FIELDS OF POWER IN RAPE TRIAL REFORM: HEGEMONY, *HABITUS* AND HERETICS

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Despite incremental reforms over the past fifty years, transformative change of sexual assault proceedings has not occurred. This article uses Bourdieu's sociological concepts to explore why the legal field remains resistant to substantial reform. It argues that doxa, or deeply ingrained beliefs, underpin both resistance to change and a tolerance of complainant harm, while habitus ensures the replication of established practices. This resistance is evident in the notion of a 'fair trial', where the hegemony of defendant-centric doxa tends to minimise complainant interests and embed the role of 'rape myths' in the courtroom. Although reform advocates – Bourdieu's 'heretics' – have proposed solutions such as juryless trials, real change remains elusive. This article examines recent proposals by the Australian Law Reform Commission and draws lessons from Scotland's failed attempt at a juryless trial pilot. Ultimately, a Bourdieusian analysis suggests that policymakers may be bound to a Sisyphean path, pursuing incremental reform to address persistent issues.

I INTRODUCTION

> Whether [rape] law reform is to be counted upon is one question; the second is whether law reform will even be the beginning of the answer.[1]

> Power is … the prime mover in the social world.[2]

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1 Jocelynne A Scutt, 'Introduction' in Jocelynne A Scutt (ed), *Rape Law Reform: A Collection of Conference Papers* (Australian Institute of Criminology, 1980) vii, xxii <https://www.aic.gov.au/sites/default/files/2020-07/rape-law-reform.pdf>.

2 Lars Bang, 'Between the Cat and the Principle: An Encounter between Foucault's and Bourdieu's Conceptualisations of Power' (2014) 6(1) *Power and Education* 18, 18 <https://doi.org/10.2304/power.2014.6.1.18>.

Sexual violence can be experienced by anyone, but it is overwhelmingly gendered: around 1 in 5 Australian women (22%) experience sexual violence as compared to 1 in 16 Australian men (6.1%) over 15 years of age.[3] However, women and girls ('complainants')[4] who choose to engage with the criminal justice system following sexual violence have historically experienced little in the way of 'justice'. More than 30 years ago, Judith Herman observed that the criminal justice system protects defendants[5] from superior state power but fails to protect complainants.[6] Whilst the rights of defendants are carefully guarded, there are 'essentially no guarantees' for complainants; indeed, if one were to design a system to retraumatise, 'one could not do better than a court of law'.[7] The complainant's plight is clearly illustrated by the *Heroines of Fortitude* study of court experiences in New South Wales ('NSW'),[8] released almost 30 years ago. Two thirds (65%) of sexual assault trials were stopped due to distress, as 'complainants dry-retched, claimed to feel nauseous in the witness box, were unable to answer questions or had to take regular breaks'.[9]

Over the decades, advocates for law reform have worked tirelessly to improve the complainant's lot. Certainly, some significant reform has been achieved, but its impact on either deterrence or accountability can be questioned: the prevalence rates for sexual violence in Australia are lurching toward 'emergency' levels,[10] with an 11% increase in the past year.[11] The structure of power in the adversarial criminal trial has prompted some to question the value of further reform efforts,[12] or

3 'Personal Safety: Australia', *Australian Bureau of Statistics* (Web Page, 15 March 2023) <https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>.

4 While the term 'victim-survivor' is generally accepted in the literature as the preferred term for people who have experienced sexual violence, this article utilises the term 'complainant' as the technical legal terminology for a victim-survivor in the criminal justice system before a verdict is handed down.

5 This article uses the term 'defendant' for a person accused of using violence, although the term 'accused' is often used in the literature. We have not changed the terminology in quotes.

6 Judith Herman, *Trauma and Recovery: The Aftermath of Violence* (Pandora, 1992) 72, cited in Louise Ellison and Vanessa E Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2016) 21(3) *International Journal of Evidence and Proof* 183, 190 <https://doi.org/10.1177/1365712716655168>.

7 Herman (n 6) 72.

8 New South Wales Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Report, November 1996) 101, cited in Julia A Quilter, 'Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35 *Australian Feminist Law Journal* 23, 54 <https://doi.org/10.1080/13200968.2011.10854458>.

9 Quilter (n 8) 54.

10 Elena Campbell et al, *Unlocking the Prevention Potential: Accelerating Action to End Domestic, Family and Sexual Violence* (Report, 2024) 6 <https://www.pmc.gov.au/sites/default/files/resource/download/unlocking-prevention-potential.pdf>.

11 'Recorded Crime: Victims', *Australian Bureau of Statistics* (Web Page, 27 June 2024) <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-victims/latest-release>.

12 Annie Cossins, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan, 2020) 76 ('*Closing the Justice Gap*'), citing Wendy Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19(1) *Feminist Legal Studies* 27, 29.

to declare that rape has effectively been decriminalised.[13] Against this background, it is timely to reflect on the power dynamics that impact on the receptiveness or otherwise to current proposals for reform of sexual assault proceedings, and the prospects of substantial change. As Julia Quilter notes, the work of Continental theorists can offer insights.[14]

This article investigates the drivers of resistance to law reform in the sexual violence space, adopting a socio-legal lens that draws on Pierre Bourdieu's work on power relations and 'fields' of power.[15] This article examines the recent Australian Law Reform Commission ('ALRC') inquiry,[16] and compares Scottish reforms that have progressed beyond inquiry to the Victims, Witnesses, and Justice Reform (Scotland) Bill ('Justice Reform Bill') which implements its recommendations.[17] Both initiatives considered implementing a juryless trial. This is not a new reform,[18] but it is important for three reasons relevant to our investigation: (i) it presents one possible pathway to reform on the significant issue of misconceptions or 'rape myths'; (ii) it is an example of a more fundamental challenge to established legal practice and, as such; (iii) it is a fitting vehicle to test whether Bourdieusian theory can help us understand resistance to sexual violence law reform.

This article proceeds as follows. Part II outlines Bourdieu's 'thinking tools' on power relations (*doxa*, *habitus*, capital) as applied to the 'field' of law and sexual assault trials. It discusses the notion of a 'fair trial' and the power imbalances between defendants, complainants and the public interest. This article asks whether a rebalancing is possible, exploring Bourdieu's concept of change,[19] and the potential for meaningful law reform set against hegemonic legal interests. This leads to a discussion in Part III of the recent ALRC inquiry, its proposed 'micro-strategies', and a Bourdieusian analysis of the potential for more fundamental

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13 Rachael Burgin, 'Rape Myths Make It Almost Impossible for Victim-Survivors of Sexual Assault to Find Justice in Australia's Legal System', *The Guardian* (online, 13 August 2023) <https://www.theguardian.com/commentisfree/2023/aug/12/myths-make-it-almost-impossible-for-victim-survivors-of-sexual-assault-to-find-justice-in-australias-legal-system>.

14 Quilter (n 8) 25.

15 Loic JD Wacquant, 'Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu' (1989) 7(1) *Sociological Theory* 26.

16 'Terms of Reference', *Australian Law Reform Commission* (Web Page, 23 January 2024) <https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/terms-of-reference/> ('Terms of Reference'); Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper No 49, April 2024) <https://www.alrc.gov.au/publication/jrsv-issues-paper-2024/> ('*Justice Responses Issues Paper*').

17 See SP Bill 26A Victims, Witnesses, and Justice Reform (Scotland) Bill [as amended at Stage 2] Session 6 (2025) ('Justice Reform Bill').

18 There are various models of juryless trial in common law courts, including judge-alone, multi-judge panel and hybrid panel of judge and lay assessors. Early examples of juryless trials include South Africa (introduced via the *Abolition of Juries Act 1969* (South Africa)) and Northern Ireland (introduced via the *Northern Ireland (Emergency Provisions) Act 1973* (NI) 'to deal with juror intimidation by paramilitary organisations and to address perverse acquittals along religious or sectarian lines': Liz Campbell, 'The Prosecution of Organised Crime: Removing the Jury' (2014) 18(2) *International Journal of Evidence and Proof* 83, 87 <https://doi.org/10.1350/ijep.2014.18.2.445>).

19 Bridget Fowler, 'Pierre Bourdieu on Social Transformation, with Particular Reference to Political and Symbolic Revolutions' (2020) 49(3) *Theory and Society* 439, 459 <https://doi.org/10.1007/s11186-019-09375-z>.

reform such as juryless trials. This analysis is supported by early indications of resistance from legal agents.

Part IV then compares the Scottish reform effort, canvassing Lady Dorrian's 2021 Review and its associated Justice Reform Bill of legislative reforms.[20] After discussing the government 'field' of power, this article examines the government's incendiary clash with agents in the legal field (and their *doxa*, *habitus*). The 'moon-sized meteor of a bill'[21] proved too controversial, and the government has dropped the provisions on the juryless pilot. The Scottish experience is particularly instructive as a recent example of the governmental challenges involved in trying to implement a juryless pilot, demonstrating Bourdieu's power relations at work. For this reason, interviews were conducted with Scottish stakeholders during October and November 2024 (quotes are incorporated where appropriate).[22]

Part V concludes that the difficult trajectory of law reform in the sexual violence space can be better understood with the assistance of Bourdieusian theory. Currently, there is considerable symbolic power creating 'room for manoeuvre'[23] and a desire for law reform. However, the drivers that reproduce the already entrenched legal field of power – Bourdieu's *doxa* and *habitus* – are formidable. 'Micro' law reform that is intelligible or 'readable' by dominant legal agents[24] may be successfully introduced, but 'clean sheet'[25] or 'root and branch'[26] proposals for paradigm-shifting change, such as the juryless trial, are likely to be staunchly resisted by the legal establishment.

II BOURDIEU'S POWER DYNAMICS IN SEXUAL ASSAULT LAW REFORM

A The 'Field' of Law and Its Capital, *Habitus* and *Doxa*

To lay the foundation for subsequent analysis it is necessary to briefly outline the main 'thinking tools' in Bourdieu's sociological theory: fields of power, capital,

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20 *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* (Report, March 2021) <https://www.scotcourts.gov.uk/media/gmrbrw5p/improving-the-management-of-sexual-offence-cases-march-2021.pdf> ('*Dorrian Review*').

21 Scotland, *Parliamentary Debates*, 23 April 2024, col 64 (Michael Marra).

22 The first author was appointed to the Lived Experience Expert Advisory Group to the ALRC inquiry. This provided insights into the reform process, however, this article presents the co-authors' views and not those of the ALRC. On 16 September 2024, the first and second authors briefed the ALRC Commissioners on the Scottish reform process. The authors obtained human ethics clearance for interviews with Scottish stakeholders (CQU25104) and the first author conducted interviews in Edinburgh, Scotland, from 21–23 October 2024. The first and second authors conducted virtual interviews on 4 and 13 November 2024. Further analysis of the data is continuing.

23 Fowler (n 19) 457, quoting Pierre Bourdieu, *Classification Struggles: General Sociology* (Polity, 2019) vol 1, 72.

24 Quilter (n 8) 26.

25 *Dorrian Review* (n 20) 3–4, 140.

26 Phoebe Bowden, Terese Henning and David Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) 37(3) *Melbourne University Law Review* 539, 544.

habitus and *doxa*. These tools can be applied to social contexts to identify the power dynamics that maintain and reinforce structural inequalities,[27] and to explain why these inequalities can be accepted as natural and continue largely unchallenged.

A *field* is a durable configuration of relations[28] – essentially, a playground of power within the wider social field, in which agents struggle for recognition and dominance in producing, circulating, and appropriating goods, services, knowledge or status.[29] For Bourdieu, power is a macro-concept describing the way that dominant institutions (such as law or government), as well as individuals, relate to each other and the entire social field.[30] Law may be conceptualised as a broad juridical field.[31] For Bourdieu, the force of the legal field of power is that it appears to be founded on equitable principles, coherent formulations and rigorous application. Clothed in the 'positive logic of science and the normative logic of morality',[32] law compels universal acceptance with its vision of an ordered society.[33]

The rules and practices in a field are fashioned by powerful agents with influence and access to *capital*, to maintain their position and exclude nonconforming agents or those without access to the capital valued in that field.[34] Capital as power may be economic, cultural, social or symbolic. Economic capital is self-explanatory, while cultural capital includes attributes such as education and verbal facility ('linguistic capital').[35] Linguistic capital, like all capital, is not distributed evenly. Especially in the legal field, the greater an agent's linguistic capital, the more they can 'exploit the system of differences … and thereby secure a profit of distinction'.[36] Social capital operates at both individual and collective levels, and includes social relationships (network ties) and resources (such as trust).[37] Symbolic capital is a sort of reputational capital – an accumulation of other types of capital 'as soon as they are known and recognized'.[38] Capital can be harnessed as *symbolic power* and used to maintain and reinforce structural inequality or, potentially, to generate change – challenging the assumption that symbolic power is *purely* symbolic.[39]

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27 Wacquant (n 15) 50.
28 Ibid 36.
29 David L Swartz, 'Bourdieu's Concept of Field', *Oxford Bibliographies* (Web Page, 28 April 2016) <https://doi.org/10.1093/obo/9780199756384-0164>.
30 Jen Webb, Tony Schirato and Geoff Danaher, *Understanding Bourdieu* (Allen & Unwin, 2002) xii.
31 Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38(5) *Hastings Law Journal* 814 ('The Force of Law').
32 Ibid 818.
33 Ibid 819.
34 'Pierre Bourdieu: Habitus, Capital, Fields, Doxa, and Reflexive Sociology', *PHILO-NOTES* (Web Page, 31 March 2023) <https://philonotes.com/2023/03/pierre-bourdieu-habitus-capital-fields-doxa-and-reflexive-sociology> ('Pierre Bourdieu: Habitus').
35 David L Swartz, 'Cultural Capital', *Oxford Bibliographies* (Web Page, 11 January 2018) <https://doi.org/10.1093/obo/9780199756384-0209>.
36 John B Thompson, 'Editor's Introduction' in Pierre Bourdieu, *Language and Symbolic Power*, ed John B Thompson, tr Gino Raymond and Matthew Adamson (Polity Press, 1991) 1, 18 (emphasis omitted).
37 Benjamin Cornwell and Alicia Eads, 'Social Capital', *Oxford Bibliographies* (Web Page, 29 October 2013) <https://doi.org/10.1093/obo/9780199756384-0076>.
38 Frédéric Lebaron, 'Symbolic Capital' in Alex C Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014) 6537, 6538, citing Pierre Bourdieu, *Choses Dites* (Minuit, 1987).
39 Ibid.

