

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: DY

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

Commission: Sandra Di Bartolomeo (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: 8 February 2022

Date of Hearing: On Papers

Date of Determination: 6 April 2022

Determination: The Application for review is dismissed and the barring notice is affirmed in accordance with section 115AD(7) of the *Liquor Control Act 1988*.

Authorities considered in the determination:

- *Liquor Control Act 1988* (WA) Sections 5, 115AA(2), 115AB, 115AD(3), 115AD(7), 115AD(7)(a) and (7)(b)
- *SVS v Commissioner of Police* (LC19/2011)
- *KRB v Commissioner of Police* (LC33/2011)
- *ZUW v Commissioner of Police* (LC12/2021)
- *DJB v Commissioner of Police* (LC05/2017)
- *Barrington v Austin* [1939] SASR 130
- *Heanes v Herangi* [2007] WASC 175

Background

- 1 This is an application for the review of a Barring Notice pursuant to section 115AD(3) of the *Liquor Control Act 1988* (WA) ("Act") made by [REDACTED] ("Applicant").
- 2 On 21 November 2021 at and in the vicinity of licensed premises, namely [REDACTED] ("Premises"), it is alleged that the Applicant committed the offence of disorderly behaviour and that the Applicant contravened a provision of written law in the vicinity of licensed premises ("Incident").
- 3 As a result of the Incident, a delegate officer for the Commissioner of Police ("Delegate") issued a Barring Notice dated 20 December 2021 ("Barring Notice") under section 115AA(2) of the of the *Liquor Control Act 1988* ("Act") prohibiting the Applicant from entering licensed premises within Western Australia of the following licence classes:
 - a. All hotel licences issued under section 41 (includes hotel, hotel restricted, tavern and tavern restrict 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 and regulation 9A of the *Liquor Control Regulations 1989*.
- 4 The Barring Notice was posted to the Applicant on 29 December 2021, which the Applicant states he received on 14 January 2022, and which is for a period of approximately 5 months expiring on 21 May 2022.

Incident

- 5 The following allegations regarding the Incident were considered by the Respondent, as set out in the Statement of Material Facts brief no. [REDACTED]:
 - a. At about 1.50am on Sunday 21 November 2021, the Applicant was outside of [the Premises].
 - b. There were several members of the public on the footpath outside of [the Premises].

- c. The Applicant was refused entry into [the Premises] and became aggressive toward [the Premises] security. The Applicant swung at [the Premises] security in an attempt to punch him.
 - d. Police bike patrol were flagged down by [the Premises'] security staff.
 - e. The Applicant continued to shout and swear in the presence of Police and members of the public.
 - f. The Applicant was charged with the offence of disorderly behaviour in a public place, and issued with move on notice serial number [REDACTED] ("Move on Notice").
 - g. The Applicant was ordered to move beyond the area bounded by [REDACTED].
 - h. The order was explained to the Applicant and he was told to leave the area as per the [Move on Notice] immediately. The [Move on Notice] was due to expire at 11.00 pm on Sunday 21 November 2021.
 - i. At about 2:00 am on Sunday 21 November, the Applicant was still located outside [the Premises] after being asked to leave a number of times by Police and being told he will be arrested if he does not leave.
 - j. The Applicant was spoken to by Police and it was ascertained the Applicant was in the bounded area of the [Move on Notice] and provided no lawful excuse for being in breach of the order.
 - k. The Applicant was arrested and conveyed to Perth Police Station on the charge of 'Fail to Obey Order Given by an Officer'.
- 6 The Incident giving rise to the Barring Notice is referred to in the following documents:
- a. Section 115AD Application for review of Barring Notice dated 8 February 2022.
 - b. The evidential material relied upon by the Commissioner of Police being:
 - i. Statement of Material Facts brief no. [REDACTED];
 - ii. Barring Notice Running Sheet a/c Op Manual;
 - iii. Move on Notice dated 21 November 2021;
 - iv. Disclosable Court Outcomes of the Applicant dated 14 December 2021;
 - v. template Barring Notice;
 - vi. image of [REDACTED];
 - vii. body worn camera ("BWC") footage of the incident; and
 - viii. BWC timeline including still frames extracted from the BWC footage.
 - c. The Respondent's Outline of Submissions dated 23 March 2022.

