

**An analysis of reports by the Ombudsman
under s 486O of the *Migration Act 1958*
sent to the Minister for Immigration
and Border Protection in 2015-16**

Commonwealth and Immigration Ombudsman

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Executive Summary

The Ombudsman reports to the Minister for Immigration and Border Protection 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 report in parliament.

2015-16 represented the busiest year for the Ombudsman's statutory reporting function since this commenced in 2005. This was evidenced by:

- the highest number of s 486N reviews (1662) received from the department
- the highest number of s 486O reports (1058) sent to the minister
- the highest number of s 486O reports (856) tabled in parliament.

This also impacted on some of the Statutory Reporting team's timeliness measures as reflected in the time taken to prepare the first report for an individual, as well as the elapsed time from the receipt of a s 486N review to the time a s 486O report is tabled.

The number of people that we were able to interview prior to preparing their report was also less than in the previous year.

In the last four years the minister has tabled 2825 s 486O reports prepared by the Ombudsman's office.

This is the first year in which we have recorded the cohort for individuals. It shows that the majority of people in detention are asylum seekers who arrived in Australia by boat. The cohort of people who have had their visa cancelled under s 501 of the *Migration Act 1958* is likely to increase. These people have been assessed as not passing the character test, most of whom have been convicted of a crime and sentenced to a term of imprisonment.

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 legacy caseload of asylum seekers.

We continue to report on people who have received an adverse security assessment. The number of such reports decreased from 49 in 2014-15 to 22 in 2015-16. We are now advised that there are only five people with an adverse security assessment still being held in detention.

The Ombudsman made a record number of recommendations to the minister in 2015-16. We continue to monitor the minister's response to these recommendations and where appropriate follow this up in subsequent reports. 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.

We have noted the reduction in the number of people who have been able to lodge an application for a Protection visa, as well as the increased time it takes for these applications, and any subsequent reviews, to be determined.

It is expected that there will be a gradual decline in the number of people subject to reporting in the next 12-24 months as more are released from detention on Bridging visas and also as the processing of Temporary Protection visas increases.

Introduction

Background

The *Migration Act 1958*, s 486N 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.

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. A de-identified copy of the report is to be tabled in parliament¹ by the minister. Such reports may include recommendations. The Act states that the minister is not bound by a recommendation made by the Ombudsman.

Analysis of 2015-16 reports

In 2015 the Ombudsman's office changed the reporting cycle for this analysis to a financial year basis rather than a calendar year basis as was done in 2013 and 2014.

This analysis is the second based on the financial year and includes comparison with the previous financial year's reports for the first time.

This is an analysis of all reports sent to the minister and tabled in parliament in 2015-16 and draws on similar data as the analyses for previous years that are published on the Ombudsman's website.

In 2015-16 a total of 851 s 486O reports in the usual format for individuals and family groups were sent to the minister and tabled in parliament. These 851 reports cover 1544 people. A further five reports, covering 117 people, were tabled in a format that grouped individuals who had not had their claims for asylum assessed and for whom the Ombudsman had not received individual s 486N reviews from the department.

As in previous years, this analysis looks at both the administrative processes within the Ombudsman's office in preparing these reports and the processes involved for people claiming protection in Australia.

However the changes in government policy for people claiming protection resulted in few of these people being able to lodge a valid application for a protection visa. This meant that the Ombudsman was not able to report on the status of their claims for protection nor any subsequent merits review.

¹ In this analysis reports by the Ombudsman to the minister are referred to as s 486O reports, based on the section of the Migration Act under which they are created. Likewise, reports received from the Department of Immigration and Border Protection are referred to as s 486N reviews.

The Ombudsman’s s 486O reports

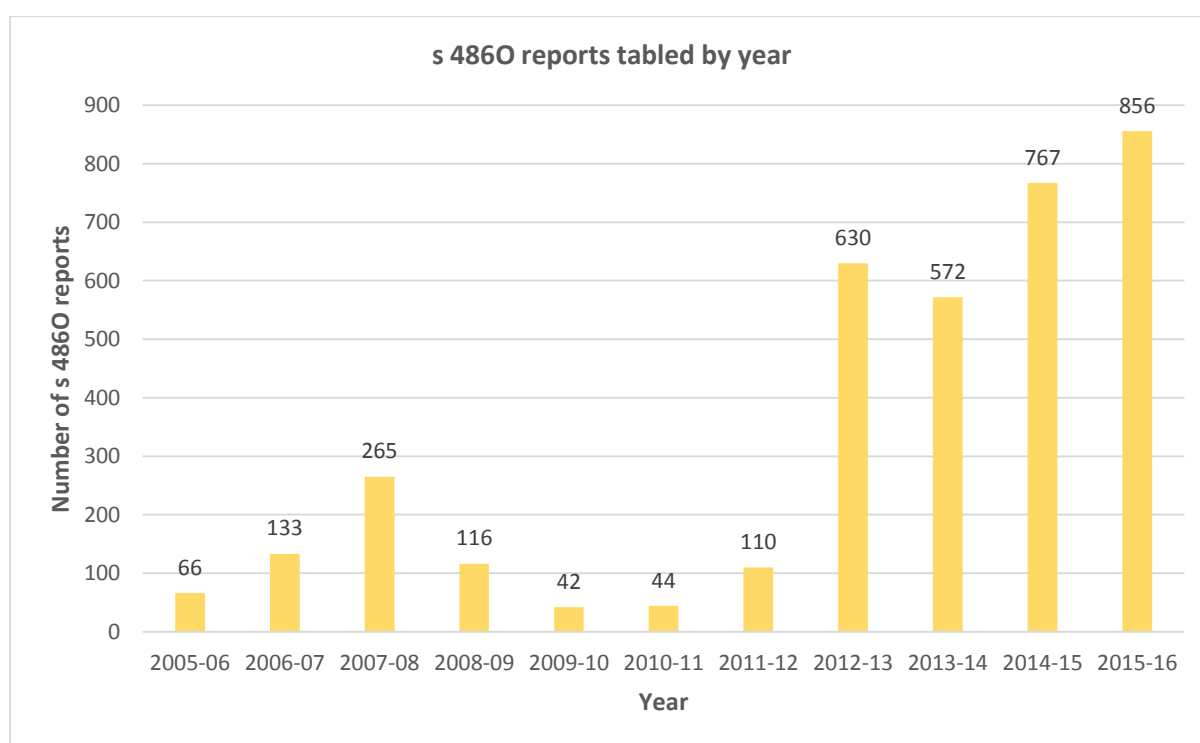
2015-16 saw the highest number of s 486O reports tabled in parliament since the statutory reporting function commenced in 2005, exceeding the previous highest figure in 2014-15.

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

In the last four years the minister has tabled 2825 s 486O reports prepared by the Ombudsman’s office.

It is noted that the last tabling for 2015-16 was on 6 May 2016. It would normally be the case that reports would also be tabled when parliament is sitting in June, however this did not occur as parliament was dissolved after the election was called for 2 July 2016.²

Fig 1



With arrivals of asylum seekers coming by boat ceasing in mid-2014 and the ongoing release of people from detention, it is forecast that there will be a gradual decline in the number of people who are subject to reporting under s 486O over the next 12 months and beyond.

² Figure 11 shows the number of reports sent to the minister in May and June, some of which would ordinarily have been tabled before the end of June 2016.

Report type – first and subsequent reports

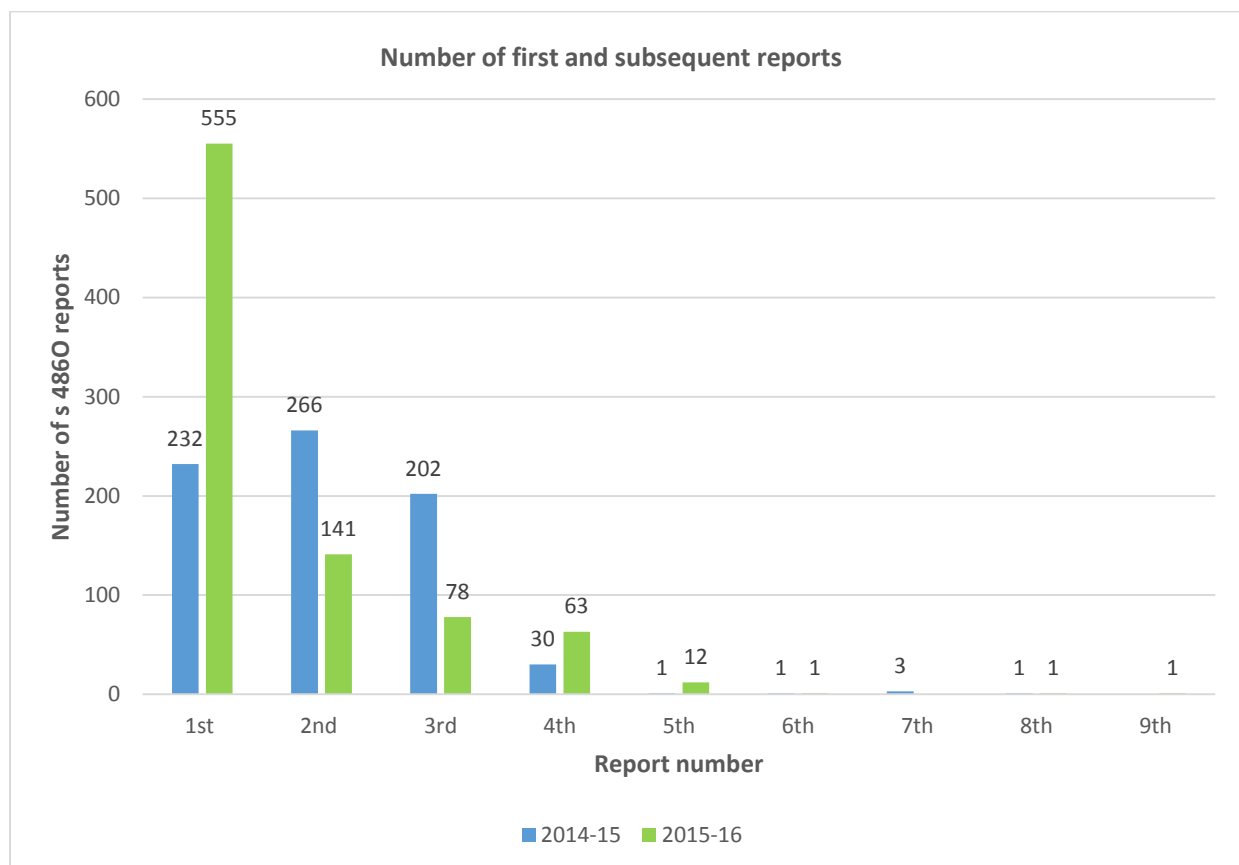
The Ombudsman is required to report on the circumstances of a person’s detention after they have been in detention for 24 months (first report) and every six months (subsequent report) thereafter, even if the person is released from detention.