Agents in a field are socialised into its *habitus* – a set of dispositions, attitudes and practices unique to that field. Success in a field depends on agents closely aligning with its *habitus*.[40] *Habitus* is both structured and structuring: the field structures the *habitus*, and in turn the *habitus* constructs the field as meaningful, 'a world endowed with sense and with value, in which it is worth investing one's energy'.[41] *Habitus* almost subconsciously generates and organises practices,[42] aligning the 'sense of the game' with 'the game'.[43] In the legal field, *habitus* emerges as practices 'strongly patterned by tradition, education, and the daily experience of legal custom and professional usage … They have a life, and a profound influence, of their own' – including the power to determine '*what* and *how* the law will decide' in any particular conflict.[44]

Deeply entrenched within *habitus* is *doxa*, a kind of self-evident set of values or conventional wisdom that shapes judgments about the world. As such, it is rarely questioned, prompting 'unconscious submission to conditions that are in fact quite arbitrary and contingent'.[45] It can therefore cause social injustice to be 'misrecognised' as simply part of the 'social order that goes without saying'.[46] Its normalcy can be so complete that the norm, as coercion, ceases to exist as such.[47] Thus the 'paradox of doxa' is that it is uniquely capable of generating both suffering and submission.[48] Bourdieu calls this 'symbolic violence':[49] the imposition of symbols and meaning (culture) so that they are experienced as legitimate.[50] *Doxa* is defended in a field's orthodoxy, and attacked in heterodoxy.[51] Importantly, law's *doxa* drives its *habitus* to continue or replicate the legal field of power over time and, as a corollary, underpins resistance to law reform by hegemonic agents.

Yet Bourdieu's theory is not simply about 'pitiless social reproduction'.[52] A field should not be considered 'static' or incapable of change;[53] dynamic relations of material or symbolic domination cannot operate without implying or activating resistance.[54] Bourdieu's 'architectural drawing' of a theory of change[55] indicates a number of ways that 'room for manoeuvre' around *doxa* and *habitus* can be

40 'Pierre Bourdieu: Habitus' (n 34).
41 Wacquant (n 15) 44.
42 Pierre Bourdieu, *The Logic of Practice*, tr Richard Nice (Polity Press, 1990) 53; Gerd Christensen, 'Three Concepts of Power: Foucault, Bourdieu, and Habermas' (2024) 16(2) *Power and Education* 182, 185 <https://doi.org/10.1177/17577438231187129>.
43 Wacquant (n 15) 45.
44 Richard Terdiman, 'The Force of Law: Towards a Sociology of the Juridical Field: Translator's Introduction' (1987) 38(5) *Hastings Law Journal* 805, 807 (emphasis in original).
45 Webb, Schirato and Danaher (n 30) xi.
46 Fowler (n 19) 453.
47 Terdiman (n 44) 812.
48 Pierre Bourdieu, *Masculine Domination*, tr Richard Nice (Polity Press, 2001), cited in Webb, Schirato and Danaher (n 30) 96.
49 Terdiman (n 44) 812–3.
50 Richard Jenkins, *Pierre Bourdieu* (Routledge, 1992) 66.
51 Fowler (n 19) 457.
52 Ibid 459.
53 See generally Fowler (n 19) and Wacquant (n 15) 36–7.
54 Wacquant (n 15) 36.
55 Fowler (n 19) 459.

achieved.[56] For example, 'heretics' may accumulate capital, increase symbolic power and preach 'the ministry of the universal',[57] that is, purport to represent the universal 'public interest' to mobilise change.[58] While the prospects of transformative heretical success may be slim,[59] Bourdieu believes that the process of sociological analysis itself can assist, by 'transforming metaphysical problems into problems that can be treated scientifically and therefore politically'.[60]

B The Sub-field of Sexual Assault Proceedings

Having mapped out Bourdieu's thinking tools on power relations, this section applies them to the sub-field of sexual assault proceedings, to better understand the balancing of interests in a fair trial.[61]

Adversarial sexual assault proceedings are heard in a courtroom, which may be conceptualised in Bourdieusian terms as a distinct field[62] or sub-field of law.[63] The courtroom is a separate space where conflicts are transmuted into 'specialist dialogues' and a fair trial is viewed as an ordered progression towards the 'truth'.[64] What is at stake is a symbolic act of naming (guilty/not guilty), consecrated by the state's vision of order.[65] The 'triangulation' of interests in a fair trial, namely the interests of the accused, victim and the community, have been explicitly recognised in England and Wales. In *Attorney-General's Reference (No 3 of 1999)*, Lord Steyn acknowledged that a 'fair trial' does not focus predominantly on the defendant's interests: 'There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.'[66]

This principle has been accepted in NSW and Victoria at the Supreme Court level.[67] However, in England, courts have also acknowledged a (*doxic*) tendency to focus on the defendant's interests and minimise the complainant's interests in a sexual assault trial. In *R v A*, Lord Hope recognised that this addresses:

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56 Including heretical or prophet-like leaders of symbolic revolutions (such as Manet in the French art world), intelligentsia, and exploited agents: see generally Fowler (n 19).

57 Wacquant (n 15) 37.

58 Fowler (n 19) 447.

59 Ibid 450.

60 Pierre Bourdieu, *Sociology in Question*, tr Richard Nice (Sage, 1993) 28, cited in Webb, Schirato and Danaher (n 30) 66.

61 'Fair Trial and Fair Hearing Rights: Public Sector Guidance Sheet', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights?> ('Fair Trial Guidance Sheet').

62 Quilter (n 8) 53.

63 Julia Cooper, 'Judges as Myth-Busters: A Re-examination of Jury Directions in Rape Trials' (2022) 31(4) *Griffith Law Review* 485, 501 <https://doi.org/10.1080/10383441.2022.2143663>. Cooper notes that Bourdieu is somewhat unclear as to the nature of the courtroom: whether it is an independent field, or a sub-field. The latter is preferred and adopted in this article.

64 Bourdieu, 'The Force of Law' (n 31) 830.

65 Ibid 838.

66 [2001] 1 All ER 577, 584.

67 See *R v Lodhi* (2006) 199 FLR 250, 263–4 [56] (Whealy J) ('*Lodhi*'); *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300, 319 [77] (Bell J) ('*Ragg*').

> one side of the balance only. On the other side there is the public interest in the rule of law. The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case.[68]

Construed as *doxa*, it is unsurprising that this imbalanced focus – despite causing suffering for complainants – has not been significantly challenged in England or Australia. Cloaked by the 'smooth working of habitus',[69] it is defended as orthodoxy. The following subsections therefore investigate the *doxa* and *habitus* surrounding the law's approach to the defendant's interests, and the complainant's challenges, in the sub-field of the sexual assault trial. While *habitus* (given its field reproductive function) resists reform, as Lord Hope points out, the third interest in the balancing exercise – the public interest in the rule of law – indicates reform is necessary.

1 Defendant's Rights/Fair Trial

The view that the right to a fair trial is 'a defendant-centric right'[70] is neatly encapsulated in William Blackstone's (in)famous ratio of 1765, that it is 'better that ten guilty persons escape, than that one innocent suffer'.[71] The proposition in this ratio that it is '*much worse* to convict an innocent than mistakenly release the guilty' is debatable,[72] but Blackstone did not explicate it further, presenting it casually, 'with no discussion as to whether or why it is true'.[73] Blackstone's 'seductive asymmetry'[74] has been uncritically accepted in Australia for generations as part of the core legal *doxa* underpinning the vigorous safeguarding of a defendant's rights in a criminal trial. As noted in *Lehrmann v Network Ten Pty Ltd*,[75] such orthodoxy is instilled in legal agents from the outset:

> Most first-year law students are introduced to … 'Blackstone's ratio' … This moral choice accommodating the possibility of error has been reflected in fundamental aspects of our criminal justice system, including the presumption of innocence and the logically connected requirement the burden of proof rests with the prosecution. It also finds reflection in the rigour of the criminal law standard of proof [beyond reasonable doubt].[76]

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68 *R v A (No 2)* [2002] 1 AC 45, 82 ('*R v A*').

69 Pierre Bourdieu and Terry Eagleton, 'Doxa and Common Life: An Interview' in Slavoj Žižek (ed), *Mapping Ideology* (Verso, 1994) 265, 277, cited in Webb, Schirato and Danaher (n 30) 96.

70 Bowden, Henning and Plater (n 26) 558.

71 William Blackstone, *Commentaries on the Laws of England* (Oxford University Press, 2016) bk 4, 231 [352].

72 Lewis Ross, *The Philosophy of Legal Proof* (Cambridge University Press, 2024) 8 (emphasis in original) <https://doi.org/10.1017/9781009127745>.

73 Fritz Allhoff, 'Wrongful Convictions, Wrongful Acquittals, and Blackstone's Ratio' (2018) 43 *Australasian Journal of Legal Philosophy* 39, 39.

74 Ross (n 72) 8.

75 [2024] FCA 369 ('*Lehrmann*').

76 Ibid [106]–[107] (Lee J).

Apart from these defendant safeguards underpinned by Blackstone's ratio, Australia's adversarial system 'employs numerous means to prevent accused persons who are innocent from being convicted'.[77] Indeed, there are significant obligations on the prosecution and a lack of 'obligation of any kind upon the accused to prove, or bring forward anything'.[78]

However, the defendant's 'right' to a fair trial is not a positive right, but is 'more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial'.[79] This right is enshrined within the laws and procedural rules that govern the trial process,[80] such that the courts may consider the trial unfair and quash the resulting conviction if there was a failure to comply with the rules.[81] This 'negative right' leads to a number of 'minimum requirements' that must be met,[82] such as the presumption of innocence as noted above,[83] the defendant's right to silence,[84] legal representation,[85] an impartial tribunal,[86] having adequate time to prepare a defence,[87] and access to the assistance of an interpreter where necessary.[88]

Beyond these basic parameters, the requirements of the 'negative right' have not been exhaustively defined; they can evolve and expand with further judicial articulation.[89] Some argue that juries play a 'critical role' in ensuring a fair trial[90] – but while juries are required for all indictable offences under section 80 of the *Australian Constitution*,[91] there is no such requirement in the state/territory laws

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77 *Eastman v DPP (ACT)* (2003) 214 CLR 318, 358 [114] (Heydon J) ('*Eastman*'). See also *Azzopardi v The Queen* (2001) 205 CLR 50.

78 *Dyers v The Queen* (2002) 210 CLR 285, 327 [119] (Callinan J).

79 *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J) ('*Dietrich*'). See also at 326 (Deane J), 356 (Toohey J). As the concept is not articulated in the *Constitution* or legislation, James Spigelman suggested it should be referred to as the 'principle of a fair trial'. See James Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78(1) *Australian Law Journal* 29, 30.

80 *Dietrich* (n 79) 300 (Mason CJ and McHugh J), 326 (Deane J).

81 Ibid 362 (Gaudron J). Each case is considered on its particular facts: at 364.

82 Many of these rights are also expressly identified in article 14 of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'), although Australia has failed to incorporate the *ICCPR* fully into domestic legislation. See also the list of requirements of a fair trial and relevant discussion in Anne Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That Is the Question' (2006) 18(2) *Current Issues in Criminal Justice* 318, 332–3.

83 See also *ICCPR* (n 82) art 14(2).

84 See also ibid art 14(3)(g).

85 Although this does not extend to legal representation at the public's expense: *Dietrich* (n 79) 317 (Brennan J), 349 (Dawson J). See also ibid art 14(3)(d).

86 See, eg, *Eastman* (n 77) 358 [114] (Heydon J). See also *ICCPR* (n 82) art 14(1).

87 *Dietrich* (n 79) 300 (Mason CJ and McHugh J). See also *ICCPR* (n 82) art 14(3)(b).

88 *Dietrich* (n 79) 300 (Mason CJ and McHugh J). See also *ICCPR* (n 82) art 14(3)(f).

89 *Lodhi* (n 67) 263 [56] (Whealy J), citing *R v H* [2004] 2 AC 134. The appellate case law provides guidance as to factors and requirements likely to be relevant when determining whether the defendant received a fair trial on the facts: *Dietrich* (n 79) 353 (Toohey J).

90 Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, February 2011) 7.

91 It is for the federal Parliament to determine what amounts to an indictable offence: see *R v Archdall and Roskruge; Ex parte Carrigan* (1928) 41 CLR 128, 138–9 (Higgins J). In *Cheng v The Queen* (2000) 203 CLR 248, 291, McHugh J reiterated this view: 'The literal meaning of s 80 is very clear: trial by jury is required only where the trial is on indictment.' This therefore diminishes the protection section 80

that apply to almost all prosecutions for sexual offences. Australia is also a member of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), but article 14 only specifies 'a fair and public hearing by a competent, independent and impartial tribunal'.[92] The *ICCPR* does not stipulate a jury trial, and could not do so, given that juryless models operate successfully in many signatories' jurisdictions – including Australian states/territories (in a limited sense).[93]

As noted above, some Australian courts have acknowledged the need to balance the triangulation of interests,[94] although the High Court has not yet done so. Often, only the defendant's and State interests as parties are considered;[95] the complainant is not a party, so their interests are easily overlooked. This deeply embedded *doxa* is not a uniquely Australian experience. As a Scottish Chief Executive Officer of a sexual assault service observed, the criminal justice system is 'an adversarial system that's been seen very much in terms of the binary context between the state – so the public interest – and the accused person. What that's meant is that the complainer[96] is or can feel very, very peripheral to that process.'[97]

A Scottish defence counsel described the *doxa* in very different terms:

> the overriding thing is 'where is the harm in the game?' … I appreciate that there are complainers that come to court and are retraumatised … but at the end of the day it is … the might of the state against the man. … So it's very challenging. So we have the safeguards built in and the checks and balances in the system.[98]

The Bourdieusian tool of *doxa* is therefore useful to explain the imbalanced 'defendant-centric' view of a fair trial, which drives its corresponding *habitus*:

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offers from tyranny. See also Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 228 [8.39].

92 *ICCPR* (n 82) art 14. Australia signed the *ICCPR* in 1972, and ratified in 1980, but the *ICCPR* has not been adopted formally into local law: Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Legal Foundations of Religious Freedom in Australia* (Interim Report, November 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion>.

