**Submission to the Attorney-General's Department responding to the Administrative Review Reform: Issues Paper**

**Kaldor Centre Data Lab, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Sydney**

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## 1. Introduction

We thank the Attorney-General's Department for the opportunity to provide submissions into the design of the new federal administrative review body. The purpose of this submission is to provide the Department and the Expert Advisory Group with a summary of the findings of statistical analysis by the Kaldor Centre Data Lab concerning the decision-making of the Administrative Appeals Tribunal (AAT) and the Immigration Assessment Authority (IAA) with respect to Protection Visa applications, and to draw on that data to provide insights and recommendations in regard to the design of the new administrative review body. We believe that it is crucial for the Department and Expert Advisory Group to be equipped with the most robust evidence and data in carrying out the difficult and complex task of designing a federal body that is user-focused, efficient, accessible, independent and fair.

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

The Kaldor Centre Data Lab was established in 2022. The Lab publishes regularly updated data and statistical analysis of Australia's refugee status determination decisions. The data currently covers review by the AAT and IAA, as well as judicial review by the Federal Circuit and Family Court.

The data drawn on for the purposes of this submission covers:

- 26,036 Protection Visa decisions made by the AAT from 1 January 2015 to 18 May 2022; and
- 10,000 Protection Visa decisions made by the IAA from 1 May 2015 to 17 May 2022.

This data covers the entire caseload of the AAT and IAA with respect to Protection Visa decisions during the respective periods and was obtained through freedom of information requests to the AAT.

We have also separately collated data on the judicial review of migration and refugee decisions made by the AAT (and its predecessor tribunals), as well as the IAA, from 1982 to 2022. This data was drawn from the published annual reports of the respective bodies.

It is important to note the limited data points which we were able to access through the freedom of information process and annual reports. Access to more detailed data would open opportunities for more robust analysis in relation to many of the questions set out in the Administrative Review Reform Issues Paper ('Issues Paper'). Making further data available would improve the evidence base about how the AAT and IAA have been operating, and areas that need to be addressed when determining the structure and operation of the new body.

## 2. Design: The Utility of Embedding Data Collection and Analysis Practices

*Question 1: What are the most important principles that should guide the approach to a new federal administrative review body?*

The present review provides a once-in-a-generation opportunity to redesign Australia's federal administrative review system. It is crucial that reforms are informed by the best available evidence on how the AAT and IAA are currently operating. Going forward, the new administrative review body should embed robust data collection and transparency policies into its design from the outset. This will enable ongoing evaluation of the operation of the new body and its performance and provide a foundation for future evidence-based reforms.

### *2.1 Data and evidence-based approach to administrative institutional design*

**Recommendation: The Attorney-General's Department and the Expert Advisory Group should access and draw on the existing data collected by the AAT and the IAA in relation to its decision-making and operation when designing the new administrative review body's operations, structure and composition.**

The AAT and IAA likely collect data that could provide valuable insights into many of the 67 questions identified in the Issues Paper. In this submission, we focus on questions and areas where we can draw on the limited data we have been able to obtain from the AAT through freedom of information requests and published annual reports. In the spirit of designing a transparent and independent administrative review body, the Attorney-General's Department should seek access to, and make public, more detailed granular data, capturing the characteristics of cases, applicants and decision-makers to ensure that the design of the new administrative review body is based on the best available evidence. This would provide broader insights than the data presented in our submission, which largely focuses on Protection Visa applications (except for Part 3 which also includes data on the judicial review of all migration decisions) and would also help to overcome other limitations in our data set. For example, we do not have access to any data on the time taken to finalise individual applications. Having access to such data is essential

for being able to make any evidence-based recommendations relating to improving the efficiency of decision-making.

### *2.2 Embedding a uniform data collection and publication practice to foster greater transparency of the new administrative body and enable ongoing evaluation of its performance*

**Recommendation: The new administrative review body should establish a uniform practice to collect and publish data and statistics on its decision-making across each of its respective divisions.**

The Kaldor Centre Data Lab fully endorses the reform objectives of designing a merits review body that is transparent, modern, fit for purpose and flexible. As a critical step towards achieving these objectives, the new body should collect data on its own decision-making across all divisions and make this data publicly available. Data collection and use internally by the new body will enable it to anticipate and address increases in workload and identify areas in need of additional resources. Data and statistics are also an important tool that can assist the body in evaluating the quality and efficiency of their own decision-making and identifying potential areas in need of improvement or reform.

In the judicial context, the Australian Law Reform Commission (ALRC) recently recognised and endorsed the utility of using statistical data to improve the function of the courts. The ALRC's Report on Judicial Impartiality recommended that:

> [t]he Commonwealth courts (individually or jointly) should develop a policy on the creation, development, and use of statistical analysis of judicial decision-making.[1]

Both administrative and judicial decision-making are changing rapidly with the development of new technologies that make access and analysis of such data easier. The new administrative review body should leverage the insights that data and statistics on decision-making can provide to monitor the functioning and performance of the body as a whole.

### *2.3 Administrative Review Council (ARC) role with data*

*Question 3: Should the ARC or a similar body be established in the new legislation? What should be its functions and membership?*

**Recommendation: The ARC or a similar body should be re-established, and its responsibilities should include reviewing, analysing and publishing data on the decision-making and operation of the new administrative review body.**

The Kaldor Centre Data Lab endorses Professor Mary Crock's submission on this point:

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[1] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021), Recommendation 13.

> If the new tribunal is to be truly independent, transparent and accountable, the creation of an ARC could play a critical role in collecting and analysing data on the operation of the tribunal.[2]

In addition, we recommend that this data also be made publicly available. Publication of data is also crucial to ensuring the new administrative review body achieves its objectives of transparency. In the words of former Chief Justice Gleeson of the High Court, 'all institutions of government exist to serve the community'.[3] By publishing this data, the community will be better informed about how the new administrative review body is operating, which, in turn, can strengthen public confidence in the body.

**2.4 *Using data to improve agency decision-making***

*Question 4: How should the legislation creating the new body encourage or require government agencies to improve administrative decision-making in response to issues identified in the decisions of the new federal administrative review body?*

**Recommendation: Detailed data on the outcomes of decision-making, and the types of decisions being overturned by the new administrative review body, should be shared with relevant agencies. This data should be as granular as possible, broken down by individual decision-makers.**

The new administrative review body should collect detailed data on the outcomes of decision-making and conduct analysis on the types of decisions being overturned. This analysis and data should be shared with agency departments and decision-makers. Particular types of cases from a specific agency or individual decision-maker that have high overturn rates should be identified and flagged to enable strategies to be implemented to address any identified issues.

