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Invisible Powers to Punish: Licensee-barring Order Provisions in Victoria and South Australia

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Abstract

Problems associated with excessive alcohol consumption have prompted a range of legislative, regulatory and operational responses. One provision empowers licensees, in Australian jurisdictions such as Victoria and South Australia, to formally exclude patrons from their venues and the surrounding public area. The imposition of a licensee-barring order requires no demonstrable offence to be committed. No proof needs to be documented and the ban takes effect immediately. Non-compliance is subject to police enforcement and possible criminal breach proceedings. The process through which a barring order may be challenged can be ambiguous and time consuming, and the punishment is typically served regardless of the review outcome. However, limited data are available to enable assessment of the way in which barring orders are used. As such, this paper examines how licensee-barring orders extend to non-judicial and non-law enforcement officers an on-the-spot and pre-emptive power to punish. Yet, with no formal training, monitoring or meaningful oversight of their use, barring orders are open to abuse and constitute a summary power to punish that is opaque to scrutiny.

Keywords

Barring order; discretionary punishment; alcohol-related disorder; individual rights; summary justice; individualised control.

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Introduction

Problems and harms associated with excessive alcohol consumption in and around licensed premises have led to a range of responses and additional powers for licensees and police officers across Australian and other Western jurisdictions.¹ New offences, penalties and licensing provisions have steadily been implemented to help address issues related to alcohol-related violence and disorderly behaviour, and to empower licensees to more effectively manage associated risks. Patron banning—the removal and exclusion of individuals from licensed venues or wider public areas—is one mechanism that has found favour in a variety of contexts.² Banning provisions sit within a growing body of on-the-spot, summary punishments, and typify a discernible move towards discretionary and pre-emptive control of behaviours.³ The boundaries of criminal, civil and regulatory law have become increasingly blurred by legislative developments that have expanded the use of powers to prohibit and exclude under the auspices of both punishment and control. The adversarial criminal process embodies expectations of due process and procedural fairness. For example, a judicial hearing is predicated upon the presumption of innocence and requires guilt to be proven beyond reasonable doubt. By contrast, discretionary summary justice, administered on the spot, permits an immediate and subjective determination of both guilt and punishment.

This paper examines the further expansion of the discretionary power to punish to include non-judicial and non-law enforcement officers. The implementation of licensee-barring provisions continues a steady progression of summary powers to punish and exclude that are often opaque to scrutiny. By extending such powers to an individual member of the community, Room's (2012) notion of individualised control is, arguably, taken to its most individualised manifestation. The first part of this paper notes the steady growth of summary justice and concerns, which have been identified with respect to the application of banning and exclusion, using examples drawn from a range of Western jurisdictions. The use of licensee-barring powers in Victoria and South Australia is then examined. Their rationale and operationalisation are set out to inform consideration of the effect on due process and the attendant potential for their misuse. The extent to which the provisions are scrutinised is then examined. The paper concludes with a discussion of the key issues that licensee-barring powers embody and highlights the ongoing risk of such discretionary summary justice, which is largely invisible to scrutiny.

The growth of summary justice and exclusion

Police-imposed summary justice has become increasingly evident in regulatory responses to issues of public order. Beckett and Herbert (2008, 2009, 2010a, 2010b) examined the use of police discretionary powers to exclude in Seattle in the United States (US). Trespass rules allow police officers to issue on-the-spot exclusion orders from public spaces, which can last for up to a year. There is no requirement to provide any evidence of wrongdoing, restrictions apply to extensive geographical areas, and breaching an order can result in arrest and incarceration. Beckett and Herbert (2010a) highlighted the notable and disproportionate effect of exclusion upon the vulnerable, and found that the rigour with which orders were enforced progressively increased the likelihood of infringement and punishment.⁴ In England and Wales, the *Criminal Justice and Police Act 2001*, the *Anti-social Behaviour Act 2003* and the *Violent Crime Reduction Act 2006* introduced and extended police notices for disorder (PNDs), dispersal orders and police exclusionary powers.⁵ PNDs are issued on the spot by police officers for a range of alcohol-related and disorderly behaviours, while dispersal orders enabled police officers to exclude recipients from designated areas for actual or perceived anti-social behaviours. In 2014, section 34 of the *Anti-social Behaviour, Crime and Policing Act (UK)* authorised the creation of dispersal zones and empowered police to issue dispersal notices to individuals perceived to be likely to contribute to 'harassment, alarm or distress' of the public. Section 59 of the same *Act* introduced public space protection orders (PSPO), enabling local authorities to apply a range of prohibitions and exclusions within specific public areas. PSPO compliance is enforced by 'authorised persons' who are not required to be sworn law enforcement officers. Fines may be issued and prosecutions

initiated for alleged PSPO contraventions for behaviours that are not necessarily or inherently criminal. Belina (2007: 327) observed in relation to comparable exclusionary spatial orders in Bremen, Germany that such measures and their enforcement increasingly reflect the ‘criminalisation of the merely being there’.