Applicant's Submissions

- 7 On 8 February 2022, the Applicant applied to the Liquor Commission for a review of the Barring Notice.
- 8 The Applicant has elected to have the review determined on the papers pursuant to section 115AD of the Act.
- 9 Submissions of the Applicant are contained within the application made by the Applicant on 8 February 2022 and an email dated 23 February 2022 sent by the Applicant to the Liquor Commission.
- 10 The submissions of the Applicant are summarised as follows:
 - a. The Applicant requests that the Barring Notice be reviewed on the basis that it is an unjust and excessive measure for his situation.
 - b. The Applicant was seen to be behaving in a disorderly manner, which is a first time offence, and he does not believe that a 6 month ban is an appropriate outcome for the [Incident].
 - c. The Applicant suggests in his email that this is not regular behaviour for him and feels that the outcome does not apply or fit the Applicant's situation.
 - d. The Applicant states that there are worse situations that happen in Northbridge than [the Incident], that do not receive the same penalty of a Barring Notice.
 - e. In addition, the Applicant states that he believes the incident was [REDACTED].
 - f. The Applicant works full time and currently [REDACTED] and states that he is not a "thug" out to cause trouble when [he goes] out with [his] friends, and simply [goes] out to enjoy [himself] and be social with [his] friends/relatives.
 - g. The Applicant states that [the Incident] has made him hesitant about going anywhere in the future, but [the Applicant] would like to be able to have that choice if [he wished] to do so, without having a Barring Notice.

Respondent's Submissions

- 11 The Respondent provided an Outline of Submissions dated 23 March 2022.
- 12 The Respondent's submissions are summarised as follows:

Reasonable grounds for believing the Applicant has been violent or disorderly or contravened a provision of any written law on licensed premises

- a. The Respondent submits that the Applicant did in fact disturb the peace outside [the Premises] by using insulting, offensive and threatening language directed towards the police officers and others.

- b. The Respondent submits as evidence the BWC footage, described at paragraph 7 of the Respondent's submissions.
- c. In addition, the Respondent refers to various evidence from the BWC footage as described in paragraph 8 of the Respondent's submissions in respect of the Applicant's failure to obey an order given by an officer.
- d. The Respondent asserts that there is a compelling inference, and thus reasonable grounds to believe, that the Applicant has:
 - i. contravened the criminal prohibition on failing to obey an order given by an officer under the *Criminal Investigation Act 2006* (WA), without reasonable excuse, contrary to section 153(1) of that Act;
 - ii. contravened the criminal prohibition on disorderly behaviour in public contrary to section 74A(2)(a) of the *Criminal Code*; and
 - iii. in the vicinity of licensed premises, been disorderly, even if the more stringent definition of 'disorderly conduct' in the criminal context is applied.

Nature and circumstances of the incident giving rise to the Barring Notice

- a. The Respondent submits that the Applicant was, in the vicinity of [the Premises]:
 - i. disorderly in his behaviour;
 - ii. verbally abusive, and threatening, to others;
 - iii. verbally abusive to, and argumentative with, police officers; and
 - iv. non-compliant in relation to orders given to him by police officers.

The risk of the Applicant behaving in a similar manner

- a. The Respondent accepts that the Applicant does not have an extensive criminal history. However, the Respondent submits that it is not required to demonstrate, nor is the Commission required to be satisfied, that there was multiple, serial, habitual or repetitious conduct in order to issue a barring notice.
- b. The Respondent notes that in the BWC footage of the incident, the Applicant states that he is "sober" and then that he is "tipsy". The Respondent submits that as the [Incident] occurred in the vicinity of a licensed premises, there is a risk that the Applicant might behave in the same or similar manner in the future, particularly in circumstances where the Applicant is further intoxicated than he was at the time of the incident.
- c. Further, the Respondent notes the poor choices of the Applicant during the [Incident]. The Applicant was first given an opportunity by police officers present at the incident to simply walk away, and second to comply with the Move on Notice. Despite support from friends and the significant time he was afforded to take one of those options, the Applicant chose to remain in the area which resulted in his arrest.

- d. The Applicant states in his email that "there are worse situations that happen in Northbridge than [his] incident, that do not receive the same penalty of a Barring Notice". The Respondent submits that this illustrates a failure of the Applicant to appreciate the nature of his actions and the effect that they have.
- e. The Respondent submits that even if the Commission considers that there is a low risk that the Applicant could behave in a similar manner, the Respondent submits that any such risk can be further minimised by the terms of the Barring Notice.

Statutory Framework

- 13 The Commissioner of Police has the power to ban people from licensed premises, or a specified class of licensed premises, for a period not exceeding 12 months, pursuant to section 115AA 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.
- 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 Subsection 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 18 The Act also in section 16 prescribes that the Commission:
 - a. may make its determinations on the balance of probabilities;¹ and
 - 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;² and
 - c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.³

¹ *Liquor Control Act 1988* (WA), s 16 (1)

² *Ibid*, subsection (7)(a).

³ *Ibid*, subsection (7)(b).

- 19 Section 5 of the Act set 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.
- 20 In light of the primary and secondary objects of the Act, the effect of a barring notice on a recipient, whilst it may have a detrimental effect on the recipient, is not meant to be seen as a punishment imposed upon the recipient but is to be seen as a protective mechanism.⁴

Principles

- 21 The Commission, in considering an application under section 115AD, must review the decision and determine whether to affirm, vary or quash the decision.
- 22 The matters to be determined on a review are whether:
- a. there are 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; and
 - b. the length and terms of the barring notice are sufficient to uphold the objects of the Act and are not punitive in nature.
- 23 It is for the Commission to determine whether, on the balance of probabilities, the barring notice is warranted.