93 Most states provide for judge-alone trials although Victoria, the Australian Capital Territory ('ACT') and Northern Territory do not: see *Justice Responses Issues Paper* (n 16) 9 [40] (the ACT allows them but excludes sexual offences). Victoria provided for judge-alone trials during COVID-19 but then removed this option; there is now a 'push to get it back': Andrew Burke, 'Please Explain: Trial by Judge or Jury?', *The Lighthouse* (Blog Post, 22 August 2024) <https://lighthouse.mq.edu.au/article/august-2024/please-explain-trial-by-judge-or-jury>. Judge-alone criminal trials increased in NSW from 6% to 18% of trials between 1999–2019: Jonathan Gu, 'The Effect of Judge-Alone Trials on Criminal Justice Outcomes' (Crime and Justice Bulletin No 264, NSW Bureau of Crime Statistics and Research, March 2024) 32.

94 *Lodhi* (n 67); *Ragg* (n 67).

95 The High Court has stated that courts must consider 'the interests of the Crown acting on behalf of the community as well as to the interest of the accused': *Barton v The Queen* (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J), cited in *Dietrich* (n 79) 335 (Deane J). See also *Jago v District Court (NSW)* (1989) 168 CLR 23, 33 (Mason CJ) ('*Jago*'); *McKinney v The Queen* (1991) 171 CLR 468, 488 (Dawson J); *Phillips v The Queen* (1985) 159 CLR 45, 62 (Deane J); *Matusevich v The Queen* (1977) 137 CLR 633, 654 (Aickin J).

96 'Complainer' is the Scottish term for 'complainant'.

97 Interview with Sandy Brindley, Chief Executive Officer of Rape Crisis Scotland (AJ George, online, 4 November 2024) ('Brindley Interview').

98 Focus group interview with members of the Law Society of Scotland (AJ George, Law Society of Scotland, 22 October 2024).

resistance to complainant-focused reform, and arguments that the pendulum of reform has already 'swung too far'.[99]

2 Complainant's Experience

Lord Hope's balancing of competing interests is achieved (in typically adversarial language) by respecting 'the principle of "equality of arms", which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings'.[100]

There is ample evidence indicating that the experiences of complainants do not reflect this 'equality of arms' because, as noted above, they are not a party but merely a witness to their own sexual assault.[101] Complainants have recounted finding 'themselves in a "central yet compromised position" in criminal justice proceedings', through systemic barriers that prevent them from adequately participating in the justice process.[102] Complainants may wait months or even years for their case to be heard which, in addition to their sexual assault, can leave them in a prolonged state of emotional turmoil.[103] In anticipation of the trial, complainants know they will have to retell their traumatic experience in front of a jury of strangers, which can lead to chronic stress, exacerbating the psychological toll of

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99 See, eg, Cossins, *Closing the Justice Gap* (n 12) 341; Janet Albrechtsen, 'Ideology Has No Place in Sexual Assault Law Reform', *The Australian* (online, 28 June 2024) <https://www.theaustralian.com.au/inquirer/ideology-has-no-place-in-sexual-assault-law-reform/news-story/92d615013d6255b86b043557af70dbed>.

100 'Fair Trial Guidance Sheet' (n 61).

101 See the various reports and inquiries: National Summit on Women's Safety, 'Joint Statement by the 2021 Women's Safety Summit Delegates Representing the Rights and Interests of Migrant and Refugee Women' (Joint Statement, 2021) <https://www.ssi.org.au/images/Publications/Joint_Statement_by_the_2021_National_Womens_Safty_Summit.pdf>; Kate Fitz-Gibbon et al, Monash Gender and Family Violence Prevention Centre, *National Plan Victim-Survivor Advocates Consultation Final Report* (Report, February 2022); National Office for Child Safety (Cth), *National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030* (Report, 2021) <https://www.childsafety.gov.au/resources/national-strategy-prevent-and-respond-child-sexual-abuse-2021-2030>; Sexual Assault Prevention and Response Steering Committee, Parliament of Australian Capital Territory, *Listen. Take Action to Prevent, Believe and Heal* (Report, December 2021) <https://www.act.gov.au/__data/assets/pdf_file/0020/2390204/Listen-Take-Action-to-Prevent-Believe-and-Heal.pdf>; Women's Safety and Justice Taskforce, Parliament of Queensland, *Hear Her Voice: Women and Girls' Experiences Across the Criminal Justice System* (Report No 2, 1 July 2022) vol 1 <https://www.publications.qld.gov.au/dataset/8a9488b5-65a3-4d8c-bea6-202bab63eb55/resource/5b70727a-cc0e-4e08-8eda-e1434e6e0814/download/wsjt-hear-her-voice-report-2-volume-1.pdf>; New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) ('*Improving Justice System Response*'); Western Australian Law Reform Commission, *Project 113: Sexual Offences* (Final Report, October 2023); *Justice Responses Issues Paper* (n 16).

102 Amanda-Jane George et al, *Specialist Approaches to Managing Sexual Assault Proceedings: An Integrative Review* (Report, August 2023) 26 ('*Specialist Approaches*'), citing Haley Clark, '"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' [2010] (85) *Family Matters* 28.

103 'New Victims' Commissioner Survey Looks at Impact of Court Delays on Victims', *Victims Commissioner* (online, 13 August 2024) <https://victimscommissioner.org.uk/news/new-victims-commissioner-survey-looks-at-impact-of-court-delays-on-victims/>.

the initial assault.[104] Delays also hamper recovery efforts, affecting a complainant's sense of self-worth.[105]

A detailed discussion of the many retraumatising factors in the justice system's response to complainants of sexual violence is beyond the scope of this article;[106] however, the persistent issue of 'rape myths' (or 'misconceptions') is of particular interest, as it disadvantages complainants at all stages of the criminal justice process. Rape myths are 'prejudicial, stereotyped or false beliefs about rape'[107] which question a complainant's portrayal of an assault as being factual.[108] Some of the more common rape myths are that 'real' rape is stranger rape, that a complainant will sustain injuries, that they will fight back, report early, and present as emotionally distressed. When a complainant's sexual assault experience or behaviour does not align with such beliefs, they can be viewed as less credible or actually responsible for the assault ('victim-blaming'). Rape myths are often justified as 'common sense'; as such, they fit the description of collective *doxa* in the wider social field[109] – unquestioned attitudes, accepted as being the 'way of things'.

The literature indicates that rape myths disadvantage complainants at both the police reporting[110] and prosecution stages.[111] Moreover, during the trial, defence counsel can draw on rape myths to manipulate the jury or reinforce the biases they may already hold, undermine the complainant's credibility, and create doubts

104 Miguel Clemente and Dolores Padilla-Racero, 'The Effects of the Justice System on Mental Health' (2020) 27(5) *Psychiatry, Psychology and Law* 865, 866 <https://doi.org/10.1080/13218719.2020.1751327>.

105 Ibid.

106 See the detailed analysis in George et al, *Specialist Approaches* (n 102).

107 Martha R Burt, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217, 217 <https://doi.org/10.1037//0022-3514.38.2.217>; Kimberley A Lonsway and Louise F Fitzgerald, 'Rape Myths: In Review' (1994) 18(2) *Psychology of Women Quarterly* 133 <https://doi.org/10.1111/j.1471-6402.1994.tb00448.x>.

108 Full Stop Australia, Submission to Women's Safety and Justice Taskforce, *Discussion Paper No 3: Women and Girls' Experiences across the Criminal Justice System as Victim-Survivors of Sexual Violence and Also as Accused Persons and Offenders* (April 2022) 10.

109 Andi Nirmalasari and Billy Sarwono, 'Symbolic Violence Manifestation behind Victim Blaming Practices' (2019) 558 *Advances in Social Science, Education and Humanities Research* 26, 32 <https://doi.org/10.2991/assehr.k.210531.004>. See also the analyses based on Roland Barthes' notion of *doxa*: Tanya Serisier, 'How Can a Woman Who Has Been Raped Be Believed? Andrea Dworkin, Sexual Violence and the Ethics of Belief' (2015) 4(1) *Diegesis* 68, 76; Tanya Serisier, 'What Does It Mean to #BelieveWomen? Popular Feminism and Survivor Narratives' in P Dawson and M Mäkelä (eds), *The Routledge Companion to Narrative Theory* (Routledge, 2022) 342, 343. Barthes' notion of *doxa* is 'closely related' to Bourdieu's, albeit more closely focused on the structure of language and the cultural myths of mass culture: Erik Bengtson, 'The Concept of *Doxa* in the European Reinvention of Rhetoric' in Norbert Gutenberg and Richard Fiordo (eds), *Rhetoric in Europe: Philosophical Issues* (Frank & Timme, 2017) 79, 82–4.

110 Particularly for populations at greater risk of sexual violence: see Amanda-Jane George et al, *Towards a Culturally Safe and Trauma-Informed Court: A Scoping Review of Populations That Experience Increased Susceptibility to Sexual Violence* (Report, 2024) <https://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/abstract_george-scoping_review_of_priority_populations.html>.

111 George et al, *Specialist Approaches* (n 102) 188. See also Mary Iliadis and Kerstin Braun, 'Sexual Assault Victims Can Easily Be Re-traumatised Going to Court: Here's One Way to Stop This', *The Conversation* (online, 25 March 2021) <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428>.

about whether consent was provided.[112] Cross-examination in the 'theatre' of the adversarial trial is a showcase for defence counsel's verbal acuity – a paradigmatic example of Bourdieu's linguistic capital – and is set amongst the cultural and social capital in the courtroom sub-field of power which is alien to many complainants:

> The myriad of symbolic devices – the robes, the wigs, the ritual expressions … are not irrelevant distractions: they are the very mechanisms through which those who speak attest to the authority of the institution which endows them with the power to speak …[113]

Studies show that despite incremental reforms introducing a range of measures which can alleviate some retraumatising aspects of trial,[114] improper questioning using rape myths remains relatively unaffected.[115] As one defence counsel recently observed, quoting Lord Brougham's (*doxic*) observation from 1821:

> A criminal defense lawyer is obligated as a matter of ethics to zealously pursue the client's interest within the bounds of law. … To save that client by all means and expedients, and at all hazards and costs to other persons, and … in performing this duty [she] must not regard the alarm, the torments, the destruction which [she] may bring upon others.[116]

Defence counsel questioning based on rape myths is precisely the kind of conduct that Lord Hope called 'deflecting juries from the true issues in the case'.[117] Construing the defence's utilisation of rape myths as *habitus* driven by *doxa* provides both a sound understanding of the nature of this conduct (deploying 'common sense' arguments as to the 'way of things'), as well as an insight into the misrecognised nature of the issue and the 'surprising' absence of more successful challenges to it.[118] In the face of such displays of power – shaming and blaming – it is understandable how at once the retraumatised complainant's ability to provide her best evidence is prejudiced and the seeds of reasonable doubt are sowed for the

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112 Ania Moroz and Tamar Dinisman, Victim Support, *Suffering for Justice: Sexual Violence Victim-Survivors' Experiences of Going to Court and Cross-Examination* (Report, October 2024) 37. At least one question using myths or stereotypes was asked in 73% of the sexual violence cases analysed. Of the cases included in the analysis: 27% of victim-survivors were asked about what they did to prevent the offence; one-third were asked what they did to stop the offence while it was happening; one-third were asked if pursuing justice was a way of seeking revenge; and one-third were asked if they were under the influence of alcohol or another substance. Victim-survivors were also asked about their mental health and the medication they use.

113 Thompson (n 36) 9.

114 Such as closed courts for complainant evidence, alternative arrangements for complainants to give evidence (typically CCTV), allowing a support person for the complainant, and other specific protections such as prohibitions on a defendant personally cross-examining a complainant, and the use of sexual reputation/experience evidence: Julia Quilter and Luke McNamara, 'Experience of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis' (Crime and Justice Bulletin No 259, NSW Bureau of Crime Statistics and Research, August 2023) 12, 34.

115 Ibid 35: '[C]omplainants are still routinely questioned in ways that place them at the centre of intense scrutiny and judgment that is underpinned by rape myths'.

116 Abbe Smith, 'Can You Be a Feminist and a Criminal Defense Lawyer?' (2020) 57(4) *American Criminal Law Review* 1569, 1580, quoting *The Trial at Large of Her Majesty Caroline Amelia Elizabeth, Queen of Great Britain, in the House of Lords, on Charges of Adulterous Intercourse* (J Gleave, 1821) vol 2, 2–3 (Lord Brougham). Substitution of female gender in original.

117 *R v A* (n 68) 31 [94].

118 Webb, Schirato and Danaher (n 30) 96.

jury. Implementing Bourdieu's theory, the continued and normalised imposition of suffering on complainants can be read as 'symbolic violence'.

3 Public Interest

The historical failure to appropriately balance the defendant's and complainant's interests in the sub-field of the adversarial sexual assault trial prejudices the third interest in Lord Hope's balancing exercise: the public interest. The concept of public interest itself is notoriously 'ambiguous and mutable',[119] but on a broad ideological level, it is one of those 'juridical norms' that exemplifies the powerful language of '*universal* and *eternal* values'.[120] 'Like justice, the public interest is taken to be an ideal worthy of pursuit; it is something our laws and policies should aim towards'[121] for the welfare of society.

In a sexual assault trial, the State brings the action, representing the public interest. In this context, as Lord Hope notes, the public interest is served by achieving a fair trial and, more broadly, a properly functioning criminal justice system which supports the rule of law – and which is *seen* to do so, providing appropriate accountability and deterrence such that reporting a serious offence like rape is viewed as a viable option. This is also important to ensure peace and order.[122]

However, as Lord Hope points out, the low reporting and conviction rates indicate that the balance between the parties' interests is not being achieved. Why is this so, given the need for change has been recognised for decades? And where legislative reform occurs, why is it resisted or misapplied in practice?[123] Part II(B)(1) examined one potential factor: legal *doxa* involving a defendant-centric view of rights in a fair sexual assault trial, accompanied by its *habitus*-driven resistance. In addition, *doxa* and *habitus* can be seen working on a more basic level. As discussed in the next section, legal agents are generally quite conservative about whether or how the law or legal practice should change.

