

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicants: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(all represented by [REDACTED]
[REDACTED])

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

Commission: Mr RA Zilkens (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: 21 September 2020
17 October 2020
13 October 2020
12 November 2020

Date of Determination: 25 March 2021

Determination: The barring notice is upheld and remains in place ending on 21 February 2021

Authorities considered in the determination:

- Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 2010, 7925 (MLA Terry Waldron)
- Western Australia, *Parliamentary Debates*, Legislative Assembly 19 October 2010, 7926 (MLA Terry Waldron)
- *VS v Commissioner of Police* (LC19/2011).
- *AC v Commissioner of Police* (LC01/2018) [21]
- *B v Commissioner of Police* (LC 33/.2011)
- *Q v Commissioner of Police* (LC 46/2011)
- *P v Commissioner of Police* (LC 55/2011)
- *L v Commissioner of Police* (LC 58/2011)

Review of Barring Notice

1. This is an Application for Review of a Barring Notice pursuant to s115AD(2) of the Liquor Control Act 1988 (**the Act**) made by the applicants.
2. On 16 August 2020 the applicants attended a licensed premises, namely, the restaurant [REDACTED] in [REDACTED], and for several minutes the applicants stood in the restaurant and addressed the other patrons without request from the owner of the restaurant or the patrons (**the incident**).
3. As a result of the incident, the Commissioner of Police (**the Commissioner of Police**) by way of his delegate, [REDACTED] Acting Inspector (**the delegate**), issued a Barring Notice under s115AA(2) of the Act on 22 September 2020 to the applicants prohibiting each of the applicants from entering licensed premises in Western Australia which hold a restaurant licence issued under section 59 (**barring notice**).
4. The applicants applied to the Liquor Commission on 21 September 2020, 17 October 2020, 13 October 2020 and 12 November 2020 respectively for a review of the Barring Notice. The Barring Notice expired on 21 February 2021.

Statutory Framework

5. The Commissioner of Police has the power to ban people from licensed premises 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:
 - (1) been violent or disorderly;
 - (2) engaged in indecent behaviour; or
 - (3) contravened a provision of any written law.
6. 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.
7. 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 Commissioner for a review of the decision.
8. Subsection 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.
9. Subsection 115AD(7) provides that on a review the Commission may affirm, vary or quash the relevant decision.
10. Section 16 of the Act also prescribes that the Commission:

- (1) may make its determinations on the balance of probabilities: section 16(1)(b)(ii); and
 - (2) is not bound by the rules of evidence or any practices or procedures applicable to the courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply: section 16(7)(a); and
 - (3) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms: section 16 (7)(b).
11. In 2010, the Act was amended by the addition of subsection 115AA and subsection 115AB, among others, "*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).
 12. The Minister further stated that the legislation gave the Commissioner of Police the power to issue barring notices to persons engaging in antisocial behaviour at licensed premises (Minister's statement to the House, Western Australia, Parliamentary Debates, Legislative Assembly 19 October 2010, 7926).
 13. Section 5 of the Act sets out the objects of the Act. One of the primary objects of the Act is to cater for the requirements of consumers for liquor and related services; Section 5(1)(c).
 14. The effect of a barring notice on a recipient, while 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: *VS v Commissioner of Police* (LC19/2011).

Outcome sought by the Applicant

15. The applicants seek that the Commission:
 - (1) quash the decision to issue the barring notice under section 115AD(7) of the Act on the basis that:
 - (a) the Act did not confer power on the delegate to issue the notice in circumstances; and/or
 - (b) the applicants' conduct was not 'disorderly' for the purposes of section 115AA(2)(a) of the Act; and/or
 - (c) the issuing of the barring notice was manifestly excessive and disproportionate to the Applicants' conduct; and/or
 - (d) it would otherwise be appropriate to quash the decision in the circumstances of the case.
 - (2) if the Commission is not minded to quash the decision to issue the barring notice, then the Commission vary the decision, under section 115AD(7) of the Act to:

- (a) reduce the length of time the applicants are prohibited from entering a licensed premises to one (1) month from the date of which the notice was issued; and/or
 - (b) reduce the classes of licensed premises to only include the venue in which the incident occurred.
- (3) Pursuant to section 21 of the Act, the Commission determine that the Commissioner of Police are to pay the applicant's costs.

