

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: [REDACTED]

Respondent: Commissioner of Police
(*represented by Mr Bishop Geddes of State Solicitor's Office*)

Commission: Ms Sarah Oliver (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: 27 August 2020

Date of Determination: 19 November 2020

Determination: The decision under review is affirmed

Authorities referred to in Determination:

- *KRB v Commissioner of Police* (LC 33/2011)
- *LMC v Commissioner of Police* (LC 05/2012)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *GML v Commissioner of Police* (LC 58/2011)
- *MP v Commissioner of Police* (LC 55/2011)
- *AQ v Commissioner of Police* (LC 46/2011)
- *SVS v Commissioner of Police* (LC 19/2011)
- *YZ v Commissioner of Police* (LC 13/2013)

Background

1. At around 10.15pm on Friday, 24 July 2020, an incident occurred in the front entry way and carpark area of the [REDACTED] ("the Tavern"). The Tavern is a licensed premises for the purposes of the *Liquor Control Act 1988* ("the Act").
2. Following that incident, the Applicant was issued with an infringement notice in relation to one offence of behaving in a disorderly manner in a public place, contrary to section 74A(2)(a) of the *Criminal Code* (WA). There is no information before me as to whether the Applicant has paid that infringement notice.
3. As a result of the incident, a delegate of the Commissioner of Police issued a barring notice under section 115AA(2) of the Act in respect of the Applicant dated 14 August 2020 ("**the Barring Notice**"). The Barring Notice was served on the Applicant on or about 14 August 2020.
4. The Commissioner of Police, or his delegate (pursuant to section 115AB), has the power to ban people from licensed premises, pursuant to section 115AA(2) 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.
5. A single incident can be sufficient to found a barring notice.
6. The underlying purpose of a barring notice is not to penalise an individual but to act as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; *LMC v Commissioner of Police* (LC 05/2012) at [14]; *GML v Commissioner of Police* (LC 58/2011) at [20]).
7. The Barring Notice issued in this case (which remains in force until 11 February 2021) prohibits the Applicant from entering licensed premises in Western Australia of the following licence classes:
 - (a) All hotel licences issued under section 41 of the Act (including hotel, hotel restricted, tavern and tavern restricted 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 of the Act and regulation 9A of the *Liquor Control Regulations 1989* (WA).

Application for Review

8. On 27 August 2020, the Applicant applied to the Commission for review of the decision to issue the Barring Notice, pursuant to section 115AD(3) of the Act. That application was filed within the time specified in section 115AD(4).

9. The Applicant has elected to have the review determined on the papers, and the matter was referred to me on 12 October 2020 for that purpose.
10. The primary issue for determination by the Commission on review, on the balance of probabilities (section 16(1)(b)(ii) of the Act), is whether there are reasonable grounds for believing that the barred person has been violent, disorderly or engaged in indecent behaviour on licensed premises or in the vicinity of licensed premises (*YZ v Commissioner of Police* (LC 13/2013) at [15]). In considering that issue, the relevant considerations include the nature and circumstances of the incident/s giving rise to the issue of the barring notice, the risk of the Applicant behaving in a similar manner and the need to protect the general public, the licensee and the Applicant themselves (*KRB v Commissioner of Police* (LC 33/2011) at [34]; *AQ v Commissioner of Police* (LC 46/2011) at [34]; *MP v Commissioner of Police* (LC 55/2011) at [21]; *GML v Commissioner of Police* (LC 58/2011) at [19]; *YZ v Commissioner of Police* (LC 13/2013) at [19]).
11. On review, the Commission can affirm, vary or quash the decision under review (section 115AD(3)). The Commission is to undertake full review of the materials before it and to make its own determination on the basis of those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224 at [54] per Martin CJ, who was considering section 25(4) of the Act, which also includes a power to affirm, vary or quash a decision). The discretion to affirm, vary or quash a barring notice must be exercised consistently with the objects and purposes of the Act.
12. In conducting a review of the decision in this case, the Commission can only have regard to material that was before the delegate and “any information or document provided by the Applicant” (section 115AD(6)). In the present case, the Applicant has provided the Commission with two references.
13. In the circumstances, I have had regard to the following material (pursuant to section 115AAD(6) of the Act):
 - (a) the material that was before the delegate of the Commissioner of Police when making the decision, consisting of:
 - i. Criminal Code Infringement Notice (number 10100000302824);
 - ii. Divers Tavern Incident Reports (three) by J Nicolson;
 - iii. ██████████ Security Incident Report by ██████████
 - iv. ██████████ Incident Report by unknown author;
 - v. brief jacket for brief number 1994628-2;
 - vi. Incident report 260720 0700 14776 (redacted);
 - vii. a witness statement by the complainant, ██████████
 - viii. authority to release medical information regarding the complainant;
 - ix. four photographs of the complainant’s injuries;
 - x. twelve screen captures from the Tavern’s CCTV footage;
 - xi. a disk containing CCTV footage from the Tavern; and
 - xii. the Applicant’s criminal history as at 11 August 2019.
 - (b) the Barring Notice;
 - (c) the application for review filed by the Applicant, together with written submissions (dated 27 August 2020) and references from ██████████ (dated 25 August 2020) and ██████████ (dated 25 August 2020); and
 - (d) the outline of submissions filed by the respondent (dated 21 September 2020).

