

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: MDA
(represented by Mr Adrian Barbaro of Bar Legal)

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

Commission: Ms Pamela Hass (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: 30 December 2021

Date of Hearing: On Papers

Date of Determination: 3 May 2022

Determination: The Barring Notice is affirmed pursuant to section 115AD(7) of the *Liquor Control Act 1988*

Authorities referred to in determination:

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

BACKGROUND

1. On 26 September 2021 an Incident (“the Incident”) occurred at licensed premises, namely [REDACTED] (“the Premises”).
2. As a result of the Incident the Applicant was charged with the offence of Fighting in Public causing fear under section 71 of the Criminal Code (W.A.) and with Endangering life, health or safety of a person under section 304(1)(b) of the Criminal Code.
3. As a further result of such Incident the Commissioner of Police (“the Respondent”) issued a Barring Notice (“the Barring Notice”) dated 30 November 2021, pursuant to section 115AA(2) of the *Liquor Control Act 1988*, prohibiting the Applicant from entering specified licensed premises of the following classes in Western Australia for a period expiring 26 September 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 6 December 2021.
5. On 30 December 2021, the Applicant lodged an Application for Review of the Barring Notice under section 115AD of the Act. The Applicant has elected to have the review determined on the papers.
6. The Incident giving rise to the Barring Notice is referred to in the following documents:
 - a) The Application for Review dated 30 December 2021 (“the Application”).
 - b) The evidential material relied on by the Respondent:
 - i. Statement of Material Facts;
 - ii. W.A. Police Detected Incidents Report;
 - iii. Photographs of Applicant and Alleged Victim;
 - iv. Disclosable Court Outcomes for the Applicant – Criminal and Traffic;

- v. Footage of CCTV taken from inside the Premises and Statement dated 13 October 2021 of [REDACTED] manager/employee of the Premises who downloaded the footage.
 - vi. Body Camera Footage (Video); and
 - vii. Photographs from the Footage.
- c) The Respondent's Outline of Submissions dated 7 February 2022.
 - d) The Respondent's Outline of Response Submissions dated 15 March 2022.
 - e) Consultation notes – [REDACTED] dated 27 September 2021.

THE INCIDENT

7. The circumstances of the Incident are summarised in the Statement of Material Facts as follows:
- a) At about 3:50pm on Sunday 26 September 2021 the Victim [REDACTED] was at the Premises with friends.
 - b) The Applicant was also at the premises with [REDACTED] who was a former colleague of the Victim.
 - c) The Victim walked into the male toilets at the Premises and stood at the urinal with his back to the entrance.
 - d) The Victim was approached from behind by 2 men and struck on the back of the head with a glass, causing laceration. The glass broke and he was punched and kicked to the head, upper body and arms.
 - e) The Victim identified [REDACTED] as one of the assailants and detailed another male kicking and punching him, who had been in company with [REDACTED] in the bar.
 - f) The evidential material is partially consistent with the above summary.

SUBMISSION BY THE APPLICANT

8. The Applicant lists his grounds for Application as follows:
- a) The Applicant is represented by Mr. Barbaro of Bar Legal.
 - b) In the application for review dated 30 December 2021 the grounds for application are listed as:
 - 1. *The Barring Notice is invalid, harsh and ought to be quashed.*
 - 2. *There are no reasonable grounds to believe that the Applicant was violent, disorderly or engaged in indecent behaviour on licensed premises or in the vicinity of licensed premises.*
 - 3. *The undue impact on the Applicant's ability to work using licenced premises and participate in work functions and/or training programs held on licensed premises.*