C General Drivers of Resistance to Reform of Sexual Assault Proceedings

Legal change proceeds at a laggard pace. This is necessary to maintain consistency and public order, but when it comes to law reform, laggard change can be problematic. This is particularly so where the public interest shifts with changes in social mores and values.[124] For example, Sir Matthew Hale's 1736 proposition that marital rape was not possible because women irrevocably consented to sex through marriage[125] was only eradicated in Australia over a 20-year period to

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119 Jane Johnston, 'Whose Interests? Why Defining the "Public Interest" Is Such a Challenge', *The Conversation* (online, 22 September 2017) <https://theconversation.com/whose-interests-why-defining-the-public-interest-is-such-a-challenge-84278>.

120 Bourdieu, 'The Force of Law' (n 31) 841 (emphasis added).

121 Eric R Boot, 'The Public Interest: Clarifying a Legal Concept' (2024) 37(2) *Ratio Juris* 110, 112 <https://doi.org/10.1111/raju.12401>.

122 Here, the High Court's discussion was in the context of company fraud: *Jago* (n 95) 49–50 (Brennan J).

123 See Quilter (n 8).

124 Johnston (n 119).

125 Patricia Easteal and Christine Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8(2) *Flinders Journal of Law Reform* 185, 186 n 6: '[F]or by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract'.

1994[126] – although it was still argued in the 2012 High Court case of *PGA v The Queen* ('*PGA*').[127]

The judgments in *PGA* capture precisely the range of conservative legal attitudes to change. The majority countenanced slow, incremental change, stating: 'the tooth of time will eat away an ancient precedent' and 'gradually' deprive it of authority.[128] Yet Heydon J in dissent flatly stated, '[t]he fact that a rule of law is disliked does not mean that it has ceased to be the law'; public opinion is relevant only to the legislature, not the courts, because 'those who seek to foster the rule of law prize certainty'.[129] And even where sexual assault law reform is legislatively introduced, it may not succeed in its aims due to conservative interpretation or failure to change prior established practice: 'The statute books are littered with [reform] provisions that have never been properly implemented because once the legislation was adopted; nobody bothered to make the necessary adjustments at the level of *organizational practice* [*habitus*].'[130]

A Bourdieusian analysis reveals that the sometimes lacklustre approach to reform or its ineffective implementation (*habitus*) may be due to conflicting values or conventional wisdom (*doxa*). The field-replicating nature of the dominant *doxa* results in legal agents tending to comply with and continue established practices. In the sub-field of the sexual assault trial, the legal agents' performances are grounded in 'the often '"unwritten" methods for carrying out (particular types) of trials';[131] this *habitus* resists change by defending cautiousness as the orthodoxy of the legal field, as exemplified by Heydon J in *PGA*. When this is coupled with the *doxa* and *habitus* driving prioritisation of a defendant's 'rights' in a sexual assault trial, law reform to improve a complainant's experience in the justice system may seem like a 'Sisyphean task'.[132] However, the next section reveals there are some possibilities for transformation.

D Possibilities for Transformation

1 Change Is Difficult, but Possible

The *habitus* and *doxa* discussed above can drive resistance to reforms even if they would make for a more responsive legal system. 'In other words, the way things are in practice is misrecognised as the natural way they should be.

126 Lisa Featherstone, '"That's What Being a Woman Is For": Opposition to Marital Rape Law Reform in Late Twentieth-Century Australia' (2017) 29(1) *Gender and History* 87, 87 <https://doi.org/10.1111/1468-0424.12281>.

127 (2012) 245 CLR 355 ('*PGA*').

128 Ibid 371 [24] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing John W Salmond, 'The Theory of Judicial Precedents' (1900) 16(4) *Law Quarterly Review* 376, 383.

129 *PGA* (n 127) 400 [123], 401 [125].

130 Quilter (n 8), citing Victorian Law Reform Commission, *Rape: Reform of Law and Procedure* (Interim Report No 42, July 1991) 16 (emphasis in original).

131 Quilter (n 8) 54.

132 Ibid 27, citing Clare McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 139, 150 <https://doi.org/10.4324/9780203852194>.

Therefore, the … legitimacy of the social order is never questioned'[133] – by either the dominant or, mostly, the dominated. In addition, the legal *habitus* operates with rules and logic that are not found in any other field; this professional autonomy can facilitate the prioritisation of traditional practices over public interest reforms.[134] Thus, the prospect of success or failure in any law reform effort is directly related to its alignment or otherwise with *habitus*, or the 'readability' of those reforms in relation to the language, practices, and disciplining of those in the legal field.[135] Reform 'can only be "readable" to the extent that it cites and repeats past practices. In this way new laws are understood within their historicity, being practiced and repeated in ways that conform to it.'[136]

Particularly in relation to rape myths, Quilter considers that '[t]he possibilities for transformation, for change, are highly limited where the "schema" is so stable'.[137] The challenge rests in 'changing what legal practitioners, judicial officers and jurors in particular know and how they perform that embodied knowledge'.[138] Yet hegemonic legal agents possessing formidable linguistic capital and accumulated symbolic power can commandingly influence public opinion and policymakers, and marshal resistance to reform in the name of the public interest: 'even the most virtuous man's imposition of his view on public interest should alarm us. And perhaps we should be most on our guard when such an imposition is disguised by the well-worded manner of its delivery.'[139]

Indeed, the legal field and its sub-fields exert 'a force upon all those who come within its range. But those who experience these "pulls" are generally not aware of their source.'[140] This comparison of fields of power with a magnet reflects a *habitus* that 'remains essentially deterministic and circular', where 'objective structures produce culture, which determines practice, which reproduces those objective structures'.[141] Nevertheless, there is some scope for change. It may be possible incrementally: '[a]lthough the structurally situated roots of *habitus* favor stability over change in the long run, *habitus* is not static, not categorically immutable; its properties can evolve by degree in response to changing experiences and

133 James J Nolan, Joshua C Hinkle and Zsolt Molnar, 'Changing the Game: A Sociological Perspective on Police Reform' in James J Nolan, Frank Crispino and Timothy Parsons (eds), *Policing in an Age of Reform: An Agenda for Research and Practice* (Palgrave Macmillan, 2021) 17, 20.

134 Bourdieu, 'The Force of Law' (n 31) 836–7.

135 Quilter (n 8) 55.

136 Ibid 53. Quilter's analysis at 51–5 draws on both Jacques Derrida's notion of the 'readability' of the mark (Jacques Derrida, *Limited Inc* (Northwestern University Press, 1993)), and Bourdieu's *habitus* to understand who is doing the reading, and where.

137 Quilter (n 8) 55. There, 'rape schema' or rape myths conflicted with the intentions of legislative reform.

138 Ibid.

139 Christoph Bezemek and Tomas Dumbrovsky, 'The Concept of Public Interest' (Graz Law Working Paper Series No 1, University of Graz, 2020) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701204>.

140 Terdiman (n 44) 806.

141 Cooper (n 63) 501.

circumstances'.[142] Alternately, change may occur by 'symbolic revolutions'.[143] The following section discusses Bourdieu's perspective on revolutionary change, and the agents that might achieve it.

2 Law Reform, Heretics and Academics

When seeking to understand how reform in the sub-field of sexual assault proceedings can occur given the powerful forces at play, Bourdieu's theory suggests 'room for manoeuvre' can be identified and actioned through 'symbolic revolutions' that challenge *habitus* and *doxa* with new beliefs and values – heterodoxy.[144] Revolutions can be mobilised by 'heretics'[145] and/or the 'corporatism of the universal', the latter referring to professionals and academics in pursuit of social justice and other universal or public interest goals.[146]

The current advocacy environment for sexual assault victims would suggest a symbolic revolution has started and is underway. 'Heretics' are actively engaged in providing new understandings about sexual assault and its impacts. This is increasingly challenging assumptions about sexual assault and providing scope for new practices to be introduced that better reflect the justice needs of complainants.[147]

Specialist practitioners and academics have also contributed to the promotion of new understandings about sexual assault, in what Bourdieu's theory might call a symbolic revolution. Their research and awareness campaigns have detailed the enduring social, mental health and physical impacts sexual assault can have on victims.[148] Other projects have identified the wide-ranging influence of rape myths on the under-reporting of sexual assault and the retraumatisation of victims who enter the court system.[149] The notion of trauma-informed care, widely accessible a decade ago in the healthcare field,[150] is now migrating into the legal field. These outcomes underpin the promotion of a 'new' way to engage with victims of sexual assault – trauma-informed legal practice.[151]

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142 Jason D Edgerton and Lance W Roberts, 'Cultural Capital or Habitus? Bourdieu and Beyond in the Explanation of Enduring Educational Inequality' (2014) 12(2) *Theory and Research in Education* 193, 199 <https://doi.org/10.1177/1477878514530231>.

143 Fowler (n 19) 457.

144 Ibid.

145 Ibid 450–4. Fowler discusses Bourdieu's portrayal of Manet as a heretic and 'prophet' of change.

146 Ibid 454. Fowler notes Bourdieu sees secular intellectuals as producing weapons for change that are 'coherent and distinctive', deriving from membership of professional associations and their championing of universalist rights.

147 George et al, *Specialist Approaches* (n 102) 35.

148 There is a large and growing literature in this space. See, eg, the literature reviewed in George et al, *Specialist Approaches* (n 102).

149 See, eg, Cooper (n 63) 485; Fiona Leverick, 'What Do We Know about Rape Myths and Juror Decision Making?' (2020) 24(3) *International Journal of Evidence and Proof* 255 <https://doi.org/10.1177/1365712720923157>.

150 SAMHSA's Trauma and Justice Strategic Initiative, 'SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach' (Paper, Substance Abuse and Mental Health Services Administration, July 2014).

151 George et al, *Specialist Approaches* (n 102) 204. See also Lucy Britt and Wilson H Hammett, 'Trauma as Cultural Capital: A Critical Feminist Theory of Trauma Discourse' (2024) 39(4) *Hypatia* 916 <https://doi.org/10.1017/hyp.2024.22>.

This awareness about sexual assault and its impacts on victims has garnered national and international attention from political and legal agents with significant symbolic power. Government reviews of the experiences of sexual assault victims in the justice system have occurred in Australia at state and territory level,[152] and in many common law countries including New Zealand,[153] Scotland,[154] England and Wales[155] and Northern Ireland.[156] Multilateral agreements like the *Istanbul Convention* and *European Directive* recognise that gendered violence constitutes discrimination and contravenes human rights, creating 'multiple protection and support needs' for traumatised victim-survivors.[157]

The following sections discuss recent Australian and Scottish reform efforts in more detail. But to recap the analysis thus far, Part II outlined Bourdieu's 'thinking tools' and applied them to the sub-field of sexual assault proceedings, to elucidate the drivers of resistance to reform. It showed that established *doxa* and *habitus* create a defendant-centric focus that minimises complainant interests, which works against the public interest in an effective criminal justice system. When coupled with *doxa* driving resistance to reform generally – as seen in *PGA* – the prospects of reform are slim, but not impossible. The requisite 'room for manoeuvre' may be created by Bourdieu's heretics, professionals and academics; this is occurring nationally and internationally. In Part III we apply this analysis to the ALRC inquiry, its 'micro-strategies' and a more fundamental option: juryless trials. Discussion of the Scottish reform process, which is further advanced than Australia, follows in Part IV.

III THE ALRC INQUIRY

A Further 'Micro-Strategy' Reform

As noted above, most Australian state and territory governments have reported on, and introduced measures to reform, sexual offence trials. However, many are what Quilter describes as 'micro-strategies':[158] they do not unduly impact on the *habitus* of the courtroom and are easily read by legal agents. As Quilter's research

152 See, eg, the various reports and inquiries above at n 101.

153 New Zealand Law Reform Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, December 2015) 63–4 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf>.

154 *Dorrian Review* (n 20).

155 United Kingdom, *The End-to-End Rape Review Report on Findings and Actions* (Report No CP 437, June 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001417/end-to-end-rape-review-report-with-correction-slip.pdf>.

156 Sir John Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, 9 May 2019) pt 1.

157 George et al, *Specialist Approaches* (n 102) 21.

158 Quilter (n 8) 50 nn 110–11, 55: discussing training of judges, legal professionals, police and service providers, jury directions, incorporation of objectives and guiding principles, community and school education and awareness programs, and expert evidence to dispel rape myths.

suggests, they have not been consistently implemented.[159] Many complainants have continued to voice concerns about their challenges in seeking justice. The need for a consistent response was subsequently acknowledged by the joint Australian, state and territory governments in their *National Plan to End Violence against Women and Children 2022–2032*,[160] as well as by the Australian Senate Legal and Constitutional Affairs Reference Committee in its 2023 inquiry and report on *Current and Proposed Sexual Consent Laws in Australia.*[161] In Bourdieusian terms, 'room to manoeuvre' was being etched through acknowledgement of complainants' need to improve responses from these two government sources with significant symbolic power, which built on the symbolic capital accrued by 'heretic' advocates and corporatism of the universal (contributions by practitioners, academics).

Subsequently, the Commonwealth Attorney-General referred an inquiry into the criminal justice response to sexual offences to the ALRC, an independent agency advising government on law reform.[162] While its recommendations are not automatically implemented, the ALRC's website states that its success rate makes it 'one of the most effective and influential agents for legal reform in Australia'.[163] The ALRC was to 'consider how to harmonise laws about sexual violence across Australia and how to promote just outcomes for people who have experienced sexual violence'.[164] It was to examine the effectiveness of past reforms and how to increase their effectiveness if necessary, but the focus was to be on opportunities to explore new ground rather than duplicating past work.[165] It was to take a 'transformative' approach.[166]

The ALRC's *Justice Responses to Sexual Violence* Issues Paper ('*Justice Responses Issues Paper*') identified a range of potential improvements, including:

- Audiovisual recordings of complainants' evidence;
- Intermediaries to assist with communication;
- Expert evidence to explain complainants' trauma responses;
- Jury directions to counter rape myths and misconceptions;
- Strengthening of legislative prohibitions on questions that reflect myths and misconceptions;
- Judge-alone trials;
- Interpreters for culturally and linguistically diverse and First Nations people;
- Independent legal representation to provide protection from the disclosure and use of complainants' personal information;

159 Ibid. See also George et al, *Specialist Approaches* (n 102) 210.

160 Department of Social Services (Cth), *National Plan to End Violence against Women and Children 2022–2032: Ending Gender-Based Violence in One Generation* (Report, 2022) 36.