In this regard, we endorse the recommendation set out in the submission by Refugee Advice and Casework Services to this review, supporting the inclusion of:

> a legislated mechanism requiring the review body to review decisions from primary decision-makers, identify systemic issues in decision making and provide feedback to them. AAT decisions are currently subject to judicial review and decisions by the FCFCOA and appellate courts provide a source of feedback on decision-making by the AAT. No such feedback loop exists for the Department in relation to its primary decision making processes in relation to visa applications or cancellations. As AAT decisions do not engage directly with the process of decision-making at the primary level, a mandated review to identify recurring and systemic issues with decision-making and provide feedback on these to address with training.[4]

***2.5 Using data to improve the consistency of tribunal decision-making***

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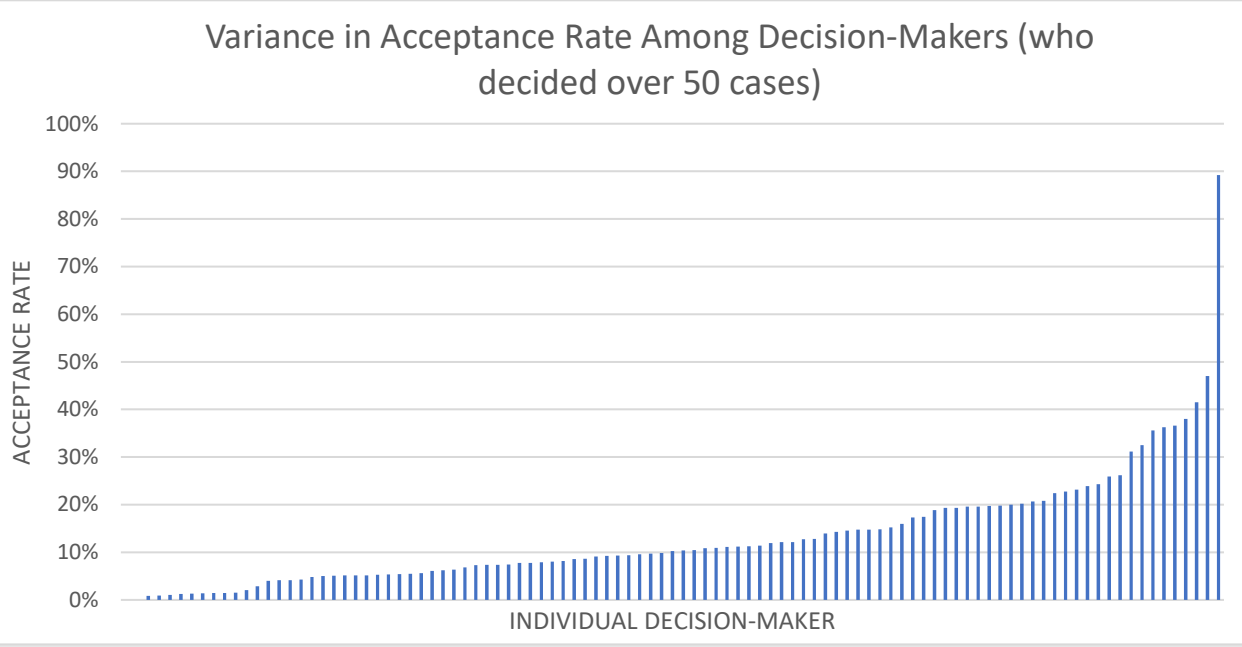
[2] Professor Mary Crock, Submission to the Attorney-General's Department, Administrative Review Reform, p. 4.
[3] Justice Murray Gleeson, 'Public Confidence in the Courts' (Speech, National Judicial College of Australia, 9 February 2007) p. 2.
[4] Refugee Advice and Casework Services, Submission to the Attorney-General's Department, Administrative Review Reform, [3.2].

**Recommendation: The new administrative review body should develop a policy on the collection and use of statistical analysis of tribunal decision-making for the purpose of identifying and addressing the potential influence of cognitive and social biases in decision-making.**

The data collected by the Kaldor Centre Data Lab demonstrates that there are high levels of variation when it comes to the decision-making outcomes of individual members of the AAT in relation to Protection Visa applications.

Our data set covers 26,036 Protection Visa decisions made by the AAT between 1 January 2015 and 18 May 2022. Of the entire case load, 12% of asylum seekers were granted a Protection Visa. However, an applicant's chance of success varied from 0% to 89%, depending upon on which tribunal member they appeared before (these results only include data from tribunal members who decided over 50 cases). 18 decision-makers found in favour of the applicant in less than 5% of their cases, and two of these decision-makers rejected every application they heard.

**Figure 1. Variation in Acceptance Rate Among Individual Members**



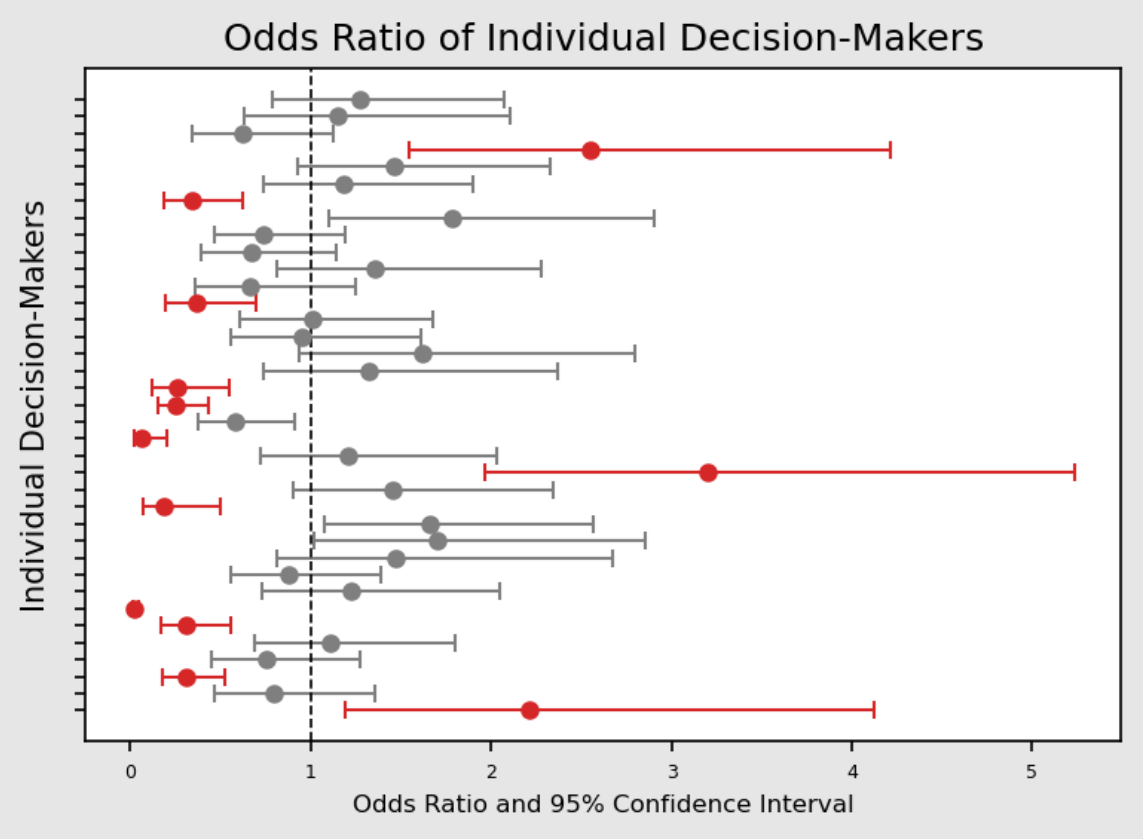

These variations in outcomes may be explained to some degree by the way in which cases are allocated at the AAT. Cases are not allocated randomly, and as such, certain members may be assigned cases with characteristics that have higher or lower chances of success, such as cases from particular countries of origin, or particular claim types within those countries.

