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

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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

This data covers the entire caseload of the AAT and IAA with respect to Protection Visa decisions during the

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

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

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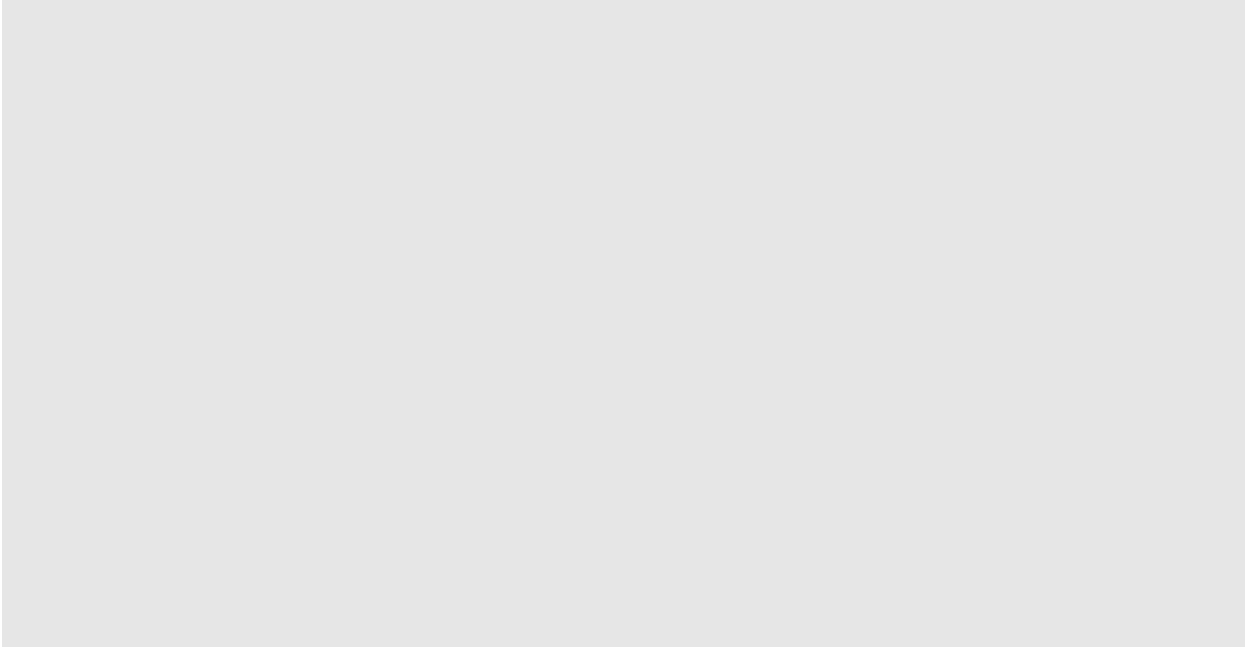
These variations in outcomes may be explained to some degree by the way in which cases are allocated at the AAT. Cases are not allocated randomly, and as such, certain members may be assigned cases with characteristics that have higher or lower chances of success, such as cases from particular countries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

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.

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 rer99.422 0 Td[(o4(r)-6v1

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-

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)	

2010-11	MRT: 255 RRT: 541 (21% AR) Total: 796	MRT: 13% (n=33/252) RRT: 7% (n=40/537) Total: 9%
2011-12	MRT: 263 RRT: 695 (25% AR) Total: 958	MRT: 15% (n=40/259) RRT: 13% (n=86/687) Total: 13% (n=126/946)
2012-13	MRT: 776 RRT: 971 Total: 1747	MRT: 11% (n=87/760) RRT: 17% (n=153/889) Total: 15%
2013-14	MRT: 1715 RRT: 1283 Total: 2998	MRT: 12% (n=174/1414) RRT: 15% (n=120/827) Total: 13%
2014-15	MRT: 1835 RRT: 1489 Total: 3324	MRT: 17% (n=88/507) RRT: 14% (n=37/265) 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) Including, refugee cases: 1455 (290.013 Two55	

