TAKING PROCEDURAL FAIRNESS SERIOUSLY: STRUCTURED PROPORTIONALITY AND LEGISLATIVE SCRUTINY

HENRY PALMERLEE*

This article argues that the Senate Standing Committee for the Scrutiny of Bills ('SSCSB') should use the analytic framework of structured proportionality to hold Ministers accountable for justifying laws which infringe administrative law norms of procedural fairness. While procedural fairness in Australian public law has been primarily examined through the lens of judicial review, this article shifts the focus to Parliament – specifically, the role of the SSCSB. Through a case study on the Administrative Review Tribunal Bill 2024 (Cth), this article illustrates the inadequacy of current ministerial justifications for legislative abrogation of procedural fairness in administrative proceedings. Structured proportionality is proposed as a novel and valuable addition to a more robust scrutiny process. By demanding rigorous justification based on structured proportionality, the SSCSB can enhance legislative practices and safeguard a fundamental common law right.

What is just …, then, is what is proportionate.

–Aristotle, *Nicomachean Ethics*[1]

I INTRODUCTION

The right to be heard is a foundational principle of justice. Seneca declared that 'he who decides anything without having heard the other side, though he may decide rightly, by no means has acted justly'.[2] For Kautilya, justice demanded that '[a] judge shall not … drive away or unjustly silence any litigant'.[3] Even Adam,

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1 Aristotle, *Nicomachean Ethics*, tr Roger Crisp (Cambridge University Press, rev ed, 2014) 85 <https://doi.org/10.1017/CBO9781139600514>.

2 Seneca, *Medea*, ed CDN Costa (Oxford University Press, 1973) 29 <https://doi.org/10.1093/actrade/9780198721352.book.1> [tr author].

3 Kautilya, *The Arthashastra*, tr LN Rangarajan (Penguin Books, 1992) 352.

notes Edelman J, was afforded a right of reply before the Fall.[4] With humanity's capacity to speak seems to come a burning desire to be heard.

Equally well-established is the Commonwealth Parliament's largely plenary legislative power to pursue its policy objectives at the expense of procedural fairness in administrative hearings.[5] It is therefore somewhat surprising that in Australian public law, procedural fairness in government decision-making is primarily conceptualised as an issue of judicial review. Judges are tasked to articulate procedural fairness' demands and protect its remit. Very few scholars have approached procedural fairness from a parliamentary angle.

As such, there is much to be gained – at both the explanatory and normative levels – by supplementing our understanding of procedural fairness in the administrative state with consideration of Parliament's role in its maintenance. Specifically, I examine what it means to take procedural fairness seriously throughout the legislative process.

I argue that the Senate Standing Committee for the Scrutiny of Bills ('SSCSB') should use the analytic framework of structured proportionality to hold ministers accountable for justifying fairness-infringing laws. This is a novel claim on two levels. Firstly, no academic work to date has addressed how the principle of procedural fairness is dealt with in the legislative process, and the demands that can and should be made of that process' key actors. Moreover, the link I make between structured proportionality and legislative justification has not been explored in the institutional context of Commonwealth Parliament. Hence, although my ultimate proposal can fairly be described as modest, it carries meaningful implications – both in terms of its practical potential to improve legislative practice, and its contribution to the instantiation of Australian traditions of political constitutionalism regarding fundamental common law rights.

Four preliminary points will delimit the scope of my argument. Firstly, 'procedural fairness' refers to the hearing rule of procedural fairness (that a person is entitled to be heard before a decision affecting their rights or interests is made) rather than the more general definition that includes the bias rule.[6] Secondly, I deal only with procedural fairness in administrative decision-making.[7] Thirdly, I am concerned solely with committees that conduct *pre-legislative* scrutiny of bills. Finally, I employ 'structured proportionality' as a broad analytic framework, defined by the three core requirements of suitability, necessity, and proportionality *stricto sensu*. While I refer to various courts' and scholars' perspectives on proportionality, my argument does not rely on adopting as exclusively true any

4 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 46 [42].

5 The situation differs in Chapter III courts due to limitations stemming from the principle in *Kable v DPP (NSW)* (1996) 189 CLR 51. See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 348 (French CJ).

6 This restricted definition is appropriate for my legislative focus because, while it is theoretically possible for Parliament to exclude the bias rule in statutes, such exclusions are very uncommon: Robin Creyke et al, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 5th ed, 2019) 730–1.

7 Cf in judicial decision-making.

particular formulation of the framework, or precise weighting of its different elements.

Although procedural fairness is a venerable common law principle, it finds enduring relevance in contemporary lawmaking. The hasty legislative response to *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, for example, imposed heavy limitations on the procedural fairness afforded to irregular migrants.[8] Under the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth), natural justice does not apply to decisions to impose monitoring conditions on Bridging (Removal Pending) visa-holders;[9] and an applicant seeking to have a monitoring condition removed is required to prove a negative proposition (that they do not pose a risk to the Australian community), without any statutory criteria against which to establish their case.[10] It may well be wondered whether this heavy-handed approach affords procedural fairness the importance it is owed.[11]

I aim to show that greater respect for procedural fairness in the legislative process is nevertheless possible. My objective is to supplement two fields of scholarship which to date have primarily concentrated on the judiciary: Australian doctrinal work on procedural fairness, and theoretical literature investigating connections between proportionality and justification. By better recognising Australia's parliamentary model of rights protection, my legislative focus is appropriately attentive to local context.[12]

To develop my argument, I contend in Part II that procedural fairness is a rights-like concept that should be taken seriously as such in the legislative process. To take procedural fairness seriously means to afford it a measure of qualitative priority over more basic legislative considerations. I identify two key actors: ministers, who control and justify the content of bills; and scrutiny committees, which play an important oversight role by suggesting amendments and seeking justification for drafting decisions. I contend that ministerial justification of a bill, in explanatory materials and in correspondence with committees, is a critical element of taking procedural fairness seriously in the legislative process.

With the goalposts erected, I turn in Part III to an empirical question: do ministers take procedural fairness seriously? Using a case study – part 6 of the Administrative Review Tribunal Bill 2024 (Cth) ('ART Bill'), concerning review of intelligence and security decisions – I suggest that reliance on an impressionistic

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8 (2023) 280 CLR 137. The *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ('*Bridging Visa Conditions Act*') was enacted in just two days.

9 *Bridging Visa Conditions Act* (n 8) sch 1 item 4, inserting *Migration Act 1958* (Cth) s 76E ('*Migration Act*').

10 *Bridging Visa Conditions Act* (n 8) sch 1 item 4, inserting *Migration Act* (n 9) ss 76E(3)–(4).

11 See, eg, concerns raised in Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 15 of 2023, 29 November 2023) 18–20. The High Court has recently held in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 that certain elements of the *Bridging Visa Conditions Act* (n 8) were unconstitutional. However, this decision was based on the punitive nature of visa conditions and the associated line of Chapter III jurisprudence, rather than the absence of procedural fairness in the Act.

12 George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58 <https://doi.org/10.1093/slr/hms048>. On attention to local context in comparative public law, see, eg, Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1, 12–16.

notion of 'balance' between procedural fairness and national security tends to produce anaemic justification. Finally, Part IV presents my case for the use of structured proportionality by the SSCSB. I argue that the rigorous approach required by structured proportionality is more likely to promote ministerial justification of fairness-infringing bills than current practice.

II TAKING PROCEDURAL FAIRNESS SERIOUSLY

I make two claims in this Part – the first normative, the second descriptive. Firstly, procedural fairness should receive a measure of qualitative priority in the legislative process, rather than being treated as just another integer in the rough-and-tumble of lawmaking. In other words, procedural fairness should be taken seriously.

My second, descriptive claim is that courts cannot force legislators to take procedural fairness seriously in this sense,[13] a reality insufficiently appreciated in Australian legal scholarship. I argue that taking procedural fairness seriously requires ministers to provide justification for fairness-infringing laws before and during the parliamentary scrutiny process.

A Taking Procedural Fairness Seriously

Procedural fairness has deep salience in the contemporary administrative state. As noted by Brennan J, a 'large and increasing variety of interests [are] affected by the exercise of statutory powers', rendering executive decision-making a defining element of the individual's experience of state power.[14]

This renders the grant of a fair hearing before such powers are exercised a crucial element of modern good governance, for both instrumental and intrinsic reasons. On one level, as Megarry J's timeless caution regarding 'open and shut cases' reminds us, the grant of a fair hearing often produces wiser judgments and better outcomes.[15] More fundamentally, procedural fairness is intrinsically important because it recognises the dignity of the legal subject and their ability to give an account of their interests.[16] A person subject to an administrative decision is a rational being capable of explaining themselves and deserving of respect, not 'a rabid animal'.[17]

These justifications, often intertwined in judicial dicta, have seen procedural fairness become 'hallowed by time [and] entrenched in our jurisprudence'.[18] Its significance is illustrated by the onus of 'almost nothing' imposed on an applicant seeking to demonstrate that a denial of fairness was material (and thus constituted

13 Beyond insisting that derogations be irresistibly clear: see below n 22 and accompanying text.
14 *Kioa v West* (1985) 159 CLR 550, 619 ('*Kioa*').
15 *John v Rees* [1970] Ch 345, 402.
16 See, eg, *R(Osborn) v Parole Board* [2014] AC 1115, 1149 (Lord Reed JSC).
17 Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *Cambridge Law Journal* 200, 210 <https://doi.org/10.1017/S0008197312000256>.
18 *Kioa* (n 14) 614 (Brennan J).

jurisdictional error).[19] Moreover, fairness falls under the protective umbrella of the principle of legality – the canon of construction which dictates that Parliament must use clear, unambiguous language to infringe fundamental common law rights and principles.[20] As Brendan Lim has argued, the principle of legality is essentially normative.[21] It attaches to Australia's 'basic common values and aspirations' and demands absolute clarity of intention before courts will countenance their infringement.[22]

Procedural fairness is clearly a foundational element of Australian legal practice, the reasons for which have been explored extensively in existing scholarship.[23] For my purposes, the fundamental importance of procedural fairness supports a specific intuition: that, because of its intrinsic value, procedural fairness is entitled to the sort of special attention commonly associated with rights. It is an aspect of a person's well-being that has 'qualitative priority over considerations of utility' but is nevertheless non-absolute.[24] I will use 'taking procedural fairness seriously' as consistent shorthand for this idea: that procedural fairness is a rights-like concept that should be given special priority in legislation over basic utilitarian and other considerations.[25]

Two important points of clarification are required here. The first is that many laws do not contain express provisions regarding procedural fairness. To apply to a broad array of different administrative decisions, the content of procedural fairness must necessarily be flexible. As such, statutory or contextual factors frequently influence procedural fairness without Parliament having specifically turned its mind to the issue.[26] For example, procedural fairness may be excluded by virtue of urgency rather than by express provisions to that effect.[27] Similarly, the factual contingencies of allegations made against a person frequently will determine the notice period required to enable them to 'consider the allegations … and … obtain

19 See especially *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, 123 [93] (Edelman J).

20 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J) ('*Potter*').

