Refugee Council of Australia

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

THE PERFORMANCE AND INTEGRITY OF AUSTRALIA'S ADMINISTRATIVE REVIEW SYSTEM

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The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, people seeking asylum and the organisations and individuals who work with them. RCOA consults regularly with its members, community leaders and people from refugee backgrounds, and this submission is informed by their views.

The Administrative Appeals Tribunal (AAT) plays a pivotal role in refugee status determination (RSD) for those seeking protection in Australia. It ensures that errors in the high volume of decisions made by the Department of Home Affairs are reviewable by an independent body. This is especially important in case of refugee claims, when matters of life and death are under consideration. Indeed, the AAT can provide a critical safeguard against forced return to danger by helping to ensure accuracy and fairness in decision-making. Robust mechanisms for independent merits review are also in the best interests of the Australian Government as they ensure the correct decision is made and help to ensure high-quality and consistent administrative decision making. The merits review process also ensures that many broader aspects vital to a healthy democracy are upheld, including affording natural justice, upholding the rule of law and contributing to open and accountable government.

As such, it is vital that the AAT remain independent, adequately resourced and appoint members who are highly skilled and qualified to assess refugee status determinations. Unfortunately, this is not the case with the current AAT. The AAT is significantly under resourced, with a backlog of 32,000 refugee cases, and only about 5,500 cases decided last financial year. This backlog is not only due to under-resourcing of the AAT, but also due to the lack of expertise from some AAT members. This is due in part to the politicisation of appointments to the AAT, and the lack of legal qualifications of some appointees.

Likewise, the politicisation of appointments has also resulted in discrepancies in decision making. Using figures obtained under Freedom of Information, researchers from Macquarie University show that acceptance rates at the AAT for ALP-appointed members were 1.79 times higher than appointees of Liberal-National Coalition governments. These figures highlight a worrying level of discrepancy between Members based on the political party which appointed them.

We also reiterate our ongoing concerns with the Immigration Assessment Authority, a body established under the Fast-Track process to review appeals for people seeking asylum who arrived by boat. This process was designed to favour expediency over procedural fairness, with legislation specifically omitting requirements for fairness, in contrast to the requirements of the AAT. This has resulted in significant discrepancies between the IAA and the former review process, with the IAA affirming the Department's original decision to refuse an asylum claim in 91% to 94% of cases. The IAA decisions are also legally questionable, with 37% of appeals succeeded in the federal courts.

Together, these issues highlight significant concerns with our merits review mechanism. These issues need urgent attention in order to restore integrity, public trust, and the rule of law to the AAT.

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1 Delays in processing asylum reviews

1.1 The AAT is facing significant delays within the Migration and Refugee Division (MRD), with the Division unable to address its growing backlog. As the AAT explained itself in its recent 2020-21 Annual Report:

> *In the past 5 reporting years, the Migration and Refugee Division has received sustained, high levels of lodgements relating to decisions about protection (refugee) visas, without a commensurate increase in member resources. This has resulted in a gradual but substantial increase in refugee cases on hand to 32,064 as at 30 June 2021. The active refugee caseload increased by 18% when compared to 30 June 2020 and constituted 57% of all cases on hand in the Division. Refugee matters comprised 66% of all lodgements in 2020–21 and remains the largest single caseload within the Division…The vast majority of refugee applications were for review of a decision to refuse to grant a protection visa. This generally requires the Tribunal to consider whether the applicant is a person in respect of whom Australia has protection obligations: whether they are a refugee or, in the alternative, entitled to complementary protection.*

1.2 The AAT Annual Report provides a table of current cases on hand at the Tribunal (Figure 1).[1] It shows that the number of cases on hand increased by 18% from the last financial year, to a total of 32,064 cases pending. The backlog is due to the AAT receiving 10,521 lodgements in 2020-21, but only finalising 5,558 cases. At this rate, it would take over five years to get through the existing backlog of applications, not accounting for further applications.