161 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Current and Proposed Sexual Consent Laws in Australia* (Report, September 2023).

162 'About', *Australian Law Reform Commission* (Web Page) <https://www.alrc.gov.au/about/>.

163 Ibid. The ALRC's website states that 'over 85 per cent of ALRC reports have been either substantially or partially implemented'.

164 'Terms of Reference' (n 16); *Justice Responses Issues Paper* (n 16) 1.

165 'Terms of Reference' (n 16); *Justice Responses Issues Paper* (n 16) 1.

166 'Terms of Reference' (n 16).

- Reforms relating to the admissibility and use of complainant evidence;
- Training of judges and counsel; and
- Reforms to prevent delays.[167]

The nature of most of the above reforms, with the exception of judge-alone trials, could also be considered 'micro-strategies' that mirror many reforms already implemented, to some degree, across various jurisdictions. 'Transformative' was mentioned only once in the ALRC's discussion, in the context of restorative justice.[168] The application of Bourdieu's theory would suggest that such an outcome should be expected because of the nature of *doxa* and *habitus*. This inquiry was undertaken by legal agents and in the language of law such that its narrative is readable by agents in the legal field with their settled (*doxic*) 'truths'.[169] The readability of reforms is important; as discussed, Quilter's study indicates that even when reforms are legislated, the effect (of *habitus*) is that they are often misapplied or attenuated due to problems of readability.[170]

B Efficacy of Micro-strategies to Bring about Change

Since most of these measures would be readable for legal agents, little substantive change would be required in the legal *habitus*. However, Quilter has reflected on 'the inability of all of this law reform, all of this work, to affect justice for victims of sexual assault'.[171] Some of the ALRC's proposed reforms, if implemented, may improve the complainant experience and reduce retraumatisation. Yet it is questionable whether they can 'mitigate pervasive myths and misconceptions about rape, which have been demonstrated to impact the juror decision-making process' – a major stumbling block for meeting complainants' justice needs, and also for the accountability and deterrence factors relating to the public interest.[172]

For example, studies show jury directions – a reform directly aimed at countering rape myths – may be ineffective; jurors can be 'unreceptive' to directions designed to dispel the myth that a 'real rape' only occurs when a complainant physically resists the assault.[173] Julia Cooper considers this finding to be 'significant because it suggests that directions are not a simple panacea for "correcting juror misconceptions"'.[174] The timing of jury directions and the ability of jurors to comprehend the directions are factors that 'have the potential to undermine or at least temper the efficacy of any jury direction'.[175] Studies have shown that 'jurors

167 *Justice Responses Issues Paper* (n 16) 11.
168 Ibid 25.
169 Quilter (n 8) 55. We note that the ALRC took advice from the Lived Experience Expert Advisory Group during the inquiry, nevertheless the Issues Paper was (and report and recommendations will be) drafted solely by the ALRC.
170 Ibid 51–5: Quilter's analysis concludes that 'reforms that might conflict with … "truth" [are] (almost) unreadable'.
171 Ibid 25.
172 Cooper (n 63) 485.
173 Louise Ellison and Vanessa E Munro, 'Turning Mirrors into Windows: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *The British Journal of Criminology* 363, 374 <https://doi.org/10.1093/bjc/azp013>.
174 Cooper (n 63) 497.
175 Ibid 498.

typically only comprehend between 50% and 70% of instructions',[176] with one study revealing that juror comprehension of directions could be as low as 31%.[177] Hence, Cooper reiterates an important concern about relying on jury directions to counter rape myths – 'juror attitudes and the decision-making process is largely inscrutable because jury verdicts are provided without reason, and jury secrecy rules prohibit deliberation disclosures'.[178]

In Bourdieusian terms, the jury in a sexual offence trial is placed into the subfield of the courtroom to make decisions based on the 'interaction between the habitus and this environment, which is at once unfamiliar, ritualised and emotionally charged'.[179] When rape myths are raised by defence counsel they can hook into part of a juror's collective *doxa*:[180] 'myths are not mere "misconceptions", but rather they operate as a type of "unconscious schemata" which is cemented in history, culture and ideology'.[181] The understandings garnered through this analysis and the previously mentioned research cast doubt on the ability of jury directions to counter rape myths, suggesting further research is required. Independent evaluations would also be required for the introduction of expert evidence on complainants' counter-intuitive trauma-based responses, any strengthening of legislative provisions against improper questioning and also juryless trials. The next section outlines the various juryless models and, as a Bourdieusian analysis would indicate, early resistance from legal agents.

C Reform or Transformation: Juryless Trials

Rosa Luxemburg, a social reform theorist, suggested that 'the struggle for reform is its means; the social revolution, its aim'.[182] Therefore, while reforms lay the foundation for change, they do not replace the need for transformational social action. Such action could be represented by the more fundamental reform of juryless trials, which may improve a complainant's cross-examination experience at court, address rape myths and provide the benefit of transparency (written reasons).[183] Juryless trials can also reduce the potential risks that jurors might be influenced by rape myths, 'media coverage, conduct their own research, or be intimidated', or be 'unable to reach a unanimous verdict'; there is at least some potential for 'greater

176 Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Re-evaluating How to Measure Jurors' Comprehension and Application of Jury Instructions' (2020) 26(1) *Psychology, Crime and Law* 53, 54.

177 Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series No 1/10, February 2010) 38.

178 Cooper (n 63) 496.

179 Ibid 501.

180 Nirmalasari and Sarwono (n 109).

181 Cooper (n 63) 501, citing Webb, Schirato and Danaher (n 30).

182 Frank Jacob, 'Rosa Luxemburg: Revolution Theory and Revolutionary Practice' in Frank Jacob, Albert Scharenberg and Jörn Schütrumpf (eds), *Rosa Luxemburg Volume 1: Life and Work* (Büchner-Verlag, 2021) 45, 59, citing Helen Scott, *The Essential Rosa Luxemburg: Reform or Revolution and the Mass Strike* (Chicago, 2007) 41.

183 For a discussion of the benefits of juryless trials see generally Scottish Government, 'Alternatives to Jury Trials: An Evidence Briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group' (Paper, Social Research, December 2022) ('Alternatives to Jury Trials').

flexibility, reduced cost, and reduced delay'.[184] Thus the further consideration of juryless models has merit, along with a review of the jury system generally.[185]

One juryless model cited in the *Justice Responses Issues Paper*, judge-alone trials,[186] has been implemented in several jurisdictions (including Australia, in limited circumstances) and proposed in others (Scotland).[187] A hybrid model of judge and two lay assessors has enjoyed long-term success in South Africa[188] and has been introduced in Norway.[189] In contrast, the Dutch juryless system involves a panel of three judges.[190] However, any juryless model may have a low level of readability by legal agents as it conflicts with current *habitus* in the courtroom subfield; resistance would thus be likely.

Indeed, suggestions that juryless trials could warrant further investigation have raised objection from powerful agents in the legal field.[191] The Law Council of Australia ('LCA') responded to the ALRC's discussion of judge-alone trials in their *Justice Responses Issues Paper*, stating that the adversarial jury trial 'enhance[s] community perceptions of the transparency and legitimacy of the administration of justice'[192] because it:

- Involves community in the administration of justice;
- Safeguards against arbitrary exercise of state power;
- Facilitates impartiality and guards against bias; and
- Reinforces outcomes as 'legitimate and impartial'.[193]

The LCA's response draws on its considerable symbolic capital as Australia's peak legal body, harnessing the usual legal orthodoxy (the stated public interest factors) in promoting its interest – which is to maintain the status quo of the sexual offence trial. The drive of the legal field's *doxa* and *habitus* prevents serious consideration of an unreadable challenge like juryless sexual assault trials, and forecloses discussions on how to improve the intractable problem of rape myths. Bourdieu's theory would

184 Ibid 14.

185 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, December 2005) 590–1 [18.5], 595; *Improving Justice System Response* (n 101); Peter Lowe, 'Problems Faced by Modern Juries' [2012] (Winter) *Bar News* 46; Crispin Hull, 'The Problem with the Jury System in Australia', *The Sydney Morning Herald* (online, 9 March 2019) <https://www.smh.com.au/national/the-problem-with-the-jury-system-in-australia-20190307-p512iy.html>; Richard Ackland, 'Australia's Legal System Leaves Juries Stranded in a Time Warp: The World Has Moved On', *The Guardian* (online, 29 October 2022) <https://www.theguardian.com/commentisfree/2022/oct/29/australias-legal-system-leaves-juries-stranded-in-a-time-warp-the-world-has-moved-on>.

186 *Justice Responses Issues Paper* (n 16) 14.

187 George et al, *Specialist Approaches* (n 102) 81.

188 Ibid 72.

189 'Alternatives to Jury Trials' (n 183) 21.

190 Ibid 15.

191 See, eg, George et al, *Specialist Approaches* (n 102) 234; Ellie Dudley, 'Jury-less Rape Trials Could Compromise Fair Trials', *The Australian* (online, 28 December 2023) <https://www.theaustralian.com.au/nation/juryless-rape-cases-could-compromise-fair-trials-law-council-of-australia-says/news-story/6b10a3c2c04028eba1f08e4b071bc402>.

192 Law Council of Australia, Submission No 215 to Australian Law Reform Commission, *Justice Responses to Sexual Violence* (4 July 2024) 30 [101] ('LCA Submission').

193 Ibid.

suggest this co-opting of these interest factors is an example of the law's unquestioned ability to preach to the 'ministry of the universal' (purporting to represent the public interest) in a display of symbolic power.[194]

Yet most of the LCA's public interest factors are open to question. While it is true that community involvement is removed with judge-alone or multi-judge panels, hybrid juryless models do not suffer the same issue. It is also arguable whether a jury's group decision-making is superior to an individual judicial decision-maker, multiple judges or hybrid panel: most jurors are 'unlikely to have "worked with a group to reach a decision about a complex problem" which involves high-stakes (freedom versus conviction and imprisonment)'.[195] Juries comprise twelve individuals who likely have no legal knowledge or training, yet must navigate their way through evidence, conflicting facts and the application of legal rules to provide a verdict.[196] This is particularly the case for sexual assault trials, where the law is extremely complex.[197]

Community involvement is also touted as injecting 'a diversity of life experience'[198] to decision-making, but this cannot be an evidence-based assertion. The very randomness of jury selection means there can be no *guarantee* of diversity, representativeness, or a panel of 'peers' that might be better suited than a judge, panel of judges or hybrid panel to understand the parties' perspectives.[199] Rather, there are concerns regarding the lack of diversity on juries,[200] and that jury members mainly represent those who are available to participate and do not have work commitments.[201]

As to juries protecting against state tyranny, sexual offences are typically not 'political crimes which any faction of the state might seek to prosecute for improper reasons'.[202] Regarding potential judicial bias, the *Justice Responses Issues*

194 Wacquant (n 15) 37.

195 Cossins, *Closing the Justice Gap* (n 12) 98, citing Sara Gordon, 'All Together Now: Using Principles of Group Dynamics to Train Better Jurors' (2015) 48(2) *Indiana Law Review* 415 <http://dx.doi.org/10.18060/4806.0002>.

196 Cossins, *Closing the Justice Gap* (n 12) 98.

197 The *Lazarus* case exemplifies this point, with successive judicial errors. At first instance the trial judge misdirected the jury, even though the content of the written directions had been approved by both the Crown and senior counsel for the appellant: *Lazarus v The Queen* [2016] NSWCCA 52, [147], [156] (Fullerton J). The retrial was heard by a judge alone (Tupman DCJ), who on appeal failed to have regard to the steps taken by the defendant to ascertain consent: *R v Lazarus* (2017) 270 A Crim R 378, 406–7 [143]–[149] (Bellew J). No further retrial was ordered because, among other things, it would have been 'oppressive to put the respondent [defendant] to the expense and worry of a third trial': at 410 [163].

198 LCA Submission (n 192) 30.

199 This was also discussed in the Scottish reform process: see Evidence to Criminal Justice Committee, Scottish Parliament, Glasgow, 24 January 2024, col 64 (Simon Di Rollo) ('CJC 24 January 2024 Meeting').

200 Victorian Law Reform Commission, *Inclusive Juries: Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Report, 16 May 2023) [4.1]–[4.37]. See also Jill Hunter and Sharleigh Crittenden, Australasian Institute of Judicial Administration, *The Australian Jury in Black and White: Barriers to Indigenous Representation on Juries* (Report, June 2023).

201 Potential jurors may be excused on the basis of '[u]ndue hardship – work': Federal Court of Australia, 'Information Sheet 3: Requests to Be Excused' (Information Sheet, July 2021) <https://www.fedcourt.gov.au/going-to-court/jury/excused>. See also Brindley Interview (n 97).

202 *Dorrian Review* (n 20) 93.

Paper acknowledges this concern regarding the judge-alone model, pointing out that the requirement for judges to provide reasons could also cause further delay or result in more appeals.[203] However, the other juryless models go at least some way to addressing bias, and the value of written reasons for both defendant and complainant could potentially outweigh associated inconvenience. In addition, when contemplating bias, the very real presence of rape myths and potential juror bias should not be dismissed.

Thus, the LCA's reasons for resistance are not dispositive. However, the resistant nature of the legal *habitus* is highlighted by the LCA's insistence that jury trials are 'a fundamental part of the system of criminal justice in Australia' and any reforms would require 'extremely careful consideration'.[204] Of course, any introduction of a juryless pilot would need to be done with care, ensuring the defendant's rights were not prejudiced; but the ongoing retraumatisation of complainants of sexual assault and the dearth of uniform national law reform in Australia for sexual offence trials have been recognised as areas requiring urgent action.

This Part has noted that many of the proposed reforms by the ALRC appear to be micro-strategies that are easily read by legal agents. Legal agents have resisted the idea of more radical reform, such as the juryless trial – despite its potential to address rape myths. A Bourdieusian analysis indicates this is to be expected, given the formidable drivers of legal *doxa* and *habitus* to replicate the current legal field. Part IV discusses recent Scottish reform efforts, which are instructive given that they have progressed beyond the inquiry process, to the Justice Reform Bill which legislatively implements the reforms. The Scottish experience neatly illustrates the significant symbolic power inherent in the legal field with its entrenched *doxa* and *habitus* and may point to the challenges involved in further consideration of juryless trials in Australia.

