COMMONWEALTH OMBUDSMAN

An analysis of assessments by the Ombudsman under s 486O of the *Migration Act 1958* sent to the Minister for Immigration and Border Protection in 2016-17

Commonwealth Ombudsman

August 2017

Contents

Executive Summary

The Ombudsman provides an assessment to the Minister for Immigration and Border Protection (the department) on all people who have been in immigration detention for more than two years, and every six months after that time if they remain in detention. The Minister tables a de-identified copy of each assessment in parliament.

2016-17 saw 1325 s 486O assessments[1] tabled in parliament by the Minister, an increase of 35% from the previous year[2]. This was the highest number of assessments prepared for the Minister by the Ombudsman's Office (the Office) since the statutory reporting function commenced in 2005.

This increased workload has had an impact on some aspects of the timeliness of the Office's statutory reporting functions. Specifically more time was taken in 2016-17 than 2015-16 to prepare the first assessment for an individual or family group, as well as between the receipt of a s 486N report and the tabling of a s 486O assessment.

While the number of people that we were able to interview prior to preparing their report was slightly higher than in the previous year, the number of people not interviewed increased by 444.

This year's analysis again shows that the majority of people in detention for more than two years are asylum seekers who arrived in Australia by sea. The number of people who have had their visa cancelled under s 501 of the *Migration Act 1958* has increased slightly and this trend is likely to continue. These people have been assessed as not passing the character test.

The number of people reported on who have now been released from detention increased considerably from the previous year. We anticipate this trend will continue as the department continues with its processing of the protection claims of asylum seekers.

The Ombudsman made a similar number of recommendations to the Minister in 2016-17 as in the previous year. We continue to monitor the Minister's response to these recommendations and where appropriate follow this up in subsequent assessments. The recommendations included those that were specific to an individual, for example relating to placement in the detention network or medical treatment, and those that relate to a broader cohort of people such as those who have not yet had the s 46A bar lifted by the Minister.[3]

This is the first year in which we have reported on the cohort of individuals and families who have been returned to Australia from a Regional Processing Centre (RPC) for medical treatment. It is of concern to the Ombudsman that in most cases, for medical reasons, these people are not able to be returned to an RPC and are also not able to have their claims for protection assessed in Australia. The Ombudsman notes the desirability that a durable immigration solution be found for this cohort of people.

[1] In this analysis reports by the Ombudsman to the Minister are referred to as s 486O assessments, referring to the section of the Act under which they are created. Likewise, reports received from the department are referred to as s 486N reports.

[2] Nearly 200 of these assessments would have been tabled in 2015-16, however due to Parliament being prorogued when the federal election was called, they were held over to 2016-17.

[3] Asylum seekers who arrive in Australia by sea are subject to a bar under s 46A of the Act that prohibits them from lodging a valid application for a visa. This bar can be lifted only by the Minister.

Introduction

Background

Section 486N of the Act requires the Secretary of the Department of Immigration and Border Protection to send to the Ombudsman a report relating to the circumstances of a person's detention for every person who has been in immigration detention for more than two years, and every six months thereafter, even if the person is no longer in detention. This report is to be sent to the Ombudsman within 21 days after the detention reporting time.

The Ombudsman, under s 486O of the Act, is then required to report to the Minister, giving an assessment of the appropriateness of the arrangements for the detention of the person. While there is no statutory requirement for the Ombudsman to submit an assessment to the Minister within a specific timeframe, the Office has a key Performance Indicator that 80% of assessments will be sent to the Minister within 12 months of a report being received from the department. In 2016-17 we achieved a figure of 83%.

A de-identified copy of the assessment is to be tabled in parliament by the Minister. Such assessments may include recommendations. The Act states that the Minister is not bound by a recommendation made by the Ombudsman.

Analysis of 2016-17 assessments

This is an analysis of all assessments sent to the Minister and tabled in parliament in 2016-17 and draws on similar data as the analyses for previous years that are published on the Ombudsman's website.

In 2016-17 a total of 1,325 s 486O assessments for individuals and family groups were sent to the Minister and tabled in parliament. These 1,325 assessments covered 2,125 people.

As in previous years, this analysis looks at both the administrative processes within the Office in preparing these assessments and the processes involved for people claiming protection in Australia. However this year we have not included details of those who have applied for a Protection visa, and the various reviews undertaken by unsuccessful applicants.

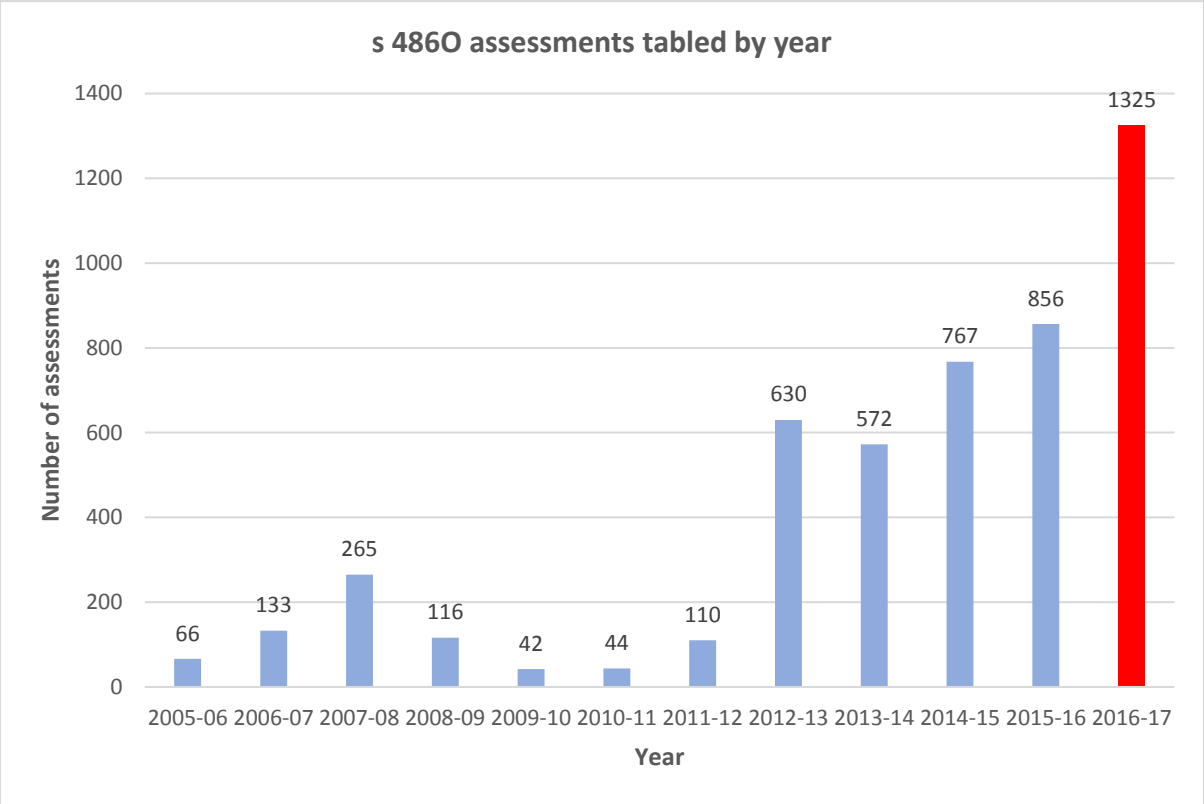
Changes in government policy have meant that there have been very few Permanent Protection visas applied for and the small number of applicants that we provided an assessment for is insufficient to be able to observe any significant trends. However people are now able to apply for Temporary Protection visas (TPV) or Save Haven Enterprise visas (SHEV) and we have included details of these for the first time.

The Ombudsman's s 486O assessments

In 2016-17 the highest number of s 486O assessments was tabled in Parliament since the statutory reporting function commenced in 2005, exceeding the previous highest figure in 2015-16.

Figure 1 shows the number of s 486O assessments tabled in each financial year from 2005-06.

Fig 1



It had been anticipated that with arrivals of asylum seekers coming by sea ceasing in mid-2014 and the ongoing release of people from detention there would be a gradual decline in the number of people subject to reporting under s 486O in 2016-17, however this did not eventuate. The number of new reports being received from the department remains steady and is likely to continue at a similar level for the next 12 months.

