



Tasmanian Aboriginal Legal Service (“TALS”) Written Submission:

Review of the Guide to Judicial Conduct

May 2025

As an advocate for law reform, justice and equity for all Tasmanian Aboriginal peoples, the Tasmanian Aboriginal Legal Service (‘TALS’) welcomes the opportunity to comment on the review of the Guide to Judicial Conduct (‘the Guide’), and how the Guide might best address social and cultural issues related to Aboriginal and Torres Strait Islander peoples.

TALS is an Aboriginal and Torres Strait Islander Legal Service (ATSILS) that specialises in criminal, civil and family law matters for Tasmanian Aboriginal peoples. TALS also operates SiS Tasmania a Family Violence and Prevention Legal Service (FVPLS) that specialises in supporting Aboriginal victim/survivors of family violence with legal and non-legal services.

As a Tasmanian Aboriginal Community Controlled Organisation incorporated under the Office of the Registrar of Aboriginal Corporations (ICN 9283), TALS is committed to improving the life outcomes of Aboriginal peoples.

In this submission, any reference to Aboriginal peoples is understood to encompass Torres Strait Islander peoples.

TALS strongly support any initiatives that promote equity and respect, while addressing the social and cultural issues, stereotyping and inter-generational trauma experienced by Aboriginal peoples. Currently, on all standard indicators, Aboriginal peoples emerge as the most socially and economically deprived, making them the most disadvantaged and marginalized group in Australia.¹ TALS recognise that Aboriginal peoples experience disproportionate structural disadvantage and are grossly overrepresented in the justice system.

This document responds directly to the *Terms of Reference*, provided by the Committee for the Review of the Guide to Judicial Conduct, and offers feedback relative to the cultural and social issues faced by Aboriginal peoples.

¹ Tasmanian Government - Department of Justice, *Prisoners, detainees and community-based offenders output data* (23 October 2024).

INTRODUCTION

It is accepted that people from culturally diverse backgrounds face many barriers to justice, including communication barriers, mistrust or lack of confidence in legal systems and agencies, and experiences of social and economic disadvantage.² Unfortunately, Aboriginal peoples remain the ‘highest risk’ community in Australia and are significantly more likely to experience disadvantage, and thus it is more probable they will be disproportionately represented in the justice system.³

Aboriginal peoples continue to be disproportionately represented in custodial settings, with thirty-six (36) percent of all prisoners in Australia identifying as Aboriginal during the 2023/24 financial year.⁴ Of the Aboriginal peoples who spent time incarcerated during this period, seventy-eight (78) percent had previously experienced a custodial episode, compared to fifty-two (52) percent of non-indigenous prison population.⁵ The disproportionate incarceration rate, and higher recidivism rate experienced by Aboriginal peoples, can be attributed to a range of factors stemming from systemic discrimination that has long existed in public policies, practices and social structures.⁶ Additionally increased, and repeated, rates of imprisonment compounds the existing disadvantage experienced by Aboriginal peoples and exacerbates the intergenerational effects.⁷

Aboriginal peoples are often suffering the impacts of ‘service failure’, where they have not been adequately supported or protected by the social systems in place. The inadequate provision of support can be due to several barriers, including access, cost or systemic discrimination. Therefore, the disadvantage, and adverse outcomes, experienced by Aboriginal peoples can be due to inequities beyond their control.⁸

Revising the Guide to include considerations for people of Aboriginal descent will facilitate greater understanding of the inequities experienced by Aboriginal peoples, better support judicial officers in making culturally appropriate decisions, and challenge any unconscious biases. The Guide can increase the cultural competency of judicial officers, which will further empower them to consider the impact of their conduct. Additionally, revising the Guide to expand upon how it may address issues experienced by Aboriginal peoples will ensure it reflects the diverse nature of the community and promotes an environment that embraces all cultural perspectives.

TERMS OF REFERENCE

a. Artificial Intelligence and Digital Technology

With increased use of artificial intelligence (‘AI’) as a creative and learning tool in modern society, it is appropriate to consider how AI content and digital technology will be utilized by judicial officers, and subsequently, how this is reflected in the Guide.

² Judicial Commission of New South Wales, *Handbook for Judicial Officers – Cultural Diversity: reflections on the role of the judge in ensuring a fair trial* (accessed 8 April 2025).

³ Parliament of Australia, *Chapter 13 – Indigenous Australians* (accessed 1 February 2025).

⁴ The Guardian, *Unsentenced prisoners make up a third of Australia’s prison population as bail refusals boom* (1 February 2023)

⁵ Australian Institute of Health and Welfare, *Contact with the criminal justice system* (accessed 8 April 2025).

