

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: JW
(represented by Mr Ben Jackson of Holborn Lenhoff
Massey)

Respondent: Commissioner of Police
(represented by Ms Angelyn Seen of State Solicitor's
Office)

Commission: Ms Elanor Rowe (Presiding Member)

Matter: Application seeking review of a barring notice pursuant to
section 115AD of the *Liquor Control Act 1988*.

Date of Hearing: On papers

Date of Determination: 18 May 2020

Determination:

1. The barring notice issued by the Commissioner of Police to JW on 4 January 2020 is varied to permit the Applicant to enter the licensed areas located at:
[REDACTED]
[REDACTED]
2. JW is precluded from consuming alcohol at both venues as permitted in Order 1.
3. The remainder of the Barring Notice is to remain.

Authorities referred to in determination:

- *Van Styn v Commissioner of Police* (LC19/2011)
- *Batty v Commissioner of Police* (LC 33/2011)
- *Quartermaine v Commissioner of Police* (LC 46/2011)
- *Piscopo v Commissioner of Police* (LC 55/2011)
- *Lewer v Commissioner of Police* (LC 58/2011)

Background

- 1 On [REDACTED], an incident ("the Incident") occurred at licensed premises, namely [REDACTED] ("the Venue") involving the Applicant (aged [REDACTED] at the time).
- 2 As a result of such Incident, the Applicant was charged with assault occasioning bodily harm, contrary to section 317(1) of the *Criminal Code* ("Charge").
- 3 At the time of the Application, a plea had not been entered by the Applicant to the Charge.
- 4 As a further result of the Incident, the Commissioner of Police ("the Respondent") issued a barring notice ("Barring Notice") pursuant to section 115AA(2) of the *Liquor Control Act 1988* ("the Act") prohibiting the Applicant from entering specified licensed premises in Western Australia for a period of six months, namely:
 - 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 licences 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 licenses issued under section 59; and
 - k. all special facility licences issued under section 46 and regulation 9A of the *Liquor Control Regulations 1989*.
- 5 The Barring Notice was served on the Applicant on 4 January 2020 and will expire on 30 June 2020.
- 6 On 30 January 2020, the Applicant lodged an Application for Review in respect of the Barring Notice pursuant to section 115AD of the Act. The Applicant has elected to have the review determined on the papers.
- 7 The Incident which gave rise to the Barring Notice is referred to in the following documents:
 - a. The Application for Review ("Application");
 - b. The material relied upon by the Respondent's delegate when the Barring Notice was issued:
 - i. Brief Jacket [REDACTED]
 - ii. Statement of Material Facts;
 - iii. WA Police Incident Report;
 - iv. Victim Statement dated 12 August 2019

- v. WA Police Authority to Release Medical Information [REDACTED];
 - vi. Photograph showing the Victim's injuries;
 - vii. CCTV footage and a set of still images from the footage; and
 - viii. Copy of the Applicant's Court Outcomes – Criminal and Traffic.
- c. The Applicant's further submissions dated 26 February 2020; and
 - d. The Respondent's outline of submissions dated 27 February 2020.

The Incident

- 8 The circumstances of the Incident are summarised in the Statement of Material Facts as follows:
- a. At about 12.40am on Sunday 11 August 2019, the Applicant was standing in the line to the nightclub and was standing in front of the Victims group.
 - b. At about 12.40am the Applicant and the Victim's group provided their details to nightclub staff before entering the nightclub separately and heading to different areas of the club.
 - c. At about 1.15am, the Applicant was standing on the upper level outdoor terrace of the nightclub and after a few minutes the Victim arrived in the same area.
 - d. A friendly natured conversation took place, and then without warning, the Applicant head butted the Victim, with a forceful motion causing the Victim's nose to bleed and to experience pain.
 - e. The Victim attended [REDACTED] soon after and was advised he had a fractured nose requiring an operation. The operation was carried out on 22 August 2019 at [REDACTED] where the victim incurred [REDACTED] out of pocket expenses.
- 9 The evidential material (including the incident report and the CCTV material) is largely consistent with the summary as set out above.

Submissions by the Applicant

- 10 The Applicant submits that there is no utility or purpose in the Barring Notice. Furthermore, or alternatively, it is submitted that the Barring Notice is too broad and should be limited to the Applicant being prohibited from attending nightclubs (which is the type of venue where this incident is alleged to have occurred).

Personal Circumstances of the Applicant

- a. At the time of the Application, the Applicant was [REDACTED] years of age and had no criminal record.
- b. At school he was highly involved in extra-curricular activities such as [REDACTED].

