Commonwealth OMBUDSMAN

An analysis of reports under section 486O of the *Migration Act 1958* sent to the Minister by the Ombudsman in 2013

Immigration Ombudsman

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Introduction

Section 486O of the Migration Act 1958 (the Act) requires the Ombudsman to send to the Minister an assessment of the appropriateness of the arrangements for the detention of every person who has been in immigration detention for more than two years, and every six months thereafter, with a copy to be tabled in Parliament.

This is an analysis of all such reports sent to the Minister and tabled in Parliament in 2013.

While these reports are an important aspect of the Ombudsman's oversight of people in immigration detention, other aspects of this oversight include:

- investigating complaints from people in detention and their advocates
- own motion investigations
- inspection of immigration detention facilities.

We work to address systemic issues that arise in s486N[1] reports such as delays in security assessments and access to medical treatment.

In 2013 a total of 709 s486O reports were prepared, sent to the Minister and tabled in Parliament. This is the largest number of reports tabled in any single year since this function commenced in 2005. Generally an individual report relates to one individual person but some reports cover family units and therefore the 709 reports represent more than 709 people.

This analysis looks at both the administrative processes within the Ombudsman's office in preparing these reports and the processes involved for people seeking asylum in Australia. Most of this analysis was done manually by examining the reports and extracting relevant data.

It is acknowledged that the processes involved in applying for asylum and for review of protection claim decisions have changed significantly over this period.

The reports analysed are about people who arrived in Australia between December 2009 and July 2011, predominately by boat as irregular maritime arrivals (IMA). Some were boat crew and others were awaiting removal from Australia after having their visa cancelled under the character provisions of s501.

Of the 709 reports, 120 reports were about boat crew, all of whom were either serving a term of imprisonment for people smuggling offences or had been removed from Australia after serving their sentence.

Four hundred and ninety two reports were first reports about people seeking asylum.

Ninety seven reports were either subsequent reports for people seeking asylum, reports on boat crew, or s501 cases.

[1] In this analysis reports received from the Department of Immigration and Border Protection are referred to as s486N reports, based on the section of the Migration Act under which they are created. Reports by the Ombudsman to the Minister are similarly referred to as s486O reports.

Trends in issues identified

Ombudsman recommendations to the Minister in 2013 remained consistent with recommendations of previous years and address similar issues arising from:

- people who have been found to be owed protection but have no foreseeable prospect of being released from detention because of an adverse security clearance
- people found not to be owed protection but who cannot be returned to their own country for non-refoulement reasons
- mental and physical health problems; pre-existing conditions exacerbated by the detention experience; problems created by the detention experience; and issues associated with the treatment provided in detention facilities and in community detention
- delays in processing claims for asylum, including delays in security clearances.

The Ombudsman's s486O reports

The surge in people coming to Australia to claim asylum since 2011, and the consequent increase in the number of people being held in immigration detention, has led to a considerable increase in the workload of the Ombudsman's office in compiling reports for the Minister under s486O of the Act. (see fig 1)

Report type – first and subsequent reports

The Ombudsman is required to report on the circumstances of a person's detention after 24 months and every six months thereafter, even if the person is released from detention. Subsequent six-monthly reports tend to be briefer than first reports. In 2013:

- this office completed 579 (82%) first reports and 130 (18%) subsequent reports.
- of the 130 subsequent reports tabled in 2013:
    - 12 had their previous report also tabled in 2013
    - 118 detainees had their previous report tabled in 2012.

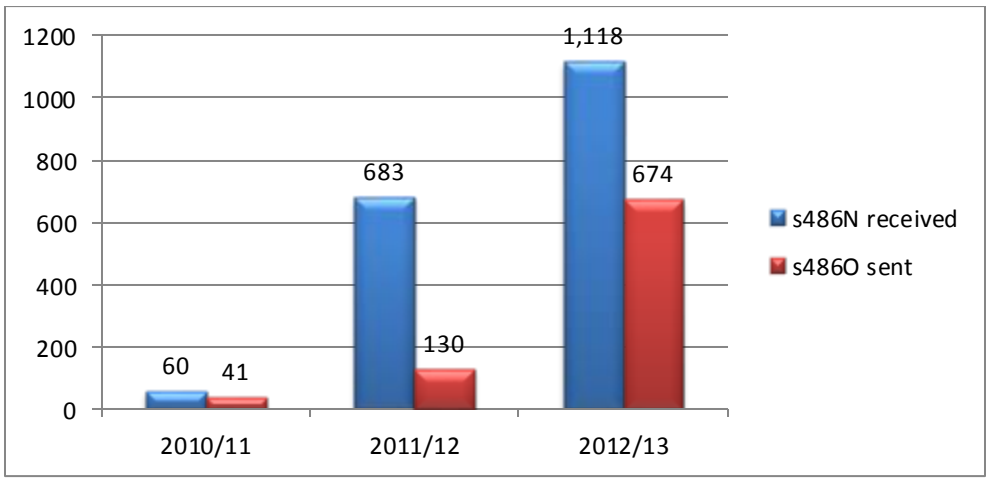
Timeliness of reports

Section 486O of the Act requires the Ombudsman to provide the Minister with a report 'as soon as practicable' after a s486N report has been received from the Secretary of the Department of Immigration and Border Protection (the department).