Assessment type – first and subsequent assessments

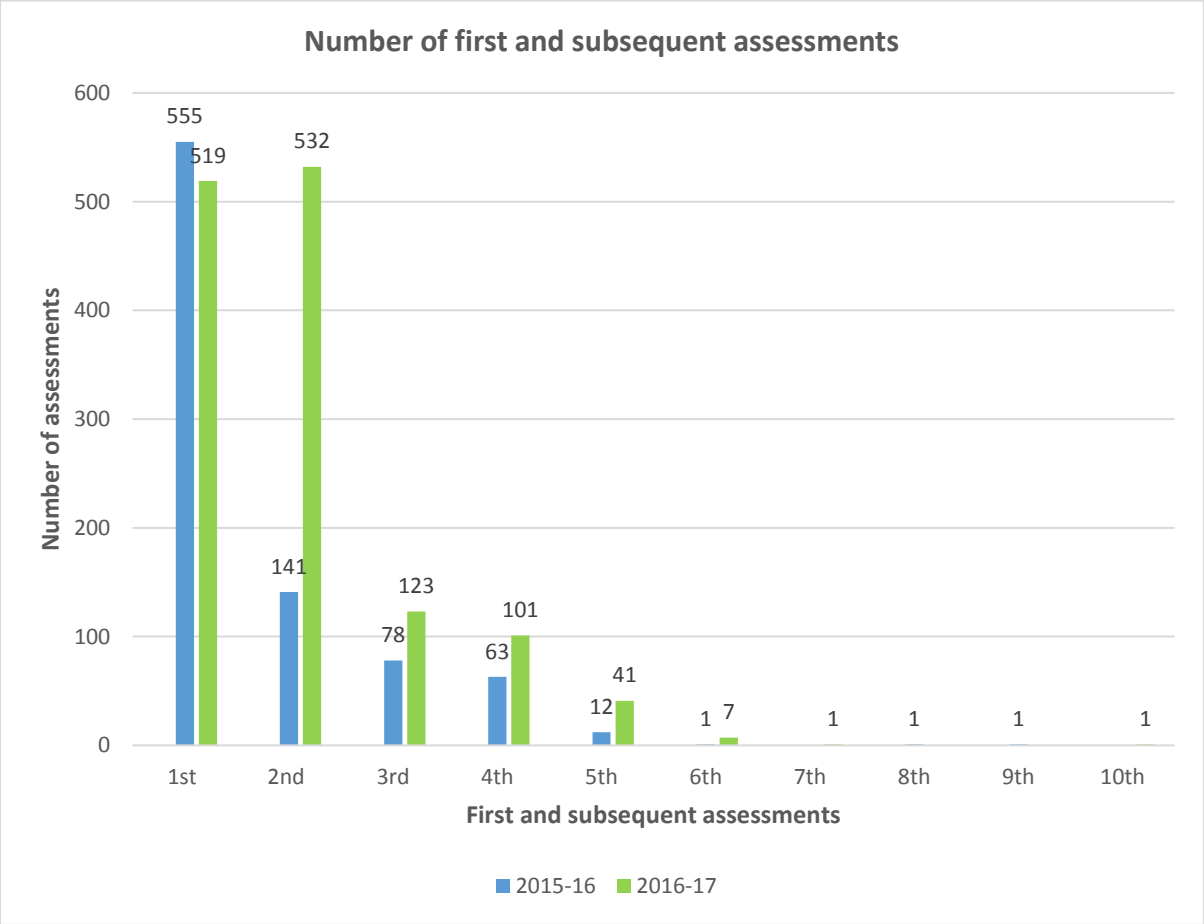
The Ombudsman is required to assess the circumstances of a person's detention after they have been in detention for 24 months (first assessment) and every six months (subsequent assessment) thereafter, until they are released from detention.

Figure 2 shows the number of first and subsequent s 486O assessments tabled in 2016-17, and the comparative figure from 2015-16. The most notable change from 2015-16 is the increase in the number of second assessments, increasing from 141 to 532 in 2016-17.

Further, for 2016-17, 87% are either first, second or third assessments. This compares with 90% for the previous year.

The number of people for whom a fifth or further subsequent assessment is required remains low and represents those people for whom no resolution of their immigration status is readily apparent. These people are also reflected in figure 18 which shows the length of time spent in detention.

Fig 2



Timeliness of assessments

There are four general measures of timeliness for the production of s 486O assessments by the Office. These are:

1. the interval between the receipt of the first s 486N report for a person and the time the first s 486O assessment is tabled in parliament
2. the interval between tablings for those people who require subsequent s 486O assessments
3. the interval between the receipt of the latest s 486N report (which may be a first or subsequent report) and the s 486O assessment being tabled; and
4. the number of s 486N reports that are referenced in each s 486O assessment.

The Office gives priority to preparing s 486O assessments for people in detention, particularly those held in immigration detention facilities, over people who have been granted a visa and released from detention, who have been removed from Australia, or are held in concurrent detention in correctional facilities.

It should be noted in relation to points 1-3 above that in some instances there can be a period of two to three months between the time a s 486O assessment is sent to the Minister and when it is tabled in parliament, particularly if parliament is in recess at the time the assessment is sent.

As the Act requires s 486O assessments to be tabled within 15 sitting days of being received by the Minister, the date of tabling and the period between tablings for subsequent assessments is influenced by parliament's sitting calendar.

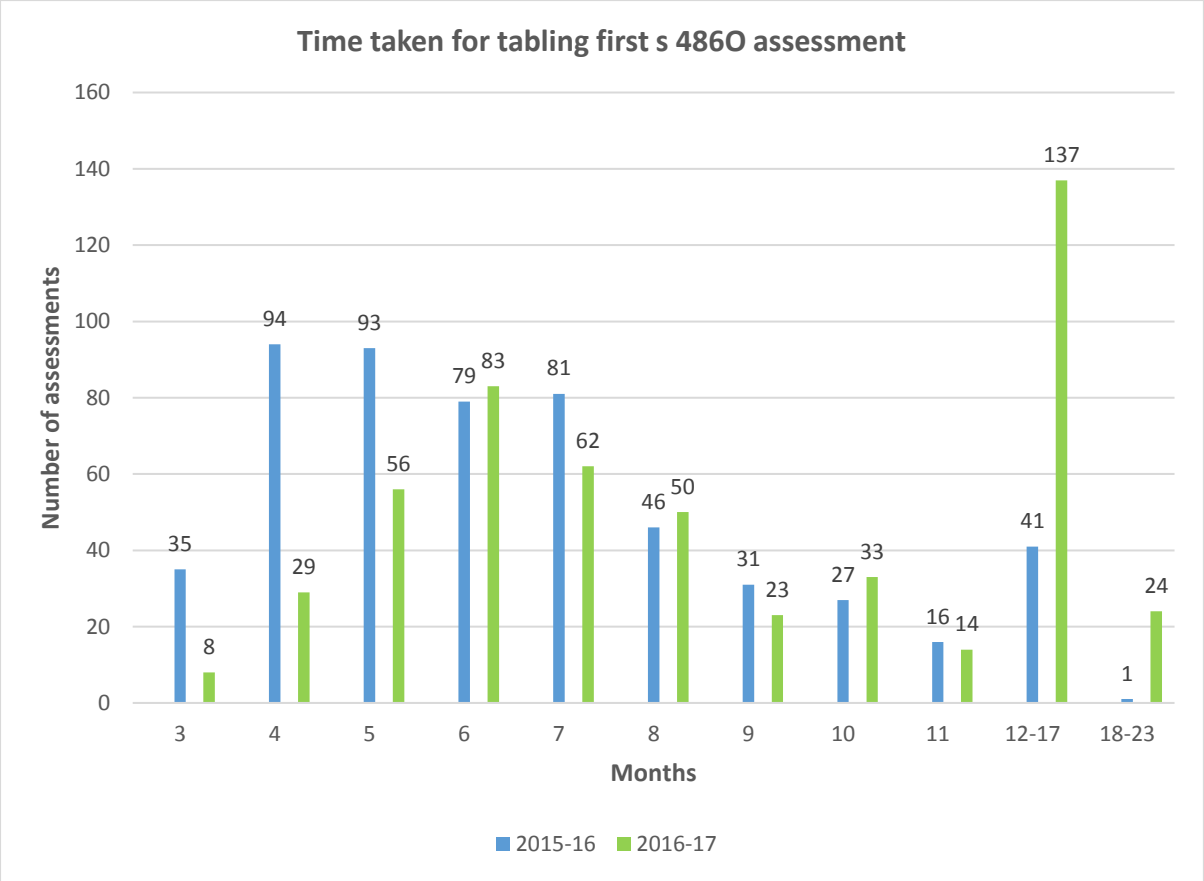
First assessments

Figure 3 shows how long it takes from the time the first s 486N report is received from the department to when the first s 486O assessment is tabled by the Minister in parliament.

In 2016-17, 69% of first s 486O assessments were tabled within eleven months of the first s 486N report being received. This compares with 92% in the previous year.

Of the 161 people whose first assessment was tabled 12 months or more after the first s 486N report was received from the department, 153 (96%) had been released from detention on bridging visas at some time before tabling. Three people had been removed, three were in community detention and one was in an immigration detention facility. For those people no longer in detention, their s 486O assessment was given a lower priority than those for people still in detention.

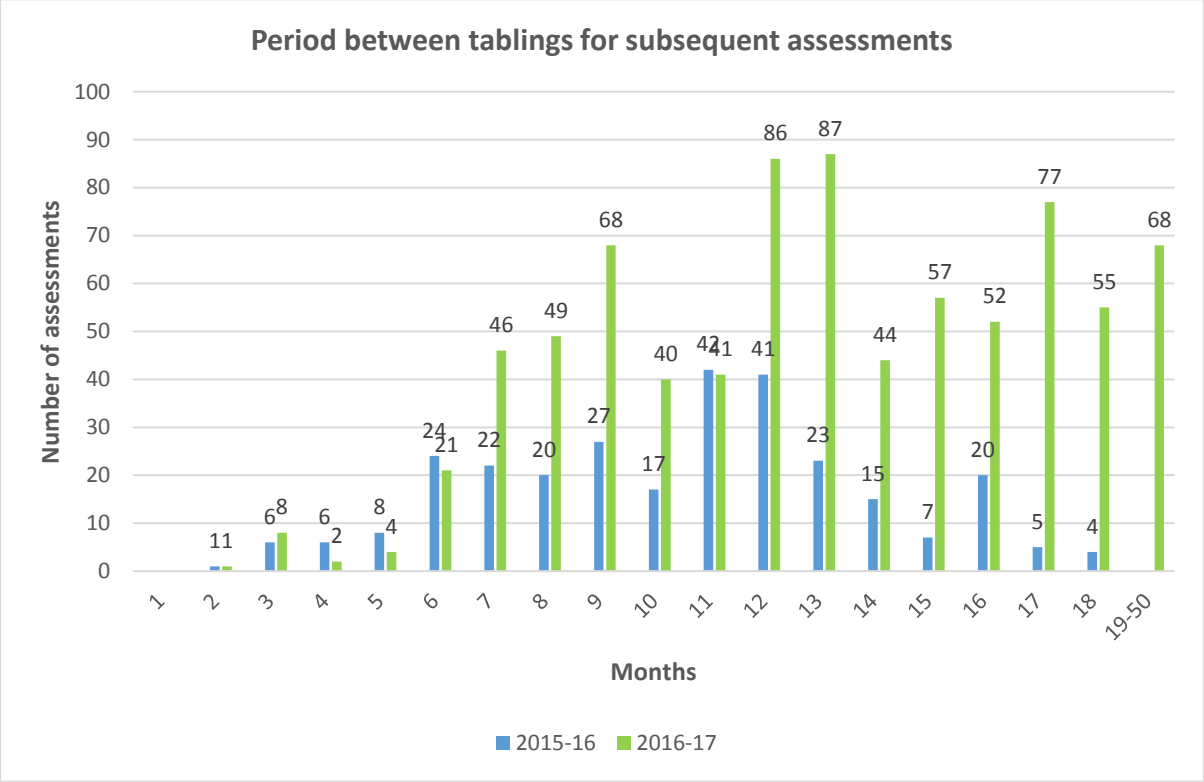
Fig 3



Subsequent assessments

Figure 4 shows the period between tablings for the most recent s 486O assessment and the one tabled previously. In 2016-17, 4% were tabled in six months or less, 41% were tabled within 7 to 12 months and 55% took more than 12 months to be tabled. As noted in figure 2 above, there were considerably more subsequent assessments tabled in the current year and this is also reflected in figure 4. The high number of detainees requiring an assessment has meant that it was not possible to have the majority of them tabled within 12 months of the previous tabling.