- He went on to study a [REDACTED] course at the [REDACTED] [REDACTED] and continued to be involved in playing and coaching [REDACTED] [REDACTED]
- d. While at university he also began working as an [REDACTED] [REDACTED] where he continues to work and has gained a reputation as a diligent, hardworking and compassionate member of the team.
- e. After obtaining his [REDACTED] the Applicant began studying a [REDACTED]. While he was there he volunteered to work with a number of charitable organisations.
- f. On 14 January 2020, the Applicant began employment with a [REDACTED] as a [REDACTED]. He also continues to work as a volunteer.
- g. The Applicant attached a number of character references to the Application and submitted that the following can be gleaned from the various references:
- the Applicant is well thought of by his peers and by adults who know him;
 - he is generous with his time and in volunteering to assist others;
 - he has a responsible attitude towards alcohol; and
 - he does not have a history of aggressive or violent behaviour, even when drinking alcohol.

Effects of the Barring Notice on the Applicant

- h. Ever since arriving [REDACTED], the Applicant has played [REDACTED] for either [REDACTED] and he wishes to continue to be involved with those clubs. However, both clubs have licensed bars and the team is encouraged to attend team meals in these areas after every game (both home and away).
- i. The Barring Notice in its current form will prohibit him from attending the sporting clubs of which he is a member and will prohibit him from attending any other sporting facilities that have liquor licences attached to them.
- j. The [REDACTED] with which the Applicant works strongly encourages team members to attend Friday night drinks or have a meal in the city in order to build team rapport. The Applicant is concerned that if he is unable to do so, it will have a negative effect on his prospects of gaining employment with the firm.
- k. The Applicant has an active social life that includes going to restaurants with his friends at least once a month. The Barring Notice would have the effect of prohibiting him from doing so.
- l. The Applicant refers to a specific visit from family in [REDACTED] and a [REDACTED] [REDACTED] that he would be prevented from attending.

- m. It is submitted that the Barring Notice will have a significant effect on the Applicant and that it is in the community's best interest for the Applicant to be able to attend sporting clubs such as his [REDACTED] in order to play sport.

Circumstances of the Offence and relevance to the Barring Notice

- n. At the time of the Application, the matter had not been dealt with in the criminal courts; it was submitted therefore that the Applicant was circumscribed from providing much detail relating to the offence.
- o. There is CCTV footage that shows the Incident. However, it is unclear from the footage whether it is the Applicant that was involved in the Incident or another person.
- p. There is no evidence that the offence allegedly committed by the Applicant was because of any consumption of alcohol and there is no evidence that the Applicant was intoxicated on the night of the Incident. Furthermore, when the circumstances of the alleged offence are considered in conjunction with the Applicant's personal circumstances, there is no utility or purpose in the Barring Notice.
- q. Furthermore, or alternatively, it is submitted that the Barring Notice is too broad and should be limited to only preventing the Applicant from attending nightclubs (which is the type of venue where this Incident is alleged to have occurred). If the Barring Notice was limited only to nightclubs, the Applicant would then be able to play his chosen sport, go to licensed restaurants and attend family and social events held away from nightclubs.
- r. It is also submitted that if the Barring Notice is to remain then it should be for a much more limited timeframe, bearing in mind the relatively limited nature of the offending, the lack of evidence that excessive consumption of alcohol was responsible for the alleged assault and the Applicant's prior good history.

Submissions by the Respondent

- 11 The Respondent submits that the circumstances of the case warrant the exercise of the Respondent's discretion to issue a barring notice. The decision of the Respondent should not be quashed or varied, and the Barring Notice should be affirmed.

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

- a. In the present circumstances and on the evidence before the Respondent, a reasonable person would have been inclined to assent to, and not reject, the proposition that the Applicant had engaged in violent or disorderly conduct on licensed premises, or contravened a provision of any written law, being the *Criminal Code*.
- b. The Respondent refers to the materials relied upon when making the decision to issue the Barring Notice which demonstrate the following:
- the Applicant was involved in an altercation with the Victim at the Venue where the Applicant head butted the Victim; and
 - as a result of the head butt, the Victim suffered a fracture to his nose.

- c. While the CCTV footage is blurry, it is evident that a person head butted another and was subsequently escorted out of the Venue. Taken together with the footage of the Applicant being escorted out of the nightclub, the Victim's statement and the photo of the injury to his nose, the evidence before the Commission provides reasonable grounds for the belief that the Applicant was violent on licensed premises and contravened a provision of written law by head butting the Victim.
- d. The Commission is entitled to have regard to all the available material and is entitled to make independent findings of fact as to what happened on the night in question, irrespective of the findings that might be made later in criminal proceedings.
- e. If the Applicant wished to put further evidence corroborating his account before the Commission, it was open to him to do so. He did not and accordingly the Commission is entitled to take into account the evidence before it, including the CCTV footage, the statement of the Victim and the photos of the Victim's injuries to his face.

