

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

Applicant: Mr Tristan Kempton

Respondent: Commissioner of Police
(*represented by Ms Angela Milne of State
Solicitor's Office*)

Commission: Mr Michael Egan (Presiding Member)

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

Date of Hearing: 7 April 2017

Date of Determination: 20 April 2017

Determination: The term of the barring notice is varied from twelve
months to eight months.

Authorities referred to in this determination:

- *Shane Van Styn v Commissioner of Police* (LC 19/2011)
- *George Mark Lewer v Commissioner of Police* (LC 58/2011)
- *Paul Michael Johnson v Commissioner of Police* (LC 03/2017)

Background

- 1 On 5 December 2016, the applicant applied for a review of a decision of the delegate of the Commissioner of Police (“the Police”) to issue a barring notice to the applicant on 2 November 2016 (“barring notice”) in response to an incident in which the applicant was involved at the Tropicana Hotel in Carnarvon on 16 September 2016.
- 2 The barring notice, effective for 12 months, was issued pursuant to section 115AA of the *Liquor Control Act 1988* (“the Act”) prohibiting the applicant from entering all types of licensed premises with the exception of premises with a liquor store licence.
- 3 The application for a review of the decision to issue the barring notice is accompanied by a statement from the applicant, a number of character references and some hospital emergency department notes and photographs of injuries the applicant sustained during the incident which lead to the issue of the barring notice.
- 4 In response to the application, the Police served on the applicant:
 - a) a Statement of Material Facts prepared by the Police in relation to the arrest and charging of the applicant on 24 October 2016 with the offence of “Endanger life, health or safety of a person”, contrary to section 304(1)(b) of the *Criminal Code* – the charging of the applicant arose out of the same circumstances upon which the barring notice was grounded;
 - b) a copy of a Police Incident report, an internal record maintained by the police of the details and investigation of the incident; and
 - c) CCTV footage of the incident at the Tropicana Hotel.
- 5 In summary and with slight modification to suit the present context, the Statement of Material Facts indicates:
 - a) at 11.35 pm on Friday 16th September 2016 the applicant was at the Tropicana Hotel.....drinking with friends;
 - b) an associate of the applicant became involved in a physical altercation with other patrons at the venue.....the applicant was not involved in the altercation at that time;
 - c) the applicant became angry with the group of males he perceived to have assaulted his associate and over a period of 7 minutesthrew three glass bottles at the group of males....in an attempt to strike the group;
 - d) the applicant repeatedly approached the group, taunting them and verbally arguing with them....his behaviour contributed to the continuation

of the fight between himself, his associates and the opposing group.....he picked up numerous other items including several more glass bottles, but was disarmed by others prior to throwing them; and

- e) the applicant had an avenue to leave the premises at any point... however he chose to remain involved in the altercation....no person was significantly injured as a result of the applicant's actions, however by throwing the bottles he did endanger the health and safety of the group of males and other patrons within the venue.
- 6 Following a number of deferrals at the request of the applicant, the hearing of the Commission to determine the application was conducted on 7 April 2017 - the applicant attended in person, accompanied by his partner.
- 7 As at the date of the Commission hearing, the charge against the applicant for contravening the Criminal Code had not been determined.

Applicant's submissions

- 8 In his written submission and at the Commission hearing, the applicant has submitted the following in relation to the incident leading to the barring notice and its consequences:
- a) he was attending the hotel with his partner and his partner's mother for a social night out;
 - b) he and his partner were about to leave the premises when the incident arose;
 - c) he had been drinking and was intoxicated;
 - d) his involvement in the incident was principally in response to an injury he sustained "after having a beer bottle thrown and smash on my head splitting it open" and receiving a "wound/stab to my shoulder";
 - e) he was not sure who inflicted his injuries apart from the fact the person responsible was a member of a group of patrons, one of whom had punched another patron known to the applicant;
 - f) he felt threatened throughout the entire incident, but his reaction was inappropriate and completely out of character;
 - g) he is remorseful for his involvement in the incident, acknowledges he could have acted differently, and is thankful no one was injured; and

- h) the 12 month barring notice has had an effect on not only him and his family, but also his ability to participate in work functions and training programs which are, on occasions, held on licensed premises.
- 9 In his written submission, the applicant also contends “there was obviously no responsible service of alcohol being adhered to” and that he still hadn’t “heard anything in regard to the bikers who prompted everything that occurred on the evening of the incident”.
- 10 The applicant has lodged three character references from:
- a) the Central Regional TAFE Regional Training Co-ordinator who attests to the applicant’s good character, the work the applicant has undertaken on youth programs, including his work with the Remote School Attendance strategy in Carnarvon, and the obstacles the applicant has overcome to become a responsible member of the community;
 - b) the Director of Regional Services of Ngala who also attests to the applicant’s character and his challenging role as a Family Support Officer for the Remote School Assistance program; and
 - c) the mother of the applicant’s partner, a primary school teacher in Carnarvon, who attests to his good character and the impact the barring notice is having on the applicant.
- 11 According to the applicant, the authors of the three character references are all aware of the incident that lead to the Barring Notice and the criminal charge that has been levelled against the applicant.