21 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372.

22 Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 16. Not every administrative law norm rises to this level of importance. For example, there is no general right to receive reasons for an administrative decision: *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ). Similarly, the non-fettering principle does not create a right to have one's case considered completely from first principles: *Re Drake and Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634.

23 In addition to preceding citations, see Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002).

24 Jeremy Waldron, 'Rights in Conflict' (1989) 99(3) *Ethics* 503, 516 <https://doi.org/10.1086/293094>. In other words, procedural fairness is 'resistant to trade-offs, but not completely so': James Griffin, *On Human Rights* (Oxford University Press, 2008) 76 <https://doi.org/10.1093/acprof:oso/9780199238781.001.0001>.

25 Jules L Coleman, 'Taking Rights Seriously, by Ronald M Dworkin' (1978) 66(4) *California Law Review* 885, 913 <https://doi.org/10.2307/3479972>. To be clear, despite adapting Ronald Dworkin's terminology, I do not endorse his account of rights as 'trumps'.

26 *Kioa* (n 14) 585 (Mason J), 612 (Brennan J).

27 See, eg, *South Australia v Slipper* (2004) 136 FCR 259, 285 (Finn J); *Re Hatfield and Comcare* [2010] AATA 848, [65]–[66] (Prof Creyke).

material to rebut them', rather than prescribed statutory timelines.[28] The second point is that it would be a mistake to view the search for legislative intention as invariably leaving courts with a passive, mechanical role.[29] Parliament's intention will frequently be incomplete or unclear, and it will fall to the courts to perform the requisite exegesis of that intention.

The result of these two matters is that not every situation in which white-glove procedural fairness norms do not apply is the result of a conscious legislative decision. In most situations, Parliament is content to leave a close examination of what fairness requires to the courts. Parliament only makes explicit decisions to limit procedural fairness in certain circumstances – often regarding politically sensitive topics like national security and migration law.[30] When such decisions are made, the principle of legality requires that the intention to restrict procedural fairness be unavoidably clear. It is this kind of decision – where Parliament has sought *actively* to attenuate procedural fairness – in relation to which it is appropriate to refer to 'taking procedural fairness seriously'.[31] In the next section, I consider how the responsibility for ensuring that this occurs rests in the hands of ministers and scrutiny committees, not courts.

B The Two Key Actors

The previous section concentrated primarily on how judges conceptualise procedural fairness. However, I now show that legislative power to abrogate fairness is largely unconstrained by courts. Instead, the two actors who play central roles in nurturing, or neglecting, procedural fairness in legislation are ministers, who oversee the drafting and introduction of bills (along with associated extrinsic materials), and scrutiny committees, who perform independent evaluation of fairness-infringing legislation.

1 Ministers

Courts usually approach procedural fairness in two stages: does procedural fairness apply in a statutory scheme; and if so, what does fairness demand in the circumstances? In the first 'applicability' step, courts will honour an express legislative intention for procedural fairness to have limited application (or to be excluded entirely) in a statutory scheme.[32] Moreover, even if the court finds

28 *Ansell v Wells* (1982) 43 ALR 41, 62 (Lockhart J).

29 See Gageler (n 22) 7 ff.

30 See, eg, *Migration Act* (n 9) vol 1 pt 2 div 3 sub-div AB.

31 This also refers to amendments designed to preclude creative judicial interpretation. For example, amendments to the *Migration Act* (n 9) were introduced immediately following the High Court's decision against the Commonwealth in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 ('*Miah*'). These amendments, which purported to exhaustively codify applicants' right to procedural fairness, were 'plainly a response' to *Miah* (n 31): *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 263 [26] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

32 Provided clear language is used: see, eg, *Leghaei v Director-General of Security* (2007) 241 ALR 141, 145–7 [43]–[55] (Tamberlin, Stone and Jacobson JJ). But see the High Court's interpretive approach in *Miah* (n 31).

that a decision-maker is bound by procedural fairness rules, their character is chameleonic. This is the second question, that of 'content'. Here, the precise demands of procedural fairness are recognised to be flexible and adaptable to the statutory context – a context determined by Parliament.[33] As such, even if fairness applies in a statutory scheme, Parliament plays the dominant role in determining what the rule demands, including reducing its content to 'nothingness'.[34]

This reality sits somewhat at odds with how Australian procedural fairness scholarship concentrates primarily on judicial review of administrative action.[35] Fairness-minded academics have largely focused their attention on how courts seek to ensure that procedural fairness is taken seriously, with very few scholars considering procedural fairness through a legislative lens. Sarah Moulds' work on post-legislative scrutiny is the major exception. In various articles, she highlights the value of post-legislative scrutiny for procedural fairness through case studies of the Djokovic visa affair, the Robodebt fiasco and national security legislation.[36] However, Moulds' work focuses primarily on *post*-legislative scrutiny. There has to date been no extended attention given to how Parliament *makes* fairness-infringing laws – ie, the initial legislative process, and the role played by scrutiny committees. My objective is to explore this important gap in our understanding of how the principle of procedural fairness is dealt with in Australia.

Reference to 'Parliament' at large, however, is imprecise. Although bills can be introduced by any member or senator, in practice it is generally only the government's bills (or of which the government approves) that will pass the lower house.[37] Within government, the relevant minister oversees (from a high level) the drafting of a bill by the Office of Parliamentary Counsel, and of the associated extrinsic materials by their department staff, before it is introduced into Parliament. To be sure, ministers clearly do not themselves draft bills or write explanatory

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33 *Kioa* (n 14) 612 (Brennan J). See also *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296, 326 (Brennan J); Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2016) 512.

34 See cases cited in *Leghaei v Director-General of Security* [2005] FCA 1576, [51]–[54] (Madgwick J) ('*Leghaei FCA*'). See above Part II(A) for further discussion of express provision for procedural fairness and judicial interpretation.

35 See, eg, Anthony Gray, 'The Common Law and the Constitution as Protectors of Rights in Australia' (2010) 39(2) *Common Law World Review* 119, 144–5, 156 <https://doi.org/10.1350/clwr.2010.39.2.0201>; Robert Lindsay, 'Natural Justice: Procedural Fairness "Now We See through a Glass Darkly"' [2010] (63) *AIAL Forum* 67; Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39(2) *Monash University Law Review* 285; Matthew Groves, 'The Unfolding Purpose of Fairness' (2017) 45(4) *Federal Law Review* 653 <https://doi.org/10.1177/0067205X1704500408>; Nicholas Chen, 'Procedural Fairness in Judicial Review of Migration Decisions: The Evolution of a Fundamental Common Law Principle' (JSD Thesis, University of Sydney, 2015).

36 On Djokovic, see Sarah Moulds and Anja Pich, 'Reviewing Executive Decision-Making in Emergencies: Time to Consider a More Systematic Approach to Post Legislative Scrutiny in Australia' (2022) 41(2) *University of Tasmania Law Review* 43, 66–71, 77–8. On Robodebt, see Sarah Moulds, 'Democratic and Judicial Review of Enacted Laws in Australia: A Case Study of the Rights Scrutiny Work of Australian Parliamentary Committees' (2021) 51(hors série) *Revue générale de droit* 47, 71–6 <https://doi.org/10.7202/1085789ar>. On national security, see Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-terrorism Lawmaking in Australia* (Springer, 2020) ch 5 <https://doi.org/10.1007/978-981-15-4350-0> ('*Committees of Influence*').

37 Putting aside edge cases of minority government.

memoranda, and secretaries and departmental staff play a key role in generating policy briefs, including different legislative options. Nevertheless, ministers control and are ultimately responsible for the drafting process. In referring to ministers as key actors, I use the word as a metonym for the entire executive drafting apparatus over which the minister has final authority, consciously conceiving of 'the minister' in a broader institutional setting rather than as a natural person sitting behind a ministerial desk.

Once a bill is introduced into Parliament, its basic structure and mechanisms are relatively resistant to change.[38] The government will take minimal account of Opposition or crossbench views unless their votes are required, and successful committee amendments tend to be relatively minor and technical.[39] As such, the executive dominates the drafting, introduction and passage of law, giving ministers a critical role in ensuring that procedural fairness is taken seriously throughout that process.[40] The following section introduces the other key actor: scrutiny committees.