Fig 4

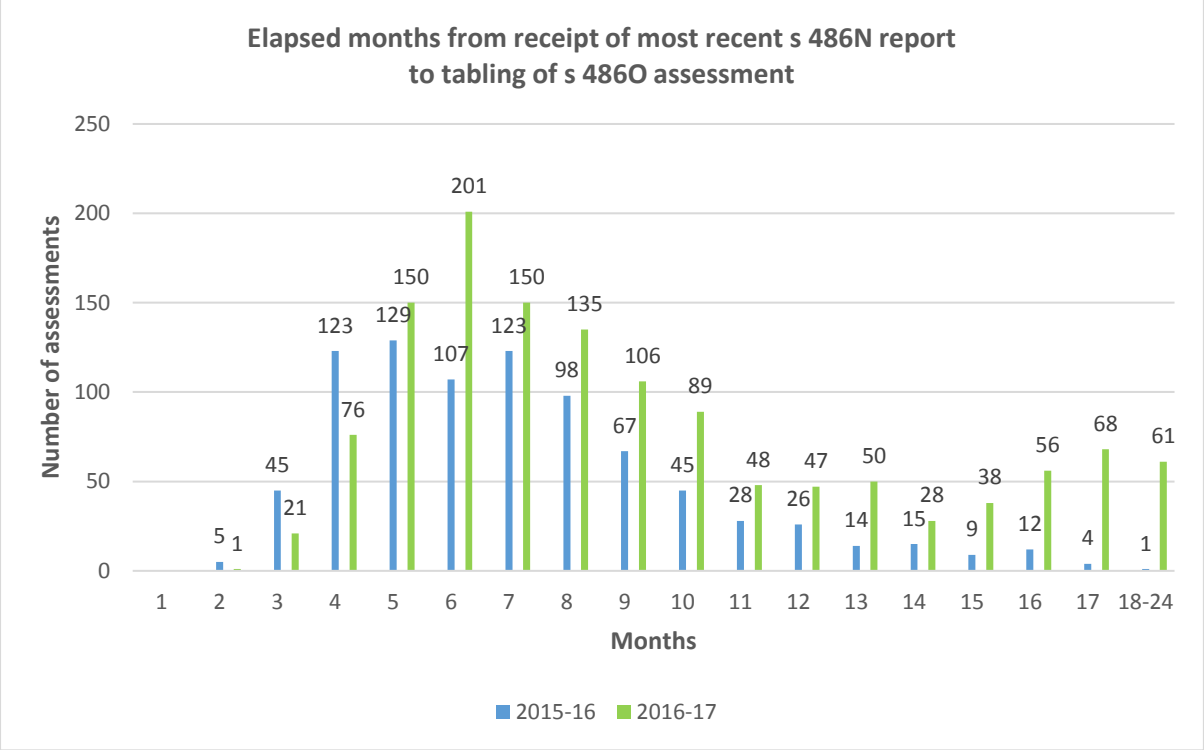


For the 68 cases where there were from 19 to 50 months between tablings, 19 of these detainees had a period of 24 months or more between tablings and in all instances this included at least one period when they were not in detention. Fifty detainees had been released or absconded from detention and their assessment had been given a lower priority than assessments for those still in detention.

Elapsed time from receipt of s 486N report to tabling of s 486O assessment

The interval between the receipt of the most recent s 486N report (first or subsequent report) and the tabling of the s 486O assessment is shown in figure 5.

Fig 5



2016-17 saw a similar trend in the time taken to have an assessment tabled from the date of the most recent s 486N report as in the previous year, recording higher numbers for all periods from five to 24 months. There was a significant increase in assessments taking 15 months or more, and this is largely a reflection of the increased workload.

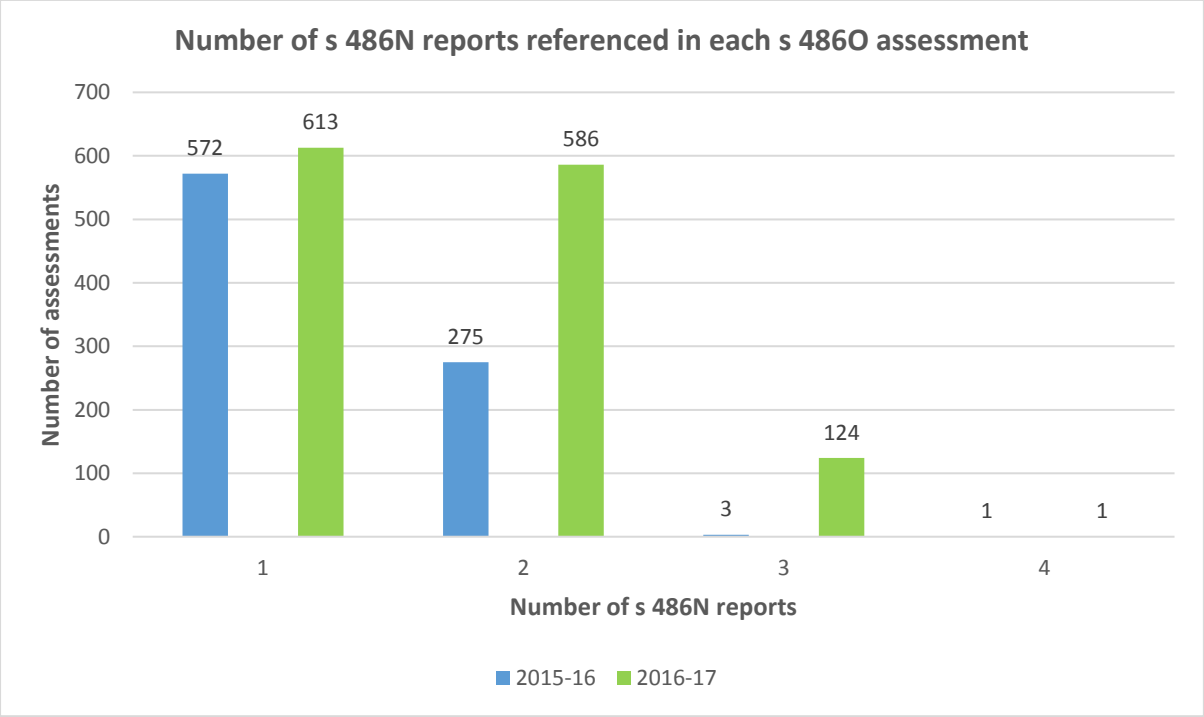
Of the 348 assessments for people for whom it took 12 months or more for their assessment to be tabled after the s 486N report had been received, four were in community detention, two were in an immigration detention facility, one was in a correctional facility and the remaining 341 people had been released on a visa or removed from Australia.

Number of s 486N reports referenced

It is not always possible to prepare s 486O assessments for each s 486N report received, and if one or more subsequent s 486N reports are received from the department prior to a s 486O report being prepared, these are then incorporated into the one assessment.

Figure 6 shows the number of s 486N reports that are referenced in each s 486O assessment.