The Immigration Ombudsman strives to prepare s486O reports as soon as practicable after the receipt of the s486N report. Cases are prioritised according to the individual circumstances of the detainee which means some people wait longer than others for a s486O report.

Priority is given to preparing reports for people in detention, particularly those in immigration detention facilities, over people in community detention, granted a visa and released from detention, or who had been removed from Australia.

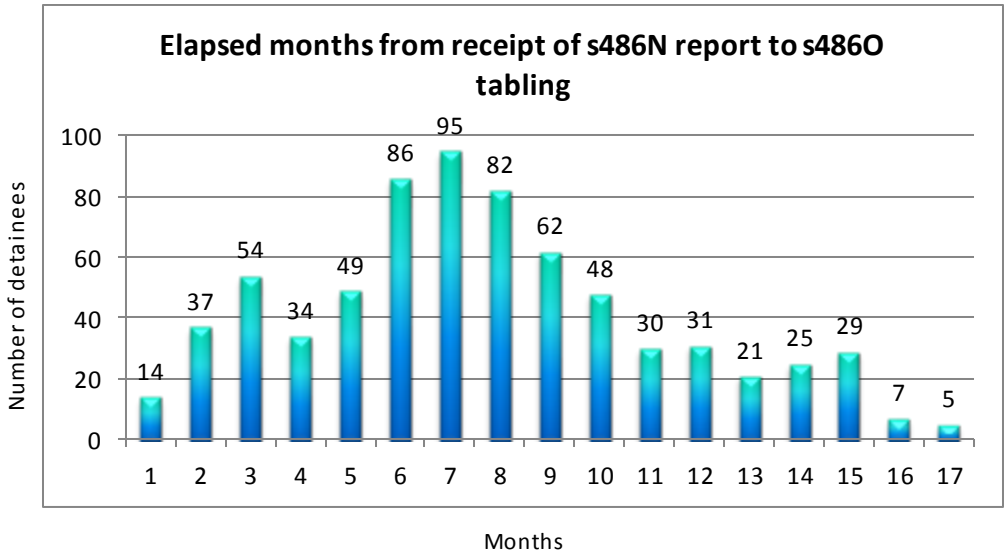
Fig 1. Reports received and reports sent 2010 - 2013



The variance between the number of reports received and sent is largely accounted for by more than one s486N report for an individual being reported in a single s486O report. Those not accounted for in this way make up the balance of cases on hand.

Fig 2 shows the elapsed time from when the most recent s486N report was received from the department to when the corresponding s486O report was tabled in Parliament by the Minister.

Fig 2. Time taken from receipt of report to being tabled in Parliament



Of the 145 people for whom there was a period of eleven months or more between receipt of the last s486N report and their s486O report being tabled:

- 141 had been released at the time of tabling
- two detainees were in a detention facility and
- two were in community detention.

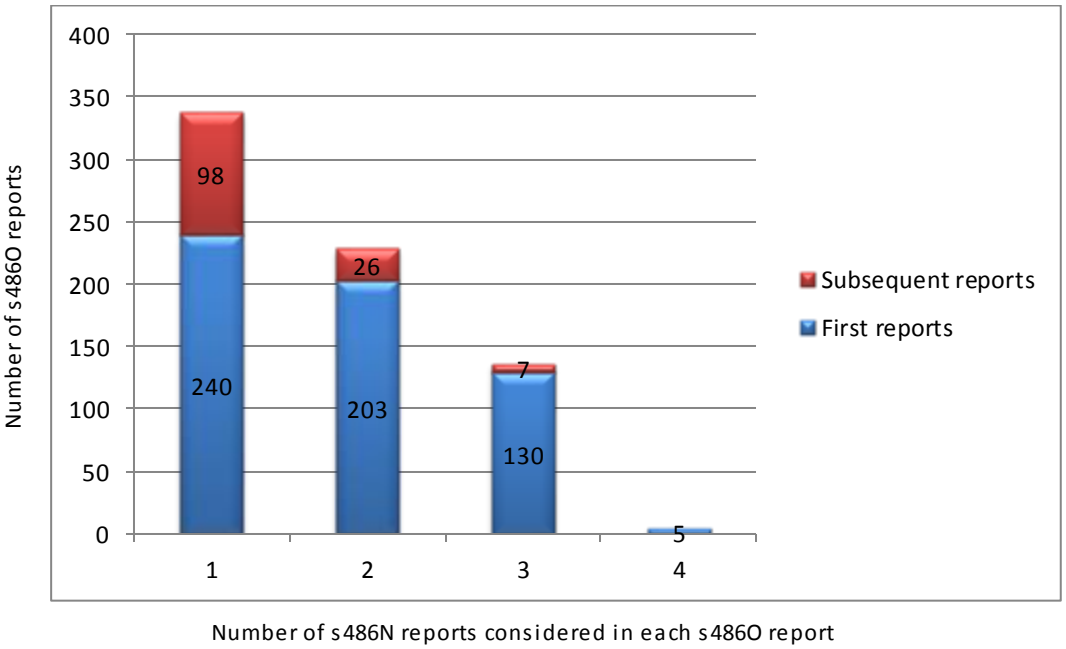
Multiple s486N reports included in some s486O reports