Over the last four decades, the use of summary justice in Australia has evolved and expanded. Fox and Freiberg (1989) discussed the growth of discretion afforded to police in Victoria through the growing use of on-the-spot fines and infringement notices.⁶ In particular, the monetisation of justice—embedded within the move towards discretionary, police-imposed powers to punish—enabled money, risk and justice to converge (O’Malley 2009, 2010, 2011). Administrative instruments, typified by infringement fines for traffic offences, simulate a process of summary justice but operate outside of traditional judicial mechanisms. O’Malley (2009) observed the progression of this monetised approach into non-traffic related forms of offending, such as disorderly behaviours. In this context, police discretion is further enhanced, guilt is presumed—unless a recipient lodges an appeal—and justice is determined almost invisibly. More recently, Quilter and Hogg (2018) highlighted what they call the hidden punitiveness of fines, which reflects the potentially unseen consequences of summary penalties, many of which can be imposed on the spot by police and other regulatory officers. The number of actions and behaviours subject to summary police regulation and control continues to expand. In Victoria, between 2006–2007 and 2015–2016, infringement notices issued by Victoria Police increased by nearly 35 per cent to 3.1 million (Infringement Management and Enforcement Services 2016: 9).

Victoria was the first Australian jurisdiction to permit the imposition of discretionary public area banning notices,⁷ which enable police officers to exclude individuals from expansive public spaces for up to 72 hours. Similar provisions were introduced in South Australia in 2008 and have since been implemented in all other Australian jurisdictions (with the exception of the Australian Capital Territory).⁸ Banning notices may be imposed for a range of specified offences or in anticipation of a perceived future problematic behaviour. Concern has been noted, in both parliamentary and academic discourse, about the way in which summary and discretionary police powers in Australia can undermine individual rights, dilute due process expectations and create the potential for the provisions to be abused.⁹ The imposition of police banning notices,¹⁰ which are imposed summarily on the spot, exemplifies these concerns. They curtail freedom to move and are subject to criminal breach provisions; however, no evidence is recorded, no offence has to be committed and there is typically no appeal mechanism beyond the auspices of the police.¹¹ In Victoria, data are published each year documenting the use of police banning powers. Farmer (2016, 2018) analysed the available data and highlighted concerns that Indigenous and homeless people may be disproportionately affected. This mirrors issues identified by Beckett and Herbert (2008, 2009, 2010a, 2010b), with respect to the undue effect of exclusion on vulnerable people in the US city of Seattle. The discretionary and subjective nature of police-imposed banning provisions creates a risk of their specific and deliberate inappropriate application—for example, to further personal agendas, for discriminatory purposes or to punish individuals for reasons beyond the scope intended by the banning legislation.

Patron banning, as a response to alcohol-related disorderly behaviour, is popular with police and governments (Farmer, Curtis and Miller 2018) and finds little opposition from the liquor industry or the media. Sogaard (2018) examined the use of patron banning in Denmark and highlighted the underlying, but largely unverified, assumptions of deterrence and effect. Banning mechanisms implemented in the US, Germany, England and Wales, Denmark and Australia all reflect a determination to target and manage the behaviour of individuals through prohibition and exclusionary punishment. Patron banning specifically removes and excludes troublesome individuals from licensed venues and wider entertainment districts. As such, banning provides a direct and immediate response to unacceptable behaviours, and a tangible mechanism to manage risk within a given location. Nevertheless, the way in which police-imposed public area banning provisions are operationalised dilutes due process and undermines individual rights.

The issues embedded within such police-imposed provisions are mirrored in similar powers afforded to venue licensees. However, the concerns are heightened, as licensees are not law enforcement or judicial officers, but their powers to ban have become increasingly formalised and now embody lengthy periods of exclusion enforced by stringent criminal breach penalties. To date, the use and effect of licensee-barring provisions have been subject to very limited oversight and scrutiny.

Licensee-barring order provisions

Patron-banning measures have proliferated in Australia over the last decade (Farmer, Curtis and Miller 2018; Trifonoff et al. 2011). Venue-specific bans can apply in licensed premises in which an individual is alleged to have acted or behaved in a manner that is not acceptable. Licensed venues are private spaces and licensees have a longstanding common law right to determine who is entitled to enter and remain.¹² In recent years, the right of licensees to ban has been formalised in Victoria and South Australia by the introduction of barring order powers as a statutory codification of the common law right to exclude individuals from a private domain. Formal barring orders are imposed for a fixed period, are enforceable by police and non-compliance may lead to criminal breach proceedings.

