Submission to the Senate Legal and Constitutional Affairs Committee

INQUIRY INTO THE PERFORMANCE AND INTEGRITY OF AUSTRALIA'S ADMINISTRATIVE REVIEW SYSTEM

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1. Introduction

1.1 RACS welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee.

1.2 The Refugee Advice and Casework Service (RACS) provides free legal advice, assistance and representation to financially disadvantaged and vulnerable people seeking asylum in Australia. We advocate for systematic law reform and policy that treats refugees with justice dignity and respect, and we make complaints about serious human rights violations.

1.3 This submission focuses on the independence, procedural fairness and timeliness of Australia's administrative review system and its impact on people seeking asylum in Australia. Our comments on these matters are drawn from our extensive experience working with clients whose protection claims have been reviewed (or are pending review) by the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT) and/or the Immigration Assessment Authority (IAA). Noting the terms of reference for the current inquiry, we express specific concerns on the following:

- preserving the integrity, independence and procedural safeguards of the AAT
- the impacts of delay/prolonged wait times;
- the need for greater resourcing of the MRD and funding of legal representation; and
- the limited review process under the IAA.

2. The importance of preserving the AAT's independence, transparency and procedural safeguards

2.1 The AAT plays a critical role in ensuring access to justice by providing independent merits review on a wide range of decisions made by the Department of Home Affairs. This is especially important in the context of refugee protection claims, given the particular vulnerability of asylum seekers and their potential exposure to harm if errors are made by departmental decision-makers.

2.2 The AAT's current statutory framework, in particular, its adherence to established principles of natural justice is an invaluable safeguard against administrative error, ensuring standards of consistency, transparency and fairness in Government decision-making are maintained. Importantly, with regard to protection visa claims, the AAT affords individuals seeking merits review of Departmental decisions the right to a *de novo* hearing, as well as the opportunity to give fresh evidence and present arguments/submissions before an independent decision maker.

2.3 The independence of the AAT, and its role as an expert body, is integral to ensuring government accountability and access to justice for individuals aggrieved by departmental decisions. This, in turn, bolsters public confidence in government decision-making because it demonstrates (by design) Government commitment to transparency and just outcomes in decision-making.[1]

2.4 RACS is, however, deeply concerned that the performance and integrity of Australia's administration review system is presently being undermined by:

a) the politicisation of the AAT, in particular, the lack of independence and transparency in the selection process of tribunal members;
b) the lack of independent oversight of the function and performance AAT (and IAA);
c) the lack of resources and inadequate staffing levels required to address the large caseload at the MRD and wait times; and
d) the lack of independence and procedural fairness at the IAA.

Independence of Tribunal Appointments

2.5 As Tribunal members are appointed to fixed terms of up to seven years, they are required to seek periodic reappointment by the government of the day as those terms expire.[2] Presently, appointees are selected by the Commonwealth Attorney-General, who is afforded broad discretion in the appointment of tribunal members with limited transparency, or requirements for consultation with independent bodies.

2.6 Bearing in mind that the AAT is a statutory body whose crucial function is to undertake *independent* merits review of Government department decision-makers, RACS considers it wholly inappropriate that the Attorney-General possesses such broad discretion to appoint tribunal members with little oversight and transparency.

2.7 According to recent reports, at least 79 Liberal Party politicians, candidates, staffers and lobbyists, have been appointed as members of the tribunal over the past eight years – many lacking sufficient experience, skill and qualifications suited for the role.[3] The 'political stacking' of Tribunal appointments (by any government) in this manner undermines public confidence in the

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[1] Narelle Bedford, 'AAT: Importance, Independence and Appointments' on AUSPUBLAW (10 April 2019) https://auspublaw.org/2019/04/aat-importance,-independence-and-appointments/..
[2] *Administrative Appeals Tribunal Act 1975* (Cth), ss6-8.
[3] Tom Stayner, Concern as Australia's visa tribunal admits it can't handle backlog of asylum cases, *SBS News* (online, 2 November 2021) https://www.sbs.com.au/news/concern-as-australia-s-visa-tribunal-admits-it-can-t-handle-backlog-of-asylum-cases/5105b0c2-3828-49f9-8af8-0a07da4dc602; Finn McHugh, Senate estimates: Labor attacks Administrative Appeals Tribunal, Coalition over political appointments to the tribunal', *Canberra Times* (Online, 26 October 2021): https://www.canberratimes.com.au/story/7485036/government-grilled-on-stacking-aat-with-political-appointments.