Figure 2 shows the number of first and subsequent s 486O reports tabled in 2015-16, and the comparative figure from 2014-15. For 2015-16, 64% of reports tabled were first reports, compared with 30% for 2014-15.

Further, for 2015-16, 90% are either first, second or third reports, which is a general reflection of the time most people are held in detention. This compares with 95% for the previous year.

The number of people for whom a 5th or further subsequent report 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 21 which shows the length of time spent in detention.

Fig 2



Timeliness of reports

There are four general measures of timeliness for the production of s 486O reports by the Ombudsman's office. These are:

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

The Ombudsman's office gives preference to preparing s 486O reports for people in detention, particularly restricted detention, 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 report is sent to the minister and when it is tabled in parliament, particularly if parliament is in recess at the time the report is sent.

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

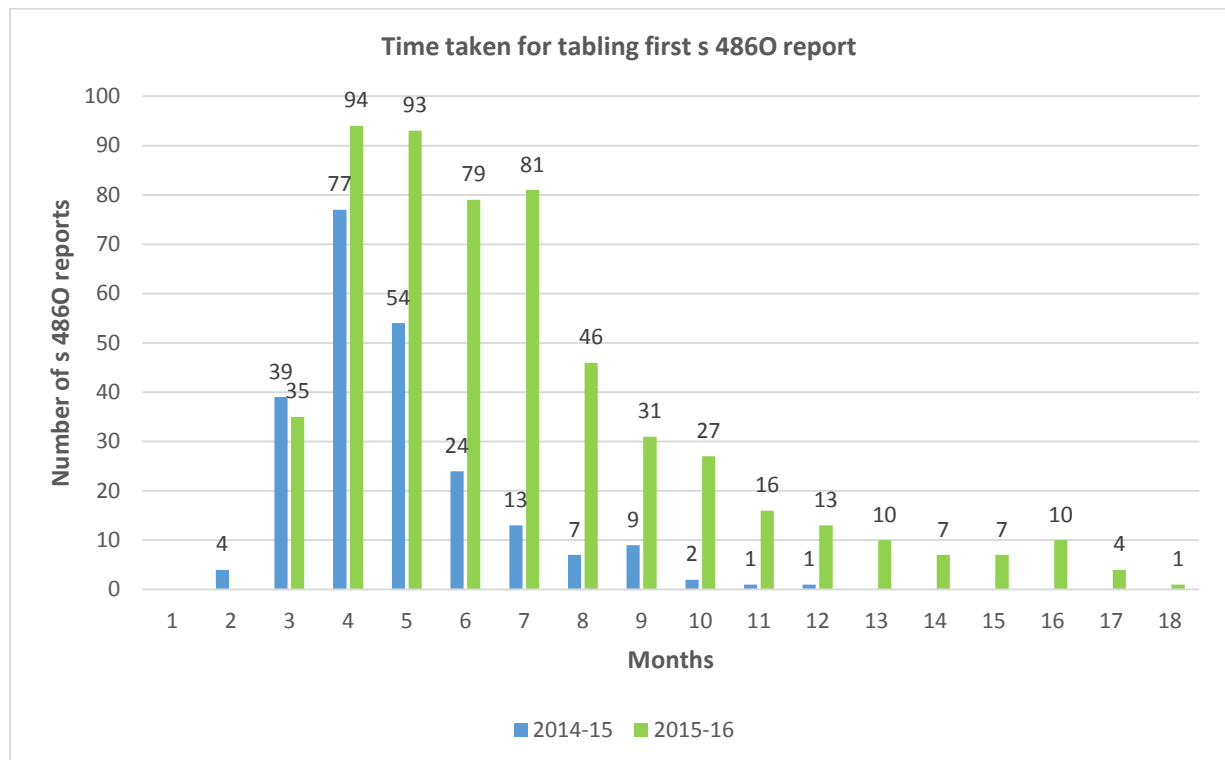
First reports

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

In 2015-16, 53% of first s 486O reports were tabled within six months of the first s 486N review being received. This compares with 85% in the previous year.

It should be noted that all of the people whose first report was tabled more than 12 months after the first s 486N review was received from the department had been released from detention at some time before tabling. In these instances their s 486O report was given a lower priority than those for people still in detention.

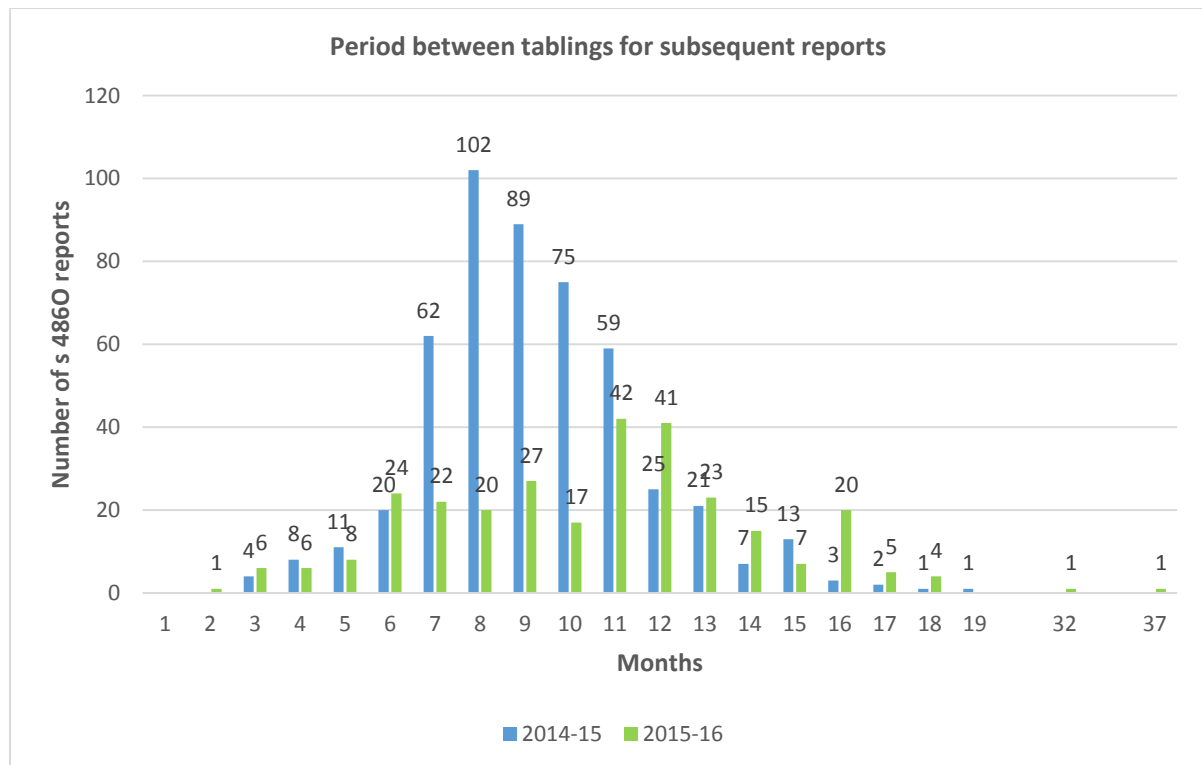
Fig 3



Subsequent reports

Figure 4 shows the period between tablings for the most recent subsequent s 486O report and the one tabled previously. In 2015-16, 8% were tabled in six months or less, 82% were tabled within 7 to 12 months and 10% took more than 12 months to be tabled. As noted in figure 2 above, there were considerably fewer subsequent reports tabled in the current year and this is also reflected in figure 4.

Fig 4



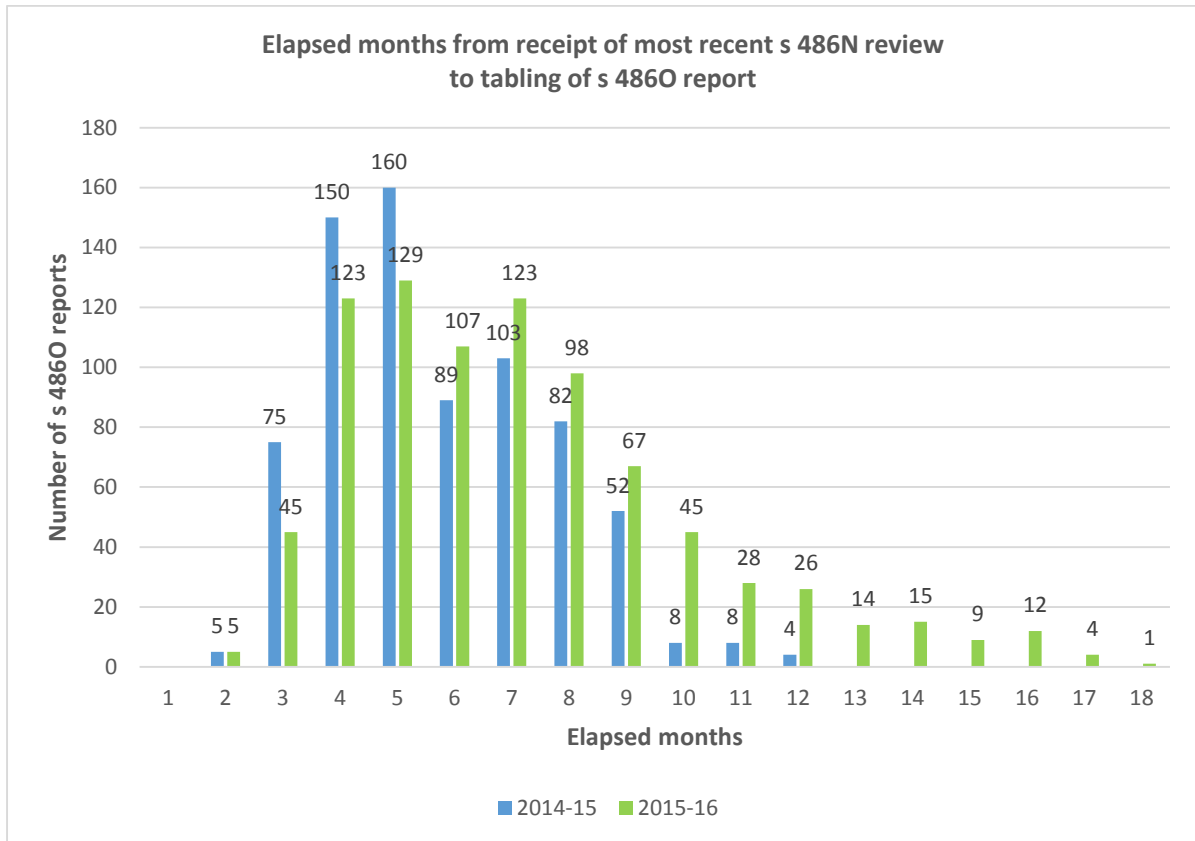
There were two subsequent reports that were tabled more than 30 months after the previous tabling.