In South Australia, licensee-barring orders were implemented following a 2008 amendment to the *Liquor Licensing Act 1997*. Section 125 empowers a licensee to issue a barring order if the recipient commits an offence, acts in a disorderly or offensive way in or near to the venue, or for any other reasonable cause. A first barring order can be imposed for up to three months, a second for up to six months and any further barring orders may be set for any period of time (*Liquor Licensing Act 1997* (SA) s. 125(5)). Breach of a barring order may lead to a fine of up to AU\$1,250 (*Liquor Licensing Act 1997* (SA) s. 125(2)), while recipients may seek a review of their order by request to the Liquor and Gambling Commissioner (*Liquor Licensing Act 1997* (SA) s. 128). Similar provisions were implemented in Victoria through the *Justice Legislation Amendment Act 2011*, which amended the *Liquor Control Reform Act 1998*. Section 106D enables a licensee or another 'responsible person' to bar someone from a licensed premises if 'the person is drunk, violent or quarrelsome', or is creating a 'substantial or immediate risk' (*Justice Legislation Amendment Act 2011* (Vic)). An individual receiving their first order may be barred for up to one month (*Justice Legislation Amendment Act 2011* (Vic) s. 106G). A second order, within a three-year period, may be imposed for up to three months, while a third or subsequent order, also within any three-year period, for up to six months. Failure to comply with the requirements of a barring order, which includes not entering any public place within 20 metres of a licensed venue (such as a footpath or car park), can carry a fine of up to 20 penalty units (*Justice Legislation Amendment Act 2011* (Vic) s. 106J).¹³ Under section 106I, the recipient of the barring order may seek its variation or revocation by a request to the Director of Liquor Licensing. If the recipient does not comply with the requirements of the barring order Victoria Police may issue an 'on-the-spot fine or formally charge them with an offence' (Victorian Commission for Gambling and Liquor Regulation [VCGLR] 2012: sec. 3).

Barring orders provide licensees with a police-enforceable power to exclude individuals from their venue and its environs. The rationale is, in theory, sensible. It is reasonable that those responsible for licensed venues should be empowered to address potentially harmful behaviours within their establishment, for the safety of themselves and other patrons. It is also reasonable that, once a decision has been made to bar a troublesome individual, police officers should be able provide enforcement support. However, the formalisation of barring order provisions has provided licensees with a summary power to punish, previously exercised only by police and judicial officers. Parallels can be drawn with the PSPOs in England and Wales, which are declared by local authorities and enforced by 'authorised persons' (*Anti-social Behaviour, Crime and Policing Act 2014* (UK) s. 68(1)), rather than police officers. Licensees are empowered to issue a police-enforceable punishment for an alleged behaviour, with breach of the punishment subject

to criminal proceedings. This power gives rise to concerns similar to those expressed about discretionary police powers to punish, with particular respect to the potential for individual rights to be undermined, and for the barring powers to be misused or abused.

No training is required before a licensee can exercise their police-enforceable power to bar, there is no process of certification, and no consequences for licensees if a barring order is revoked following formal review. In Victoria, no barring order records are published and there is no official scrutiny or oversight of the way in which licensee-barring powers are used.¹⁴ Section 106K(4) of Victoria's *Liquor Control Reform Act 1998* precludes licensees sharing any details of the barring orders they have imposed, other than with Victoria Police or a compliance inspector. Failure to comply with this requirement can lead to criminal proceedings. As a result, no data are accessible to enable examination of the nature and extent of the use of barring order powers in Victoria. In South Australia, section 128(A)(1) of the *Liquor Licensing Act 1997* requires an annual report to be tabled to Parliament summarising the number, reason for and location of licensee-barring orders that are issued for six months or longer. The report must also include data relating to the number and outcome of reviews submitted in relation to all licensee-barring orders.

In Victoria, the legislated behaviours for which a barring order can be imposed include being 'drunk, violent or quarrelsome' (*Liquor Control Reform Act 1998* (Vic) s. 106D). Violent and drunken actions are undeniably potentially problematic and can, in theory, be interpreted with reasonable objectivity. Such behaviours can also align with existing offence categories, for which punishments such as a barring order could be justified. However, the term 'quarrelsome' is much more subjective. There are many ways in which an individual could be deemed quarrelsome, which would not necessarily pass a threshold of criminality or merit a formal police-enforceable punishment. In South Australia, the reasons for which a barring order can be imposed are similarly broad and loosely framed. For example, an order can be imposed if an offence has been committed, but also for alcohol-related welfare reasons, offensive or disorderly behaviour, or 'any other reasonable ground' (*Liquor Licensing Act 1997* (SA) s. 125(1)). The inclusion of the term 'disorderly behaviour' and the absence of objective clarification regarding the remit of 'reasonable ground' are cause for concern. McNamara and Quilter (2015) drew particular attention to the risk of discrimination in New South Wales through police responses to subjectively defined disorderly behaviours. In both Victoria and South Australia, given the summary nature of licensee-barring order powers in the hands of untrained individuals, their broad interpretative scope is also potentially problematic. Zifcak (quoted in McArthur and Schulz 2011: para. 14) referred to Victoria's proposed licensee-barring powers as dangerous and 'a recipe for inconsistency ... [that] may actually provoke bad behaviour'.