Figure 1 AAT Refugee caseload on hand at year end, 2019-20 to 2020-21.[2]

	ON HAND AT YEAR END		
Country of reference	**2019–20**	**2020–21**	**% change from 2019–20**
Malaysia	12,399	13,339	8%
China	5,181	6,868	33%
Vietnam	1,510	1,774	17%
India	658	1,435	118%
Thailand	1,503	1,336	-11%
Fiji	834	1,051	26%
Indonesia	436	931	114%
Pakistan	668	649	-3%
Taiwan	556	648	17%
Other	3,355	4,033	20%
TOTAL	**27,100**	**32,064**	**18%**

[1] Administrative Appeals Tribunal, *2020-21 Annual Report, page 59, https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports*
[2] Administrative Appeals Tribunal, *2020-21 Annual Report, page 59, https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports*

1.3 This is in addition to the backlog of protection visas currently on hand with the Department of Home Affairs. As of October 2021, there are 31,620 applications for onshore protection visas awaiting a decision by the Department.[3] Many of these applications are likely to be refused by the Department, especially as the Department often decides applications without an interview. The Department's processing of initial protection applications is also significantly delayed. In the last 12 months (to October 2021), the Department made 14,064 refugee status determinations for permanent protection visa applications.[4] At the current rate, it would take over two years to process these initial permanent protection claims. As such, a person applying for a permanent protection visa may have to wait seven years for an outcome on their protection visa application.

1.4 This demonstrates a completely dysfunctional review system and contributes to significant distress and uncertainty for applicants. Failure to address these delays leaves these people in a very precarious situation. For many, their visa status will preclude them from access to Medicare and many will have no work rights. Changes to government policy regarding income support mean that it is unlikely they will receive government support while they are waiting for a decision, risking destitution. Delays also mean that those who are not entitled to stay in the country can stay for extended periods while they are waiting for a decision, creating an incentive to lodge weak claims.

1.5 These delays are substantially caused by a lack of resources to the AAT, especially for the appointment of additional members to the MRD. There is a clear need to further resources the MRD to process the backlog in a timely manner, while also ensuring procedural fairness and accurate decision making. We endorse the recommendations from the Callinan review that "the deficiency of numbers of Members in the MRD be immediately addressed by the appointment of no fewer than 15 to 30 Members, some only of whom should be part-time Members."[5]

1.6 We would strongly oppose any changes that reduce procedural fairness in decision making, such as moving cases from the MRD to the IAA. As we discuss below, the IAA is a flawed system that does not provide a fair and independent review of decisions, and has made many legal errors in its decision making, as highlighted in the remittal rate in the federal courts (below).

1.7 While we acknowledge the high number of applications from countries where there is a very low success rate for a protection application, this does not justify fast-tracking certain cohorts at the expense of denying procedural fairness for those with genuine claims. A better solution to address the issue of unmeritorious asylum claims is to speed up the processing of refugee cases at the MRD, so that those who wish to exploit the asylum system in order to remain in the country longer are not able to do so. A key reason why we are seeing a high number of unmeritorious cases before the AAT is because there are a number of people who are using the extensive delays at the AAT in order to stay in Australia for longer. As above, the current delays from an initial protection visa application to a decision at the AAT can take up to seven years. If asylum claims are reviewed in a timely manner, there would be no incentive to lodge an unmeritorious claim in order to stay in Australia for this period of time.

1.8 However, these delays are not only caused by a lack of resourcing for the MRD but also due to the politicisation of appointments, especially where members appointed to the MRD do not

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[3] https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-october-2021.pdf
[4] Compiled from the last 12 months of onshore proception visas processing statistics from the Department of Home Affairs, *https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/humanitarian-program*
[5] I.D.F Callinan, AO, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, ttps://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F6813 page 5.

have legal qualifications or expertise in refugee law. We believe the appointment of independent, qualified and expert decision makers at the MRD will also significantly improve the ongoing backlog.

Recommendation 1 Increase resourcing of the Migration and Refugee Division

The Australian Government should significantly increase resources to the AAT Migration and Refugee Division in order to address the backlog of protection visa cases. At very least, it should follow the recommendations from the Callinan Review of appointing "no fewer than 15 to 30 Members" to the MRD.

2 Appointment of members

2.1 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.

2.2 RCOA has consistently raised concerns with the politicisation of appointments of members to the AAT, and the previous Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT). We had hoped that the amalgamation of the RRT and MRT with the AAT would help address this issue, which has been an unfortunate practice of both sides of politics. Under both Coalition and Labor governments, members were appointed with links to the governing party while others were not reappointed because of such links or perceptions that they were unduly 'soft'. Further, their governing legislation was often changed, especially in response to unfavourable court decisions.