- Mr X, whose report was tabled 32 months later, had absconded from community detention and was living unlawfully in the community for 22 months before he was apprehended and returned to an immigration detention facility.
- In the case of Mr Y, whose report was tabled 37 months later, the department advised the Ombudsman’s office that s 486N reviews for Mr Y were inadvertently missed due to interpretations of concurrent immigration and criminal detention provisions. The provision of s 486N reviews was then further delayed because of a departmental system failure. This in turn affected the ability of the Ombudsman’s office to report in a timely manner. It is also noted that Mr Y’s s 486O report referenced four s 486N reviews (see figure 6).

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

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

Fig 5



2015-16 saw an increase in the number of reports which took more than six months from the receipt of the most recent s 486N review to the time the s 486O report was tabled. This is largely a reflection of the increased workload for the office’s Statutory Reporting team.

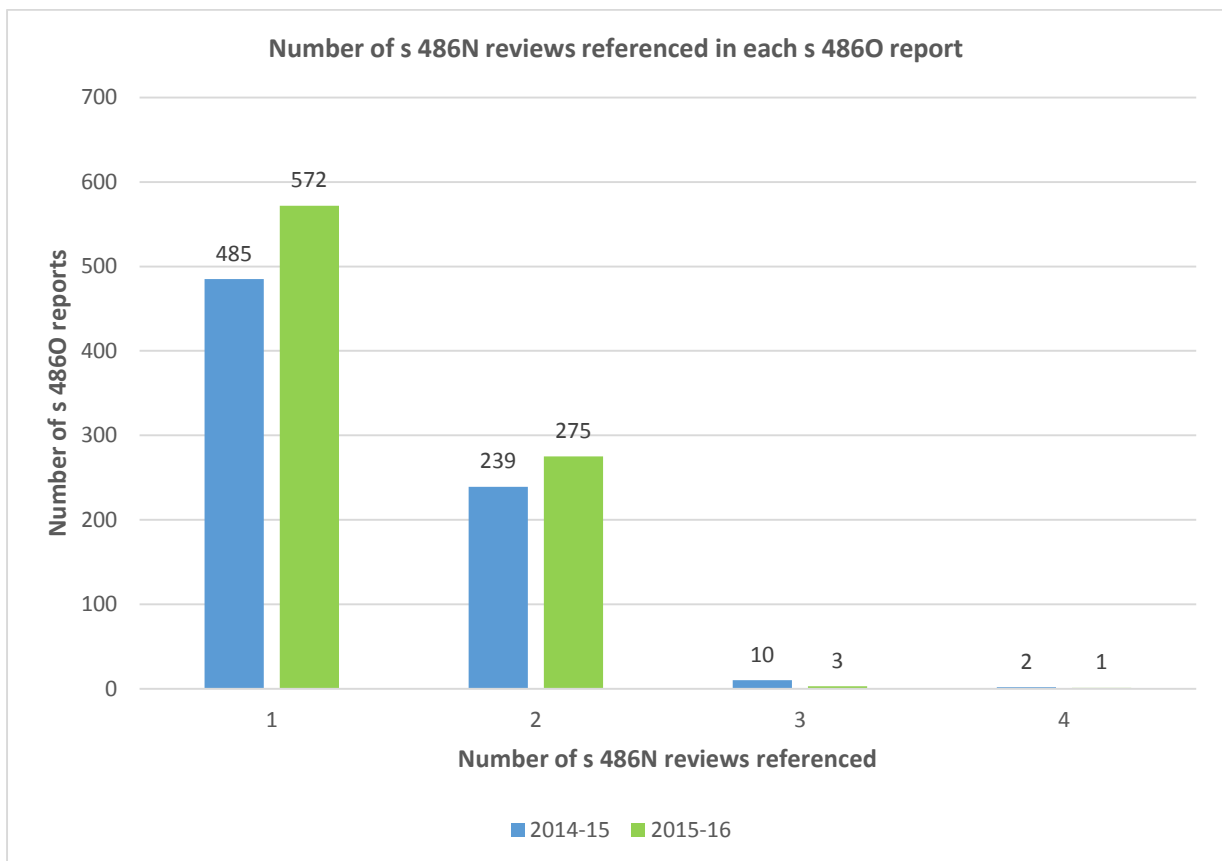
Of the people for whom it took 11 months or more to table a s 486O report after the s 486N review had been received, only one was still in community detention, with the remaining people having been released on a visa or removed from Australia.

Number of s 486N reviews referenced

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

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

Fig 6

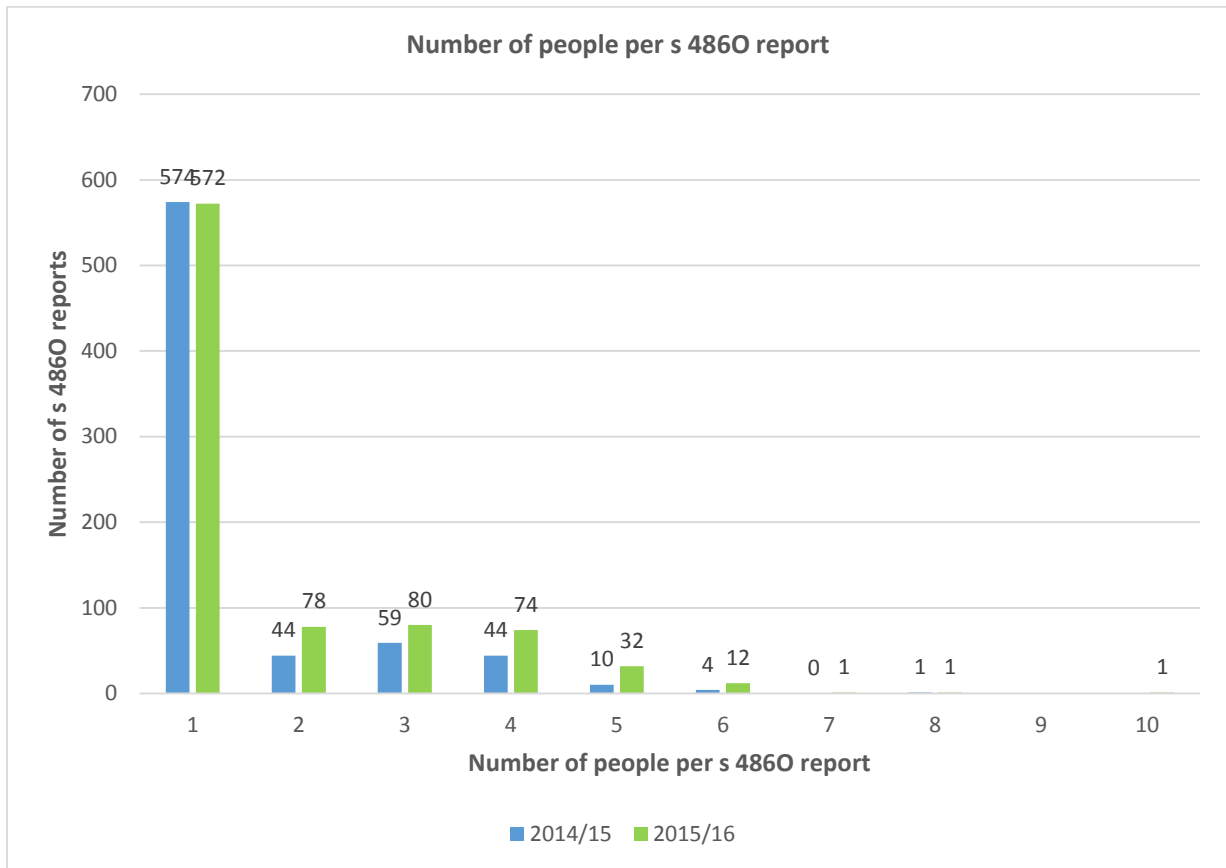


In 2015-16 there was a slight increase, from 63% to 68%, of s 486O reports that referenced one s 486N review compared with the previous year. There was little change in the number of reports referencing two or more s 486N reviews compared with 2014-15.

Number of people per s 486O report

While the majority of s 486O reports relate to a single person (62% in 2015-16), many reports are for family groups of two or more people. Figure 7 shows the number of people per s 486O report. The percentages for these groupings has remained fairly consistent in the last two years.

Fig 7

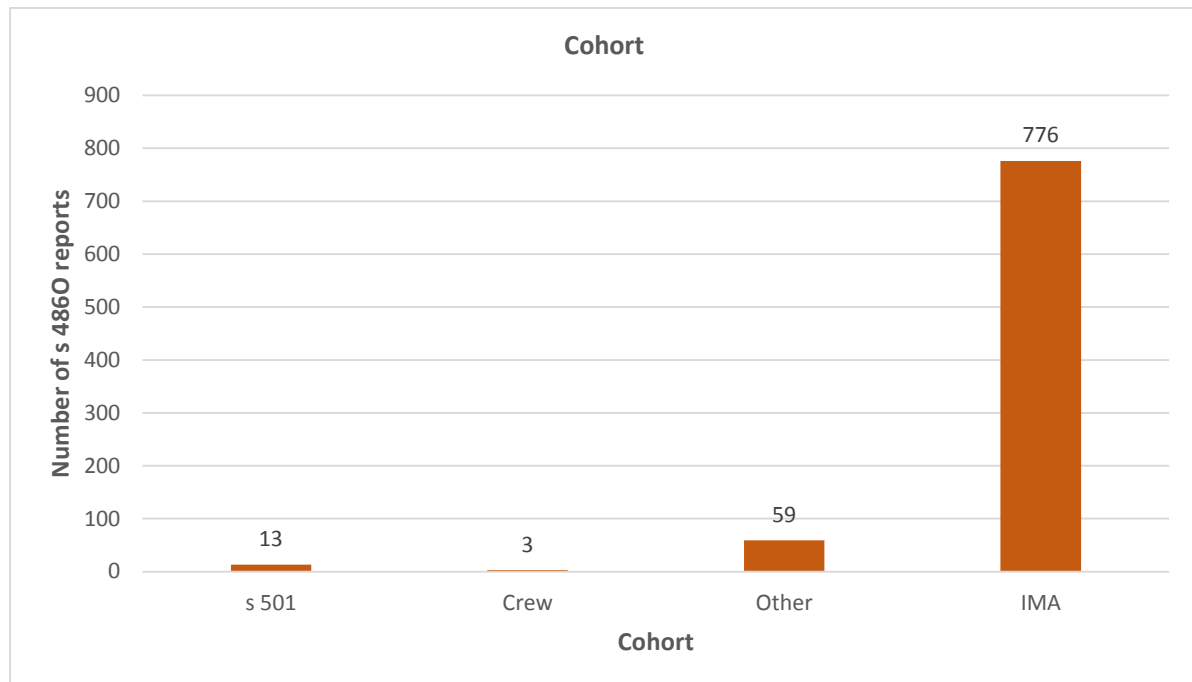


Cohorts of people in detention

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

Figure 8 shows the numbers in the main cohorts of people for whom s 486O reports were tabled in 2015-16.