2 Parliamentary Scrutiny Committees

The Commonwealth Parliament currently has three scrutiny committees: the Parliamentary Joint Committee on Human Rights ('PJCHR'), the SSCSB, and the Senate Standing Committee for the Scrutiny of Delegated Legislation ('SSCSDL').[41] To foreshadow detailed discussion below, although the PJCHR already employs structured proportionality in its scrutiny of bills for 'compatibility with human rights',[42] international human rights are narrower in scope than common law norms of procedural fairness.[43] As such, I will argue in Part IV that the SSCSB should *also* require ministers to provide proportionality-oriented justification of fairness-infringing legislation. As the SSCSDL does not undertake pre-legislative scrutiny, which is the focus of this article, it falls beyond the scope of my inquiry.[44]

The SSCSB's non-partisan character is perhaps the defining characteristic distinguishing it from the PJCHR. For one, the government does not have a casting vote in the SSCSB.[45] The SSCSB also undertakes 'technical scrutiny' of bills and

38 Julie Debeljak and Laura Grenfell, 'Diverse Australian Landscapes of Law-Making and Human Rights: Contextualising Law-Making and Human Rights' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, 2020) 1, 3.

39 See Moulds, *Committees of Influence* (n 36) 169–70.

40 Noting, however, the varying role the Senate will play depending on seat distribution: Andrew Gibbons and Rhonda Evans, 'The Executive Lawmaking Agenda: Political Parties, Prime Ministers, and Policy Change in Australia' (2023) 51(2) *Policy Studies Journal* 307, 311–12 <https://doi.org/10.1111/psj.12503>.

41 The SSCSDL was known as the Senate Standing Committee on Regulations and Ordinances until 2019.

42 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7 ('*HR(PS) Act*').

43 See Part IV(B)(2).

44 The SSCSDL scrutinises delegated legislation after it has already been enacted by the executive and taken legal effect. Since its recommendations concern the disallowance of this existing delegated legislation, rather than the passage of a bill, the SSCSDL's role does not constitute pre-legislative scrutiny.

45 Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate* (July 2025) ords 24(4), (6) <https://www.aph.gov.au/-/media/05_About_Parliament/52_Sen/523_PPP/Standing_Orders_2015/

legislative instruments. Since technical scrutiny does not assess the wisdom of government policy, the Committee has a plausible claim to non-partisanship – a factor which supports its influence in the legislative process.[46] While inquiry-based committees often assess a bill's substantive policy merits with input from stakeholders, technical scrutiny instead focuses instead on enumerated principles which vary according to each committee's role.[47] The SSCSB's five scrutiny principles 'broadly reflect themes of good governance; administrative fairness and accountability; and parliamentary propriety'.[48]

Parliamentary scrutiny committees are important for my purposes because their work helps pry the legislature apart from the executive. The SSCSB's independence from the government is consistent with the Senate's status as a chamber of 'review and reflection'.[49] Moreover, the establishment of the PJCHR is one example of a government enacting legislation to *increase* its own accountability.[50] Like Odysseus bound to the mast, executive accountability regimes recognise that greater wisdom often flows from voluntary self-restraint. Scrutiny committees therefore limit the extent to which ministers can simply roll legislation through Parliament. This is not to suggest that inquiry-based committees do not also influence the legislative process – indeed, past empirical analysis has found these committees to play an important role in refining legislative drafting.[51] However, these committees are often prone to divide along party lines.[52] For example, in both inquiry-based committees which considered the ART Bill, the Opposition and

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StandingOrders.pdf> ('*Senate Standing Orders*'). Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 26 July 2022, 30–1 (Anthony Burke, Leader of the House).

46 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (Final Report, May 2012) 20–3 ('*Future Role and Direction*'). Partisan politics tend to intrude more obviously into the PJCHR's work, perhaps owing to the value-laden nature of human rights and the casting vote held by the government Chair. On the growth of partisanship in PJCHR, see Adam Fletcher, *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018) ch 4 <https://doi.org/10.2307/jj.5371947> ('*Democratic Masterstroke or Mere Window Dressing?*').

47 I follow Moulds in using the term 'inquiry-based committees' to refer to committees such as the House Standing Committee on Social Policy and Legal Affairs, and the Senate Legal and Constitutional Affairs Legislation Committee: see Moulds, *Committees of Influence* (n 36).

48 Senate Standing Committee for the Scrutiny of Bills, Submission No 150 to Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (3 December 2015) 1. The principles are contained in *Senate Standing Orders* (n 45) ord 24.

49 JR Odgers, *Odgers' Australian Senate Practice: As Revised by Harry Evans*, ed Rosemary Laing (Department of the Senate, 14th ed, 2016) 35.

50 See further *Administrative Appeals Tribunal Act 1975* (Cth); *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Freedom of Information Act 1982* (Cth).

51 See, eg, Moulds, *Committees of Influence* (n 36) 170–1.

52 Sarah Moulds, 'Committees of Influence: The Impact of Parliamentary Committees on Law Making and Rights Protection in Australia' [2019] (97) *AIAL Forum* 11, 34 ('The Impact of Parliamentary Committees'); Sarah Moulds, 'Parliament: The House of Representatives' in Mark Evans, Patrick Dunleavy and John Phillimore (eds), *Australia's Evolving Democracy: A New Democratic Audit* (LSE Press, 2024) 231, 243 <https://doi.org/10.31389/lsepress.ada.k>. See also George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469, 481.

crossbench attached dissenting reports or appendices to the majority report.[53] The SSCSB's non-partisan (or at least, less overtly partisan) approach has rendered it especially influential.[54] Moreover, its enumerated scrutiny principles promote close consideration of procedural fairness issues, making its work especially relevant for my purposes.[55] The focus of this article, therefore, will be on the SSCSB rather than inquiry-based committees.

Hence, with ministers' policy choices regarding procedural fairness largely unconstrained by judicial review, scrutiny committees assume a crucial role in ensuring that fairness is taken seriously. The following section demonstrates that promoting a 'culture of justification' is a chief means through which the committees perform this function. Before proceeding, though, it should be noted that this article's argument likely applies to any fundamental common law right that does not overlap with an area of constitutional doctrine. While the common law right to free speech gains partial protection from legislative infringement via the constitutionally implied freedom of political communication,[56] common law rights which do not map easily onto the *Constitution* – like the freedom to depart and re-enter one's own country[57] – are in a similar position to that described above regarding procedural fairness. I have nevertheless chosen to concentrate on procedural fairness because, as discussed in Part II(A), it is a foundational element of Australian legal practice and is central to controlling the broad statutory powers afforded to the executive in the modern administrative state. Focusing an article-length contribution on such a crucial and basic right allows my proposal's practical importance to be most clearly demonstrated. Hence, while further work could certainly enlarge the scope of enquiry by considering the possible benefits of proportionality with respect to other common law rights, the choice to concentrate

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53 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No 1) Bill 2023* (Report, February 2024); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Administrative Review Tribunal Bill 2023 [Provisions] and Related Bills* (Report, May 2024).

54 Dennis Pearce, 'Rules, Regulations and Red Tape: Parliamentary Scrutiny of Delegated Legislation' (Papers on Parliament No 42, Department of Senate, Parliament of Australia, December 2004) 88; Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' [2019] (Winter) *Canadian Parliamentary Review* 25, 27.

55 While acknowledging the crude character of this measure, I note that the SSCSB's scrutiny digest concerning the ART Bill and its associated bills refers to procedural fairness nearly 10 times more frequently than the reports of the inquiry-based committees (1.25 references per page, compared to 0.13 and 0.14 references per page respectively in the reports: see above n 53).

56 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'). See further Adrienne Stone, 'Expression' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 952 <https://doi.org/10.1093/law/9780198738435.003.0040>.

57 *Momcilovic v The Queen* (2011) 245 CLR 1, 178 [444] (Heydon J), citing *Potter* (n 20). A contemporary discussion of the possible existence of an implied freedom of re-entry to Australia for citizens is provided in Benjamin Durkin, 'No Place Like Home? Alienage, Popular Sovereignty and an Implied Freedom of Entry into Australia under the *Constitution*' (2024) 52(2) *Federal Law Review* 230 <https://doi.org/10.1177/0067205X241255445>.

on procedural fairness is consistent with my relatively modest, and primarily practical, objectives in the present article.

C Procedural Fairness in a Culture of Justification

The 'culture of justification' is a widely-used term in global constitutional discourse.[58] It refers to the intuitively compelling idea that government decisions (both legislative and executive) should be justified to citizens, even if they are within power.[59] In the legislative context, justification can be defined as explaining and defending a law's substantive wisdom to citizens. The culture of justification is a liberal concept in that it argues for legislation built on persuasion, not coercion.[60]

Scrutiny committees exist in part to promote such a culture.[61] Their powers can include requesting further explanation of a law's wisdom from the relevant minister,[62] calling for departmental staff to attend as witnesses,[63] and for departments to produce documents.[64] These functions encourage ministers to explain why a bill should be enacted in its current state – in other words, to justify their legislation.

The idea that legislative justification is a core part of taking rights seriously is widely accepted. For one, justification increases ministers' electoral accountability for rights-infringing decisions, subjecting them to the 'superintendence of the public'.[65] It also promotes thoughtfulness, requiring ministers to think deeply and conscientiously about the moral assumptions that underpin their decisions.[66] More fundamentally, justification encourages the reasonable disagreements about rights that define a pluralist society.[67] Robust public contestation about rights is, in Jeremy Waldron's view, 'the *best possible sign* … that people take rights seriously'.[68] Hence, while 'taking procedural fairness seriously' is a fuzzy concept that is probably impossible to define through a set of collectively sufficient

58 A term coined in Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31 <https://doi.org/10.1080/02587203.1994.11827527>.

59 See Kai Möller, 'Justifying the Culture of Justification' (2019) 17(4) *International Journal of Constitutional Law* 1078, 1078 <https://doi.org/10.1093/icon/moz086>.

60 Mureinik (n 58) 32.

61 See Daniel Reynolds, Winsome Hall and George Williams, 'Australia's Human Rights Scrutiny Regime' (2020) 46(1) *Monash University Law Review* 256, 289.

62 *Senate Standing Orders* (n 45) ords 24(1)(d)–(f).

63 House of Representatives, Parliament of Australia, *Standing Orders* (2 August 2022) ord 236 <https://www.aph.gov.au/-/media/05_About_Parliament/53_HoR/532_PPP/Standing_Orders/full_SOs_2Aug2022.pdf>.