AAT, because it gives rise to legitimate concerns of political influence and bias in members' decision-making. It also means that the Tribunal is not truly reflective of the diversity of the community and its values as a whole. As such, assessments of what is just or reasonable are likely to be skewed, putting at risk confidence in the Tribunal's independence.

2.8 The political appointment of members who lack the requisite degree of experience, qualifications and skills to be competent decision-makers is also highly problematic, given the 'quasi-judicial' function of the Tribunal and legal complexity involved in deciding matters (particularly those in the MRD). The appointment of inexperienced and insufficiently skilled Tribunal members increases the risk of inefficiency and errors being made. For individuals seeking protection in Australia, such errors can mean the difference between life and death.

2.9 Indeed, this problem has manifested at the IAA, where IAA reviewers – in contrast to the AAT – are public servants appointed for a fixed term without any prescribed minimum legal qualifications or skills to undertake merits review. The lack of skilled reviewers and independence at the IAA has unfortunately disadvantaged asylum seekers subject to its 'fast track' process.This is made even more problematic given the heavily curtailed form of review at the IAA (see below) If the objective at the IAA is to ensure speed and inefficiency, it is imperative that only sufficiently skilled individuals reviewers be appointed in order to fulfil that objective. This, unfortunately, is not the case currently.

2.10 Recent data (see paragraphs 3.10-3.13 below) shows that asylum seekers are significantly more likely to have the refusal of their protection claims affirmed by the IAA than at the AAT. The stark differences in the review outcomes at the IAA and AAT (explored further below) legitimizes ongoing concern that errors are being made at the IAA due to the inexperience of reviewers, as well as its lack of procedural safeguards and independence from Departmental decision-makers. As a result, we fear that the IAA 'fast track' system is resulting in asylum seekers being forced to return to countries where they risk persecution and/or serious harm – contrary to Australia's legal obligations. In the circumstances, whilst the IAA may review a larger number of cases than the MRD each year — it is important to bear in mind that this is due to the limited nature of its 'merits review' processes (if one can describe it as such). As explored further below, the IAA's review process has denied procedural fairness and natural justice to asylum seekers in the interests of speed and efficiency. Errors in decision-making are also likely to lead to protracted legal proceedings at a significant cost to the individual and Courts. In the circumstances, in the absence of adequately skilled decision-makers, the IAA is contributing to inefficiencies in our administrative review system. This system has no place in Australia's administrative review system.

2.11 While the workload of the AAT has continued to increase substantially in recent years,[4] RACS echoes concerns that the appointment of unqualified or insufficiently experienced members is currently contributing to the delay and backlog experienced currently at the AAT.[5] We are also troubled at the lack of oversight of tribunal members, which has meant that some paid members have done no work for the Tribunal during their tenure.[6]

2.12 Reform to the AAT's appointment process is critical to not only rebuild public confidence in the independence of the Tribunal's decision, but also improving its efficiencies and reducing current delays.

2.13 In 2018, the Honourable Ian Callinan AC QC, former Justice of the High Court of Australia, completed a comprehensive statutory review (**the Callinan Report**) of the AAT and made a number of recommendations to address ongoing concerns over member appointments.[7] Relevantly, the review recommended that "[a]ll 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 ...*[8]" As regards the qualifications of tribunal members, Callinan observed (pointedly) that '[t]here is, in my opinion, no necessity to appoint professionals other than lawyers to the AAT (except perhaps for accountants to the Taxation and Commercial Division).'[9] RACS echoes these sentiments.

2.14 While RACS does not recommend any particular model for such reform, we do consider a useful starting point to be the Callinan Report and also the 2016 document prepared by the Council of Australasian Tribunals (COAT), *Tribunal Independence in Appointments: A Best Practice Guide*.[10] The suggestions made in the Guide – including a transparent and public process, the explicit exclusion of certain considerations such as political purposes and memberships from the appointments process, and nomination of candidates by an independent assessment panel prior to Ministerial decision-making – would help to mitigate perverse outcomes and increase public