We understand that various factors are taken into account when allocating cases, including the member's expertise with respect to specific countries of origin, expertise with respect to specific claim types (i.e. tribunal members may have particular expertise or training in hearing refugee claims on the grounds of religion, gender, political affiliations etc), and the member's level of experience.

Our analysis shows, however, that even when such variables are controlled for, there are still significant discrepancies in terms of how individual members are deciding cases. We conducted logistic regression analysis controlling for the variables of the country of origin of the applicant, the level of experience of the tribunal member (calculated on the number of years since they were first appointed),[5] the political party that appointed the tribunal member, and whether the applicant was legally represented. The results of the logistic regression analysis reveal that the member allocated to a case has a statistically significant effect on the outcome of a case ($\chi^2(38)=722.6$, $p<.05$) after controlling for those variables.

Further, of the 38 tribunal members who decided cases in over 1% of the dataset (being over 260 cases), 32% (being 12 tribunal members) were inconsistent with the mean tribunal member ($p<.05$). Controlling for the country of origin of the applicant, whether they had legal representation, the level of experience of the member, and the political party appointing the member, an applicant's chance of success could range from 3.2 times more than that of applicants who had their case decided by the mean tribunal member, to 98% lower than the mean, depending on the tribunal member deciding their case. This variation in an applicant's odds of success is shown in the graph below.

**Figure 2. Odds Ratio of Individual Members**




[5] Note that this data covers the date of first appointment to previous tribunals such as the RRT and MRT but does not include information of prior experience in any other tribunals.

This plot shows the variation in an applicant's odds of success, depending on the tribunal member deciding their case (for members who decided cases in over 1% of the data set). The markers represent the odds ratio of each member in comparison to the mean decision-maker (represented by the vertical line at 1). The error bars indicate the 95% confidence intervals for each tribunal member. Those members who have a statistically significant inconsistency with the mean tribunal member are shown in red. For example, the right-most marker at 3.2 represents a member who, when controlling for the country of origin of the applicant, whether they had legal representation, the level of experience of the member, and the political party appointing the member, gives an applicant 3.2 times higher odds of success, compared to the mean decision-maker. In comparison, the left-most marker at 0.02 represents a decision-maker who gives an applicant 98% less chance of success, compared to the mean decision-maker.

Some of this discrepancy in decision-making may be the result of the influence of the social and cognitive biases of members. To be clear, we cannot draw any causal inferences from our data that the variations we identify are caused by social and cognitive biases, given that they may be influenced by other variables for which we have not controlled. However, it is now well accepted that all human decision-making, including decision-making by judges and tribunal members, is influenced by such biases.[6]

Several decades of research has resulted in much progress being made in understanding how humans process information and make judgments and decisions. Drawing on this research, Nobel Prize-winning psychologist Professor Daniel Kahneman identifies two systems in the mind:

- System 1 operates automatically and quickly, with little or no effort or sense of voluntary control;
- System 2 allocates attention to effortful mental activities that demand it. The operations of System 2 are often associated with the subjective experience of agency, choice and concentration.[7]

An overreliance on System 1 thinking can lead to unwanted influences in tribunal and judicial decision-making. The ALRC Report drew on empirical research demonstrating that judges may be susceptible to a number of intuitions that may lead to bias when engaging in the more intuitive System 1 thinking.[8] This includes mental shortcuts and heuristics – common 'rules of thumb' for solving problems and processing information. These shortcuts are essential in guiding human behaviour and decision-making, helping to reduce cognitive overload in our information-rich lives. However, System 1 can also be influenced by unconscious biases. For example, System 1 thinking can open the door for stereotyping that can lead to inequitable outcomes for different groups within society. Similar intuitions and resulting concerns very likely equally apply in the context of the decision-making process of tribunal members.

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[6] Australian Law Reform Commission, 'Consultation Paper: Judicial Impartiality' (2021).
[7] Daniel Kahneman, Thinking, Fast and Slow (Farrar, Straus and Giroux, 2011) p. 20–1. This work has been referred to by senior Australian judges. See, eg, Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) Sydney Law Review 189, p. 197.
[8] Australian Law Reform Commission (n 1) p. 112.

Making members aware of the existence of such biases is an important starting point and is likely to make them better equipped to counteract them. But this will likely not be enough.

As the ALRC Report recognises, cognitive and social biases are notoriously difficult to counteract. Indeed, research suggests that interventions that involve informing people of the existence of unconscious biases before asking them to complete a task are largely ineffective.[9] The same goes for related interventions, including implicit bias training.[10]

However, one intervention which has been shown to be effective in counteracting cognitive and social biases is the use of statistics on the outcome of decision-making as a feedback tool. This is a process known as 'post decision auditing'. This has been shown to be effective in the context of judicial decision-making.[11] Given the similar decision-making processes are undertaken by members of the tribunal, it is very likely that those findings in relation to the effectiveness of such an intervention would extend to administrative decision-makers.

It is very difficult to spot the influence of implicit cognitive and social biases in a single case. However, if similar tribunal decisions are logged across time and multiple decision-makers, then data can reveal patterns in decision-making outcomes. Providing these statistics and feedback to members will give them information that they can use to reflect on their decision-making, exposing automatic System 1 thinking to the scrutiny of analytic and deliberative System 2 thinking. Scrutinising statistics may also provide insights at an institutional level and highlight potential institutional biases.

The ALRC Report recognised the utility of using data as a feedback tool for judges, and this was the justification for the recommendation, referred to above, that courts should proactively engage in developing policies related to the creation, development and use of statistical analysis of judicial decision-making.[12]

We recommend that the new administrative body adopts a similar approach to collecting data on the outcomes of individual decision-making and using this a feedback tool for members.

There is strong evidence as to the effectiveness of internal use of data as a feedback tool, particularly when coupled with some form of peer review or mentoring process.[13]

The President of the ALRC, Justice SC Derrington, provided some examples of how data could potentially be used in this way in the judicial context*:*

> The data could potentially be useful in relation to bias and unconscious bias… A head of jurisdiction might be alerted to a statistic that shows that a particular judge has never found in favour of a refugee, for example…

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[9] Ibid p. 131.
[10] Ibid.
[11] Ibid. See also Associate Professor Daniel Ghezelbash, Dr Robert Ross and The Behavioural Insights Team, Submission No 29 the Australian Law Reform Commission, Review of Judicial Impartiality.
[12] Australian Law Reform Commission (n 1) p. 488.
[13] Jeffrey J Rachlinkski et al, 'Does Unconscious Racial Bias Affect Trial Judges' (2009) 84(3) Notre Dame Law Review p. 1195, 1230; John Irwin and Daniel Real, 'Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity' (2010) 42(1) McGeorge Law Review 1, p. 9.

