

**Investigation into the
processing of asylum seekers
who arrived on *SIEV Lambeth*
in April 2013**

January 2017

Report by the Commonwealth Ombudsman,
Colin Neave AM, under the *Ombudsman Act 1976*

REPORT NO. **01|2017**

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Executive summary

This investigation came about because of apparent inconsistencies our office identified in the processing of irregular maritime arrivals (IMAs) by the Department of Immigration and Border Protection (the department) while undertaking the Ombudsman's statutory obligations to report on the circumstances of people held in immigration detention for more than two years.

In assessing the reviews provided by the department under s 486N of the *Migration Act 1958* we noticed that people who were recorded as being detained under s 189(1) of the Act, having been detained on Australia's mainland, were subject to the bar under s 46A of the Act, which applies to offshore arrivals.

Further investigation indicated a number of boats carrying IMAs had arrived between 13 August 2012 and 20 May 2013¹ and these IMAs were all detained on the Australian mainland. In the information provided to our office in the department's s 486N reviews, all of these IMAs were noted as having been detained onshore under s 189(1), however not all were subject to the s 46A bar. This was the apparent inconsistency that came to our attention.

What followed was a prolonged attempt by our office to have this clarified by the department. And while ultimately we were satisfied that the IMAs had been processed correctly, what emerged from this investigation and the multiple requests for information we sent to the department was that there appeared to be no central integrated repository of all the relevant information that pertained to individual IMAs.

This was made starkly evident when we asked for the department to provide our office with legal advice that clarified the issue of whether IMAs from Suspected Illegal Entry Vessel (SIEV) *Lambeth* had been correctly classified as onshore arrivals and made subject to the s 46A bar. This legal advice asserted that they were not offshore entry persons under the Act, but we were later informed that this advice was incorrect.

This raises concerns that all relevant matters were not available to someone authorised to provide legal advice on behalf of the department and that adequate clearance procedures were not in place to prevent what amounted to incorrect advice to be released.

When we did receive the department's response to our investigation we were advised that SIEV *Lambeth*'s passengers had been taken by an Australian Customs vessel through the waters of Ashmore Lagoon (which was then a place excised from Australia's migration zone) for the purpose of rendering them as offshore arrivals and thus subject to the s 46A bar and transfer to a Regional Processing Centre. However it appeared this information was not recorded in the department's records for these IMAs and it required the department to undertake an analysis of the ship's log to confirm that this had in fact happened.

¹ Australia's mainland was excised from the migration zone on 20 May 2013

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The Ombudsman makes two recommendations in this report:

Recommendation 1

That the department review the information that was recorded for persons arriving on board SIEV *Lambeth* and identify any shortcomings in the scope and manner of the information recorded and ensure that all relevant information is available to all departmental officers who have a reasonable need for access to it.

Recommendation 2

That the department consider any learnings from this review and apply these to its systems more broadly where appropriate.

Department's response

The department responded to the amended draft report on 6 January 2017. This response is at Attachment A. The department advised of an apparent error in the draft report relating to the interpretation of offshore and onshore arrivals. The report has been amended at paragraph 1.5 to reflect this.

PART 1— INTRODUCTION

Background

1.1 This report is the result of an ongoing investigation into aspects of the processing of claims for protection for people who arrived in Australia aboard SIEV *Lambeth* in April 2013.

1.2 In July 2015 the Ombudsman’s office identified apparent errors in the assessment of individuals’ claims for protection as part of its statutory reporting obligations under s 486 of the *Migration Act 1956* (the Act) to report on the circumstances of people who have been detained for more than two years.

1.3 This office sought information from the department to clarify our understanding of this situation on a number of occasions. Some of the responses to these queries were late, incomplete or contradictory. The department’s inability to provide adequate responses to these requests in a timely manner led to the Ombudsman commencing an own motion investigation in December 2015 and made a formal request to the department for information under s 8 of the *Ombudsman Act 1976*.

1.4 There were 22 boats which arrived in Australian waters between 13 August 2012 and 20 May 2013 with 1367 IMAs seeking protection. This investigation has focussed on SIEV *Lambeth*, as a representative example of the entire cohort.