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[4] See Administrative Appeals Tribunal, *Annual Report* 2021-21, 54-61 accessed: https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%E2%80%9321.pdf
[5] See Asylum Seeker Resource Centre (ASRC), Submission to the Senate Legal and Constitutional Affairs Reference Committee to the inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021, accessed: https://asrc.org.au/wp-content/uploads/2021/07/ASRC-Submission-Senate-Inquiry-on-Courts-and-Tribunals-15.7.2021.pdf.
[6] See Finn McHugh, Senate estimates: Labor attacks Administrative Appeals Tribunal, Coalition over political appointments to the tribunal', *Canberra Times* (Online, 26 October 2021): https://www.canberratimes.com.au/story/7485036/government-grilled-on-stacking-aat-with-political-appointments.
[7] I.D.F Callinan, AC, *Review: section 4 of the Tribunals Amalgamation Act 2015 (Cth),* accessed at: https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf.
[8] Ibid, 9 [emphasis added].
[9] Ibid, 175.
[10] Council of Australian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide*, (August 2016) [online] available http://www.coat.gov.au/images/Tribunal-Independence-in-Appointments_COATBestPracticeGuide-2016-Final-web-interactive.pdf

confidence in the appointments process. Unfortunately, the best practice recommendations in the Guide as well as the 2018 Callinan Report were not implemented by the Government at the time nor subsequently. In our view, the failure to implement these recommendations and best practice guidelines has led to the unfortunate situation the AAT is in today.

2.15 Given the current lack of independent oversight of the AAT (including the IAA), RACS supports the re-establishment of the (currently defunct) Administrative Review Council, or a similar independent body, tasked with the responsibility of providing, amongst other things, oversight and review of the federal administrative law system.[11]

2.16 **RACS recommends** that a merits-based, transparent and consultative process be used consistently for all AAT Member appointments and re-appointments, as well as IAA Reviewer appointments and re-appointments. We also urge the explicit exclusion of certain considerations, such as political purposes and memberships, from the appointments process.

Impacts of Delay and Lack of Resources

2.17 RACS is deeply concerned that the MRD-AAT is not sufficiently resourced to process and hear the large volume of protection visa cases that is presently before it.[12] Moreover, RACS is concerned at the lack of transparency over the AAT's member appointment process (as detailed above) and the impact that this, too, is having on the integrity and overall performance of the Tribunal.

2.18 RACS' own experience is that since 2015, it has become increasingly common for applicants at the MRD to be left waiting for a hearing before the Tribunal (and, consequently, a decision on their matter) for between two years and four years.

2.19 Such prolonged wait times have significant impacts on applicants for protection visas who are highly vulnerable and have in many cases been exposed to serious trauma and ongoing physical and psychological harm prior to arriving in Australia. In RACS' experience, prolonged delay in the finalisation of matters, contributes to a lack of certainty over their status in Australia and, for some clients a fear of being returned.[13] This uncertainty feeds into and exacerbates existing

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[11] See Administrative Appeals Tribunal 1975 (Cth), s51
[12] AAT Annual Report above n 4, 9.
[13] See, for example, M A Kenny, N Procter, C Grech, 'Mental Health and Legal Representation for Asylum Seekers in the "Legacy Caseload"', *Cosmopolitan Civil Societies Journal* 2016, 8(2), 84 at 87.
"All reports identify ongoing uncertainty relating to visa status as causing significant mental distress (Fleay et al 2013; Doney 2014; Mares 2014; Australian Red Cross 2013, UNHCR 2013). These findings are consistent with research which links delays in the adjudication of an asylum seeker's claims, the resulting uncertainty and fear of a potentially negative outcome with psychological distress above and beyond the impact of pre-existing trauma (Human Rights First 2016)."

anxiety and mental health concerns. Often so much is riding on the outcome that the uncertainty means there is an inability to make plans regarding reuniting with family, education and employment or housing decisions, which also feeds into applicants' anxiety and depression, as demonstrated in case study 1 below. As non-citizens holding temporary bridging visas, these applicants are also unable to access certain Australian public services that are restricted to permanent residents and/or citizens.

Case Study – Example 1

Angelo left his country of origin to seek asylum in Australia in 2013. Angelo fears harm from authorities in his home country due to his anti-government political opinion. Following refusals by the Department to grant his requests for protection, Angelo lodged a review at the AAT in 2019. He presently suffers mental health issues, including chronic post-traumatic stress, depression and anxiety. The uncertainty and delay in processing his protection application has exacerbated Angelo's underlying mental health conditions. Angelo has limited access to necessary social welfare and support. He is currently homeless and lives periodically in crisis accommodation while awaiting an outcome at the AAT. He is incredibly fearful and anxious at the thought of being returned to his home country.