> But that might only be enough to raise a question and then to look at the nature of cases being allocated to that particular judge, to look at if there have been appeals of decisions of that particular judge, and if so whether those appeals have been successful.
>
> So it might just be enough to ask a question and to ask a question of the judge themselves – have you reflected deeply enough on your own biases before you have made your decision on these cases.[14]

In the specific context of the new administrative review body, this would involve providing members the opportunity to account for their decision-making to the heads or executive team of their respective divisions.

However, there is evidence which suggests that publishing the data publicly would be more impactful. There is a robust body of social science research demonstrating that making data public can be even more effective intervention to counteract social and cognitive biases than internal use of data as a feedback tool alone.[15]

In our view, having the new administrative body, or the ARC or a similar body, publish this form of statistical analysis would not only enhance the effectiveness of such data in counteracting cognitive and social biases in decision-making, but would foster greater transparency and hence promote community trust in the new administrative body.

## 3. Structure

*Question 7: How can the legislation best provide for or support the application of different procedures for specific categories of matters?*

**Recommendation: The separate code of procedure for decisions made by the Migration and Refugee Division (MRD) in the *Migration Act 1958* (Cth) should be abolished, and the procedures for review at the MRD should be harmonised with the review of (migration and non-migration) decisions in the other divisions of the new administrative review body.**

We endorse the position in Professor Mary Crock's submission to this review that the separate practices and procedures for the MRD, set out in Parts 5, 7 and 7AA of the *Migration Act 1958* (Cth), have not served either the AAT or migrant applications. As Professor Crock notes:

> These create inefficiencies and unjust outcomes. They also create on-going problems for the system of administrative law more generally in the form of burgeoning rate of judicial review applications and/or applications for ministerial intervention.[16]

Over the years, Parliament has passed numerous pieces of legislation that have attempted to codify decision-making procedures for decisions (and exclude the common law natural justice hearing rule) under the *Migration Act 1958* (Cth), as well as other measures aimed at limiting access to judicial review of migration decisions. This process

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[14] 'Life, Death and the Law', *ABC's Law Report,* 9 August 2022, <https://www.abc.net.au/radionational/programs/lawreport/law-archie-battersbee/101317000>
[15] Behavioural Insights Team and Macquarie University, Submission No 29 to the Australian Law Reform Commission Review, Review into Judicial Impartiality (30 June 2021).
[16] Professor Mary Crock (n 2) p. 6.

began with the *Migration Reform Act 1992* (Cth) (which became operative from 1 September 1994), and included numerous subsequent reforms, including the *Migration Legislation Amendment Act (No 1) 1998* (Cth), the introduction of the privative clause by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), the exhaustive statement of natural justice requirements in the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth), the concept of a purported privative clause decision in the *Migration Litigation Reform Act 2005* (Cth), and the *Migration Amendment (Review Provisions) Act 2007* (Cth).

The stated goal of the procedural code and other associated amendments was to make the process clearer, and to reduce the number of applications for judicial review of migration decisions. However, the code of procedure and associated reforms do not appear to have achieved either of these goals in practice.

In a joint submission to the 2012 Administrative Review Council review into federal judicial review in Australia, the Migration Review Tribunal ('MRT') and Refugee Review Tribunal ('RRT') argued that the code had been the subject of significant litigation yet had not improved the quality of decision-making, and that:

> the experience in the migration jurisdiction has been that codification aimed at supplanting the natural justice hearing rule has distinct limitations. Although the codification of procedure may have the advantage of setting out a framework for the parties, experience shows that it leads to unexpected interpretation, uncertainty and extensive litigation... Statutory codes of procedure, whilst providing a framework for the parties, cannot replicate the adaptiveness of common law procedural fairness.[17]

There is also no evidence that the procedural code has been effective in its goal of reducing the number of judicial review applications for migration and refugee cases. The table and graphs below set out data we have compiled on judicial review of migration and refugee decisions from 1988 to 2022. The data shows that the number of applications for judicial review of migration and refugee decisions has steadily increased over time, and there are no correlations between the introduction the procedural code or subsequent amendments and the number of judicial review applications.

**Table 1. Judicial Review of Migration and Refugee Decisions in the Federal Courts[18]**

| Year | **Number of applications made to Federal Court** from migration and refugee decisions | **Percentage of applications decided that were successful** |
|---|---|---|
| **1982-3** | 30 | 23% (n=7) |
| **1983-4** | 31 | 23% (n=7) |
| **1984-5** | 45 | 7% (n=3) |
| **1985-6** | 80 | 11% (n=9) |
| **1986-7** | 106 | 7% (n=7) |
| **1987-8** | 94 (Calendar year 1987) | No data available |

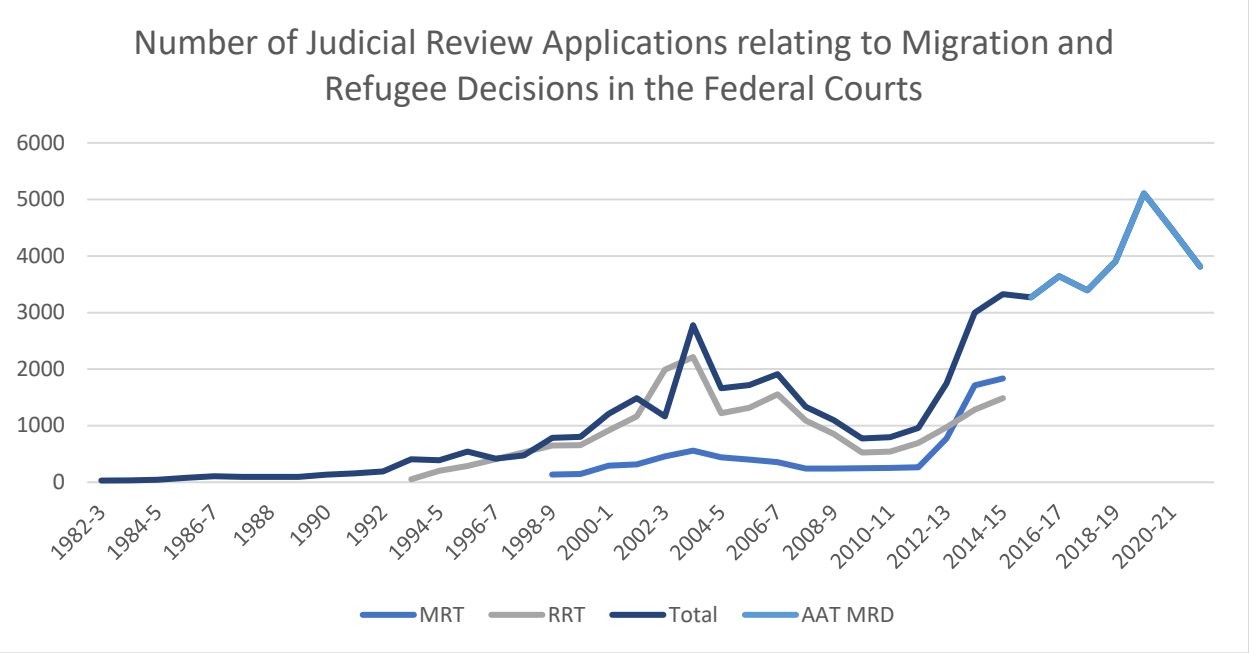
[17] Migration Review Tribunal (MRT)—Refugee Review Tribunal (RRT), Submission to the Administrative Review Council, *Consultation Paper on Judicial Review in Australia*, 5 July 2011, p. 3; ARC, *Federal judicial review in Australia*, September 2012, p. 120.