2.3 Unfortunately, the history of politicising the RRT and MRT simply seems to have transferred itself to the AAT. The appointments to the AAT at the end of the 2017 financial year raised serious (albeit longstanding) concerns about the politicisation of the Tribunal.[6] In 2018, a former Liberal State Minister was appointed, alongside a former federal Liberal member.[7] In 2019, the Coalition Government appointed many former political Liberal advisors, senators, donors and Liberal Party members to the AAT, some of whom did not have legal qualifications.[8] In 2020, further appointments included a former Liberal political advisor and former Liberal senators and MPs.[9] The appointment of members with close connection to the current government undermines the integrity of the AAT and diminishes public trust in this vital review mechanism.

2.4 We note that s 17D of the *Administrative Appeals Tribunal Act 1975* requires the Minister for Immigration to be consulted before a member is assigned to the Migration and Refugee Division. In our previous submissions, we recommended against this requirement, as it is vital that the AAT must be seen to be completely independent. Allowing the Minister to have influence over the appointment of Tribunal members who will be tasked with reviewing

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[6] Michael Koziol, 'George Brandis clears out 'infuriating' Administrative Appeals Tribunal' *Sydney Morning Herald* (28 June 2017) <http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx071l.html>.
[7] Matt Maloney, 'Groom scores lucrative new job' *The Examiner* (10 August 2018) <http://www.examiner.com.au/sport/local-sport/5577423/groom-scores-lucrative-new-job/>.
[8] 'A who's who in the AAT zoo' *Crikey* <https://www.crikey.com.au/2019/09/24/a-whos-who-in-the-aat-zoo/>.
[9] David Hardaker, 'Porter gives some last-minute Christmas presents at the AAT' *Crikey* (21 December 2020) <https://www.crikey.com.au/2020/12/21/aat-christmas-appointments/>; David Hardaker and Charlie Lewis, 'It's official: Christian Porter confesses to appointing Liberal mates to AAT' *Crikey* (18 September 2020) <https://www.crikey.com.au/2020/09/18/christian-porter-aat-tip/>.

decisions made by the Minister (and the Department headed by the Minister) clearly creates a conflict of interest. Such a recommendation is even more relevant in light of the public hostility of the Minister for Immigration towards particular members who have made controversial decisions.

2.5 In particular, we note that while s 17CA of the AAT Act requires the Minister to ensure the member has relevant training, knowledge or experience in relation to freedom of information, there is no such requirement in s 17C of the AAT Act. We would recommend streamlining the provisions for appointment by removing the requirements for consultation with Ministers and replacing them with similar requirements for qualifications. Given the complexity of refugee and migration law, most refugee matters should be heard by qualified members who are well trained in refugee law and understand the complex issues that people seeking asylum may experience. RCOA strongly suggests that a Tribunal member also be trained in cross-cultural communication, cultural awareness, the refugee experience and the impacts of torture and trauma, to ensure that they have the requisite skills to assess protection claims accurately and fairly.

2.6 These concerns were highlighted by the Callinan Report into the Government's 2015 amalgamation of the AAT,[10] which RCOA contributed to. High Court Justice Ian Callinan recommended that "all further appointments, re-appointments or renewals of appointment to the Membership of the AAT should be of lawyers, admitted or qualified for admission to a Supreme Court of a State or Territory or the High Court of Australia, and on the basis of merit".[11] The report also recommended "further appointments of, preferably, full-time, appropriately legally qualified, Members".[12] Unfortunately, these recommendations have not been implemented.

2.7 As the former Administrative Review Council stated, "It is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence."[13] RCOA supports its recommendation that the "selection and appointment process for all tribunal members should be rational, merit-based and transparent".[14] We also endorse the detailed best practice guide to ensuring independent merits-based appointments, published in 2016 by the Council of Australasian Tribunals.[15] In our view, the adoption of a model of independent appointments commission, along the lines used in the United Kingdom, would in the long term ensure the proper independence of tribunal members.

2.8 The politicisation of appointments not only undermines trust in the AAT, it also affects the quality of decision making, with significant discrepancies between decision makers.

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[10] I.D.F Callinan, AO, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth)*, ttps://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F6813071%22;src1=sm1.
[11] Ibid page 9.
[12] Ibid page 6.
[13] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report, 39, 1995) <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo39.aspx>, 71.
[14] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report, 39, 1995) <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo39.aspx>, 77.
[15] Council of Australasian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide* (August 2016) <http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments_COATBestPracticeGuide-2016-Final-web-interactive.pdf>.

Recommendation 2 Establish an independent appointment body for the AAT

The Australian Government should establish an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.