2.20 In addition, long wait times also increase the time before family members can be sponsored and reunited, and also increase the time before citizenship can be applied for, if the initial protection visa is granted, as noted in the case studies below.

2.21 Historically, the AAT has been able to cure clear errors by the Department in a timely fashion to minimise the harm they cause. Currently, extended waiting times at the Department also and inconsistent decision-making means people seeking asylum effectively wait for 7 or more years for a meaningful hearing that will be scrutinised by judicial review. Given the current politicisation of the AAT and its partisan appointment process, RACS is deeply concerned that this long, painful wait will not lead to a fair hearing. If not deliberately cruel, the consequences are nonetheless devastating, as noted in the case studies below.

Case Study – Example 2

Tedros escaped from his country of origin in 2015, leaving behind his wife and children, because he feared he would be persecuted due to his political opinion and activities there. He applied for a Protection Visa in Australia which was refused in 2018. Though the Department Officer believed Tedros' evidence, he misinterpreted information provided and thought his safety was at lower risk than it was, and that the political situation in his country of origin was more stable than when he first arrived in Australia. Tedros applied to the AAT for a review of the decision in early 2018. In 2020, conflict broke out in his country of origin putting Tedros' family in danger. Tedros remained concerned for his family's safety. Despite the vulnerable situation of his family, Tedros was unable to sponsor them to come to Australia while on a Bridging Visa. He asked to have his hearing expedited and even requested to waive his right to a hearing at the AAT to expedite the process so that he could sponsor his family (if protection was granted). A request for expedition to the AAT went unread. He has been told he will need to wait another 2 years before his case would be heard. Tedros is anxious and remains torn between whether he should remain in Australia to secure his and his family's protection in the long-term, or put his life at risk by returning to his country of origin to physically protect his family during the conflict.

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Case Study – Example 3

Zheng came to Australia in order to escape political persecution in his country of origin. He applied for a protection visa in 2016. His application was however, refused in 2016 because the case officer at the Department claimed that he had not provided sufficient evidence to support that the type of persecution he feared existed in his country of origin. This conclusion was reached despite him including in this application a detailed contemporaneous report by Human Rights Watch detailing the type of persecution he faced. Zheng has been waiting for a hearing at the AAT since 2018. He does not know when he will see his wife and child who he was forced to leave behind.

2.22 Delay in processing of cases at the MRD is also problematic because of the considerable cuts made in 2014 to the Immigration Advice and Application Scheme (IAAAS). The lack of available legal assistance for asylum seekers in Australia not only disadvantages those who are unable to afford legal representation, but is also likely to exacerbate delay at the AAT by creating more workload for members. Bearing in mind the importance of legal representation to facilitating access to justice, RACS is concerned by the large number of unrepresented applicants who appear before the AAT. Research undertaken by Associate Professor Daniel Ghezelbash at Macquarie University of 18,196 cases of asylum seekers who had their cases reviewed by the AAT between January 2015 and December 2019 showed that 52% did not have representation

when they appeared before the AAT. [14] Of this cohort, only 4% of unrepresented applicants were successful at the AAT. This figure rose to 28% when the applicant had secured legal representation.[15] These findings strongly suggest that cuts to the public funding of free legal advice is severely disadvantaging applicants at the AAT who are unable secure legal representation. The current lack of funding not only impacts the success rate of unrepresented applicants negatively but also increases the workload of tribunal members – since they are likely to spend more time case managing unrepresented litigants than those who have legal representation. The only way forward to address this issue is to provide greater funding for individuals who cannot afford legal representation.

2.23 The considerable delay at the MRD must be reduced. At a bare minimum, this will require: investment in greater resources to boost staffing levels and capacity for high-quality decision-making at AAT; increased support for current members to ensure cases are processed within a reasonable time; the implementation of a transparent merits-based appointment process (see above); and greater funding being made available to individuals seeking protection in Australia who cannot afford legal representation at the AAT.

2.24 **RACS recommends** that the above steps be taken, and supports calls made by AAT President, Justice David Thomas, for the MRD-AAT to receive additional financial support and resources, including increases to its member appointments through an independent process and staffing levels, to allow cases to be finalised in a reasonable timeframe. In addition, RACS also strongly recommends that greater funding be provided to individuals who cannot afford legal representation. We also support the establishment of an independent body to provide oversight over the AAT and its functions.