Legislation

1.5 People who arrive in Australia and claim protection are assessed as either onshore (also known as *direct entry*) or offshore arrivals. A person classified as either an offshore or onshore arrival has, regardless of their classification, arrived inside the migration zone. However any unlawful non-citizen who arrives at an excised offshore place (which is still part of and within the migration zone) cannot apply for a visa without the permission of the Minister given verbally.²

1.6 An individual’s detention under s 189 of the Act is not directly relevant to their status as offshore entry persons. Detention under section 189(1) or 189(3) is dependent on when and where an individual is detained, that is onshore or offshore.

1.7 There have been a number of changes in recent years to the legislation that applies to people who arrive in Australia by boat and wish to lodge a claim for protection. In August 2012 an Expert Panel recommended, *inter alia*, that regional processing capacity be developed on Nauru and Manus Island to process all unauthorised maritime arrivals.

1.8 This recommendation was accepted by the government and it was subsequently legislated that all people arriving by boat at locations excised from Australia’s migration zone from 13 August 2012, including Christmas Island, would be subject to detention and processing of their claims for asylum at a Regional Processing Centre (RPC). At this time, people who arrived by boat on Australia’s mainland were regarded as being onshore arrivals.

1.9 In practice, the majority of boats containing asylum seekers have arrived at Christmas Island, either by sailing there directly, or being intercepted by Australian naval or

² This paragraph of the draft report has been amended based on information provided by the department.

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Customs vessels and directed there under escort. In some instances where boats were located at sea and deemed unseaworthy the passengers were transferred to Australian vessels and then taken to Christmas Island or in some instances to the Australian mainland.

1.10 On 20 May 2013, changes to the Act excised the Australian mainland from the migration zone, meaning that anyone arriving on the Australian mainland by boat would be treated as being an offshore entry person.

PART 2— OMBUDSMAN’S INVESTIGATION

2.1 The Ombudsman is required under s 486O of the Act to report on all persons who have been in immigration detention for two years, and then every six months thereafter until the person is released from detention.

2.2 The Ombudsman undertakes this function using a variety of sources of information, including, for example, reports provided by the department under s 486N of the Act, medical information provided by International Health and Medical Services, details of court or tribunal proceedings, interviews with detainees, and information provided by legal representatives, family members, advocates and other interested parties.

2.3 In July 2015 in exercising its statutory reporting role, this office became aware of apparent inconsistencies in information provided by the department in s 486N reports in relation to certain people who had arrived in Australia by boat and claimed they were owed protection. This was based on our understanding of the relevant legislation, in particular the apparent nexus between the application of s 46A and a person being detained under either s 189(1) or s 189(3) of the Act.

2.4 SIEV *Lambeth* arrived in Australian waters in April 2013. It was our understanding that all of the passengers were transferred to Australian Customs Vessel *Ocean Protector*, and were then taken directly to Darwin. If this were the case they would have been classified as onshore arrivals and not subject to the s 46A bar and transfer to an RPC.

2.5 When we first received s 486N reports from the department for IMAs who had arrived on SIEV *Lambeth* it was noted that some of the passengers were detained onshore under s 189(1), with others detained offshore under s 189(3).

2.6 We first asked the department for information about the individuals who had arrived on SIEV *Lambeth* in September 2015 in an attempt to clarify what appeared to be inconsistencies in the way in which they had been processed when taken into immigration detention.

2.7 Most individuals who arrived on SIEV *Lambeth* were detained under s 189(1) on 22 April 2013 in Darwin. The department provided this office with a copy of legal advice dated 27 August 2015 confirming that these individuals were properly detained as onshore arrivals under s 189(1).

Of particular interest, and relevance to this investigation, in this advice was the statement: *“The intention was to take these individuals to Ashmore Island and then onwards to Christmas Island. However, because of various operational reasons and based on the evidence that you have, the individuals were taken to Darwin instead. I understand that **there is no evidence** [emphasis added] that the individuals were taken to Ashmore or Christmas Island.”*

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2.8 This advice also stated unequivocally that “*Although the 138 individuals entered Australia on 22 April 2013 and became unlawful non-citizens because of that entry, they did not enter at an excised offshore place. Therefore they would not be offshore entry persons under s 5(1) of the Act*”.³ This would mean they were not subject to the s 46A bar.

2.9 Two individuals from this boat were detained under s 189(3) as offshore arrivals. We asked the department to explain why these two persons were detained under a different section of the Act from the rest of the passengers and were advised that they had in fact been detained under s 189(1) and that our office had previously been incorrectly advised of their detention under s 189(3).