Licensee-barring powers can also undermine due process and individual rights. It is a longstanding common law right for licensees to exclude individuals from their private premises. However, the barring order provisions formalise this power, extend the exclusion to a 20-metre public area around the venue (see *Liquor Control Reform Act 1998* (Vic) s. 3(4)), and enable the ban to be both enforced by police officers and subject to criminal breach proceedings. Licensees now have the capacity to formally punish individuals, but no evidence needs to be recorded, no hearing takes place before the imposition of a barring order and there is no meaningful oversight of their use. The barring order provisions were implemented to assist licensees to manage harmful behaviours, but the clear potential exists for the abuse of these powers. The lack of training and monitoring, and the subjective language used to describe some of the behaviours for which a ban can be imposed, enables licensees to issue a barring order for reasons that do not necessarily meet the legislated requirements. In such cases, individuals can find themselves subject to an on-the-spot, police-enforceable punishment at the whim of a licensee, for reasons that may be discriminatory, for personal gain or another illegitimate or capricious motivation.

In Victoria and South Australia, barring order recipients may submit a review request to their respective liquor licensing body.¹⁵ However, the barring order remains in place until or unless a

review takes place and the order is revoked, varied or it expires. There is no clear time frame provided with respect to a review, but it is likely that the process will require input from licensees and other interested parties or witnesses, all of which would take time. Section 128(1a) of South Australia's *Liquor Licensing Act 1997* makes clear that licensees must be given 'reasonable notice' of any hearing and the opportunity to attend. The effect is that the recipient of a barring order will be compelled to serve some or all of their ban regardless of any eventual decision to revoke it. For some recipients, their barring order may be an appropriate response to behaviours regarded as unacceptable or potentially harmful. However, given the way in which barring orders can be imposed, the process places a high level of discretionary power in the hands of licensees, who are not sworn law enforcement or judicial officers.

The scrutiny of licensee-barring orders

South Australia

South Australia mandates the annual publication of limited data regarding the use of licensee-barring orders under section 128(A)(1) of the *Liquor Licensing Act 1997*. Key data derived from the reports for the period between 2010 and 2017 are summarised in Table 1.¹⁶

Table 1: Overview of South Australia licensee-barring order data

	2009– 2010	2010– 2011	2011– 2012	2012– 2013	2013– 2014	2014– 2015	2015– 2016	2016– 2017
Number of licensee-barring orders	898	635	622	n/r	n/r	n/r	n/r	n/r
Number of licensee-barring orders \geq six months	303	294	105	121	47	185	159	128

n/r: the total number of licensee-barring orders issued is not reported. The legislation only requires reporting of orders issued for six months or longer, but early reports included data for all licensee-barring orders.

Across every report, the most common reason for the imposition of a licensee-barring order is recorded within the broadly defined category 'disorderly behaviour'. Four of the reports only include the imposition reasons for orders issued for a period of at least six months, which limits analysis of the data. The first two reporting years include reason data for all licensee-barring orders, and this is set out in Table 2. These data confirm the main imposition reason across these two reporting years to be disorderly behaviour. Unlike assault, property damage, drugs, theft and entering when barred, disorderly behaviour does not align with a specific offence and is not defined objectively in the barring legislation. Indeed, interpretation of disorderly behaviour is highly subjective.

Table 2: Licensee-barring order imposition reasons*

	2009–2010	2010–2011
Disorderly behaviour	584	343
Assault	98	99
Staff assault	55	81
Property damage	54	50
Drunken behaviour	51	37
Theft	37	32
Entering when barred	25	0
Drugs	13	12
Other reasons	13	126
False pretences	4	2

* Some barring orders may be issued for more than one reason.

Between 2010 and 2011, 126 barring orders were imposed for ‘other reasons’. It is not known what these may be, but this category accounts for approximately 16 per cent of imposition reasons in the 2010–2011 reporting year. The inclusion of such a category could enable barring orders that have been imposed for reasons that do not meet the legislated requirements to be hidden in the data. The absence of further information prevents any assessment of the validity of such orders.