Each s486O report references the number of s486N reports received from the department that have been considered in compiling the s486O report.

Ideally this office would prepare a s486O report for each s486N report received and it would be sent to the Minister before the next s486N report is received.

However where the office has received two or more s486N reports before a s486O report is completed, the s486O report references two or more s486N reports.

Fig 3. s486N reports considered in each s486O report by first and subsequent report



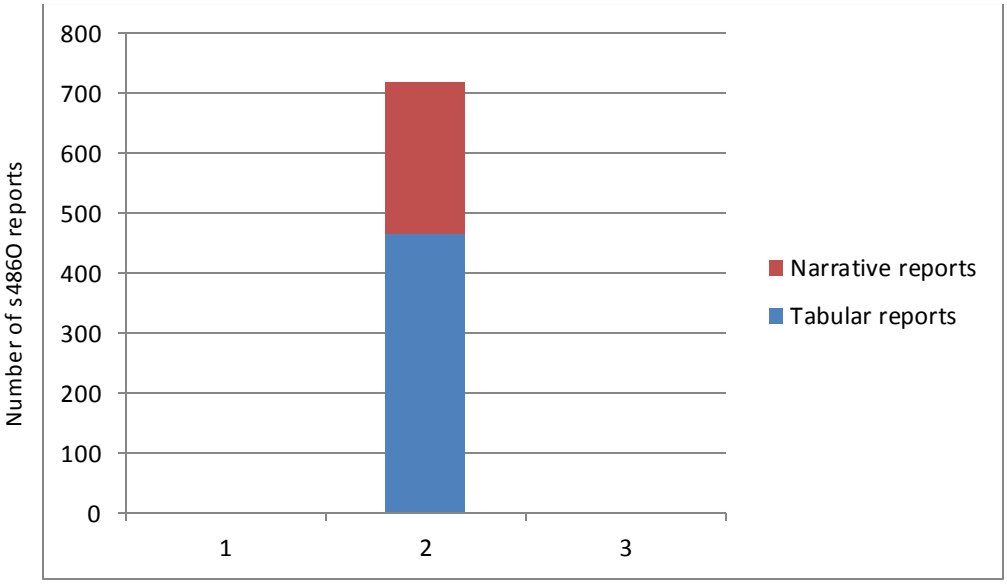
Of the five reports where we had received four s486Ns before submitting a s486O report, four of the people were in community detention and one had been removed from Australia.

Report format

The Act does not mandate any particular format the s486O reports are to follow so in order to meet the challenge of a significantly increasing workload, in 2012 a tabular report format was introduced for less complex reports such as boat crew who were either serving a term of imprisonment for people smuggling offences or had been removed from Australia after having served a term of imprisonment.

This format was expanded in 2013, and since January 2014 all reports have been further trialled in a tabular format, with the exception of particularly complex or sensitive reports that require a narrative report.