Submissions on behalf of the Commissioner of Police

- 12 It is submitted on behalf of the Commissioner of Police (“the Police”) that:
- a) there was sufficient evidence and sound grounds for issuing the barring notice;
 - b) notwithstanding the injuries the applicant suffered, this does not explain his violent and threatening behaviour or his repeated return, over a period of seven minutes, to the site of the altercation between him and his associates and the opposing group of patrons;
 - c) given the age of the applicant (35 years), it cannot be argued he is young, inexperienced with alcohol and accordingly acted out of character;
 - d) the character references from work colleagues are based on the applicant’s behaviour in a work or volunteer work setting not a setting where alcohol is served;

- e) the statement accompanying the application does not express remorse, but focuses on the impact of the barring notice on the applicant's social life;
- f) even if the risk of the applicant behaving in a similar manner in the future is low, that risk can be further minimised by the terms of the barring notice; and
- g) the term of the barring notice (12 months) provides the applicant with an opportunity to reassess his actions, address his aggression and his interactions with alcohol.

Determination

- 13 Section 115AA(2) of the Act empowers the Police to give a notice to a person prohibiting that person from entering specified licensed premises if the Police believe, on reasonable grounds, that the person has, on licensed premises, been violent or disorderly, engaged in indecent behaviour, or contravened a provision of any written law.
- 14 The Police may delegate this power to a member of the Police Force of, or above the rank of Inspector.
- 15 In this case, the barring notice has been issued by Inspector M H Longman on behalf of the Commissioner of Police.
- 16 Section 115AD(3) provides that where a person is dissatisfied with the decision of the Police to give the notice, the person may apply to the Liquor Commission ("the Commission") for a review of the decision.
- 17 When conducting a review, the Commission may have regard to the material that was before the Police and any information provided by the applicant (section 115AD(6) of the Act).
- 18 Section 115AD (7) provides that on a review, the Commission may affirm, vary or quash the decision the subject of the review.
- 19 By virtue of section 16 of the Act, the Commission may make its determination on the balance of probabilities.
- 20 As submitted on behalf of the Police and consistent with previous decisions of the Commission when considering an application for a review of a barring notice, the Commission is to conduct a review of the decision of the Police on its merits, effectively by way of a rehearing, and, in doing so, is to have regard to the objects and purpose of the Act.

- 21 Two of the primary objects of the Act in section 5(1) are to minimise harm and ill-health caused to people or any group of people due to the use of liquor and to regulate the sale, consumption and supply of liquor.
- 22 Further, in introducing legislation to give effect to barring notices in October 2010, the responsible Minister stated: “the whole idea of the legislation is to protect the general public, the licensee.... and also the person”. (WA Parliamentary Debates Legislative Assembly 19 October 2010)
- 23 To the extent that there may be any doubt about the intent and purpose of section 115AA in the context of the objects and purpose of the Act as a whole, it is well established, by previous decisions of the Commission, that the purpose of a barring notice is not to impose a penalty, but is a mechanism to protect the general public, a licensee or, indeed, the subject of the barring notice from his or her own actions (for example, see *Shane Van Styn v Commissioner of Police (LC19/2011)*).
- 24 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.
- 25 The barring notice issued to the applicant specifies that the Police believe, on reasonable grounds, that the applicant has “contravened a provision of written law on licensed premises”.
- 26 Submissions made on behalf of the Police contend that on the basis of the evidence before the Police a “reasonable person would have been inclined to, and not reject, the proposition that the applicant had contravened a written law, or alternatively been violent or disorderly, whilst on licensed premises”.
- 27 Without in any way pre-judging the criminal charge levelled against the applicant, in my view, the issue of the barring notice is supportable and was an appropriate exercise, under delegation, of the power and discretion of the Police as contemplated by the Act.
- 28 Indeed, even with the benefit of hearing directly from the applicant (at the Commission hearing), it is difficult, in my view; to conclude that the applicant’s actions towards the opposing group on the night of the incident leading to the issue of the barring notice were not retaliatory. Certainly, a viewing of the CCTV footage of the incident suggests that, at least over the entire period of the altercation, the applicant was not acting in self-defence because he felt threatened, as it would appear he could have desisted from an ongoing involvement in the altercation and awaited the arrival of the police.
- 29 Twelve months is the maximum period for which the Police may issue a barring notice and given that members of the public have a right to expect to be able to

attend at licensed premises without having their safety and well being threatened, it is understandable that the Police issued the Barring Notice for the maximum period.