Fig 6

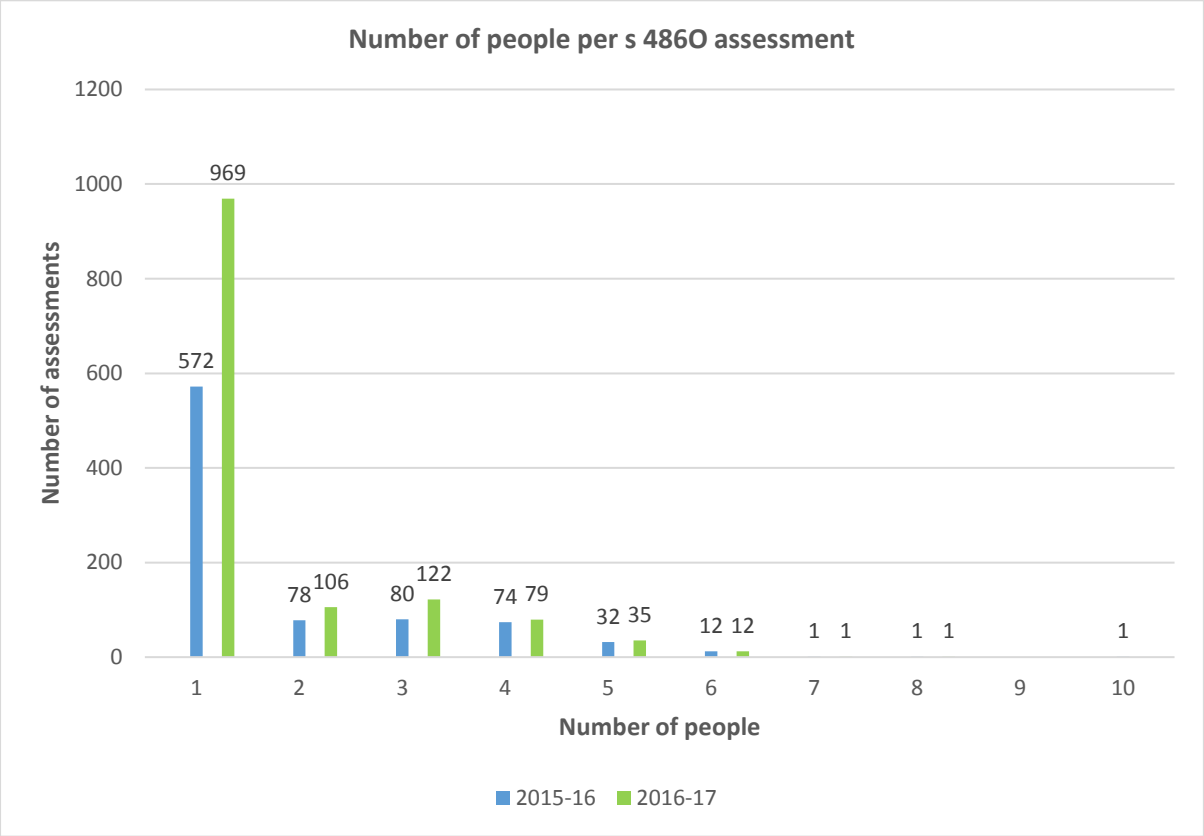


In 2016-17 there was a decrease, from 68% to 46%, in s 486O assessments that referenced one s 486N report compared with the previous year. There was a considerable increase in the number of assessments referencing two or more s 486N reports compared with 2015-16. Again, this is a reflection of the higher number of s 486N reports on hand and the subsequent workload.

Number of people per s 486O assessment

While the majority of s 486O assessments relate to a single person (73% in 2016-17), many assessments are for family groups of two or more people. Figure 7 shows the number of people per s 486O assessment. The percentage for single person assessments tabled in 2016-17 increased by 11% from 2015-16.

Fig 7



Assessment format

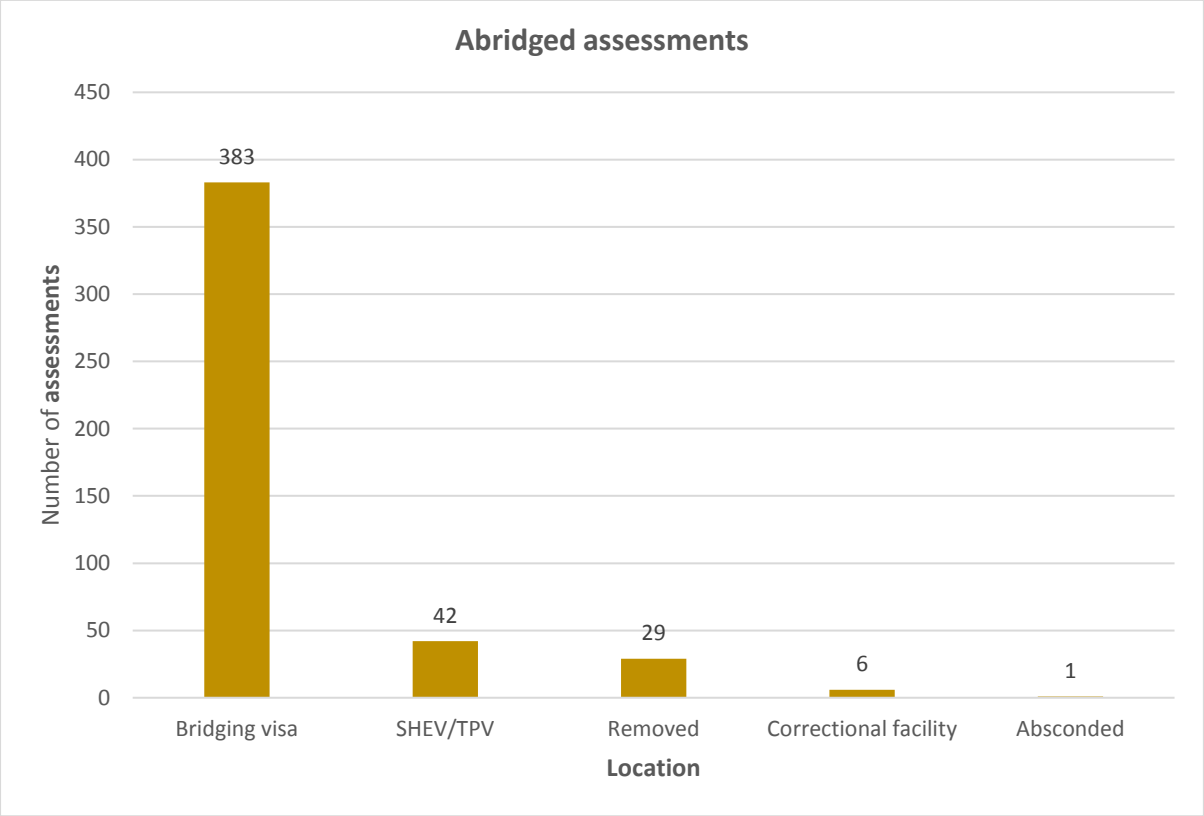
An abridged form of assessment was introduced in 2016-17 for detainees who had been released from detention between the time the department provided a report to the Ombudsman and their assessment was drafted.

Not all detainees who had been released from detention were reported on using this abridged format. If there were significant issues either with the progression of their immigration pathway, medical treatment or other significant matter, then a full assessment was provided for the Minister.

In these 461 abridged assessments (35% of the total number of assessments tabled) we provided a summary of the person's bio-data and details of their detention, including medical issues, and the reason for their release from detention.

The location of these detainees at the time their assessment was sent to the Minister is shown in figure 8.

Fig 8

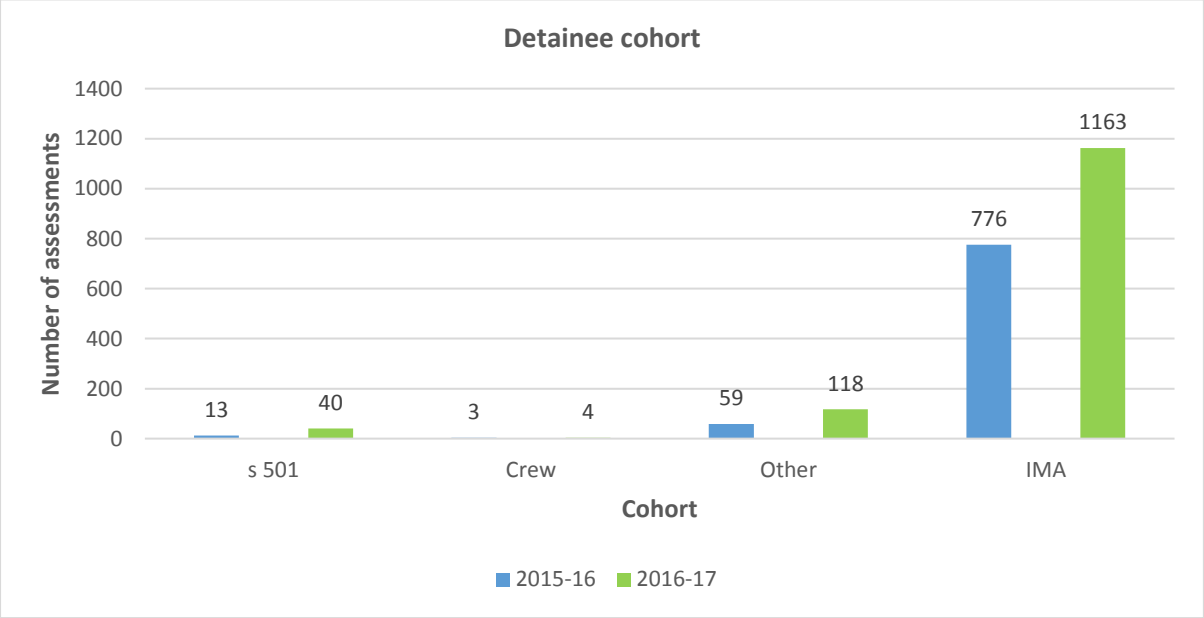


Cohorts of people in detention

People come to be in immigration detention for a variety of reasons and the numbers in the various cohorts can vary over time.

Figure 9 shows the numbers in the main cohorts of people for whom s 486O assessments were tabled in 2016-17.

Fig 9



Legend

s 501	People who have had their visas cancelled under s 501[4]
Crew	Crew members of boats bringing asylum seekers to Australia
Other	Others not specified – in most cases people brought into detention who had held a valid visa which expired or was cancelled
IMA	Irregular Maritime Arrivals - asylum seekers who arrived in Australia by sea

With arrivals by sea having ceased in mid-2014, and the increase in the number of people being granted visas (bridging or substantive visas) or removed from Australia, the numbers in the IMA cohort is expected to lessen.

Likewise, with the increasing number of people being detained under s 501 of the Act after serving a term of imprisonment, and the increasing length of time they are spending in detention while their request for revocation of the cancellation of their visa is considered, it is anticipated that we will observe an increase in the numbers in this cohort.