Fig 4. The proportion of narrative reports and tabular reports tabled in 2013

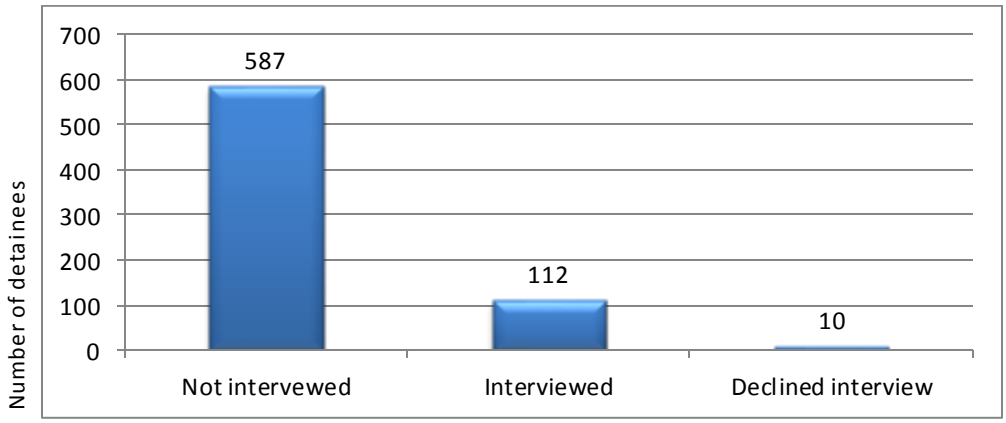


Interviews

Due to the increase in the number of people in detention since 2012, and especially in community detention, the capacity of this office to conduct in-person interviews has diminished. This means that for detainees who we do not interview we utilise the information provided by the department, making no further inquiries with the detainee before reports are drafted (we may however, seek further information from the department if required).

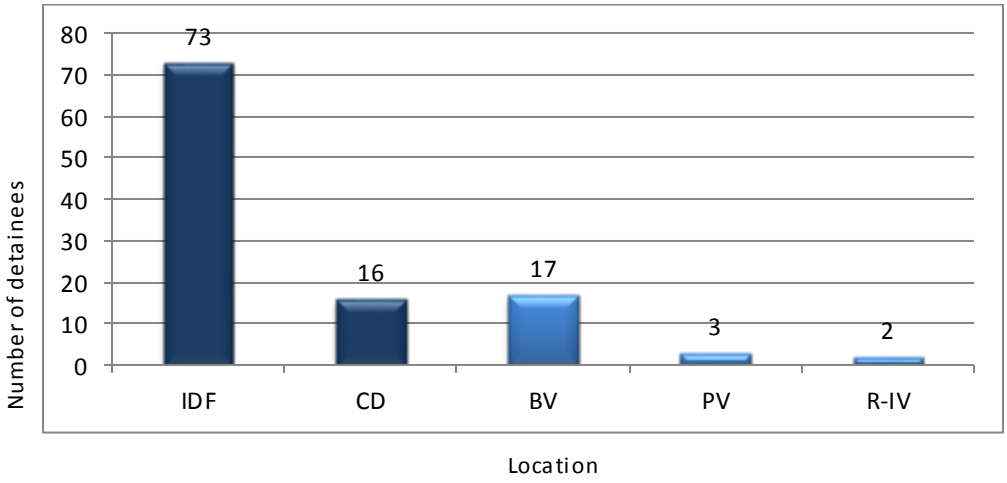
The location of a detainee was a major consideration as to whether or not we were able to offer them the opportunity to be interviewed for their report. In most instances, people in restrictive detention are the most vulnerable. These detainees are therefore given a higher priority than those in community detention or those who have already been released from detention but on whom the Ombudsman is still required to report. For logistical reasons it is also easier to arrange interviews with people held in detention centres than with people in the community.

Fig 5. The number of people interviewed, not interviewed and who declined to be interviewed, for all reports tabled in 2013



Since January 2014 the office has conducted interviews with detainees before we prepare a subsequent report. These interviews are conducted by telephone with detainees in community detention and provide an opportunity for them to add to or correct information in their first s486O report.

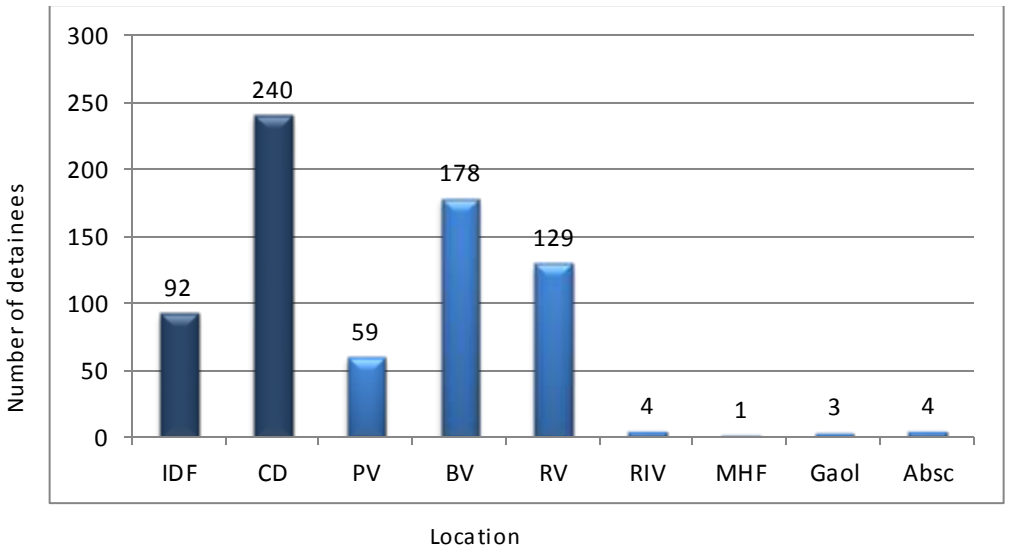
Fig 6. The location of detainee at the time their report was sent to the Minister