IV SCOTTISH REFORM OF SEXUAL VIOLENCE TRIALS

The Scottish legal system is in a process of 'devolving' whereby the Parliament of the United Kingdom is gradually conferring powers to Scottish Parliament.[205] Scotland has its own unique criminal justice system which diverges from that of England and Wales.[206] Like Australia, Scotland has engaged in decades of incremental reform of the adversarial trial system to improve the complainer ('complainant') experience in sexual offence proceedings.[207] Also like Australia, the law reform process has historically encountered resistance driven by the

203 *Justice Responses Issues Paper* (n 16) 15.
204 Dudley (n 191).
205 Since the passing of the *Scotland Act 1998* (UK), Parliament can make laws on a range of devolved matters.
206 Sandy Brindley and Michele Burman, 'Meeting the Challenge? Responding to Rape in Scotland' in Nicole Westmarland and Geetanjali Ganjoli (eds), *International Approaches to Rape* (Policy Press, 2011) 147, 150 <https://doi.org/10.2307/j.ctt9qgkd6>.
207 Ibid.

deeply engrained *habitus* and *doxa* of dominant agents in the legal profession.[208] Scotland's current round of reforms are further advanced than Australia, with a major national review having been completed in 2021 and the Justice Reform Bill which implements its recommendations introduced in Holyrood (the metonym for the Scottish Parliament) in 2023.[209] Applying Bourdieusian thinking tools reveals the strategies of dominant agents in the genesis, conduct, and recommendations of the review – particularly the proposed juryless pilot court – as well as resistance to the initiative, media coverage, and debates emerging from Holyrood.

A Room for Manoeuvre: Lady Dorrian's Report

In 2019, the Scottish judiciary was becoming increasingly concerned at the number and complexity of sexual offences cases coming to court, which comprised the 'vast majority' of High Court trials and a 'significant' number of cases in the Sheriff Court solemn procedure and Children's Hearing systems.[210] Such growth was anticipated to continue[211] and would 'become unsustainable as presently managed' in the Scottish court system.[212] Lord Carloway, the Lord President and Lord Justice General (most senior Scottish judge), held discussions on the matter with two senior legal and government ministers: the Lord Advocate[213] and Cabinet Secretary for Justice.[214] Lord Carloway then commissioned a review of Scottish court procedure in serious sexual offence cases to improve complainers' experience 'without compromising the rights of the accused'.[215] Lady Dorrian, the Lord Justice Clerk (second most senior Scottish judge) was appointed to chair a cross-sectoral review panel.

It is notable that Lady Dorrian's review, which resulted in the *Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group* ('*Dorrian Review*'), represented a convergence of reform-driven will at the highest levels: it was commissioned and chaired by agents with enormously powerful cultural and symbolic capital in both the legal and

208 Ibid 157.

209 Parliament is located in the Holyrood area of Edinburgh, Scotland.

210 *Dorrian Review* (n 20) 3.

211 Ibid.

212 Ibid 4.

213 The Lord Advocate is the most senior law officer and Minister in the Scottish Government: the appointee is head of the prosecution system, principal legal adviser to the government, and 'represent[s] the public interest in a range of statutory and common law' functions. They do not have to be a Minister of the Scottish Parliament; they can sit in the debating chamber and answer questions but do not have a vote (then Walter James Wolffe KC, currently the Right Honourable Dorothy Bain). See generally 'Lord Advocate: Role and Functions', *Scottish Government* (Web Page, 23 October 2024) <https://www.gov.scot/publications/lord-advocate-role-and-functions/>; 'What Is a Law Officer?', *The Scottish Parliament* (Web Page, 2024) <https://www.parliament.scot/msps/ministers-and-law-officers/law-officers>.

214 The Cabinet Secretary for Justice and Home Affairs is responsible for, among other things, courts, sentencing, justice reform, justice system and criminal law procedure, the Scottish Courts and Tribunals Service, and violence against women and misogyny (then Mr Humza Yousaf, currently Ms Angela Constance): see 'Cabinet Secretary for Justice and Home Affairs', *Scottish Government* (Web Page, 2024) <https://www.gov.scot/about/who-runs-government/cabinet-and-ministers/cabinet-secretary-for-justice-and-home-affairs/>.

215 *Dorrian Review* (n 20) 4 (emphasis omitted).

government fields. This convergence generated the requisite symbolic power to spearhead a drive for substantial reform, and to challenge the *doxic* acceptance of an imbalanced system. In comparison to the ALRC's relatively modest terms of reference, the *Dorrian Review*'s terms of reference required it to 'take an entirely fresh look at the way in which sexual offences are dealt with' – a '"clean sheet" approach'[216] – because there were 'many ways in which the current system could and should be changed fundamentally'.[217]

The *Dorrian Review* acknowledged that it built on prior reforms including the *Victims and Witnesses (Scotland) Act 2014* (Scot). This legislation imposes an obligation on (among others) the Lord Advocate, police and court service, to 'a person who is or appears to be a victim', to treat them in a 'respectful, sensitive, tailored, professional and non-discriminatory manner', consider their needs, and protect them from secondary and repeat victimisation.[218] This and other reforms were 'designed to reset the relationship the criminal justice system has with complainers',[219] that is, to implement Lord Hope's rebalancing exercise. However, the legislation was not as successful as was hoped.[220] The law was 'out of touch', resulting in 'unacceptable trauma and distress'[221] and there was '*a consensus* that … more requires to be done, and specifically with regard to practice and procedure relating to the way in which sexual offence cases are processed and managed'.[222]

Here, note Lady Dorrian's (validating) articulation of a long-felt need and invocation of a *universal* consensus, harnessing its associated social capital and concomitant symbolic power. As discussed, change is always more palatable and more likely when coming from a spokesperson with sufficient symbolic power to speak for collective interests. As Bourdieu's theory suggests, when judges preach to the 'ministry of the universal' (public interest) like this, it is particularly powerful:[223]

> '[J]urists are the driving force of the universal, of universalization', with their proclaimed independence and their 'capital of words' … '[t]hey were the bearers of a rational habitus …'. And where legal opinion favours change, their coveted autonomy reinforced it …[224]

The *Dorrian Review* recommended many 'micro-strategies' similar to those considered by the ALRC in Australia, including specialist training and specialist courts. But in an audacious departure from orthodoxy, it raised several heretical prospects, the most publicly controversial being a pilot for judge-alone trials.[225] In a not-so-subtle nod to the comforts of legal *habitus*, the *Dorrian Review* observed

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216 Ibid 3–4.
217 Ibid 4.
218 *Victims and Witnesses (Scotland) Act 2014* (Scot) ss 1(1)–(2), 1A(1)–(2).
219 *Dorrian Review* (n 20) 42.
220 Ibid 24.
221 Ibid 43.
222 Ibid (emphasis added).
223 Wacquant (n 15) 37.
224 Fowler (n 19) 446, quoting Pierre Bourdieu, *On the State: Lectures at the College de France (1989–1992)* (Polity, 2014) 270, 331, 333.
225 The other controversial reforms included abolishing the 'not proven' verdict and reducing jury size from 15 to 12 plus a move from simple to two-thirds majority verdict.

the profession's 'strong historical and emotional attachment to trial by jury, and valid arguments in favour of the democratic benefit of community involvement'.[226]

However, the *Dorrian Review* also noted there were strong arguments in favour of 'conducting these trials in other ways' to address the following issues, including the low conviction rate, 'appalling' ordeal of cross examination for complainers, defence counsel deliberately targeting jurors' potential rape myths, evidence of inexplicable acquittals, lack of written reasons, and anticipated cost and time savings.[227] The principal disadvantages of judge-alone trials were removal of community involvement, protection of the individual from State oppression (noting that sexual offences were not conventionally political crimes), judges taking on the role of deciding facts (noting they were trained to do so and there was a right of appeal), and 'case hardening' giving judges a pro-complainer perspective.[228]

The *Dorrian Review* reiterated that 'the accused's right to a fair trial must not be compromised, but the concept of a fair trial does not hinge on involvement of a jury'.[229] Finding reassurance in precedent, the *Dorrian Review* noted that judge-alone trials exist in Scotland and comparable jurisdictions, and preferred this model over either a multi-judge panel or hybrid judge and lay panel model.[230] However, the group conducting the *Dorrian Review* were 'strongly divided' and did not recommend a move to judge-alone trials.[231] It did agree there was merit in a wider debate, and issued a recommendation that '*[c]onsideration* should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness … and to enable the issues to be assessed in a practical rather than a theoretical way'.[232] Essentially, the *Dorrian Review* did not recommend change, but an evidence-gathering exercise. Again, Bourdieu's thinking tools are helpful, directing attention to the powerful influence of the main change agents within the government and legal fields, and understanding the drivers behind the *Dorrian Review*'s narrative and its recommendations. The door was opened a crack, providing room for manoeuvre.

B Literature Review and *Working Group Report*

In response, the government commissioned an updated literature review titled 'Alternatives to Jury Trials: An Evidence Briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group' ('Alternatives to Jury Trials'),[233] although it was not the bulwark for the judge-alone model that might have been anticipated. There were mixed findings on international developments; while some countries had increased citizen participation, others had moved to a

226 *Dorrian Review* (n 20) 89.
227 Ibid 89–105. See also James Chalmers, Fiona Leverick and Vanessa E Munro, 'The Provenance of What Is Proven: Exploring (Mock) Jury Deliberation in Scottish Rape Trials' (2021) 48(2) *Journal of Law and Society* 226 <https://doi.org/10.1111/jols.12287>.
228 *Dorrian Review* (n 20) 92–4.
229 Ibid 97.
230 Ibid 98–9. Resourcing in particular was seen as an issue for multi-judge panels.
231 Ibid 118.
232 Ibid 16, 118 (emphasis added).
233 'Alternatives to Jury Trials' (n 183).

judge-alone model. Still others – notably Norway – had a panel of judge and lay assessors.[234] The 'Alternatives to Jury Trials' review also noted mixed English (Cheryl Thomas) and Scottish (James Chalmers, Fiona Leverick and Vanessa E Munro) findings on rape myth research,[235] and the evidence was limited on judge-alone trials specifically. There were no robust conclusions on the impact of changing mode.[236] The 'Alternatives to Jury Trials' review ultimately found a judge-alone pilot could gather valuable evidence on changing trial mode, but would 'not likely be sufficient' to improve complainer experience – a holistic consideration of the system was required.[237] The 'Alternatives to Jury Trials' review was then considered by a Working Group comprising 12 members representing the diverse interests of the justice system, which reported on the practicalities of a judge-alone model in December 2022 in the *Lady Dorrian Review Governance Group: Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group Report* ('*Working Group Report*').[238]

The *Working Group Report* noted that the Working Group was divided on introducing a judge-alone pilot, which would ultimately be decided by the Scottish Parliament.[239] The Group did not agree on a number of fundamental and seemingly uncontroversial issues, including whether there was any issue of potential judicial bias in the judge-alone model, or whether measures would be required to control for it.[240] The *Working Group Report* concluded in reasonably spartan fashion that any judge-alone model should minimise changes to practice, its objectives should be clear, all cases of rape should be included (with limited possibility for exclusion), and the pilot should be in the High Court. Written reasons should be published within two weeks of the verdict, and the appeals process should remain unchanged.[241] So, after an ambitious call for change from the *Dorrian Review*, it was clear from the tenor of the *Working Group Report* that implementation would be enormously challenging. In a Bourdieusian sense, this is unsurprising, given the triangulation of interests in a sexual assault trial and the conflicting *doxa* and *habitus* inherent in the Working Group's diverse interests.

234 Ibid 8.

235 Ibid 10. See Chalmers, Leverick and Munro (n 227) (Scottish research); Cheryl Thomas, 'The 21st Century Jury: Contempt, Bias and the Impact of Jury Service' [2020] (11) *Criminal Law Review* 987 ('21st Century Jury') (English research).

236 'Alternatives to Jury Trials' (n 183) 11.

237 Ibid 29.

238 Scottish Government, *Lady Dorrian Review Governance Group: Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group Report* (Report, 12 December 2022) <https://www.gov.scot/publications/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report/> ('*Working Group Report*').

239 Ibid 3.

240 Ibid 10.

241 Ibid 14–15.

C Introduction of Legislation

1 The Government Field

The Justice Reform Bill to implement the *Dorrian Review* recommendations was introduced into Scottish Parliament in April 2023.[242] Before analysing its passage through Parliament, a brief description of the government field is required. Of all Bourdieusian fields, this field represents an 'extraordinary symbolic act of force, which consists in getting universally accepted … as the general will … "a site made by agents commissioned to state the public good, to be the public good and to appropriate public goods"'.[243]

A government's success therefore lies in ensuring it is perceived as the people's voice,[244] and marshalling a '*national* habitus'[245] (despite serving 'the dominant more than the dominated').[246] Then, via the law – with its impersonal logic of science and normative power of morality – the government comes to possess a 'monopoly of symbolic power as well as force'.[247] The inherent weakness is that if the government blatantly ignores public need, it will no longer be seen as the most effective way to take care of the public's interests.[248] This is as it should be in a democracy, but it means that policymaking and implementation is often turbulent and reactive, an 'unceasing' task to generate credit and avoid discredit.[249]

This task can require tough choices on whether or not to engage in policy compromises to strengthen a party's power. Strategically, as noted through the use of Bourdieu's theory, compromises have the benefit of 'the logic of *Realpolitik* which is the condition of entry to political reality'.[250] The government's policymaking must also weather the challenges of collisions with other fields. Where the government attempts legislative reform of legal institutions and processes, it can quickly become clear that the legal field 'is not simply a cat's paw of State power … [it] has its own complex, specific, and often antagonistic relation to the exercise of such power'.[251]

Bourdieu's thinking on relations of power thus elucidates both the dynamic and somewhat reactive nature of the government field and signals the risk of its collision with the powerful legal field in an attempt to implement reform of sexual assault trials. These difficulties were played out in the submissions and evidence before the Criminal Justice Committee of the Scottish Parliament ('Committee'),[252]

242 Justice Reform Bill (n 17).
243 Fowler (n 19) 445.
244 Webb, Schirato and Danaher (n 30) 93.
245 Fowler (n 19) 446 (emphasis added). See also ibid.
246 Fowler (n 19) 446.
247 Ibid 448.
248 Webb, Schirato and Danaher (n 30) 102.
249 Pierre Bourdieu, *Language and Symbolic Power*, ed John B Thompson, tr Gino Raymond and Matthew Adamson (Polity Press, 1991) 193.
250 Ibid 190 (emphasis in original).
251 Terdiman (n 44) 807–8.
252 Criminal Justice Committee, Parliament of Scotland, *Victims, Witnesses, and Justice Reform (Scotland) Bill Stage 1 Report* (Report, 29 March 2024) <https://www.parliament.scot/-/media/files/committees/criminal-justice-committee/cjs062024r02.pdf> ('*Bill Report*').

which was tasked with reporting prior to a vote on whether the Justice Reform Bill could proceed to Stage 2 of the parliamentary process.