64 Ibid.

65 Michael James, Cyprian Blamires and Catherine Pease-Watkin (eds), *The Collected Works of Jeremy Bentham: Political Tactics* (Oxford University Press, 1999) 29–30 <https://doi.org/10.1093/actrade/9780198207726.book.1>. On 'publicity', see Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) ch 3.

66 Jeremy Waldron, 'Clarity, Thoughtfulness, and the Rule of Law' in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, 2016) 318, 327–8 <https://doi.org/10.1093/acprof:oso/9780198782889.003.0016>. See also Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press, 2023) <https://doi.org/10.4159/9780674294851>.

67 Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing, 2005) ch 1 <https://doi.org/10.5040/9781472563491>.

68 Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 311 (emphasis added) <https://doi.org/10.1093/acprof:oso/9780198262138.001.0001>.

conditions, much scholarly work provides good reason to think that justification is a core element of doing so.[69]

Committees are especially important in this context because courts play a very limited role in extracting justification for fairness-infringing laws from the executive. The most that courts can do is demand clarity of language when procedural fairness is abrogated, forcing Parliament to 'accept the political cost' thereof.[70] Provided clear language is used, though, courts have no power to demand that ministers justify their legislative proposals.

The position is different where a common law principle coincides with a constitutionally protected freedom. Take the implied freedom of political communication, which overlaps substantially with the common law principle of free speech.[71] Courts demand justification of laws which prima facie burden the implied freedom, requiring the relevant government to make submissions on the impugned law's legitimate purpose and proportionate character. By contrast, no constitutional cause of action flows from legislative restriction of procedural fairness – meaning judges cannot extract justification from the executive for such laws.[72] This focuses attention even more squarely on the legislative process, giving the scrutiny bodies an extremely important role in mediating the interaction of procedural fairness and competing policy objectives.

As such, the justificatory requirements associated with parliamentary committees' work cannot merely be given lip service by ministers. Providing justification for fairness-infringing legislation is a crucial element of taking procedural fairness seriously.

D Three Justificatory Pathologies

Applying this standard in a meaningful way requires a definition of 'justification'. I advance a negative standard – an explanation for a decision constitutes justification where it avoids the three 'pathologies' identified in this section.[73]

The crucial starting point is that most policy problems have no single right answer. The culture of justification is sensitive to this reality and does not require governments to locate an illusory 'best' decision. A justifiable decision is simply one that is rational and so can be understood by others.[74] The focus is on non-arbitrariness, not right answers.

Nevertheless, justification demands robust reason-giving by decision-makers.[75] Consider a doorman denying me entry to a nightclub. Stony-faced silence (although perhaps the norm in such a situation) would not constitute justification;

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69 'Justification' is defined below at Part II(D).

70 See *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

71 Ibid 125 (Lord Steyn).

72 Cf restriction of fairness in Chapter III courts: see above n 5.

73 Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law and Ethics of Human Rights* 141 ('Socratic Contestation') <https://doi.org/10.2202/1938-2545.1047>.

74 This idea does not require endorsing any particular theory of public reason: ibid 160.

75 Janina Boughey, 'The Culture of Justification in Administrative Law: Rationales and Consequences' (2021) 54(2) *University of British Columbia Law Review* 403, 409.

nor, importantly, would 'I'm hungry' or some other irrelevant consideration. The mere fact that reasons have been advanced for a decision does not justify it.

By contrast, suppose the doorman says that I am too drunk to be admitted. Although I might disagree about whether I am in fact too drunk, I recognise that excessive intoxication is a relevant reason to refuse entry to a nightclub, and is a standard on which minds might reasonably differ. However, our doorman is not out of the justificatory woods yet, because a mere statement of conclusion obfuscates the reasons grounding his decision. By contrast, if the doorman notes that I am slurring my words, swaying on my feet and struggling to maintain eye contact, I can understand his decision and perceive it as having been made following a good-faith assessment of the facts – irrespective of whether I, the eager patron, would have made the same assessment.

I draw three points from this example. Firstly, justification of a decision clearly requires something more than silence. The imposition of will – no matter whose – never itself creates a reason justifying that imposition. Secondly, not every reason for a decision is a *relevant* reason. The doorman's hunger could explain him going to buy a cheeseburger on his break, but does nothing to illuminate why he has refused me entry. Here, relevance approximates the idea of 'reciprocity' used in other work.[76] Reasons for a decision are relevant insofar as they are intelligible to persons bound by the decision.

Finally, a mere statement of conclusion cannot constitute a reason in the thick sense that the culture of justification requires. This requirement resonates with the administrative law approach to statutory duties to give reasons. Courts generally demand that reasons be capable of 'explain[ing] in a reasonable and intelligible way the decision-maker's justification for its exercise of the power'.[77] An 'all-embracing … statement of conclusion' does not sufficiently explain how a decision has been reached.[78]

Justification, therefore, avoids these three pathologies – giving no reasons, giving irrelevant reasons, and giving conclusory reasons. Although this triad deliberately omits the Rawlsian view that public reasons must be premised upon principles of justice that any reasonable person could accept, it is sufficient to rest on well-developed scholarly criticisms of John Rawls' requirement as irreconcilable with the extent of reasonable disagreement about justice in a pluralist society.[79]

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76 Gutmann and Thompson (n 65) ch 2; Rainer Forst, *The Right to Justification*, tr Jeffrey Flynn (Columbia University Press, 2011) 6.

77 Steven Rares, 'Judicial Review of Administrative Decisions: Should There Be a 21st-Century Rethink?' (2015) 22(3) *Australian Journal of Administrative Law* 157, 161. See also *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

78 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 244 [111] (Kirby J).

79 John Rawls, *Political Liberalism* (Columbia University Press, 1993) ch 6. Cf Simon Caney, 'Anti-perfectionism and Rawlsian Liberalism' (1995) 43(2) *Political Studies* 248, 257 <https://doi.org/10.1111/j.1467-9248.1995.tb01710.x>; Michael J Sandel, 'Political Liberalism' (1994) 107(7) *Harvard Law Review* 1765, 1782–9 <https://doi.org/10.2307/1341828>.

E Interim Conclusion

This Part's core normative claim was that procedural fairness is a rights-like concept which requires special attention. At a descriptive level, ministers and scrutiny committees play a crucial role in influencing how procedural fairness is treated in the legislative process. As such, existing scholarship's focus on judicial review can be productively enlarged by a focus on the justification given by ministers for their bills. This process operationalises the special attention which legislative decisions to exclude fairness should attract.

III A JUSTIFICATORY CASE STUDY

In this Part, I examine a case study of ministerial engagement with legislative scrutiny's justificatory requirements. The case study suggests that pursuing a vague notion of 'balance' between a right and a competing governmental objective can result in unsatisfactory justification of fairness-infringing legislation.

A Part 6 of the ART Bill

The ART Bill (which passed into law as the *Administrative Review Tribunal Act 2024* (Cth) on 3 June 2024) replaced the Administrative Appeals Tribunal ('AAT') with the new Administrative Review Tribunal ('ART'). The Bill was designed to remedy what the Attorney-General argued was a terminal decline in public trust in the AAT caused by political appointments.[80] A particularly memorable headline read: 'Tribunal Appointments: "They Should Call It the ATM, Not the AAT"'.[81]

While reception of the ART Bill was positive, at the time of writing no academic attention has been devoted to part 6 of the Bill.[82] In broad terms, part 6 adjusted the ART's process to recognise the sensitivity of national security and law enforcement information relevant to a proceeding.[83] These adjustments exclude the obligation to give reasons for intelligence and security decisions,[84] and allow the responsible minister or Director-General of Security to issue a certificate preventing access to evidence by the applicant and their counsel.[85] There is no requisite state of satisfaction for issuing a certificate, and a certificate has mandatory effect, giving

80 Commonwealth, *Parliamentary Debates,* House of Representatives, 7 December 2023, 9198 (Mark Dreyfus, Attorney-General).

81 Michael Pelly, 'Tribunal Appointments: "They Should Call It the ATM, Not the AAT"', *Australian Financial Review* (online, 7 April 2022) <https://www.afr.com/politics/tribunal-appointments-they-should-call-it-the-atm-not-the-aat-20220405-p5aayz>.

82 On the ART Bill generally, see Matthew Groves and Greg Weeks, 'Editorial: The Proposed Administrative Review Tribunal' (2023) 30(4) *Australian Journal of Administrative Law* 231; Jason Donnelly, 'Towards a Progressive Future: The Advent of the Administrative Review Tribunal and Its Transformative Impact on Administrative Law' (2023) 30(4) *Australian Journal of Administrative Law* 234. See also posts in the AUSPUBLAW blog on the Bill: *AUSPUBLAW* (Website) <https://www.auspublaw.org>.

83 See Administrative Review Tribunal Bill 2023 (Cth) cl 156(2) ('ART Bill'). See also *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 7 (definition of 'national security information').

84 ART Bill (n 83) cl 136(2).

85 Ibid cls 158–9, 161.

the ART no discretion as to whether the evidence ought to be disclosed to the applicant. While part 6 largely replicated the AAT's Security Division procedures, it centralised a regime that previously operated diffusely across five separate Acts.[86] It is a clear case of fairness-infringing legislation, potentially denying applicants the opportunity to test and make submissions on government evidence.