IDF	Immigration Detention Facility	PV	Released on a Protection visa
CD	Community Detention	RIV	Removed involuntarily
BV	Released on a Bridging visa		

The 22 detainees released on Bridging or Protection visas or who had been removed from Australia, were interviewed while still in detention.

Fig 7. The location of all detainees reported on in 2013 at the time their s486O report was sent to the Minister



IDF	Immigration Detention Facility	RV	Removed voluntarily
CD	Community Detention	RIV	Removed involuntarily
PV	Released on a Protection visa	MHF	Mental Health Facility
BV	Released on a Bridging visa	Absc	Absconded from detention and still at large

Of the 709 reports 378 reports were for people no longer in detention and 331 reports were for people in immigration detention.

Report recommendations

Under s486O of the Act the Ombudsman may make recommendations in an assessment, and the Act gives examples of such recommendations. The Act also states that the Minister is not bound by a recommendation made by the Ombudsman.

In 2005-2006 when the reporting function commenced, 66 reports containing 106 different recommendations were tabled. The Ombudsman's annual report for that year recorded that the Minister agreed to 54 of the recommendations, disagreed with 26 and had not yet made a decision on a further 25.

This compares with 709 reports tabled in 2013, 71 of which contained a single recommendation and five of which contained two recommendations.

It should be noted that the current Minister's tabling statement does not formally indicate that he agrees or disagrees with individual recommendations. Recommendations are noted and a comment is provided giving a more detailed response at a later time.

The recommendations in the reports tabled in 2013 fall into two broad categories; those that are specific to an individual detainee and those that are common to a broader cohort of detainees.

Cohort-specific recommendations

In the latter category, there are two cohorts of detainees that had recommendations made about the circumstances of their detention. These are:

- those people who have been found to be refugees but have received an adverse security assessment, and
- those people 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[2].

The Ombudsman has been making recommendations about people who have received an adverse security assessment for nearly two years and in that period successive Ministers have consistently noted the recommendations and stated that it is the policy of the government for such people not to reside in the community and that third country resettlement options are being explored. Recommendations for a less secure form of detention that takes into account the need for managing any security threat have been similarly noted.

We noted that in 2013 the Independent Reviewer of Adverse Security Assessments recommended that the Director-General of Security, at his discretion, issue either non-prejudicial or qualified assessments in six cases. The Director-General accepted those recommendations and issued non-prejudicial assessments for these six individuals. They were released from detention, four with Protection visas, and two with Bridging visas. The Independent Reviewer continues to review over 40 cases during 2014.

[2] Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33

This office has recognised a cohort of detainees who are not owed protection by Australia but cannot be returned to their home because they are affected by the Full Federal Court's decision SZQRB and are having their complementary protection claims reassessed as part of a new International Treaties Obligations Assessment. The Ombudsman recommended that the government give priority to resolving the legal and policy position of these individuals. The Minister's response is that he expects these people to return home and the department will work with them to develop Assisted Voluntary Return packages. If they are unwilling to return home they will remain in detention until they can be involuntarily removed.

This office is not aware of any detainees in this cohort who decided to return home voluntarily in 2013 so it is likely that we will see continued six-monthly reports on their detention.

Individual recommendations

The majority of recommendations made for specific individuals relate to their placement within the detention network or into community detention, or being released from detention on a Bridging visa.

Responses to recommendations vary according to the individual. For example the Minister has stated that detainees who are subject to criminal proceedings will not be considered for a variation to their placement while such matters are ongoing.

In instances where we have noted that removal may take some time and recommended community detention or the grant of a Bridging visa, the Minister has asked his department to consider the person's placement if their removal becomes protracted. If the Ombudsman receives a subsequent s486N report, we will seek details of what action the department has taken to reconsider placement in detention.

Other specific recommendations relate to access to medical treatment or counselling services and for the processing of a person's visa or asylum claim to be expedited. In these instances the Minister's response is that the department is preparing a response on the matter. If the response is not explicit in subsequent departmental communication, we will seek details of what action has been taken in response to the Ombudsman's recommendation.