Submissions of the Parties

14. The Applicant submits that the Barring Notice is harsh and ought to be quashed.
15. Whilst the Applicant acknowledges that his behaviour on 24 July 2020 was disruptive, he submits that there is no evidence that his behaviour was because of any consumption of alcohol.
16. The Applicant submits, in essence, that there are no reasonable grounds to believe that his behaviour on the day in question was violent or so disorderly such as to warrant a barring notice being issued. The Applicant submits that he was provoked into the altercation with the complainant, and believed the fight was consensual, with the complainant even shaking his hand afterwards.
17. The Applicant also submits that he was not charged with any criminal offence, despite the complainant making a statement to the Police and the Police having reviewed the CCTV footage.
18. It is submitted that the Applicant is a hard-working individual who has lived in [REDACTED] for the past 10 years. The Applicant submits that he currently works 54 hours a week for an [REDACTED] business, and he wants to be able to go for a meal or beer with his girlfriend after he finishes work. It is submitted that there is no need to protect the public from the Applicant.
19. The reference provided by [REDACTED] the Applicant's employer, confirms he is a hardworking and valuable member of his employer's business.
20. The respondent submits that the Commission should affirm the Barring Notice because there is clear evidence, and therefore reasonable grounds, for finding that the Applicant has been violent or disorderly and has contravened a provision of a law in the vicinity of the Tavern, and that, in light of his conduct, banning the Applicant from licensed premises under the terms of the Barring Notice is reasonable and appropriate in all the circumstances, in order to provide a level of protection to the community.
21. The respondent further submits that the discretion to affirm, vary or quash the Barring Notice must be exercised consistently with the objects and purposes of the Act, citing *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710 at 715 and *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758. It is said that the primary object of the Act in section 5(1) that is relevant to this case is in paragraph (b), "*to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor*"; and the relevant secondary object in section 5(2) is in paragraph (d), "*to provide adequate controls over, and over the person directly or indirectly involved in, the sale, disposal, and consumption of liquor*".

Consideration

22. Having considered all of the materials before the Commission, I consider there are some inconsistencies in the version of events given by the complainant and the Applicant. More significantly, there are inconsistencies between what each says compared to what can be seen on the CCTV footage. In the circumstances, I have given greater weight to what can be seen on the CCTV footage over the version given by the complainant or the Applicant.
23. From my review of the CCTV footage, I am satisfied on the balance of probabilities of the following salient matters:
 - (a) On 24 July 2020, the Applicant was at the Tavern. At around 10.10pm, he was in the outside entry area of the Tavern and was drinking a beer with two male acquaintances.

