

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: JDH
(Represented by Ms Jakita Hodgson of Armstrong Legal)

Respondent: Commissioner of Police
(Represented by Ms Hannah Cowie of the State Solicitor's Office)

Commission: Ms Pamela Hass (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: 7 January 2022

Date of Hearing: On papers

Date of Determination: 5 May 2022

Determination: The Barring Notice to the Applicant is varied pursuant to section 115AD(7) of the *Liquor Control Act 1988* to permit JDH to enter sporting clubs (football only) with licences issued under section 48 of the Act up to the hour of 9pm.

The remainder of the barring notice remains in full force.

Authorities referred to in determination:

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

BACKGROUND

1. On 16 October 2021 an Incident (“the Incident”) occurred at licensed premises, namely [REDACTED] (“the Premises”) involving the Applicant.
2. As a result of such Incident the Applicant was charged with assault occasioning bodily harm under section 317(1) of the *Criminal Code* and refusal to leave a licensed premises under section 115(4B) of the *Liquor Control Act 1998* (“the Act”).
3. The Applicant pleaded guilty to both charges in the Magistrates Court of W.A. on 25 January 2022 and was convicted, fined and granted a spent conviction. He has no previous convictions.
4. As a result of the Incident, the Commissioner of Police (“the Respondent”) issued a Barring Notice (“the Barring Notice”) dated 23 November 2021 pursuant to section 115AA(2) of the Act prohibiting the Applicant from entering the following specified classes of licensed premises in Western Australia for a period of approximately 11 months expiring on 16 October 2022:
 - 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 licence 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 2022.
6. On 7 January 2021 the Applicant lodged an Application for Review of the Barring Notice under section 115AD of the Act. The Applicant filed an Amended Application for Review dated 3 March 2022 through his solicitors, Armstrong Legal. The Commission agreed to accept the Amended Grounds of Application and extended the deadline for responsive submissions. The Applicant has elected to have the review determined on the papers.
7. The Incident giving rise to the Barring Notice is referred to in the following documents:
 - a) The Application for Review dated 7 January 2022 (“the Application”) and 3 March 2022 (“the Amended Application for Review”).

- b) The evidential material relied on by the Respondent:
 - i. Brief No. [REDACTED]
 - ii. Statement of Material Facts;
 - iii. W.A. Police Detected Incidents Report;
 - iv. Statement of [REDACTED], Security Officer/Crowd Controller at [REDACTED] dated 16 October 2021;
 - v. Photographs of the Victim;
 - vi. Photographs taken from CCTV and Body Camera footage;
 - vii. Footage of CCTV taken from the premises;
 - viii. Body Camera footage (Video); and
 - ix. Disclosable Court Outcomes for the Applicant – Criminal and Traffic.
- c) The Respondent's Outline of Submissions dated 1 March and Responsive Submissions of 25 March 2022.

THE INCIDENT

- 8. The circumstances of the Incident are summarised in the Statement of Material Facts as follows:
 - a) At about 9.25pm on Saturday 16 October 2021 the Applicant was at the Premises.
 - b) Security staff allege they observed the Applicant in the toilets. They suspected he was using drugs with a friend.
 - c) He was asked to leave and was escorted to the front of the Premises along with his friend.
 - d) The Applicant then stopped in the doorway and continued to consume a drink he was holding.
 - e) Security officer [REDACTED] informed the applicant that he would be removed from the premises.
 - f) [REDACTED] then attempted to take the bottle of drink from the Applicant. He resisted.
 - g) Security Officer [REDACTED] (the Victim) positioned himself behind the Applicant and hugged him from behind.
 - h) A struggle ensued. The Victim maintained his hold on the Applicant and had him in a head lock position. At that point the Applicant head butted the Victim.
 - i) The struggle continued and the Applicant, the Victim and Mr [REDACTED] moved slowly towards the entrance. The Victim was pushed back against a retaining wall. The Applicant backed down the stairs pulling the Victim with him and then swung the Victim around and threw him onto the ground of the carpark.