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
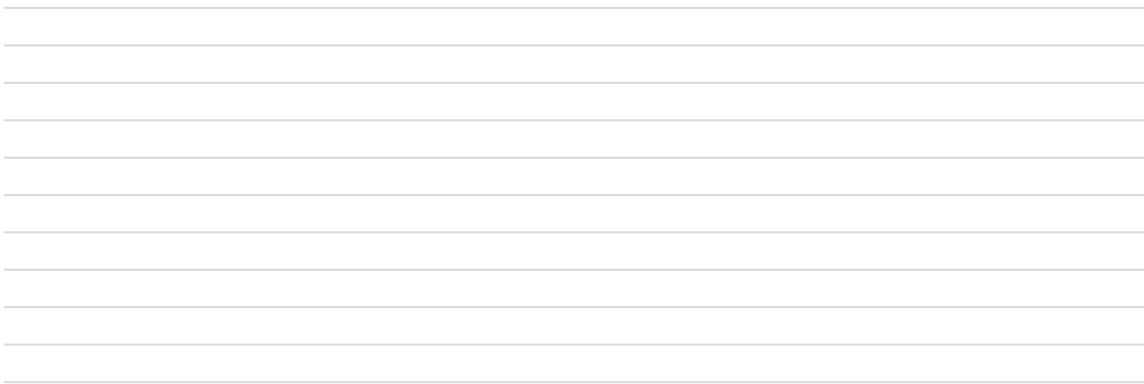
Not only is there no evidence that the code of procedure has reduced legal uncertainties or reduced the number of judicial review applications, but the rigidity of the procedures may be actively contributing to inefficiencies. These limitations resulting from the rigidity of the procedures are set out 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

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[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

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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.

