

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

Applicant: Mr APD

Respondent: Commissioner of Police
(represented by Mr Michael McIlwaine of State Solicitor's Office)

Commission: Ms Emma Power (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: 12 February 2019

Date of Determination: 16 May 2019

Determination: The application for review is dismissed.

Authorities referred to in Determination:

- *SVS v Commissioner of Police* (LC19/2011)
- *KRB v Commissioner of Police* (LC 33/2011)

Review of Barring Notice

- 1 On 23 December 2018, an incident occurred in the vicinity of licensed premises namely [REDACTED] [REDACTED] ("the Incident") involving the applicant aged 19.
- 2 As a result of such Incident, the applicant was charged with Assault Occasioning Bodily Harm contrary to section 317(1) of the *Criminal Code (WA)* on 13 January 2019.
- 3 On 4 February 2019, the applicant received a spent conviction in respect to the Incident at the Joondalup Magistrates Court.
- 4 As a further result of the Incident, the Commissioner of Police ("the Police") issued a barring notice under section 115AA(2) of the of the *Liquor Control Act 1988* ("the Act") prohibiting the applicant from entering licensed premises in Western Australia of the following licence classes:
 - a. all hotel licences, however referred to, issued under section 41;
 - b. all small bar licences issues under section 41A;
 - c. all nightclub licences issued under section 42;
 - d. Casino licence issued under section 44;
 - e. all club licences issued under section 50;
 - f. all restaurant licences issued under section 59;
 - g. all occasional licences issued under section 59; and
 - h. all special facility licences issued under section 46 and regulation 9A of the Liquor Control Regulations.
- 5 The barring notice was served on the applicant on 24 January 2019 to expire on 17 July 2019, being for a total period of just less than 6 months.
- 6 On 12 February 2019, the applicant appealed to the Liquor Commission ("the Commission") for a review of the barring notice.
- 7 The applicant has elected to have the review determined on the papers pursuant to section 115AD of the Act.
- 8 The Incident giving rise to the barring notice is referred to in the following documents:
 - a. the applicant's application for review dated 10 January 2019 (sic);
 - b. the evidence presented before the Commissioner of Police's Delegate including:
 - i. barring notice dated 22 January 2019;
 - ii. statement of Material Facts No. 1885031-1;
 - iii. statement of the victim of the Incident;
 - iv. photographs of the victim;

- v. incident brief report of Sir Gardiner Hospital (Incident no: 231218 0330 15805;
 - vi. WAPOL Running Sheet – Incident Report - 231218 0330 15805;
 - vii. move on notice – M0442571;
 - viii. disclosable court outcomes of the applicant – criminal and traffic; and
 - ix. CCTV footage.
- c. The Commissioner of Police’s outline of submissions dated 13 March 2019.

Submissions by the applicant

- 9 The applicant has made submissions requesting the Commission to review the barring notice on the following grounds:
- a. he has already been dealt with by the Magistrate and will pay costs to the victim as well as the court fees and costs;
 - b. he is extremely sorry for his actions on 23 December 2018, has taken full responsibility and makes no excuses for his behaviour; and
 - c. he would understand being barred from [REDACTED] until 17 July 2019, however, feels being barred from all licensed venue in Perth, including restaurants seems harsh considering he has been punished for his actions already by the Magistrate.
- 10 The applicant has also provided the following documentation to the Commission:
- a. a signed character reference from each of:
 - i. Elizabeth Kirby – 27 January 2019;
 - ii. David Moore – 1 February 2019;
 - iii. Will Tascon – undated;
 - b. barring notice dated 22 January 2019; and
 - c. Notice of Conviction dated 4 February 2019.

Submissions on behalf of the Commissioner of Police

- 11 The circumstances upon which the decision of the Police to issue the barring notice is based are contained within those items set out in paragraph 8(b) above.
- 12 The Police submit that:
- a. there is sufficient evidence before the Commission to establish that the applicant has, in the vicinity of licensed premises, acted violently and disorderly and contravened a written law and the Commissioner for Police is therefore entitled to issue a barring notice;
 - b. the Incident was aggravated by the following circumstances:

- i. the conduct giving rise to the barring notice is the very type of conduct which the Act is intended to overcome, being antisocial and disorderly behaviour within the vicinity of licensed premises;
 - ii. the victim's injuries were not insignificant. It was purely fortuitous that they were not worse;
 - iii. the applicant threw the victim to the ground with significant force while the victim was in a passive stance, speaking on his mobile telephone. The victim's head hit the pavement and it appears that he was knocked out from the impact; and
 - iv. the victim did not appear to be expecting the assault and did not have sufficient opportunity to brace for impact. His head was unprotected when it hit the pavement and after the victim hit the ground the applicant again grabbed the Applicant and shoved him towards the ground;
 - v. recent history in Australia has shown that such incidents can have disastrous consequences for the victim;
- c. violent behaviour in the vicinity of licensed premises is not conduct which the public should be exposed to. This is the purpose of the barring regime;
- d. even if the risk that the applicant will behave in a similar manner in the future is low, that risk can be further minimised by the barring order;
- e. it is not clear whether the character references refer to the applicant's appearance at the Magistrates Court or this application. However, each character reference refers to the Incident as out of character. Despite this, the week before the Incident the applicant was served with a Move on Notice for disorderly behaviour, including attempting to fight crowd controllers;
- f. while two events may fall short of a pattern of behaviour it is clear that the applicant's anti-social behaviour was not isolated and the Commission should have regard to this;
- g. the barring notice for a period of just less than 6 months will:
 - i. allow the applicant to reflect on his behaviour and the importance of behaving appropriately on licensed premises; and
 - ii. provide a level of protection to the public from this type of behaviour.
- h. there is no basis for varying the barring notice;
- i. despite the applicant's submissions stating he has already been punished with respect to the Incident, a barring notice is not intended to be punitive, restorative or compensatory, it is a measure to protect the public from antisocial behaviour;
- j. there is no logical reason to limit the reach of the barring notice to just one licensed premises. There is no evidence before the Commission to suggest that the applicant's violent and antisocial behaviour is a factor relating to locality;