3. Immigration Assessment Authority (IAA) – Denying Access to Justice

3.1 RACS is incredibly concerned by the lack of procedural safeguards available at the IAA, and the impacts that this is having on the quality of decision-making, when compared to the AAT.

3.2 The IAA – which was established under Part 7AA of the Migration Act 1958 (Cth) as an independent authority housed within the MRD – offers a heavily restricted form of 'merits review' for certain categories of asylum seekers. This system, which was introduced in 2014 via the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), was initially designed for so-called "fast-track" applicants; largely individuals who arrived in Australia between 13 August 2012 and 1 January 2014 by boat and, when permitted, applied

[14] Daniel Ghezelbash 'How refugees succeed in visa reviews: new research reveals the factors that matter', *the Conversation* (10 Mach 2020) accessed: https://theconversation.com/how-refugees-succeed-in-visa-reviews-new-research-reveals-the-factors-that-matter-131763
[15] Ibid.

for Temporary Protection Visas or Safe Haven Enterprise Visas in Australia. However, the process has since been expanded to apply to other categories of asylum seekers who arrive in Australia without a valid visa.[16]

3.3 In effect, the establishment of the IAA has resulted in the (unjust) bifurcation of merits review for protection visa applicants in Australia based on their mode of arrival. While asylum seekers who arrive in Australia with a valid visa are entitled to merits review through the AAT (including a *de novo* hearing and ability to submit fresh evidence), individuals who arrive irregularly (that is, without a valid visa) or who otherwise do not pass immigration clearance at the airport, are denied access to the AAT and instead are subject to a severely limited form of merits review under the IAA (as outlined below).

3.4 Although the IAA shares some features with the broader MRD-AAT (i.e. the IAA conducts merits review of similar protection visa categories resulting in the application of similar underlying laws regarding protection visas), its objectives and merits review processes differ fundamentally from the MRD in a number of ways.

3.5 In the pursuit of expediency, Part 7AA has radically confined obligations for IAA decision makers to observe rules of natural justice by way of an exhaustive statement of the natural justice hearing rule applicable to the IAA.[17] This in almost all cases excludes the IAA from an obligation to invite an applicant to an interview before a Department decision can be affirmed, and generally confines the nature of IAA review to the same material that was before the primary decision-maker. In this regard, the IAA generally: does not hold interviews;[18] does not seek new information from a fast track review applicant;[19] and is not permitted to consider new information provided by the fast track review applicant, other than in accordance with section 473DD, which includes a requirement that the IAA must be satisfied that there are 'exceptional circumstances' to justify considering new information.[20]

3.6 Another concerning feature of the IAA is the absence of fairness and the pursuit of just outcomes in its statutory mandate. Relevantly, in contrast to the MRD-AAT, which must "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick"[21] and act "according to the substantial justice and merits of the case"[22] – the IAA's statutory

[16] See Migration Act 1958, s 5(1); Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) – 19/007 (Cth) F2019L00506 (26 March 2019) https://www.legislation.gov.au/Details/F2019L00506.
[17] *Migration Act 1958* (Cth), s473DA.
[18] *Migration Act 1958* (Cth), s473DB(1)(b).
[19] *Migration Act 1958* (Cth), s473DC(2); 473DB(1)(a).
[20] *Migration Act 1958* (Cth), s473DB(1)(a).
[21] *Administrative Appeals Tribunal Act* 1975 (Cth), 2A
[22] *Migration Act 1958* (Cth), s420.

mandate requires only that it undertake merits review that is "efficient, quick, free of bias and consistent with Division 3 (conduct of review) [of Part 7AA]."

3.7 Whilst efficiency in decision-making is certainly a factor which must be taken into account in the promotion of access to justice, it is not an end itself, and should never usurp the object of achieving fairness and just outcomes for individuals seeking merits review.

3.8 The IAA's curtailment of natural justice principles represents a significant and deeply concerning departure from accepted common law precepts of merits review afforded under Australian law. In this regard, RACS notes and echoes concerns raised prominent administrative law academics[23] and the Federal Court of Australia about the efficacy of the IAA's review processes in contrast to merits review afforded by the AAT. In *BM16 v Minister for Immigration and Border Protection*, for instance, the Court observed that: "*The form of review tasked to the Authority under Pt 7AA of the Act lacks features that might be considered desirable or optimal when compared with the form of merits review that has become familiar since the introduction of the AAT."*[24]

3.9 Since prior to its inception in 2014, RACS has raised repeated concerns over the IAA and the efficacy of its method of limited review, given the vulnerability of individuals whose applications come before it and the complexity of such review in the context of refugee status determination.[25] In RACS' experience – which is also borne out by recent data (see below) and academic research– the lack of procedural safeguards available at the IAA (compared to the AAT) significantly impacts the quality of decision-making and therefore, increases the risk that Australia will return asylum seekers to countries where they face persecution due to the inadequacies of the 'fast track' merits review process.