Table 3 sets out the number of licensee-barring orders subject to review each year, and the number that was subsequently revoked or varied. The data confirm that a number of barring orders were reviewed each year, but it is not known for which reasons such orders were imposed or why a review request was submitted. In every annual report a proportion of barring orders is revoked or varied. As a share of the reviews submitted each year, the revocation rate ranges from 11 per cent in 2015–2016 up to 27 per cent in 2012–2013. The rate of variation is even higher, ranging from 21 per cent in 2009–2010 to 81 per cent in 2015–2016. The actual numbers involved are relatively low (with the exception of 2015–2016), but a notable proportion of licensee-barring orders that are subject to formal review are either revoked or varied.

Table 3: Number of licensee-barring order reviews, and the number of orders revoked and varied

	2009–2010	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017
Number of reviews submitted	53	39	41	56	31	38	191*	60
Number of orders revoked	8	6	8	15	7	6	21	10
Revoked orders as % of reviewed	15%	15%	20%	27%	23%	16%	11%	17%
Number of orders varied	11	9	17	18	17	19	154	44
Varied orders as % of reviewed	21%	23%	41%	32%	54%	50%	81%	73%

* There is a notable spike in reviews submitted in 2015–16. The total number of licensee barring orders issued in that year is not known, but the number imposed for at least six months shows no similar increase.

The reasons for the revocations are not known, neither are the details of any variations, specifically whether the period or remit of an order was reduced or extended. However, given that reviews are most likely initiated by ban recipients, it is presumed that most of the variations will reduce the scope of the ban in some way, but this cannot be confirmed. Each change does serve to highlight one or more issues with the imposition of the original licensee-barring order. The fact of revocation and variation points to a robust process of review in South Australia, but it is not known to what extent recipients are aware that they may submit a review request, or how accessible barring order recipients find the review process. It is clear that a significant proportion (between 36 per cent and 92 per cent) of those who do submit a review have their order revoked or revised. Further, given the time taken to undertake a formal review, for those orders that are subsequently revoked or reduced the recipient is likely to be required to have served all or some of their punishment. This means that a proportion of licensee-barring order recipients are subject to the full effect of a licensee-barring order that has been imposed contrary to requirements. As a result, recipients will have suffered a formal penalty for which there was no legitimate reason and no recompense.

The data published in South Australia enable only limited scrutiny of the use of licensee-barring powers, but it is clear that orders have been imposed incorrectly or inappropriately. The extent to which this reflects genuine error rather than deliberate misuse is not known and cannot be discerned from the available data.

Victoria

In Victoria, no data are published or accessible to enable analysis of the use of licensee-barring order powers. The legislation specifically prohibits licensees from sharing barring order information, other than for reasons of compliance, and the VCGLR does not collect any licensee-

barring data.¹⁷ As a result, there is no information available to monitor the number imposed, the reasons for their imposition, or the number or outcome of any reviews. While it may be reasonable to think that imposition patterns may be similar to those evident in South Australia, this supposition cannot be tested. The absence of data is a notable issue, as it renders the licensee summary power to punish invisible to scrutiny. Consequently, the extent to which licensee-barring orders in Victoria may be imposed improperly is not known. To demonstrate that the risk of the misuse of licensee-barring powers is more than theoretical, the circumstances of a barring order that was subsequently determined by Victoria's Director of Liquor Licensing to have been imposed without reason are briefly set out below.¹⁸ The barring order recipient is referred to by the pseudonym 'Mary', the licensed venue by 'Club X' and the licensee by the pseudonym 'Richard'.¹⁹

Mary and Richard both attended an event at Club X. Mary engaged in a conversation with Richard, during which she expressed some concern regarding his running of the venue. CCTV footage confirms the conversation lasted just under 10 minutes. It shows what appears to be a calm exchange, with no raised arms, no gesticulations, no stepping forward and no headshaking. Other people are visible in the vicinity of the conversation and nobody is seen to react to it. At the end of the conversation, Mary walks away and leaves the venue. She is not accompanied and nobody follows her. Richard later confirmed that the conversation came to a natural conclusion, that Mary was not asked to leave and no concern was expressed to her about what she had said or the manner of the exchange.

Six weeks after the initial conversation with Richard, Mary received a formal barring order by registered mail. The barring order stated that Mary 'was quarrelsome and abusive [and] used obscene language'. The order barred Mary from Club X for a period of one month, which commenced six weeks after the alleged incident. Mary had no prior issues with Club X, no criminal history and no record of contact with Victoria Police in any way. Yet, she was subject to a police-enforceable barring order. Mary was deeply concerned about what was happening and the possible reasons for it. She believed that she was being victimised for speaking out against the way in which Richard was running Club X, and that Richard's actions were rooted within a broader problem of gender discrimination, which other members of Club X had reported.