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

- f. The Applicant head butted the Victim, causing a fracture to the Victim's nose. The evidence suggests that the Applicant head butted the Victim without warning.
- g. The nature of the Incident demonstrates random aggressive and violent behaviour on the part of the Applicant, in circumstances where the Applicant was unprovoked.
- h. 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

- i. The Commission should have regard to the relevant personal characteristics of the Applicant and the Respondent acknowledges that two character references provided in support of the Application indicate that violent behaviour is "*out of character*" for the Applicant. Furthermore, several of the referees state that they have never witnessed the Applicant be violent in any way.
- j. However, the Respondent is not required to demonstrate, or is the Commission required to be satisfied, that there were multiple, serial, habitual or repetitious conduct in order to issue a barring notice.
- k. In any case the Respondent submits that little weight ought to be given to the character references for the following reasons:
 - it does not appear that all of the referees were aware of the Application; and
 - it appears that a number of the references were provided for employment purposes and therefore their comments on the prior good character of the Applicant and his contributions to the community provide limited support for the Application.

Relevant considerations in determining whether to vary the Barring Notice

- i. In considering whether to vary a barring notice, the Commission may have regard to all the circumstances of the case, including the effect of the Barring Notice on the Applicant. However, the primary consideration for the Commission should remain the objects and purposes of the Act, and in particular the need to minimise instances of antisocial behaviour in licensed premises and to protect the general public. The Barring Notice reinforces community expectations that violent behaviour is not acceptable and will reduce the likelihood of harm to the general public.

The effect of the Barring Notice on the Applicant's personal circumstances does not warrant a variation of the Barring Notice

- m. Given the object of a barring notice is protective, minimal, if any, heed should be paid to matters personal to the Applicant (such as the impact that the Barring Notice may have on the Applicant's employment prospects or the impact it may have on his family or social life). Nothing in the Act suggests the Commissioner is required to balance the Applicant's personal interests with the purposes of the Act.
- n. In any event, there is no evidence to support the Applicant's assertion that the Barring Notice will have a negative effect on his prospects of gaining employment with the firm he currently clerks with. Due to the absence of any statement from his employer regarding the effect of the Barring Notice on the Applicant's future prospects with the firm, it is unclear whether the Applicant's inability to enter licensed premises affects the Applicant's prospects with the firm or whether such social events occur on licensed premises. The Respondent also observes that the Barring Notice did not affect the Applicant's ability to commence work on [REDACTED], nor does it affect his ability to improve his prospects of continuing his employment within the firm by other means.
- o. Similarly, there is no evidence to support the Applicant's assertion that the Barring Notice will prohibit him from attending or being involved with the sporting clubs of which he is a member, particularly given the Applicant's longstanding involvement with the clubs. Furthermore, the Applicant could conceivably still participate as a player for those clubs without entering the licensed premises of the club.
- p. While the Barring Notice may limit the Applicant's ability to engage in social activities to his own satisfaction, the Barring Notice does not absolutely prevent the Applicant from engaging in social activities with his family or any other person. The Applicant is still permitted to socialise with his friends and family at unlicensed premises.
- q. Rather, the submissions regarding the impact of the Barring Notice on the Applicant's social life suggests that the Applicant commonly equates social activity with the consumption of alcohol at licensed premises, which is concerning in light of the Applicant's conduct on licensed premises.
- r. The Barring Notice is due to expire on 30 June 2020. Any effect on the Applicant's personal circumstances will be confined to that date. Precluding the Applicant from entering licensed premises until 30 June 2020 provides him with an opportunity to reassess his actions. It also ensures that members of the public are afforded some protection while he is unable to enter licensed premises.

- 12 Counsel for the Respondent makes further comprehensive written submissions regarding the applicable law, which are referred to as necessary during the course of the determination below.

Statutory Framework

- 13 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.
- 14 The Commissioner 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 section 115AB of the Act.
- 15 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.
- 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 Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 18 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)].
- 19 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).
- 20 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.

- 21 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.
- 22 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 (*Van Styn v Commissioner of Police* (LC19/2011)).