3 Consistency in decision making

3.1 There are serious concerns around the consistency of decision-making by tribunal members in refugee cases. There is a widely held perception amongst asylum seeker and their legal representatives that chances of success of their review at the tribunal largely depend on the decision-maker assigned to the matter, rather than on the merits of the case.[16]

3.2 Data obtained by a team of researchers at Macquarie University appears to lend support to such a view.[17] The data demonstrates significant differences in the success rates for refugee visa reviews, depending on which tribunal member hears the case. The data was obtained through a Freedom of Information request and covers all IAA and AAT decisions in relation to protection visa applications made between 1 January 2015 and the 18 May 2020. This included 18,613 cases decided by the AAT, and 8,059 cases decided by the IAA. The average success rate before the AAT was 13.6% and 9.8% at the IAA. However, the data showed that there was significant variation in success rates before individual members.

3.3 The researchers only examined members who had decided 50 or more cases to ensure the sample was large enough to be statistically relevant. The AAT had 88 members who decided more than 50 cases. One member did not find in favour of a single asylum seeker applicant, and another 15 had approval rates of less than 5%. At the other end of the spectrum, one member decided in favour of the asylum seeker applicants in 86% of cases while another three members had approval rates of over 40%.

3.4 The IAA had 47 decision-makers who decided more than 50 cases. Five did not find in favour of the applicant in any cases and 21 members had a success rate of under 5%. Five members had success rates over 25% and one member found in favour of the applicant in 35% of cases.

3.5 Some of this variation can be explained by the fact that members are often assigned applicants from certain countries. However, the data also shows significant inconsistencies at the country level. This is evident in the data in relation to cases from Iran. At the AAT, the overall success rate for Iranian applicants was 49%. However, of the members that had heard more than 20 cases involving Iranian applicants, there were some notable outliers. One member, decided 65 cases, all affirming the Departments decision to refuse the visa, while one member found in favour of Iranian applicants in 93% of cases, and another in 80%.

3.6 At the IAA, the overall success rate for Iranian applicants was significantly lower, at 16%. 31 members heard more than 20 cases involving Iranian applicants. Six of these did not find in favour of the applicant in any of the cases they heard. 15 had success rates of 10% or less, while seven had success rates of 25% or more, with one member finding in favour of the applicant in 53% of case.

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[16] These concerns were raised by participants of the 'Future of Refugee Litigation: What Role Can Academic Research Play' (Conference, Andrew and Renata Kaldor Centre for International Refugee Law, 13 November 2018).
[17] Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, Refugee Decision-Making Database (unpublished, on file with the authors); Daniel Ghezelbash, How Refugees Succeed in visa reviews: New Research Reveals the Factors that Matter, *The Conversation* (10 March 2020) <https://theconversation.com/how-refugees-succeed-in-visa-reviews-new-research-reveals-the-factors-that-matter-131763> (examining earlier FOI data on this topic).

3.7 In addition to the concerns relating to the inconsistency between members of the AAT and IAA, the significant disparity in the overall success rate between the two bodies is also striking. Iranian applicants were three times more likely to succeed at the AAT as compared to the IAA.

3.8 The data also shows inconsistencies in the way members decide cases over a range of countries. The researchers identified decision-makers who had decided cases involving applicants from three or more countries. At the AAT, 60% of members had lower acceptance rates than the average for every country they decided and 20% had higher than average acceptance rates. In the IAA, 33% of those members had lower acceptance rates than average across every country they decided, while 13% had higher acceptance rates.

Discrepancies based on appoints under Coalition and Labor governments

3.9 The data also reveals significant differences in the overall success rate between members appointed by Coalition or Labor governments. This data was only compiled in relation to the AAT. Coalition-appointed members decided in favour of the applicants in 11% of cases, while ALP-appointed members decided in favour of the applicants in 19.7% of cases. The acceptance rate for ALP-appointed members was thus 1.79 times higher than Coalition appointees. This statistic is confirmed by research from Rohan Simpson, which reviewed decisions of Labor and Coalition-appointed MRD members for *published* decisions 2015 to 2018. He found that "the odds of a Labor-appointed Member giving a favourable decision to an asylum-seeker were 1.46 times higher than those of a Liberal-appointed Member".[18]

3.10 There may well be plausible explanations for this variation, beyond the individual preference or bias of individual members. However, these inconsistencies should at the very least be cause for further investigation and explanation. It is incumbent on the tribunal to provide this context. The principles of predictability and consistency are essential to the rule of law.[19] If tribunal members are deciding like or similar cases differently, this raises concerns about the accuracy of decision-making. The stakes are very high in the context of asylum cases. A wrong decision can result in a person being returned to serious harm or even death.