⁶ Victorian Aboriginal Justice Agreement, *Underlying causes of Aboriginal over-representation* (15 August 2024).

⁷ *Ibid* (n 5).

⁸ University of New South Wales, *The social determinants of justice: 8 factors that increase your risk of imprisonment* (18 April 2023).

How best to use AI in legal proceedings is debated, with guidelines still being developed and reviewed across many jurisdictions. Much of the discourse centres on the responsible, safe and fair use of AI in courts and tribunals, and what the key regulating principles should be.⁹ Additionally there has been some concern with regards to maintaining the ‘human element’ of decision making, which is important to our democratic process.¹⁰

Wider discourse on the use of AI raises concerns with regards to its ability ‘erode public trust’, with AI generated content often used to create content that easily spreads misinformation and disinformation, resulting in the public unsurety on what information they can trust.¹¹ This strengthens the need for the Committee to consider how AI is adopted and regulated in judicial practice.

Drawing upon a combination of principles related to AI use and the principles of justice, the Victorian Law Reform Commission proposed eight (8) key principles with regards to judicial AI use:¹²

- Impartiality and fairness.
- Accountability and independence.
- Transparency and open justice.
- Contestability and procedural fairness.
- Privacy and data security.
- Access to justice.
- Efficiency.
- Human oversight and monitoring.

These principles are said to be a foundation in maintaining public trust in the courts and demonstrating that the risks of using AI have been considered and mitigated.¹³

In addition to principles outlined above, TALS recommend the Committee consider the following:

- Advocate for judicial/human oversight in the use of AI to prevent racial bias and to maintain accuracy and reliability in sentencing and decision-making.
- Ensure AI principles of use do not interfere with the Court’s independence.
- The provision of explicit guidance regarding the use of AI tools to ensure they do not disproportionately impact Aboriginal defendants or litigants.
- Consider the relevance of AI and digital technology in relation to social media use and content creation (chapter 9 of the Guide).

⁹ Victorian Law Reform Commission, *Artificial Intelligence in Victoria’s Courts and Tribunals: Consultation Paper* (17 October 2024).

¹⁰ Lewis, A, *NSW chief justice warns of artificial intelligence and its use in state’s legal system on eve of restrictions*, ABC News (2 February 2025).

¹¹ Parliament of Australia, *Chapter 2 – Impacts of AI on democracy* (accessed 24 April 2025).

¹² *Ibid* (n 9).

¹³ *Ibid*.

b. Judicial Bias and Impartiality

Judicial impartiality is defined as being free from ‘improper and unacceptable influences in judicial decision-making’ and it is critical to preserving public confidence in the Courts and maintaining judicial legitimacy.¹⁴

The *Without Fear or Favour: Judicial Impartiality and the Law on Bias* report, released in 2021 by the Australian Law Reform Commission (‘ALRC’), outlined fourteen (14) recommendations that will (if implemented) underpin impartial decision-making and help maintain judicial legitimacy.¹⁵ These recommendations include clarifying procedures for disqualifying judges, strengthening institutional supports and training for judicial impartiality and establishing a federal judicial commission.¹⁶ It is noted that the recommendations relating to increased support and training for judicial officers emphasizes the importance of a structured, ongoing program of Aboriginal cross-cultural education, led by Aboriginal peoples and organisations.¹⁷ TALS are strongly supportive of such education.

In addition to the above, TALS recommend the Committee consider the following:

- Support and promote the findings from the *Without Fear or Favour: Judicial Impartiality and the Law on Bias* report, emphasising the need for judges to recognise and address unconscious bias actively.
- Implementation of the fourteen (14) recommendations offered in the *Without Fear or Favour: Judicial Impartiality and the Law on Bias* report.
- Development of clear guidelines on identifying and mitigating cultural bias in court proceedings.

c. Judicial Education, Training and Cultural Competence

As stated, in the fourteen (14) recommendations in the ALRC’s report *Without Fear or Favour: Judicial Impartiality and the Law on Bias* the need for Aboriginal-centric cultural training was acknowledged. It is said that strengthening this would shape responses to perceived poor judicial conduct and mitigate the potential for cultural bias.¹⁸

Additionally, TALS recommend the Committee consider the following:

- Emphasise the importance of direct engagement with Aboriginal communities as part of judicial education.
- Emphasise the importance of judicial officers referring to relevant resources (*Equality before the Law* Bench book, *the Bugmy Bar Book*, *the National Bench Book on Aboriginal and Torres Strait Islander People and the Legal System*).