The asylum seeker experience

Protection claim

Four hundred and ninety two of the reports included details of the individuals' claims for protection, and the outcome of their claim. Ordinarily a positive outcome would mean a person would be released from detention before the two year period elapsed, however, 40 people were not released because of an adverse security assessment or they were charged with offences committed while in detention, such as occurred after the Villawood riots in 2011.

Process Overview

The majority of people in this analysis arrived by boat seeking asylum. A typical pathway is:

- claims for protection are first considered by a DIBP officer through a non-statutory Refugee Status Assessment (RSA) process or a Protection Obligations Evaluation (POE) depending on when they arrived
- Independent Merits Review (IMR) or review by the Independent Protection Assessment Office (IPAO)
- review by the Federal Court then possibly the Full Federal Court

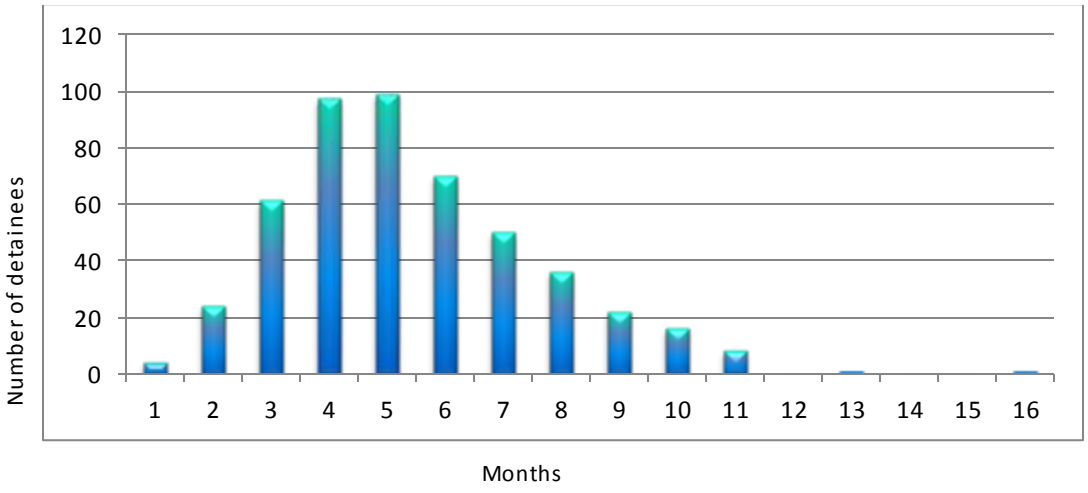
If at any stage the person is found to be owed protection, and has met the public interest criteria for the grant of a protection visa, the Minister would then consider lifting the s 46A bar to allow a valid application for Protection visa to be made.

Processing time

A common theme of complaint to the Ombudsman's office has been the delay in assessing claims for protection. The following information shows that on average it takes about 5–6 months for the RSA/POE from date of arrival. Then an additional 8-9 months for the IMR/IPOA. The second review can be in a number of forms and takes another 8-9 months and the third review takes 6-7 months. Note that a positive outcome can be obtained at any stage along that continuum.

Fig 8 shows the time taken for all those who claimed asylum from the date of their arrival to the date their initial claim was determined.

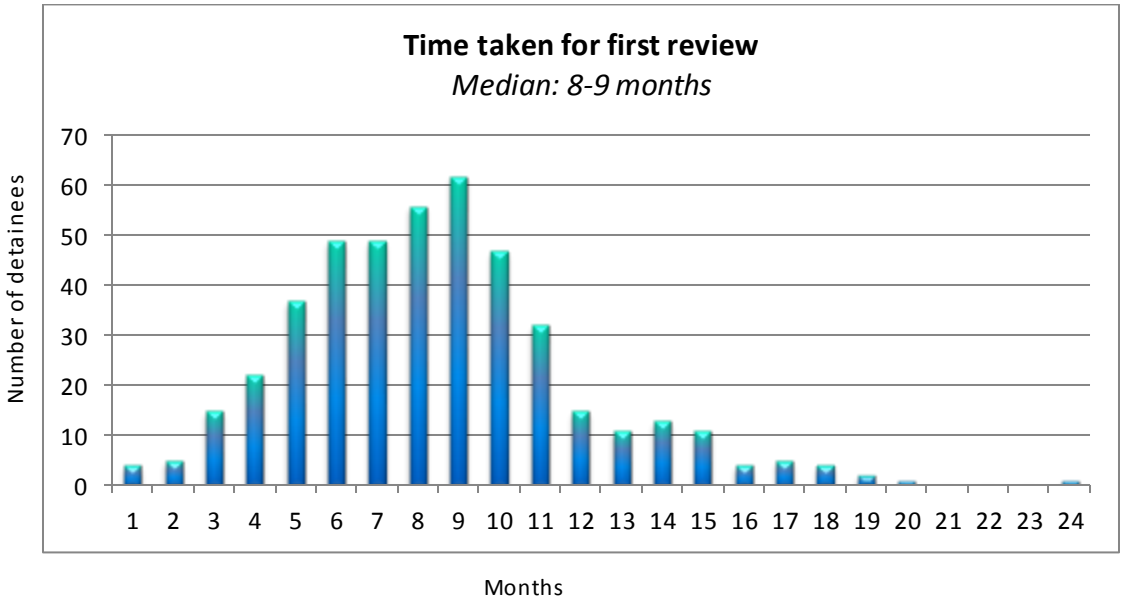
Fig 8. Time taken for assessment of asylum claim



