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Australian Law Reform Commission (ALRC)
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RE. ALRC INQUIRY INTO JUSTICE RESPONSES TO SEXUAL VIOLENCE

The Foundation for Alcohol Research and Education (FARE) welcomes the opportunity to provide a submission to this Inquiry.

The Foundation for Alcohol Research and Education (FARE) is a not-for-profit organisation with a vision for an Australia free from alcohol harms – where communities are healthy and well and where laws, policies and programs are fair, equitable and just.

Working with local communities, people with lived experience of alcohol harm, values-aligned organisations, health professionals, researchers and governments across the nation, we are improving the health and wellbeing of everyone in Australia.

FARE supports the submission to this Inquiry by Dr Julia Quilter and Dr Luke McNamara. Our responses below are structured around the following Issues Paper Questions: 18, 19, 20, 24, and 33. We note that the Issues Paper states that it focusses on procedural issues, and that future reform proposals will cover substantive law, including laws about consent. Given that the Terms of Reference specifically includes “*Laws about consent*”, much of our response below relate to how these procedural issues relate to the issue of consent.

Recent figures from the Australian Institute of Health and Welfare (AIHW) revealed that almost half of the nearly 350,000 women in 2021-22, who had experienced male perpetrated sexual assault in the previous decade, believed alcohol or another substance was a contributing factor.¹ The Alcohol / Drug-Involved Family Violence in Australia (ADIVA) project found alcohol was involved in around one in three incidents of intimate partner violence.²

The justice system needs to be unequivocal and consistent in how it deals with alcohol use to help prevent sexual assault and ensure that justice is served for survivors. Reforming justice responses to sexual violence, (including an accurate treatment of the role of alcohol in sexual violence), will directly support victim survivors. This is both through them experiencing a less-traumatic process, and through increasing the likelihood of a just outcome. Reforms should consider including calling expert evidence, jury directions, restricting questions, training justice professionals and specialist courts.

Assessment of the credibility and reliability of complainants

Questions 18 - Calling Expert Evidence

Dr Quilter and Dr McNamara's submission indicate their research showed jurors rarely had the benefit of medical / scientific expert evidence on the effects of alcohol or other drugs (AOD).³ They were more often told to use their 'common sense / knowledge' in relation to determining complex issues such as the relationship between AOD use and consent formation.

This also applied to the ways in which intoxication does (and does not) impact on memory and recall of events. They indicated that the claim that intoxication impeded memory (bringing into question the reliability of the complainant's evidence), tended to be asserted rather than substantiated with science-based evidence.

Recommendation 1. Ensure that judicial processes have access to, and call on medical / scientific experts to address the lack of credible evidence, including evidence about the effects of alcohol.

Question 19 - Jury Directions to Counter Myths and Misconceptions

Scientific knowledge on sexual violence trauma has discredited rape myths and misconceptions, and appellate courts have pronounced that there is no 'expected' way a complainant should behave. However, Dr Quilter and Dr McNamara's submission suggests these directions are limited in their effectiveness, compared with specifically restricting or prohibiting the admissibility of questions and evidence that risk reinforcing rape myths and misconceptions.

Recommendation 2. Ensure that any use of jury directions are fully evaluated for effectiveness, and not used in place of specifically restricting or prohibiting the admissibility of questions that reinforce myths and misconceptions, including myths about the role of alcohol.

Question 20 - Other Reform Options

Laws have been changed to add provisions to sexual offences to shift the significance of a complainant's intoxication away from carrying an assumption of consent, towards it being evidence of non-consent. In many Australian jurisdictions, a person cannot be deemed to have consented to sex if they are so affected by alcohol that they are incapable of consenting. However, these legislative advances have not resulted in widespread changes in how courts actually deal with alcohol use in determinations of sexual assault cases.

Some women are discouraged from even pursuing criminal charges if they were drinking during the time of their assault. A 'Four Corners' investigation last year highlighted the case of a survivor, who was told by Tasmanian Police that because she could not fully remember her assault, and because she did not look 'too intoxicated' on CCTV footage as she left the bar, that she could be viewed as having given consent.⁴

Dr Quilter and Dr McNamara's research showed that despite the legislative attempt to break the traditional connection between intoxication and consent, evidence that the complainant was intoxicated has still often been used by the defence to challenge the Crown case. This included arguments about complainant's disinhibition, failing to remember consent, and false memory.