Fig 8



Legend

s 501 People who have had their visas cancelled under s 501 of the Act³

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 boat

With boat arrivals having ceased in mid-2014 it is likely that we will see a decline in the number of people in the IMA cohort in the next 12 months as they are either granted visas (Bridging or substantive visas) or removed from Australia.

With the increasing number of people being detained under s 501 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.

³ Under s 501 of the *Migration Act 1958*, a person's visa may be cancelled if they have *inter alia* a substantial criminal record or the minister reasonably suspects them of having committed certain offences such as people smuggling.

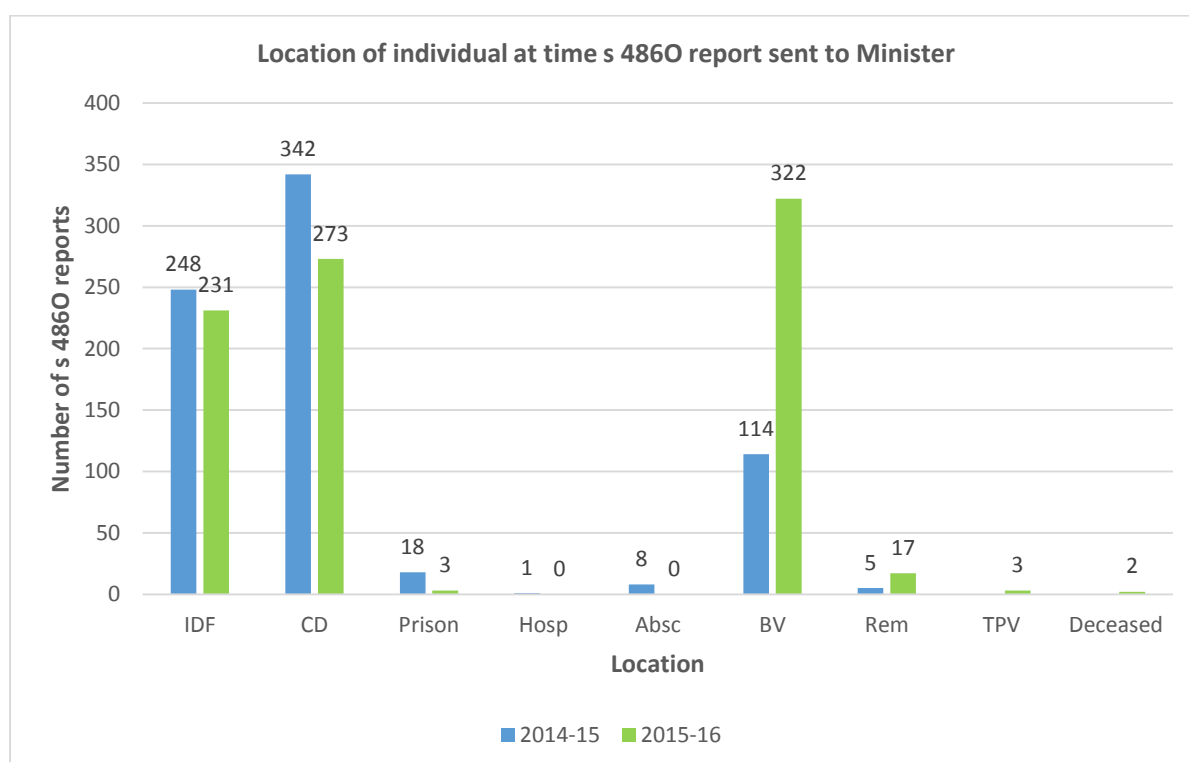
Location

Figure 9 shows the location of people as recorded in their s 486O report that was submitted to the minister.

There was a considerable increase in the number of people reported on in 2015-16 who had been released on a Bridging visa. In these cases the Ombudsman’s office was advised of their release after the department’s s 486N review had been received (and thus the person was still subject to reporting under s 486O) and before we had finished preparing their report.

We also observed a reduction in the number of people reported on who were in immigration detention facilities, community detention and in prison. The number of people removed increased slightly.

Fig 9



Legend

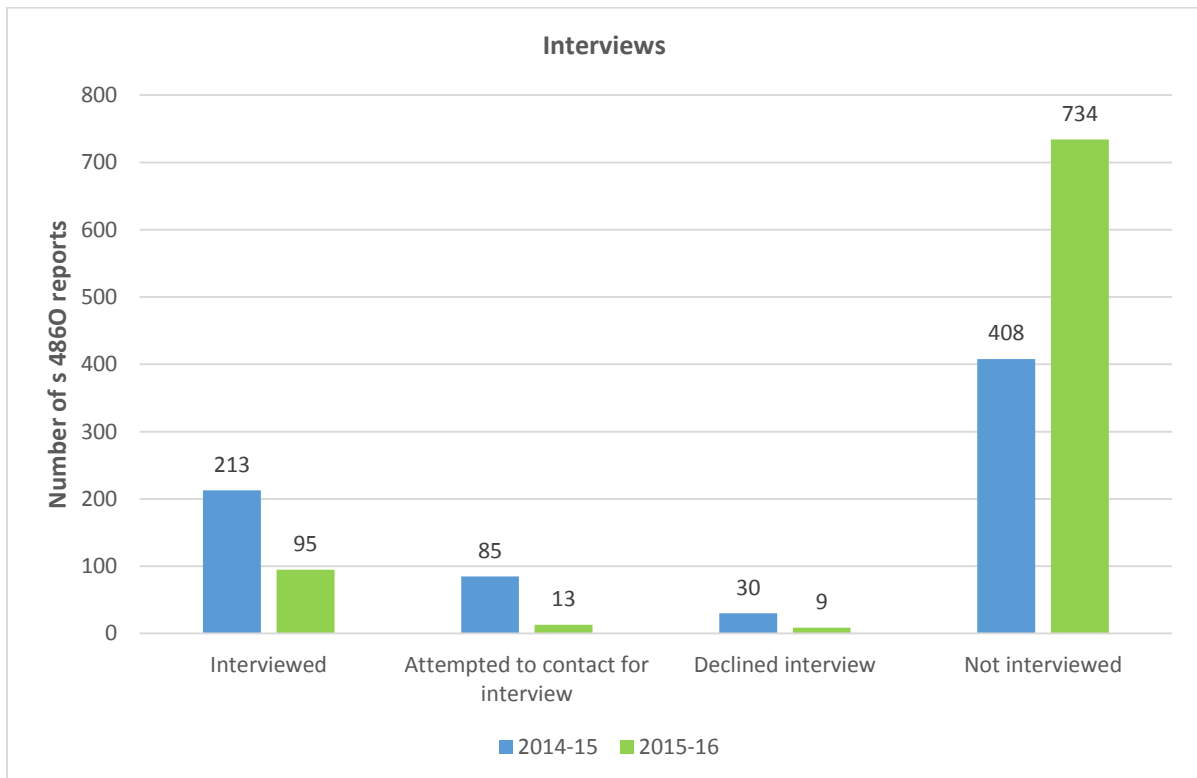
IDF	Immigration detention facility	BV	Released on Bridging visa
CD	Community detention	Rem	Removed from Australia (voluntarily or involuntarily)
Prison	Prison	TPV	Released on Temporary Protection visa
Hosp	Hospital	Deceased	Died while in detention
Absc	Absconded from detention and still at large		

Interviews

The Ombudsman’s office attempts to interview as many people in detention as possible prior to their s 486O report 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 10 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 10

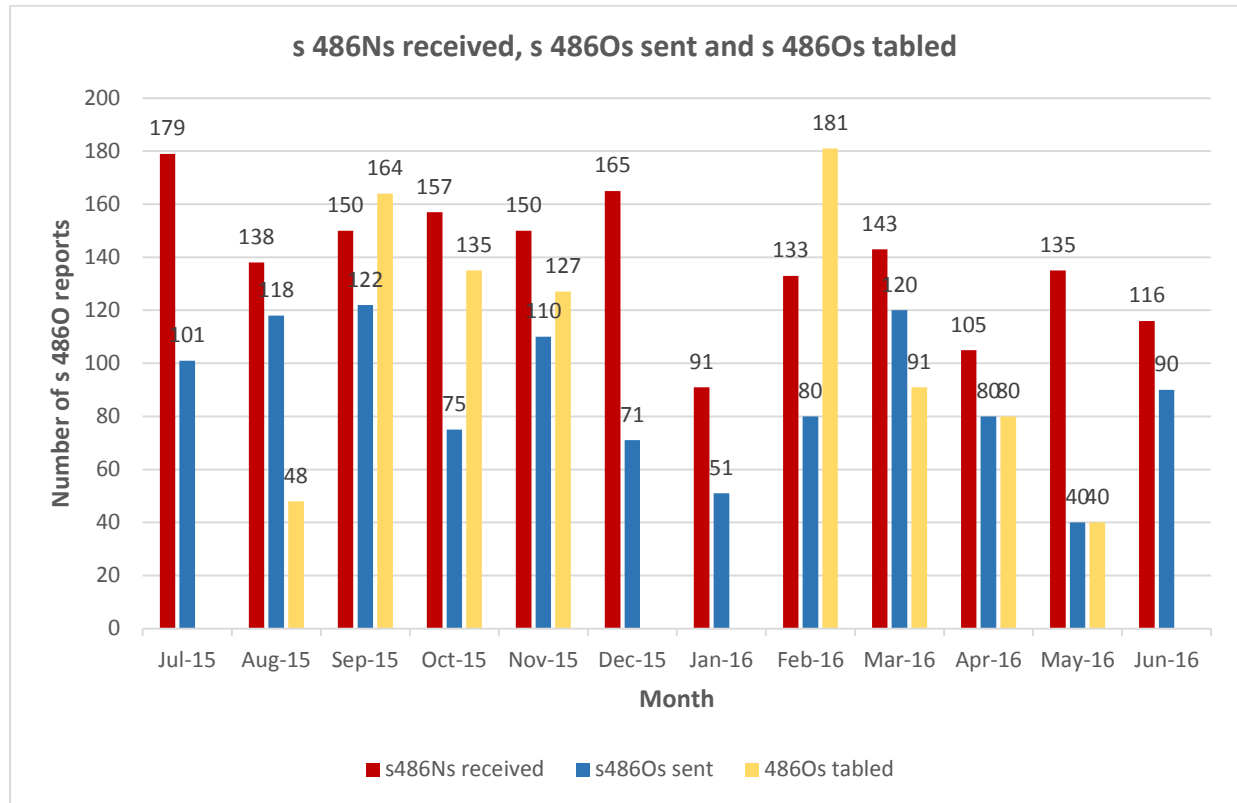


The number of people interviewed in 2015-16 is fewer than in the previous year, decreasing from 28% in 2014-15 to 12% in 2015-16. This is largely due to the resources required to undertake interviews balanced with the need to process as many reports as possible.