Publishing statistics

3.11 There is a growing body of academic literature in the field of behavioural psychology that demonstrates the power of using statistics on past decision-making as a feedback tool to improve future decision-making. Exposing decision-makers to statistics about how they decided cases with respect to specific cohorts, and how this compares to other decision-makers is an effective way of combatting bias and reducing the influence of personal preferences on decision-making.

3.12 Exposure to this form of data can encourages individuals to scrutinise their decision-making. The aim is to limit 'system one' thinking. These are 'decision rules' using for solving problems – mental shortcuts that person uses when processing new information.[20] While such thinking can be useful in some cases, they can also, at times, lead to 'severe and systemic' error in the form of 'cognitive biases'.[21] The goal of the intervention is to foster 'system two' thinking, which is more deliberative and intentional.[22] If a decision-maker is distracted, rushed or tired, or if

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[18] Rohan Simpson, *Got AATitude? A Quantitative Analysis of Refugee Decision-Making at the Administrative Appeals Tribunal* (Honours Thesis, University of Sydney, 14 January 2020) <https://ses.library.usyd.edu.au/handle/2123/21665>.
[19] Karen Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 *Judicial Review* 22, 22.
[20] Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus & Giroux, 2011) 7-8, cited in Australian Law Reform Commission ('ALRC'), Judicial Impartiality: Cognitive and Social Biases in Judicial Decision-Making (Background Paper JI6, April 2021) 8-9 ('Background Paper').
[21] Kahneman, 10.
[22] Kahneman 9.

system one and system two thinking is in conflict, they are more likely to rely on system one thinking and invoke biases.[23] By encouraging tribunal members to use system two thinking, decision making is less likely to be affected by biases.

3.13 Variations in overall success rates, or success rates for certain cohorts of asylum seekers, do not necessarily indicate bias. These may be explained by the individual circumstances of each case. However, when confronted with data on large or systemic discrepancies in their decision-making patterns, research shows that decision-makers may be more deliberative when assessing future cases from the cohort.

3.14 As discussed, this form of data is already being collected and disseminated by researchers. However, its power as a feedback tool for decision-makers would be much more persuasive it was published by the Tribunal itself. This would also provide an opportunity for the Tribunal to be able to contextualise the data and explain potential reasons for discrepancies in decision-making patterns. This form of transparency will not only lead to better decision-making, but foster greater public confidence in the integrity of the Tribunal.

Recommendation 3 Publish Statistics

The AAT should publish yearly statistics which set out the decision-making patterns of individual tribunal members in refugee cases. This would include data comparing individual tribunal members overall success rates, and success rates for specific cohorts.

4 Concerns with the IAA

4.1 Our concerns raised above regarding the AAT are even more acute in regard to the Immigration Assessment Authority (IAA), which is housed within the AAT but is not staffed by its members and follows its own set of legislative rules that differ from those of the Migration and Refugee Division. IAA reviewers are appointed separately, for initial terms of 18 months and subsequent terms of up to a year. This short-term appointment, combined with the unique features of the IAA of a 'paper' review with exclusions of 'late' evidence, make the IAA even less independent and worthy of public trust and confidence than the AAT.

4.2 IAA Reviewers are not independent decision makers, but rather public servants engaged under the *Public Service Act 1999*. They are part of the Executive and therefore responsible for implementing Government policy. AAT members are required to take an oath of office, declare conflicts of interest, and enjoy independence of remuneration and have fixed term appointments. In contrast, IAA reviewers serve at the pleasure of the executive and do not need to even have legal qualifications. Many, if not most of them, are former Department officers.

4.3 Apart from the lack of credibility of the tribunal itself, there are clear inefficiencies (not to mention injustice) in having a separate body of reviewers (paid less, and without any real security of tenure) who are doing, in effect, the same work as those within the AAT, simply because some visa applicants have arrived by plane and others by boat. For example; the IAA separately recruits its members, which led to a significant delay in the IAA being constituted.