Submissions on behalf of the applicants

16. The applicants made the following submissions with respect to:

(1) **The evidence presented and relied upon in the decision to impose the barring notice**

The applicants submit the delegate noted it had been presented with evidence in relation to the incident however the barring notice does not provide any detail of:

- (a) what the evidence referred to is;
- (b) who presented such evidence;
- (c) details of the incident referred to;
- (d) who alleged the applicants were behaving 'disorderly'; or
- (e) what the delegate relied on to conclude that there were reasonable grounds to believe the applicants had, on licensed premises, been disorderly.

Further, the applicants submit they were not provided with an opportunity to comment on the evidence before the delegate and as a result the applicants were denied procedural fairness prior to the delegate issuing the barring notice.

(2) **The power of the delegate to issue the barring notice**

The applicants submit the Act does not confer power on the delegate to issue a barring notice under section 115AA (2)(a) of the Act on the facts of this case, particularly being that the applicants are people who engaged in conduct with no connection to alcohol. The applicants submit the Act confers power on the Commissioner of Police to issue a barring notice when a person's conduct on a licensed premises is in connection to alcohol, due to the use of alcohol or related to the sale and consumption of alcohol, that being the consumption of alcohol must necessarily be related to the incident.

(3) **The conduct of the applicants**

The applicants submit that their behaviour during the incident could not be found to have been angry, violent, insulting, offensive or threatening and therefore they could not have been disorderly.

(4) **The excessiveness and disproportionate nature of the punishment of the barring notice**

The applicants submit their behaviour during the incident does not warrant the protective element a barring notice provides to the general public as their actions during the incident did not involve any violence, coercion or result in any harm and the fact the applicants lack of a history of violence or offensive behaviour supports this.

Further, the applicants noted previous decisions of the Commissioner of Police in relation to barring notices all concerned incidents whereby the applicant had been affected by or consumed alcohol and involved a level of severity of violence that was significantly greater than the applicants'. The applicants submit the barring notice was issued on terms that are manifestly excessive and disproportionate to previous decisions of the Commissioner of Police in consideration of the facts of the incident and circumstances of the incident the subject of other barring notices.

Outcome sought by the Commissioner of Police

17. The Commissioner of Police seeks that the Commission affirms the decision of the delegate in issuing the barring notice on the basis that there were reasonable grounds for the finding that the applicants engaged in conduct in contravention of section 115AA(2) of the Act.

Submissions on behalf of the Respondent, the Commissioner of Police

18. The respondent made the following submissions with respect to.

(1) **Materials**

The following materials were before the delegate when making the decision to issue the barring notice to the applicants:

- (a) CAD Incident report [REDACTED];
- (b) A statement made by DSC [REDACTED] together with exhibits:
 - i. DVD containing CCTV footage taken from [REDACTED] and from videos posted on the [REDACTED] [REDACTED] page; and
 - ii. Stills taken from the above footage complete with annotations; and
- (c) The relevant applicants' criminal history as at 1 September 2020

(2) **The role of commission on review**

- (a) The primary question to be determined on review is whether 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 premises or within the vicinity of licensed premises
- (b) There is sufficient material on which the Commission can be satisfied there were reasonable grounds for the delegate to issue the barring notice.

(3) Statutory objects and purposes

- (a) The Commission's discretion to affirm, vary or quash a barring notice must be exercised consistently with the objects and purposes of the Act. Further the Commission is permitted to have regard to the parliamentary debates to determine the proper interpretation of those objectives and purposes.
- (b) The language used by the minister in the second reading speech indicates that the discretion afforded to impose the barring notice or not has to be taken with consideration to the effect of the barring notice and whether it will minimise instances of antisocial behaviour in and around licensed premises.

