

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

Applicant: KS
(represented by Ms Tabitha Raphael of Andrews Legal)

Respondent: Commissioner of Police
(represented by Ms Catherine Wallace of the 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: 28 January 2022

Date of Hearing: On Papers

Date of Determination: 26 April 2022

Determination: The barring notice is varied in accordance with section 115AD(7) of the *Liquor Control Act 1988* to permit the Applicant to enter licensed premises:

- a) when such attendance is required in relation to the Applicant's employment; and
- b) provided that the Applicant is precluded from purchasing or consuming alcohol whilst attending such licensed premises.

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)
- *ZUW v Commissioner of Police* (LC12/2021)
- *DJB v Commissioner of Police* (LC05/2017)
- *SL v Commissioner of Police* (LC27/2020)
- *Tristan Kempton v Commissioner of Police* (LC10/2017)

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 26 September 2021 at and in the vicinity of licensed premises, namely the [REDACTED] ("Premises"), it is alleged that the Applicant contravened a provision of written law on licensed premises ("Incident").
- 3 As a result of the Incident, a delegate officer for the Commissioner of Police issued a Barring Notice dated 30 November 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 30 December 2021 and is for a period of approximately 9 months expiring on 26 September 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. On Sunday 26 September 2021, at about 4.00pm, [REDACTED] ("Victim") was at the [Premises] with some friends.
 - 5.2. The Victim and his friends were sat outside in a booth. An unknown male walked past and stared at the group, and a short while later, the Applicant walked past and stared at the group.

- 5.3. About 45 minutes later, the Victim went to the bathroom. As the Victim was using the bathroom, the Applicant entered the bathroom and hit the Victim to the back of the head with a glass, causing laceration injuries.
 - 5.4. The Applicant and another patron ("Patron") then began punching and kicking the Victim. The Victim was bent over in pain and was protecting his face.
 - 5.5. The Victim pushed the Applicant off and both the Applicant and the Patron rushed out of the bathroom. The Victim recognised the Applicant, but was unsure who the Patron was.
 - 5.6. The Victim attended the doctor on Monday 27 September 2021 and then attended the police station to provide a report.
 - 5.7. On 21 October 2021, the Applicant was arrested and conveyed to the police station where he participated in an audio-visual record of interview. The Applicant made admissions in relation to the offence and was released pending further inquiries.
 - 5.8. On 18 November 2021, the Applicant was again arrested and taken to the police station and declined to participate in an audio-visual record of interview.
 - 5.9. The Applicant was bailed on the charges of endanger life, health or safety of a person and fighting in public causing fear.
- 6 The Incident giving rise to the Barring Notice is referred to in the following documents:
- 6.1. the Barring Notice.
 - 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. Statement of Material Facts brief no. [REDACTED];
 - 6.2.3. Statement of Material Facts brief no [REDACTED];
 - 6.2.4. Running Sheet, Incident Report [REDACTED];
 - 6.2.5. Statement of the Victim dated 27 September 2021;
 - 6.2.6. Addendum Statement of the Victim dated 27 October 2021;
 - 6.2.7. Consultation notes for the Victim recorded by [REDACTED] on 27 September 2021 in relation to a visit by the Victim on 27 September 2021 ("Doctor's Notes");
 - 6.2.8. four photographs of the Victim's injuries;
 - 6.2.9. Statement made by manager/employee of the Premises, [REDACTED] in relation to the video filmed in the Premises on the date of the Incident ("CCTV Footage");
 - 6.2.10. the CCTV Footage;

6.2.11. nine still images of the CCTV Footage; and

6.2.12. the Criminal and Traffic History of the Applicant.

