

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr CTF

Respondent: Commissioner of Police
*(represented by Ms Caroline Chapman of State
Solicitor's Office)*

Commission: Mr Michael Egan (Presiding Member)

Matter: Application seeking review of a barring notice
issued pursuant to section 115AA(2) of the *Liquor
Control Act 1988*

**Date of lodgement of
Application:** 11 April 2016

**Date of Determination:
(on papers)** 19 May 2016

Determination: The application is dismissed.

Review of barring notice

- 1 The applicant has applied, pursuant to section 115AD of the *Liquor Control Act 1988* ("the Act"), for a review of a decision of the Commissioner of Police ("the Police") to issue a barring notice under section 115AA(2) of the Act prohibiting the applicant from entering any licensed premises in Western Australia other than premises operating under a liquor store licence, producer's licence or wholesaler's licence.
- 2 The barring notice, dated 4 March 2016 and effective until 2 March 2017, was issued in response to an incident that occurred on 22 November 2015 at licensed premises, specifically, a restaurant of which the applicant was co-owner and approved manager.
- 3 As a result of the incident, the applicant was charged with indecent assault pursuant to section 323 of the *Criminal Code (WA)*. The matter has yet to be determined by the court.
- 4 The applicant has elected to have the review determined on the papers.

Submissions by the applicant

- 5 The applicant has sought the review of the barring notice on the basis he has not been convicted of any offence and he completely denies the allegation made against him.
- 6 The applicant views the barring notice as a very harsh punishment, especially given he has not been convicted on any offence.
- 7 According to the applicant, the barring notice has been very upsetting, stressful and extremely limiting when trying to enjoy a family day out.
- 8 The barring notice was served on 17 March 2016, two days after the applicant attended court (presumably a preliminary hearing pending the final determination of the charge against him) where he was informed he was not subject to any conditions.
- 9 The applicant also claims that when served with the barring notice he was told the intention of barring notices is to keep convicted offenders away from licensed premises, offenders such as those convicted of assault or with a history of violent behaviour, in the interests of public safety.
- 10 The applicant submits that not only has he not been convicted of any offence, but also he is not a violent person, repeat offender or a threat to anyone's safety.
- 11 The applicant describes himself as:
 - a) a former licensee with eight years experience;
 - b) a respected employer and restaurateur;

- c) an active member of his local community and contributor to local charities; and
 - d) a person with 20 years experience of working in the hospitality industry, both in Australia and the UK, who has a clean record and is a respected member of the community.
- 12 Other than the applicant's written submissions, no other evidence has been submitted in support of the application.

Submissions on behalf of the Commissioner of Police

- 13 The circumstances upon which the decision of the Police to issue the barring notice is based are contained within a Police Statement of Material Facts, a Police Incident Report, a statement from the person alleged to have been indecently assaulted ("the complainant") and a statement from a witness present when the indecent assault is alleged to have occurred ("the witness").
- 14 The applicant is alleged to have indecently assaulted the complainant at the restaurant of which the applicant was the approved manager on the evening of 22 November 2015, when the applicant and co-owner of the premises were taking a group photograph of the complainant, the witness, and another person, all three of whom were performing, in their capacity as professional performers, at the restaurant that evening. The photograph was being taken in the performers' dressing room.
- 15 The applicant is alleged by the complainant to have been intoxicated, to have grabbed the crutch of the complainant's co-actor (who brushed the applicant away) and to have grabbed and squeezed the testicles and genitalia of the complainant over his clothing for a couple of seconds.
- 16 The complainant further alleges that the applicant approached and pursued him later in the evening during the interval of the performance and called him a "wanker" several times, as a consequence of which the complainant locked himself in the performers' dressing room.
- 17 Following a telephone call by the complainant to his employer, the performance was cancelled and the complainant attended the police station to make a complaint of indecent assault.
- 18 The submission on behalf of the Police also sets out in some considerable detail the law governing the issue by the Police of barring notices, and the review by the Liquor Commission ("the Commission") of those decisions.
- 19 The Police submit:
- a) there is evidence to establish that the applicant has, on licensed premises, engaged in indecent behaviour, for which the applicant provides no explanation or alternative version of events;
 - b) there is no reason to think that the applicant may not behave in a similarly indecent manner on future occasions when he enters licensed premises;

- c) the barring notice reinforces community expectations that indecent behaviour is not acceptable and will reduce the likelihood of harm to the general public; and
 - d) the 12 month period of the barring notice will provide the applicant with an opportunity to reassess his actions and the nature of his interactions with alcohol.
- 20 In addition, the Police point out that the barring notice was not issued as a consequence of the applicant being charged with an offence, but as a consequence of the applicant's behaviour/conduct.

