

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: GC

Respondent: Commissioner of Police
(represented by Ms Grace Gilbert of the State Solicitor's Office)

Commission: Alya Barnes (Presiding Member)

Matter: Application seeking review of Barring Notice issued pursuant to Section 115AD of the *Liquor Control Act 1988* ("the Act") dated 16 January 2022

Date of lodgement of Application: 16 January 2022

Date of Hearing: On Papers

Date of Determination: 5 April 2022

Determination: The term of the barring notice is varied pursuant to section 115AD(7) of the Act to expire on 3 June 2022

Authorities referred to in Determination:

- Liquor Control Act 1988 (WA) Sections 5, 115AA(2), 115 AB, 115AD (3), 115 AD(7), 115AD(7)(a) and (7)(b)
- *SVS v Commissioner of Police* (LC19/2011)
- *DJB v Commissioner of Police* (LC05/2017)
- *Commissioner for Equal Opportunity v ADI Limited* [2007] WASCA 261 [44]-[46]
- *AC v Commissioner of Police* (LC01/2018)

Background

1. On Saturday 20 November 2021 an incident involving the Applicant occurred at the licensed premises, [REDACTED] (the **Premises**) whereby the Applicant punched a man (the **Incident**).
2. On 24 November 2021, because of the Incident, the Applicant was served with a Criminal Code Infringement Notice for behaving in a disorderly manner in a public place or in sight or hearing of any person in a public place (section 74A(2)(a)).
3. On 3 January 2022, following the Incident, the Applicant was served with a Barring Notice pursuant to section 115AA(2) of the *Liquor Control Act 1988* (WA) (the **Act**) prohibiting him from entering any licensed premises in Western Australia for a period of 12 months expiring 20 November 2022 (the **Barring Notice**).
4. On 16 January 2022, the Applicant applied to the Liquor Commission (**Commission**) for a review of the Barring Notice under section 115AD of the Act (the **Application**).
5. The Applicant has elected for the Application to be determined on the papers.
6. The Commission has been presented with the following evidence in support of the Barring Notice:
 - a. Copy of the Barring Notice stamped 29 December 2021;
 - b. Criminal Code Infringement Notice [REDACTED] issued 24 November 2021;
 - c. Detected Incidents Report [REDACTED];
 - d. Redacted CAD Report [REDACTED];
 - e. Stills from CCTV Footage of Premises, 20 November 2021, Internal Camera and Internal Camera 2;
 - f. Stills from Body Worn Camera Footage, 20 November 2021;
 - g. Police photograph of Applicant;
 - h. Copy of Disclosable Court Outcomes – Criminal and Traffic for the Applicant;
 - i. CCTV Footage of Premises, 20 November 2021, Internal Camera and Internal Camera 2; and
 - j. Body Worn Camera Footage (both suspects ID and Account at Scene and Both Suspects accounts at scene),

together the **Material Evidence**.

Applicant's Statement of Fact dated 20 November 2021

7. The Applicant attached to his 16 January 2022 Application a Statement of Facts in which he asked for the Decision to be quashed on the basis he was the victim and not the perpetrator and stated further:
- a. he was verbally abused by a man (**Mr S**) in the toilet at the Premises and then, Mr S physically assaulted him by kneeling him in the stomach as he left the bathroom;
 - b. later that evening, Mr S approached the Applicant's table and verbally abused him again. When the Applicant stood up to tell him to leave him alone, Mr S headbutted his face which assault precipitated several people, including the Applicant, restraining Mr S from further attacking the Applicant;
 - c. the Applicant feared for his safety and that of the [REDACTED] in his group;
 - d. Mr S was escorted out of the Premises and the doors locked for patron safety;
 - e. Mr S, after the doors were locked, ran at the door to break it by headbutting and kicking it;
 - f. the Applicant was fully cooperative with the police;
 - g. the Applicant could, if asked, produce character references from all his local licensed premises;
 - h. the Applicant's business and additional role as [REDACTED] requires that he attend the local tavern; and
 - i. the Applicant perceives himself as the victim of the incident, not the perpetrator, and seeks to have the ban removed.

Applicant's Further Submissions dated 10 February 2022

8. In the Applicant's further submissions dated 10 February 2022, he says:
- a. that Mr S attacked him;
 - b. that Mr S was both drug and alcohol affected and was ultimately locked out of the hotel for the patron's safety;
 - c. several other patrons tried to stop Mr S from attacking him; and
 - d. he himself was not asked to leave the Premises.