- (b) At the same time, the complainant was standing in the queue to enter the Tavern with a male acquaintance, who I will call Male A. Shortly thereafter, the complainant moved out of the queue and was standing to the side of the queue, behind the Applicant. The complainant was talking on a mobile phone at this time. Whilst this was happening, the Applicant looked at both the complainant and Male A.
- (c) At around 10.11pm, a male person approached the complainant (having come from within the Tavern). I will refer to this male as Male B. The Applicant's attention was drawn to Male B, and the Applicant watched Male B walk up to the complainant and speak to the complainant.
- (d) At around 10.11.45pm, Male A approached the complainant from the queue to enter the Tavern. Male A said something to the Applicant. As a result of this, the Applicant approached Male A and stood very close to him.
- (e) I cannot determine on the evidence before me whether Male A or Male B is [REDACTED], but I am satisfied he is one of the two males.
- (f) At around 10.11.57pm, the Applicant's attention turned to the complainant. The Applicant stood very close to the complainant in a manner that appeared aggressive. The Applicant's demeanour at this time attracted the attention of both one of his own acquaintances and a security officer, both of whom intervened to separate the Applicant from the complainant.
- (g) At about 10.12pm, the Applicant and the complainant exchanged punches. It appears that the complainant threw the first punch. I observe that the CCTV footage contradicts the complainant's statement that he had to separate the Applicant and [REDACTED] from fighting, and is also inconsistent with the complainant's evidence that the Applicant commenced the fight by grabbing his shirt and slinging him down the ramp to the carpark.
- (h) Following the initial punches, the fight progressively moved from the entry area into the carpark of the Tavern.
- (i) In the carpark area, the Applicant can be seen kicking at the complainant at least twice (at 10.12.31pm). The two continue to fight and they fall to the ground at around 10.12.42pm. In falling to the ground, it does appear that the Applicant has swung the complainant to the ground whilst gripping his shirt.
- (j) At around 10.13pm, the Applicant got to his feet and walked back towards the entry to the Tavern. Around 30 seconds later, the complainant was helped to his feet. The complainant was shirtless at this time.
- (k) The Applicant attempted to approach the complainant again, but was blocked by security guards. Shortly thereafter the two men can be seen speaking to each other. At this time Male A appears to have become agitated and he had to be restrained by security guards.
- (l) At 10.15pm, the Applicant and the complainant separated and the complainant, Male A and another male acquaintance (not Male B) walked across to carpark to a waiting taxi. The complainant was helped into the front seat of the taxi by Male A.
- (m) At 10.17pm, the Applicant approached the taxi which the complainant was located. There was some discussion before the Applicant and one of his acquaintance left the carpark area on foot.