¹⁴ Appleby, G, ‘*Without Fear of Favour*’: ALRC report on judicial impartiality, Law Society of NSW Journal (2 September 2022).

¹⁵ Australian Law Reform Commission, *Without Fear of Favour: the ALRC’s new report on judicial impartiality and the law on bias* (3 August 2022).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

- The application of learnings and discretion in decision-making by judicial officers, i.e. how the lived experiences of Aboriginal peoples may impact on court delays, failure to appear for court proceedings or capacity to satisfying bail conditions.
- The consideration of cultural connections during bail decision making, ensuring they are not restrictive to Aboriginal people's connection to place or community.
- The consideration of cultural reports in sentencing/decision making.

d. Relationship Between Courts and the Media

The relationship between the courts and the media has two key considerations.

Firstly, judicial officers are human and do not live in isolation, meaning that they are conscious of media discourse around court proceedings, and their subsequent decisions.¹⁹ Numerous studies have found that this has the potential to influence judicial decision making.²⁰ This further supports the need for the Guide to outline safeguards and adequate support to ensure judicial officers maintain judicial impartiality.

Secondly, media content creators are in a powerful and important position to keep the public informed about what is happening in crime, justice and government responses to community issues. Considering this, the media have a responsibility to report in an accurate, ethical and balanced manner, free of themes that perpetuate negative stereotypes or demonstrate unfair bias.²¹ Unfortunately, this standard is not always met, with media content frequently trending towards a sensationalist reporting style that often displays ignorance towards minorities.²²

Additionally, people are increasingly consuming news through a variety of digital sources, social media outlets and AI platforms.²³ Whilst this grants unprecedented access to information, there are concerns with the accuracy and trustworthiness of some digital outlets as the proliferation of sources can make it challenging for people assess quality.²⁴ This can result in misinformation or disinformation being distributed, resulting in harm to individuals and the wider community.

In relation to how Aboriginal peoples in contact with the justice system are portrayed in the media, and how judicial officers can respond to this, TALS recommend the Committee consider the following:

- Support judicial officers in condemning media reports that reinforce negative stereotypes about Aboriginal people in the justice system.

¹⁹ Hanych, M, Smekal, H, Benak, J, *The Influence of Public Opinion and Media on Judicial Decision-Making: Elite Judges' Perceptions and Strategies*, International Journal for Court Administration (11 December 2023).

²⁰ Ibid.

²¹ Australian Human Rights Commission, *The media and racial hatred* (accessed 8 April 2025).

²² Ibid.

²³ Australian Communications and Media Authority, *Misinformation and news quality on digital platforms in Australia – A position paper to guide code development* (June 2020).

²⁴ Ibid.

- Recommend that judicial officers receive guidance in responding to misrepresentation or bias in media coverage of Aboriginal defendants or victims.
- Implementation of the fourteen (14) recommendations offered in the *Without Fear or Favour: Judicial Impartiality and the Law on Bias* report.
- Development of clear guidelines on identifying and mitigating media bias on judicial officer decision-making during court proceedings.

e. Inclusive Language

Non-inclusive language contributes to stereotyping and can have an insidious effect on excluded individuals.²⁵ Inclusive and respectful language, reflects the diversity in our community and reinforces positive perceptions.²⁶ It is important to note that inclusive language ‘best practice’ is always changing, therefore what may have been acceptable once, may not be in the future and it is the responsibility of all to remain fluid and move with changes.²⁷

TALS recommend the Committee consider the following with regards to the use of inclusive language in reference to Aboriginal peoples:

- The use of a well-researched source to inform inclusive language best practices (such as *Inclusive Language and Events Guide* by Amnesty International Australia).
- Ensure terminology used in the Guide respects Aboriginal cultural perspectives on justice, community, and law.
- Recommend language that avoids reinforcing deficit-based narratives about Aboriginal people in legal contexts.
- Engage with local Aboriginal community organisations and stakeholders regarding communication styles and terminology preferences within jurisdictions.
- Promote the use of ‘strengths-based language’ (i.e. focus on individual abilities and capacities).

f. Diversity and Diversity in Career Backgrounds

Australia is one of the most culturally diverse countries in the world, which brings with it a range of social and linguistic differences.²⁸ In addition to those who have migrated to this country, Australia has a rich Indigenous history, which in itself offers many different languages, customs and experiences.²⁹

²⁵ Amnesty International Australia, *Inclusive Language and Events Guide* (accessed 8 April 2025).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Judicial Council of Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (accessed 7 April 2025).