Given my focus on promoting transparent reason-giving and robust public discourse about procedural fairness, a detailed case study of deficient justification is more appropriate than a purely theoretical approach, or broader quantitative analysis. Case study methodology has been favoured in parliamentary scholarship by discourse-oriented authors, in whose work Statements of Compatibility ('SoC') and other justificatory documents are themselves the object of analysis rather than an independent variable in a broader consideration of legislative treatment of rights.[87] To supplement publicly available information, I also filed freedom of information requests with the Attorney-General's Department regarding the drafting of part 6.[88]

Since a case study's explanatory power is necessarily limited, it is important to locate a 'critical case' – one that is likely to either clearly confirm or falsify a hypothesis.[89] Part 6 is a critical case for this Part's hypothesis (that current ministerial justification for infringing procedural fairness is unsatisfactory) because it is a highly charitable account of justificatory practice. The ART Bill was a centrepiece of the Albanese Government's accountability agenda, and the drafting process involved extensive public and expert consultation.[90] After introduction, the Bill was then considered by four different parliamentary committees.[91] If my hypothesis concerns an alleged deficiency in justification, then taking justification at its highest provides the best possible opportunity for that hypothesis to be disproved.

Moreover, part 6 provides the sort of hard case in which the temptation not to take procedural fairness seriously is greatest. Decisions to *respect* the right to procedural fairness, even if it is less administratively efficient to do so, are easy to justify for the reasons discussed above. It is when an exercise of government power *interferes*

86 Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 117.

87 See, eg, Simon Rice, 'Allowing for Dissent: Opening Up Human Rights Dialogue in the Australian Parliament' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, 2020) 99; Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Legislative Framework: How Deliberative Has Parliament Been?' (2016) 27(4) *Public Law Review* 271. Cf Daniel Reynolds and George Williams, 'Evaluating the Impact of Australia's Federal Human Rights Scrutiny Regime' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, 2020) 67.

88 Limited further information was made available: see below n 107.

89 Bent Flyvbjerg, 'Case Study' in Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (SAGE Publications, 4th ed, 2011) 301, 307.

90 'A New System of Federal Administrative Review', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>.

91 Two scrutiny committees (the PJCHR and SSCSB) and two inquiry-based committees (the House Standing Committee on Social Policy and Legal Affairs and the Senate Standing Committee on Legal and Constitutional Affairs).

with a protected interest like procedural fairness that justification is most important.[92] Hence, the significant limitations placed by part 6 on procedural fairness to protect national security are an excellent case study for how ministers justify hard decisions. When push comes to shove, is procedural fairness taken seriously?

I argue in the following section that the Attorney-General's justification of part 6 was anaemic, characterised by the three pathologies of insufficient justification outlined above. I attribute this to the pursuit of an imprecise and poorly-defined objective of finding 'balance' between procedural fairness and important national security interests.

B Executive Justification of Part 6: Seeking Balance

Two scrutiny committees engaged with the ART Bill: the PJCHR and the SSCSB. During the scrutiny process, the Attorney-General advanced substantive justification for part 6 on two occasions. The first was the Bill's SoC – a section in the Explanatory Memorandum stating whether the Bill is compatible with human rights.[93] The second was in response to the SSCSB's *Scrutiny Digest*, which raised concerns about the quality of justification provided for part 6 and requested that the Attorney-General provide 'a comprehensive justification for the rigid approach adopted for decisions made in the intelligence and security jurisdiction of the Tribunal'.[94]

In both the SoC and his correspondence with the SSCSB, the Attorney-General couched his justification of part 6 in terms of 'balance'. The metaphor of balancing rights against national security is commonly used and has been vigorously critiqued on both principled and pragmatic grounds.[95] More broadly, balance is a shibboleth for ministers making rights-infringing legislation, a catchphrase to indicate that the relevant right has been carefully considered and safeguarded to the extent possible while still achieving the government objective.[96]

This section's objective is to advance a novel critique of the balance metaphor in the context of ministerial justification of legislation. The problem is not balance

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92 David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 234, 254 <https://doi.org/10.1017/CBO9781107565272.015>.

93 SoCs are required under the *HR(PS) Act* (n 42) s 8.

94 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 2 of 2024, 7 February 2024) 11.

95 A dichotomy drawn by Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32(4) *Journal of Law and Society* 507, 510 <https://doi.org/10.1111/j.1467-6478.2005.00336.x>. In Australia, see Christopher Michaelsen, 'Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *University of New South Wales Law Journal* 1; Christopher Michaelsen, 'The Proportionality Principle, Counter-terrorism Laws and Human Rights: A German–Australian Comparison' (2010) 2(1) *City University of Hong Kong Law Review* 19. Other notable contributions include Ronald Dworkin, 'The Threat to Patriotism' (2002) 49(3) *New York Review of Books* 44; Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *Journal of Political Philosophy* 191 <https://doi.org/10.1111/1467-9760.00174> ('Security and Liberty').

96 See, eg, balancing protecting the public from infectious diseases against infected individuals' freedom of movement in Explanatory Memorandum, Public Health and Wellbeing Bill 2008 (Vic) 25–6. See also balancing the public interest in gathering evidence of offences against individuals' bodily autonomy in Explanatory Note, Police Powers (Internally Concealed Drugs) Bill 2001 (NSW) 1.

itself. Rather, the absence of a structured approach – a set of necessary and sufficient conditions for *achieving* balance – appears to make it far too easy to poorly justify legislation.

1 Statement of Compatibility

Only two paragraphs of the ART Bill's SoC attempted to justify part 6.[97] These paragraphs contend that the limitation of procedural fairness is required to safeguard the public interest in national security, and that they are ultimately 'carefully balanced' – a largely conclusory statement that obscures the Attorney-General's underlying reasoning. The sole justification advanced in support of part 6 was that proceedings in the Intelligence and Security jurisdictional area must be constituted with a Deputy President or the President of the ART.[98] The President and Deputy Presidents are all either current or former federal judges, or persons with substantial expertise relevant to the ART's jurisdiction.[99]

However, without for a moment impugning the Tribunal's expertise, its composition is an irrelevant reason. For one, the High Court is currently closely divided on whether it is appropriate for federal judges to have reference to secret evidence in court proceedings.[100] Further, given that many distinguished administrative lawyers are members of the AAT, proceedings constituted without the President or a Deputy President should not be expected to be less rigorous or considered. Finally, although by training and culture judges are reliable independent adjudicators, they also tend to be at their most deferential when questions of national security are involved.[101]

More generally, the foundation of the adversarial system is the principle that, *no matter the arbiter's perceptive powers*, the best decision will be made when parties have a chance to challenge one another's evidence – 'one story is good until another is told'.[102] The ART's constitution is therefore an irrelevant reason (much like the nightclub doorman's statement of appetite), and cannot serve as good justification for a secret evidence regime. The SoC ultimately does little to show that part 6 provides 'a carefully balanced framework for people to seek independent review of such decisions without compromising sensitive information'.[103]

2 Attorney-General's Correspondence with SSCSB

In his correspondence with the SSCSB, the Attorney-General first describes how the imperatives of national security must be 'balanced' against procedural fairness – once again invoking this catechism in place of substantive justification.

97 Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 10.
98 Ibid 19.
99 ART Bill (n 83) cls 205–7.
100 The High Court split 4:3 on this issue in *SDCV v Director-General of Security* (2022) 277 CLR 241.
101 See, eg, *Leghaei FCA* (n 34) [90] (Madgwick J); Waldron, 'Security and Liberty' (n 95) 191.
102 *Pontifical Society for Propagation of the Faith v Scales* (1962) 107 CLR 9, 20 (Dixon CJ).
103 Explanatory Memorandum, Administrative Review Tribunal Bill 2023 (Cth) 10.

The responses then given to the SSCSB's various questions about part 6 vary substantially in quality.[104]

A detailed justification is given for the blanket exclusion of an obligation to give reasons for intelligence and security decisions. The Attorney-General sensibly points out that the information relied on in such decisions is exclusively of a sensitive nature, and that in some cases giving reasons would require divulging security information to the very person who had been judged by the relevant agency to be a security risk.[105]

By contrast, when asked whether the Bill could be amended to include additional mechanisms to provide for procedural fairness, the Attorney-General responded that the Bill adopts similar procedures to the *Administrative Appeals Tribunal Act 1975* (Cth), and that stakeholders had not raised concerns about those provisions.[106] A lack of concerned submissions, however, is irrelevant to justifying the government having rolled its arm over in drafting part 6.[107] It says nothing about whether legislative provisions strike the 'appropriate balance' – only that no one has complained about them. Further, members of civil society may simply have lacked the time and resources to make submissions; or been wary of impugning the Security Division – the only tribunal-based accountability mechanism for organisations like the Australian Security Intelligence Organisation – for fear that it would be marginalised or shuttered.[108] If 'the most important reform of the federal system of administrative review for decades' is not the time to consider the wisdom of a law de novo, when is?[109]

Finally, there was one important decision for which the Attorney-General advanced *no* justification: the absence of a special advocate regime in the ART Bill. A special advocate, or special counsel, is a security-cleared lawyer who is granted access to classified or sensitive material that cannot be disclosed to the non-government party and their counsel.[110] The special advocate acts in the interests of the non-government party insofar as they test evidence placed before the court or tribunal, but they do not take instructions from that party, nor communicate with them regarding the secret material.[111] While a special advocate is certainly not a silver bullet against intelligence agency overreach, these regimes have been

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104 Letter from Mark Dreyfus to Dean Smith, 15 March 2024, 2–3 <https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2024/ministerial_responses_d5_24.pdf> ('Attorney-General's Response').

105 Ibid 6.

106 Ibid 7.

107 For example, despite part 6's serious implications for procedural fairness, very little guidance was sought by the Attorney-General from his Expert Advisory Group. Part 6 was discussed at only 1 of the Group's 11 meetings: Letter from Joanna Virtue to Henry Palmerlee, 2 May 2024, 2 (copy on file with author). This letter was produced following a freedom of information request.

108 I am grateful to Dominique Dalla-Pozza for this point.

109 Commonwealth, *Parliamentary Debates,* House of Representatives, 7 December 2023, 9198 (Mark Dreyfus, Attorney-General).