[18] For data from 1982-96, see Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18(3*) Sydney Law Review* 267, pp. 288-290. Data for 1996-2021 is taken from the Migration Review Tribunal, Refugee Review Tribunal and Administrative Review Tribunal Annual Reports.

| | | |
|---|---|---|
| **1988-9** | 97 (Calendar year 1988) | 42% |
| **1989-90** | 95 (Calendar year 1989) | 46% |
| **1990-1** | 137 (Calendar year 1990) | 42% |
| **1991-2** | 160 (Calendar year 1991) | 37% |
| **1992-3** | 192 (Calendar year 1992) | No data available |
| **1993-4** | RRT: 52 (4% appeal rate ('AR'))<br>Total: 404 | 12% (n=36/292) |
| **1994-5** | RRT: 202 (8% AR)<br>Total: 387 | 41% (n=142/349) |
| **1995-6** | RRT: 286 (12% AR)<br>Total: 543 | 37% (n=152/415) |
| **1996-7** | RRT: N/A (9.9% AR)<br>Total: 419 | 11% (n= 43/389) |
| **1997-8** | RRT: N/A (7.3% AR)<br>Total: 476 | 16% (n=84/518) |
| **1998-9** | MRT: 136 (5.5% AR)<br>RRT: 651 (9.98% AR)<br>Total: 787 | MRT: 39% (n=54/138)<br>RRT: 26% (n=172/663)<br>Total: 28% |
| **1999-2000** | MRT: 145 (4.8% AR)<br>RRT: 657 (10.40% AR)<br>Total: 802 | MRT: 25% (n=18/73)<br>RRT: 16% (n=94/579)<br>Total: 17% |
| **2000-1** | MRT: 294<br>RRT: 916 (16.39% AR)<br>Total: 1,210 | MRT: 31% (n=74/240)<br>RRT: 18% (n=147/833)<br>Total: 21% |
| **2001-2** | MRT: 318 (4% AR)<br>RRT: 1167 (21.3% AR)<br>Total: 1485 | MRT: 21% (n=64/299)<br>RRT: 15% (n=130/874)<br>Total: 17% |
| **2002-3** | MRT: 455 (4% AR)<br>RRT: 1989 (30% AR)<br>Total: 2444 | MRT: 10% (n=29/279)<br>RRT: 6% (n=66/1031)<br>Total: 7% |
| **2003-4** | MRT: 561 (6% AR)<br>RRT: 2,213 (38% AR)<br>Total: 2774 | MRT: 15% (n=61/414)<br>RRT: 8% (n=166/2059)<br>Total: 9% |
| **2004-5** | MRT: 440 (5.0% AR)<br>RRT: 1223 (40% AR)<br>Total: 1663 | MRT: 17% (n=93/541)<br>RRT: 11% (n=245/2144)<br>Total: 13% |
| **2005-6** | MRT: 401<br>RRT: 1315 (40% AR)<br>Total: 1716 | MRT: 23% (n=104/450)<br>RRT: 28% (n=363/1304)<br>Total: 27% |
| **2006-7** | MRT: 353<br>RRT: 1556 (51% AR)<br>Total: 1909 | MRT: 33% (n=114/343)<br>RRT: 16% (n=246/1542)<br>Total: 19% |
| **2007-8** | MRT: 244<br>RRT: 1090<br>Total: 1334 | MRT: 38% (n=91/241)<br>RRT: 16% (n=169/1090)<br>Total: 20% (n=260/1331) |
| **2008-9** | MRT: 244<br>RRT: 855 (35% AR)<br>Total: 1090 | MRT: 31% (n=76/242)<br>RRT: 14% (n=119/851)<br>Total: 18% |
| **2009-10** | MRT: 248<br>RRT: 527 (24% AR)<br>Total: 775 | MRT: 32% (n=79/245)<br>RRT: 8% (n=44/520)<br>Total: 16% |

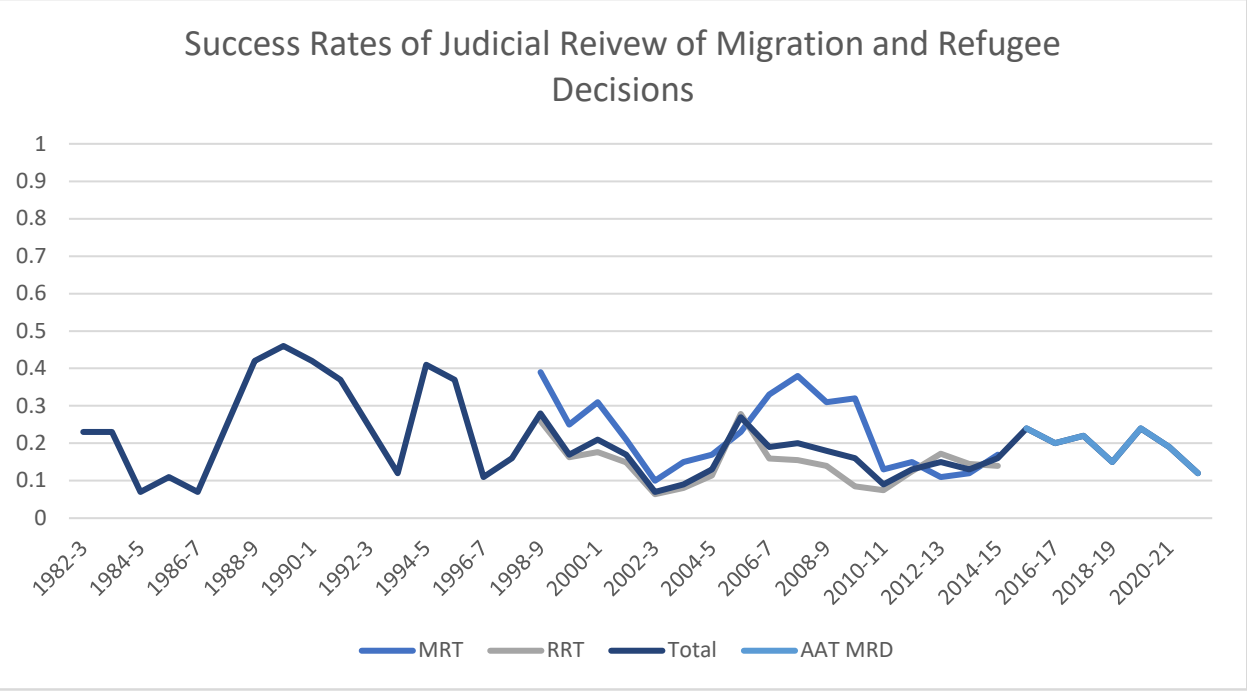
| | | |
|---|---|---|
| **2010-11** | MRT: 255<br>RRT: 541 (21% AR)<br>Total: 796 | MRT: 13% (n=33/252)<br>RRT: 7% (n=40/537)<br>Total: 9% |
| **2011-12** | MRT: 263<br>RRT: 695 (25% AR)<br>Total: 958 | MRT: 15% (n=40/259)<br>RRT: 13% (n=86/687)<br>Total: 13% (n=126/946) |
| **2012-13** | MRT: 776<br>RRT: 971<br>Total: 1747 | MRT: 11% (n=87/760)<br>RRT: 17% (n=153/889)<br>Total: 15% |
| **2013-14** | MRT: 1715<br>RRT: 1283<br>Total: 2998 | MRT: 12% (n=174/1414)<br>RRT: 15% (n=120/827)<br>Total: 13% |
| **2014-15** | MRT: 1835<br>RRT: 1489<br>Total: 3324 | MRT: 17% (n=88/507)<br>RRT: 14% (n=37/265)<br>Total: 16% |
| **2015-16** | AAT MRD: 3269 (23% AR) | AAT MRD: 24% (n=710/2958) |
| **2016-17** | AAT MRD: 3644 (22% AR) | AAT MRD: 20% (n=523/ 2617) |
| **2017-18** | AAT MRD: 3393 (23% AR) | AAT MRD: 22% (n=602/ 2735) |
| **2018-19** | AAT MRD: 3900 (23% AR) | AAT MRD: 15% (n=398/ 2650) |
| **2019-20** | AAT MRD: 5106 (24% AR) | AAT MRD: 24% (n=398/2857) |
| **2020-21** | AAT MRD: 4467 (23% AR)<br>Including, refugee cases: 1455 (29%) | AAT MRD: 19% (n=390/2052)<br>Including, refugee cases: 23% (n=133/590) |
| **2021-22** | AAT MRD: 3812 (22% AR)<br>Including, refugee cases: 2043 (41%) | AAT MRD: 12% (n=251/2067)<br>Including, refugee cases: 13% (n=82/654) |

