LC 23/2020

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

Applicant:	[redacted] *(represented by Mr Jeremy Scudds of Porter Scudds Barristers & Solicitors)*
Respondent:	Commissioner of Police *(represented by Mr John Carroll and Mr Lachlan Geddes of State Solicitor's Office)*
Commission:	Ms Sarah Oliver (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:	24 June 2020
Date of Determination:	5 November 2020
Determination:	The decision under review is varied to include the words "(except for the sole purpose of competing in a bowling tournament)", immediately after the words "All club licences issued under section 48" in the Barring Notice issued on 20 May 2020.

Authorities referred to in Determination:

- *KRB v Commissioner of Police* (LC 33/2011)
- *LMC v Commissioner of Police* (LC 05/2012)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *GML v Commissioner of Police* (LC 58/2011)
- *MP v Commissioner of Police* (LC 55/2011)
- *AQ v Commissioner of Police* (LC 46/2011)
- *SVS v Commissioner of Police* (LC 19/2011)
- *YZ v Commissioner of Police* (LC 13/2013)

Background

1. At around 7pm on Tuesday, 18 February 2020, an incident occurred outside the [redacted] ("**the Club**"). The Club is a licensed premise for the purposes of the *Liquor Control Act 1988* ("**the Act**").

2. Following that incident, the applicant was charged with one offence of aggravated grievous bodily harm and one offence of aggravated assault, contrary to sections 297 and 313 of the *Criminal Code* (WA) respectively. The applicant has entered pleas of not guilty to these charges and they are currently pending before the Courts.

3. As a result of that incident, a delegate of the Commissioner of Police issued a barring notice under section 115AA(2) of the Act in respect of the applicant dated 20 May 2020 ("**the Barring Notice**"). The Barring Notice was served on the applicant on 12 June 2020.

4. The Commission of Police, or his delegate (pursuant to section 115AB), has the power to ban people from licensed premises, pursuant to section 115AA(2) of the Act, if he believes on reasonable grounds that the person has, on licensed premises "or in the vicinity of licensed premises":

   (a) been violent or disorderly; or
   (b) engaged in indecent behaviour; or
   (c) contravened a provision of any written law.

5. A single incident can be sufficient to found a barring notice.

6. The underlying purpose of a barring notice is not to penalise an individual but to act as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; *LMC v Commissioner of Police* (LC 05/2012) at [14]; *GML v Commissioner of Police* (LC 58/2011) at [20]).

7. The Barring Notice issued in this case (which remains in force until 19 May 2021) prohibits the applicant from entering licensed premises in Western Australia of the following licence classes:

   (a) All hotel licences issued under section 41 of the Act (including hotel, hotel restricted, tavern and tavern restricted licences);
   (b) All small bar licences issued under section 41A;
   (c) All nightclub licences issued under section 42;
   (d) Casino licence issued 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 of the Act and regulation 9A of the *Liquor Control Regulations 1989* (WA).

Application for Review

8. On 24 June 2020, the applicant applied to the Commission for review of the decision to issue the Barring Notice, pursuant to section 115AD(3) of the Act. That application was filed within the time specified in section 115AD(4).

9. The applicant has now elected to have the review determined on the papers, and the matter was referred to me on 14 September 2020 for that purpose.

10. The primary issue for determination by the Commission on review, on the balance of probabilities (section 16(1)(b)(ii) of the Act), is whether there are reasonable grounds for believing that the barred person has been violent, disorderly or engaged in indecent behaviour on licensed premises or in the vicinity of licensed premises (*YZ v Commissioner of Police* (LC 13/2013) at [15]). In considering that issue, the relevant considerations include the nature and circumstances of the incident/s giving rise to the issue of the barring notice, the risk of the applicant behaving in a similar manner and the need to protect the general public, the licensee and the applicant themselves (*KRB v Commissioner of Police* (LC 33/2011) at [34]; *AQ v Commissioner of Police* (LC 46/2011) at [34]; *MP v Commissioner of Police* (LC 55/2011) at [21]; *GML v Commissioner of Police* (LC 58/2011) at [19]; *YZ v Commissioner of Police* (LC 13/2013) at [19]).