110 See John Ip, 'The Rise and Spread of the Special Advocate' [2008] (Winter) *Public Law* 717.

111 John D Jackson, 'In a World of Their Own: Security-Cleared Counsel, Best Practice, and Procedural Tradition' (2019) 46(S1) *Journal of Law and Society* S115, S117 <https://doi.org/10.1111/jols.12186>.

adopted as best practice in several countries grappling with the difficult balance between national security and procedural fairness.[112]

However, when pressed by the SSCSB on why it chose not to adopt this best practice model, the Attorney-General simply stated that 'the Government will not be considering a special advocate scheme in the Tribunal at this time'.[113] Given the success of special advocate schemes in other contexts, the absence of justification for this drafting choice is a notable refusal to engage with the justificatory requirements of the scrutiny process.

This section has endeavoured to demonstrate the lacklustre quality of justification advanced by the Attorney-General on behalf of part 6. Although some decisions – like the exclusion of an obligation to give reasons – were more robustly justified, this was the exception rather than the rule. For the most part, the arguments made in the SoC and subsequent correspondence were conclusory or irrelevant statements about the supposedly ideal 'balance' that part 6 achieves.

C Interim Conclusion

By pursuing an impressionistic target with no specific requirements, the Attorney-General advanced justification that at times lacks logic, structure, and intelligibility. With no clear criteria for establishing that a decision is 'balanced', it becomes all too easy to deploy poor-quality justification. This claim is best demonstrated by considering the counterfactual. In the next and final Part IV, I argue that justification would be improved by the SSCSB applying a clear set of rational conditions to fairness-infringing legislation.

IV STRUCTURED PROPORTIONALITY AND LEGISLATIVE SCRUTINY

Enter the 'export triumph of German jurisprudence': structured proportionality.[114] Proportionality has spread rapidly as a tool to balance competing rights and interests, predominantly in relation to judicial review of legislation. In this Part, I argue that Senate scrutiny committees should require fairness-infringing legislation to be justified using the structured proportionality framework. This would encourage ministers, who oversee the drafting and justification process, to provide the sort of justification that I identified above as a condition of taking procedural fairness seriously.

Although judges and scholars have drawn a strong link between justification and the *judicial* use of structured proportionality, scant attention has been given

112 John Jackson, *Special Advocates in the Adversarial System* (Routledge, 2019) chs 3–4 <https://doi.org/10.4324/9781315278773>. See further discussion by French CJ in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 66–70 [55]–[65].

113 Attorney-General's Response (n 104) 5.

114 Matthias Jestaedt, 'The Doctrine of Balancing: Its Strengths and Weaknesses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, 2012) 152, 153 <https://doi.org/10.1093/acprof:oso/9780199582068.003.0007>.

to the use of proportionality as a *legislative* tool.[115] Moreover, the only Australian source to have considered the idea that committees other than the PJCHR might consistently apply structured proportionality is the Australian Law Reform Commission in a 2015 report on traditional rights and freedoms.[116] Hence, despite being modest in practical terms, my proposal presents a novel means of enhancing parliamentary practice in respect of a foundational common law principle.

In practical terms, this might mean amending the *Standing Orders and Other Orders of the Senate* ('*Senate Standing Orders*') establishing the committee to define its role with reference to the proportionality criteria. The SSCSB could also issue guidance notes requiring proportionality-oriented justification of bills,[117] employ proportionality terminology in its correspondence with ministers, or request that existing proportionality resources prepared by the Attorney-General's Department be utilised.[118] Since the Committee lacks coercive power to demand justification, adopting all these tactics may well be necessary to maximise the chance of ministerial compliance.

A Structured Proportionality

At its core, structured proportionality is a 'set of rules determining the necessary and sufficient conditions' for a limitation on a protected right to be permissible.[119] Different formulations of structured proportionality have between three to five steps.[120] However, they all share the familiar requirements that a rights-limiting law must be:

1. appropriate: the means adopted are rationally connected to the desired objective;
2. necessary: those means are the least-infringing manner of achieving the objective; and
3. proportionate *stricto senso*: the beneficial effects of infringing the right outweigh the negative consequences.

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115 Notable exceptions include Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, 1996) 134–9; Brian F Fitzgerald, 'Proportionality and Australian Constitutionalism' (1993) 12(2) *University of Tasmania Law Review* 263; Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 343 <https://doi.org/10.1017/CBO9781107565272.020>.

116 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 44–50.

117 A practice already adopted by the PJCHR: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Expectations for Statements of Compatibility* (Guidance Note No 1, November 2021) 1.

118 'Tools for Assessing Compatibility with Human Rights', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/tools-assessing-compatibility-human-rights>.

119 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3 <https://doi.org/10.1017/CBO9781139035293> ('*Proportionality*').

120 In addition to the three core steps, some formulations include *identification of the right infringed* and the requirement for a *legitimate governmental objective*. The High Court includes these steps in its application of structured proportionality.

The 'balance' approach discussed above will often overlap with proportionality *stricto senso*. As such, I consider a 'structured' application of proportionality to require these three core steps at minimum. The 'reasonably appropriate and adapted' test in Australian constitutional law, for example, does not constitute structured proportionality.[121]

Importantly, despite the substantial debate it has generated in Australia, proportionality need not carry controversial theoretical baggage. While scholars like Robert Alexy view proportionality as an overarching legal doctrine connected closely to particular theories of rights, the High Court in *McCloy v New South Wales* explicitly endorsed the view of proportionality as an analytic tool, not a universal doctrine.[122] This distinction seems to have been a disavowal of the slavish application to every case of each step of the structured test. Since structured proportionality has been criticised for its rigidity, the majority may have wished to clarify that each element can be afforded varying attention in different factual matrices. Hence, proportionality ought not require any sweeping ontological assertions about rights. Divorced from judicial review and associated doctrine, structured proportionality can be relied on simply as a useful analytic tool.

B Proportionality and Justification

This section develops my central contention: that the SSCSB should use the analytic framework of structured proportionality to hold ministers accountable for justifying fairness-infringing laws. That argument has two constituent claims: first, that a framework developed and used in judicial review of constitutional rights could improve the tenor of ministerial justification; second, that proportionality would have a greater impact if applied by both pre-legislative scrutiny committees, rather than only the PJCHR.

1 Proportionality as a Justificatory Framework

Comparative constitutional scholars recognise a strong connection between structured proportionality and legislative justification, in that '[p]roportionality … is essentially a requirement of justification'.[123] This relationship is also appreciated in Australian judicial review, with the two concepts frequently intertwined in the

121 *Lange* (n 56) 562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

122 (2015) 257 CLR 178, 215 [72] (French CJ, Kiefel, Bell and Keane JJ). The 'express or ritual invocation' of 'all or any of the steps of structured proportionality' was also recently rejected by a majority of the High Court in *Babet v Commonwealth* [2025] HCA 21, [49] (Gageler CJ and Jagot J, Gordon J agreeing at [72], Beech-Jones J agreeing at [242]). Cf Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) ch 3.

123 Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463, 466 <https://doi.org/10.5131/AJCL.2010.0018>. See also Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) ch 6 <https://doi.org/10.1017/CBO9781139134996>; Matthias Klatt, 'Proportionality and Justification' in Ester Herlin-Karnell, Matthias Klatt and Héctor A Morales Zúñiga (eds), *Constitutionalism Justified: Rainer Forst in Discourse* (Oxford University Press, 2019) 159 <https://doi.org/10.1093/oso/9780190889050.003.0008>; Möller (n 59) 1079.

High Court's constitutional review of legislation.[124] I contend that translating court-focused ideas about justification and proportionality to the parliamentary realm would help to mitigate the three justificatory pathologies identified above.[125]

Firstly, by setting a clear set of requirements, structured proportionality brings into sharper relief a complete absence of reasons for a decision. This is a straightforward proposition – more detailed expectations of the reasons given in SoCs and ministerial correspondence will render more obvious the absence of material addressing those expectations. Take the Attorney-General's refusal to give reasons for not including a special advocate regime in part 6. While perhaps this refusal is already apparent to the conscientious reader, a one-line response in correspondence that otherwise advances structured, step-by-step proportionality analysis would be an extremely obvious failure of justification. To the extent that ministers wish publicly to respect parliamentary committees, requesting structured proportionality analysis would make it more difficult for ministers to slip their evasion under the radar.

Moreover, proportionality helps to prescribe which reasons are relevant in the sense described above.[126] It serves as a logical 'argumentation framework' within which the only cogent reasons are those which prove that a measure is suitable, necessary, and proportionate.[127] Other reasons are irrelevant, like the fact that part 6 provides for special composition of tribunals hearing sensitive matters. Since this justification does nothing to show that part 6 is the minimally impairing option, or that its benefits outweigh its costs, it would find no place in structured proportionality-style justification. Irrelevant reasons will either be excluded or, as with an absence of reasons, will stick out as obviously contorted or contrived.

Finally, and most importantly, proportionality eschews conclusory reasoning. It demands that the reasons for a decision be transparent and detailed. The virtue of proportionality in a justificatory context is that it contains no substantive moral imperatives, but nevertheless demands candour from ministers about the assumptions and judgments that ground their decisions.[128] This idea of transparency has been crucial to the High Court's endorsement of structured proportionality in constitutional review. Justice Susan Kiefel (as her Honour then was, writing extra-curially) identified conclusory reasoning as a vice of unstructured, all-in balancing reasoning that can be remedied through a more rigorous approach.[129]

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124 In recent cases, see *Clubb v Edwards* (2019) 267 CLR 171, 202 [74] (Kiefel CJ, Bell and Keane JJ); *Palmer v Western Australia* (2021) 272 CLR 505, 596 [262] (Edelman J) ('*Palmer*'); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 624 [271] (Gleeson J).

125 See above Part II(D).

126 See further Kumm, 'Socratic Contestation' (n 73) 160.

127 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 88–9. See further Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 3094, 3142.

128 David M Beatty, 'In Praise of Casuistry: Making Hard Cases Easier' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 273, 286 <https://doi.org/10.1017/9781316691724.013>.

129 Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85, 87.