**Figure 3. Number of Judicial Review Applications Relating to Migration and Refugee Decisions in the Federal Courts**



Similarly, the procedural code and other associated amendments have not correlated with a reduction of the success rate of judicial review applications. While the percentage of migration and refugee cases which were successful before the Federal Courts has oscillated over time, there are no clear correlations between the introduction of the procedural code and subsequent amendments, and the rates of success at judicial review.

**Figure 4. Success Rates of Judicial Review of Migration and Refugee Decisions**




Not only is there no evidence that the code of procedure has reduced legal uncertainties or reduced the number of judicial review applications, but the rigidity of the procedures may be actively contributing to inefficiencies. These limitations resulting from the rigidity of the procedures are set out in detail in Professor Crock's submission to this review, and we endorse Professor Crock's conclusion that the code of procedure reduces

> the tribunal's ability to respond with efficiency and humanity to different situations…. these shortcomings encourage the conclusion that as far as possible the new review tribunal should be established with processes that apply uniformly but flexibly across cases according to the nature and complexity of each matter. In other words, fairness and efficiency would be enhanced by abandoning the blanket 'carve out' for migration appeals.[19]

**Recommendation: The Immigration Assessment Authority should be abolished**

The IAA provides another example of the ineffectiveness of attempts to create efficiencies by creating separate procedures for decision-making with respect to certain cohorts of applications. Introduced in 2015, the IAA conducts reviews of Protection Visa decision for fast-track applicants – people who arrived in Australia by boat without a visa

[19] Professor Mary Crock (n 2) 6.

between 13 August 2012 and 1 January 2014, and who were permitted by the Minister to make an application for a Protection Visa.

Applicants in the IAA process are subject to more restrictive statutory procedures set out in the *Migration Act 1958* (Cth). Decisions are generally made on the papers without a hearing, and there are barriers to providing new evidence.[20] While this may have reduced the average time taken for the IAA to finalise a decision, the very high rates at which cases are successful at judicial review in the Federal Courts has led to significant delays. From 2015 to 2022, 37% of judicial review applications relating to IAA decisions were successful, generally resulting in the cases being remitted back to the IAA for reconsideration. On average, the judicial review process takes more than 2-3 years, and many cases have been remitted to the IAA two or more times. Thus, any time saving generated by abbreviated procedures at the IAA stage is likely more than negated by the delays caused by the high rates of judicial review of these cases. When the system is considered holistically, it can be argued that the 'fast track' process has not led to any efficiency gains, but rather caused significant additional delays.

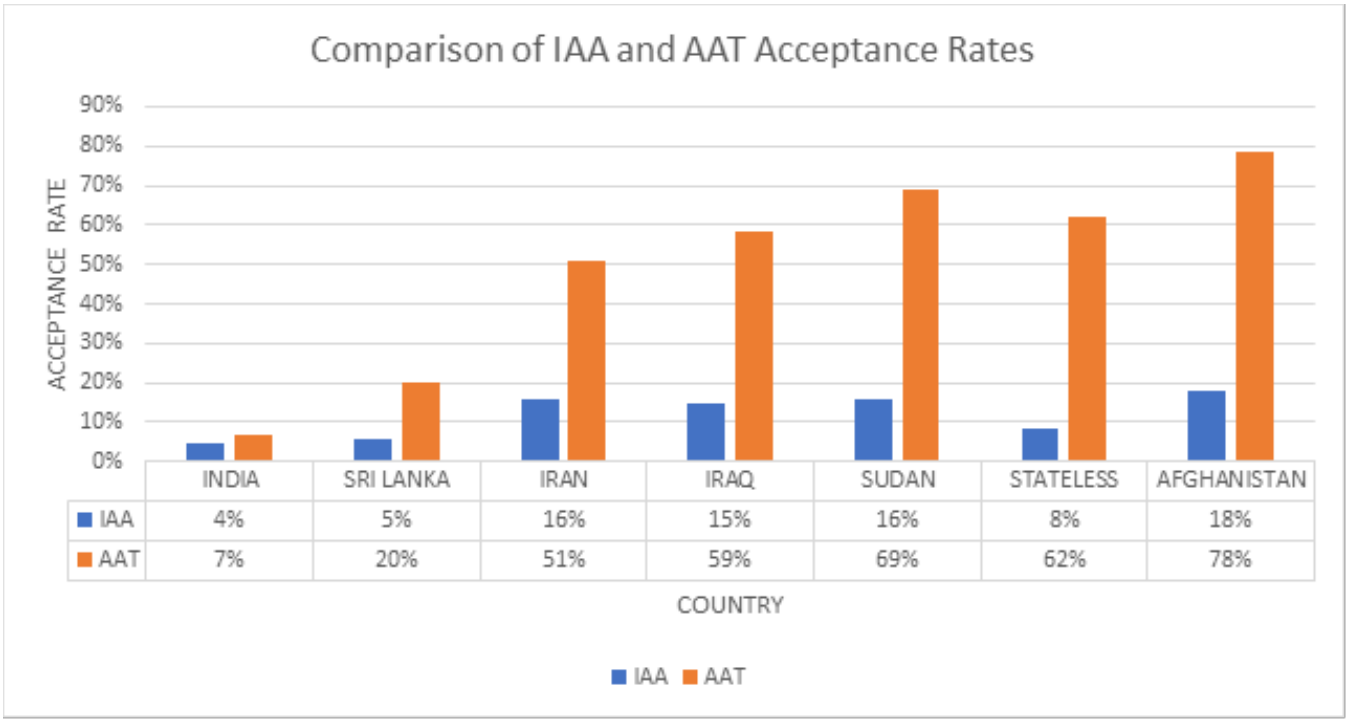
**Table 2. Remittal and set aside rates for judicial review cases of IAA decisions[21]**