- j) The Applicant then raised his closed fist and repeatedly punched the Victim in the face causing a laceration to the Victim's left cheekbone.
- k) The Victim and other security officer restrained the Applicant until Police arrived.
- l) The Victim later attended hospital for treatment.
- m) The Applicant was charged.

SUBMISSION BY THE APPLICANT

9. The Applicant lists his grounds for Application as follows:

- a) He has no prior criminal history and this behaviour is out of character.
- b) His offending is unlikely to be repeated as there is no pattern of such behaviour.
- c) He has always in the past on licensed premises complied with lawful direction.
- d) The sentencing for the 2 criminal offences is enough of a deterrent.
- e) The Barring Order should be quashed as it is not warranted either as a protective mechanism for the public and should not be imposed as a punitive measure given his past good history and the preventative measures he now has in place to exercise proper control over his use liquor.
- f) Alternatively the Barring Order should be varied as the range of premises is too wide and effectively isolates the Applicant, potentially adversely affecting his mental health.
- g) The Applicant has also provided an affidavit indicating full acceptance of responsibility for his behaviour; an appreciation of the seriousness of the criminal charges to which he pleaded guilty and an understanding of the effect of his intoxication and unwise use of alcohol on his behaviour. He has apologised to the Victim and made a full and frank admission to the Police.
- h) Ten (10) Character references have been supplied from prominent community members [REDACTED].
- i) A letter has been provided from a Counselling Psychologist to whom the Applicant has been referred and states a concern about the serious isolation effects of the Barring Notice on the Applicant contributing to his negative mental health symptoms.
- j) A further letter from [REDACTED] has been provided confirming that the Applicant had attended counselling sessions with upcoming future sessions scheduled.

SUBMISSIONS BY THE RESPONDENT

- 10. The Respondent submits that the Barring Notice should remain in force without any variation and should be affirmed entirely.
- 11. The Respondent submits that the primary question to be determined on review is whether there are reasonable grounds for believing that the Applicant has been violent or disorderly or contravened a provision of a written law on or in the vicinity of a licensed premises.

12. In the present circumstances the Respondent points to the evidence and says that a reasonable person would assent to the view that the Applicant has engaged in violent or disorderly conduct on licensed premises and contravened a provision of written law. In this context the Respondent refers to the evidence before the Commission of the punching to the victim, the repeated struggle and the need to be physically restrained.
13. The Respondent refers to the consequent demonstration of contravention of written laws, namely assault occasioning bodily harm and refusal to leave licensed premises. Once satisfied that there are reasonable grounds for the Respondent to impose a Barring Notice, the Commission must then look at whether to exercise its discretion to quash, vary or affirm the Barring Notice.
14. The Respondent asserts that the Applicant's conduct displayed a natural tendency to disobey lawful instruction and that his behaviour demonstrated an inability to control his actions in a licensed premises. The Respondent says therefore the Barring Notice needs to be affirmed as a protective measure for the public in general and himself. The Respondent further asserts there is a distinct danger or risk of the Applicant behaving in a similar manner again. In short, the Respondent submits on all the evidence that the Barring Notice should be affirmed.

STATUTORY FRAMEWORK

15. 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.
16. The Commissioner may delegate the power conferred by section 115AA of the Act to any member of the police force of or above the rank of Inspector pursuant section 115AB of the Act.
17. 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.
18. 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 documents provided by the Applicant.
19. Section 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.

20. 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)].
21. 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).
22. The Minister further stated that the legislation gave the Police the power to issue barring notices to persons engaging in anti-social behaviour at licensed premises.
23. 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.
24. 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 (*SVS v Commissioner of Police* (LC19/2011)).

DETERMINATION

25. The Commission, in considering an application under section 115AD is to review the decision and determine whether to affirm, vary or quash a decision.
26. Therefore, the questions are whether:
 - a) there are reasonable grounds for believing that the barred person has, on or in the vicinity of a 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 purposes of the Act and are not punitive in nature.
27. 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.
28. I have considered all the evidence before me and I am satisfied that there were reasonable grounds to conclude that the Applicant was disorderly and violent on or in the vicinity of licensed premises.
29. It is undisputed that the Applicant was asked to leave a licensed premises, refused to do so and became involved in an altercation with security staff.