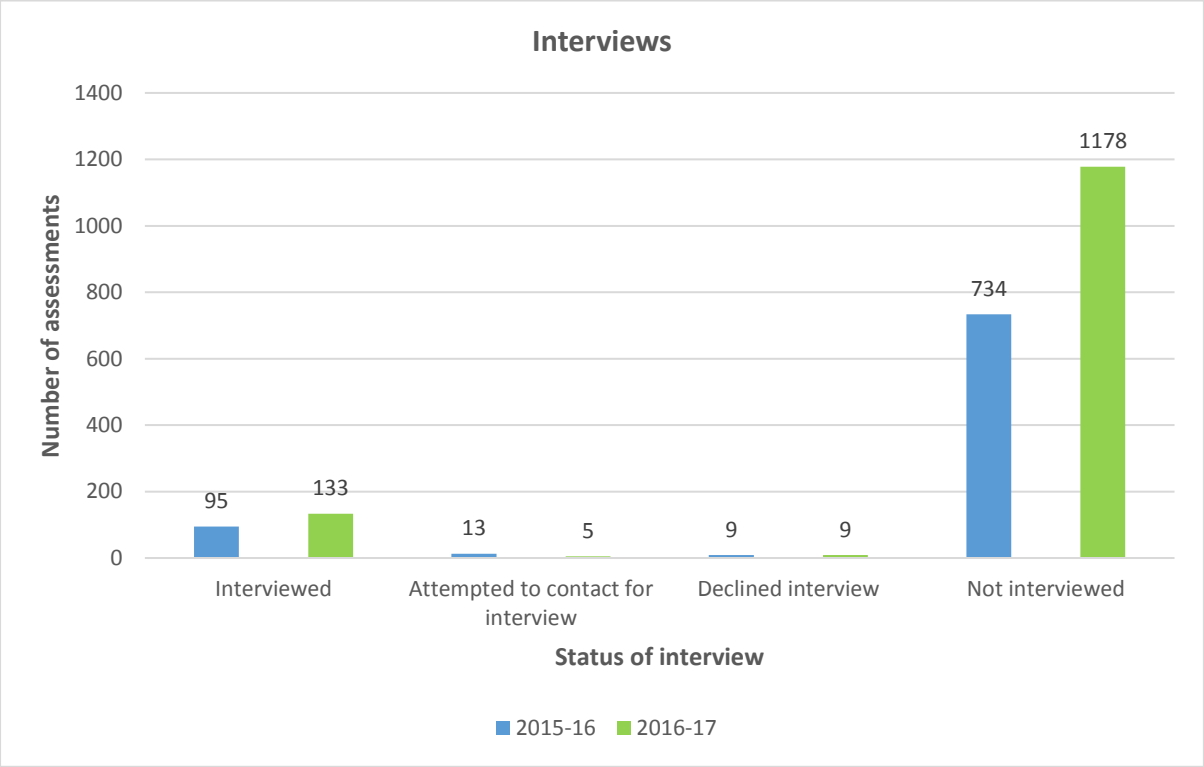
[4] Under s 501 of the Act, a person's visa may be cancelled *inter alia* if they have a substantial criminal record or the Minister reasonably suspects them of having committed certain offences such as people smuggling.

Interviews

The Office attempts to interview as many people in detention as possible prior to their s 486O assessment being prepared. This includes visiting detention facilities to conduct interviews in person and interviewing people by telephone. Interpreters are used if the person requires it.

Figure 11 shows the number of people who were interviewed, as well as those we attempted unsuccessfully to contact, those who declined to be interviewed and those who were not interviewed.

Fig 11



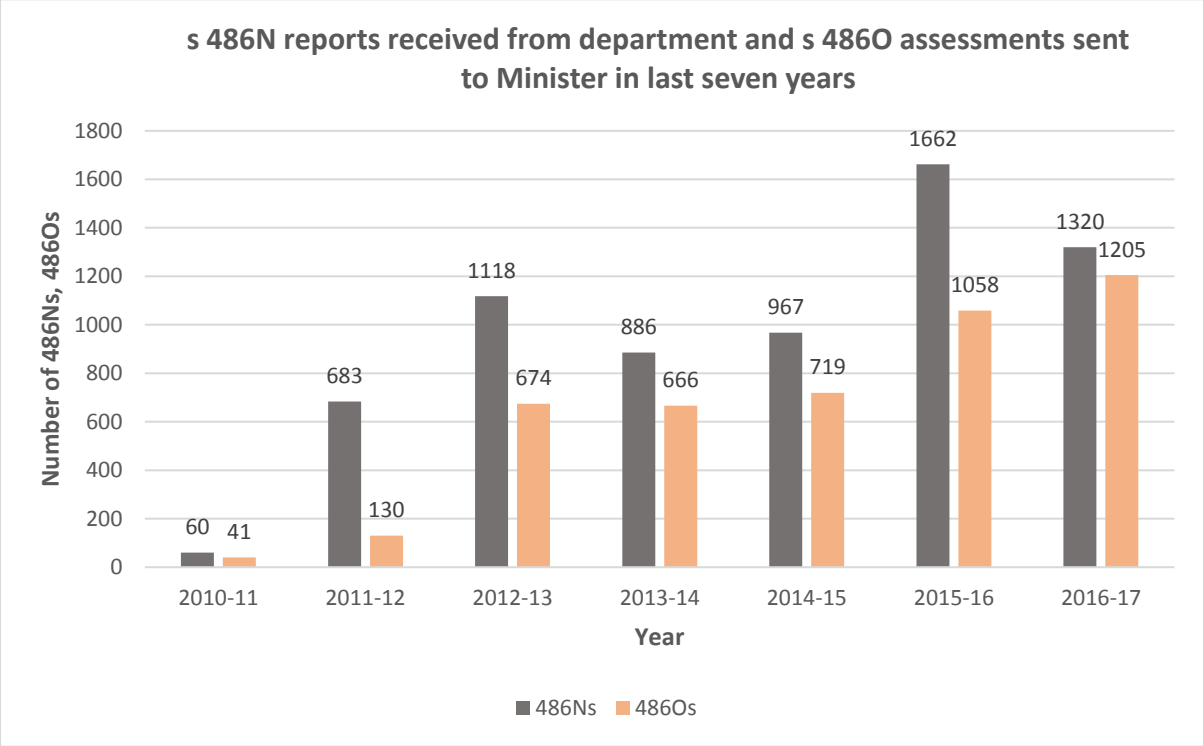
The number of people interviewed in 2016-17 is slightly higher than in the previous year, however the number who were not interviewed increased by 444 from the previous year. This is largely due to the resources required to undertake interviews balanced with the need to process as many assessments as possible.

Section 486N reports received, s 486O assessments sent

Figure 12 shows the number of s 486N reports received from the department and the number of s 486O assessments sent to the Minister for the last seven years. For the number of assessments tabled in the same period see figure 1.

2016-17 showed a decrease in the number of s 486Ns received from the previous year, and the highest number of s 486O assessments sent to the Minister since this figure was first recorded in 2010-11.

Fig 12



As noted in previous years, we receive more s 486N reports than the number of s 486O assessments that are submitted to the Minister. This is accounted for by both multiple s 486N reports being referenced in a single s 486O assessment in some instances (refer to figure 6), and those s 486N reports on hand that are waiting to be actioned.

The number of s 486O assessments sent to the Minister varies from the number of assessments tabled because assessments sent near the end of the year are in most instances tabled in the following year, depending on parliament's sitting calendar.

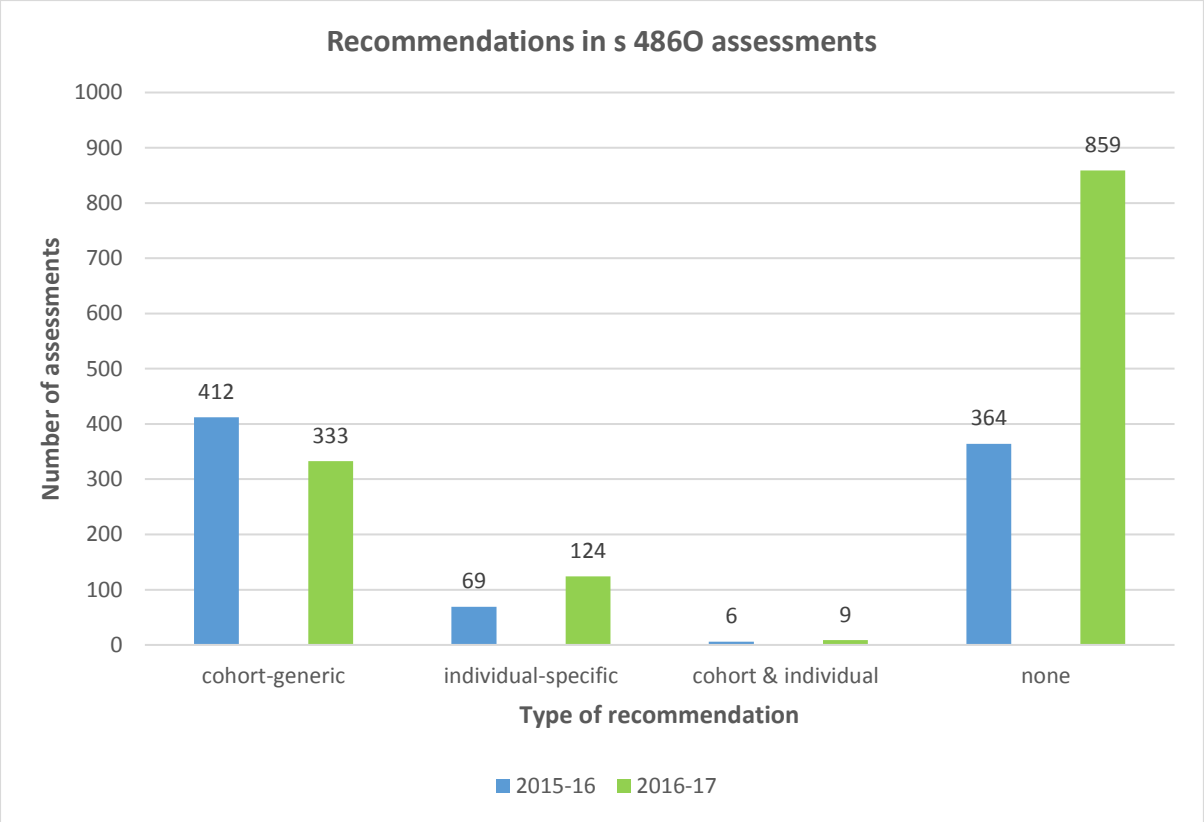
Assessment recommendations

The Ombudsman may make a recommendation in an assessment where he thinks there is an action that could or should be taken by the Minister or the department in relation to an individual. The Minister is not bound by a recommendation of the Ombudsman.