- c) The grounds are further set out in the Applicant's Outline of Submissions dated 8 March 2022 as follows:
1. *The Inspector has stated there are reasonable grounds to believe that the Applicant contravened a written law, namely ss 304 and 71 of the WA Criminal Code.*
 2. *It is submitted that the objective evidence is not sufficient to provide reasonable grounds, considering that the standard is lower than for proof, for the belief that the Applicant contravened ss 304 and 71.*
 3. *██████████ is a busy venue which is visited by many members of the public. The audio-visual stills and footage provided show many individuals entering and exiting the toilets within the time frame that the ██████████ and the Applicant enter. It was merely by chance that the Applicant happened to visit the toilet prior to leaving at a time when ██████████ alleges he was assaulted.*
 4. *In ██████████ statement he alleges that a male walked past his group but could not provide a further description other than he was wearing sunglasses.*
 5. *██████████ then alleges that he was assaulted from behind by 2 males. He identifies ██████████ but admits that he cannot remember any details of another man. ██████████ fails to state whether the person referred to is the same person who he alleges is the other man.*
 6. *██████████ did not identify the Applicant or describe his appearance as an assailant to the alleged assault.*
 7. *The Applicant was not identified by any other evidence as being involved in any assault.*
 8. *The laceration to the Applicant's hand did not occur on 26 September 2021. The applicant would not have waited until the next day to seek treatment and the stills from the audio-visual do not show any injury to the Applicant's hands. It is submitted if the Applicant was bleeding such that he required hospital treatment, this would have been visible upon the Applicant exiting the premises.*
 9. *In addition, although the Applicant has a criminal record, he has no history of violent offending and is not a violent individual.*
 10. *The Inspector relies upon the Applicant being in the wrong place at the wrong time and thus, it is submitted that there were no reasonable grounds to believe that the Applicant had contravened a written law.*
 11. *Therefore, the Applicant submits that the Commission should quash the decision to issue the Barring Notice. Alternatively, the Applicant submits that the Commission should reduce the duration of the barring notice to the date of the hearing, or the restricted premises be limited to the type of class of license the ██████████ is.*
- d) Note reference to "The Inspector" indicates Inspector Cooper who, as a delegate of the Commissioner of Police, issued the Barring Notice.

SUBMISSIONS BY THE RESPONDENT

9. The Respondent submits that there are reasonable grounds to believe that the Applicant has been violent or contravened a provision of written law. In this context the Respondent refers to evidence provided to the Commission including:
- a. The Victim's statement which identifies ██████████ as one of his assailants.
 - b. The materials provided to the Commission in the Evidence Bundle, read together, are sufficient to provide reasonable grounds for believing the Applicant has engaged in violent conduct and contravened a provision of written law. In particular:
 - i. *The Victim's Statement identifies ██████████ as one of his assailants;*
 - ii. *the CCTV stills show the Applicant was at ██████████ at the time the victim was assaulted, including showing the Applicant with a glass in his hand and ██████████ entering the restroom area shortly after the victim, and departing ██████████ straight after exiting the restroom area;*
 - iii. *the CCTV timestamps indicate that the Applicant and ██████████ followed the victim into the restroom area at or around the time of the assault;*
 - iv. *the Victim's Statement and the Addendum Statement of ██████████ (Addendum Statement) indicate he was struck to the back of the head by a glass;*
 - v. *██████████ consultation notes from attending to the victim the day after the Incident 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 Evidence Bundle;*
 - vi. *the Statement of Material Facts indicates that the Applicant was treated at Sir Charles Gairdner Hospital for a laceration to his hand the day after the incident which is consistent with the Applicant holding the glass while entering the restrooms and holding the glass during the assault on the victim.*
 - c. The Respondent further expands its submissions as to the factors applicable to decide whether to quash, vary or affirm the Barring Notice as follows:
 - i. *In determining whether to quash, vary or affirm the Barring Notice, it is relevant to take into account the nature and circumstances of the Incident giving rise to the Barring Notice, the risk of the Applicant behaving in a similar manner in the future, and the need to protect the general public, the licensee and the Applicant himself.*

Nature and circumstances of the Incident giving rise to the Barring Notice
 - ii. *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. There are three factors that exacerbate the violent conduct in this case: the apparent premeditation of the assault, that the victim was not personally known to the Applicant, and the use of a glass in the assault.*