2.10 At various times between June and September 2015, as advised to the Ombudsman by the department in individual s 486N reports, the passengers detained onshore were referred to the Minister for consideration to lift the bar under s 46A to allow them to lodge a temporary visa. This was the apparent contradiction we identified as our office was of the understanding that s 46A did not apply to those detained onshore.

2.11 On 14 January 2016 our office submitted a number of questions to the department under s 8 of the *Ombudsman Act 1976* to clarify the issues surrounding the arrival and detention of the passengers on SIEV *Lambeth*.

2.12 The department did not provide a response within the agreed 28 days and so based on the information we had at hand, a draft report was prepared and on 31 March 2016 was sent to the department for comment.

2.13 The department responded to the s 8 request on 19 April 2016. This response was the first time our office was made aware of what had actually transpired with the passengers on SIEV *Lambeth*. The department advised that a small number of passengers who required medical treatment were brought directly to Darwin by a naval vessel, HMAS *Childers*. These individuals were not subject to the s 46A bar as they entered the migration zone in Darwin and were classified as ‘direct entry arrivals’.

2.14 The remainder of the passengers were transferred to Australian Customs Vessel *Ocean Protector* which then sailed westwards for two days to Ashmore where the ship transited through Ashmore Lagoon. At this time Ashmore and its associated waters were excised from the Australian migration zone. It was this action of transiting the IMAs through Ashmore Lagoon that rendered these IMAs as offshore entry persons. *Ocean Protector* then sailed to Darwin where the IMAs were disembarked and taken into immigration detention.

2.15 Transiting these passengers through Ashmore Lagoon was done for the specific purpose of rendering them offshore arrivals and thus subject to the s 46A bar and transfer to an RPC.

2.16 It is noted that a reason for the delay in the department’s response is that it did not have information on hand in its computer systems that was able to confirm that the IMAs were taken to Ashmore. The department had to request copies of the *Ocean Protector*’s ship log to verify that the IMA’s had been taken to Ashmore.

³ Our office was subsequently advised that this legal advice was incorrect and was based on information that was available to the legal officer at the time the advice was prepared.

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2.17 The department's response clarified a number of points, including that being subject to the s 46A bar depended on a person arriving in Australia at a place excised from the migration zone. Further, their subsequent detention related to the location they were detained, irrespective of where they first entered the migration zone.

2.18 Our office was then satisfied that the passengers from SIEV *Lambeth* had been properly processed, both in terms of being subject to the s 46A bar and in being detained under the correct section of the Act.

2.19 In the draft report, the Ombudsman made two recommendations:

Recommendation 1

That the department undertake a detailed evaluation of all asylum seekers who arrived in Australian waters between 13 August 2012 and 20 May 2013 and were detained on the Australian mainland in Darwin and other locations, to ensure that they were detained under the correct section of the Act and that if they are determined to be onshore arrivals they are assessed as such.

Recommendation 2

For those individuals who have been incorrectly assessed as being subject to the s 46A bar, or incorrectly detained as offshore arrivals, the department should undertake the necessary steps to expedite the processing of their claims for protection, mitigating any consequences of them having been incorrectly detained or improperly assessed as being subject to the s 46A bar.

2.20 In its response to the draft report, the department advised that recommendation 1 was agreed, with the department initiating a review of IMAs on board SIEVs which arrived between 13 August 2012 and 20 May 2013, as an assurance activity to gauge whether all were processed correctly under the Act. The review will assess whether IMAs were correctly assessed as an 'offshore entry person' or a 'direct entry arrival'.

2.21 Recommendation 2 was noted, as based on detailed assessments, the department was yet to identify an individual who has been incorrectly assessed as being subject to the bar imposed by s 46A of the Act, or incorrectly categorised as an offshore entrant.

2.22 The department advised it will notify the Ombudsman if it identifies any processing errors for this cohort of IMAs. Mitigation strategies or remedial actions would be developed in respect of these individuals based on their particular circumstances.

2.23 We subsequently asked the department for further confirmation that transiting persons through Ashmore Lagoon did in fact render them as offshore arrivals. The department provided legal advice that confirmed this is the case, and also explained how the geography of places such as Ashmore and Christmas Island affects the boundaries of the migration zone as it applies to these locations.

PART 3— CONCLUSIONS AND RECOMMENDATIONS

3.1 When our office first asked questions of the department to clarify these issues we were not able to get a response that provided all the relevant information. Further, had we received the response to our formal investigation in a more timely manner it would have influenced the content of the draft report we provided to the department

3.2 For example, in the response to the first questions we asked about the IMAs on SIEV *Lambeth*, the department made no reference to the fact that they had been transited through Ashmore Lagoon and that this was done to make them offshore arrivals and subject to the s 46A bar and transfer to an RPC.