In 2016-17 the recommendations in the assessments tabled fell into two broad categories; those that are specific to an individual person, and generic recommendations that are common to a broader cohort of persons. A small number of assessments had both specific and generic recommendations.

Figure 13 shows the type of recommendations in assessments tabled in 2015-16 and 2016-17 and the number of assessments that contained no recommendations.

Fig 13



Individual – specific recommendations

The majority of recommendations made for specific individuals relate to:

- their placement within the detention network or in community detention
- consideration for granting of a bridging visa
- processing of their case being expedited
- medical treatment issues.

Cohort – generic recommendations

The cohorts of people that had generic recommendations made about the circumstances of their detention were:

- those detainees who have been transferred from a Regional Processing Centre (RPC) to Australia for medical treatment and who remain liable for return to an RPC on completion of their treatment. They are unable, under current policy settings, to have their claims for asylum assessed in Australia. Recommendations for this cohort were that their immigration status be resolved, and in some cases that they be transferred from an immigration detention facility to community detention.
- those who arrived post 13 August 2012 and for whom the Minister has not lifted the bar under s 46A that allows them to lodge a valid application for protection. For these people the Ombudsman recommended that the Minister lift the bar.

The Minister responds to each recommendation in his tabling statement.

Where a specific recommendation is made for an individual, the Minister provides a response that addresses the recommendation, indicating either that he accepts or rejects it, or that he has asked his department to prepare a submission in relation to the recommendation.

In those instances where a subsequent s 486N report is received for a person for whom a recommendation was made in a previous s 486O assessment, the department provides an update on the recommendation and indicates the status of the response to it for those cases where the update has not otherwise been referenced in the s 486N report and/or the recommendation is unresolved.

Where a recommendation is made and the person is subsequently released from detention before a further s 486N report is due, the Office receives no further information in relation to the recommendation as the department's reporting obligation has ceased.

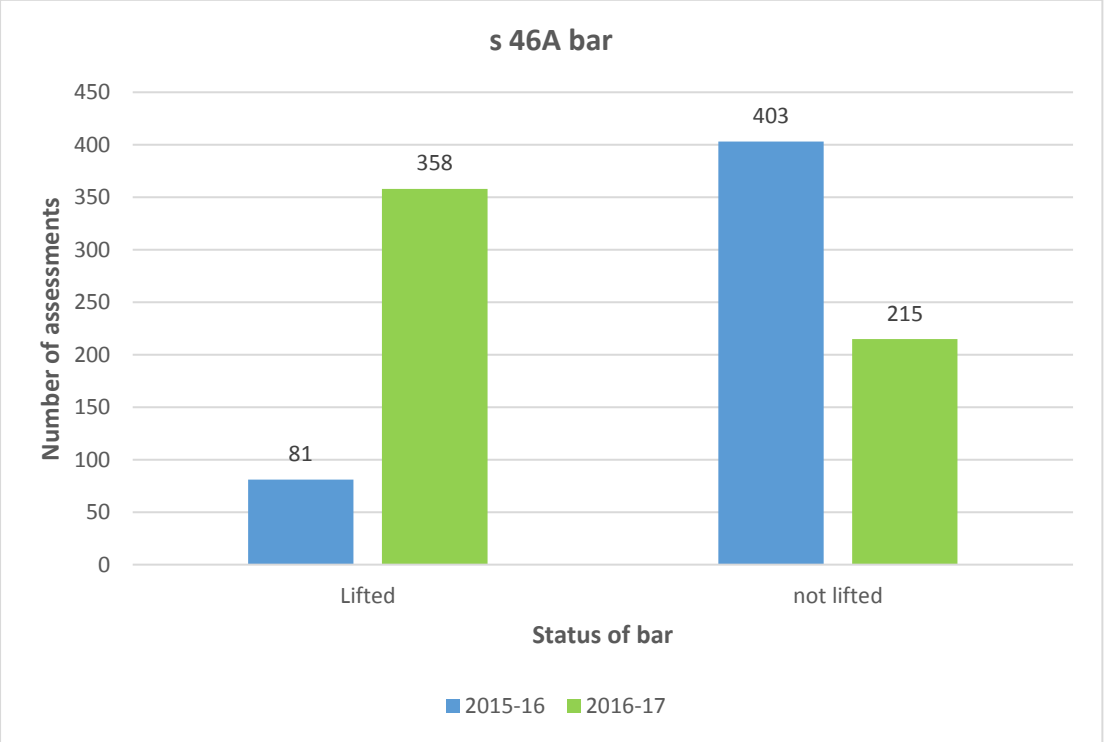
Recommendation to lift the s 46A bar

Asylum seekers who arrive in Australia by sea are subject to a bar under s 46A of the Act that prohibits them from lodging a valid application for a visa. This bar can be lifted only by the Minister.

For those people who at the time their s 486O assessment was prepared were noted as being subject to the bar which had not been lifted (aside from those transferred to Australia from an RPC for medical treatment who remain liable for return to an RPC on completion of their treatment), the Ombudsman recommended to the Minister that he lift the bar and allow the person to lodge an application for a visa.

Figure 14 shows the number of assessments where the person (or family group) was noted as being subject to the bar and the bar had either been lifted or not lifted at the time their s 486O assessment was prepared. 2016-17 showed a considerable increase in the number of assessments for detainees who had had the bar lifted, and a corresponding decrease in the number for whom the bar had not been lifted.

Fig 14



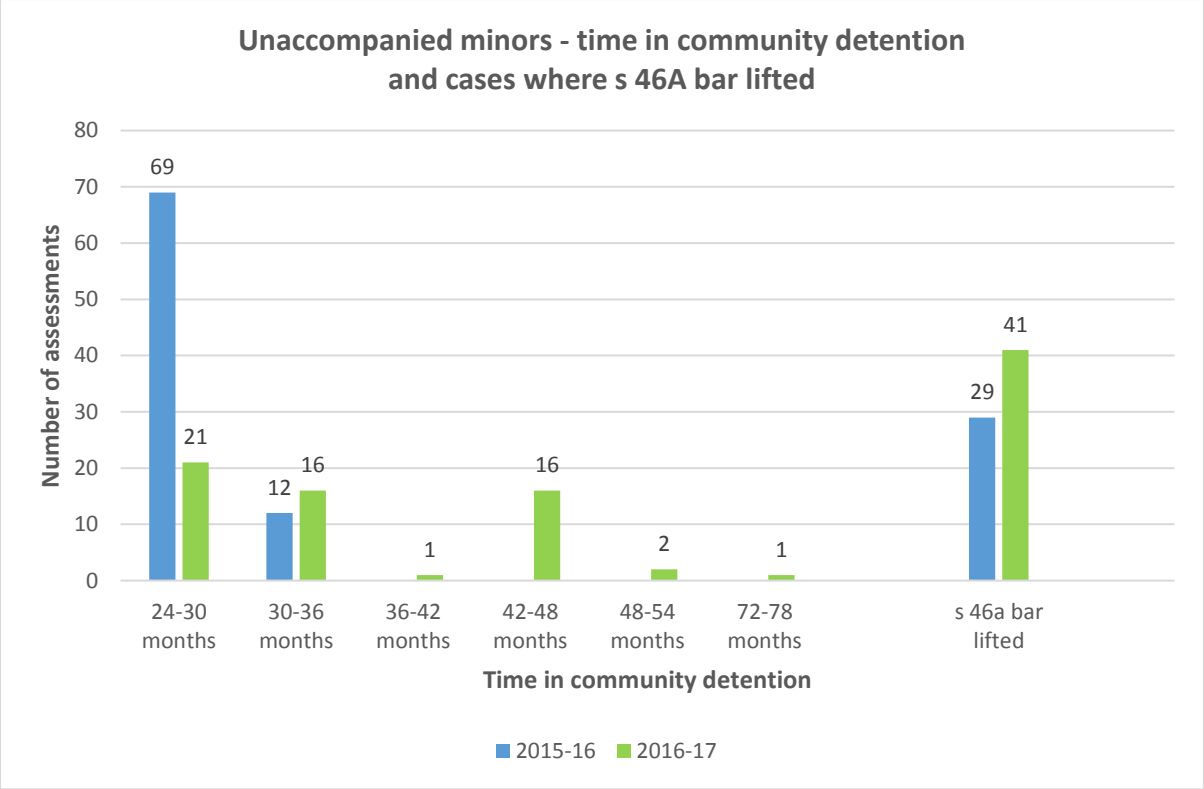
Unaccompanied minors

In the latter part of 2010 through to the time when boat arrivals stopped in mid-2014, a number of unaccompanied minors arrived in Australia by sea to claim asylum.

Such minors are automatically placed under the guardianship of the Minister. After initial processing they are housed in community detention and when they turn 18 they are able to be granted a bridging or substantive visa.

Figure 15 shows the number of unaccompanied minors who had s 486O assessments tabled by the Minister, the duration of their time in detention when the assessment was prepared, and the number who had had the s 46A bar lifted.

Fig 15



In 2016-17, 72% of unaccompanied minors had had the s 46A bar lifted, compared with 36% in 2015-16.