- iii. *In regards to the first factor, the apparent premeditation of the assault, the Victim's Statement indicates that approximately 45 minutes elapsed between him first noticing ██████████ and another male staring at the victim and his friends, and the assault on the victim. The (minutes and seconds) timestamps from the first (43:41) and fifth (53:09) CCTV stills indicate the Applicant and ██████████ walked past the area where the victim was sitting approximately 10 minutes before they followed the victim into the restroom area. The lapse of time between the parties encountering each other and the Incident suggests the assault was a planned and deliberate act, not a 'heat of the moment' altercation.*
- iv. *Regarding the second factor, the Victim's Statement (at [7], [10]) indicates that he used to work with ██████████, but the second assailant was not known to him. This suggests a willingness on the Applicant's part to engage in violent conduct against a stranger without any personal reason or provocation for doing so. In the absence of any evidence as to whether the Applicant was intoxicated at the time of the Incident, it is reasonable to infer that the Applicant either was sober and is prone to violence, or was intoxicated and is unable to make sound decisions while intoxicated.*
- v. *As to the third factor, the Applicant is seen in the CCTV stills and footage entering the restroom area with a glass in his right hand, and he was treated for a laceration to his hand the follow day. This suggests it was the Applicant who struck the victim to the back of his head with a glass. The act of striking someone to the head from behind is a violent one. In addition, a blow with a glass has the potential to cause more serious harm than a regular punch.*
- vi. *The victim reports that his injuries have healed well and he does not anticipate any long-term effects. However, 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

- vii. *In determining whether there is a risk that the Applicant might behave in a similar manner in the future, the Commission should have regard to the relevant personal characteristics of the Applicant.*
- viii. *The Respondent is not required to demonstrate, nor is the Commission required to be satisfied, that there was multiple, serial, habitual or repetitious conduct in order to issue a barring notice.*
- ix. *The Respondent repeats the submissions regarding the apparent premeditation of the assault and the fact that the victim was not personally known to the Applicant, and says that these factors suggest there is a real risk that the Applicant will behave in a similar manner again. In particular, the Applicant appears to be willing to engage in violent conduct against a stranger. 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 no reason to think that when faced with such a situation he would not act in the same way.

- d. The Respondent also further expands its submissions in the Respondent's Responsive Submissions dated 15 March 2022.

Respondent Conclusion

10. The Respondent concludes that the decision of the Commissioner should be affirmed as there are reasonable grounds for believing that the Applicant has engaged in violent behaviour on or in the vicinity of a licensed premises and that there is a real risk that the Applicant will behave in a similar manner again.

STATUTORY FRAMEWORK

11. The Commissioner of Police has the power to prohibit people from entering specified licensed premises, or a specified class of licensed premises, for a period of up to twelve months pursuant to section 115AA of the Act if the Commissioner believes on reasonable grounds that the person has, on licensed premises:
 - a) been violent or disorderly;
 - b) engaged in indecent behaviour; or
 - c) contravened a provision of any written law.
12. The Commissioner may delegate the power conferred by section 115AA of the Act to any member of the police force of or above the rank of Inspector pursuant section 115AB of the Act.
13. Section 115AD(3) of the Act 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.
14. 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 documents provided by the Applicant.
15. Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
16. Section 16 of the Act prescribes that the Commission:
 - a) may make its determination on the balance of probabilities [subsection (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 [subsection 7(a)]; and
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].

17. In 2010, the Act was amended “to give protection to the general public from people who have engaged in disorderly or offensive behaviour, who threaten people and who put people in dangerous situations” (Minister’s statement to the House, Western Australia, Parliamentary Debates, Legislative Assembly 19 October 2010, 7925).
18. The Minister further stated that the legislation gave the Police the power to issue barring notices to persons engaging in antisocial behaviour at licensed premises.
19. Section 5 of the Act sets out the objects of the Act. In subsection 5(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. Section 5(2) provides for various secondary objects including to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor.
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 them but is to be seen as a protective mechanism (*SVS v Commissioner of Police* (LC19/2011)).