30. He further assaulted the Victim by pulling him down some stairs, pushing him to the ground and punching him causing lacerations to the face.
31. The Victim was a security officer on duty at the time.
32. The Applicant pleaded guilty to 2 offences relating to assault and refusal to leave licensed premises and was duly sentenced.
33. Accordingly, by looking at all the evidence before me and considering the submissions of both the Respondent and the Applicant, I find that there is a clear and proper basis for the Delegate of the Respondent to have exercised the power conferred by section 115A of the Act and impose a Barring Notice.
34. Therefore, it is for the Commission to determine in the 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.
35. 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.
36. The nature of the Incident is serious and the Applicant involved himself in an assault on a person who was at the time on duty.
37. It is acknowledged that the Applicant was heavily intoxicated.
38. Given his conduct there must, on the balance of probabilities, be a risk that he could behave in a similar manner again if he is intoxicated and provoked.
39. I note and take into account his previous good record prior to the Incident.
40. I note also the character references as to his previous record, particularly from [REDACTED] where he and his family are apparently held in high regard and where he has contributed to the community generally and engaged with the football club.
41. I also note his ongoing attendance at [REDACTED] and apparent evinced intention to continue counselling sessions.
42. I also accept that he has had several counselling sessions upon being referred to a psychologist [REDACTED] and participating in ongoing treatment for mental health concerns.
43. I also accept he was remorseful for his actions and apologised to the victim.
44. It however appears to me that there is some risk that the Applicant will behave in in a similar manner in the future and that risk can be minimalised by the terms of the Barring Notice. He did not remain in control of his drinking and himself, and the risk remains that in similar circumstances he could behave in the same manner again.
45. It must also be noted that the Incident could well have escalated with more tragic outcomes for the victim and the Applicant himself.

46. Further, it is noted that barring notices are not intended as punishment. Instead, they serve as a measure to protect the public from anti-social behaviour in and around licensed premises. Barring notices are also a mechanism to protect a licensee and in some cases the Applicant from his/her own actions.
47. In balancing the above, I note that members of the public must be able, when they frequent licensed premises, to be assured that they are in safe environments and not become victims of, or witness, violent anti-social behaviour or disorderly conduct. On the evening in question that could not be said to be the case. From a viewing of the CCTV footage and body cam and reading witness statements it can only be concluded that the public interest in attending a safe environment was severely compromised by a situation in which the Applicant played the major and initiating role.
48. 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.
49. The Applicant has made submissions as to the impact of the scope of the Order on him. While I do not find his arguments wholly convincing, I note the potential impact on his psychological wellbeing.
50. Therefore I have determined to vary the Order so that the Applicant will be able to enter certain licensed premises, namely sporting clubs (football only) under section 48 of the Act on the basis that such venues do not have the same innate similarities with the venue where the Incident occurred. This attendance is limited to attendance prior to 9pm.
51. The Variation of the Order will allow the Applicant to continue to be a viable member of the community, while also providing a sufficient degree of protection to the community in that he will not, for the length of the Barring Notice, be able to attend all specified classes of venues listed in paragraph 4 with the exception of paragraph 50.
52. In passing I note that the Applicant on the evidence appears to be at a cross roads in his life. He has engaged in serious and violent conduct whilst on licensed premises. This, if one accepts the character and other references, is behaviour which is out of character. The Applicant faces a choice to either embrace the opportunity to continue counselling and treatment and continue on the path he has originally set himself of being a contributing and valued member of the community, or to engage in drunken anti-social and violent behaviour with consequences which could be more serious and dire for not only innocent members of the community but also himself and consequently his family.
53. The Barring Notice is not a punitive but a protective measure for the community attendees at licensed premises and the Applicant himself.
54. The Barring Notice accordingly is affirmed but varied so that the Applicant may enter certain licensed premises namely sporting clubs (football only) under section 48 of the Act up to the hour of 9pm.



PAMELA HASS
PRESIDING MEMBER