3.10 Relevantly, recent caseload data obtained from the IAA confirms that asylum seekers governed by the 'fast track' system under the IAA are significantly more likely to have the refusal of their protection claims affirmed by the IAA than at the AAT.[26] In Table 1 below we have set out the

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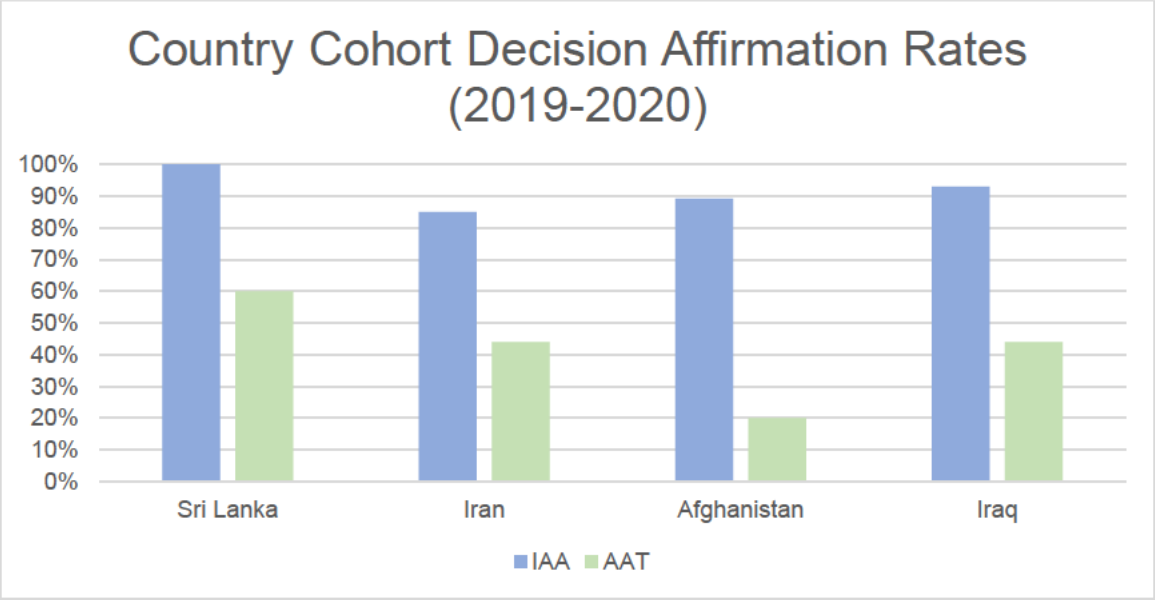
[23] Joel Townsend and Hollie Kerwin, 'Erasing the Vision Splendid? Unpacking the Formative Responses of the Federal Courts to the Fast Track Processing Regime and the 'Limited Review' of the Immigration Assessment Authority (2021) 49(2) *Federal Law Review* 185-209; Emily McDonald and Maria O' Sullivan 'Protecting vulnerable refugees: Procedural Fairness in the Australian Fast Track System' (2018) 41(3) UNSW Law Journal, 1003 – 1043.
[24] (2017) 253 CR 448, 473 [91].
[25] See Refugee Advice and Casework Service (RACS), Submission No 134 to Senate Legal and Constitutional Affairs Committee *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, 31 October 2014; RACS Submission to the Hon Ian David Francis Callinan AC QC, *Statutory Review of the Administrative Appeals Tribunal's Amalgamation Act 2015*, 24 August 2018.
[26] Immigration Assessment Authority (IAA) *Caseload Report 2018-19* (2019) 2 accessed at https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2018-19.pdf; IAA *Caseload Report 2019-20* (2020) 2 accessed at https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2019-20.pdf;Immigration Assessment Authority *Caseload Report 2021-22* (2021) 2 accessed at

differences in affirmation rates for the AAT and IAA over the period 1 July 2019 - 30 June 2020 in relation to applicants from the top 4 source countries at the IAA. These countries are also widely accepted as having strong refugee claims. Table 2 sets out the raw data obtained from which those percentages have been calculated.[27] As demonstrated by these comparisons, the IAA's review of protection claims by applicants from countries such as Afghanistan, Iran, Iraq and Sri Lanka demonstrates a stark variance when compared to outcomes at the AAT.