Determination

- 21 Section 115AA(2) of the Act empowers the Commissioner of Police to give a notice to a person prohibiting that person from entering specified licensed premises if the Commissioner believes, on reasonable grounds, that the person has, on licensed premises, been violent or disorderly, engaged in indecent behaviour, or contravened a provision of any written law.
- 22 The Commissioner may delegate this power to a member of the Police Force of, or above the rank of Inspector.
- 23 In this case, the barring notice has been issued by Detective Superintendent J. M. Migro, on behalf of the Commissioner of Police.
- 24 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.
- 25 When conducting a review, the Commission may have regard to the material that was before the Police and any information provided by the applicant (section 115AD(6) of the Act).
- 26 Section 115AD (7) provides that on a review, the Commission may affirm, vary or quash the decision the subject of the review.
- 27 By virtue of section 16 of the Act, the Commission may make its determination on the balance of probabilities.
- 28 As submitted on behalf of the Police and consistent with previous decisions of the Commission when considering an application for a review of a barring notice, the Commission is to conduct a review of the decision of the Police on its merits, effectively by way of a rehearing, and, in doing so, is to have regard to the objects and purpose of the Act.
- 29 Two of the primary objects of the Act in section 5(1) are to minimise harm and ill-health caused to people or any group of people due to the use of liquor and to regulate the sale, consumption and supply of liquor.
- 30 Further, in introducing legislation to give effect to barring notices in October 2010, the responsible Minister stated: *"the whole idea of the legislation is to*

protect the general public, the licensee.... and also the person". (WA Parliamentary Debates Legislative Assembly 19 October 2010)

- 31 To the extent that there may be any doubt about the intent and purpose of section 115AA in the context of the objects and purpose of the Act as a whole, it is well established, by previous decisions of the Commission, that the purpose of a barring notice is not to impose a penalty, but is a mechanism to protect the general public, a licensee or, indeed, the subject of the barring notice from his or her own actions (for example, see *Shane Van Styn v Commissioner of Police LC19/2011*).
- 32 Section 115AA(2) does not specify or require that the person to whom a barring notice may be issued must have been charged or convicted of an offence. Nor does the section require that the person to whom the barring notice is issued must have engaged in habitual or repetitious behaviour of the type specified in the section.
- 33 The barring notice issued to the applicant specifies that the Police believe, on reasonable grounds, that the applicant has "contravened a provision of written law on licensed premises".
- 34 Submissions made on behalf of the Police contend that on the basis of the evidence before the Police a "reasonable person would have been inclined to, and not reject, the proposition that the applicant has, on licensed premises, engaged in indecent behaviour".
- 35 Without in any way prejudging the outcome of the charge levelled against the applicant, the Commission must proceed on the basis of the information submitted with the application.
- 36 On the basis of this information it appears:
 - a) the complainant and his fellow performers were unknown to the applicant on the night of the alleged incident, at least in any personal capacity – they were professional actors engaged to perform at the applicant's premises;
 - b) according to the statement of both the complainant and the witness, the circumstances and actions of the applicant have been clearly described and the statements appear consistent – whilst the witness does not state she saw the actual alleged assault, she describes the circumstances and reactions of the complainant and their co-actor which corroborate the complainant's statement;
 - c) as described in the complainant's statement, the behaviour of the applicant amounts to indecent behaviour;
 - d) the incident resulted in the cancellation of the performance, if not entirely, at least partly, because of the impact of the alleged behaviour of the applicant on the complainant; and
 - e) the complainant, that same evening, made a complaint to the police.

- 37 Whilst the applicant may have some alternative explanation of the circumstances and of his behaviour, the Commission does not, as part of this review, have the benefit of such an explanation.
- 38 Without any such evidence, the Commission has determined this review on the basis of the alleged behaviour of the applicant.
- 39 Although the description of the behaviour in the barring notice and in submissions made by the Police differ slightly, the alleged behaviour is clearly indecent and falls within the description in section 115AA(2).
- 40 The power entrusted in the Commissioner of Police by way of section 115AA(2) is discretionary and not all behaviours that may be described in terms of subsections (a), (b) and (c) of the section would necessarily persuade the Commissioner to exercise the power entrusted in him.
- 41 In this respect, it is relevant to consider whether the objects and purpose of the Act are served by the terms of the barring notice issued to the applicant.
- 42 An important consideration is whether there is a degree of probability or possibility that the applicant will behave in a similar manner in the future on licensed premises and, if so, if there is a need to protect the general public or the applicant himself.
- 43 Having regard to the personal characteristics and history of the applicant, as described by the applicant himself in his submission, the alleged behaviour appears out of character and, if it occurred, an inexplicable aberration.
- 44 Unfortunately, self-serving statements unsubstantiated or uncorroborated by independent evidence carry little weight.
- 45 On the basis of the information before the Commission, the applicant, for no apparent reason (and it is difficult to comprehend any reason) indecently assaulted a person unknown to him in any personal capacity on licensed premises when intoxicated.
- 46 Clearly, in these circumstances, the risk of a recurrence of the behaviour on licensed premises when the applicant is consuming alcohol could not be ruled out.
- 47 The community has a right to expect that indecent behaviour will not be tolerated, and the integrity of the liquor, hospitality and tourism industries is dependent upon indecent behaviour not occurring, on licensed premises.
- 48 The barring notice is effectively for the maximum period of 12 months permitted under section 115AA (subsection (5)). Such a period would be expected for cases involving serious behaviour as a consequence of which members of the public may be at risk.
- 49 Any barring notice is likely to have a salutary effect and the period of the barring notice under review may be viewed as at the top end of the scale for the alleged behaviour.

50 However, without some alternative version of the circumstances of the alleged behaviour, some explanation of the applicant's alleged behaviour, some indication supported by evidence that the behaviour is unlikely to occur again, or some other mitigating circumstances, the Commission is not satisfied there are sufficient grounds to vary the barring notice.

51 The application is, therefore, dismissed.



MICHAEL EGAN
PRESIDING MEMBER