Applicant's Further Submissions dated 14 February 2022

9. In the Applicant's further submissions by email dated 14 February 2022, the Applicant:
- a. reiterates he was not the aggressor, but the one attacked;
 - b. claims the barring order has already affected his everyday life and he fears for his mental health;

- c. says his only form of exercise and stress relief has been playing golf as he can no longer (physically) play other sports and, due to the scope of the barring order, he is prevented from playing golf because the licence includes the course;
- d. says he can no longer preside at meetings or fund-raising events due to the barring order and this is in turn, affecting his mental health;
- e. says Mr S, his aggressor, was simply sent home by the police whereas he is restricted for a period of 12 months from attending licensed premises; and
- f. concludes the witness statements of [REDACTED] support his version of the facts and claim to be of good character.

Respondent's primary submissions dated 22 February 2022

10. The Respondent, in its primary submissions dated 22 February 2022, first describes the incident (drawing on certain elements of the Material Evidence); then sets out the legal parameters of Barring Notices including review of barring notices and procedure on review; the role of the Commission on Review and submits that:
 - a. there are reasonable grounds for believing that the barred person has been violent or disorderly; engaged in indecent behaviour; or contravened a provision of a written law on licensed because:
 - i. the Applicant was involved in a physical altercation with Mr S at the Premises; and
 - ii. the Applicant engaged in violent conduct by punching Mr S during the physical altercation which conduct was unlawful and contravened section 313 of the *Criminal Code*;
 - b. Mr S was not the sole aggressor;
 - c. the Applicant required several patrons to restrain him who were then forcefully pushed away which, when coupled with the Applicant's punch to Mr S on the ground, contradicts the Applicant's evidence he was not "aggressive in any way, except to protect [his] [REDACTED] and [him]self";
 - d. punching Mr S was not an act of self-defence, it was an act of aggressive retaliation;
 - e. the Applicant's antisocial behaviour is the type of behaviour which a barring notice is intended to address;
 - f. the Applicant's action had the potential to cause serious harm to Mr S thereby demonstrating a need for the public to be protected from violence perpetrated by the Applicant;
 - g. one punch is sufficient for the purpose of section 115AA(2);
 - h. the Applicant has failed to take any responsibility for his actions and has not shown any insight into the fact his behaviour was not acceptable as evidenced by blaming Mr S: "I

was not the aggressor, I was one being attacked" (sic), and "I was the victim, not the perpetrator of this incident";

- i. it is not unlikely that the Applicant will encounter similar circumstances in the future and will engage in violent behaviour as he has not shown remorse for his actions;
- j. the Applicant's convictions in relation to alcohol misuse are relevant in the assessment of risk;
- k. the primary consideration for the Commission are the objects and purposes of the Act, and in particular, the need to minimise instances of antisocial behaviour in licensed premises and protect the general public from harm;
- l. a 12 month ban is appropriate in all of the circumstances;
- m. the Applicant could hold his [REDACTED] meetings at alternative unlicensed premises or the Applicant could attend remotely thus his social life is not unduly inconvenienced and there is no evidence to support an assertion otherwise; and
- n. there are other courses for the Applicant to play golf at and other recreational activities to do thus the 12 month barring notice is, in the circumstances, warranted.

Applicant in response to the Respondent's Submissions dated 25 February 2022

11. The Applicant responded to the Respondent's submissions on 25 February 2022 essentially to elaborate further on the circumstances before and after the incident to the effect:
 - a. he was first kned in the ribs by Mr S yet did not retaliate;
 - b. Mr S forcefully re-entered the premises, trying to attack him again;
 - c. he acknowledges hitting Mr S whilst he was on the ground explaining he did so to protect [REDACTED] who had been knocked down by Mr S and was [REDACTED];
 - d. he did not leave the Premises nor was he asked to;
 - e. he was not violent or aggressive, he was only trying to protect [REDACTED] and himself;
 - f. he has paid the fines and incurred the suspensions with respect to the traffic offences;
 - g. he did not know he could ask for the Barring Notice to be varied as to term but now that he does, seeks a shorter period;
 - h. all the golf courses in his area are licensed [REDACTED] with the nearest unlicensed course being [REDACTED]; and
 - i. the bar manager did not have a problem with him.