3.11 For instance, in 2019-20, the IAA affirmed 89% of Departmental decisions refusing applications from Afghan asylum seekers, while the AAT affirmed only 20% of Departmental decisions. This discrepancy is not, however, a statistical anomaly. Similarly, high affirmation rates at the IAA were found across several other source countries, including Iran, Iraq and Sri Lanka. By comparison, the AAT had much lower percentage rates of affirmation.

Table 1: IAA vs AAT Affirmation Rates: 1 July 2019- 30 June 2020[28]



https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2021-22.pdf. Cf Administrative Appeals Tribunal (AAT) *MRD refugee caseload summary by country of reference* (2020) 1, 3, and 5 accessed at https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-refugee-caseload-statistics-2019-20.pdf

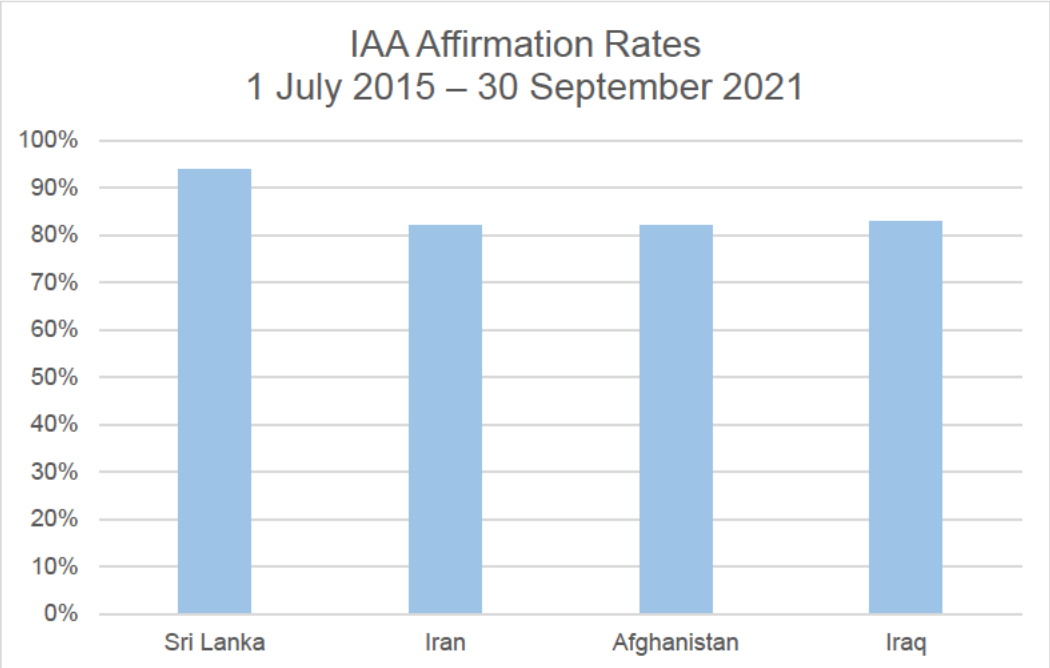
[27] Ibid.

[28] Table 1 is a visual representation of the percentage rates calculated from statistics/data obtained in the IAA and AAT annual reports: IAA *Caseload Report 2018-19* above n 26; *Caseload Report 2019-20,* above n 26; and AAT-*MRD refugee caseload summary* above n 26. The source data used to prepare Table 1 is set out in Table 2.

Table 2 – Data of Cases: 1 July 2019 – 30 June 2020[29]

Country Cohort	Number of IAA Decisions	Number of IAA Decisions Affirmed	% of IAA Decisions Affirmed	Number of AAT Decisions	Number of AAT Decisions Affirmed	% of AAT Decisions Affirmed
Sri Lanka	458	458	100%	55	33	60%
Iran	403	342	85%	57	25	44%
Afghanistan	71	63	89%	25	5	20%
Iraq	88	82	93%	52	23	44%

Table 3: IAA Affirmation Rates for Selected Country Cohorts: 1 July 2015 to 30 September 2021[30]



[29] Table 2 has been prepared using source data from the IAA and AAT, as referred to above at n 26. The IAA does not publish a breakdown of its annual caseload figures but does provide an annual cumulative sum from its inception in 2015 to the date of publication. In the circumstances, the IAA annual figures referred to in Table 2 (for the period 1 July 2019 to 30 June 2020) have been calculated by deducting the cumulative number of IAA decisions/affirmations (by reference to country of origin) for the reporting period 2015-2019 from those reported over the reporting period 2015-2020.