2 Evidence and the Stage 1 Report

While many of the Justice Reform Bill's reforms around sexual assault proceedings were less controversial, the recommendation of a time-limited juryless pilot was an incendiary proposition for most of the Scottish legal establishment,[253] particularly defence counsel. The battle lines were drawn in submissions and evidence provided to the Committee, most predominantly around the conflicting Scottish and English research on rape myths and their potential to influence jury verdicts.[254] Other hotly debated issues included the tone of sexual offence proceedings, conviction rates, removal of public involvement, fairness and bias. These debates nicely illustrate: (i) the issues that may be raised against juryless trials; and (ii) archetypal Bourdieusian power dynamics, with government and legal agents arguing vigorously to either advance reform or defend entrenched *doxa* and *habitus*.

(a) Rape Myths

The research divergence was exploited with tactical efficacy by witnesses on opposing sides of the juryless debate, who invariably hailed the most supportive research and dismissed opposing research, sometimes with very public collateral damage. The Faculty of Advocates Criminal Bar Association ('FACBA') stated that Thomas' research in England and Wales showed that 'rape myths were themselves "myths"';[255] the Scottish Solicitors Bar Association ('SSBA') claimed this meant that the government was 'trying to solve a problem that does not, in fact,

253 Other controversial reforms included the abolition of the 'not proven' verdict, and reduction of the size of juries from 15 to 12.

254 Chalmers, Leverick and Munro's research consisted of over 400 mock jurors (recruited so as to be a representative sample of the Scottish population) that watched a rape trial reconstruction and engaged in recorded deliberations for 90 minutes. It found a range of rape myths were discussed in deliberations including querying the complainant's failure to resist, failure to sustain injury, failure to struggle, scream, or seek resistance. The complexity of Scottish law was also an issue: see Chalmers, Leverick and Munro (n 227) 240. In contrast, Thomas' research involved interviews with former real-life jurors to determine the prevalence of rape myths. The study found that jurors did not, by and large, accept rape myths: see Thomas, '21st Century Jury' (n 235). While Thomas lauded her own research as with 'real juries' and critiqued mock trials (at 1001), Chalmers, Leverick and Munro and others criticised a number of perceived methodological flaws in Thomas' work, as well as the fact that Thomas' research was with *former* juries, not 'real juries' deciding live cases – and so were essentially as artificial as any mock trial research: see Ellen Daly et al, 'Myths about Myths? A Commentary on Thomas (2020) and the Question of Jury Rape Myth Acceptance' (2023) 7(1) *Journal of Gender-Based Violence* 189, 192–3. See also Dominic Willmott and Lara Hudspith, 'Jury Trials and Rape Myth Bias: Exploring the Research Evidence, Stakeholder Perspectives and Effective Solutions' in Nicola Monaghan (ed), *Contemporary Challenges in the Jury System: A Comparative Perspective* (Routledge, 2025) 167.

255 Faculty of Advocates Criminal Bar Association, Submission No 70855816 to Criminal Justice Committee, Parliament of Scotland, *Victims, Witnesses, and Justice Reform (Scotland) Bill* (26 September 2023) 11 ('FACBA Submission').

exist'.[256] Conversely, the Cabinet Secretary for Justice indicated that Chalmers, Leverick and Munro's Scottish research provided 'overwhelming evidence that rape myths are a factor and that they influence decision-making'.[257] Under intense questioning from another frontbencher eager to demonstrate Thomas' research actually did reveal jurors held rape myths, Thomas herself lamented being caught in the crossfire: 'I find it quite worrying that, for some reason, my research has to be knocked down in Scotland'.[258]

Following extensive evidence, however, it became clear that the research was not so far apart, so there was somewhat of a stalemate: Thomas' research did indicate a number of prevalent rape myths,[259] and Leverick, Chalmers and Munro acknowledged that while their previous research found jurors articulated rape myths in deliberations, no direct line could be drawn to show impact on either individual decision-making or overall verdicts of juries: 'it is not easy, or even perhaps possible, to do that in the context of group deliberations'.[260] All researchers indicated the need for caution around jury research, particularly before making 'fundamental decisions based on one piece of evidence'.[261]

(b) Improving the Tone of Court Proceedings

The *Working Group Report* stated that the first of the pilot's objectives was improving complainers' experience,[262] that is, the tone of court proceedings; it was anticipated a judge-alone model may assist. There was some evidence to support this view,[263] as one King's Counsel indicated:

> Lawyers approach a jury case in a way that is different from the way in which they would approach a case with a single judge. It is, if you like, the contrast between an impressionistic approach taken with a jury – that is, they try to create an impression – and the more analytical approach that is taken with a judge. There is a difference in that.[264]

Yet the other King's Counsel flatly refused to concede improper questioning was occurring:

> I think that there have been improvements year on year, with a particular acceleration recently, in moving away from the approach of the past when I, with my finery in court, was entitled to be regarded as some sort of elevated being, such that I could speak to witnesses as I liked and expect the jury to weigh my every word as gold … I think that the theatre that went along with powerful sarcasm or whatever as a tool of the trade should not be tolerated, and it currently is not.[265]

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256 Scottish Solicitors Bar Association, Submission No 973271972 to Criminal Justice Committee, Parliament of Scotland, *Victims, Witnesses, and Justice Reform (Scotland) Bill* (22 January 2024) 1 ('SSBA Submission').

257 *Bill Report* (n 252) 157 [1116].

258 CJC 24 January 2024 Meeting (n 199) col 15 (Cheryl Thomas).

259 Thomas, '21st Century Jury' (n 235) 1002–4.

260 CJC 24 January 2024 Meeting (n 199) col 4 (James Chalmers).

261 *Bill Report* (n 252) 156 [1102].

262 *Working Group Report* (n 238) 5.

263 *Bill Report* (n 252) 167 [1189], quoting Vanessa Munro. See also Evidence to Criminal Justice Committee, Parliament of Scotland, 6 December 2023, cols 25–6 (Witness 1).

264 CJC 24 January 2024 Meeting (n 199) col 39 (Simon Di Rollo).

265 Ibid col 38 (Tony Lenehan).

In response, a Committee member curtailed such attempts at evasion: '[A]ll that I am seeing are all the reasons for not doing something. The Committee must address the reforms, which, by necessity, are significant.'[266]

Nevertheless, like the 'Alternatives to Jury Trials' review, further questions had been raised about another key plank in the Dorrian arguments for reform.[267]

(c) Conviction Rates

Given that one of the pilot's objectives was to gather evidence on outcomes, another significant issue for the Committee was the lack of data on Scottish conviction rates for those cases eligible for the pilot: single complainer/single defendant facing charges of rape or attempted rape.[268] The FACBA submitted this was a considerable weakness, because the 'irresistible conclusion is that the *sole purpose of the pilot scheme*' was to increase conviction rates.[269] It opined that: 'In trying to promote the interests of one side (complainer) above the other (accused), it seems intended to create an imbalance, rather than balancing competing interests with the overall interests of justice.'[270]

Polemically, this implies there is, presently, a 'just' balance in sexual offence proceedings that would be upset by a measure aiming to drive up conviction rates. As noted, this singular aim for the juryless pilot was not apparent from the *Dorrian Review* or *Working Group Report*; the submission is essentially a straw man argument. It would serve no-one's interests – complainer, defendant or public (or indeed the government) – to implement a reform purely to achieve greater conviction rates, as this would rapidly undermine the public's interest in a properly functioning criminal justice system. The perception of legitimacy would be lost. In Bourdieusian terms, this would endanger the incumbent government's seat of power and undermine the impartiality and equity that the legal field needs in order to maintain its symbolic power. The government later responded that the conviction rate was concerning: for all offences, 88%; for rape or attempted rape, 48%; for single charge cases of rape or attempted rape, 22–7%.[271]

However, the SSBA argued that other factors contributed to the low conviction rate more than rape myths, including the 'beyond reasonable doubt' standard of

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266 Ibid col 41 (John Swinney).

267 It may indeed be that the tone of cross-examination is so embedded in the adversarial system, with its provision for difficult defence 'testing' of a complainer's evidence and credibility, that measures such as trauma-informed training and better complainer preparation achieve more traction: see generally ibid col 43 (Sheila Webster).

268 *Bill Report* (n 252) 151–5 [1063]–[1091].

269 FACBA Submission (n 255) 11 (emphasis added).

270 Ibid.

271 While the government could not guarantee the conviction rates involved only single complainer/single defendant cases given limitations on the data collection, it was confident that single charge cases were a 'sensible' proxy: Letter from Angela Constance, Cabinet Secretary for Justice and Home Affairs, to Audrey Nicoll, Convenor of the Criminal Justice Committee, 16 April 2024, 39–40 <https://www.parliament.scot/-/media/files/committees/criminal-justice-committee/correspondence/2024/vwjr-bill-scottish-government-response-to-stage-1-report-16-april-2024.pdf> ('Cabinet Secretary Letter').

proof and the not uncommon lack of hard evidence such as CCTV footage.[272] Similarly, the Law Society's submission noted:

> Sexual offence cases are, by their very nature, often difficult cases to prosecute. There are often no eye-witnesses. Proving the allegation can be technically complex. Juries can be presented with competing accounts which both appear plausible. Not all allegations are true. Complainers can, on occasion, misremember events, or incorrectly identify perpetrators. The differences may be in the detail; but those differences can be hugely important.[273]

The commanding linguistic capital should be noted here. Nestled in among the indisputable factual difficulties (often no eye-witnesses) and technical difficulties (legal complexity) there is an almost imperceptible drawing on rape myths (false allegations)[274] and misconceptions (memory inconsistency, which can be trauma-induced).[275] Ideological seed-planting of this kind is common in courtroom cross-examination but is perhaps more surprising – or telling – in a submission on the doubtful role of rape myths and misconceptions. But such is the power of *doxa* under the smooth workings of *habitus*.

(d) Removal of Public Involvement, Potential for Bias

A further SSBA concern echoed that of the ALRC discussed in Part III above: a judge-alone model would remove the 'public's closest involvement in the legal system' and means of securing diversity in decision-making.[276] Around 38% of the Scottish judiciary are aged 50–59 years and almost half (47%) are aged 60+ years; most (71%) are male.[277] This lack of judicial diversity led almost inevitably to the concern voiced by many Committee witnesses and victims, that the judge-alone model was susceptible to the potential for judicial bias.[278] In a Realpolitik move,

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272 Stuart Waiton, 'What Do We Know about "Rape Myth" Research and the Claim that There Is "Overwhelming Evidence" that Juries are Prejudiced in Rape Trials?' (2024) 28(2) *International Journal of Evidence and Proof* 154, 155 <https://doi.org/10.1177/13657127231217510>, citing 'Lawyer Boycott of Juryless Rape Trials "To Be Unanimous"', *BBC News* (online, 10 May 2023) <https://www.bbc.com/news/uk-scotland-65531380> ('Lawyer Boycott'), quoting Stuart Murray, Vice President of the Scottish Solicitors Bar Association.

273 Law Society of Scotland, Submission No 393332425 to Criminal Justice Committee, Parliament of Scotland, *Victims, Witnesses, and Justice Reform (Scotland) Bill* (22 January 2024) 17 (emphasis omitted). See also Senators of the College of Justice, Submission No 689599645 to Criminal Justice Committee, Parliament of Scotland, *Victims, Witnesses, and Justice Reform (Scotland) Bill* (26 September 2023) 1, 21–2.

274 As to the preponderance of evidence, see Christine Coumarelos et al, *Attitudes Matter: The 2021 National Community Attitudes towards Violence against Women Survey (NCAS)* (Report, February 2023) 138. While Tom Nankivell and John Papadimitriou dispute this and other research on false allegation rates, their conclusion is simply that, 'it is doubtful that any study … could tightly estimate the prevalence rate': Tom Nankivell and John Papadimitriou, 'True or False, or Somewhere between? A Review of the High-Quality Studies on the Prevalence of False Sexual Assault Reports' (Research Paper, Gander Research, 4 April 2023) 16.

275 *Lehrmann* (n 75) [117] (Lee J).

276 SSBA Submission (n 256).

277 *Bill Report* (n 252) 161 [1146]. However, against this, it should be noted that jury selection is random, so diversity is not guaranteed: see CJC 24 January 2024 Meeting (n 199) col 64 (Simon Di Rollo).

278 *Bill Report* (n 252) 161 [1147], citing the evidence of Tony Lenehan KC.

the government responded that it was open to considering both the multi-judge and judge plus lay panel models.[279]

(e) Prejudicing the Right to a Fair Trial

The Cabinet Secretary was confident that 'a pilot will be lawful, and … as a Government, we will comply with [article 6 of] the *European Convention on Human Rights*'.[280] However, Senators of the Judicial College posited that a pilot, evaluated by the government, may not constitute an 'independent tribunal' for the purposes of the Convention.[281] Lady Dorrian pointed out that many other pilots, such as drug courts, have been successfully run without causing problems.[282] However, the Senators ultimately failed to support the pilot.