Section 486N reviews received, s 486O reports sent and tabled

Figure 11 shows the number of s 486N reviews received from the department and the number of s 486O reports sent to the minister, and tabled, in each month for 2015-16.

Fig 11



As noted in previous years, there is no precise correlation between the number of s 486N reviews received from the department and the number of s 486O reports sent to the minister and subsequently tabled in parliament.

Taking into account the number of reviews on hand and the time taken for s 486O reports to be drafted and cleared, there are very few s 486O reports completed within four months of the s 486N review being received. The majority take at least six months.

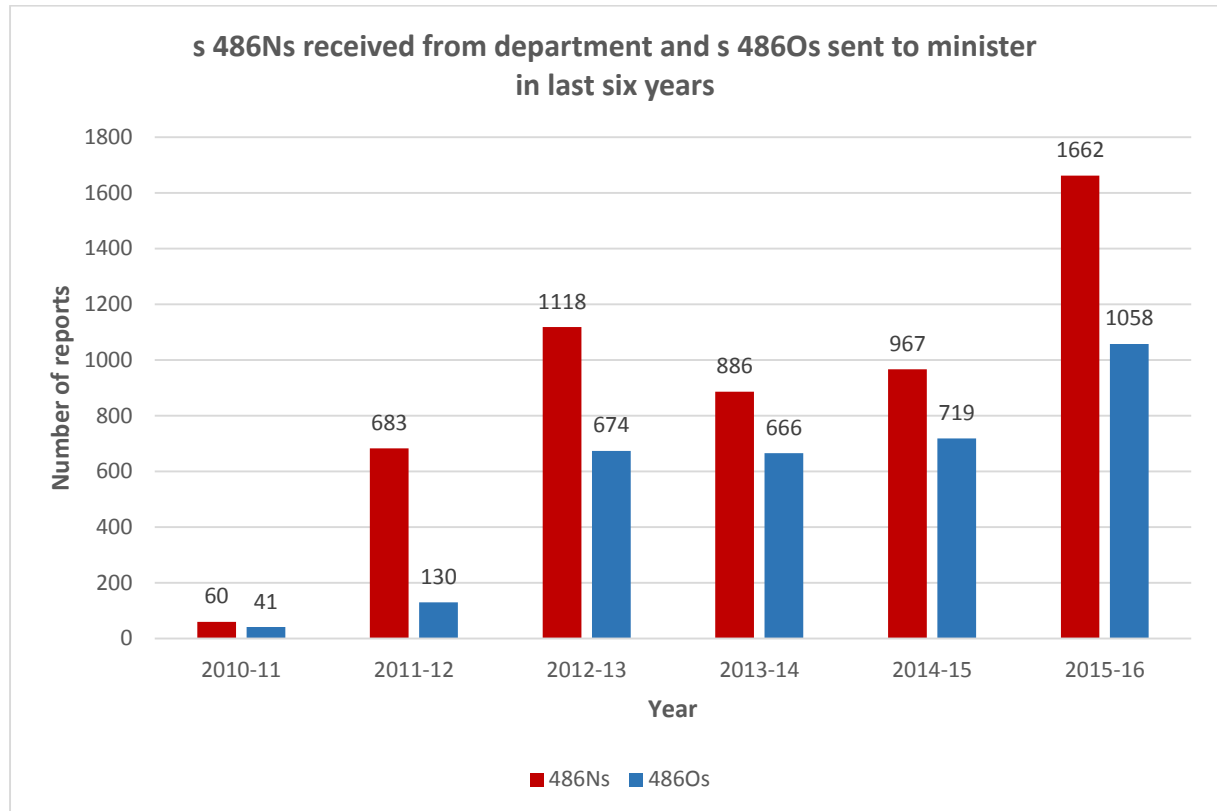
The department regularly advises the Ombudsman's office of people being released from detention. We assign a lower priority to the cases of those people who have left immigration detention after we receive a s 486N review and before we have commenced drafting their s 486O report. This allows us to focus on those people still in detention, particularly those people who have been identified as vulnerable.

The differences in the number of reports sent to the minister and the number tabled in parliament in any given month arises from the requirement for reports to be tabled within 15 sitting days of being received and the fact that parliament may be in recess or dissolved at the time reports are sent to the minister.

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

2015-16 showed both the highest number of s 486Ns received and the highest number of s 486Os sent to the minister since the statutory reporting function commenced in 2005.

Fig 12



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

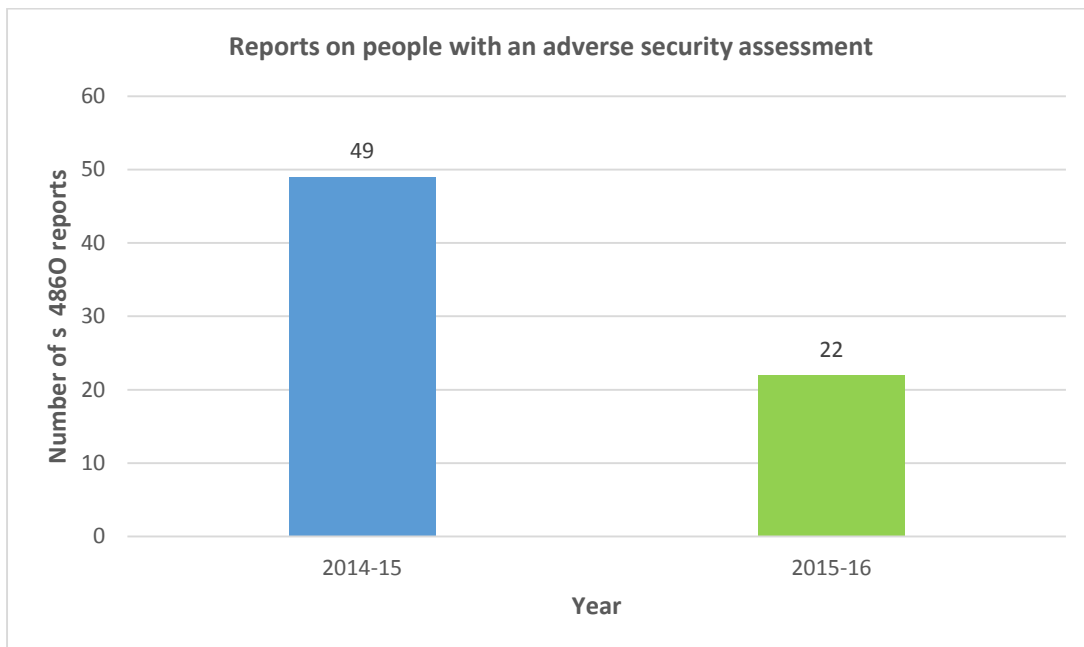
People with an adverse security assessment

In 2015-16 the Ombudsman submitted 22 reports on 20 individuals who had received an adverse security assessment from the Australian Security Intelligence Organisation, two of whom had two reports tabled in that year.

In 2014-15 there were 49 reports tabled for 47 people who had an adverse security assessment. Two individuals had two reports tabled in that year.

The Independent Reviewer of Security Assessments conducts periodic reviews of all adverse assessments. Since this function commenced a number of individuals have had their adverse assessments reviewed with many receiving Bridging visas after they received qualified security assessments. At 30 June 2016 there were still five people with adverse assessments still in detention for more than two years.

Fig 13



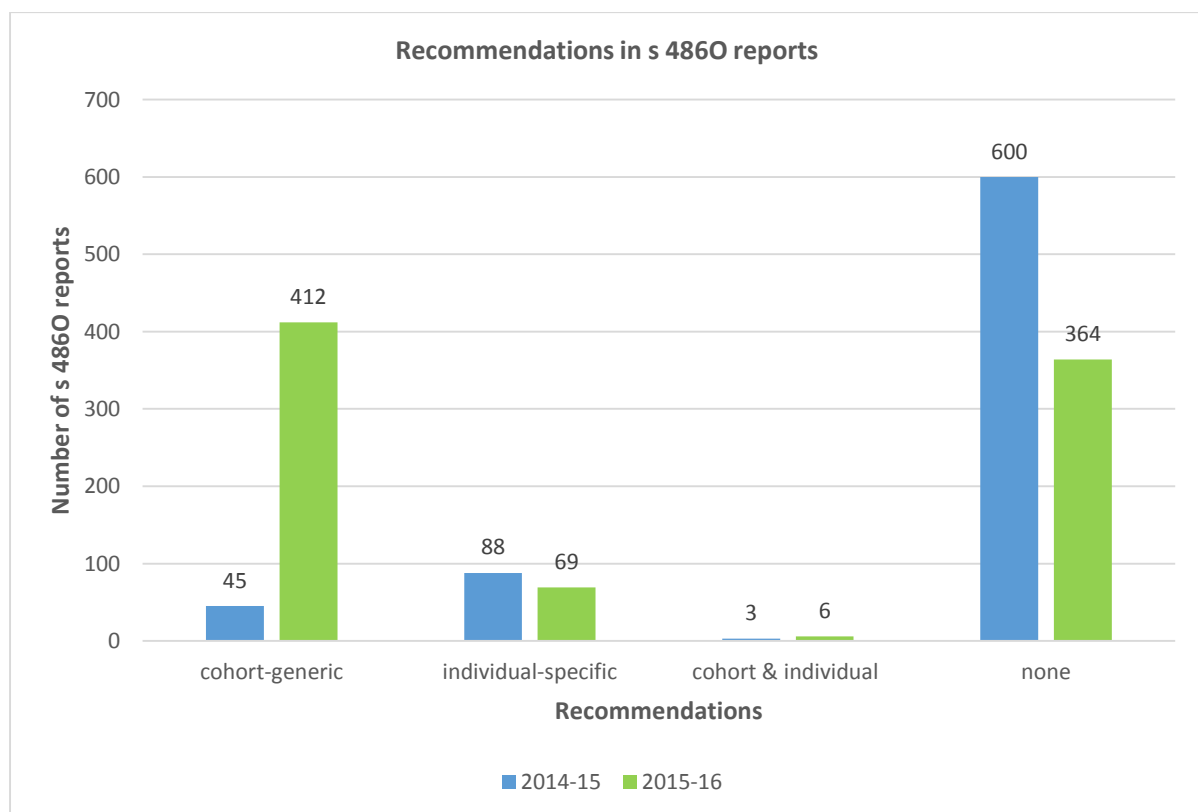
Report recommendations

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 a specific person. As previously noted, the minister is not bound by a recommendation of the Ombudsman.