3.3 We have received no information to date from the department that explains how officers responsible for processing the detention of SIEV *Lambeth*'s IMAs knew that they were offshore arrivals because they had been transited through Ashmore Lagoon, yet such information was not available to departmental officers (including legal officers) who were tasked with providing responses to this office's inquiries. In fact it was explicitly stated in the initial legal advice provided to this office that there was no evidence that SIEV *Lambeth*'s IMAs were taken to Ashmore.

3.4 While it was initially the view of this office that those persons arriving on board SIEV *Lambeth* had been incorrectly assessed as being subject to the s 46A bar, we now accept that this is not the case, and that by being transited through the waters of Ashmore Lagoon, they were then made offshore arrivals. They were then subsequently detained in Darwin under the correct section of the Act.

3.5 It is acknowledged that since arrivals of IMAs by boat to Australia have at this point in time ceased, and with the excision of the Australian mainland from the migration zone, the circumstances that led to the SIEV *Lambeth* situation are unlikely to be repeated.

3.6 However it is the view of the Ombudsman that such systemic failings in properly recording all relevant data can manifest themselves in other situations and it is the department's responsibility to ensure that its systems and processes are robust and are able to properly support all departmental officers in exercising their duties.

3.7 The Ombudsman makes two recommendations in this report:

Recommendation 1

That the department review the information that was recorded for persons arriving on board SIEV *Lambeth* and identify any shortcomings in the scope and manner of the information recorded and ensure that all relevant information is available to all departmental officers who have a reasonable need for access to it.

Recommendation 2

That the department consider any learnings from this review and apply these to its systems more broadly where appropriate.

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Attachment A

Department's response



Australian Government
Department of Immigration
and Border Protection

DEPUTY SECRETARY

06 January 2017

Mr Colin Neave
Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Mr Neave,

Thank you for the opportunity to provide comment on your amended draft own motion report, '*Investigation into the processing of asylum seekers who arrived on the SIEV *Lambeth* in April 2013*', which was sent to the Department of Immigration and Border Protection (the Department) on 21 November 2016.

DIBP comments in respect of the Commonwealth Ombudsman draft report

Processing of persons on board SIEV *Lambeth*

I am pleased the amended draft report recognises that the persons from the *SIEV *Lambeth** were properly processed under the *Migration Act 1958* (the Act).

In particular, the Department notes you are satisfied that those persons who arrived in Australia on board the *SIEV *Lambeth** and who were subsequently transferred to Darwin in *ACV *Ocean Protector** were correctly identified as *offshore entry persons*, that section 46A of the Act applied to these persons, and that section 46A acted to prevent those persons from making a valid visa application.

Incomplete recording in departmental systems

In considering the broader conclusions and recommendations of the report, it is important to note the complex environment in place at the time of the *SIEV *Lambeth**'s arrival and, more generally, over the period between 13 August 2012 and 20 May 2013.

With the coming into effect of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* on 18 August 2012 the Department needed to immediately establish a complex operational framework.

For example, the Department faced immense pressure to simultaneously manage the arrival of several thousand asylum seekers arriving by boat, operationalise the logistics for the regional processing centres and manage the immigration detention network in Australia.

In this high-tempo environment, the Department was required to make decisions on complex and high risk matters affecting how and where a person's claims for protection would be considered.

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The Department acknowledges the comments contained in the report relating to the imposition of the s 46A bar on persons arriving between 13 August 2012 and 20 May 2013. In particular that there is 'an absence of any central integrated repository of all relevant information that pertained to individual IMAs' and relevant persons not having access to all relevant information.

The Department considers it important to note in this context that at the relevant time multiple agencies including ADF, the then Customs, the Department and others were tasked by Government to respond in cooperation to the issue of asylum seekers arriving unlawfully by boat.

Officers of this Department do not, as a matter of usual practice, have direct access to the operational records, including ships logs, of those agencies which intercepted SIEVs at sea and moved those persons found onboard. Such information was not, as a matter of usual practice, provided to the Department in connection with the transfer into immigration detention of those unlawful non-citizens located onboard SIEVs and was therefore not recorded in departmental IT systems.