11. On review, the Commission can affirm, vary or quash the decision under review (section 115AD(3)). The Commission is to undertake full review of the materials before it and to make its own determination on the basis of those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224 at [54] per Martin CJ, who was considering section 25(4) of the Act, which also includes a power to affirm, vary or quash a decision). The discretion to affirm, vary or quash a barring notice must be exercised consistently with the objects and purposes of the Act.

12. In conducting a review of the decision in this case, the Commission can only have regard to material that was before the delegate and "any information or document provided by the applicant" (section 115AD(6)). In the present case, the applicant has provided the Commission with one further document that was not before the delegate, being the transcript of the applicant's interview with the Police conducted on 26 February 2020.

13. In the circumstances, I have had regard to the following material (pursuant to section 115AAD(6) of the Act):

    (a) the material that was before the delegate of the Commissioner of Police when making the decision, consisting of:
        i. brief jacket for brief number 1994628-1;
        ii. statement of material facts for brief number 1994628-1;
        iii. brief jacket for brief number 1994628-2;
        iv. statement of material facts for brief number 1994628-2;
        v. incident report prepared by Mr Johnston;
        vi. CAD incident brief report LWP20021800138322;
        vii. Incident report 180220 2110 14120 (redacted);
        viii. a witness statement by the complainant, Mr Fairclough;
        ix. authority to release medical information regarding the complainant;
        x. four photographs of the complainant's injuries;
        xi. Global Diagnostics CT Scan report;
        xii. a report by Dr Cooper;
        xiii. a witness statement by Ms Elward;
        xiv. a witness statement by Mr Johnston;
        xv. a witness statement by Ms Brown;
        xvi. a witness statement by Detective Senior Constable Hawley;
        xvii. a photograph of the applicant; and
        xviii. the applicant's criminal history as at 20 February 2019.

    (b) the Barring Notice;

(c) the application for review filed by the applicant, the transcript of the applicant's interview with Police (which was sent to the Commission by the applicant's lawyer on 12 August 2020), and the outline of submissions filed on behalf of the applicant (received 13 August 2020); and

(d) the outline of submissions filed by the respondent (dated 3 September 2020).

14. I note that, in relation to the material that was before the delegate, the delegate indicated that he had before him at the time he made his decision, "Other: CCTV stills". By letter dated 3 September 2020, I have been advised by the respondent's lawyer that the reference to "Other: CCTV stills" is an error and that "no CCTV was before the delegate". Therefore, in conducting this review, I have not had access to any CCTV footage of the relevant incident.

Submissions of the Parties

15. The applicant submits that the Barring Notice is invalid and ought to be quashed.

16. The applicant raises, as a preliminary point, an argument that the Barring Notice is invalid as his conduct did not occur on a licensed premises, and therefore the Commissioner of Police had no jurisdiction to issue a Barring Notice. This submission is based on a misreading of the legislation. As set out at [4] above, the relevant conduct can occur at a licensed premise "or in the vicinity of licensed premises". In the present case, the incident occurred on a street that borders the Club, and immediately followed an incident at the Club. In the circumstances, I am satisfied that the relevant conduct occurred "in the vicinity of licensed premises", such that it could be the subject of a barring notice, assuming the other relevant requirements of the Act were met (which I will consider further below).

17. The applicant submits that there are no reasonable grounds to believe that the applicant's behaviour on the day in question was violent such as to warrant a barring notice, or even disorderly or indecent. It is submitted that he was at all material times a victim of abuse and violent / inappropriate actions committed against him. It is said that, in hitting the complainant once to the face, the applicant was acting in self-defence and not unlawfully.

18. The applicant argues that, at a criminal trial, the prosecution will bear the onus of proving beyond reasonable doubt that the applicant was not acting in self-defence. He is presumed to be innocent. It is argued that his actions were lawful and that he did not engage in any illegal violent or disorderly or indecent behaviour, other than to lawfully defend himself.

19. It is submitted that there is no need to protect the public from the applicant, because he has a limited criminal record. It is submitted that, by contrast, the complainants are known to Police, and that the public need protection from them rather that the applicant. It is said that this is "one clear case where unprovoked violence was used against a man going about his lawful business", and that it is not in the public interest that a person be punished for being the recipient of abusive/violent behaviour.