4.4 It also does not make economic sense to maintain a separate review body for a caseload which is significantly reducing each year. The IAA was established to process a finite number of applicants, all of whom arrived by boat in Australia before July 2013. Due to the ongoing policy of boat turnbacks and offshore processing under Operation Sovereign Borders (which we oppose), there will no longer be new applicants seeking review in the IAA. When the Fast-

[23] Background paper, 6

Track process was established in 2015, there were approximately 30,000 applicants awaiting an initial decision on their asylum claim. That number is now less than 3,200,[24] most of whom will not seek review in the IAA. As at September 2021, the IAA has 287 active cases, with a median time to finalise reviews at 41 days.[25] While there may be a small number of re-applications for refugees applying for a second Temporary Protection Visa (TPV) or Safe Haven Enterprise Visa (SHEV), the vast majority of these refugees will have their subsequent protection claim approved by the Department, as circumstances in most countries of origin have not changed significantly for people to be refused a subsequent protection application. As such, there is very little justification for maintaining a separate review body for such a small, finite, caseload.

4.5 One of our key concerns with the IAA is that is significantly decreases scrutiny of the Department's decisions. The usual rule with the IAA, unlike the former RRT, is that it only reviews the Department's decisions 'on the papers' without hearing directly from the people involved. The IAA also can also only consider new information that had not been provided to the Department earlier (for example, late disclosures of sexual assault) in exceptional circumstances. It is unsurprising that this unfair process has resulted in a significant number of refusals at the IAA. In 2019-20, the IAA affirmed the original decision to refuse a visa in 94% of cases.[26] In 2020-21, this figure was 91%.[27] Figure 2 shows the rate of affirmations (i.e. visa refusals) and remittances. Figure 3 shows the IAA's outcomes by country of origin.

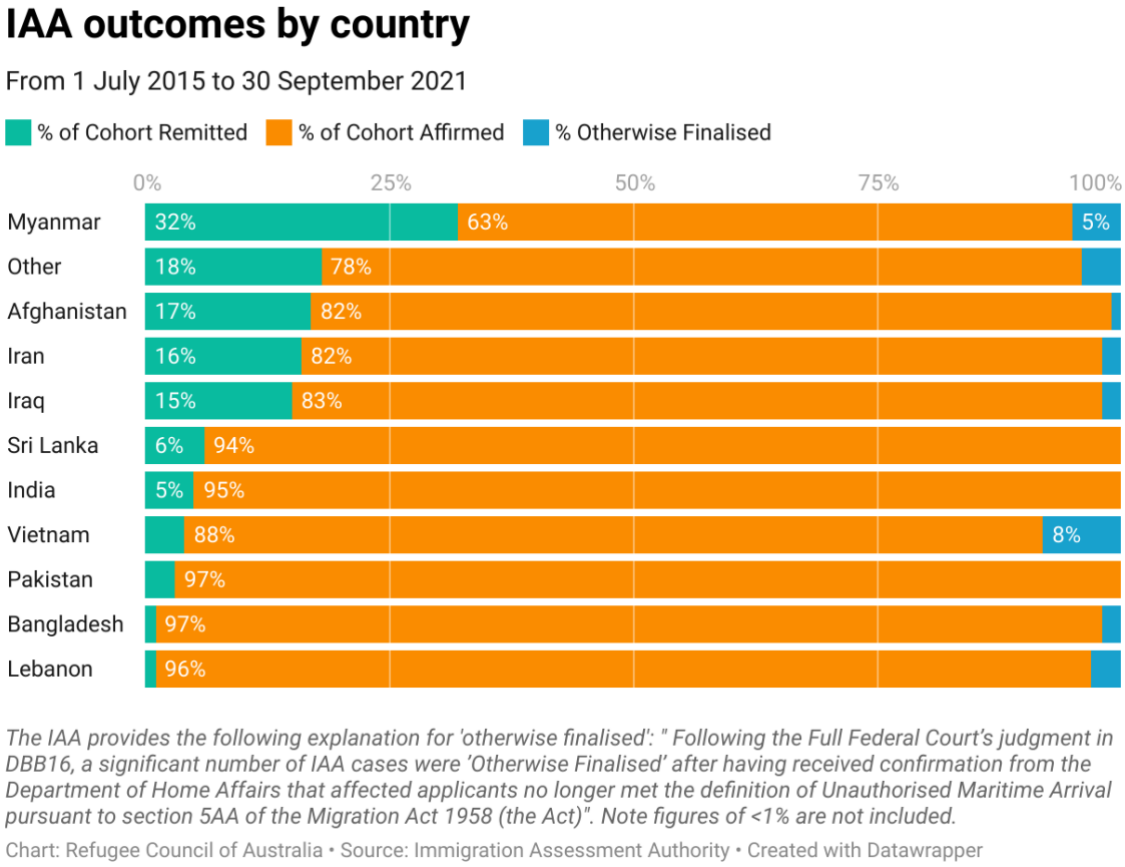
Figure 2 Outcomes of IAA Reviews, 2019–20 TO 2020–21.[28]

	DECISION AFFIRMED		DECISION REMITTED		OTHER[a]	
	No	% of total	No	% of total	No	% of total
2019–20	1,625	94%	96	6%	10	1%
2020–21	717	91%	55	7%	16	2%

[a] Cases referred to the IAA in error.