As in previous years, the recommendations in the reports tabled in 2015-16 fall 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 reports have both specific and generic recommendations.

Figure 14 shows the number of reports tabled in 2014-15 and 2015-16 that contained recommendations.

Fig 14



Individual – specific recommendations

The majority of recommendations made for specific individuals relate to:

- their placement within the detention network or in community detention
- 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 who have been found to be refugees but have received an adverse security assessment
- those who were detained as onshore arrivals (eg SIEV *Lambeth*) and were deemed to be subject to the s 46A bar
- those who have been found not to be refugees but who cannot be returned to their home country as they are affected by the Federal Court's decision in SZQRB
- 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.

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.

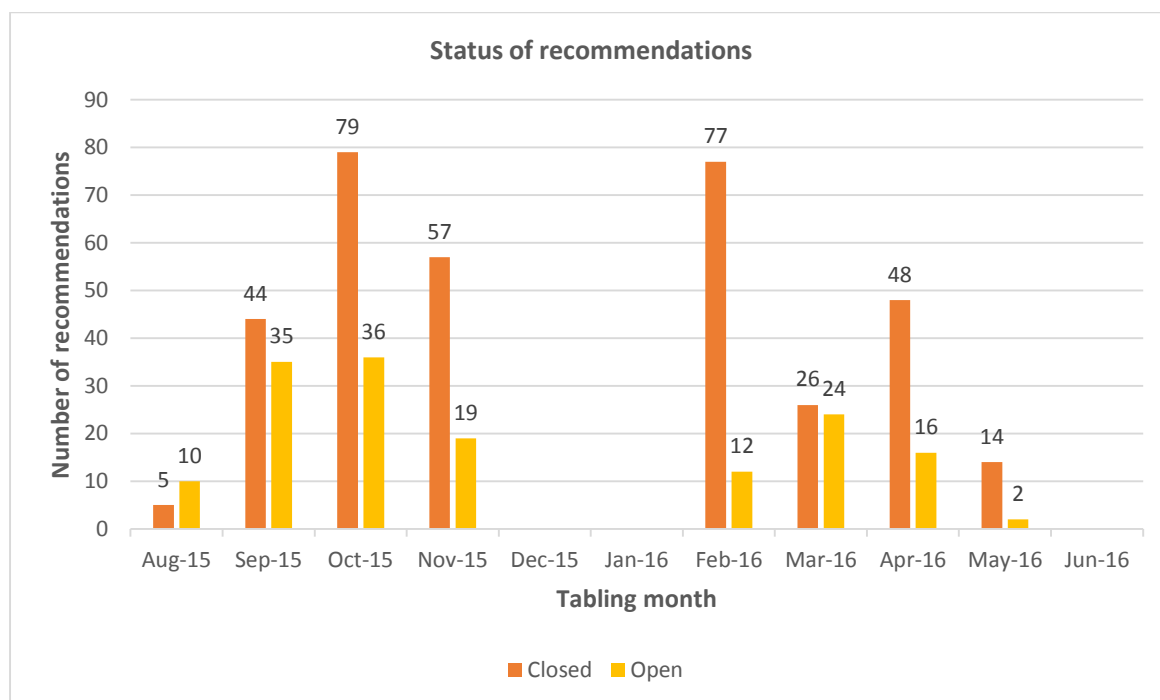
In those instances where a subsequent s 486N review is received for a person for whom a recommendation was made in a previous s 486O report, the department provides a update of the recommendation and indicates the status of the response to it for those cases where the update has not otherwise been referenced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

Where a recommendation is made and the person is subsequently released from detention before a further s 486N review is due, the Ombudsman's office receives no further information in relation to the recommendation.

Status of recommendations

Figure 15 shows the status of recommendations made in s 486O reports tabled in 2015-16.

Fig 15



Legend

Closed: The minister has accepted the recommendation and it has been implemented or the Minister did not accept the recommendation

Open: The minister has noted the recommendation and it is subject to one of the following conditions:

- it is to be implemented 'in due course'
- it has not yet been implemented and the Ombudsman will not be further notified due to person's release from detention (and no longer subject to reporting)
- it may have been implemented but the Ombudsman will not be notified until a subsequent s 486N review is provided and analysis of information and drafting of s 486O report commences
- is awaiting outcome of departmental investigation
- the acceptance is dependent on a legislative instrument (eg s 46B bar lift; babies born in Australia to maritime arrivals post 13 August 2012)
- is awaiting departmental action (eg ministerial intervention submissions to lift the s 46A bar; consider BV release under s 195A; consider transfer to community detention under s 197AB).

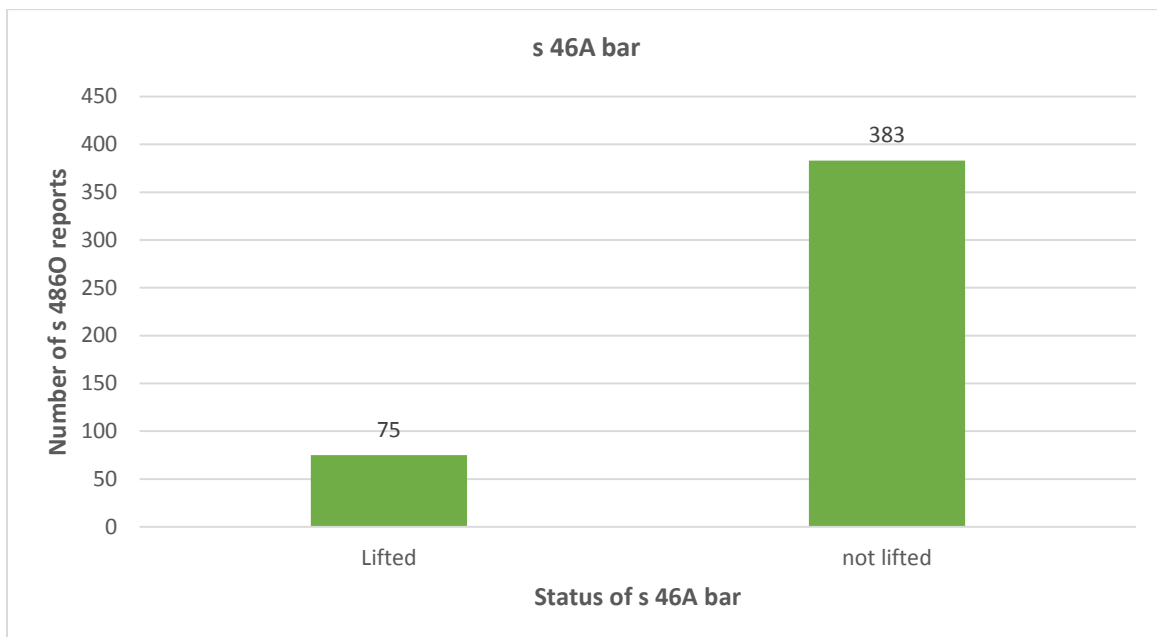
Recommendation to lift the s 46A bar

Asylum seekers who arrive in Australia by boat 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 report was prepared were noted as being subject to the bar which had not been lifted, the Ombudsman recommended to the minister that he lift the bar and allow the person to lodge an application for a visa.

Figure 16 shows the number of reports 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 report was prepared.

Fig 16



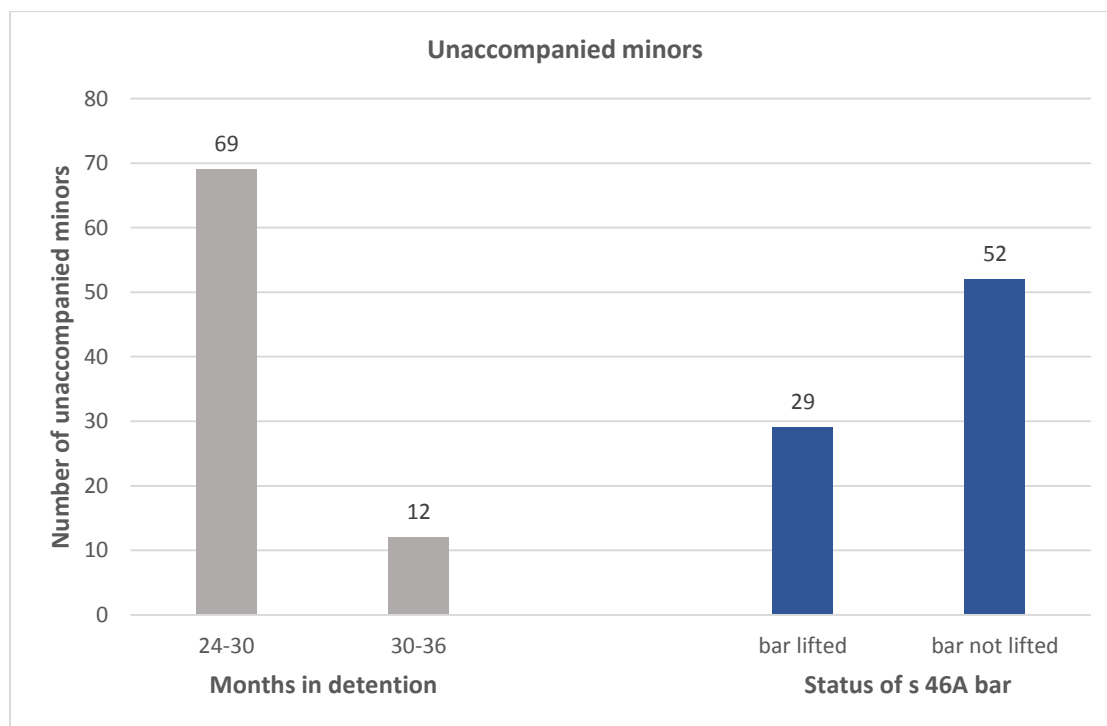
Unaccompanied minors

In the latter part of 2012 through to the time when boat arrivals stopped in mid-2014, a number of unaccompanied minors arrived in Australia by boat to claim asylum⁴.