- 30 Nevertheless, although the applicant's behaviour was serious and the incident in which he was involved may have resulted in injury, even serious injury, to a patron or patrons of the hotel, there are, in my view, some matters with respect to this particular applicant relevant to a consideration of the appropriateness of the term of the barring notice.
- 31 I acknowledge the submission made on behalf of the Police that the references lodged by the applicant attest to his character based on his behaviour outside of licensed premises.
- 32 However, the character referees have provided their support in the knowledge of the applicant's involvement in this incident, and the issue of the barring notice and laying of a criminal charge.
- 33 I am particularly influenced by the references from the Regional Director of Ngala and the TAFE Training Co-ordinator attesting to the applicant's work in the community, including volunteer work with young children, and the important role he plays as a Family Support Officer in supporting families to develop skills, seek support services and take on the responsibility of getting their children to school.
- 34 It appears to me from these references that the applicant's behaviour on this occasion was out of character.
- 35 While the applicant's submission accompanying the application is, at least in part, directed at other people's behaviour rather than his own, I formed the view at the hearing of the application that the applicant is remorseful and recognises the seriousness of his behaviour and the potential impact it may have on his future employment and his reputation in the community.
- 36 I do not place a great deal of emphasis on the impact of the barring notice on the applicant's entertainment opportunities for him and his young family; nonetheless, I do recognise that the impact of the barring notice in the relatively small regional town of Carnarvon is probably more severe than what would be the case in, for example, metropolitan Perth or some large regional city where the number and type of unlicensed premises is far more expansive.
- 37 The potential impact on the applicant's ability to participate in work functions and/or training programs held on licensed premises is a more relevant consideration.
- 38 I also note that while the Police have made reference to the applicant's focus on the impact of the barring notice on his and his family's social life, the

applicant did acknowledge in his submission that his reaction was inappropriate and completely out of character.

- 39 In my view, irrespective of the terms of the barring notice and the laying of a criminal charge as a consequence of this incident, the resulting experience has had a salutary affect on the applicant.
- 40 Judging from the character references provided, the applicant is a valued member of Ngala and an important contributor to the Remote Schools Attendance strategy, and as a result of this incident and the consequences that have followed, he will have to repair the damage to his standing in the community and restore the trust shown in him both by his employer and those with whom he works and with whom he acts as a mentor and role model.
- 41 In *George Mark Lewer v Commissioner of Police (LC 58/2011)* the Commission observed that “the barring notice is not only about protecting the public, but also protecting the applicant”. The barring notice imposed upon the applicant is not a punishment, but an opportunity for him to reflect and adopt strategies to manage his behaviour particularly on licensed premises.
- 42 All users of licensed premises also need to be aware of the existence and scope of barring notices so that they can also contemplate and adopt strategies to manage their behaviour on licensed premises and be aware of the consequences of failing to do so (see *Paul Michael Johnson v Commissioner of Police (LC 03/2017)*).
- 43 Having had the benefit of hearing directly from the applicant and having regard to his background, work history, personal circumstances and the character references submitted with the application, I consider the risk of harm to the community, patrons of licensed premises and liquor licensees from a repeat of the applicant’s behaviour to be low.
- 44 Furthermore, although there may be scope for some further reflection on the part of the applicant to take full responsibility for his actions, rather than point to others for causing or triggering his behaviour, it appeared to me at the Commission hearing that the applicant has reflected on his behaviour and recognises it was totally unacceptable and is not to be repeated.
- 45 In light of the particular circumstances relating to this applicant and the mitigating factors to which I have referred, I consider there is a justifiable basis upon which to reduce the term of the barring notice to eight (8) months.

46 Accordingly, the term of the barring notice issued on 2 November 2016, shall now expire on 2 July 2017.

A handwritten signature in black ink, appearing to read 'Michael Egan', with a long horizontal stroke extending to the right.

MICHAEL EGAN
PRESIDING MEMBER