Immediate and subsequent remedial action taken by the Department

When you first raised these serious matters in your initial report, the Department established a management initiated review to identify any shortcomings in the processing of persons who arrived by boat between 13 August 2012 and 20 May 2013, including those on *SIEV Lambeth*. The Department engaged the services of an independent external contractor, Ernst and Young, to undertake this review.

Four SIEVs were selected for review, *SIEV Lambeth* and three other vessels randomly chosen by Ernst and Young, as a representative sample of all SIEVs arriving within the relevant time period. The objective of the review was to establish whether persons arriving on these vessels were processed in accordance with the Department's legislative requirements and to identify any gaps or risks in the process undertaken.

The conclusion of the independent review being that the Department dealt with those persons onboard *SIEV Lambeth* consistent with the requirements of the *Migration Act 1958*. That is, those persons were correctly categorised by the Department according to their place of arrival and there were no adverse implications for the *SIEV Lambeth* cohort of persons.

The review is now examining all persons who arrived on vessels over the period 13 August 2012 and 20 May 2013. The Department will use the conclusions of the completed review to identify mitigation strategies and develop remedial measures for any individuals whose outcomes may have been negatively affected by the incorrect application of the s 46A bar.

We are committed to embedding any improvements identified as part of the review and to ensuring corporate knowledge of these matters is retained.

References to excision from the Migration zone

The Department disputes the interpretation in the draft report as to the legal effect of the excising legislation. In this context the Department draws the Ombudsman's attention to paragraphs 1.6 and 1.7 of your draft report.

If the Department has understood them correctly, those paragraphs appear to explain the distinction between an offshore and onshore arrival as turning on whether a person arrives at a location **outside** or **inside** the Migration zone. This is incorrect.

The Department offers that the legal effect of the *Migration Amendment (Excision from Migration Zone) Act 2001*, and similar subsequent amendments, is, despite the use of the term

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'excision from the migration zone', not to remove any place or installation from the Migration zone; but rather to prevent arrival in such places by an unlawful non-citizen giving rise to an ability of that unlawful non-citizen to make a valid application for any visa. This is clear from the qualifying words, '*for the purposes of limiting the ability of offshore entry persons to make valid visa applications*' appearing in the Migration Act definition of excised offshore place. Section 46A was inserted into the Migration Act at the same time to give effect to this qualified intent.

In straight forward terms, a person classified as either an offshore or onshore arrival has, regardless of their classification, arrived *inside* the Migration zone. However any unlawful non-citizen who arrives at an excised offshore place (which is still part of and within the Migration zone) cannot apply for a visa without the permission of the Minister given personally.

References to 'Ashmore Island'

The Department draws your attention to the various references to Ashmore Island made in the draft report and notes that such references are incorrect. There is no Ashmore Island within Australia's maritime jurisdiction and as such references to such a place are likely to be legally incorrect.

The geographical area concerned is properly called the Territory of Ashmore and Cartier Islands. 'Ashmore' is a reference to Ashmore reef which encloses East, West and Middle Islands and the Ashmore lagoon.

Departmental comments in respect of the Commonwealth Ombudsman recommendations

The Department's responses to the recommendations are at attachment A.

If you would like to further discuss our response to the amended draft own motion report, please contact Ms Lisa-Ann Howgego, Assistant Secretary, Audit and Assurance Branch, on 02 6264 2022.

Yours sincerely



Jenet Connell
Chief Operating Officer
Deputy Secretary, Corporate

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Attachment A: DIBP Response to the Commonwealth Ombudsman recommendations

Recommendation 1

*That the Department review the information that was recorded for persons arriving on board SIEV *Lambeth* and identify any shortcomings in the scope and manner of the information recorded and ensure that all relevant information is available to all departmental officers who have a reasonable need for access to it.*

Department's Response: **Agreed**

The Department has reviewed the information recorded for persons who arrived on the *SIEV Lambeth* and determined their processing was consistent with the requirements of the *Migration Act 1958*. This review forms part of the review into all persons who arrived by vessel between 13 August 2012 and 20 May 2013. The conclusions of the review will be used to identify mitigation strategies and develop remedial measures for any individuals whose outcomes may have been negatively affected by the incorrect application of the s 46A bar.

Recommendation 2

That the Department consider any learnings from this review and apply these to its systems more broadly where appropriate.

Department's Response: **Agreed**

The Department is committed to the development of robust systems and processes that support efficient public administration. Any learnings from the review will be used to update or develop Departmental systems and processes.