Mary submitted a written request to Richard to revoke the order. She denied the alleged behaviour, questioned the timing of the barring order, and insisted that it was an unwarranted and personally motivated punishment. Richard did not respond to Mary's request. Mary then determined to submit a request to the Director of Liquor Licensing to revoke the barring order. The information on the reverse of the order states:

the Director of Liquor Licensing (the Director) has the power to change or cancel any Barring Order. If you wish to make a request to the Director to consider changing or cancelling this Barring Order, you must complete the required form available from www.justice.vic.gov.au/alcohol.

The website link directs to the VCGLR home page. Once located, the instructions on the cancellation request form state the following:

Please note that the power to review is not intended to operate as a general appeals process. Instead, this power will be used sparingly to make minor changes to barring orders such as an incorrect name or wrong address. The VCGLR may also consider reducing the time length of the barring order.

This instruction appears to contradict the information on the barring order form, as it suggests that it will be difficult to secure the revocation of a barring order. Despite the ambiguity, Mary

submitted the review form to the Director of Liquor Licensing, along with a detailed outline of the facts of the case.

Two months later, Mary was advised that the Director would investigate her case. Mary submitted nine witness statements and the CCTV footage. Richard submitted his own statement and one other.²⁰ After a further two months, the Director of Liquor Licensing formally revoked Mary's barring order. The Director made clear that there was insufficient evidence to support the claims made against Mary and, crucially, that the context in which the barring order was issued did not meet the legislated imposition criteria.

This single case study does not prove the existence of systemic abuse of licensee-barring order powers in Victoria. However, in the absence of any accessible data, it does demonstrate that the powers can be misused by licensees for reasons that may be personal or discriminatory. Mary was eventually able to secure the revocation of her barring order, which suggests that the review process has the capacity to uphold the expectations of due process, albeit post hoc. Nevertheless, Mary was required to serve the entirety of her punishment, issued summarily by a non-law enforcement and non-judicial officer, yet later found to be without merit. The operation of the licensee power to impose a barring order has the clear potential to circumvent key due process requirements and undermine the rights of individuals to fair and transparent justice.

Discussion

Licensee-barring order provisions in Victoria and South Australia presume that a licensee has acted appropriately and proportionately. The ban takes effect immediately and recipients must comply. Barring orders afford licensees the power to remove and exclude troublesome patrons, and they ensure the support of police in their enforcement. However, the rights of the accused are manifestly diminished. That is, recipients must accept the barring order, which is imposed by a non-judicial and non-law enforcement officer. The reasons for the order can also be subjectively determined, no evidence needs to be provided by licensees and no witness statements are required. Failure to comply, even if the order has not been properly imposed, can lead to police enforcement action. There is no formal review process before the barring order and the explicit punishment that it embodies takes effect. In Victoria, the information provided to recipients about the formal review process is ambiguous. In particular, the advice on the reverse of the review form provides a clear indication that there is no general appeal process. The only option explicitly included on the review form is to correct name or address errors, or to adjust the period of the order. It is not known how many recipients of barring orders may have been discouraged from submitting an appeal by this confusing information.

The review data published for South Australia confirm that it is possible for a barring order to be revoked or varied. Similarly, the revocation of Mary's barring order suggests that the review process in Victoria can be effective. However, the nature of the review process will typically require recipients to serve their ban before the conclusion of the review. For Mary, the revocation came nearly five months after her order had been imposed. As a result, and regardless of the outcome, Mary served her full punishment—the effect of which is more than a short-term theoretical annoyance. Licensee-barring orders contain a very clear diminution of the right to move freely. In Victoria, this right is formalised within section 12 of Victoria's 2006 *Charter of Rights and Responsibilities Act*. The remit of the barring order extends beyond the private domain of a licensed venue to include all public areas within a 20-metre radius. The reason for this requirement is logical: to prevent a barred person from standing in or near a venue's doorway and/or continuing to behave in a problematic manner. However, this additional requirement restricts recipients from moving freely in the surrounding public area. In Mary's case, Club X is located adjacent to key local facilities. Her barring order precluded visits for the period of the ban as, due to the layout of roads, car parks and pathways, Mary would have to pass within 20 metres of Club X to reach her destination. As such, Mary's barring order prevented her from participating

in other activities unrelated to Club X for one month. The additional punitive effect of this is heightened by the later revocation of the order.