| Year | Appeals finalized | Remitted or set aside | Dismissed or discontinued | Success of appeals |
|---|---|---|---|---|
| **2015-16** | 1 | 1 | 0 | 100% |
| **2016-17** | 53 | 19 | 34 | 36% |
| **2017-18** | 309 | 100 | 209 | 32% |
| **2018-19** | 925 | 449 | 476 | 49% |
| **2019-20** | 840 | 262 | 578 | 31% |
| **2020-21** | 523 | 158 | 365 | 30% |
| **2021-22** | 457 | 161 | 296 | 35% |
| **TOTAL** | **3,108** | **1,150** | **1,958** | **37%** |

There are also significant concerns about the quality of decision-making at the IAA, and the fact that errors may be being made due to the lack of procedural safeguards. Data compiled by the Kaldor Data Lab shows that there was significant variation between the acceptance rates of the IAA and the AAT, with the AAT exhibiting higher success rates in every country with more than 20 applicants. For example, applicants from Iraq were more than five times more likely to succeed at the AAT, applicants from Afghanistan were more than four times more likely to succeed, while stateless applicants were more than seven times more likely to succeed at that AAT than at the IAA.

**Figure 5. Comparison of IAA and AAT Acceptance Rates for Protection Visa Applications (1 May 2015–17 May 2022)**

[20] See Part 7AA, *Migration Act 1958* (Cth); Daniel Ghezelbash, 'Fast-track, accelerated, and expedited asylum procedures as a tool of exclusion' in Catherine Dauvergne (ed) *Research Handbook on the Law and Politics of Migration* (Edward Elgar Publishing 2021).
[21] This data was compiled from the AAT annual reports.




## 4. Appointments and Reappointments

*Question 20: Should the requirement for a transparent merits-based selection process for members, including the Senior Leadership of the body, be incorporated in legislation? What elements should be included?*

**Recommendation: The requirement of a transparent merits-based selection process for members should be incorporated into legislation.**

The data collected by the Kaldor Centre Data Lab raises questions about the potential impacts of the existing politicised process for appointing and reappointing members to the AAT on decision-making outcomes.

The political party in government at the time a tribunal member was first appointed appears to have a significant and sizeable effect on the outcomes of their decision-making in Protection Visa cases. The odds of an applicant succeeding was 25% (95% CI [1.08, 1.44]) higher where the applicant appeared before a tribunal member appointed by a Labor government (when compared to Coalition appointed members), controlling for all other variables (including the individual decision-maker, legal representation, time since appointment, and country of origin of the applicant).

We endorse the submissions made by the Refugee Council of Australia on this point to the present review:

> The AAT plays an important role of ensuring fair and impartial decision making, in order to uphold the rule of law. The continued practice of appointing politically aligned members to the Tribunal represents a grave threat to the rule of law, and undermines the public perception of the independence of administrative tribunals, which is essential for them to discharge their function effectively.

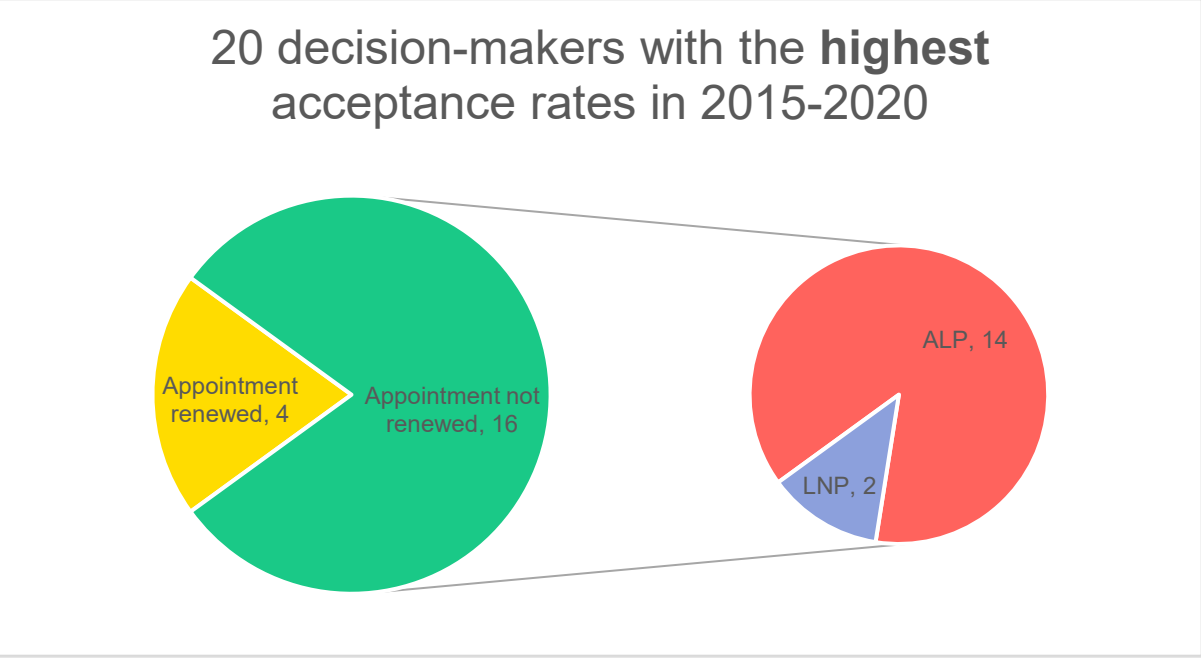
> A transparent and merits-based appointment process is vital for an independent review body... It is vital that the new review body establish a system to ensure that all staff are appointed on the basis of merit, through an open application process, and assessed against public selection criteria. Such an independent, transparent and merit-based appointment process should be provided for in the legislation.[22]

*Question 23: What is the appropriate term of appointment for members, the President and the Registrar (or equivalent)? Should terms be fixed, and should there be a maximum number of reappointments?*

**Recommendation: Terms of appointment should be as long as reasonably practicable (ideally 6-7 years) to reduce any potential or perceived political interference in decision-making and the reappointment process.**

The data collected by the Kaldor Centre Data Lab highlights the potential influence of political considerations relating to how members decide Protection Visa cases when making reappointments. Of the 20 decision-makers (who heard more than 50 cases) with the highest acceptance rates in 2015–20, 80% (being 16 decision-makers) did not have their appointments subsequently renewed by Coalition governments. Fourteen out of 16 of these decision-makers who did not have their appointments subsequently renewed were first appointed by the Labor. Below is a visualisation of this.