(4) Relevant grounds in determining whether to quash decision

- (a) The primary question to be determined on review is whether there are reasonable grounds for believing that the barred person has been violent or disorderly or engaged in indecent behaviour on a licensed premises.
- (b) The evidence establishes that a reasonable person would be inclined to view that the applicants had been disorderly and acted in an aggressive, threatening manner that disrupted the peace while in a licensed premises.
- (c) Even on the least generous interpretation of the definition of disorderly, being that of the standard of criminal prohibitions or judicial definitions, there are reasonable grounds for belief that the applicants were disorderly.
- (d) That notwithstanding that the applicants sought to convey a broader ideological message, their behaviour constituted a substantial breach of decorum and did in fact disturb the peace at the restaurant.

(5) Relevant grounds in determining whether to vary the decision

- (a) The power to vary a barring notice is a subsidiary power which should only be exercised by the Commission where the terms of the barring notice do not give effect to the objects and purpose of the Act and the need to minimise the likelihood of harm to the general public: *AC v Commissioner of Police* (LC01/2018) [21].
- (b) A barring notice offers a person an opportunity for introspection about their behaviour on licensed premises, allows for the building of greater self-control in the offender and provides the general public with assurance that they will not be exposed to disorderly behaviour when frequenting a licensed premise.
- (c) The barring notice was only issued for 6 months, not the full extent permitted of 12 months and was confined to one class of licensed premises, showing a moderate approach from the delegate in light of the seriousness of the incident.

(6) **Power to issue barring notice relating to offence in connection with alcohol**

- (a) The plain words of section 115AA(2) do not express any connection to alcohol or the consumption of such but rather relating to events that occur on licensed premises.
- (b) Section 115AA falls squarely within the primary and secondary objects of the Act insofar that the barring notice satisfies the objectives to regulate the environment in which liquor can be consumed and remove risk factors.
- (c) The construction contended for by the applicants would create absurd results in a number of events whereby any offender could assert that they had not consumed alcohol and thereby creating impossibilities of proof and undermining the barring notice regime.

(7) **Barring notice invalid for failure to afford the applicants procedural fairness**

- (a) The Commissioner of Police is not required to afford procedural fairness in respect of a decision to issue a barring notice prior to such issuing; and
- (b) any defect in procedural fairness is cured by the applicants' right to a review of the delegate's decision before the commission .

Determination

- 19. The Commission, in considering an application under s115AD is to review the decision and determine whether to affirm, vary or quash a decision.
 - 20. The questions to be determined on a review are:
 - (a) are there reasonable grounds for believing that 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) do the period and terms of the barring notice reflect the objects and purpose of the Act and are they not punitive in nature.
 - 21. It is for the Commission to determine whether, on the balance of probabilities the barring notice is warranted at all and, if, not, to quash it and, if it is, whether it should be affirmed with or without variation.
 - 22. I have considered all the evidence before me including:
 - (a) The barring notices issued to each of:
 - i. [REDACTED];
 - ii. [REDACTED];
 - iii. [REDACTED];
 - iv. [REDACTED]
- all dated 22 September 2020;

- (b) information relied on by the Commissioner of Police, of which includes:
- o State Solicitor's Office's letters dated 19 November 2020 to Liquor Commission of Western Australia concerning matters:
 - 20/5203;
 - 20/5204;
 - 20/5205; and
 - 20/5479 ;
 - o Notice of Barring notices served upon each of:
 - i. [REDACTED] by [REDACTED] on 21 October 2020;
 - ii. [REDACTED] by [REDACTED] on 22 September 2020;
 - iii. [REDACTED] by [REDACTED] on 23 September 2020; and
 - iv. [REDACTED] by [REDACTED] on 12 November 2020;
 - o Disclosable Court outcomes – Criminal and traffic report for each of:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

all obtained on the 1 September 2020;
 - o the Incident Detailed Report of incident [REDACTED] dated 17 August 2020;
 - o the statement of [REDACTED] dated 31 August 2020 with supporting exhibits, namely offender identifiers and still photographs of CCTV footage provided 4 times in identical terms, that is, one of each of the applicant's;

23. I have also had careful regard to the submission of both parties, being:

- (1) submissions made on behalf of each of the applicants';
- (2) joint submissions made on behalf of the Commissioner of Police; and
- (3) joint responsive submissions made on behalf of the applicants;

and thank counsel for their comprehensive submissions.

