REDACTED] The Incident Report Narrative states that [the Victim] had been [REDACTED] [REDACTED]. The [REDACTED] is the oval which directly adjoins the [REDACTED]. The Incident Reports record the location as being [REDACTED].
- 12.9. The Respondent submits that from the manner in which the term is used in s 115AA of the Act, it is clear that "vicinity" is intended to encompass the area surrounding licensed premises, including, car parks. Further, there is no requirement in the Act that the person subject to a barring notice must have actually attended a licensed premises or even that the relevant person had intended to attend those premises.
- 12.10. For the above reasons, the Respondent submits that the evidence before the Commission provides reasonable grounds for the belief that the Applicant was violent or disorderly in the vicinity of licensed premises and that the Applicant has contravened a provision of a written law, being the *Criminal Code*.

Nature and circumstances of the incident giving rise to the Barring Notice

- 12.11. There are several factors which elevate the seriousness of the Applicant's conduct, including that the Incident was premeditated. The Applicant actively sought out the violent situation; it was not simply a coincidence that the Applicant came across [the Victim].
- 12.12. The Applicant attacked [the Victim] with a weapon, from behind, and the Applicant's violent conduct could have killed [the Victim].

- 12.13. For the purposes of a Barring Notice, it is no excuse that a person who engaged in violent conduct was doing so as a vigilante responding to perceived wrongdoing.
- 12.14. Accordingly, the terms of the Barring Notice achieves its protective purpose, by protecting the general public from the actions of the Applicant on licensed premises.

The risk of the Applicant behaving in a similar manner

- 12.15. The Respondent states that the Applicant appears to indicate a regret that it was necessary for her to engage in the violent conduct, rather than any acknowledgment that deliberately seeking out and engaging in such violent conduct was an inappropriate response.
- 12.16. The Application, and the evidence provided in support of it, is overwhelmingly focused on justifying the Applicant's behaviour by reference to the conduct of [the Victim]. The Respondent states that this focus on [the Victim's] behaviour suggests that the Applicant has engaged in minimal introspection, which heightens the risk that the Applicant might justify similar behaviour occurring should she be wronged by someone else in the future.
- 12.17. The Respondent submits there is a real and not insubstantial risk that the Applicant could engage in similar behaviour again in the future. Even if the Commission considers that the risk that the Applicant could behave in a similar manner again is low, the Respondent considers that risk can be further minimised by the terms of a Barring Notice.
- 12.18. 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, and in the vicinity of, licensed premises, and will provide a level of protection to the public from this type of behaviour.
- 12.19. For the above reasons, the Respondent submits that the Commission should not exercise its discretion to quash the notice.

Statutory Framework

- 13 The Commissioner of Police has the power to ban people from licensed premises, or a specified class of licensed premises, for a period not exceeding 12 months, 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:
- 13.1. been violent or disorderly; or

- 13.2. engaged in indecent behaviour; or
- 13.3. contravened a provision of any written law.
- 14 The Commissioner of Police may delegate the power conferred by section 115AA of the Act on any member of the police force or above the rank of Inspector pursuant to section 115AB of the Act.
- 15 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.
- 16 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.
- 17 Subsection 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 18 The Act also in section 16 prescribes that the Commission:
- 18.1. may make its determinations on the balance of probabilities;¹ and
- 18.2. 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;² and
- 18.3. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms;³
- 19 Section 5 of the Act set out the objects of the Act. In subsection (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. Subsection (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.

¹ *Liquor Control Act 1988* (WA), s 16 (1)

² *Ibid*, subsection (7)(a).

³ *Ibid*, subsection (7)(b).

- 20 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.⁴

Principles

- 21 The Commission, in considering an application under section 115AD, must review the decision and determine whether to affirm, vary or quash the decision.
- 22 The matters to be determined on a review are whether:
- 22.1. there are reasonable grounds for believing the barred person has, on licensed premises or in the vicinity of the same, engaged in indecent behaviour, been violent or disorderly or contravened a provision of a written law; and
- 22.2. the length and terms of the barring notice are sufficient to uphold the objects of the Act and are not punitive in nature.
- 23 It is for the Commission to determine whether, on the balance of probabilities, the barring notice is warranted.

Determination

The Applicant engaged in violent conduct

- 24 A barring notice issued under section 115AA(2) does not require the charging or conviction of an offence. Even if conduct does not constitute an offence, it may nevertheless constitute violence or disorderly conduct, which can be a sufficient basis for a barring notice.
- 25 In the BWC Video, the Applicant made a number of admissions in relation to the Incident, and the Applicant does not dispute that the Incident occurred in her submissions.
- 26 Together with the BWC Video, there is sufficient material before the Commission to establish that there are reasonable grounds for believing that the Applicant engaged in violent or disorderly behaviour and/or contravened a written law.

Whether the Applicant was in the “vicinity” of licensed premises

- 27 Pursuant to section 115AA(2), the relevant conduct must occur on licensed premises or in the vicinity of licensed premises.