Such minors are automatically placed under the guardianship of the Minister for Immigration and Border Protection. After initial processing they are housed in community detention and when they turn 18 they are able to lodge an application for a Bridging or other substantive visa.

Figure 17 shows the number of unaccompanied minors who had s 486O reports tabled by the minister, and the duration of their time in detention when the report was prepared and the status of the s 46A bar.

Fig 17



All these unaccompanied minors were subject to the s 46A bar and of those, 64% had not had the bar lifted at the time their s 486O report was prepared.

⁴ While unaccompanied minors have been included in IMA boat arrivals for a number of years, 2015-16 is the first year when they have comprised a significant proportion of people reported on under s 486O. 2015-16 is also the first year in which their details have been incorporated separately in the yearly analysis of reports.

The asylum seeker experience

In 2015-16 the Ombudsman reported on 41 (5% of reports) individuals or families in their first report that gave details of their claim for protection and the outcome. This was a decrease from 14% of reports in 2014-15.

Protection claim

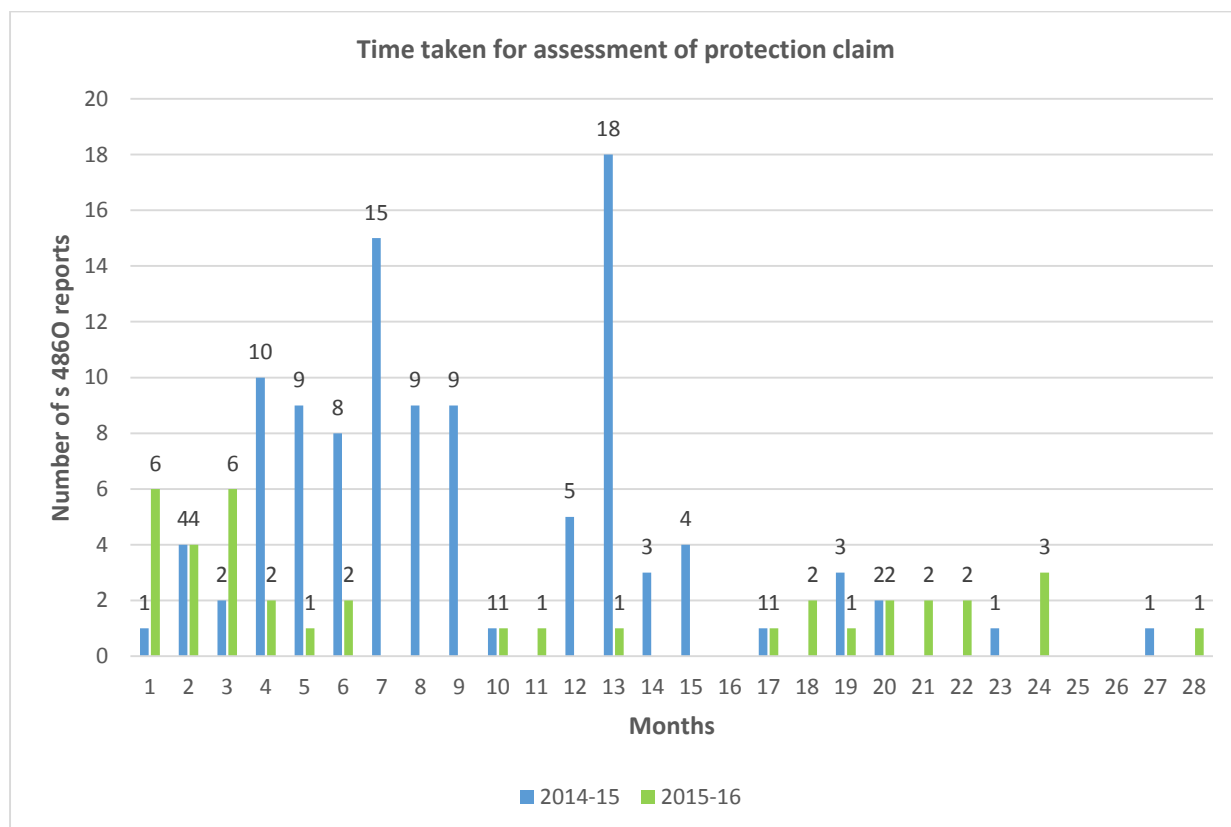
Of the 41 reports with details of a claim for protection, all people (40 individuals and one family group of two people) received a negative outcome.

Processing time – claims for protection

Processing times in 2015-16 exhibit the same apparently random range of processing times as seen in the previous year, which reflects how the changes in government policy has impacted on the assessment of asylum claims with processing times ranging from one to 28 months.

Figure 18 shows the time taken for all those who claimed protection from the date of their arrival to the date their initial claim was determined for both 2014-15 and 2015-16.

Fig 18



Review

Of the 41 reports for people reported on in 2015-16, all of who received a negative outcome for their claim for protection, 38 reports included details of those who had sought an initial review. There were a further 13 second reviews and three third reviews. Figures 19 and 19a show the time taken for each of the three stages of review for both 2014-15 and 2015-16. For the first review the time taken is measured from the date of the rejection of their claim for protection to the date of the review decision. For the second and third reviews the time taken is measured from the date of the previous review decision to the date of the subsequent decision.

Fig 19

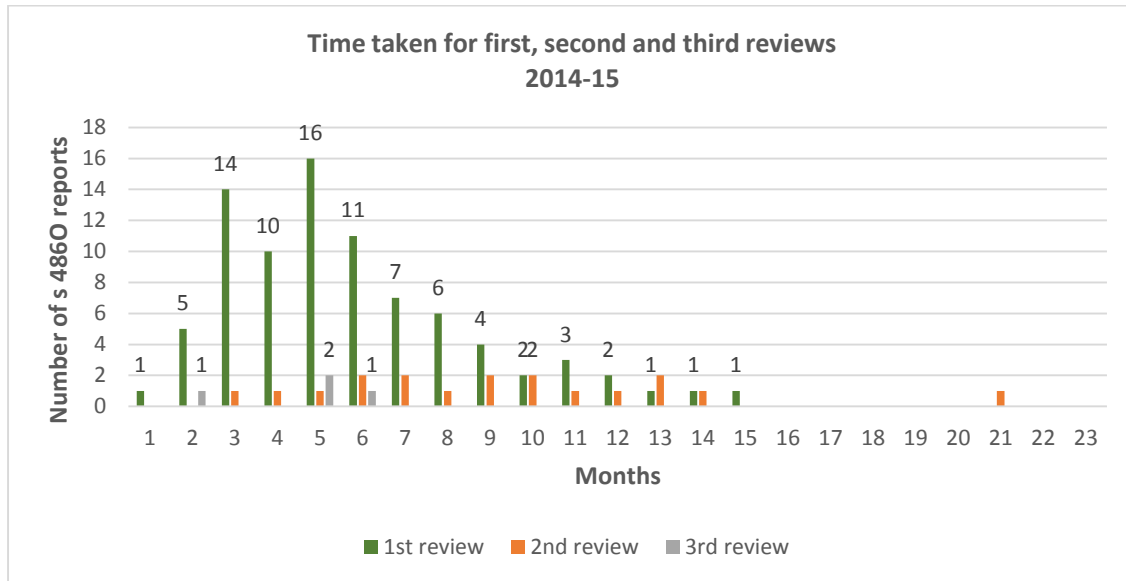
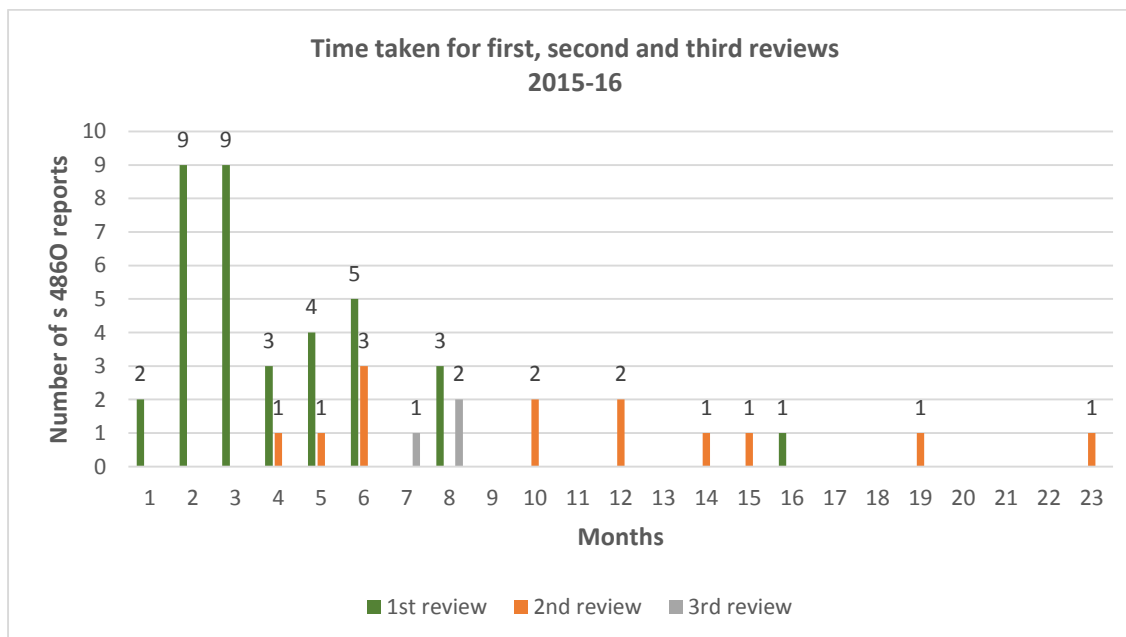


Fig 19a



Review outcomes

Figure 20 shows the outcomes of the three stages of review for people reported on in 2014-15 and 2015-16.