It is acknowledged that widespread abuse of barring order powers is not necessarily occurring in Victoria. However, the reality is that it is not known how or why such powers are being used. The absence of any recorded data precludes analysis of the extent to which other barring orders may have been issued for reasons that are not warranted. The way in which licensee powers to bar are used is not subject to any scrutiny, and the framing of such powers is subjective and open to a range of interpretations. In Victoria, barring orders afford licensees a discretionary power to impose a punishment for behaviours that may be violent, drunken and/or quarrelsome. Violent behaviours may be reasonably objective in their interpretation and, indeed, likely to be subject to additional police intervention and action. Drunken behaviour may be less easy to define or to determine when it has passed a threshold of acceptability, but a framework of relevant offences exists to provide a point of reference. More problematic is the determination of quarrelsome behaviour. There is no crime, offence category or clear guidelines within which the term quarrelsome is defined or measured. In South Australia, the inclusion of terms such as disorderly behaviour and 'any other reasonable ground' (*Liquor Licensing Act 1997 (SA)* s. 125) creates a similar potential for a barring order to be imposed for loosely framed and subjectively interpreted reasons. When added to the lack of oversight, it is feasible that licensees could impose a barring order for a range of unwarranted, disproportionate or discriminatory reasons. A 2016 review of South Australia's *Liquor Licensing Act 1997* noted some concern about the use and operation of licensee-barring order powers (Anderson 2016). In particular, the review stated:

the lack of formality and record keeping, particularly in relation to the service of such orders, makes it difficult for police to subsequently enforce such orders and brings into question the clarity and robustness of the barring provisions. (Anderson 2016: 224)

The review also recommended clarification regarding the reasons for which a barring order could be imposed.²¹

In Victoria, the potentially discriminatory use of patron-banning powers has been highlighted in an analysis of similar provisions, which were afforded to Victoria Police officers under the *Liquor Control Reform Amendment Act 2007*. Police officers may issue an on-the-spot banning notice excluding recipients from specified public areas for up to 72 hours. Unlike licensee-barring powers, the implementation of Victoria's police-imposed banning notice provisions is subject to some scrutiny. Victoria Police must publish an annual report to the Victorian Parliament detailing key data relating to the use of banning notices. It was stated during a parliamentary debate of the 2007 bill that the reports would enable examination of the way in which the banning powers are used and, in particular, highlight any disproportionate effect on more vulnerable recipients, such as Indigenous Victorians.²² This expectation was set in the context of a notable body of research into the discriminatory policing of Indigenous Australians,²³ and subsequent admissions of racial profiling by Victoria Police (2013).

Police-imposed banning powers are not identical to those given to licensees. However, they are comparable in terms of their immediate and summary imposition, the behaviours for which they can be given, and the potential effect upon due process and the individual rights of ban recipients. Analysis of the published banning notice data (Farmer 2016, 2018) has noted concern about the disproportionate effect of banning upon Indigenous Victorians, with the numbers of reported banning notice recipients being far higher than the Indigenous proportion of Victoria's population. While not conclusive proof of discrimination, the data highlights the potential for the misuse of discretionary powers to punish in a context in which key data are published and made available for scrutiny.

By contrast, Victoria's licensee-barring order form only details the name and address of recipients. No other demographic details are recorded, and no data are published to monitor the use of licensee-barring order powers. Barring order documentation is retained only at the licensed venue and is not subject to any reporting or oversight, unless an individual recipient initiates a review by the Director of Liquor Licensing. Licensee barring, and the particular potential for its discriminatory application, is currently rendered opaque to scrutiny.

Licensees across Australia enjoy powers under civil laws to determine who may enter and remain in their premises. Licensee-barring orders underwrite these longstanding powers through the formal imposition of police-enforceable criminal sanctions. The Victorian and South Australian Parliaments clearly regard licensee-barring orders as necessary and effective; however, the potential exists for licensees to use their barring order powers in ways that do not align with the purpose of the provisions. Unlike other on-the-spot punishments, such as infringement penalties for speeding or public transport fare evasion, the barring order punishment is served immediately and regardless of the outcome of any review. Indeed, the time taken to undertake a review may well serve as a major disincentive for recipients to object to their order. Further, there is no consequence for a licensee when a barring order is revoked. There is no requirement for the licensee to explain their actions, improve their processes or even to apologise, should a review determine that the provisions have been incorrectly applied.

Patron banning and barring exemplifies a move towards summary justice, which is increasingly invisible to scrutiny. Licensee-barring powers arguably take Room's (2012) notion of individualised control of alcohol consumption and associated behaviour to its most extreme manifestation. The operationalisation of the barring order provisions creates an imbalance between licensee and patron. However, the former are not law enforcement or judicial officers, but they are empowered to issue an on-the-spot, police-enforceable punishment. There is no need for licensees to demonstrate necessity or due process, and no requirement to objectively justify their decision. Barring orders tangibly dilute the individual rights of patrons and bolster the power of licensees to punish, without evidence, meaningful scrutiny or redress on the part of the excluded patron. The provisions enable licensees to discriminate, to use the power to bar for personal reasons or to exercise their power punitively. As such, licensee-barring orders are, in their current form, invisible to scrutiny and manifestly open to misuse and abuse.