⁴ *SVS v Commissioner of Police* (LC19/2011)

- 28 As submitted by the Respondent, it is accepted that the Incident did not take place on licensed premises, and so it is necessary to determine whether the relevant conduct occurred in the *vicinity* of licensed premises.
- 29 The Respondent submits that the inclusion of 'in the vicinity of' in section 115AA(2) indicates a clear Parliamentary intention that the scope of barring notices be expanded in order to capture persons engaging in particular conduct both within licensed premises and in the vicinity of those premises. This is not disputed by the Commission.
- 30 "Vicinity" is not defined in the Act, and there has been no authoritative consideration of the meaning of "vicinity" as used in the Act.
- 31 The Respondent referred to a number of matters in which the Commission has considered the application of "in the vicinity". In *ZUW v Commissioner of Police* (LC12/2021), the Commission found that an incident occurring 90 metres away from a licensed premises was still 'in the vicinity'.
- 32 In *MJI v Commissioner of Police* (LC2/2020), the Commission held that the carpark area of a tavern was 'in the vicinity of a licensed premises. In *JJ v Commissioner of Police* (LC23/2020) at [16], the Commission determined that an incident which occurred 'on a street that borders the Club' had occurred within the vicinity of the licensed premises (although, as the Respondent points out, in that case there had been an earlier incident at those premises).
- 33 The Barring Notice states that the Incident occurred 'in the vicinity of licensed premises, namely [REDACTED]'. The Applicant has stated in her Application that the Incident occurred in the [REDACTED].
- 34 The Detected Incidents Report Narrative states that the Victim had been 'standing in front of the [REDACTED]'. The Incident Reports record the location variously as being [REDACTED] [REDACTED]. It appears that there is almost one kilometre between the [REDACTED] and [REDACTED] and over 100 metres between each of the locations mentioned in the Incident Reports and evidence.
- 35 As such, the Commission finds that the material provided to the Commission does not clearly identify the location of the Incident, and there are discrepancies as to where the Incident took place.
- 36 On the basis outlined above, the Commission finds that the evidence has not established that the Incident took place sufficiently close to the Premises to be considered in the vicinity of the Premises to the required standard.

- 37 In addition, despite the Respondent's assertion as to the intention of the legislation, although the "vicinity" of licensed premises may be considered to be quite far physically from the relevant premises, it does not appear it was ever the intention of the legislation to deal with criminal conduct which has only a very limited connection with the consumption of alcohol, or the attendance of the parties at licensed premises or an entertainment precinct.

Exercise of discretion

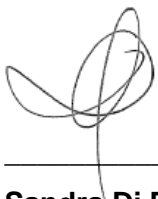
- 38 On review of a Barring Notice under section 115AD of the Act, the Commission may exercise its discretion to quash, vary or affirm the Barring Notice. In doing so, the Commission must consider the objects and purpose of the Act.
- 39 Section 5 of the Act sets out the objects of the Act with a primary object being to minimise harm or ill health caused to people, or any group of people, due to the use of liquor (ss(1)(b) of the Act) and the secondary objects including the need to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor (ss2).
- 40 The review application must also 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 of the Barring Notice on the Applicant.

The nature and circumstances of the Incident giving rise to the Barring Notice

- 41 The Incident appears to relate to a family dispute and seems to be directly related to the earlier interaction between the Applicant and the Victim which occurred on the same day of the Incident.
- 42 From the materials provided to the Commission, it does not appear that the Applicant attended the licensed premises, and the Applicant states that she had not consumed any alcohol. However, as the Respondent submits, it is acknowledged that "*intoxication or consumption of alcohol is not a prerequisite for a Barring Notice.*"
- 43 It would appear from the Applicant's submission and the BWC Video that the Incident would have occurred regardless of the location, and it is clear (on the Applicant's own account) that the Incident took place as a form of retaliation against the Victim.
- 44 While the Commission accepts that there are reasonable grounds for believing that the Applicant engaged in violent or disorderly behaviour and/or contravened a written law, the nature of the Incident appears to be one of a criminal nature, rather than a matter relating to the primary or secondary objects of the Act.

The risk of the Applicant behaving in a similar manner

- 45 The Applicant submits that she is "not the type of person who assaults others" and that she "is not a violent person". However, the Respondent submits that those statement are "plainly inconsistent with the violent conduct that she has acknowledged seeking out on the night of the incident."
- 46 As outlined above, the Incident appears to be a specific and isolated one which was directed against a specific person in response to an earlier and specific interaction with that person.
- 47 The Applicant has no prior criminal record and that is accepted by the Respondent.
- 48 While it appears that there may be some risk that the Applicant will behave in a similar manner in the future with respect to the Victim, it seems unlikely that that risk can be minimised by the terms of the Barring Notice.
- 49 The purpose of barring notices differs to that of criminal proceedings, and they are not intended as a punishment. Rather, barring notices serve as a measure to protect the public from anti-social behaviour, such as the Applicant's, in and around licensed premises. Barring notices are also a mechanism to protect a licensee or indeed, the perpetrator, from his/her own actions.
- 50 In this case, the barring order would not appear to have the intended effect, but rather be punitive in effect.
- 51 The Commission emphasises that it in no way condones the violent conduct of the Applicant, however, a barring order does not appear to be the appropriate mechanism of dealing with this manner of assault which is only peripherally linked to licensed premises and/or the interactions of the parties with alcohol.
- 52 Given the above, it is appropriate to quash the Barring Notice.
- 53 The Commission orders that the Barring Notice is quashed pursuant to section 115AD(7).



Sandra Di Bartolomeo
PRESIDING MEMBER