- k. there is insufficient evidence for the Commission to be satisfied that the applicant will not display similar anti-social and aggressive behaviour in and around a licensed premises within the period of the barring notice; and
 - l. given the aggravating factors identified above, it is submitted that there are no grounds to justify the variation of the barring notice.
- 13 Counsel for the Commissioner of Police also made comprehensive written submissions regarding the applicable law, which are referred to as necessary below.

Statutory Framework

- 14 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:
- a. been violent or disorderly;
 - b. engaged in indecent behaviour; or
 - c. contravened a provision of any written law.
- 15 The Commissioner may delegate the power conferred by section 115AA of the Act on any member of the police force or above the rank of Inspector pursuant to section 115AB of the Act.
- 16 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.
- 17 Sub 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.
- 18 Subsection 115AD(7) also provides that on a review the Commission may affirm, vary or quash the relevant decision.
- 19 Section 16 of the Act also prescribes that the Commission:
- a. may make its determinations on the balance of probabilities [subsection(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 [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)];”
- 20 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

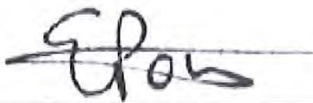
dangerous situations" (Minister's statement to the House, Western Australia, Parliamentary Debates, Legislative Assembly 19 October 2010, 7925).

- 21 The Minister further stated that the legislation gave the Police the power to issue barring notices to persons engaging in antisocial behaviour at licensed premises.
- 22 Section 5 of the Act set out the objects of the Act. In subsection 5(1)(b) one of the primary objects of the Act are to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. Subsection 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.
- 23 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 (*SVS v Commissioner of Police* (LC19/2011)).

Determination

- 24 From the wording of section 115AA of the Act it is clear that a single incident is sufficient to give rise to a barring notice and does not 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 applicant does not dispute the Incident occurred as set out in the statement of material facts. The CCTV footage confirms this position.
- 26 Due to the applicant's conviction pursuant to the *Criminal Code (WA)* it is clear there is a proper basis for the delegate of the Commissioner of Police to exercise the power conferred by section 115AA of the Act. This is not disputed by the applicant.
- 27 The review application must therefore 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 on the barring notice on the applicant.
- 28 The Incident was serious in nature resulting in the victim having his head hit on the pavement and being knocked unconscious. Further, the applicant was clearly the aggressor and the violence itself occurred a substantial period after the initial verbal altercation between the parties.
- 29 It is noted that the applicant shows remorse and the character references provided would appear to indicate that such behaviour is not usual for the applicant and that he is otherwise hard working.
- 30 Despite this, I consider that, due to the circumstances of the Incident, as well as the fact that the applicant had been issued with a Move on Notice in respect to violent behaviour a relatively short time prior to the Incident indicate that there is a risk to the public in relation to possible future antisocial behaviour by the applicant.

- 31 Even if the risk of the applicant reoffending may be relatively low, such risk may be further minimised by the terms of the barring notice [*KRB v Commissioner of Police* (LC 33/2011)].
- 32 The Incident did not appear to have any particular connection to the licensed premises, or even a particular type of licensed premises, but rather related to the applicant's interaction with alcohol. For this reason, the Commission is not minded to vary the barring notice to permit access to any other typed of licensed venue.
- 33 The applicant's argument that the matter has already been dealt with by the Magistrate's Court is not compelling. Although the Incident has already been the subject of criminal proceedings, it is clear that the purposes of barring notices issued pursuant to the Act, is different and not intended to be punitive in nature to the applicant, but to protect the public [*SVS v Commissioner of Police* (LC19/2011)]. The Incident is exactly the type of behaviour the 2010 changes to the Act were put in place to address.
- 34 I consider that the punitive effect of the barring order is relatively low when balanced with the protection of the public and the applicant himself.
- 35 In the circumstances, the barring notice for the period ending 17 July 2019 appears justified in order to:
- a. assure the members of the public who frequent licensed premises or areas in which licensed premises are present, that they are in safe environments and can expect that they will not become victims of, or have to witness, violence or antisocial and disorderly behaviour; and
 - b. allow the applicant the opportunity for introspection regarding his behaviour on, and in the vicinity of, licensed premises and his interactions with alcohol.
- 36 The application for review is dismissed.



EMMA POWER
PRESIDING MEMBER