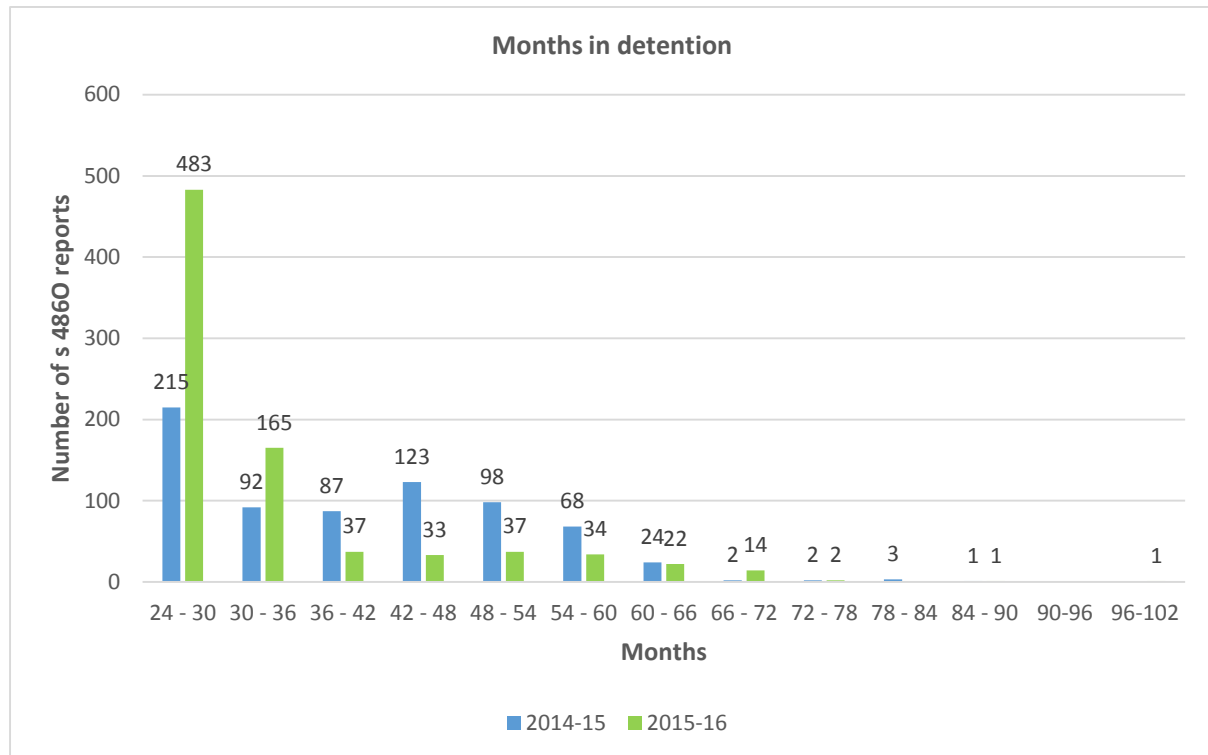
Fig 20



Time spent in detention

The amount of time spent in detention shown in figure 21, as recorded by the department in s 486N reviews, shows a change from the previous year. In 2015-16, 51% of people reported on had been in detention for between 24 and 30 months according to the most recent s 486N review. This contrasts with 28% for 2014-15.

Fig 21



It is also noted that in 2015-16 there were considerably fewer people reported on who were in detention 36 months or more than in the previous year.

Thirteen percent of those reported on had been in detention for four years or more, compared with 25% in 2014-15.

As noted in figure 2, there is a small number of people in detention who have been in immigration detention for a long time (42 people detained for five years or more) who have no foreseeable possibility of release. The Ombudsman continues to make recommendations to the minister about these individuals where appropriate.

Post 13 August 2012 cohort

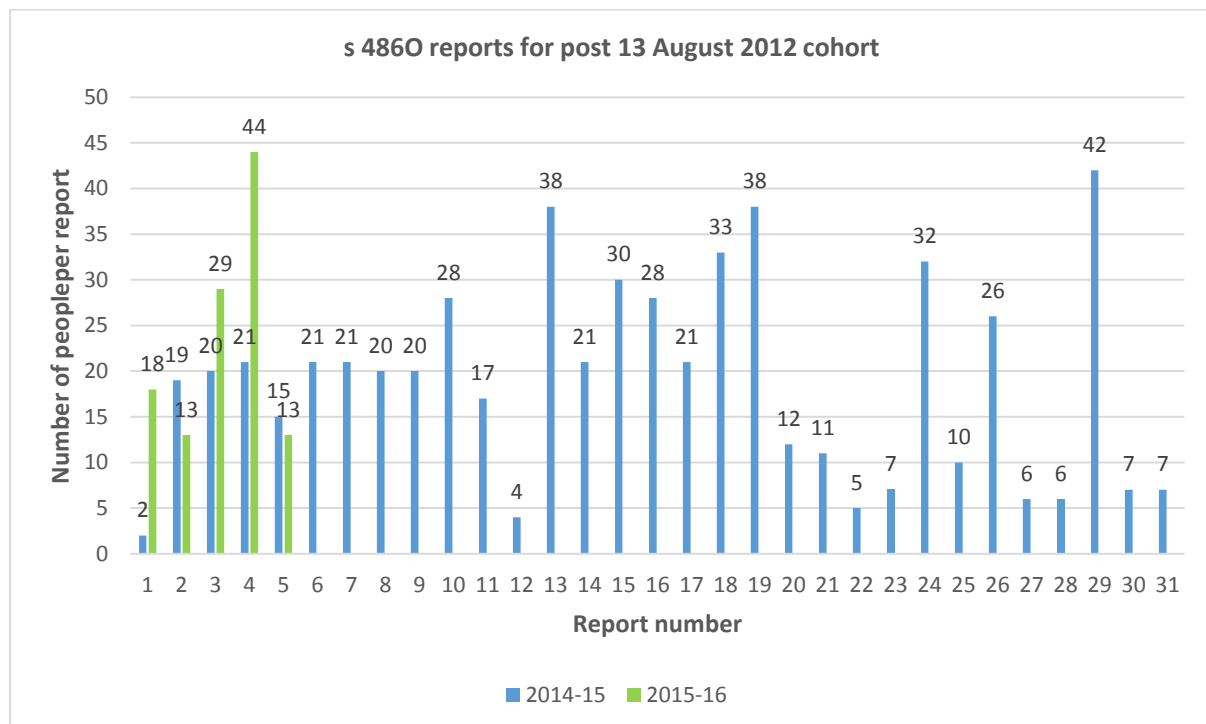
In 2014-15 the Ombudsman reported in an abridged format for people who arrived in Australia after 13 August 2012. The government announced that such people would be transferred to regional processing centres (RPCs) to have their claims for protection assessed and they would not be considered for resettlement in Australia.

Due to capacity restraints at the RPCs a number of these people have not been transferred and at the time of their s 486O report were residing in Australia (see figure 22) and their claims for protection had not been assessed (under the government's 'no advantage' policy). This meant that the usual details that would be included in a s 486N review from the department were not available so an abbreviated form of review was submitted to the Ombudsman by way of a schedule with details of the name, nationality, date of birth and gender recorded as well as the date of arrival and the name of the boat they arrived on.

The Ombudsman subsequently adopted a form of s 486O report that noted such details and reported on any medical information that was made available as well as information provided by those people who were able to be interviewed.

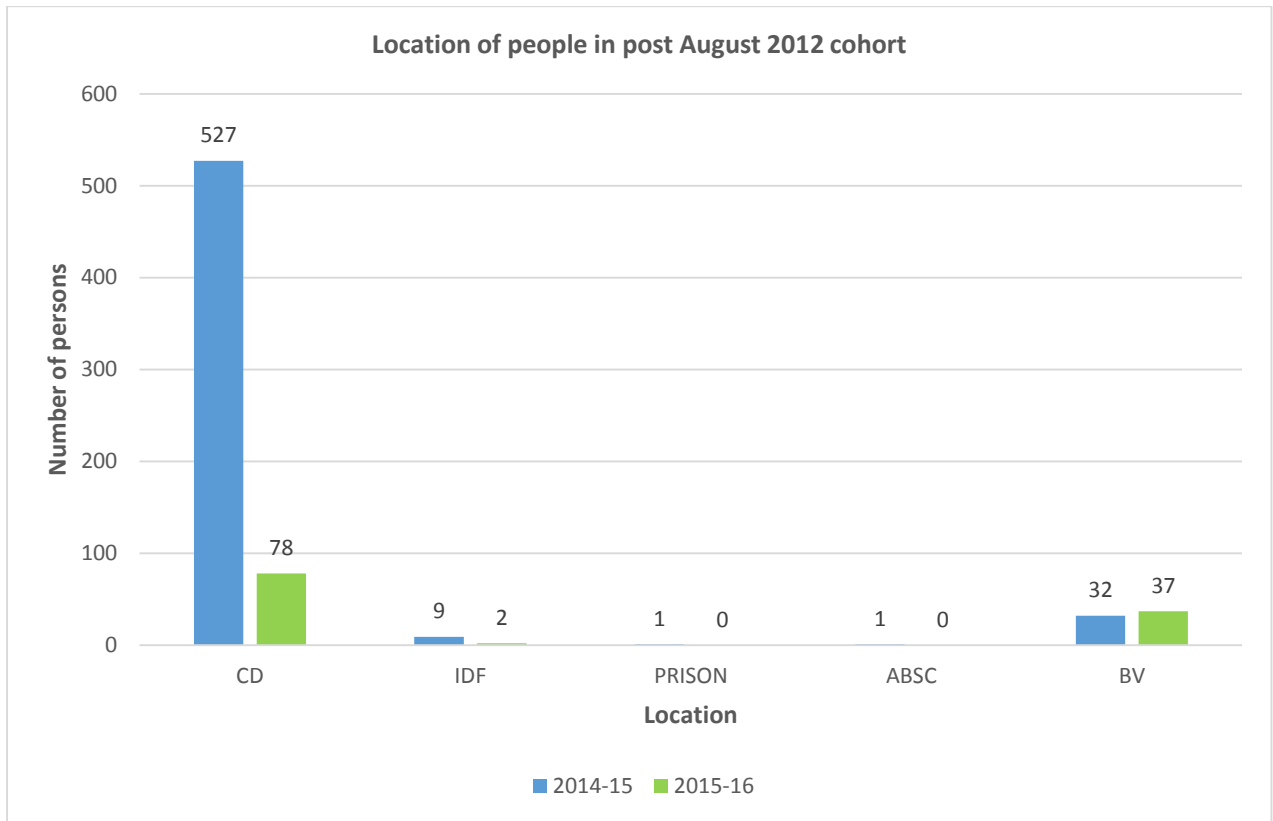
The final five reports in this format were tabled in August 2015. The department is no longer using this abridged form of s 486N reviews and consequently the Ombudsman is now able to provide to the minister s 486O reports in the usual format for all people in this cohort.

Fig 22



The location of the individuals in this cohort at the time their s 486N review was received, many of who are in family groups, is shown in figure 23.

Fig 23



Legend

CD	Community detention	ABSC	Absconded from detention and still at large
IDF	Immigration detention facility	BV	Released on Bridging visa
PRISON	Prison		