Such a 'refusal to countenance … hidden grounds' of reasoning seems equally desirable in legislating as it is in judging.[130]

By demanding justification, a proportionality approach would better highlight a bill's core moral issues – for example, whether secret evidence regimes and mandatory ex parte proceedings have any place in a liberal democracy.[131] There is clear complementarity with the idea, discussed above, that justification is important because it respects reasonable pluralist disagreement about rights. A framework that requires value judgments about right and justice to be articulated drives the sort of good-faith debate that deliberative democrats identify as critically important in the justificatory context.[132]

There are echoes here with Adrienne Stone's foundational work on the implied freedom of political communication, in which she argued that applying a proportionality framework inevitably requires making value judgements.[133] Although Stone was critiquing the High Court's devotion to legalism in articulating the standard of review to be applied, our points are similar: proportionality reasoning is inherently value-laden. It brings to the surface the 'contestable and contingent' value judgments that underpin legislative decisions, rather than permitting ministers to 'conceal … [the] choices that in fact are made'.[134]

2 The Value of a Consistent Approach

My second claim is that there is value in a consistent application of structured proportionality by any committee conducting pre-legislative scrutiny of a fairness-infringing bill. Since the PJCHR already employs proportionality in its scrutiny (albeit not usually in a clearly structured manner), I must suggest reasons as to why this practice has been insufficient to promote substantive justification of bills that abrogate the right to procedural fairness. There are two broad answers: the PJCHR's relatively narrow remit regarding procedural fairness, and the unique attributes of each scrutiny committee.

Firstly, the PJCHR's orientation towards international human rights norms does not cover the full range of administrative decisions to which administrative law rules of procedural fairness apply. There are four provisions of the international human rights instruments within the PJCHR's remit that implicate procedural fairness:[135] fair trial and fair hearing rights;[136] minimum guarantees in criminal

130 *Palmer* (n 124) 598 [266] (Edelman J).

131 '[T]hat evidence of guilt must be secret is abhorrent to free men': *United States ex rel Knauff v Shaughnessy*, 338 US 537, 551 (Jackson J) (1950).

132 See above nn 66–8.

133 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23(3) *Melbourne University Law Review* 668, 702–4.

134 Cheryl Saunders and Adrienne Stone, 'The High Court of Australia' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 72 <https://doi.org/10.1017/9781316084281.004>.

135 *HR(PS) Act* (n 42) s 3(1).

136 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

proceedings;[137] certain procedural rights regarding the expulsion of aliens;[138] and the right to challenge the lawfulness of detention.[139]

The broadest of these fairness-related rights is article 14(1) of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), which relevantly provides for equality before courts and tribunals and fair hearings in 'suits at law'. However, a 'suit at law' has historically been interpreted to exclude many administrative decisions or actions.[140] Similarly, although article 9(4) of the *ICCPR* provides for a right to challenge the lawfulness of detention in a court, such a challenge is a much narrower concept than merits review of a preventative detention order through the ART.[141]

The upshot is that international human rights concerning procedural fairness are almost certainly narrower than administrative law norms, even if the precise difference is presently unclear.[142] Proportionality scrutiny by the PJCHR, therefore, is likely too narrowly framed to call ministers to account for *all* infringements of procedural fairness in the thicker administrative law sense discussed in Part II. This might help explain why the PJCHR's report on the ART Bill was merely advisory, but the SSCSB sought further justification from the Attorney-General. If structured proportionality is likely to produce better justification, it seems desirable that all pre-legislative scrutiny of fairness-infringing bills employs the methodology – not just that undertaken by the PJCHR.

This leads to my second point: that each committee is likely to contribute to the justificatory process in a different way. The outcome of my proposal is not that we now twin PJCHRs, but that we have two committees – each with different 'membership, functions, powers [and] priorities' – scrutinising a bill using the sophisticated analytical tool of proportionality.[143] As discussed above, the SSCSB is known generally to operate in a more bipartisan manner than the PJCHR, meaning its suggested amendments tend to garner broader support in Parliament.[144] Both committees would bring their own brand of influence and expertise to bear on encouraging ministers to take procedural fairness seriously through use of structured proportionality.

Further, since they lack coercive powers, committees are more likely to have an incremental, normative impact on departmental practice at the pre-introduction stage than they are to win a post-introduction showdown with the government. With this in mind, consistency conceivably makes ministers' jobs *easier*, not harder.

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137 Ibid arts 14(3), (5)–(7).

138 Ibid art 13.

139 Ibid art 9(4).

140 Ben Saul, 'Australian Administrative Law: The Human Rights Dimension' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 50, 59 <https://doi.org/10.1017/CBO9781139168618.006>.

141 ART Bill (n 83) cl 4; *Criminal Code Act 1995* (Cth) div 105.

142 Saul (n 140) 59.

143 Moulds, 'The Impact of Parliamentary Committees' (n 52) 16.

144 Adam Fletcher, 'Human Rights Scrutiny in the Federal Parliament: Smokescreen or Democratic Solution?' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thompson Reuters, 2020) 31, 59–63.

If expectations of the justification required for fairness-infringing legislation are consistent between committees, the requirements of the minister and their staff are clearer and more uniform across interaction with both committees.[145] As in life more generally, being provided with a clear set of expectations almost invariably makes it easier to perform a task correctly. A clear, consistent requirement of proportionality analysis from all committees would be one way to influence pre-introduction practice by ministers and departments.

These reasons help to answer the objection that it might be just as easy to ignore multiple committees as it is to ignore the PJCHR. This objection depends to an important degree on what my proposal is replacing.[146] By all accounts, it replaces a system in which committees are largely unsuccessful at causing procedural fairness – and rights more generally – to be taken seriously.[147] My argument is a modest expansion of the way proportionality is already used by Parliament, but seems likely to entice at least *some* greater degree of executive buy-in than has occurred to date.

At this point, it is appropriate to acknowledge the optimistic account of government implicit in my argument. A sceptic may well have some unanswered questions. Will devious politicians learn and mimic, like lyrebirds, the language of proportionality to couch their decisions in 'a justification that [merely] *sounds* intelligible'?[148] Surely ministers would endeavour to evade justifying their bills to avoid increasing their electoral risk exposure? This sceptic might subscribe to what Judith Shklar famously called the liberalism of fear: the apprehension that 'agents of government will behave lawlessly and brutally in small or big ways most of the time unless they are prevented from doing so'.[149]

I am sympathetic to this view, especially as it might from time to time reflect the illiberal tendencies of recent Australian governments.[150] Nevertheless, an article about legislation would not get very far on a view of legislators as essentially power-hungry and cynical.[151] I instead follow a more optimistic path, answering

145 See generally Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Jeffrey Goldsworthy, Tom Campbell and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Routledge, 2006) 61, 87–8 <https://doi.org/10.4324/9781351151245-4>.

146 Vicki C Jackson (n 127) 3153.

147 Lisa Burton Crawford, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth): A Failed Human Rights Experiment?' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 143, 161 <https://doi.org/10.5040/9781509919857.ch-008>.

148 Mordechai Kremnitzer, 'Is Proportionality an Effective Protector of Human Rights? *Proportionality and Constitutional Culture* by Moshe Cohen-Eliya, Iddo Porat: A Critique' (2014) 10(1) *Jerusalem Review of Legal Studies* 111, 121 (emphasis added) <https://doi.org/10.1093/jrls/jlu009>.

149 Judith N Shklar, 'The Liberalism of Fear' in Nancy L Rosenblum (ed), *Liberalism and the Moral Life* (Harvard University Press, 1989) 21, 28 <https://doi.org/10.4159/harvard.9780674864443.c2>.

150 George Williams, 'The Legal Assault on Australian Democracy' (2016) 16(2) *Queensland University of Technology Law Review* 19, 20 <https://doi.org/10.5204/qutlr.v16i2.651>; Fletcher, *Democratic Masterstroke or Mere Window Dressing?* (n 46) 35.

151 But see Michael T Hayes, *Lobbyists and Legislators: A Theory of Political Markets* (Rutgers University Press, 1981); Kremnitzer (n 148) 121.

Waldron's clarion call for faith in the dignity of legislation.[152] My account of ministers is not as 'rash and inexperienced work[people]',[153] but as conscientious, well-meaning individuals who genuinely wish to provide strong justification for law but sometimes come up short. Such behavioural change will inevitably take time and proceed unevenly, but the strong liberal tradition of executive self-accountability discussed above gives us reason to think that change is possible. Hence, while my perspective may be optimistic, it is not naïve.

My conclusion thus arrives in the same place as critics of balance who favour proportionality, but takes a very different route.[154] The exercise of balancing is not in itself a problem – after all, proportionality is essentially a formalised, structured approach to balancing competing interests. The issue is rather that a search for balance is illusory if there is no way to assess whether the destination has been reached. In place of balance, I have argued that application of structured proportionality by the SSCSB would promote better ministerial justification of legislation. The following section considers three objections to this argument.

C Objections to Structured Proportionality in the Legislative Context

There is no need to open Pandora's box by attempting to defend structured proportionality against any possible objection. I suspect that it is relatively uncontroversial to assume that there is a justifiable case for *courts* using proportionality to analyse legislation that infringes justiciable rights. I have already considered above the objection that my proposal is unlikely to result in meaningful improvement to the status quo. Here, I highlight three further objections to my claim that the SSCSB should encourage ministers to justify their decisions in proportionality terms: one practical objection regarding the risk of increasing committee partisanship, and two related to what some commentators view as the highly legalistic nature of structured proportionality reasoning,

1 Partisanship Objection

The first objection is that applying structured proportionality could undermine the 'technical scrutiny' methodology that underpins the SSCSB's non-partisan approach. If structured proportionality requires ministers to be explicit about the value judgments underpinning government policy, its application by scrutiny committees could spark open political disagreements. Such disagreements would pierce the veil of non-partisanship that has allowed the SSCSB to remain consistently influential.[155]

While it is impossible to predict committee members' future conduct, technical scrutiny is deeply entrenched in committees' culture, and has proven capable of adapting over time. Technical scrutiny is not a formal requirement – the words

152 Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) <https://doi.org/10.1017/CBO9780511621987>.