²⁹ *Ibid.*

Promoting and facilitating an environment that is inclusive and diverse enables all parties to contribute from their unique experiences.³⁰ This notion is relevant beyond just cultural diversity, as people also have different life experiences, diverse career backgrounds and unique approaches that should also be embraced.³¹ Workplace environments that are inclusive and embrace diversity not only demonstrate a commitment to valuing all people, but are also rewarded with a broad range of skill sets and perspectives.³²

When considering diversity in relation to Aboriginal and non-Aboriginal peoples, and how the Guide may reflect this, TALS recommend the Committee consider the following:

- Recognize diverse legal and non-legal career pathways, particularly those with community-based and human rights experience.
- Advocate for Aboriginal representation in judicial appointments.
- Promote an environment with embraces diversity.
- Ensure that judicial conduct reflects the diversity of the community that it serves.
- In instances where a jury needs to be equipped with some specific knowledge regarding cultural differences (i.e. the limitations of their knowledge or the existence of subconscious biases becomes apparent) the judiciary may have to be adequately prepared to provide direction.

g. Public Comprehensibility and Companion Documents

Ensuring that suitable companion documents are available to the public not only demonstrates a commitment to cultural competence, but it also improves communication and mitigates unintentional breaches of client obligations while reducing the cost of enlisting interpreter or advocacy services.³³

Companion documents are often referred to as ‘plain language’ documents, where information is provided in a simpler manner. Documents can also be translated into languages other than English.³⁴ The primary purpose of a companion document is the make information easier to find, highlight important messages and remove ambiguity for those with literacy issues, or for people from backgrounds where English is not the primary written or spoken language.

TALS recommend the Committee consider the following:

- The development of a plain language summary of the Guide.
- A section of the Guide, or a separate document, that addresses Aboriginal perspectives on judicial conduct and facilitates access to justice.

³⁰ Ibid.

³¹ Australian Government, *Equal opportunity and diversity*, business.gov.au (accessed 7 April 2025).

³² Ibid.

³³ Victorian Law Reform Commission, *Plain English and the Law: the 1987 Report Republished* (14 July 2021),

³⁴ Law and Justice Foundation of New South Wales, *Writing in Plain Language* (5 June 2024).

- The provision and/or availability of interpreter or professional staff that can help mitigate confusion and misunderstandings, whether due to language or literacy barriers.

h. Promoting Consistency Across Jurisdictions

A judicial commission is key to ensuring judicial officers act ethically and impartially, which in turn maintains public confidence.³⁵ A judicial commission provides guidelines for judicial officers to deliver consistent sentencing decisions and maintain high knowledge and skill.³⁶

Part of a judicial commission's function is to investigate complaints of judicial misconduct via an impartial and fair process for all stakeholders. This not only ensures that judicial officers are held to account for their conduct but also contributes to driving consistency in the ethics and behaviours of judicial officers.

Strengthening the guidelines of judicial commissions and promoting consistency is particularly important for Aboriginal peoples in contact with the justice system. The ALRC's report *Without Fear or Favour: Judicial Impartiality and the Law on Bias* identified the need for ongoing Aboriginal-centric cultural training for judicial officers, indicating more support is required for them to make culturally appropriate decisions, and to challenge any unconscious bias that become apparent. Therefore, it is vital that an accessible mechanism is available to Aboriginal peoples for when they believe a judicial officer's conduct has not met the expected standard.

When considering how the guidelines of judicial commissions, and how they can promote consistency, TALS recommend the Committee consider the following:

- Advocate for national consistency in cultural competency training that reflects the diversity of Aboriginal communities across the country.
- Judicial training on Aboriginal legal issues.
- Ensure that mechanisms are in place for Aboriginal peoples to clearly understand their rights and facilitate access to, and an understanding of, complaint processes.
- Promote and protect judicial impartiality by implementing the fourteen (14) recommendations offered in the ALRC report *Without Fear or Favour: Judicial Impartiality and the Law on Bias*.

i. Workplace Conduct

Aboriginal peoples can face challenges in the workplace, including experiencing cultural barriers or lack of cultural understanding, underrepresentation and trauma attached to historical discrimination.³⁷ This can result in Aboriginal people feeling isolated in the workplace and evoke feelings of shame, resulting in underperformance.