20. Further, whilst the applicant seeks review of the decision to issue the Barring Notice *in toto* (assuming it is validly issued), he is concerned in particular with the breadth of the notice. Relevantly, in his application for review (which has not been relevantly amended), he seeks a variation to the Barring Notice such as to allow him to enter the Club and other licensed bowling clubs. It is said in his application:

> *[redacted] has qualified for the [redacted] to try and get into the [redacted] lawn bowls side for the [redacted] for lawn bowls. We seek to have the Notice varied to allow him to bowl but not drink on any lawn bowl premises.*

21. The respondent submits that the Commission should affirm the Barring Notice because there is clear evidence, and therefore reasonable grounds, for finding that the applicant has been violent or disorderly, and engaged in indecent behaviour, and in light of his conduct, banning the applicant from licensed premises under the terms of the Barring Notice is reasonable and appropriate in all the circumstances, in order to provide a level of protection to the community.

22. The respondent further submits that the discretion to affirm, vary or quash the Barring Notice must be exercised consistently with the objects and purposes of the Act, citing *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 at 715 and *Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758. It is said that the primary object of the Act in section 5(1) that is relevant to this case is in paragraph (b), *"to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor"*; and the relevant secondary object in section 5(2) is in paragraph (d), *"to provide adequate controls over, and over the person directly or indirectly involved in, the sale, disposal, and consumption of liquor"*.

23. The respondent submits that the applicant's interview with the Police in relation to the incident does not assist his case, as his account is in conflict with other evidence. For example, it is said that the applicant is unable to explain in the interview the conflict between his version (that the incident occurred near his parked car in the car park of the Club) and CCTV footage and witness statements which prove that the incident occurred on the roadside after he had driven up to the complainant and disembarked from his vehicle. It is further said that the applicant cannot explain in the interview the CCTV footage which refutes his claims that the complainant's child had been at the Club earlier in the day attempting to steal from members.

24. The respondent also submits that the applicant's admission in the interview of punching the complainant once to the face is irreconcilable with the medical evidence establishing the extent of the complainant's injuries, as well as witness accounts of him stomping on the complainant's head. I observe, however, that the medical evidence merely establishes the injuries sustained and does not give any opinion as to the mechanism necessary to cause the injuries. In those circumstances, little weight can be given to the respondent's submission that the injuries are irreconcilable with a one-punch type injury.

25. The respondent submits that the evidence before the Commission clearly demonstrates that the applicant behaved violently and disorderly on, and in the vicinity of, licensed premises "when he attacked the victims in a sustained assault".

26. Further, the respondent submits that the applicant has made admissions in his interview as to other behaviours that would each answer the description of "indecent behaviour" in section 115AA(2)(b). It is said each of the following incidents would provide an independent basis to impose the Barring Notice on the applicant:

    (a) The applicant admitted flicking the bra straps of women at a licensed venue on two separate occasions, including one at the Mandurah Bowls Club (interview at page 76);

    (b) The applicant admitted to being suspended from Osborne Park Bowls Club for exposing his buttocks (interview at page 77); and

    (c) The applicant admitted to being involved in an 'altercation' at the Club on 4 January 2020, which involved him throwing his glass and having to be restrained. As he left the Club, he punched a support column.

27. In relation to the variation sought in the application for review, as an alternative, the respondent submits that this variation is no longer sought (at [5]). Whilst it is true that the applicant's submissions do not address this variation request, there is nothing in the material before me to indicate that the applicant has withdrawn that aspect of his application for review.

Consideration

28. Having considered all of the materials before the Commission, it is clear that there are significant inconsistencies in the version of events given by the complainant [redacted] and the witness [redacted], compared to the version given by the applicant. In the circumstances, I have given greater weight to the evidence of independent witnesses ([redacted]) over the versions given by [redacted] and the applicant.

29. I am satisfied on the balance of probabilities of the following salient matters:

    (a) As at 18 February 2020, the applicant was a member of the Club.

    (b) The Club is located on [redacted]. The Club is bordered by [redacted].

    (c) Prior to 18 February 2020, there had been a number of incidents at the Club involving the theft of members' property.

    (d) The applicant was present at the Club on 18 February 2020 and, during the course of the afternoon, he played bowls, Afterwards, he had drinks at the Club's bar. He had approximately five to six standard drinks at the bar before leaving at around 7pm.

    (e) Around 45 minutes to an hour before the applicant left the Club, there was an incident involving a young girl in the grounds of the Club, who the applicant confronted and accused of stealing items. I am satisfied that this girl is not connected with [redacted] and [redacted].