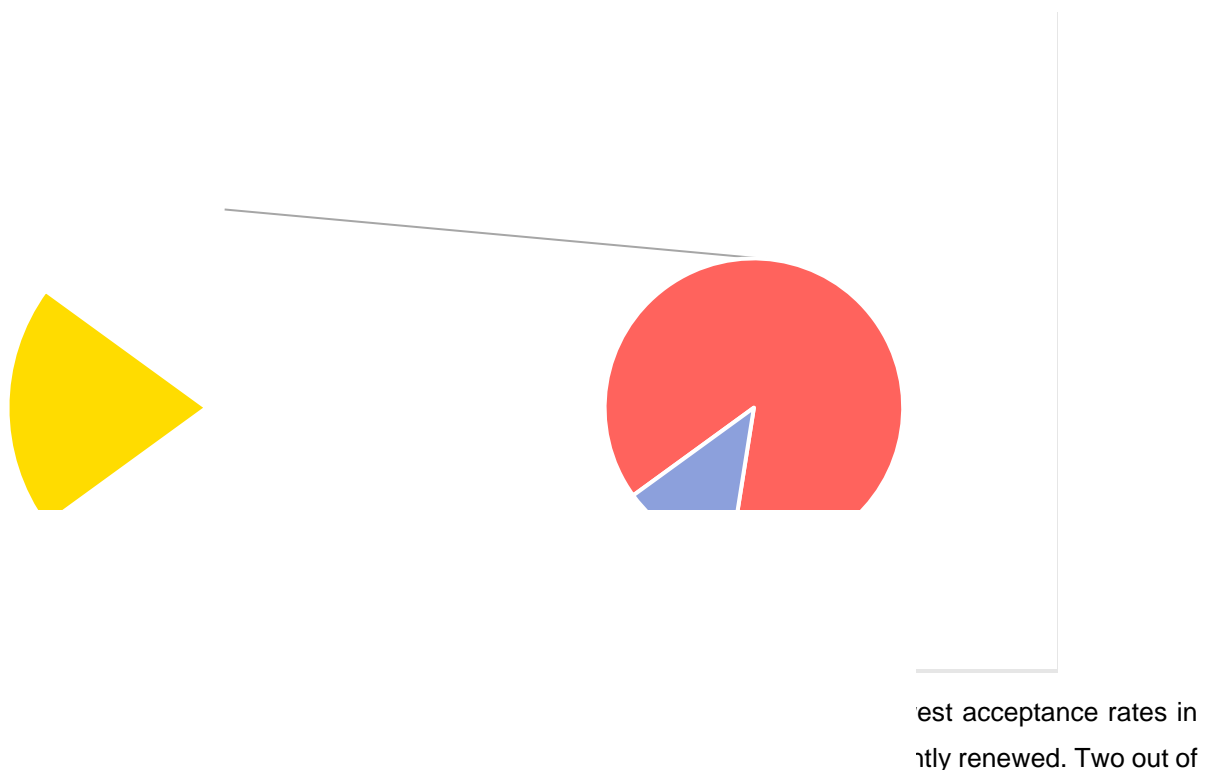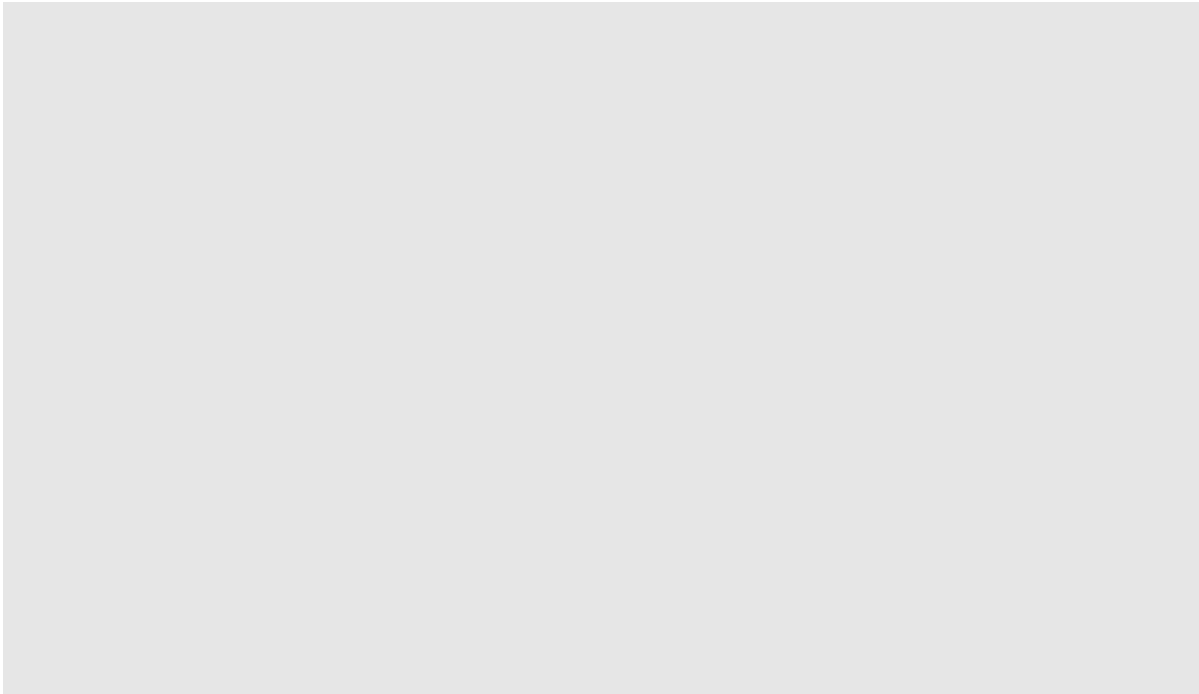**Figure 6. Reappointment of Decision-Makers with the Highest Acceptance Rates**

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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   d[(m10.6   (

The data compiled by the Kaldor Data Lab set out in Section 3 indicates that efficiency measures that focus on reducing procedural and subs