6.3. The Respondent's Outline of Submissions dated 4 March 2022.

Applicant's Submissions

- 7 On 28 January 2022, 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 Submissions of the Applicant are contained within the Applicant's Outline of Submissions dated 2 March 2022.
- 10 The submissions of the Applicant are summarised as follows:
 - 10.1. The Applicant is charged with fighting in public causing fear and endanger life, health or safety or a person. Pleas of not guilty have been entered with the Court.
 - 10.2. The Applicant's position is that the [Barring Notice] should be quashed or alternatively varied to allow the Applicant [the] ability to attend the licensed restaurant on the relevant mine sites and licensed airports in relation to his work commitments.
 - 10.3. The Applicant is currently working for a mining and construction company as a field service technician, working 5 days on and 2 days off.
 - 10.4. As part of his employment, the Applicant flies into airports, most if not all of which serve alcohol in the boarding lounge. Due to the Barring Notice, the Applicant would be barred from sitting in the boarding lounge awaiting his flight.
 - 10.5. As part of his employment, the Applicant resides at mine sites which impose restrictions on traveling to town and lack of in-room facilities available to prepare meals, and which have a restaurant/cafeteria on site to provide employees with meals. In addition to meals, these facilities on various mine sites also offer alcohol and have liquor licences. The Barring Notice would mean that the Applicant would be barred from having a meal in the mine site facilities.
 - 10.6. Additionally, there are instances where the Applicant is flown up to the rural area [of the mine site] at late hours of the night, and he is permitted to stay at a hotel or motel before going to the mine sites the next day as part of his employment. Due to the Barring Notice, the Applicant is unable to stay in licensed hotels or be able to have a meal at the restaurants of the hotel, which means he is unable to engage in these types of late fly out jobs for his employer. This may result in the Applicant potentially losing his position.
 - 10.7. The Applicant is further concerned that if he is expected to quarantine at a hotel on the direction of his employer due to COVID-19 pandemic, he will be unable to do so due to the Barring Notice.

- 10.8. The Applicant also outlines a number of scenarios where he would be unable to undertake various family outings and hobbies due to the Barring Notice, including attending the race track with his children, staying in hotels when visiting relatives and various sporting activities.
- 10.9. The Applicant submits that he is substantially affected by the Barring Notice [in relation to] his work, participation in activities focused on bettering his mental health and participating in events with his children.
- 10.10. The Applicant concludes that the [Commission should] either:
- i. quash the Barring Notice;
 - ii. vary the Barring Notice to allow the Applicant to attend any licensed premises before 9pm each day, excluding bars (that are not at airports) and nightclubs, and to stay at licensed accommodation at all times; or
 - iii. vary the Barring Notice to allow the Applicant to travel to any airport, stay in licensed accommodation and attend restaurants.

Respondent's Submissions

- 11 The Respondent provided an Outline of Submissions dated 4 March 2022.
- 12 The Respondent's submissions are summarised as follows:

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

- 12.1. The Respondent submits that there is sufficient evidence to believe that the Applicant has engaged in violent conduct and/or contravened a provision of a written law, being section 304(1)(b) of the Criminal Code.
- 12.2. The materials provided to the Commission, along with the CCTV Footage, is sufficient to provide reasonable grounds for believing the Applicant has engaged in violent conduct and contravened a provision of written law.
- 12.3. In particular:
- i. the Victim's statement identifies the Applicant as one of his assailants;
 - ii. the CCTV stills show the Applicant was at the Premises with the Patron at the time the Victim was assaulted, including showing the Applicant and the Patron (with a glass in his hand) entering the restroom area shortly after the Victim, and departing the Premises straight after exiting the restroom area;
 - iii. the CCTV timestamps indicate that the Applicant and the Patron followed the Victim into the restroom area at or around the time of the assault;
 - iv. the Victim's Statement and Addendum Statement indicate the Victim was struck to the back of the head by a glass, and then repeatedly punched and kicked by two assailants; and

- v. the Doctor's Notes record multiple lacerations to the back of the Victim's head, which are also visible in the photographs of the Victim's head provided in the Respondent's evidence.

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

- 12.4. The Respondent submits that the evidence supports a conclusion that the Applicant was involved in and/or perpetrated an assault on the Victim. The violent nature of the assault demonstrates a clear need for the Barring Notice in order for the public to be protected.
- 12.5. There are three factors which exacerbate the violent conduct in this case: the apparent premeditation of the assault, the lack of any clear reason or provocation for the assault, and the use of a glass in the assault.
- 12.6. The Victim reports that his injuries have healed well and he does not anticipate any long-term effects. However, the Respondent submits that the Applicant is not, by the imposition of the Barring Notice, being punished for the injuries that were suffered by the Victim. The key consideration is that the Applicant's actions had the potential to cause serious harm, thereby demonstrating a need for the public to be protected from violence. In this case, the potential seriousness of that harm is exacerbated by the three factors set out above.