Unaccompanied minors are reported on as such until they either are released from detention or reach 18 years of age. This means that children who arrive at a very young age can be in detention for a considerable period. In 2016-17 there were 19 who had been detained between three and a half to six years.

The asylum seeker experience

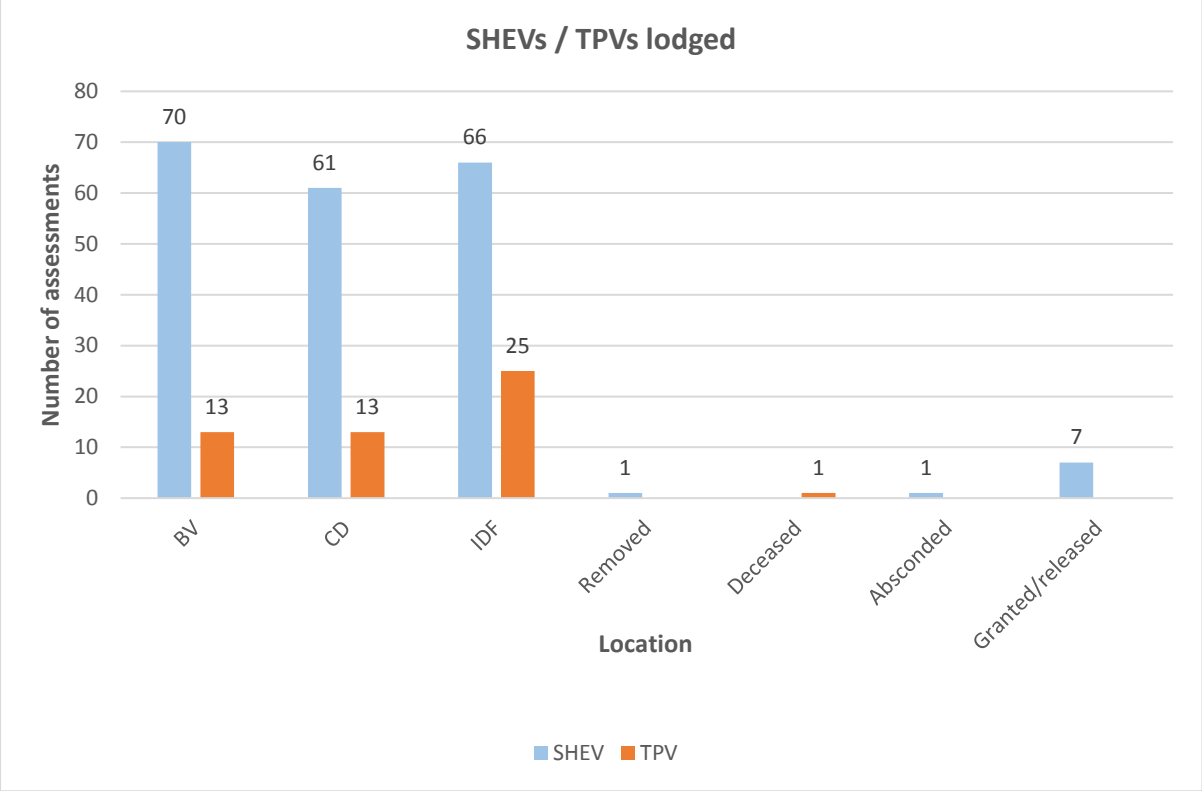
Safe Haven Enterprise visas and Temporary Protection visas

In 2016-17 we assessed, for the first time, the cases of a significant number of detainees who had applied for a SHEV or TPV. It is now no longer possible for people who arrived by sea in Australia to claim asylum to lodge an application for a permanent protection visa.

Those detainees who had previously lodged an application for a permanent protection visa that had not yet been decided, had their application deemed to be an application for a temporary visa.

Figure 16 shows the location of people reported on who were recorded as having lodged an application for a SHEV or TPV. Seven of those who had applied for SHEVs were released from detention when their SHEV was granted.

Fig 16



BV	Released on a bridging visa	Removed	Removed (voluntarily or involuntarily) from Australia
CD	Detained in community detention	Deceased	Died while in immigration detention
IDF	Detained in an immigration detention facility	Absconded	Absconded from immigration detention and still at large

Found not to be owed protection

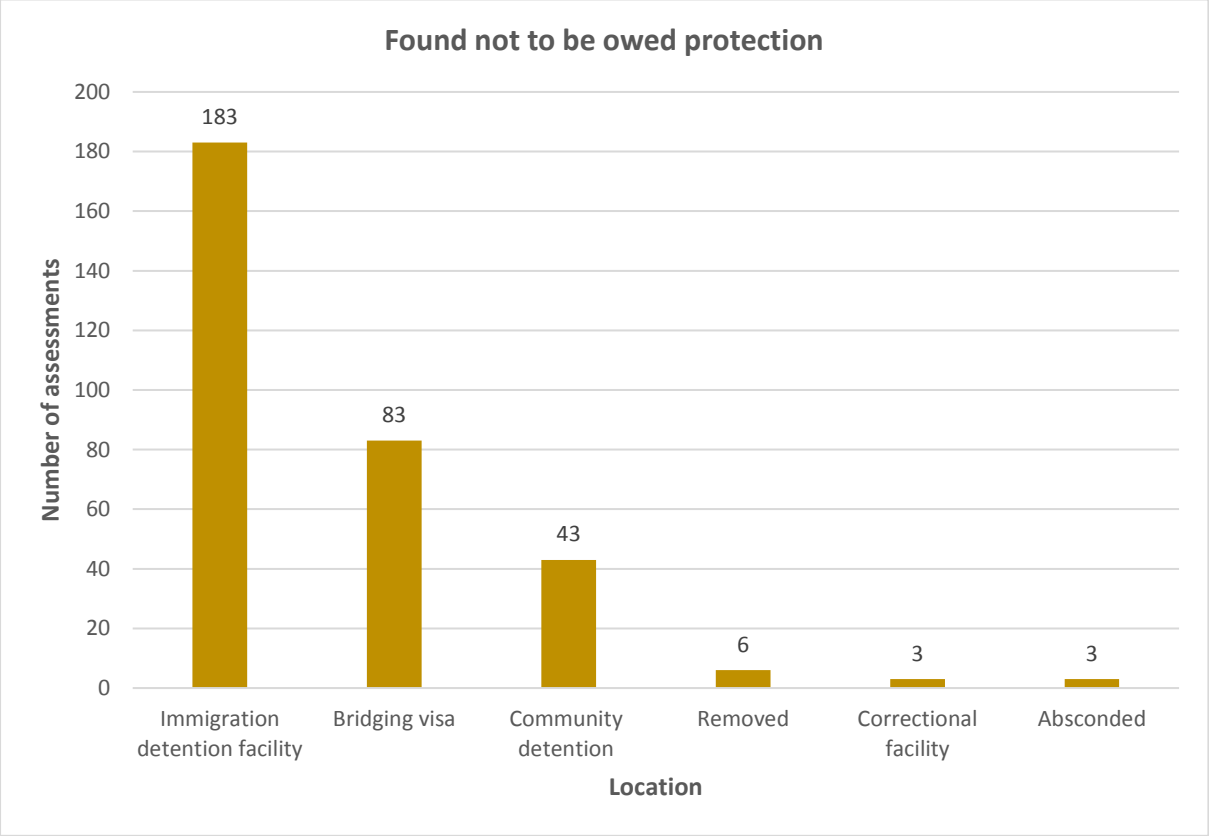
People who have had their initial claim for protection refused are in most cases entitled to review of the decision. This can be through a number of channels, including the Immigration Assessment Authority, the Administrative Appeals Tribunal and the courts.

When all review options have been exhausted and a person is finally determined not to be owed protection by Australia, it is the government's expectation that they will depart Australia, either voluntarily or involuntarily. In some cases, such as for citizens of Iran, they cannot be removed involuntarily as Iran will not accept their return at this time.

There can be other impediments to removal, including identity concerns and difficulties in obtaining travel documents.

For those detainees reported on in 2016-17 who have been found not to be owed protection, their location at the time of their assessment being sent to the Minister is shown in figure 17.

Fig 17



Regional Processing Centre transferees

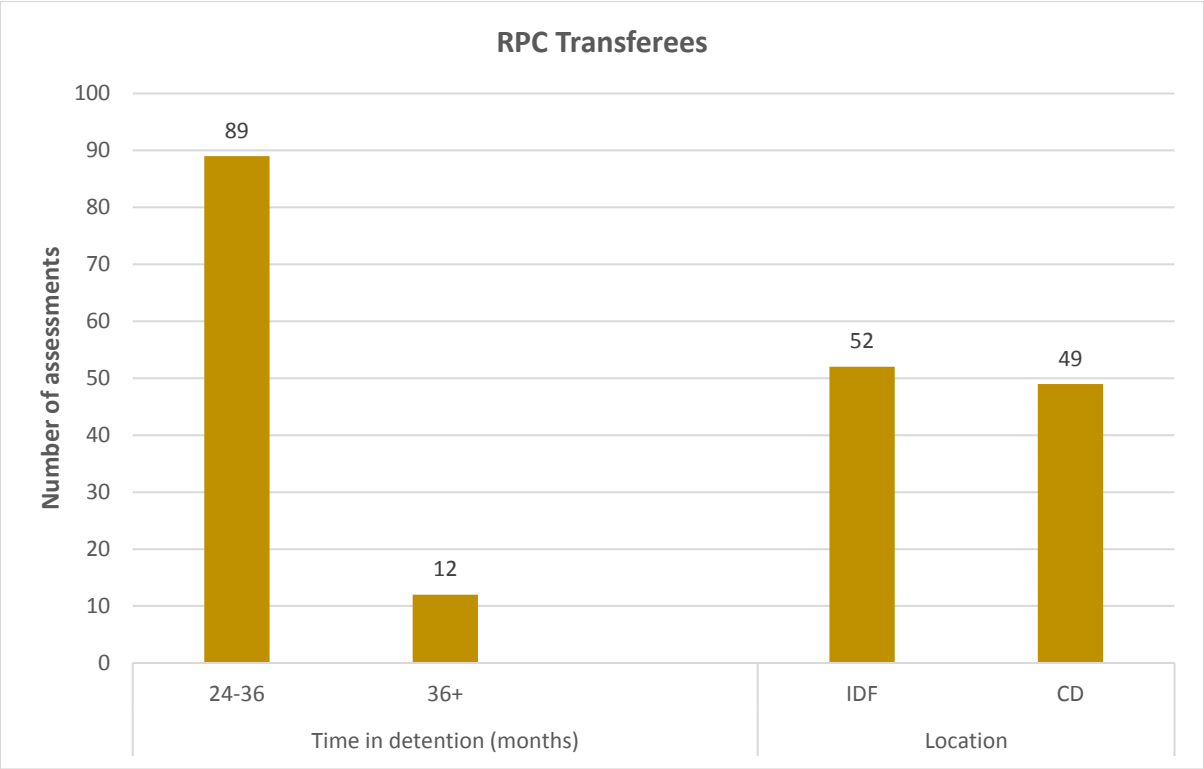
People who arrived in Australia by sea after 19 July 2013 to claim asylum were subject to transfer to an RPC. A number of individuals and family groups who were transferred to Nauru RPC or Manus Island RPC have been returned to Australia for medical treatment.