The Respondent's Responsive Submissions dated 1 March 2022

12. The Respondent on 1 March 2022, responded to the Applicant's submissions 25 February 2022 to say:
 - a. by punching Mr S on the ground, the Applicant was not intercepting any immediate threat against [REDACTED], but rather to engage in an act of aggressive retaliation;
 - b. rather than showing insight into his conduct, the Applicant denies being violent and disorderly and as such there is a greater risk of the Applicant behaving in a similar manner;
 - c. the Applicant misconceives the purpose of the barring notice is to punish by focussing on the punitive impact on the Applicant's life when the purpose is to protect the public; and
 - d. for the above reasons, the Respondent submits that the Commission should not exercise its discretion to quash the notice or vary it to reduce the term.

LEGAL AND STATUTORY FRAMEWORK

13. Section 115AA of the Act empowers the Commissioner of Police to give a Barring Notice to any person barring that person from entering all or specified classes of licensed premises if, on reasonable grounds, the person behaved in a violent and disorderly manner.
14. The Commissioner of Police may delegate the power conferred by section 115AA of the Act on any member of the police force of or above the rank of Inspector pursuant to section 115AB of the Act.
15. Section 115AD(3) provides that where a person is dissatisfied with the decision of the Commissioner of Police to give the notice, the person may apply to the Commission for a review of the decision.
16. Section 115AD(6) of the Act provides that when conducting a review of the decision, the Commission may have regard to the material that was before the Commissioner of Police when making the decision as well as any information or document provided by the Applicant.
17. 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;
 - 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;
 - c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and
 - d. is to act speedily and with as little formality and technicality as is practicable.

19. When considering an application for a review of a barring notice, the Commission is to conduct a review of the decision on its merits, effectively by way of a rehearing¹. Thus the Commission is required to consider whether there are reasonable grounds for a belief under section 115AA(2) that the barred person has, on or in the vicinity of a licensed premises, been:
 - a. violent or disorderly;
 - b. engaged in indecent behaviour; or
 - c. contravened a provision of a written law.
20. 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. A single incident can establish the belief required by section 115AA(2): *DJB v Commissioner of Police* (LC05/2017)[5].
21. If there is sufficient material on which to be satisfied on reasonable grounds of one of those three matters in paragraph 19 above, the Commission must then decide whether it should exercise its discretion to affirm, vary or quash the Barring Notice. In exercising its discretion, the Commission is to have regard to the objects and purpose of the Act: *Commissioner for Equal Opportunity v ADI Limited [2007] WASCA 261 [44]-[46]* (Martin CJ, Wheeler and Pullin JJA agreeing).
22. Section 5 of the Act sets out the objects of the Act. In subsection (1)(b), one of the primary objects of the Act is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. Subsection (2) provides for various secondary objects including to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor.
23. Conducive to the primary and secondary objects of the Act, the effect of a barring notice on a recipient, whilst it may have a detrimental effect on the recipient, is not meant to be seen as a punishment imposed upon the recipient, but is to be seen as a protective mechanism with respect to the general public².
24. Accordingly, when determining a review application, as well as considering the appropriateness of issuing a barring notice, the Commission should consider its punitive effect, and whether the length and terms of the barring notice uphold the objects of the Act (which are not to punish individuals for their behaviour): *AC v Commissioner of Police* (LC01/2018).

¹ In *Hancock v Executive Director of Public Health* [2008] WASC 224, [53]-[54] (Martin CJ) found that the same phrase used elsewhere in the Act required merits review by way of rehearing, requiring the Commission to undertake a full review of the materials before the Director and to make its own determination on the basis of those materials. It is accepted that the words 'affirm, vary or quash' should be construed consistently throughout the Act: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J); *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) 228 A Crim R 201; [2013] WASC 75 [26]. LC10/2022 - JH v Commissioner of Police Page 6 of 11.

² *SVS v Commissioner of Police* (LC19/2011). The Minister for Racing and Gaming in explaining the purpose of the relevant provisions of the Act stated: "This legislation seeks 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. The whole idea of this legislation is to protect the general public, the licensee...and also the person" (Western Australia, Parliamentary Debates, Legislative Assembly, 19 October 2010, 7925).

25. Matters to be determined on a review are whether:
- a. the nature and circumstances of the incident give rise to the Barring Notice i.e., are there reasonable grounds for believing the barred person has, on licensed premises or in the vicinity of the same, engaged in indecent behaviour, been violent or disorderly or contravened a provision of a written law;
 - b. 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; and
 - c. the length and terms of the barring notice are sufficient to uphold the objects of the Act and are not punitive in nature.
26. It is for the Commission to determine whether, on the balance of probabilities, the barring notice is warranted.
27. The Commission may have regard to the material that was before the Commissioner of Police when making its decision as well as any information or documents provided by the Applicant (section 115AD(6)).