[30] This graph sets out the cumulative affirmation rates at the IAA for the period 2015 – 2021: see IAA Caseload Report 2021-22 (2021) 2 accessed at https://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2021-22.pdf.

3.12 The stark difference between affirmation rates (and correspondingly low remittal rates) at the IAA compared to the AAT demonstrates that the insufficiency of procedural safeguards and quality of decision-making at the IAA significantly disadvantages protection visa applicants subject to the 'fast-track system.

3.13 Further, the fact that the IAA has maintained comparatively high rates of affirming Department decisions since 2015[31] perpetuates concern that decision-making at the IAA appears to be 'little more than a rubber stamp' of the Department's primary decision under review.[32]

3.14 It is worth noting also that the so-called 'fast-track' system of limited review at the IAA is actually increasing the workload at the Federal Court given the high number of appeals that come before it. This belies its purported objective for speed and efficiency. RACS also draws attention to analysis undertaken by the Refugee Council of Australia in its submission to this inquiry which shows that a significantly large proportion of cases which have been reviewed at the IAA have been successful on appeal.[33]

3.15 **RACS strongly recommends** that the IAA and its legislated truncated form of review be abolished and its current and prospective caseload transferred to the MRD for proper merits review. It is an unfair and arbitrary review procedure that significantly disadvantages (and contrary to Australia's international obligations)[34] penalises protection visa applicants subject to the system based on their mode of entry.

4. Conclusion / Recommendation

4.1 RACS recognises and commends the critical role the AAT plays in affording asylum seekers procedural fairness and access to justice when seeking merits review of Department decisions.

4.2 That said, the integrity and independence of merits review at the AAT is under serious threat from ongoing politicisation. This is further exacerbated by the AAT's current lack of funding and resources to address its caseload and current delays. In summary, RACS supports reform that will ensure:

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[31] See Table 3.
[32] Chris Honnery, *The Immigration Assessment Authority and the Erosion of Fairness in Australia's Refugee Framework,* Border Criminologies Blog *(University of Oxford):* https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/12/immigration
[33] See Refugee Council of Australia, Submission to the Senate Legal and Constitutional Affairs Reference The Performance and Integrity of Australia's review system review system (26 November 2021),11-13.
[34] Article 31(1) of the *1951 Convention relating to the Status of Refugees* (Refugee Convention) states: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

- tribunal members are appointed on a non-partisan basis;
- only qualified legal practitioners with the necessary experience and skills be eligible for appointment (see paragraphs 2.12 and 2.15)
- greater oversight at the AAT of its review and appointment processes (see paragraph 2.14)
- increased funding and support is provided to facilitate the efficient management of the AAT's caseload and reduction in delay (see paragraphs 2.23 - 2.24);
- greater funding is provided to individuals who cannot afford legal representation at the AAT (2.22 - 2.23)
- the preservation of existing procedural safeguards including the right to a *de novo* hearing before an independent decision-maker (see paragraphs 2.2- 2.3);
- the IAA system of review be dismantled and all "fast track" applicants be permitted to have their applications dealt with in the MRD (see paragraph 3.15).

3.16 Whilst RACS supports improved efficiencies AAT, this can only be meaningfully achieved through the implementation of the above measures.

3.17 Moreover, RACS considers the availability of greater funding for legal representation to be imperative in restoring public confidence and accountability in the Tribunal – not only will it improve access to justice for litigants (as recent studies demonstrate), but it will also assist the Tribunal run more efficiently and reduce delay.

3.18 Finally, we reiterate that while efficiency and speed in decision-making is a key factor in facilitating access to justice, it is not an end itself, and should not usurp the object of achieving fair and just outcomes for individuals seeking merits review. This is especially true for asylum seekers for whom the stakes are incredibly high.

3.19 The Government must act promptly to restore public confidence in decision making at the AAT through the urgent implementation of the above recommendations.

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