24. 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 applicants behaving in a similar manner again; and the need to protect the

general public, the licensee and the applicants themselves: B v Commissioner of Police (LC 33/2011); Q v Commissioner of Police (LC 46/2011); P v Commissioner of Police (LC 55/2011); and L v Commissioner of Police (LC 58/2011).

25. When considering this matter, I have also had regard to the only primary object of the Act that I consider to be relevant due to the applicants not having been involved in the supply or consumption of liquor, being section 5(1)(c) of the Act, "to cater for the requirements of consumers for liquor and related services". I have also had regard to Parliament's intention when introducing the legislation allowing for the issuing of barring notices.
26. Further, I note that the primary purpose of barring notices is to protect the general public or a licensee and is not to act as a tool to punish the offender.
27. On the issue of procedural fairness, I am satisfied procedural fairness has been afforded to the applicants. There is no obligation placed on the delegate to provide the applicants with an opportunity to comment on the evidence before it. The applicants have the right of review of the decision and in such have been afforded procedural fairness.
28. I am satisfied on the materials provided, the applicants, together with [REDACTED], [REDACTED], attended a licensed premises at the peak dinner time and after several minutes of being seated at a table they stood up, walked around the table and restaurant, [REDACTED] and shouted to the patrons of the restaurant derogatory chants, one of the applicants using a [REDACTED] to address the patrons, [REDACTED] for approximately 3 minutes.
29. On the issue raised concerning the power of the delegate to issue the barring notice to the applicants in circumstances where no alcohol was consumed by the applicants on the licensed premises, I find that the power of the delegate to issue a barring notice is enlivened if an offender engages in conduct as set out in section 115AA (2) of the Act on a licensed premises notwithstanding the consumption, or lack thereof, of alcohol by the offender or any connection to alcohol by any party involved in an incident giving rise to a barring notice. It is sufficient that the incident took place upon licensed premises.
30. On considering the materials supplied, I am satisfied that there were reasonable grounds to conclude that the applicants did in fact engage in conduct that was disorderly on licensed premises and that there were reasonable grounds for the delegate to exercise the power conferred by section 115AA of the Act.
31. In making that finding:
 - (a) I rely on the Macquarie Dictionary 8th Edition 2020 meaning of "disorderly" which is:
 - i. characterised by disorder, irregular, untidy; confused;
 - ii. unruly, turbulent, tumultuous; and
 - iii. violating, or opposed to, constituted order; contrary to public order or morality.
 - (b) While disorderly can involve the use of violence and threats, it is not necessary for the actions of the applicants to have been violent or threatening in order to constitute disorderly behaviour.

- (c) I note that the use of “disorderly” in section 115AA(2)(a) of the Act is in the alternative to “violent” in the same paragraph from which I conclude that the requisite element of being disorderly does not require “violence” to be made out nor that the conduct needs to be threatening either to the public or the licensee or staff of the premises.
32. It follows that the incident did not need to be threatening in nature, it is sufficient that it was contrary to public order and disrupted the peace of the owner of the restaurant and the patrons.
33. I find that the [REDACTED] at the restaurant and the [REDACTED] conduct engaged in by the applicants shows a propensity in the applicants to engage in anti-social behaviour towards the patrons of the restaurant and likewise other members of the general public who may have been at the restaurant or in a similar location.
34. The circumstances of the incident taken as a whole indicate there is a potential risk of future disorderly conduct by the applicants on a licensed premises and that risk was minimised by the terms and duration of the barring notice.
35. The barring notice was sufficient to uphold the objects of the Act in consideration of the seriousness of the incident.
36. I acknowledge that there was no physical violence perpetrated during the incident however I find that the behaviour engaged in by the applicants while itself not aggressive may have led to a reaction giving rise to disruption of the peace. I accept that when asked to do so the applicants left the premises albeit with some delay and no physical harm was caused to the owner of the licensed premises or the patrons, however the potential for a member of the public to have been adversely affected was high.
37. In all other respects, the Commission has determined the barring notice dated 22 September 2020 is upheld and remains in place ending on 21 February 2021. Further, the Commission determines each party shall remain responsible for their own costs incurred in connection to the application for review.



RA ZILKENS
PRESIDING MEMBER