³⁵ Law Council of Australia, *Principles underpinning a Federal Judicial Commission* (5 December 2020)

³⁶ *Ibid.*

³⁷ Queensland Government, *Working with Aboriginal and Torres Strait Islander employees*, Business Queensland (16 February 2024)

The flow on from poor performance can see colleagues make assumptions about Aboriginal employees and see an unconscious bias develop or stereotypes perpetuated.³⁸

It is essential for a workplace to understand cultural differences for not only the benefit of Aboriginal peoples but also for those from non-indigenous backgrounds. This includes understanding different language or communication styles, social cues and practices that will facilitate an environment of mutual respect and understanding between all employees.

Additionally, TALS recommend the Committee consider the following:

- The development of explicit guidelines regarding judicial officer conduct when liaising with Aboriginal court staff, legal professionals and members of the public.
- Mandatory cultural competency training and ongoing education for all judicial officers and court staff.
- Direct engagement with Aboriginal communities as part of judicial education, including the delivery of cultural competency training.

j. Post-Judicial Activities

Chapter Seven (7) of the Guide pertains to 'Post-Judicial Activities'. The purpose of this chapter is to provide guidance to judicial officer's post-judicial work and activities.³⁹

This chapter is comprehensive, without compromising a former judicial officer's right to the freedom enjoyed by other members of the community.

In general, TALS are supportive of some strengthening this chapter and recommend the committee consider the following:

- Stricter guidelines on post-judicial employment, particularly concerning potential conflicts of interest.
- Stricter guidelines on post-judicial activities, avoiding links to persons who are involved in unethical or discriminatory practices.
- Stricter guidelines on post-judicial associations and affiliations, avoiding links to organisations or groups involved in unethical or discriminatory practices.
- Encourage post-judicial appointments, activities or associations that promote diversity, advocate inclusion and educate on the adverse lived experiences of Aboriginal peoples.

³⁸ Ibid

³⁹ The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct Third Edition* (December 2023).

k. Judicial Restraint and Objectivity

Judicial restraint and objectivity in decision making are crucial principles for a fair and impartial legal system. Restraint emphasises an adherence to law and precedent, whilst objectivity ensures that judicial officer decisions are based on fact and legal principle, and void of bias.⁴⁰

Decision making sometimes calls for judicial officers to push the boundaries of the law, as they determine the 'fair' decision of an individual case against the 'right' decision with respect to the law. This is where judicial officers can face scrutiny and the ability for them to maintain self-awareness and self-restraint will correspond to avoiding errors and maintaining objectivity.⁴¹

However, it can be said that this scrutiny is necessary as it provides transparency, protects citizens from misconduct or administrative abuses, and maintains the rule of law.⁴²

TALS have provided recommendations in reference to sections (b) and (h), which are relevant to supporting judicial officers in maintaining objectivity and remaining impartial during decision making. In addition to recommendations found in the aforementioned sections, TALS recommend that the Committee consider:

- Highlighting the need for guidance on judicial officers' interactions with Aboriginal defendants, particularly regarding over-policing, bail decisions, and sentencing discretion.

l. Additional Considerations for the Guide

In addition to the above feedback, TALS recommend the committee consider the following when reviewing the Guide:

- A stronger focus on procedural fairness in cases involving Aboriginal people.
- Advocate for judicial guidance on engaging with Aboriginal Community Justice Reports.
- Consider culturally specific sentencing options where practical and appropriate.
- Advocate for reforms to legislation and executive functions that disadvantage Aboriginal people.

CONCLUSION

TALS agrees with the Committee's view that the Guide should address the impact of social and cultural factors on impartiality and strengthen judicial education and training on matters of cultural competence. Additionally, TALS welcomes the opportunity afforded by the Committee to comment on these issues from the perspective of Aboriginal peoples.

TALS encourages the Committee to continue engagement with TALS and utilise their expertise in cultural competency training and policy development. Furthermore, TALS recommends the Committee engage Aboriginal

⁴⁰ French, R, *Judicial Activism – The Boundaries of the Judicial Role* (10 November 2009).

⁴¹ Judicial Commission of New South Wales, "*Judge not, the ye be not judged: judging judicial decision-making*" (accessed 7 April 2025).

⁴² *Ibid*

community leaders, the TALS Policy and Programs team and legal experts before finalising the revised Guide to Judicial Conduct. This will ensure the perspectives of Aboriginal people have been taken into account and that the Committee prepare a revision to the Guide that fully considers cultural safety and contributes to fair and impartial outcomes for all Aboriginal peoples.

If you have any questions regarding TALS' recommendations in this document, please reach out to me directly.

Warmest regards,

A handwritten signature in black ink, appearing to read 'Lucas Tolputt', written in a cursive style.

Lucas Tolputt (He/Him)

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