Current policy settings mean that these people are unable to have their claims for protection assessed in Australia and they remain liable to return to an RPC at the conclusion of their treatment.

In 2016-17 we assessed the cases of 101 individuals and families in this situation, recommending to the Minister that priority be given to resolving their immigration status.

Figure 18 shows the time these transferees have spent in detention in Australia[5] at the time of their assessment, and their location, either in community detention or an immigration detention facility.

Fig 18

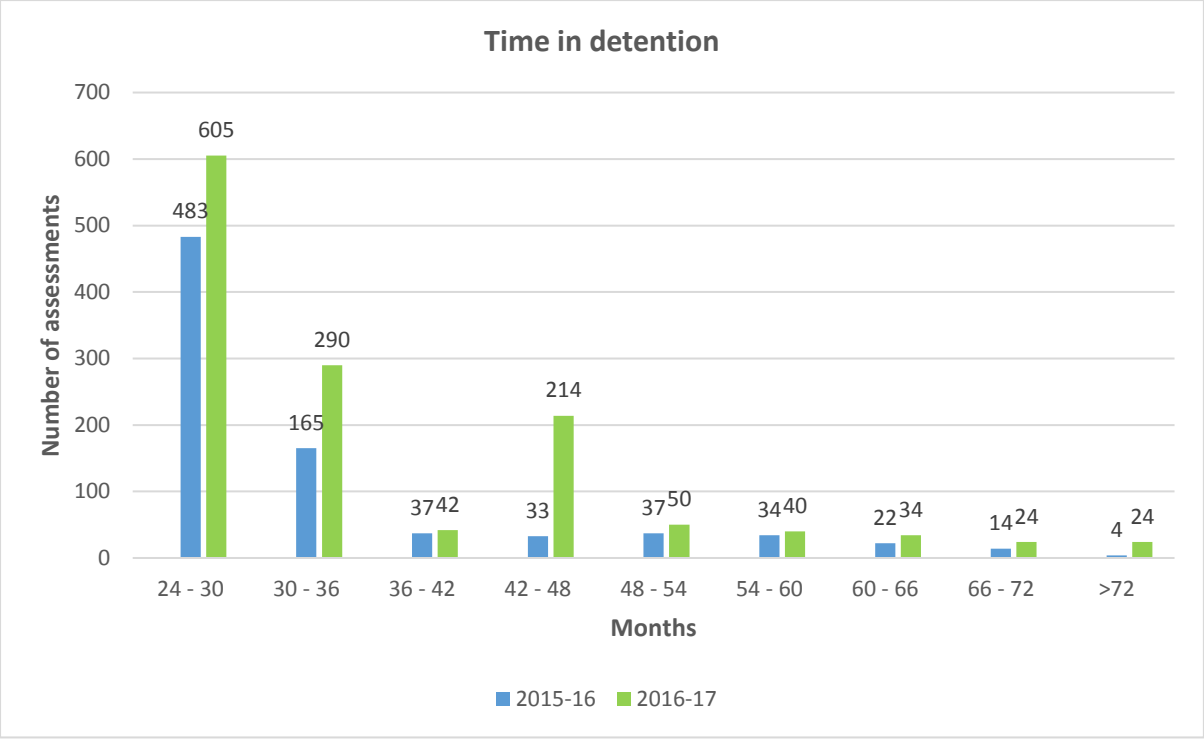


[5] Time spent in an RPC is not counted towards time spent in immigration detention for the purposes of reporting under s 486N.

Time spent in detention

The amount of time spent in detention shown in figure 19, as recorded by the department in s 486N reports, shows a similar trend from the previous year. In 2016-17, 46% of people assessed had been in detention for a period between 24 and 30 months according to the most recent s 486N report. This contrasts with 51% for 2015-16.

Fig 19



The number of people reported on who had been detained for more than five years increased from 84 in 2015-16 to 122 in 2016-17. There was also a spike in the number of people detained for 42-48 months, increasing by 181.

Nine percent of those reported on had been in detention for four years or more, compared with 13% in 2015-16.

We reported on 24 people who have been detained for six years or more. These are detainees for whom there are considerable barriers to them being released from detention. The Ombudsman continues to make recommendations to the Minister about these individuals where appropriate.

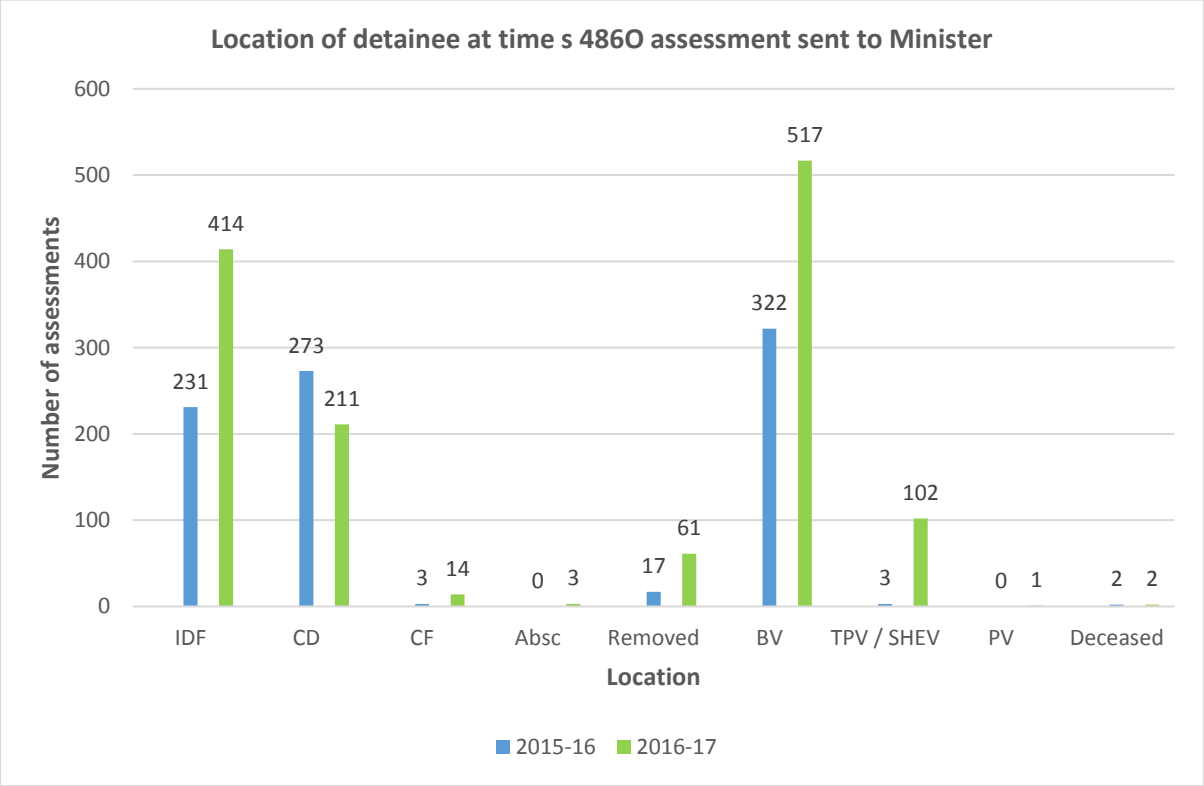
Location

Figure 20 shows the location of people as recorded in their s 486O assessment that was submitted to the Minister.

There was a considerable increase in the number of people assessed in 2016-17 who had been released on a bridging visa. In these cases the Office was advised of their release after the department's s 486N report had been received (and thus the person was still subject to reporting under s 486O) and before we had finished preparing their assessment.

The number of people assessed who were in immigration detention facilities, a correctional facility or were removed increased noticeably, while those in community detention decreased from the previous year. The number of people granted TPVs or SHEVs is higher, however this is the first year that we have reported on people granted SHEVs, which comprise the majority of this category.

Fig 20



Legend

IDF	Detained in an immigration detention facility	Removed	Removed from Australia (voluntarily or involuntarily)
CD	Detained in community detention	BV	Released on a bridging visa
CF	Detained in a correctional facility	TPV/SHEV	Released on a Temporary Protection or Safe Haven Enterprise visa
Absc	Absconded from immigration detention and still at large	PV	Released on a Protection visa
		Deceased	Died while in immigration detention