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¹ For example, see Chikritzhs et al. (2007); Eckersley and Reeder (2008); Fleming (2008); Graham and Homel (2008); Smith, Morgan and McAtamney (2011); Trifonoff et al. (2011); Room (2012); McNamara and Quilter (2015); Menendez et al. (2015); Menendez, Kypri and Weatherburn (2016); Donnelly et al. (2016); and Farmer, Curtis and Miller (2018).

² Farmer, Curtis and Miller (2018) set out the key types of patron banning.

³ Issues and concerns regarding the use of pre-emptive and preventive justice have been examined across a range of literature, including Zedner (2007), Ashworth and Zedner (2008, 2014), and McCulloch and Wilson (2016).

⁴ For example, in 2005 trespass comprised the third largest category of cases in the Seattle Municipal Court. Yet, of the 1,947 criminal trespass cases filed, 60% had criminal trespass as the only charge (Beckett and Herbert 2010a: 91).

⁵ Crawford (2008, 2009, 2011) has undertaken extensive analysis of issues relating to discretionary police powers, such as dispersal orders.

⁶ Infringement notices were first introduced in Victoria through the *Magistrates (Summary Proceedings) Act 1975*.

⁷ Twenty-four hour banning notices were introduced under the *Liquor Control Reform Amendment Act 2007* (Vic) and extended to 72 hours under the *Justice Legislation Amendment Act 2011* (Vic).

- ⁸ Farmer, Curtis and Miller (2018) examined the steady proliferation of police-imposed banning powers across Australia.
- ⁹ For example, Spooner (2001) expressed concern that police move-on decisions in Queensland were based on subjective perceptions rather than demonstrable behaviours. Walsh and Taylor (2006, 2007) identified evidence of harassment by police officers in the use of move-on powers in Queensland. In New South Wales, recommendations by the state's Ombudsman (1999) to introduce a clear code of practice to improve accountability in the application of police move-on powers were not implemented. McNamara and Quilter (2015) drew attention to the continued risk of discrimination in New South Wales through police responses to subjectively defined disorderly behaviours.
- ¹⁰ Farmer (2016) examined the passage of the banning notice bills through the Victorian Parliament and highlighted notable concerns regarding the implementation and use of the provisions. Farmer (2017a) set out key disparities between human rights policy and practice, with respect to the use of police banning powers; Farmer (2017b) considered Victoria's banning notice powers in the context of collective 'pre-victimisation' and the dilution of individual rights; and Farmer (2018) provides a detailed analysis of key issues regarding the use and scrutiny of Victoria's banning notice provisions.
- ¹¹ Queensland does permit appeal to the Queensland Civil and Administrative Tribunal. In South and Western Australia, recipients of bans longer than one month can seek a review by the Liquor Commissioner.
- ¹² For example, see section 9(1)(d) of the *Summary Offences Act 1966* (Vic).
- ¹³ Penalty units are used throughout Victoria's legislation to quantify fine amounts (an offence may constitute a number of penalty units). Their value is set out and updated through Victoria's *Monetary Units Act 2004*. For the period 1 July 2017 to 30 June 2018, one penalty unit is AU\$158.57.
- ¹⁴ This was confirmed by the VCGLR in response to a formal request for barring order data (email, 15 May 2018).
- ¹⁵ The Director of Liquor Licensing in Victoria and the Liquor and Gambling Commissioner in South Australia.
- ¹⁶ The data exclude barring orders issued for alcohol-related welfare reasons.
- ¹⁷ This was confirmed by the VCGLR in response to a formal request for barring order data (email, 15 May 2018).
- ¹⁸ The author was contacted directly by the barring order recipient and given permission to share their story. The author had full access to all paperwork, statements, CCTV footage and other evidence in relation to these events. The author has spoken directly with Mary, Richard and other parties to the alleged behaviours.
- ¹⁹ None of the pseudonyms are in any way similar or connected to the actual case. To provide a further layer of anonymity, relevant dates have not been included in this paper.
- ²⁰ The author has been given access to all statements and evidence submitted by all parties.
- ²¹ A statutory review of Victoria's *Liquor Control Reform Act 1998* commenced in 2016. The terms of reference included consideration of current controls on patron behaviour, compliance and enforcement (Office of Liquor, Gaming and Racing 2016: 12). No outcomes or recommendations have yet been published.
- ²² Farmer (2016, 2017a, 2017b, 2018) examines key issues relating to the parliamentary passage, implementation and ongoing scrutiny of Victoria's banning notice powers.
- ²³ For example, Johnston (1991), Luke and Cunneen (1995), Cunneen (2001), Paradies (2005), and Walsh and Taylor (2006, 2007).

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