

**Question on notice no. 225**

**Portfolio question number: AE21-225**

**2020-21 Additional estimates**

**Legal and Constitutional Affairs Committee, Home Affairs Portfolio**

**Senator Lidia Thorpe:** asked the Department of Home Affairs on 22 March 2021—

Senator THORPE: Thank you, Chair. My questions are around section 501. How many Aboriginal people are being held in immigration detention after the High Court decision that Aboriginal people are not aliens for the purpose of the Constitution and cannot be deported?

Mr Pezzullo: It's a question of the claim made, and then the assessment is made against the limbs of the tests set out by the High Court. It's not a straightforward statistical answer. It depends on each individual detainee advancing a relevant claim that is then assessed against the three-limb test set out by the High Court. But we do have a number of active matters under consideration, I can assure you. Ms de Veau.

Ms de Veau: The secretary is correct in saying that the issue is whether someone's evidence meets the

tripartite test as set out in the Mabo No. 2 case and as articulated, we say, by the Justice Nettle judgement in the High Court case of Love and Thoms. Immediately following the decisions early last year, people who were in detention who were claiming that they met that tripartite test were all assessed. I don't know that we have anyone currently in detention who is being considered against that test, but I will take it on notice. If they are, and they are actively making a claim that they meet that test, that would be under active consideration.

**Answer —**

Please see the attached answer.

**SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ADDITIONAL ESTIMATES  
22 MARCH 2021**

**Home Affairs Portfolio  
Department of Home Affairs**

**Program: Department of Home Affairs Corporate/General**

**AE21-225 - Character Provisions - Aboriginal People**

Senator Lidia Thorpe asked:

Senator THORPE: Thank you, Chair. My questions are around section 501. How many Aboriginal people are being held in immigration detention after the High Court decision that Aboriginal people are not aliens for the purpose of the Constitution and cannot be deported?

Mr Pezzullo: It's a question of the claim made, and then the assessment is made against the limbs of the tests set out by the High Court. It's not a straightforward statistical answer. It depends on each individual detainee advancing a relevant claim that is then assessed against the three-limb test set out by the High Court. But we do have a number of active matters under consideration, I can assure you. Ms de Veau.

Ms de Veau: The secretary is correct in saying that the issue is whether someone's evidence meets the tripartite test as set out in the Mabo No. 2 case and as articulated, we say, by the Justice Nettle judgment in the High Court case of Love and Thoms. Immediately following the decisions early last year, people who were in detention who were claiming that they met that tripartite test were all assessed. I don't know that we have anyone currently in detention who is being considered against that test, but I will take it on notice. If they are, and they are actively making a claim that they meet that test, that would be under active consideration.

Senator THORPE: I understand that there are 25 Aboriginal people imprisoned for no reason at all who have met the three-part test that you have talked about. Could you please explain the process around the three-part test. Could you also tell me what authority the government has, once the three-part test is proven, to continue to detain these people.

CHAIR: Senator Thorpe, to help the witnesses could I ask you to provide the source of your information in relation to the 25 Aboriginal people who've been jailed. That will assist the witnesses in understanding what you are referring to.

Senator THORPE: Sure.

CHAIR: Are you able to provide any more information about that?

Senator THORPE: I will get that information.

CHAIR: Maybe we could just confine your question to the latter half of it. If you could repeat that, that would be helpful.

Senator THORPE: Could you detail the three-part process and explain why those people, who have met the three-part process, are still being detained.

Ms de Veau: I would not accept that there is anyone in detention who has met, in an evidentiary way, the three limbs. If they had met in an evidentiary way the three limbs, they would not be in detention. On your earlier reference to imprisonment: no-one is imprisoned under the Migration Act; they will be in immigration detention, which is different to criminal custodial detention. If there are people in immigration detention who

have a claim in relation to a Love and Thoms case then, if the evidence satisfactorily discharges the three limbs, they will be released from detention. So I don't accept the proposition that there are 25 people who have met the evidentiary test who are still in immigration detention. I would be happy to accept the names, out of session, in a way that we can look at the ones you have indicated. But, on the three limbs you speak of, first of all the person has to self-identify as being an Indigenous person. The second limb is that they are recognised by a community. The third limb is that they have some ongoing continual connection to country. So those are the three limbs: self-identification, recognition by a community, and the ongoing connection to country that grounds it to the pre-1900 connection.

Senator THORPE: Hypothetically, if there are 25 Aboriginal men imprisoned—I don't know the difference between detention and prison; when you lock someone up, they are locked up, and you can brand it whatever—how many of them have met the test?

Ms de Veau: This is what I don't accept. I don't accept—

Senator THORPE: How many have been released for meeting the test?

Ms de Veau: Alright, that's a different issue. I suspect that about 25 people have probably been released between the Love and Thoms decision earlier, in 2020, and having provided evidence and having met the test and having been released from detention. There are probably about 25 of them. But there aren't 25 people currently in detention who have met the test.

Senator THORPE: If there are people in these prisons to meet the three requirements, hypothetically they would be released immediately?

Ms de Veau: Yes.

*Answer:*

In *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (*Love and Thoms*), a majority of the High Court held that an Aboriginal person who meets the 'tripartite test' adopted in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 70 is not an alien under section 51(xix) of the Constitution, even if they are a non-citizen.

Following the decision in *Love and Thoms*, the main consequence for the Department is that a person who is a non-citizen non-alien cannot be detained or removed from Australia under the *Migration Act 1958* (the Migration Act).

The tripartite test is comprised of three limbs:

- biological descent from an Aboriginal or Torres Strait Islander person;
- self-identification as an Aboriginal or Torres Strait Islander person; and
- recognition by elders or other people who hold traditional authority in the same Aboriginal or Torres Strait Islander society from where the person is descended. 'Traditional authority' is understood here to mean authority in an Aboriginal society which had a spiritual connection to country from before British settlement and has, since this time, continued to follow laws and customs that came from before British settlement.

All three limbs of the tripartite test must be met.

If a person is in immigration detention and found to meet or probably meet the tripartite test, the person will be released from immigration detention as the detaining officer's suspicion that the person is an alien will cease to be reasonable, and accordingly the person's detention will cease to be authorised by section 189 of the Migration Act. That

provision requires an officer to detain a person where they 'know or reasonably suspect' that a person in the migration zone is an unlawful non-citizen (i.e. the person does not hold a visa that is in effect). Following the decision in *Love and Thoms*, the officer must also know or reasonably suspect that the person is an alien.

As of 19 April 2021, there have been 9 people released from immigration detention on the basis they meet or probably meet the tripartite test (this figure includes Mr Thoms, who was released from immigration detention following the High Court judgment).

As of 19 April 2021, there are 20 people in immigration detention being assessed as to whether they meet or probably meet the tripartite test. None of these people, based on the evidence they have provided thus far, have yet been assessed as having met or probably meeting the tripartite test.