[24] See Refugee Council of Australia, 'Fast tracking and 'Legacy Caseload' statistics' (21 October 2021), https://www.refugeecouncil.org.au/fast-tracking-statistics/
[25] Immigration Assessment Authority, 'Statistics', https://www.iaa.gov.au/about/statistics
[26] AAT Annual Report 2019-20, https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201920/AAT-Annual-Report-2019-20.pdf, page 68.
[27] AAT Annual Report 2020-21, https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2020-21-annual-report page 88.
[28] AAT Annual Report 2020-21, https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2020-21-annual-report page 88.

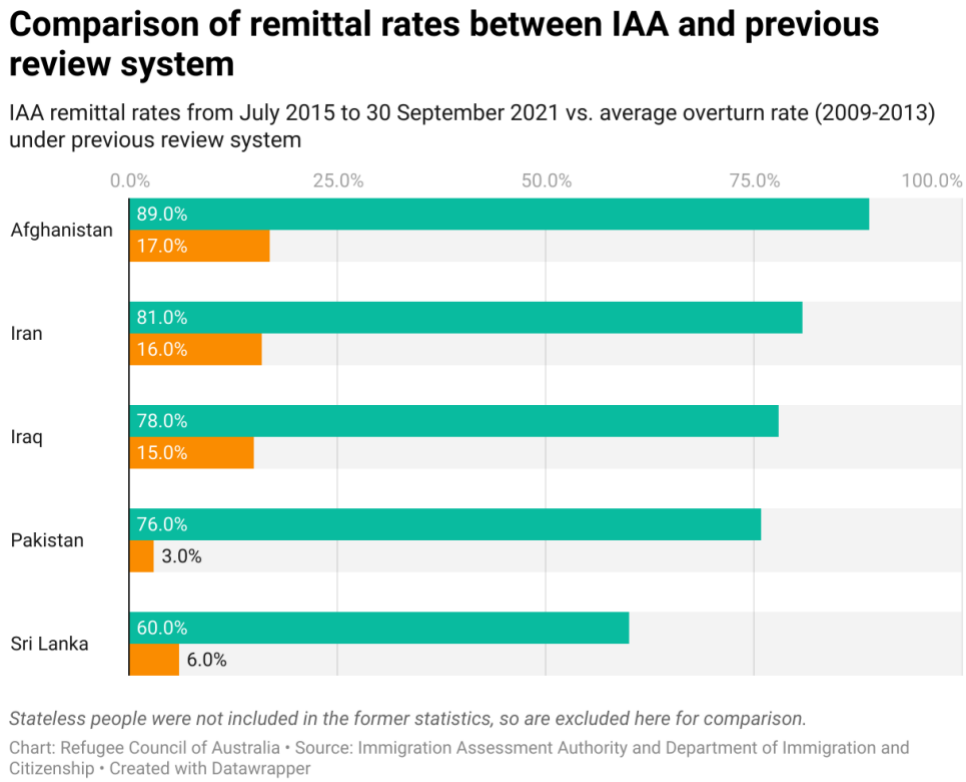
Figure 3 IAA Outcomes by country.[29]



4.6 There are also significant discrepancies between the IAA decisions and that of the former review system under the RRT, even when comparing asylum claims from refugees from the same country. The IAA's remittal rates can be compared to the last available statistics from the previous review system (for people claiming asylum by boat between 2009 and 2013). These show much higher rates of remittal, ranging from 60-90% for the same nationalities, as shown in Figure 4. These discrepancies cannot be explained by changes in country of origin, as there has been no improvement in conditions in these countries since the former system was abolished. Likewise, success rates for Iran in the IAA are 16%, compared to 49% for Iranians at the AAT for the same period. There is no reason for the significant discrepancy between IAA and AAT during the same period and same country, other than a clear lack of procedural safeguards at the IAA level. It is clear that the lack of procedural fairness and safeguards under the IAA has led to a higher refusal rate, putting refugees with legitimate claims at risk of being returned to harm.