    (f) Around the time the applicant left the Club, [redacted], [redacted] and their six year old daughter were on, or very close to, the grounds of the Club. Elward was or had immediately beforehand been on the grounds of the Club collecting cigarette butts.

    (g) The applicant believed that [redacted], [redacted] and their daughter had been attempting to steal items from the Club.

    (h) The applicant stopped his ute near [redacted] and [redacted], who at that time were close to but walking away from the Club in [redacted] Street. There was a verbal altercation between the applicant, [redacted] and [redacted] before the applicant exited his vehicle.

    (i) A further heated verbal exchange then occurred, during which the applicant accused [redacted] and [redacted] of stealing and of being junkies. The applicant demanded to be shown the contents of a bag that [redacted] was carrying.

    (j) During this exchange, [redacted] became aggressive towards the applicant, and the two were pushing each other.

    (k) A fight broke out between the applicant, [redacted] and [redacted]. During the fight, the applicant punched [redacted] to the face. As a result of that punch to the face, [redacted] fell to the ground and lost consciousness. Whilst [redacted] was on the ground, the applicant returned to his ute and drove away.

    (l) [redacted] was able to get back up and he, [redacted] and the child walked away from the Club in the direction of [redacted] Street.

    (m) As a result of this incident, [redacted] suffered a right sided zygomatico-maxillary complex fracture, being multiple facial bone fractures involving the right maxillary sinus. This injury is of such a nature as to cause or be likely to cause permanent injury to

health. The evidence before me does not allow me to make a finding as to whether the injury suffered by the applicant is consistent or otherwise with the applicant having only punched [redacted] once to the face.

30. On the material before me, I am not able to make a finding as to whether, at the time the applicant punched [redacted] to the face, he was acting in self-defence. What is clear is that at the time he approached [redacted], [redacted] and their child, the applicant was angry and believed they had been trying to steal items from the Club. He was acting as a vigilante.

31. Based on the above findings, I am satisfied that the applicant behaved in a violent or disorderly manner whilst in the vicinity of the Club, being a licensed premises, on 18 February 2020. I do not consider that I need to be satisfied that his violent or disorderly behaviour was unlawful. I am of this view because violent and disorderly behaviour is a separate ground for consideration (under section 115AA(2)(a) of the Act) from the ground that the person has "contravened a provision of any written law" in section 115AA(2)(c) of the Act.

32. I am satisfied that the applicant's behaviour was both violent and disorderly during the incident. The applicant approached [redacted] and [redacted] in an angry state after having consumed around five to six drinks. He was acting in a vigilante fashion, accusing them of stealing or attempting to steal from Club members. Objective evidence establishes that they were not stealing from the Club, yet the applicant drove up to [redacted] and [redacted], got out of his vehicle and confronted them. He did this in front of a young child.

33. The applicant was younger and of a bigger build than [redacted]. Even accepting his version that he only punched [redacted] once to the face, the force of the applicant's punch was such as to cause multiple fractures to [redacted]'s facial bones. He also admitted in his interview that he kicked at [redacted]. These actions were violent and disorderly.

34. I have also taken into account the fact that the applicant has previously behaved violently and disorderly at the Club. Whilst I have not considered the matters referred to in [26] above in determining whether there are grounds for exercising the power under section 115AA, the matter referred to in [26](c) is relevant to whether the applicant has a tendency to act violently or disorderly, particularly when drinking. There is evidence before me that one month prior to the relevant incident, the applicant became involved in an 'altercation' at the Club, which involved him throwing his glass and having to be restrained. As he left the Club, he punched a support column.

35. There are also other indications before me that the applicant may have anger management issues. Before me is his criminal history, which includes convictions in 2019 for aggravated assault occasioning bodily harm, in 2014 for aggravated assault, and in 2011, 2005 and 2004 for assault. He also has multiple recent convictions for breaching violence restraining orders and breaching Police orders. I consider that his record gives rise to an inference that he has a propensity for violent and disorderly behaviour, including whilst drinking.

36. Having regard to his propensity for violent and disorderly behaviour, I am satisfied on the balance of probabilities that when he approached [redacted], [redacted] and their daughter on the day in question, he was angry and his subsequent behaviour was violent and disorderly.