Determination

The Applicant engaged in disorderly conduct or contravened a provision of a written law in the vicinity of a licensed premises

- 24 The BWC footage establishes that the Applicant actively involved himself in an incident outside the Premises. He repeatedly used offensive, insulting and threatening language, both towards police and others around him. He was asked by police to leave, but remained outside in the vicinity of the Premises footpath and was issued with a Move on Notice.
- 25 The Applicant's refusal to leave the vicinity of the Premises leads to his subsequent arrest.
- 26 The Commission accepts that, while the Applicant's behaviour may not appear to be extreme, it nonetheless falls within the description of disorderly as defined in the Macquarie Dictionary, being 'contrary to public order or morality'. The Applicant's behaviour would also be considered as coming within the more stringent definition applicable in the criminal context of 'any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, a street or public place'.⁵

⁴ *SVS v Commissioner of Police* (LC19/2011)

⁵ *Barrington v Austin* [1939] SASR 130, 132.

- 27 In fact, in *Heanes v Herangi* [2007] WASC 175 a Magistrate's decision that "to tell a police officer, loudly, in Forrest Chase to "f**k off" is a clear case of disorderly behaviour" was upheld on appeal on the more stringent criminal standard. Here, the Applicant repeatedly used offensive language towards police officers and others in the vicinity of licensed premises.
- 28 The Applicant was charged with disorderly conduct in a public place, and failure to obey an order given by an officer, both of which are consistent with a finding of disorderly behaviour and contravention of a provision of any written law in the context of the Act.
- 29 Together with the BWC footage, there is sufficient material before the Commission to establish that there are reasonable grounds for believing that the Applicant engaged in disorderly behaviour and/or contravened a written law, and therefor there is a clear and proper basis for the Respondent's Delegate to exercise the power conferred by section 115AA of the Act and impose a Barring Notice.

Exercise of discretion

- 30 On review of a Barring Notice under section 115AD of the Act, the Commission may exercise its discretion to quash, vary or affirm the Barring Notice. In doing so, the Commission must consider the objects and purpose of the Act.
- 31 Section 5 of the Act sets out the objects of the Act with a primary object being to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor (ss(1)(b) of the Act) and the secondary objects including the need to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor (ss2).
- 32 The review application must also be decided on whether the period and terms of the Barring Notice reflect the objects and purpose 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.

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

- 33 The Applicant was provided with repeated warnings by the police which went unheeded and finally resulted in the Applicant's arrest by police.
- 34 The nature of the Incident as outlined above was serious enough to warrant police action. It is also clear from viewing the BWC footage that the Applicant had the opportunity to stop using offensive language, and to walk away and failed to do so repeatedly.

The risk of the Applicant behaving in a similar manner

- 35 The Applicant submits that the Barring Notice is unjust and excessive, and that as this is a first time offence, he does not believe that the Barring Notice is an appropriate outcome.
- 36 However, the Applicant in his submissions does not appear to acknowledge that his behaviour was inappropriate, nor does he express any remorse for that behaviour. The Applicant states that he was "seen" to be behaving in a disorderly manner, which suggests that he does not believe he was in fact behaving disorderly.

- 37 It appears that there is some risk that the Applicant will behave in a similar manner in the future, and that risk can be minimised by the terms of the Barring Notice. While the Applicant suggests in the BWC footage that he was not excessively intoxicated on the night of the Incident, he fails to move on from the Premises even on being served with a Move on Notice, and continues to behave in a disorderly manner. Therefore the risk remains that in similar circumstances, the Applicant will behave in the same way again.
- 38 It is acknowledged that the purpose of barring notices differs to that of criminal proceedings, and they are not intended as a punishment. Rather, barring notices serve as a measure to protect the public from anti-social behaviour, such as the Applicant's, in and around licensed premises.⁶
- 39 In balancing the above, it is noted that members of the public who frequent licensed premises should be assured that they are in a safe environment and can expect that they will not become victims of, or have to witness, antisocial or disorderly behaviour. On viewing the BWC footage, that cannot be said of the night of the Incident. The Applicant is clearly shown to engage in inappropriate and offensive language around members of the public, even though he had ample opportunity to walk away.
- 40 The Barring Notice will allow the Applicant the opportunity for introspection regarding his behaviour on, and in the vicinity of, licensed premises.
- 41 The Commission agrees with the decision of the Delegate and has concluded that there was a clear and proper basis for the delegate to exercise the power conferred under section 115AA of the Act and further that it is not appropriate to vary the length of the Barring Notice.
- 42 The Barring Notice is affirmed and the application for review is dismissed.



SANDRA DI BARTOLOMEO
PRESIDING MEMBER

⁶ *SVS v Commissioner of Police* (LC19/2011)