153 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press, 1765) vol 1, 10.

154 See above n 95.

155 On the importance of technical scrutiny, see Pearce (n 54) 88.

appear nowhere in the *Senate Standing Orders*. Rather, the approach has been developed and embraced by successive members over many decades.[156] Moreover, technical scrutiny is not a fragile relic that would be destroyed by any slight alteration. The *Senate Standing Orders* allow committees flexibility, in that they do not prescribe a specific method of scrutiny. Despite the Senate committees having used this flexibility to take an increasingly 'robust approach' to their work, the ethos of technical scrutiny has stood the test of time.[157] In recent years, it has been explicitly recognised that the technical approach is 'vitally important' to the SSCSB's ongoing influence in the legislative process.[158] Finally, in contrast to the PJCHR, the SSCSB does not consider the binary 'compliance/non-compliance with human rights' distinction that could encourage division along party lines. With technical scrutiny's provenance and durability in mind, 'extravagant use' of structured proportionality to agitate political issues, in a manner that undermines the SSCSB's influence and non-partisanship, seems unlikely.[159]

2 Epistemic Objection

Alternatively, we might be sceptical of proportionality on epistemic grounds. One formulation of this objection is that proportionality fosters a 'cult of rationality', a mistaken belief that 'weighing and balancing brings us (closer) to what is really going on'.[160] Legalistic methods of reasoning should not be relied on as panacean solutions to any moral or practical quandary, because they privilege the 'technicalia of legal argument' over important moral and political principles.[161]

However, structured proportionality is only vulnerable to this objection so long as it is tethered to the mores of legal argumentation. It is true, for example, that adherence to precedent – an accrual of datapoints that must be cited, analogised and distinguished – can exert an ossifying effect on proportionality analysis. However, this is a wholesale criticism of the common law method, not of proportionality. It seems epistemically uncontroversial for a committee to note that a legislative proposal is inconsistent with past approaches to an issue, so long as this forms only one part of its overall assessment of a case.[162] As Robert Oppenheimer described

156 Clerk of the Senate, Submission No 20 to Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the Future Direction and Role of the Scrutiny of Bills Committee* (6 April 2010) 2.

157 *Future Role and Direction* (n 46) 21.

158 Ibid 22. See further Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 99.

159 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ).

160 Mark Antaki, 'The Rationalism of Proportionality's Culture of Justification' in Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 284, 285, 292 (emphasis omitted).

161 Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007) 184 (emphasis omitted).

162 On preventing legislatures from being dominated by court-like reasoning, see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 63–5 <https://doi.org/10.1515/9781400822973>.

it, 'analogy is inevitable in human thought'.[163] Hence, freed from the contingencies of common law method, proportionality's general applicability seems significantly less contentious.

Waldron has advanced a different formulation of the epistemic objection, criticising overreliance on judicial modes of reasoning in relation to rights.[164] Judges, he argues, have no particular skill for deliberating about rights in the way that a Herculean account of the judicial enterprise would suggest.[165] In this way, Waldron problematises the idea that 'juridifying issues of principle improves the tenor of public debate'.[166]

However, this opposition to the exaltation of judges as moral reasoners stems in large part from the concept of constitutionally enshrined, justiciable rights – the idea that, to be meaningful, rights debates must centre around judges 'quibbling about how to interpret … some sacred text'.[167] The tension seems to fall away when we consider *legislatures* thinking about rights, even if they are applying modes of reasoning that originated in courts. I suspect Waldron's suspicion about overreliance on judicial reasoning regarding rights to be closely tied to his view of judicial review as fundamentally illegitimate, rather than a blanket belief that any technique of legal reasoning is epistemically flawed.[168]

The point of addressing Waldron's epistemic objection in this somewhat oblique way is not to score cheap points. Rather, I wish to show that thinking about proportionality in *legislative* contexts mitigates many of the criticisms levelled at proportionality in the *judicial* realm. In other words, by not claiming a universal explanatory value for proportionality, it is largely possible to avoid what is now a rather sterile theoretical debate. Although this does not dismiss the more formal epistemic objections to proportionality (for example, incommensurability)[169] all that is possible here is to advert to other scholars' well-argued positions supporting proportionality's rationality and logical integrity.[170]

3 Capability Objection

One final objection requires attention: that legalistic proportionality reasoning *cannot* be applied by those who are not legally trained. This objection proceeds on a Cokean view of the law as a hierophantic exercise in 'artificial reason' entirely

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163 Robert Oppenheimer, 'Analogy in Science' (1958) 2 *Centennial Review of Arts and Science* 351, 358.

164 Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2 <https://doi.org/10.1093/icon/mon035>. Cf J Raz, 'Disagreement in Politics' (1998) 43(1) *American Journal of Jurisprudence* 25, 46 <https://doi.org/10.1093/ajj/43.1.25>.

165 See Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1083 <https://doi.org/10.2307/1340249>.

166 Richard A Posner, 'Review of Jeremy Waldron, *Law and Disagreement*' (2000) 100(2) *Columbia Law Review* 582, 588 <https://doi.org/10.2307/1123477>.

167 Waldron, *Law and Disagreement* (n 68) 290.

168 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346, 1348 <https://doi.org/10.2307/20455656>.

169 See especially Francisco J Urbina, 'A Critique of Proportionality' (2012) 57(1) *American Journal of Jurisprudence* 49, 54–7 <https://doi.org/10.1093/ajj/57.1.49>.

170 See, eg, Barak, *Proportionality* (n 119) ch 18.

inaccessible to those unversed in its arcana.[171] As such, the faculties of legal reasoning required to apply the proportionality framework mean that it could not be meaningfully applied by ministers and committees to the project of legislative justification.

Specifically in the case of the ART Bill, the point is moot because the Bill originated in the Attorney-General's Department (in which many staff are highly legally trained). To confront the objection more generally, however, proportionality does not carry as much 'legalistic' baggage as might initially be suspected. As a frame for applied reasoning about rights, proportionality provides practical grounding for debates that (as the theoretical perspectives alluded to throughout this article demonstrate) could otherwise easily proceed at a completely inaccessible level of abstraction.[172] Proportionality, argues Mattias Kumm, is 'largely an exercise of general practical reasoning' rather than cabalistic legal doctrine.[173]

For example, the necessity requirement – that the least-rights-infringing means of achieving the relevant governmental objective be adopted – derives from the economic concept of Pareto optimality.[174] Similarly, Alexy uses the foundational microeconomic concept of diminishing marginal utility to help visualise trade-offs between different rights and government objectives.[175] While it should not be thought of as a general policy tool, proportionality nevertheless shares practical reasoning structures with methods of policy analysis. Its broad, factually-oriented questions eschew the 'interpretative puzzles'[176] that plague other areas of law in favour of empirical, factual analysis.[177]

An objector who remains unconvinced of proportionality's relative practicality must also confront empirical evidence that both legislatures and lay-people are eminently capable of understanding and applying proportionality reasoning.[178] Hence, even if proportionality is a legalistic frame of analysis, it seems inappropriately pessimistic to place such reasoning beyond the capacity of ministers and committees.

The concerns considered here are certainly not exhaustive. Perhaps imposing greater justificatory demands on government would undesirably clog the arteries of legislative efficiency. These objections are, however, left for another day. My goal in this section has been to demonstrate how a non-dogmatic view of proportionality

171 *Prohibitions del Roy* (1607) 12 Co Rep 64; 77 ER 1342, 1343 (Coke LCJ).

172 See Jestaedt (n 114) 158.

173 Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2(3) *International Journal of Constitutional Law* 574, 582 <https://doi.org/10.1093/icon/2.3.574>.

174 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 73–4 [109]–[110] (Gageler J).

175 Alexy (n 122) 102.

176 David M Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 170 <https://doi.org/10.1093/acprof:oso/9780199269808.001.0001>.

177 Jamal Greene, 'Foreword: Rights as Trumps?' (2018) 132(1) *Harvard Law Review* 28, 62–3.

178 On legislatures, see Sweet and Mathews (n 127) 118 ff; Aharon Barak, 'Human Rights in Israel' (2006) 39(2) *Israel Law Review* 12, 19 <https://doi.org/10.1017/S0021223700012991>. On lay-people see Henry Palmerlee, Ron Levy and Kate Ogg, 'Mini-Public Adjudication of Human Rights Disputes: An Empirical Evaluation' (2025) 53 *Federal Law Review* e4:1–26 <https://doi.org/10.1017/fed.2025.3>.

allows it to be seen for what it is: a valuable tool for justifying decisions, both in courts *and* legislatures.

V CONCLUSION

I have argued that procedural fairness ought to be taken seriously in the legislative process. For this to occur, the SSCSB should employ structured proportionality to hold ministers accountable for justifying fairness-infringing legislation. This will not only improve parliamentary scrutiny processes but also will have a positive impact on ministerial attention to justification in the pre-introduction stage.

In relation both to domestic work on procedural fairness and comparative literature on justification and proportionality, I contend that a much greater focus on legislation is required in the Australian context. If strong courts tasked with enforcing justificatory obligations emanated in part from Europe's deep post-bellum suspicion of populism, a legislative emphasis is consistent with the ascendancy of popular sovereignty in Australian constitutionalism.[179] Novel ways of thinking about immutable values like procedural fairness and reason-giving are required as the common law tradition finds its way in the world of contemporary administrative governance.

I have endeavoured to avoid the universalising claims that sometimes rally critics against proportionality. More broadly, no matter our aspirations for the legislative process, realpolitik must inevitably temper lofty idealism. Nevertheless, structured proportionality could be expected to result in significantly better justification of fairness-infringing legislation. If we are to be ruled by thoughtful law, law that take procedural fairness seriously, then proportionality should be given a part to play.

179 Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79(6) *New York University Law Review* 1971, 1974.