A qualitative analysis of 102 Australian appellate court decisions from rape or sexual assault trials, found that a victim's evidence of their intoxication was more likely to impede rather than support a

prosecution's ability to prove non-consent.⁵ Alcohol use is still being used to discredit a witness and suggest that consent was given, by implying inhibitions were lowered and memory impaired, meaning they cannot offer a reliable account.

Recommendation 3. Ensure that the courts send a clear and consistent message about alcohol intoxication and consent. Ensure that in courtroom practice, a victim-survivor cannot be deemed to have consented if they are intoxicated.

Cross-examination and the law of evidence

Question 24 - Restricting Cross-Examination that Reflects Myths and Misconceptions

The Issues Paper notes that cross-examination is consistently reported as being re-traumatising. This can include questions based on myths and misconceptions about memory and alcohol use, and on personal therapeutic information including from AOD counselling.

Dr Quilter and Dr McNamara noted that the application of rules governing 'improper questions' is intended to make the complainants experience less traumatising. However, their research showed that there was little evidence that this restricted the topics of cross-examination or their manner (which could be sarcastic, combative, belittling, judgmental and repetitive).

They also noted that complainants were questioned about aspects of their past that were unrelated to the alleged sexual offence. This included aspects of personal history such as AOD use, addiction and mental illness. Such evidence was suggested as a basis for challenging the complainant's credibility and the honesty of her trial evidence. This clearly breached guidelines about positively associating consent with alcohol use. However, their research demonstrated that it was rare for the Crown to object or for the trial judge to disallow such questions.

Recommendation 4. Provide clear education and strong guidance for trial Judges and lawyers as to what constitutes improper questions, to reduce the variability of rulings regarding disallowance. Include in this guidance the pre-trial adjudication on the relevance and admissibility of proposed lines of questioning, to ensure only appropriate questions will be asked.

Specialisation and training for judges and counsel

Question 33 - Specialist Courts and Training

For justice responses to sexual violence to become trauma-informed, requires more than a change to the criminal code or to court procedures. It must necessarily involve trial judges and lawyers becoming trauma-informed through specialist training. This may temporarily reduce the number of judges and lawyers available to serve on sexual violence trials, (and thus increase delays). However, this could be offset by establishing Specialist Courts/Lists, which can make a contribution to reducing trial delay, as well as moving towards a trauma-informed justice model.

Recommendation 5. Educate justice professionals about evidence-informed association of alcohol and sexual violence, and the myths and misconceptions of sexual violence, including medical / scientific evidence around alcohol intoxication and consent. Establish Specialist Courts, to reduce trial delay and move towards a trauma-informed justice model.

Thank you again for the opportunity to contribute to this inquiry. If you would like to discuss any part of this submission further, please contact Dr Catherine Earl, Policy and Research Director, on Catherine.Earl@fare.org.au

Yours sincerely,



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CEO

¹ AIHW (2024) *Family, domestic and sexual violence* <https://www.aihw.gov.au/family-domestic-and-sexual-violence/understanding-fdsv/key-findings>

² NDLERF (2016) *Alcohol/Drug-Involved Family Violence in Australia (ADIVA) Key findings* <https://www.aic.gov.au/sites/default/files/2020-09/monograph68-key-findings.pdf>

³ Quilter J & McNamara L (2024) *Justice Responses to Sexual Violence* (submission to ALRC Inquiry)

⁴ ABC (2023) *Reliable witness* <https://www.abc.net.au/news/2023-11-14/intoxication-consent-law-alleged-rape-prosecution-730/102860610>

⁵ Quilter J & McNamara L & Porter M (2023) *The Nature and Purpose of Complainant Intoxication Evidence in Rape Trials: A Study of Australian Appellate Court Decisions* 43(2) *Adelaide Law Review* 606-640