Determination

- 23 The Commission, in considering an application pursuant to section 115AD, is to review the decision and determine whether to affirm, vary or quash a decision.
- 24 The questions to be determined on a review therefore are whether:
- a. there are reasonable grounds for believing that the barred person has, on licensed premises, been violent or disorderly; engaged in indecent behaviour; or contravened a provision of a written law; and
 - b. the period and terms of the barring notice reflect the objects and purpose of the Act and are not punitive in nature.
- 25 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. At the time of the Application, the Applicant had not entered a plea to the Charge and asserted that as the matter had not yet been dealt with in the criminal courts, he was circumscribed from providing substantial detail relating to the offence. However, the Applicant did submit that it is unclear from the CCTV footage that shows the Incident whether it was the Applicant that was involved or another person.
- 26 I have considered all the evidence before me, including in particular the Statement of Material Facts (which both parties attached to their submissions), the CCTV footage (which shows the Incident) and the statement made by the Victim. I have also had careful regard to the submissions of both parties and the lack of any alternative explanation, as to what occurred, by the Applicant.
- 27 On the materials supplied I am satisfied that there were reasonable grounds to conclude that the Applicant was violent or disorderly on licensed premises or contravened a provision of a written law and that there was a clear and proper basis for the delegate of the Commissioner to exercise the power conferred by section 115AA of the Act.
- 28 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.

- 29 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 himself: *Batty v Commissioner of Police* (LC 33/2011); *Quartermaine v Commissioner of Police* (LC 46/2011); *Piscopo v Commissioner of Police* (LC 55/2011); and *Lewer v Commissioner of Police* (LC 58/2011).
- 30 The Applicant's submissions refer to the "*relative limited nature of the offending*". However, the actions of the Applicant should not be trivialised; they were very serious in nature and the Victim suffered a fractured nose requiring an operation. The Applicant exposed the public to violent and disorderly behaviour on licensed premises by carrying out an unexpected act of violence on a member of the public that was both dangerous and senseless. While it is unclear whether the consumption of alcohol was or was not a contributing factor in the Incident, that does not prevent the imposition of a barring order and the Incident was of precisely the type the amendments to the Act in 2010 were introduced to counteract.
- 31 While I accept that there is no prior criminal record against the Applicant, and he has no history of violent or aggressive behaviour, it is clear from the wording of section 115AA that a single incident is sufficient to give rise to a barring notice.
- 32 I also acknowledge the personal references supplied to support the general good character of the Applicant, which confirm:
- a. it is not in the nature of the Applicant to be violent and he is known to have a calm and controlled character;
 - b. he has a reputation for being helpful, hard-working and honest; and
 - c. he is a compassionate individual who volunteers with a number of charities.
- 33 However, the majority of the references provided by the Applicant are from friends. In addition, one of the letters appears to be an employment reference and it is not apparent that the author was aware of the Incident.
- 34 It remains of real concern that the Applicant's violent behaviour was seemingly completely unprovoked and it appears to me that there is some risk the Applicant will behave in a similar manner in the future and that risk can be minimised by the terms of the barring notice [*Batty v Commissioner of Police* (LC 33/2011)].
- 35 Finally, the purpose of the Barring Notice is not intended as a punishment. Rather, it serves as a measure to protect the public from anti-social behaviour, such as the Applicant's, in and around licensed premises.
- 36 The Applicant submits that the Barring Notice impacts on his ability to be involved with the sporting clubs of which he is a member [REDACTED]; that it will have a negative effect on his prospects of gaining employment with the law firm with which he currently clerks, and that it will impact on his active social life.
- 37 With regard to the impact on the Applicant's social life and his ability to socialise with friends, I do not find this argument compelling in the circumstances and when considering the need to protect the public. There are several other ways that the Applicant can spend time with

friends and family other than on licensed premises. Regarding the Applicant's concerns that the Barring Notice will have a negative effect on his career prospects due to the fact he is unable to attend after-work drinks and meals with his colleagues in the City - I again do not find that persuasive. The Applicant is able to continue working for the firm and the Barring Notice is in force for only a limited period of time. Furthermore, the Applicant provides no substantive evidence pointing to the likelihood of any harm being caused to his longer-term career.

- 38 In balancing the above considerations, the punitive effect of the Barring Notice is relatively low when balanced with the protection of the general public. The length of the Barring Notice is also appropriate 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. It will also allow the Applicant the opportunity for introspection in assessing his behaviour and actions and to consider his future conduct on licensed premises.
- 39 However, I consider that to ban the Applicant from attending licensed areas within the sporting clubs at which he plays soccer does not appear to be necessary to protect the general public. Further, the same would likely have an unnecessarily punitive effect on the Applicant.
- 40 Therefore, the Barring Notice to the Applicant is varied pursuant to section 115AD(7) of the Act to permit the Applicant to enter the licensed areas located at:

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on the condition that the Applicant is precluded from consuming alcohol at either of the above venues.



ELANOR ROWE
PRESIDING MEMBER