(f) Written Reasons

The main plank left in the *Dorrian Review* arguments for reform was the 'great prize'[283] of written reasons, which would counter the 'deliberative "black hole" at the centre of the trial process',[284] providing an opportunity for scrutiny (and appeal, which was seen variously as a strength and weakness given its potential for further delays). Judges could use the writing exercise as an opportunity to 'check their own biases' and ensure their decision was supported by the evidence.[285] This would benefit both complainers and defendants, and as the Cabinet Secretary noted, would provide an 'unrivalled opportunity to gather better evidence about what the real issues, deliberations and challenges are'.[286]

(g) Committee Conclusions

Ultimately, the Committee was split three ways: first, those that supported the Justice Reform Bill saw it as a valuable opportunity to gather evidence on rape myths, the experiences of stakeholders, written judgments, and to measure outcomes such as early pleas and convictions.[287] The second group argued the traditional merits of juries being the 'cornerstone of the justice system', reflecting the diversity of society and voicing concern that the judge-alone model carried potential for bias.[288] They believed time should be provided to ascertain whether the Justice Reform Bill's other initiatives work.[289] The third group also believed the pilot should not proceed, for the traditional reasons and, significantly, some very

279 Cabinet Secretary Letter (n 271).
280 *Bill Report* (n 252) 164 [1170], quoting the Cabinet Secretary.
281 Ibid 164 [1167], quoting the Senators of the Judicial College.
282 Ibid 165 [1178], quoting Lady Dorrian.
283 Ibid 166 [1182], quoting Simon Di Rollo KC.
284 Chalmers, Leverick and Munro (n 227) 230.
285 *Bill Report* (n 252) 166 [1183].
286 Ibid 166 [1186], quoting the Cabinet Secretary.
287 Ibid 178 [1268].
288 Ibid 178 [1269].
289 Ibid.

political ones: they were concerned that proceeding with the pilot despite 'such polarisation of views' would undermine public confidence.[290]

Validating the latter concerns, in an extraordinary turn of events the SSBA announced a planned boycott of the proposed pilot, which was widely reported in the media. While FACBA barristers could not engage in boycotts due to the cab rank rule, the SSBA's solicitor advocates were not so fettered.[291] The SSBA argued the boycott was justified, as the pilot would increase the risk of 'a miscarriage of justice, deliver no discernible benefits ... and undermine the public's confidence in our criminal justice system'.[292]

More hyperbolically, the SSBA commented to the media: 'The proposed pilot is a clear attempt to interfere in the independence of the judiciary and the court process by the Scottish government. … The motivation behind this pilot is to increase the conviction rate for rape at any cost.'[293]

A former judge then entered the media fray, stating the pilot was 'constitutionally repugnant' and that the Ministers were 'treating the courts as forensic laboratories in which to experiment with their policies'.[294] This followed on from a comment by the Scotland Bar's most senior female practitioner, likening the removal of a jury to acts of suppression in Hitler's Germany.[295]

While the tenor of media reports was surprising, it is hard to overstate the ideological magnitude of the SSBA's political manoeuvre; it effectively prejudices an important requirement of a fair trial (legal representation), purportedly in the name of securing a fair trial.[296] A Committee member questioned the ethics of such a move, asking why 'lawyers would "essentially say they are not going to follow the rule of law" if Parliament passes the Bill'.[297] That the SSBA would countenance this conduct illustrates the potent force of *doxa* in driving attempts to maintain entrenched *habitus*.

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290 Ibid 179 [1270].

291 The cab rank rule in Scotland, similarly to Australia, requires advocates to accept briefs to uphold that principle that, no matter 'how unpleasant the subject matter, [a defendant] will be able to instruct an advocate': CJC 24 January 2024 Meeting (n 199) col 50 (Tony Lenehan). In Scotland, a breach of the rule would be disciplined by the Dean of the Faculty of Advocates.

292 Ibid 49 (Russell Findlay).

293 Jenness Mitchell, 'Scottish Government Accused of "Interfering in Independence of Judiciary" as Lawyers Set to Boycott Juryless Rape Trials Pilot', *Sky News* (online, 9 May 2023) <https://news.sky.com/story/scottish-government-accused-of-interfering-in-independence-of-judiciary-as-lawyers-set-to-boycott-juryless-rape-trials-pilot-12877033>.

294 Ibid.

295 Lara Wildenberg, 'Juryless Trials for Sex Crimes Likened to Hitler's Germany', *The Sunday Times* (online, 15 November 2022) <https://www.thetimes.com/world/asia/article/juryless-trials-for-sex-crimes-likened-to-hitlers-germany-89nhdwk5t?region=global>.

296 However, boycotts are not new to the SSBA – in June 2024, its members actually commenced a boycott of summary domestic abuse cases, to prompt the government to act on increasing legal aid fees: PA Reporter, 'Scottish Solicitors Take Industrial Action in Row over Legal Aid', *The National* (online, 5 June 2024) <https://www.thenational.scot/news/24365776.scottish-solicitors-take-industrial-action-row-legal-aid/>.

297 'Juryless Trials Pilot Unlikely to Get Off the Ground', *Scottish Legal News* (online, 7 February 2024) <https://www.scottishlegal.com/articles/juryless-trials-pilot-unlikely-to-get-off-the-ground>.

3 Epilogue: The Scottish Sun Sets on a Juryless Pilot

Following the Committee's report, SSBA campaign and media coverage, the government indicated a start date of 2028 for the pilot, which meant it was effectively 'kicked into the long grass'.[298] The Justice Reform Bill's Parliamentary debate in April 2024 was spirited, with a Labour crossbencher objecting that its multiplicity of reforms meant it was, essentially, too threatening to current *doxa* and *habitus*:

> this moon-sized meteor of a bill is … too big and too broad, and professionals believe that it may threaten an extinction-level event for much of the principle and practice of a system that remains in need of modernisation. It makes little sense to undertake the reforms all at once, and as yet we have insufficient evidence.[299]

This echoes the sentiment of a senior prosecutor, who noted that Scotland was 'suffering from an attempt to do too much in the one bill … it *feels like a multitude attack on the accused*'.[300] While the significant majority of the Scottish National Party ('SNP')[301] was successful with 60 votes for, the 62 abstentions included 6 SNP Ministers.[302] The SSBA predicted a near-unanimous boycott of a juryless pilot,[303] and media scrutiny continued. Lady Dorrian's 'clean sheet' initiative clearly posed a threat to the Justice Reform Bill. It seems that the symbolic power of the Review's champions was no match for the *doxa* and *habitus* driving the very public response from the wider legal field.

The political sun then set for the juryless initiative following the announcement of a six-month 19.5% increase in rape reporting.[304] In a further strategic Realpolitik concession, the government announced it had dropped the pilot for lack of cross-party support, 'irrespective of the model', to build consensus for the remaining reforms.[305] Responses were, predictably, split. The FACBA were

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298 'Juryless Trials Kicked into Long Grass amid Fierce Opposition', *Scottish Legal News* (online, 17 April 2024) <https://www.scottishlegal.com/articles/juryless-trials-kicked-into-long-grass-amid-fierce-opposition>.

299 Scotland, *Parliamentary Debates,* 23 April 2024, col 64 (Michael Marra).

300 Interview with Senior Prosecutor of the Crown Office and Procurator Fiscal Service (AJ George, Edinburgh, 24 October 2024) (emphasis added).

301 The Scottish National Party has 61 sitting Members of Parliament, the Scottish Conservative and Unionist Party has 30, Scottish Labour has 22, Scottish Green Party has 7, Scottish Liberal Democrats has 5 and the Alba, Independent and No Party Affiliation have 1 Member each: 'Members of the Scottish Parliament', *Scottish Parliament* (Web Page) <https://www.parliament.scot/msps/current-party-balance>.

302 Scotland, *Parliamentary Debates*, 23 April 2024, col 84 (Presiding Officer).

303 'Lawyer Boycott' (n 272).

304 'New THAT GUY Sexual Crime Prevention Campaign Launches', *Police Scotland* (Web Page, 28 October 2024) <https://www.scotland.police.uk/what-s-happening/news/2024/october/new-that-guy-sexual-crime-prevention-campaign/>.

305 The government also dropped the proposed reduction of jury size, leaving only the abolition of the 'not proven' verdict as the principal controversial measure: Scottish Government, 'Victims, Witnesses, and Justice Reform Bill Update' (Media Release, 31 October 2024) <https://www.gov.scot/news/victims-witnesses-and-justice-reform-bill-update/> ('Bill Update'). See also the many other media reports, including Kirsteen Paterson, 'Scottish Government Scraps Pilot for Juryless Rape Trials', *Holyrood* (online, 31 October 2024) <https://www.holyrood.com/news/view,scottish-government-scraps-pilot-for-juryless-rape-trials>.

'very pleased', the SSBA noted a 'humiliating U-turn', while the Law Society noted it was 'unfortunate' the move took so long; the specialist support sector was 'disappointed'.[306] The Justice Reform Bill is still being considered;[307] meanwhile, the government has returned to incremental and more readable reform, planning legislative amendments to facilitate 'further research into jury deliberations, including how rape myths may affect verdicts'.[308] This more modest approach may appeal to the legal hegemony; as one defence solicitor noted:

> If everything else has been tried, if a complainer's experience is still an awful, dramatic experience, and [her] position would have been improved if there was no jury there, and there's … research that supports that across the board, then I suspect it would be harder to argue against the removal of the jury.[309]

As a Senior Prosecutor put it, a simplified, single issue, evidence-backed bill on juryless reform might allow policymakers to 'step gently through the objections and try and bring people with [them]'. In Bourdieusian terms, to collaborate on shifting *doxa* to make enough room for contemplating new *habitus*.

This Part has traced the Scottish government's attempt at a more fundamental transformation of sexual assault proceedings with a juryless pilot. Bourdieu's thinking tools highlight the nature of power relations inherent in the reform process, and explain how dominant legal agents can leverage significant symbolic power, harnessing formidable capital – professional and social networks – to shape public opinion, influence policymakers and successfully marshal resistance to reform.

4 Post-epilogue: The ALRC Takes the Same Approach

The ALRC's final report was handed down after this article was written and is therefore beyond its scope. But as a Bourdieusian analysis would suggest, and much like the Scottish result, the ALRC cautiously concludes it is: 'too early to say if juryless trials would help achieve more just outcomes. While this is an area worth exploring further, more research is needed before this reform idea can be properly considered.'[310]

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306 David Cowan and Jonathan Geddes, 'Juryless Rape Trials Pilot Axed by Scottish Government', *BBC News* (online, 1 November 2024) <https://www.bbc.com/news/articles/c20n3rjp7v9o>.

307 Consideration at Stage 2 of the Bill must be completed by 4 April 2025: 'Victims, Witnesses and Justice Reform (Scotland) Bill', *Scottish Parliament* (Web Page) <https://www.parliament.scot/bills-and-laws/bills/s6/victims-witnesses-and-justice-reform-scotland-bill>.

308 Ibid; 'Bill Update' (n 305).

309 Interview with Simon Brown, President of the Scottish Solicitors Bar Association (AJ George, Edinburgh, 23 October 2024).

310 Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence* (Final Report No 143, January 2025) 592. A recommendation was made for a research team to be established by the National Judicial College of Australia, with members located in trial courts, to build the shared evidence base by supporting evaluation of reform measures, including elections for juryless trials in sexual assault trials: at 17, 165 (recommendation 3(b)(vii)).

V CONCLUSION

Over the last 50 years, both Scottish and Australian advocates have worked tirelessly to improve a complainant's experience in the criminal justice system. While incremental reforms have progressed the complainant's lot, they have not provided the desired transformational change or real-world impact on deterrence or accountability. This article has contributed a timely socio-legal reflection on the power dynamics inherent in the reform of sexual assault proceedings, and how these dynamics can be better understood with the assistance of Bourdieusian theory.

Applying Bourdieu's thinking tools to the legal field and its sub-field of sexual assault proceedings shows that the driving force of law's symbolic power is *doxa*, which paradoxically generates both legal resistance to change, and acceptance of harm caused by the status quo. This is covered over by *habitus*, in the form of the time-honoured practices of the profession.[311] Since the legal hegemony's success depends on alignment with prevailing *doxa* and *habitus*, the motivation to stay aligned is formidable. Thus, the legal field (and its sub-field) reveals itself as a largely autonomous, self-replicating system.

In sexual assault proceedings, the hegemonic legal *doxa* and *habitus* focuses on a defendant's rights to a fair trial, minimising the complainant's suffering under the weight of the status quo. This is accompanied by a *doxa* of cautiousness to legal change. However, the retraumatisation of complainants at trial that is bound up with cross-examination practice and potential juror bias due to social misconceptions or 'rape myths' has motivated calls for change in the form of juryless trials. As Bourdieu's theory indicates – the law must be seen to respond; the legal field cannot close itself off from 'the social realities [it is] … supposed to express or regulate'.[312] It must adapt to ensure continued legitimation of its established order of relations.[313]

In recent times, the advocacy of heretics and the corporatism of the universal have created 'room for manoeuvre' and a political environment more receptive to reform in both Scotland and Australia. However, the Scottish experience aptly illustrates the government's implementation challenges and the power of pushback from the wider legal field on more fundamental reforms like juryless trials. Many of the ALRC's proposed 'micro' reforms, similarly to Scotland, are both readable and implementable; again, consistently with the Scottish experience, early submissions to the Australian inquiry may indicate that powerful legal agents would oppose less readable reform such as a juryless model. Thus, further research was cautiously suggested.

This dearth of prospect for more fundamental law reform to herald the potential transformation of complainants' experiences in sexual assault proceedings highlights the robust nature of the legal field and its ability to self-replicate its practices, beliefs and relationships of power – unless perhaps hegemonic legal agents decide that the necessity of reform is based on adequate evidence. The

311 Bourdieu and Eagleton (n 69).
312 Bourdieu, 'The Force of Law' (n 31) 851–2.
313 Ibid.

proposed boycott effectively prevented the evidence gathering that could support or negate juryless trials in Scotland. However, future rounds of research and advocacy may result in the sufficient mobilisation of symbolic power to achieve change – transforming what, today, seems like unreadable heresy into tomorrow's more readable, plausible reform option:

> Symbolic power, in its … heretical, anti-institutional, subversive mode, must also be realistically adapted to the objective structures of the social world. … [T]he will to transform the world by … a new vision of social divisions and distributions, can only succeed if the resulting … evocations, are also, at least in part, well-founded pre-visions, anticipatory descriptions.[314]

Ultimately, it seems, the key to policymaking success in reforming sexual assault proceedings in both Scotland and Australia will continue to lie in solidly evidence-based proposals and playing that Sisyphean long game.

314 Ibid 839.