The risk of the Applicant behaving in a similar manner

- 12.7. The Respondent repeats the submissions regarding the apparent premeditation of the assault and the lack of any proximal reason or provocation for it, and says that these factors suggest that there is a real risk that the Applicant will behave in a similar manner again.
- 12.8. In addition, the Respondent states that it is not uncommon for a person to encounter someone they know, and either do not like or have an issue with, on licensed premises. Therefore there is a real risk that the Applicant could find himself in a similar situation again, and [there is] no reason to think that when faced with such a situation, he would not act in the same way.
- 12.9. Additionally, the Respondent submits that a person willing to engage in such conduct without a direct or proximal reason or provocation would, *prima facie*, appear to be a heightened risk [of] acting violently when directly or immediately provoked, and particularly when intoxicated.
- 12.10. Therefore based on the Applicant's actions in relation to [the Incident], there is a real risk of him engaging in future violence on licensed premises and consequently a need for the public to be protected.

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 of 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), section 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 or disorderly conduct

- 24 In the Applicant's submission, he states that he has entered a plea of not guilty in relation to the charges of fighting in public causing fear and endanger life, health or safety or a person.
- 25 Whilst the material before the delegate did not include the Applicant's full record of interview with police, the Detected Incidents report notes the Applicant was arrested and conveyed to the police station where he participated in an audio-visual record of interview, and that the Applicant made admissions in relation to the offence and was released pending further inquiries.
- 26 In addition, the Applicant is known to the Victim, and the Victim identifies the Applicant as one of his assailants.
- 27 The Applicant was charged with fighting in public causing fear (section 71 Criminal Code) and an act or omission to endanger life, health or safety or a person (section 304(1)(b) Criminal Code), which are consistent with a finding of disorderly and violent behaviour in the context of the Act, noting that there does not need to be a criminal conviction for the purposes of the Act.
- 28 These factors, together with the CCTV Footage which establish the movements of the Applicant whilst at the Premises, provide 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.

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

Whether the Applicant was on or in the vicinity of licensed premises

- 29 Pursuant to section 115AA(2), the relevant conduct must occur on licensed premises or in the vicinity of licensed premises.
- 30 It is not disputed by the Applicant that the Incident occurred on licensed premises or in the vicinity of licensed premises.
- 31 The Commission finds that the evidence has established that the Incident took place on licensed premises or in the vicinity of licensed premises.

Exercise of discretion

- 32 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.
- 33 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).
- 34 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

- 35 From the materials provided to the Commission, and in particular the matters outlined in the Respondent's submissions, summarised in paragraphs 12.4 – 12.6 above, the Commission is of the view that the Incident was serious in nature.

The risk of the Applicant behaving in a similar manner

- 36 The Applicant does not address the Incident at all in his application, nor does he express remorse, but rather, focuses on the impact the Barring Notice will have on his employment, family commitments, sporting activities and social life.
- 37 In particular, the Applicant does not acknowledge that his behaviour was inappropriate, nor does he express any remorse for that behaviour.
- 38 As submitted by the Respondent, it is not unlikely that the Applicant will encounter similar circumstances in the future, and the risk that the Applicant will engage in violent behaviour is particularly heightened in circumstances where the Applicant does not appear to have learnt from the incident and does not acknowledge that his actions were unacceptable.

- 39 Therefore the Commission believes that there is the possibility, if not the probability, 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.⁵
- 40 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.⁶
- 41 In the circumstances, the Barring Notice is justified to:
- 41.1. serve to assure members of the public who frequent licensed premises that they are in safe environments and can expect that they will not become victims of, or have to witness, violence, or antisocial or disorderly behaviour; and
 - 41.2. allow the applicant the opportunity for introspection regarding his behaviour and the serious consequences of his actions in relation to the Victim.
- 42 Noting that the purpose of the Act is to minimise the likelihood of harm on both the public and the Applicant, a Barring Notice should be directed at harm minimisation, not punishment. 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.
- 43 On the balance of probabilities, it appears likely that the Barring Notice would have a punitive effect of limiting the Applicant's ability to undertake his employment.
- 44 With regard to the Applicant's ability to socialise with friends and family and undertake sporting activities, the Commission does not find those arguments compelling, as there are other ways he can socialise with friends and family and undertake sporting activities other than on licensed premises.
- 45 The Barring Notice is affirmed but is varied pursuant to section 115AD(7) of the Act to permit the Applicant to enter licensed premises:
- 45.1. when such attendance is required in relation to the Applicant's employment; and
 - 45.2. provided that the Applicant is precluded from purchasing or consuming alcohol whilst attending such licensed premises.



SANDRA DI BARTOLOMEO
PRESIDING MEMBER

⁵ *KRB v Commissioner of Police* (LC 33/2011)

⁶ *SVS v Commissioner of Police* (LC19/2011)