DETERMINATION

Did the Applicant engage in violent or disorderly conduct?

28. It is clear from the CCTV footage that the Applicant engaged in violent conduct in several respects:
- a. after being headbutted and punched by Mr S, the Applicant punches Mr S twice whilst they are in a body lock;
 - b. then later, whilst Mr S rolls over onto his forearm to get up off the ground, the Applicant pushes past the people standing around him and punches Mr S in or around the left-hand side of his head.
29. Given the above and putting aside the Applicant's reasons why he did what he did (which reasons are not relevant to this limb of the analysis), I find the Applicant did engage in violent conduct and as such there were reasonable grounds for issuing the Barring Notice.

Was the Applicant on or in the vicinity of licensed premises?

30. The CCTV footage shows that the Incident occurred inside the licensed hotel and therefore the Commission finds that the evidence has established that the incident took place on licensed premises.

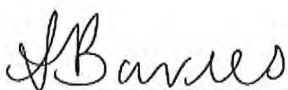
Exercise of discretion

31. Having established the Applicant was violent on licensed premises such that a barring notice could be imposed, it is necessary to determine in the nature and circumstances of the incident, the risk of the Applicant re-offending and the need to protect the public, the licensee and the Applicant considering the length and terms of the Barring Notice.

32. The incident as shown in the CCTV footage is fast paced, involves multiple people at different times and, having viewed it several times together with the body camera evidence, I consider the Applicant's perception he felt he had to protect himself and [REDACTED] from Mr S by resorting to physical force, legitimate, albeit misguided.
33. To understand the Applicant's perception, one must place the Applicant's conduct in the context of the events surrounding the Incident by reference to the Material Evidence. Firstly, the CCTV footage shows the following sequence of events:
- a. the Applicant amicably converses with Mr S;
 - b. Mr S suddenly headbutts and upper cut punches the Applicant in the stomach and draws him into a body lock;
 - c. patrons endeavour to separate the two men who are locked together and whilst locked, the Applicant tries to punch Mr S off him;
 - d. the two move as one surrounded by people and once separated, Mr S falls on the floor face down, recovers, starts after the Applicant, is then pushed by patrons and the Applicant towards the door, but Mr S continues to resist and pushes against the 5 or so people trying to stop him from getting to the Applicant with the [REDACTED] down. The Applicant is held around the waist by a woman and a man on the other side to keep him out of the fray whilst Mr S is evicted by the other patrons out the door;
 - e. Mr S, after being evicted, bursts back into the Premises shirtless and struggles against the crowd including the [REDACTED], who is then knocked down. The Applicant pushes to be released whilst Mr S is held on the floor. Pulling away from the couple restraining him, he then pushes those people surrounding Mr S on the floor out of the way, and he hits Mr S once on the left-hand side of his head. The Applicant's [REDACTED] [REDACTED] then immediately get up off the floor;
 - f. there is a skirmish, and the Applicant is then pushed outside the Premises. Mr S is inside and standing but pursues the Applicant outside. It is not clear what happens outside, but the Applicant returns inside to check on [REDACTED];
 - g. Mr S approaches the door again, the Applicant pushes [REDACTED];
 - h. Mr S struggles to re-enter and is subsequently locked out;
 - i. Mr S headbutts the door twice and kicks it until it breaks; and
 - j. later we see the bar manager go to the door, speak to the other staff member who is outside and then both re-enter the premises with the police behind them.
34. The initial 911 recording in the incident report shows that at 23:15 the caller stated there was nil security, "[REDACTED]" and "[REDACTED]" and at 23:16 can be heard yelling for people to get out. This evidence appears consistent with the Applicant's version of events that [REDACTED] were in danger and that Mr S was aggressive.