Review

Of the 452 detainees who received a negative outcome for their claim for protection, 449 sought a review. Fig 9 shows the time taken from the date of the refusal of their initial claim for protection to the date of the outcome of their review.

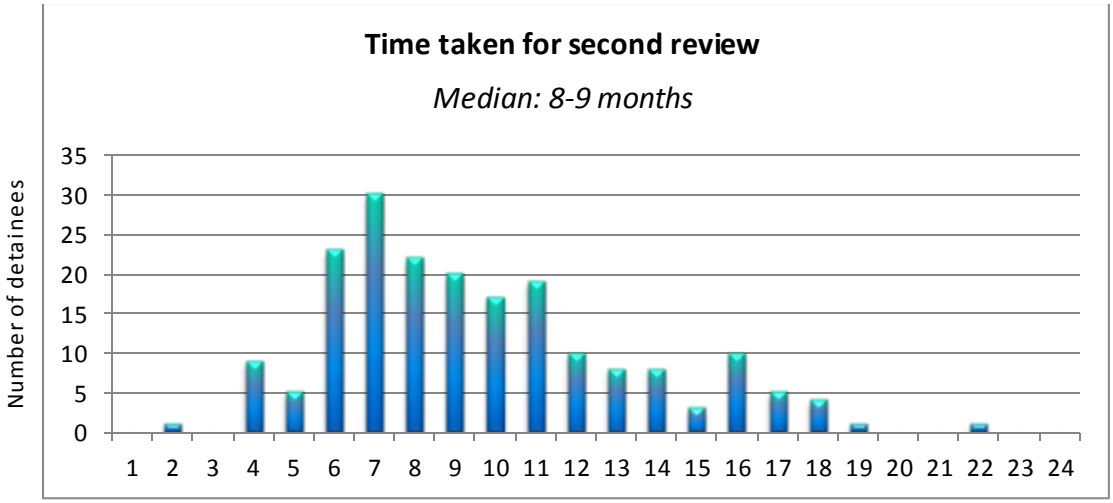
Fig 9. Time taken for first review of protection claim decision



For those who sought review of the decision on their claim for protection 69 received a positive outcome and 380 received a negative outcome (see fig 12).

Of those 380 who received a negative outcome, 198 sought a second review. These second reviews took a number of different forms. The majority were the standard Independent Merits Review; in some instances the department initiated its own reconsideration of the first review decision, while some detainees sought judicial review. The form of the review is not differentiated in fig 10, which shows the time taken from the outcome of the first review to the time of the second review decision.

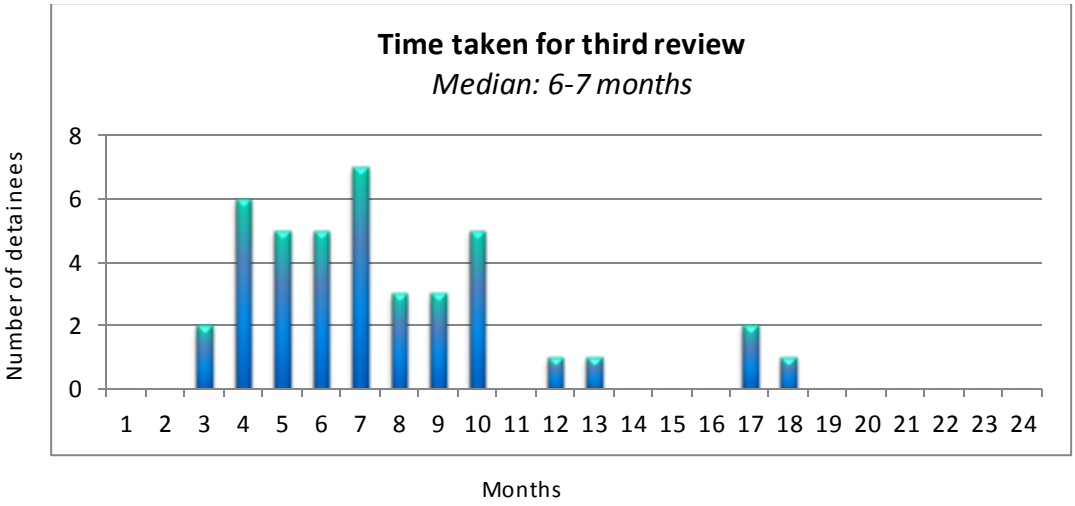
Fig 10. Time taken for second review of protection claim decision