[29] Sourced from Immigration Assessment Authority, 'Statistics', https://www.iaa.gov.au/about/statistics

Figure 4 Comparison of remittal rates between IAA and previous review system.[30]



IAA decision making has also been shown to be unlawful in a significant proportion of judicial review cases in the federal courts. An analysis of appeals of IAA decision to the federal courts (Figure 5) from 2018 to 2021 shows that 37% of cases were held to be unlawfully decided. This is a clear demonstration of the lack of procedural safeguards in the Fast-Track system and shows that the IAA cannot be relied upon as a fair and accurate review mechanism. The high rates of success at judicial review also lead to further delays and inefficiencies. There is no justification for maintaining the IAA and it should be abolished, with remaining reviews to be conducted in the AAT MRD.

Figure 5 Remittal and side aside rate for judicial review cases of IAA decisions.[31]

	Appeals finalised	Remitted	Set aside	Success of appeals
2018–19	925	217	232	48.5%
2019–20	888	256	7	29.6%
2020–21	523	155	3	30.2%
TOTAL	2336	628	242	37.2%

[30] Sourced from Immigration Assessment Authority, 'Statistics', https://www.iaa.gov.au/about/statistics
[31] Source: AAT Annual Report 2020-21, https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2020-21-annual-report page 88 and AAT Annual Report 2019-20, https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201920/AAT-Annual-Report-2019-20.pdf, page 68.

Recommendation 4 Abolish the IAA

The Australian Government should abandon the Immigration Assessment Authority and ensure all people seeking asylum have access to merits review through the Administrative Appeals Tribunal.

5 Funding legal representation

5.1 Since 2014 changes have meant that most people who come to Australia without a valid visa, most significantly people seeking asylum, cannot access free government-funded advice and representation, under the Immigration Advice and Application Assistance Scheme, when lodging an application for protection or before the IAA. Those with a valid visa do not have access to government-funded representation at the merits review process.[32]

5.2 This lack of legal representation has direct effects both on the fairness and accessibility of the system, and on its efficiencies. Long delays were caused as people seeking asylum sought help from underfunded specialist legal centres, which were overwhelmed with demand at the same time as their funding was cut. Full representation was mainly replaced by legal clinics, which had an effect on the quality of the applications prepared and created real risks of refoulement.

5.3 Research from Macquarie University researchers shows that in the AAT, applicants were seven times more likely to be accepted if they had legal representation. At the IAA, represented applicants were twice as likely to succeed as unrepresented applicants.

5.4 Unprecedented demand has meant that there are fewer legal representatives attending hearings of the IAA or AAT, leaving many vulnerable people to navigate these systems without help. This is especially significant for those who do not speak English, come from countries with different legal systems or who are suffering mental illness as a result of torture or trauma. This is almost certainly having an impact on the efficiency and quality of decision-making within the tribunals, and is making it extremely difficult to identify jurisdictional errors which may lead to a person being wrongly returned to torture or other serious harm.

5.5 We therefore recommend that funding be reinstated for all people seeking asylum at all stages of the process.

Recommendation 5 Reinstate funded legal advice

The Australian Government should reinstate access to the Immigration Advice and Application Assistance Scheme at both the primary and review stages of the refugee status determination process, at both the AAT and IAA, regardless of how a person came to Australia.

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[32] Andrew & Renata Kaldor Centre for International Law, *Legal Assistance for Asylum Seekers* (Factsheet, 30 November 2015) <http://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>.

6 List of recommendations

Recommendation 1 Increase resourcing of the Migration and Refugee Division

The Australian Government should significantly increase resources to the AAT Migration and Refugee Division in order to address the backlog of protection visa cases. At very least, it should follow the recommendations from the Callinan Review of appointing "no fewer than 15 to 30 Members" to the MRD.

Recommendation 2 Establish an independent appointment body for the AAT

The Australian Government should establish an independent body to make AAT appointments to strengthen the independence of the AAT appointment process and ensure that only relevantly experienced and qualified people are appointed.

Recommendation 3 Publish Statistics

The AAT should publish yearly statistics which set out the decision-making patterns of individual tribunal members in refugee cases. This would include data comparing individual tribunal members overall success rates, and success rates for specific cohorts.

Recommendation 4 Abolish the IAA

The Australian Government should abandon the Immigration Assessment Authority and ensure all people seeking asylum have access to merits review through the Administrative Appeals Tribunal.

Recommendation 5 Reinstate funded legal advice

The Australian Government should reinstate access to the Immigration Advice and Application Assistance Scheme at both the primary and review stages of the refugee status determination process, at both the AAT and IAA, regardless of how a person came to Australia.