- (n) At 10.18pm, the taxi left with the complainant onboard.
- (o) As a result of this incident, the complainant sustained significant swelling to his right eye and a laceration under his right eye that required stitches.
24. On the material before me, I am not able to make a finding as to whether the Applicant choked the complainant or whether the complainant lost consciousness.
25. Based on the above findings, I am satisfied that the Applicant behaved in a violent or disorderly manner whilst in the vicinity of the Tavern, being a licensed premises, on 24 July 2020 (for the purposes of section 115AA(2)(a) of the Act). I am satisfied that the Applicant's behaviour was both violent and disorderly during the incident. The Applicant approached the complainant and his demeanour was significantly aggressive so as to attract the attention of a security guard.
26. I have had regard to the reference provided by the Applicant's partner, [REDACTED] (dated 25 August 2020). She states in her reference that the behaviour during the incident was totally out of character and says that the Applicant was "provoked by the other individual and retaliated as he was standing up for himself". As I have already found, the Applicant approached the complainant with an aggressive demeanour. Whilst the complainant does appear to have thrown the first punch, this occurred when the Applicant was approaching the complainant. On my review of the evidence, I cannot be satisfied that the Applicant was provoked or was acting in any way in self-defence.
27. I also note that the Applicant has previously behaved in a disorderly fashion in public. There is evidence before me that the Applicant was convicted in April 2015 in [REDACTED] Magistrates Court of one offence of disorderly behaviour in public. He was fined \$1,000 for this offence. This is evidence that tends to demonstrate that the Applicant has a propensity to act in a disorderly fashion, and this evidence undermines the statement by [REDACTED] that the Applicant's behaviour that night was out of character.
28. I am also satisfied that the Applicant's violent or disorderly behaviour contravened a provision of a written law, being section 74A(2)(a) of the *Criminal Code* (for the purposes of section 115AA(2)(c) of the Act). Whilst the Applicant was not charged with this offence, he was issued with an infringement notice for the offending.
29. Having regard to all of the above matters, I am satisfied that there were reasonable grounds and a proper basis for the delegate of the Commissioner of Police to exercise the power conferred by section 115AA of the Act. I am satisfied that there remain reasonable grounds to exercise the discretion in section 115AA to issue the Barring Notice.
30. Turning then to the Applicant's submission that the Barring Notice is too harsh. In effect, he is submitting that the issuing of the Barring Notice is disproportionate to his behaviour at the Tavern on 24 July 2020. In considering this submission:
- (a) I have had regard to the fact that, whilst a barring notice may have a detrimental effect on the recipient, it is not meant to be seen as a punishment imposed upon the recipient, but rather is to be seen as a protective mechanism (*SVS v Commissioner of Police* (LC 19/2011) at [12]; *KRB v Commissioner of Police* (LC 33/2011) at [35]; *MP v Commissioner of Police* (LC 55/2011) at [22]; *LMC v Commissioner of Police* (LC 05/2012) at [14]; and *GML v Commissioner of Police* (LC 58/2011) at [20]).
- (b) I have considered the primary and secondary objects of the Act and considered whether the period and terms of the Barring Notice reflect the objects and purpose of the Act and are not punitive in nature.

31. The actions of the Applicant during the incident at the Tavern are serious in nature, even though they might not be described as the most serious example of this type of behaviour. The Applicant was involved in an altercation with the complainant late at night, after he had consumed at least some alcohol at the Tavern. There is no evidence before me as to how much alcohol the Applicant had consumed prior to the incident, but the CCTV footage does show him drinking at least one glass of beer before the incident. Whilst I cannot on the evidence before me positively find that alcohol contributed to the Applicant's behaviour that night, I cannot rule out that alcohol played a contributing factor to his behaviour. Further, I observe that the complainant's evidence is that he was intoxicated at the time. His own intoxication is likely to have played some part in the way the incident escalated as it did.
32. As a result of the Applicant's actions, the complainant suffered injuries. This incident is the type of incident that the objects of the Act are seeking to avoid: see section 5(1)(b), "*to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor*".
33. In all the circumstances, I consider there is a risk that the Applicant may engage in similar violent and/or disorderly behaviour in a licensed premises in the future, although that risk is probably best described as a low risk. I note that even where the risk of the Applicant reoffending is low, such risk may be further minimised by the terms of the barring notice (*KRB v Commissioner of Police* (LC 33/2011)).
34. The terms of the Barring Notice restrict the licensed venues the Applicant can attend for a period of six months. I accept that the Barring Notice is having or has the potential to have a detrimental effect on the Applicant. However, I consider that any punitive effect of the Barring Notice is relatively low when balanced with the protection of the public from alcohol related harm, whether as a victim of such harm or a witness to same. The users of licensed premises are entitled to feel safe in those venues without being subjected to the type of behaviour in which the Applicant engaged. There is a strong public interest in those who engage in violent and disorderly behaviour being barred from licensed premises.
35. In all the circumstances, I consider the imposition of the Barring Notice, and its terms, to be justified and appropriate.



SARAH OLIVER
PRESIDING MEMBER