Twenty six received a positive outcome in their second review and 171 received a negative outcome (see fig 12) and of those, 42 sought a further review.

Fig 11 shows the time taken from the outcome of the second review to the time of the third review decision. As for the second reviews, the third reviews took a number of forms including departmental reconsideration and judicial review.

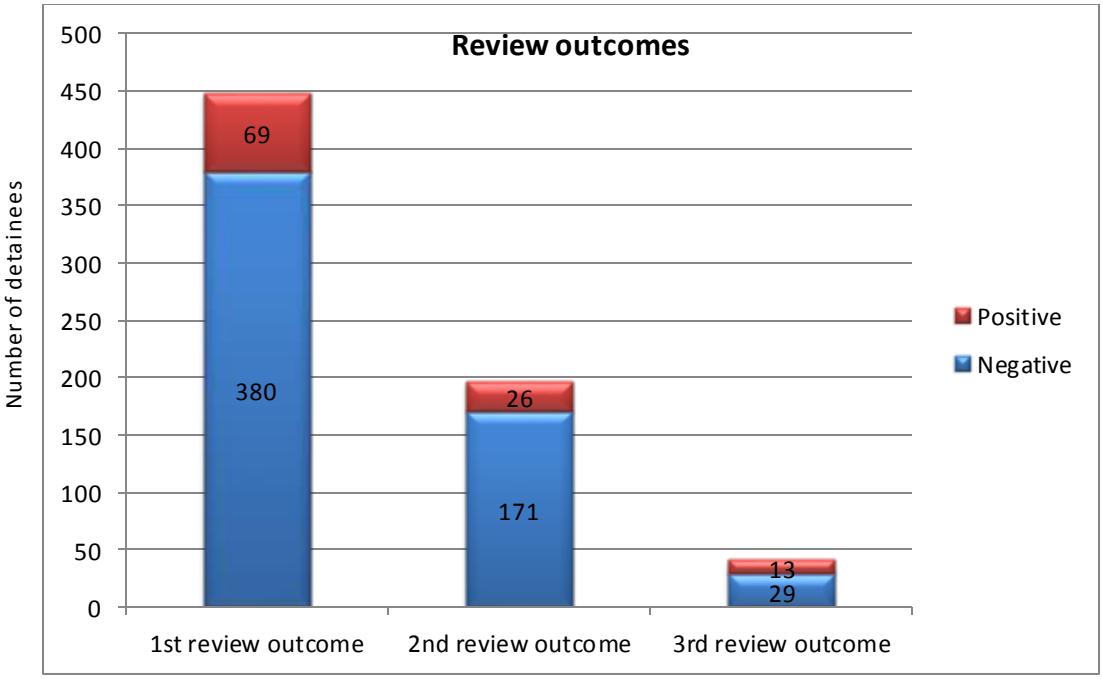
Fig 11 Time taken for third review of protection claim decision



13 people received a positive outcome and 29 received a negative outcome at their third review.

Fig 12 shows the number of positive and negative outcomes for the three stages of review.

Fig 12. Review outcomes



Of the 452 people who received a negative outcome for their claim for protection and who sought a review of this decision, 24% gained a positive outcome from the review process.

From a sample of first review cases where a review was successful, there was no apparent reason for a successful outcome. The first reviews took the form of a reconsideration of the applicant's claim for asylum and not an appeal against a particular aspect of the primary decision. Consequently the first reviews did not reference the original decision.

Where a second or third review overturned a previous decision, reasons for this included:

- a psychiatric report was not taken into account by the primary decision maker
- the primary decision maker did not properly consider the apprehended persecution of a particular social group
- the primary decision maker did not take into account the passport held by the applicant
- new information regarding the applicant's political activities was provided. In this case the second reviewer also accepted claims that had been rejected by the primary decision maker and the first reviewer.

In those cases where an appeal was heard by a court which found there was an error of law the case was remitted to the department for reconsideration.