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## **Submission to the Independent Review of the National Legal Assistance Partnership (2020-2025)**

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

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#### **1. Introduction**

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 procedures. The data currently covers over 40,000 cases finalized by the Administrative Review Tribunal and Immigration Assessment Authority, as well as judicial review of refugee cases by the Federal Circuit and Family Court.

Data on the need and effectiveness of legal representation is not readily available in Australia. At the Kaldor Centre Data Lab, we have access to data on the number of asylum seeker applicants before the AAT and the Federal Circuit and Family Court who were represented, and their outcomes. As a disadvantaged group, in which incorrect decisions involve the risk of returning individuals to situations where they face harm, or even death, the significance of accessible and effective legal assistance is of utmost importance.

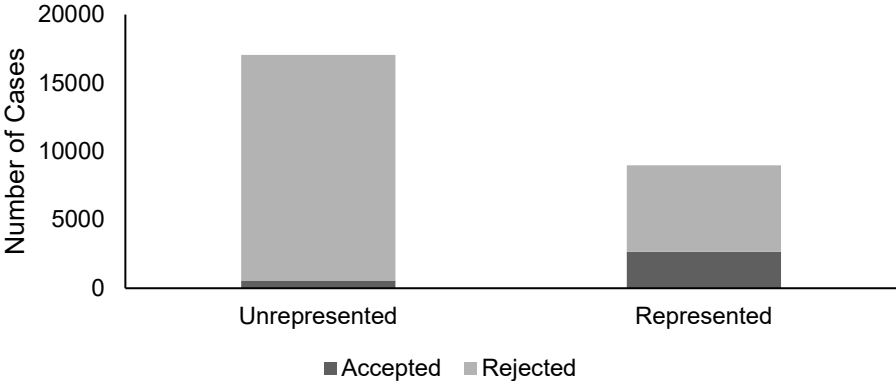
Therefore, the purpose of these submissions is to provide detailed statistical insights on the extent of unmet legal need and the impact of access to legal representation for asylum seeker applicants, addressing item 1(c) and 2 of the scope of review, as well as the role that technology can play in data collection and evaluation.

#### **2. Insights from the data from the AAT**

The Kaldor Data Lab currently has data on 26,036 Protection Visa decisions made by the AAT from 1 January 2015 to 18 May 2022. This is the entire caseload of the AAT with respect to Protection Visa decisions during the respective periods and was obtained through freedom of information requests to the AAT.

At the AAT, representation by a lawyer or migration agent appears to significantly correlate with an applicant's chances of success. Overall, 34% of applicants at the AAT had legal representation. On average, applicants with legal representation at the AAT were 10 times more likely to succeed than self-represented applicants. Self-represented applicants were successful in just 3% of cases (being 562 out of 17,055 applications), whereas represented applicants were successful in 30% of cases (being 2,674 out of 8,981 applications).

### Success of unrepresented and represented applicants at the AAT



As there are multiple factors beyond legal representation that may contribute to the outcome of a case, we conducted logistic regression analysis to control for a variety of other relevant variables. We found that applicants who were represented by a lawyer or migration agent were still 5.32 times more likely to succeed than those without representation at the AAT (95% CI [4.69, 6.03]), controlling for all other variables we had reliable data on (namely, the country of origin of the applicant, the individual decision-maker, their gender and date of appointment, and the political party that appointed the decision-maker).

### 3. Insights from the data from the Federal Circuit and Family Court

The Kaldor Data Lab has also collected and analysed data on 6,756 applications for judicial review of refugee cases in the Federal Circuit and Family Court of Australia from 1 January 2013 to 11 March 2021.<sup>1</sup> These cases were drawn from the Australasian Legal Information Institute ('AustLII') database, which contains the complete record of the Court's published decisions.

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<sup>1</sup> For a more detailed analysis of this data, see Daniel Ghezelbash, Keyvan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *UNSW Law Journal* 914: <https://doi.org/10.53637/TCNQ8226>.