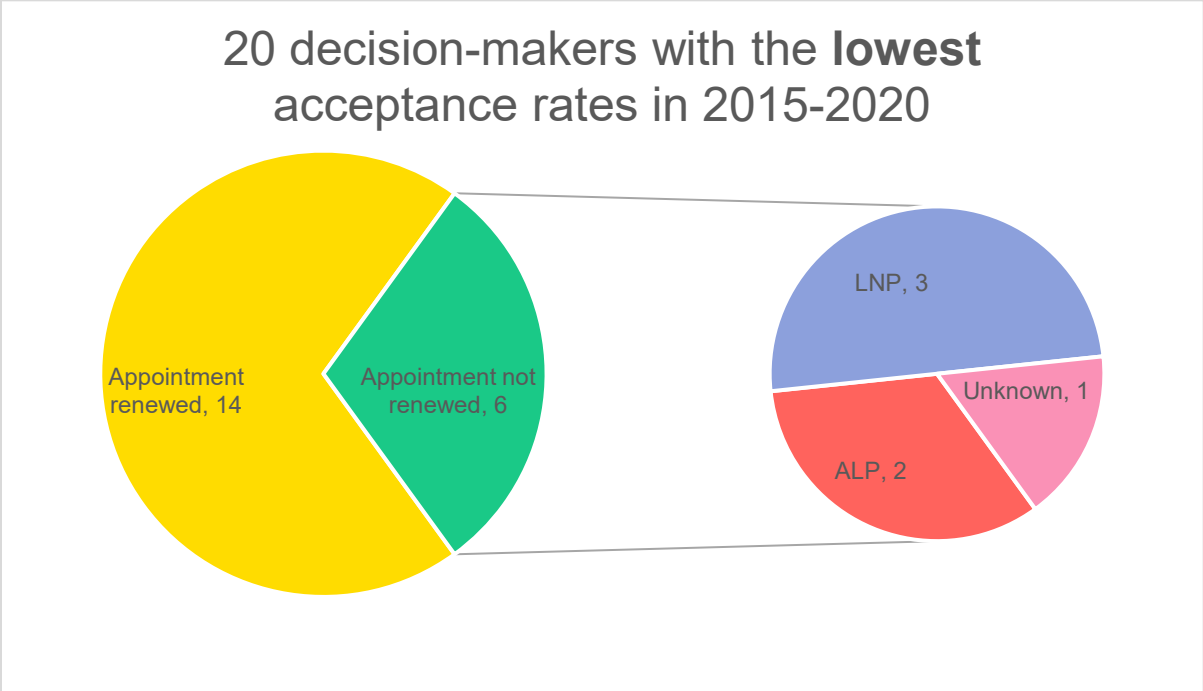
**Figure 6. Reappointment of Decision-Makers with the Highest Acceptance Rates**




By comparison, of the 20 decision-makers (who heard more than 50 cases) with the lowest acceptance rates in 2015–20, only 30% (being six decision-makers) did not have their appointments subsequently renewed. Two out of six of these decision-makers were first appointed by Labor. Below is a visualisation of this.

[22] Refugee Council of Australia, Submission to the Attorney-General's Department, Administrative Review Reform [4.1] - [4.2]

**Figure 7. Reappointment of Decision-Makers with the Lowest Acceptance Rates**




While there are many considerations involved in the decision to reappoint members, longer fixed term appointments, and clearer and more objective criteria for the re-appointment process would alleviate any potential public perceptions of political interference in the new administrative review body's operations. In order to further protect against politically motivated reappointments, members should not be eligible for reappointment until their last year in the role.

*Question 24: What should be the process and criteria for reappointment of members? How should past performance be assessed to inform reappointment or appointment at a higher level?*

**Recommendation: The reappointment process should be subject to clear and transparent objective criteria, which could include KPIs relating to the fairness and efficiency of decision-making of individual members.**

The reappointment process should be governed by clearly articulated objective criteria, including KPIs relating to efficiency and fairness of the decision-making of the member, and clearly exclude any considerations as to whether members were deciding cases in a manner that aligns with the subjective objectives of the government of the day.

**5. Case Management, Directions and Conferencing**

*Question 39: What powers or procedures should be available to the new body to expedite the resolution of matters? Are there specific types of matters which could benefit from expedited review?*

**Recommendation: Any powers or procedures to expedite the resolution of matters should not involve reducing procedural or substantive rights of applicants.**

The data compiled by the Kaldor Data Lab set out in Section 3 indicates that efficiency measures that focus on reducing procedural and substantive rights of applicants appear to be ineffective, and lead to an increase in judicial review applications that create significant delays. This is most evident with respect to the IAA, where over 37% of judicial review applications were successful.

In this regard, we support the submissions of the Refugee Council of Australia on this point:

> RCOA does not support fast-tracking or streamlining applications based on country recognition rates. A key element of administrative review is the importance of individual consideration of cases and the right to be heard… Powers to manage 'frivolous' applications should be exercised with caution, based on experience from the fast-track assessment process which excluded individuals who made 'manifestly unfounded' claims for protection from seeking independent review. In practice, this system denied procedural fairness, creating real risks of refoulement (returning people to harm), and increased inefficiency.
>
> However, 'manifestly well-founded' cases could be fast-tracked to improve efficiency as the same risks of refoulement do not apply, an approach that has been successfully implemented in other jurisdictions. Likewise, cases should be able to resolved 'on the papers' without a hearing where a member decides in favour of the applicant.[23]

**6. Supporting parties with their matter**

*Question 59: Should there be a requirement in the new body to seek leave to appear with representation? If so, should this extend to all matters or a specific category of matters?*

**Recommendation: Protection Visa applicants should be entitled to legal representation, and there should not be a requirement to seek leave to appear with representation.**

The data collected by the Kaldor Data Lab demonstrates the importance of access to representation for Protection Visa applicants. There is a very strong correlation between having representation (either by a lawyer or migration agent) and the chances of success before the AAT.

Our data shows that the odds of an applicant succeeding at the AAT were more than five times higher (5.27, 95% CI [4.66, 5.97]) if the applicant had legal representation, controlling for all other variables (including the individual decision-maker, the country of origin of the applicant and the political party that appointed the decision-maker).

At the IAA, an applicant's chance of success was 2.5 times higher (2.63, 95% CI [2.21, 3.13]) if the applicant had legal representation, controlling for the individual decision-maker and the country of origin of the applicant.

As our data on this point only covers Protection Visa applicants, we are not in a position to make recommendations with regard to other applicants. However, we note that the AAT likely has data in relation to this point across all its divisions, and that this data should be examined when considering whether other applicants should also have a similar entitlement to representation.

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[23] Refugee Council of Australia, Submission to the Attorney-General's Department, Administrative Review Reform [9.1] - [9.2]