DETERMINATION

21. The Commission, in considering an application under section 115AD, is to review the decision and determine whether to affirm, vary or quash a decision.
22. Therefore, the questions are whether:
 - a) There are reasonable grounds for believing 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 written law; and
 - b) The period and terms of the Barring Notice reflect the objects and purposes of the Act and are not punitive in nature.
23. It is for the Commission to determine whether, on the balance of probabilities, the Applicant was involved in the Incident to the degree that warrants the issue of a Barring Notice.
24. I have considered all the evidence before me and I am satisfied that there were reasonable grounds to believe that the Applicant was disorderly and violent on or in the vicinity of licensed premises.
25. I refer in particular to the Victim’s statement and to the Victim’s Addendum statement in which, taken together, the Victim positively identified [REDACTED] who was known to him and a former work colleague, and provides a description of a man who walked past his group at the Premises with [REDACTED]. This description is consistent with the Applicant. The Victim then further identifies one assailant as [REDACTED] and identifies the second assailant as the same man who had walked past his group earlier in the evening with [REDACTED].
26. At paragraph 5 and paragraph 11 of his Addendum statement he describes physical characteristics of the second assailant and states he recognised him as the same man who walked past his group.

27. I also refer to the CCTV footage and stills which show that the Applicant was at the premises with [REDACTED] at the time the Victim was assaulted. The CCTV timestamps indicate that the Applicant and [REDACTED] followed the Victim into the restroom area shortly after the Victim entered the area. The Applicant is shown with a glass in his hand.
28. The Victim indicated that he attended Karrinyup Medical Centre at 8am the following day.
29. It is noted that Consultation notes for [REDACTED] dated 27 September 2021 refer to multiple lacerations to the Victim's back of head, left side, over left side of head and left ear. It is also noted that the Victim had received first aid from staff at the Premises at the time.
30. The Statement of Material Facts indicates that the Applicant was treated at Sir Charles Gairdner Hospital for a laceration to his hand the day after the Incident.
31. Accordingly, taken together I am of the view that the evidence on the balance of probabilities provides a clear and proper basis for the Respondent's delegate to exercise the power conferred by section 115 of the Act and impose a Barring Notice.
32. Therefore, it is 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 and are not punitive in nature. The public interest must be balanced against the impact of the Barring Notice on the Applicant.
33. In determining whether to quash or vary the Barring Notice, it is relevant to take into account the nature and circumstances of the Incident giving rise to the Barring Notice; the risk of the Applicant behaving in a similar manner again; and the need to protect the general public, the licensee and the Applicant.
34. The nature of the Incident as outlined above was serious.
35. The evidence supports a conclusion that the Applicant was involved in an assault in the restroom of a licensed premises.
36. Whilst [REDACTED] was known to the Victim, there is no evidence that (apart from describing him) the Applicant was known to the Victim. There is further no evidence of provocation or evidence that the Applicant was intoxicated at the time. This tends to indicate a willingness on the part of the Applicant to engage in pre-meditated violence. I note the use of a glass which subsequently broke.
37. Given this conduct there must, on balance of probabilities, be a risk that the Applicant could behave in a similar manner in the future and that this risk can be minimised by the terms of the Barring Notice.
38. It is noted that section 16 of the Act prescribes that the Commission may make its decisions on the balance of probabilities and is not bound by the rules of evidence but is to act according to equity, good conscience, and the substantial merits of the case (ss7(b)).
39. Further 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.
40. In balancing the above, I note that 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, violent antisocial behaviour or disorderly conduct. On the afternoon in question that could not be said to be the case. From a viewing of the CCTV footage and body cam it can only be concluded that the public interest in attending a safe environment was severely compromised by a situation which resulted in injury to a patron, noting the seriousness of a seemingly unprovoked and premeditated action.

41. The Commission agrees with the decision of the Delegate and has concluded that there was a clear and proper basis for the delegate to exercise the power conferred under section 115AA of the Act and further that it is not appropriate to vary the length of the Barring Notice.
42. The Commission notes that the Applicant is still permitted to attend licensed premises solely for the purpose of performing duties relating to his work under section 115AA(7A). This excludes work functions and training. Whilst it is noted the inconvenience this inability to attend work functions and training may have on the Applicant, it does not affect his ability to enter the licensed premises solely for the purpose of work.
43. Accordingly, I have determined to affirm the decision of the delegate of the Commissioner of Police.



PAMELA HASS
PRESIDING MEMBER