40.5% of applicants in the dataset had some form of legal representation (with the presence of a solicitor and/or barrister), 54.6% of applicants were self-represented, 4.3% made no appearance. The statistics show that applicants with legal representation were on average six times more likely to succeed than self-represented applicants. Self-represented applicants were successful in judicial review in just 89 cases out of 3,698 cases. In contrast, represented applicants were successful in 430 cases out of the 2,764 cases. A chi-square test of interdependence confirms that there is a significant association between having legal representation and having a positive outcome,  $\chi^2(1, N = 6080) = 375, p < 0.001$ . The effect size was small (0.248).

#### 4. Evidence on the broader benefits of legal representation

This data contributes to a rich body of existing literature that documents the importance of access to representation for asylum seekers and refugees. Some of the discrepancy between success rates for represented and unrepresented applicants may be attributable to the screening process that prospective representatives undertake before accepting a case. This creates some selection bias in our data, with those with significant prospects of success more likely to secure representation, than cases with lower chances of success. However, there is a robust body of evidence from other jurisdiction that demonstrates that access to legal representation increases both the fairness and efficiency of refugee status determination procedures. In Canada, recent studies have emphasised that legal representation, and in particular quality legal representation, is one of the most significant factors in the efficient and fair determination and review of refugee status decisions.<sup>2</sup> Similar studies in the United States have analysed immigration court data, finding that legal representation is the greatest predictor of an asylum seeker's success before the courts. Representation, they found, not only supports asylum seekers to have their claims heard meaningfully, but is crucial to the efficiency of the asylum system: represented applicants were less likely to bring unmeritorious claims and more likely to appear at future hearings.<sup>3</sup> Likewise, in the United Kingdom, research has linked legal representation to positive effects on both the accuracy of asylum decisions and the efficiency of asylum procedures.<sup>4</sup>

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<sup>2</sup> Craig Damian Smith, Sean Rehaag and Trevor Farrow, *Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System* (2021), 28-9; Jamie Chai Yun Liew et al, 'Not Just the Luck of the Draw? Exploring Competency of Counsel and Other Qualitative Factors in Federal Court Refugee Leave Determinations (2005-2010)' (2021) 37(1) *Refugee* 61, 70; Nicholas Fraser, 'More than advocates: Lawyers' role in efficient refugee status determination' (2022) 65(2) *Canadian Public Administration* 647, 664. See, also, Sean Rehaag, 'The role of counsel in Canada's refugee determinations system: An empirical assessment' (2011) 49 *Osgoode Hall LJ* 71, 116.

<sup>3</sup> Andrew Schoenholtz and Jonathan Jacobs, 'The state of asylum representation: Ideas for change' (2002) 16(4) *Georgetown Immigration Law Journal* 739, 743-4, 764; Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, 'Refugee roulette: Disparities in asylum adjudication' (2007) 60 *Stan. L. Rev.* 295, 340; Ingrid Eagly and Steven Shafer, 'A national study of access to counsel in immigration court' (2015) 164 *U. Pa. L. Rev.* 1, 2, 9.

<sup>4</sup> Emma Jane Borland, 'Fairness and the right to legal aid in asylum and asylum related cases' (2016) 2(3) *International Journal of Migration and Border Studies* 245, 246, 262; Sonia Morano-Foadi et al, 'The Stratification of Rights and Entitlements: Access to Residency, Welfare and Justice by Migrants in the UK' in Marie-Claire Foblets and Jean-Yves Carlier (eds) *Law and Migration in a Changing World* (Springer, Cham, vol 31, *Ius Comparatum - Global Studies in Comparative Law*, 2022) 723, 740-2.

## **5. Technology and data collection**

New technologies provide opportunities to address the current gap in evidence around the scale of unmet legal need, as well as the effectiveness of legal representation and related funding models. For example, in our research on the judicial review of refugee cases used computational methods to extract data from published cases, allowing us to identify the percentage of applicants who had access to legal representation, and the correlation between the presence of legal representation and the outcome of the case. With adequate funding and resources, there is scope to use similar tech-enabled approaches to extract similar insights across other areas of legal decision-making. In this regard, we endorse the recommendations made in the submission by the Access to Justice Technology Network for the need for greater investment in technology and innovation in the access to justice sector.