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Aboriginal and Torres Strait Islander

Peoples in Immigration Detention, Following
Love and Thoms

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Aboriginal and Torres Strait Islander Peoples in Immigration Detention, Following Love and Thoms

17 July 2020

On 30 April 2020, the Law Council wrote to the Minister for Home Affairs and the Acting Minister for Immigration regarding media reports that individuals asserting an Aboriginal or Torres Strait Islander identity were being held potentially unlawfully in immigration detention centres.

The High Court's landmark decision in *Love v Commonwealth of Australia*; *Peoples v Commonwealth of Australia* handed down on 5 February 2020, held that Aboriginal and Torres Strait Islander peoples, understood according to the tripartite test in *Mabo v Queensland [No 2]*, are not 'aliens' within the meaning of section 51(xix) of the Australian Constitution. As the *Migration Act 1958* (Cth) relies on section 51(xix), this decision had the implication that non-citizens who are in this group of non-aliens cannot be deported.


The Law Council asked the Minister and Acting Minister for further information concerning steps undertaken to:

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- identify Aboriginal and Torres Strait Islander persons in immigration detention whose ongoing detention and proposed deportation under the Act may be unlawful as a result of *Love and Thoms*;
- ensure that appropriate legal advice is made available to affected individuals in light of this decision;
- release any such individuals from immigration detention;
- identify and notify any persons already deported from Australia, whose deportation was possibly unlawful due to *Love and Thoms*; and
- ensure that persons who fall within the auspices of the decision have a legislated pathway to Australian citizenship.

In response, the Acting Minister has advised that the Department of Home Affairs has implemented processes to identify persons who may be affected by the High Court's decision in *Love and Thoms*, and to assess their individual claims of indigeneity. The Department:

- has reviewed the existing immigration detention population to identify any person who may be affected by this decision;
- has released individuals from immigration detention following an assessment that they meet the tripartite test;
- continues to ensure that individuals in detention are able to exercise their existing rights to seek legal advice, including specialist advice about the implications of the High Court's decision in *Love and Thoms* on their individualised circumstances;
- has reviewed all active cases in prisons and offshore involving individuals who have applied for revocation of the decision to cancel their visa under section 501 of the *Migration Act 1958* (Cth);
- will progressively work through the cohort of potentially affected individuals, including any newly identified cases;
- will prioritise cases on the relative likelihood that the non-citizen may meet each limb of the tripartite test, based on the strength of claims and evidence presented, in order to expedite the process; and
- has issued advice on its website to communicate to non-citizens who may seek to travel to Australia solely on the basis of the claims of indigeneity and set up a centralised mailbox for enquiries (indigenous.australians@homeaffairs.gov.au (<mailto:indigenous.australians@homeaffairs.gov.au>)).

The Acting Minister has also assured the Law Council that persons affected by the High Court's decision in *Love and Thoms* may continue to apply for, and be granted, Australian citizenship, should they satisfy the relevant statutory requirements.

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