35. The police evidence includes a still with an arrow pointing to the Applicant and the description "██████████ removed from the premises and struggles with staff". This purportedly occurred immediately after the Applicant punched Mr S when he and Mr S found themselves outside the Premises. There is no evidence from the hotel staff to corroborate the Applicant had struggled with them and, having looked at the footage several times, it is not possible for me to draw such a conclusion. All that can be seen are the two men outside the Premises and then the Applicant moving back inside whereafter the door is locked. Accordingly, I do not find that the licensee's staff were at risk and indeed this is consistent with the police's questioning of the manager who does not mention the Applicant caused trouble but rather states "he [Mr S] went up to the guys and had a go at them". Furthermore, the manager declined the police's offer to have the Applicant or his group removed from the Premises.
36. From the body camera footage, Mr S who is known to the police, is stopped walking away from the scene and questioned. He is drunk and slurs his words. He is not detained after he says he does not wish to press charges against anyone, and offers to pay for the broken entrance door glass because he didn't mean to break it and the hotel owner was his "friend."
37. The Applicant who is questioned, is calm, coherent, and cooperative yet aggrieved Mr S has not been detained by the police. This concern, as the footage reveals, is shared by other witnesses.
38. Two witnesses who are part of the Applicant's group, report to the police that Mr S was "a monster", that they feared leaving the Premises because he was not in custody and one witness stated he too was headbutted by Mr S and that his ██████████ had been hit. ██████████
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██████████
39. The Applicant in his "Statement of Fact" dated 20 November 2021 attached to his Application for review states that prior to being headbutted, whilst in the bathroom Mr S had verbally and physically assaulted him.
40. ██████████ in her "Character Reference for ██████████ dated 6 February 2022 confirms this was the case after being told as much by the Applicant approximately 30 minutes before he is then headbutted. It is noted that both ██████████ for the Applicant, refer to the incident occurring on 22 November, not the 20 November 2021. I do not consider anything turns on that error.
41. In my view, the circumstances of the incident as detailed in paragraphs 33 to 40 above, indicate to me that the Applicant felt threatened by Mr S as to his own safety and that of ██████████ and that Mr S was indeed threatening. I further find that the Applicant impulsively responded to that threat by hitting Mr S whilst his partner lay on the ground.
42. What unfolded was an unfortunate turn of events where the Applicant's ██████████, having been made aware of Mr S's initial aggression towards the Applicant, intervened by pulling Mr S to the ground but got hurt in the process. Thus, the Applicant felt compelled to step in which he did. Whilst it is natural to defend oneself and one's loved ones, had they not gotten involved, it is quite likely the matter would not have escalated as it did, and the barring notice would not have been required.

43. The Respondent submits that because the Applicant has not accepted responsibility and blames Mr S as the aggressor, he should be considered a continuing risk such that the barring order should remain for the full term. Further, the Applicant's disclosable court outcomes, [REDACTED], show the Applicant's propensity to re-offend. For the Respondent, no concessions should be granted on account of the Applicant's complaint the barring order has adversely affected his wellbeing and mental health, pointing out that the Applicant has other options available to him as to exercise, and his club duties.
44. In assessing the risk of re-offending, I agree the Applicant has not fully owned responsibility for his conduct, undoubtedly because he considers his actions justified. Hopefully, since service of the Barring Notice on him, he has reflected on his position and what he could and should have done differently to avoid the legal consequence he now faces. Certainly, in his final submission he speaks of "regret". In any event, it does not necessarily follow that his lack of remorse means he poses a continuing risk to the public. Furthermore, whilst the Applicant's disclosable outcomes indicate he has in the past flouted the law, I note those past offences did not involve licensed premises.
45. Regardless of whether the Applicant was provoked or felt his partner was in danger, the Applicant had the chance to take a different path. There were two staff members already in the fray, he was told not to get involved by his friends and Mr S was on the ground immobilised. It was not necessary then for the Applicant to get involved, yet he did.
46. It is incumbent on me in this matter to act according to equity and good conscience and consider the substantial merits of this case in the task of discerning whether the public, the licensee or the Applicant in licensed premises would be at risk without the barring notice remaining for the full 12 month term.
47. The Applicant does not have a history of brawling or disorderly conduct in pubs and given the extraordinary factual matrix of this case including Mr S's repeated assault of him, the Applicant's perceived threat to [REDACTED] and Mr S's erratic and aggressive behaviour, I consider the Applicant's conduct was quite likely out of character. Furthermore, given the fact the licensee did not to consider the Applicant a threat to his patrons as he was permitted to remain on the premises, I do not find that the Applicant will be a continuing risk to the public, the licensee or himself.
48. However, perhaps with a little more time, and regrettably there is no magic formula to work out how much time, the Applicant's focus will shift from his sense of injustice to how his own actions put himself and others at risk. In so doing it is hoped he will arrive at the understanding one must control oneself in licensed premises and thus the likelihood of re-offending will be ameliorated. In my view, 5 months is sufficient time to accommodate this introspection and as I am confident the Applicant will come to understand the need, next time, to do everything in his power to walk away from conflict, the order shall be varied to end on 3 June 2022.



ALYA BARNES
PRESIDING MEMBER