37. Further, I am satisfied that the relevant conduct occurred in the vicinity of licensed premises, being the Club. The incident occurred on a street that borders the Club, and immediately followed [redacted]'s presence on the grounds of the Club. In the circumstances, I am satisfied that the relevant conduct occurred "in the vicinity of licensed premises" and therefore there is jurisdiction to consider the issuing of a barring notice.

38. Having regard to all of the above matters, I am satisfied that there were reasonable grounds and a proper basis for the delegate of the Commissioner of Police to exercise the power

conferred by section 115AA of the Act. I am satisfied that there remain reasonable grounds to exercise the discretion in section 115AA to issue the Barring Notice.

39. Turning then to the applicant's submissions in relation to the variation of the Barring Notice to allow him to attend the Club and other licensed bowling clubs. The applicant has qualified for the [redacted] and he may be able to get into the [redacted] lawn bowls side for the [redacted]. He therefore seeks to have the Barring Notice varied to allow him to bowl but not drink at licensed lawn bowling premises. In considering this application:

    (a) I have had regard to the fact that, whilst a barring notice may have a detrimental effect on the recipient, it is not meant to be seen as a punishment imposed upon the recipient, but rather is to be seen as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; LMC *v Commissioner of Police* (LC 05/2012) at [14]; and *GML v Commissioner of Police* (LC 58/2011) at [20]).

    (b) I have considered the primary and secondary objects of the Act and considered whether the period and terms of the Barring Notice reflect the objects and purpose of the Act and are not punitive in nature.

40. The actions of the applicant during the incident at the Club are very serious in nature. He was involved in an altercation with two others, after he had consumed five to six drinks at the Club. As a result of the applicant's actions, the complainant suffered significant injuries. This incident is the very type of incident that the objects of the Act are seeking to avoid: see section 5(1)(b), *"to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor"*.

41. The applicant has a criminal record, which include convictions for offending that involved violence. There is also evidence of at least one other incident at the Club where the applicant has behaved in a violent and disorderly manner. These matters give rise to an inference that the applicant has a tendency to become disruptive and disorderly in his behaviour when drinking. The applicant has not sought to put any material before the Commission to indicate that he has taken any steps to address such behaviour, or other factors that may have led to such disruptive behaviours in the past.

42. In the circumstances, I consider there is a risk that the applicant may engage in similar violent or disorderly behaviour in a licensed premise in the future. I note, in any event, that even where the risk of the applicant reoffending is low, such risk may be further minimised by the terms of the barring notice (*KRB v Commissioner of Police* (LC 33/2011)).

43. The terms of the Barring Notice restrict the licensed venues the applicant can attend. He only complains, specifically, of the fact that he is prevented from attending licensed bowling clubs. He has a legitimate purpose for attending licensed bowling clubs that is not connected with the consumption of liquor. Whilst, the Barring Notice is only for a limited period, and will expire on 19 May 2021, the applicant says that he needs to be able to attend licensed bowls clubs to compete in the [redacted], to assist in his possible inclusion in the [redacted].

44. I accept that the Barring Notice is having or has the potential to have a detrimental effect on the applicant. However, I consider that any punitive effect of the Barring Notice is relatively low when balanced with the protection of the public from alcohol related harm, whether as a victim of such harm or a witness to same. The users of licensed premises are entitled to feel safe in those venues without being subjected to the type of behaviour in which the applicant engaged. There is a strong public interest in those who engage in violent and disorderly behaviour being barred from licensed premises.

45. Having said that, in my view, the variation sought by the applicant is not inconsistent with that public interest, or with the object of the Act of minimising harm or ill-health caused to people or any group of people due to the use of liquor. That is because the variation sought by the applicant is not such as to allow him to drink liquor at a licensed premise. Rather the variation seeks to clarify, insofar as it might be necessary, that the applicant can attend a licensed bowling club for the sole purposes of playing bowls. The Barring Notice would still have the effect of barring him from consuming liquor on those premises.

46. In all the circumstances, I consider the requested variation to the Barring Notice to be justified and appropriate.

47. In the circumstances, I vary the terms of the Barring Notice to include the following words, "(except for the sole purpose of competing in a bowling tournament)", immediately after the words "All club licences issued under section 48". For the purposes of being abundantly clear, this variation does not allow the applicant to attend the bar at any bowling club, even if he is not purchasing liquor. He can only attend a licensed bowling club to compete in a bowling tournament, not for social or recreational purposes.

SARAH OLIVER
PRESIDING MEMBER