

# TRIBAL LAW AND ORDER ACT: ENHANCED SENTENCING AUTHORITY

## Tribal Code Development Considerations Quick-Reference Overview & Checklist

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Tribal Judicial Institute



### **Tribal Civil and Criminal Legal Assistance Program**

*The Tribal Civil & Criminal Legal Assistance (TCCLA) Program provides resources to:*

- 1) Enhance the operations of tribal justice systems and improve access to those justice systems, and*
- 2) Provide training and technical assistance (TTA) for development and enhancement of tribal justice systems.*

*The TTA services in the area of tribal civil and criminal assistance helps tribal communities with the provision of procedural justice in tribal civil and criminal legal procedures, legal infrastructure enhancements, public education, and the development and enhancement of tribal justice systems.*

#### **Services focus on topics that include:**

*Indigent defense services;*

*Civil legal assistance;*

*Public defender services; and*

*Strategies for implementing the enhanced sentencing authority under the Tribal Law and Order Act.*

*For more information on the TCCLA Program, visit:*

*<http://www.justice.gov/tribal/tta.html>*

## **Introduction to the Tribal Law and Order Act of 2010 Section 234: Tribal Court Sentencing Authority**

The Tribal Law and Order Act of 2010 (TLOA) was signed into law on July 29, 2010. (*Pub. L. No. 111-211, 124 Stat. 2258*). TLOA was enacted in an effort to clarify governmental responsibilities regarding crimes in Indian Country; increase and improve collaboration among jurisdictions; support tribal self-governance and jurisdiction; reduce the prevalence of violent crime in Indian Country; combat crimes such as domestic violence, sexual assault, and drug trafficking; reduce the rates of substance abuse in Indian Country; and support the collection and sharing of crime data among jurisdictions.

The TLOA amended the Indian Civil Rights Act of 1978 (ICRA) by providing the option for tribes to expand sentencing authority within tribal courts (*Pub. L. No. 90-284, 82 Stat. 73 (as amended)*). Under pre-existing law, tribes were restricted to sentences of up to 1 year imprisonment, a fine of up to \$5,000 or both; however with the amendments to ICRA made by TLOA, tribes now have an option to enhance sentences in criminal cases by imposing sentences not to exceed 3 years imprisonment, fines of up to \$15,000 or both for qualifying crimes so long as the tribe has met the specific requirements set forth in TLOA. Sentences may include a combination of incarceration and community corrections such as probation and halfway houses. Under no circumstance can the term of the sentence exceed 9 years. Tribes are not required to implement enhanced sentencing authority but rather can choose whether it is necessary for their community.

The requirements that must be satisfied by tribes opting to impose enhanced sentences are set forth in Section 234 (a) (b) & (c) of TLOA. Tribes can impose higher sentences if:

- The defendant is provided effective assistance of counsel at least equal to that under the United States Constitution, and at the expense of the tribes for indigent defendants;
- The defense counsel must be licensed by any jurisdiction that applied appropriate licensing standards, ensure competency, and has rules of professional responsibility;
- The defendant is not subject to excessive bail, excessive fines or cruel and unusual punishment;
- The presiding judge has sufficient legal training for a criminal proceeding and licensed to practice law in any jurisdiction in the United States;
- All criminal laws, rules of evidence, and rules of procedure etc. are publicly available; and
- The tribe shall maintain a record of criminal proceedings.

*See TLOA Pub. L. No. 11-211, Sec. 234 (a)(1)(2); 234 (c); see also 25 U.S.C. §1302 (c)*

In order for a defendant to be subject to greater than 1 year imprisonment, a fine greater than \$5,000, or both, the person accused of the criminal offense must be someone who:

- Has been previously convicted of the same or comparable offense by any jurisdiction in the United States; or
  - Is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.
- See TLOA Pub. L. No. 111-211, Sec. 234 (a) (3); 25 U.S.C. §1302 (b)*

Finally, should a tribe impose a sentence for a qualifying offense that is greater than 1 year of imprisonment or a fine greater than \$5,000, certain detention criteria must be met:

- The tribal correctional facility must be approved by the Bureau of Indian Affairs (BIA), U.S. Department of Interior, for long-term incarceration, in accordance with guidelines to be developed by the BIA (in consultation with Indian tribes) not later than 180 days after July 29, 2010<sup>1</sup>;
  - The facility is the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of TLOA;
  - The facility is a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
  - The facility is an alternative rehabilitation center of an Indian tribe; or
  - The defendant may be required to serve another alternative form of punishment, as determined by the tribal court judge, pursuant to tribal law.
- See TLOA Pub. L. No. 111-211, Sec. 234; 25 U.S.C. §1302 (d)*

## FEDERAL REQUIREMENTS: TLOA Enhanced Sentencing Authority

### THE INDIAN CIVIL RIGHTS ACT

TLOA amended section 1302 of ICRA to include provisions pertinent to the exercise of enhanced sentencing authority by tribal courts. The specific amendments are highlighted (in red font) in the text below:

#### 25 U.S.C §1302. Constitutional rights

##### (a) In general

No Indian tribe in exercising powers of self-government shall—

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));
- (7) (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
  - (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
  - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

<sup>1</sup> <http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf>

- (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

**(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000**

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

- (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
- (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

**(c) Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
- (3) require that the judge presiding over the criminal proceeding—
  - (A) has sufficient legal training to preside over criminal proceedings; and
  - (B) is licensed to practice law by any jurisdiction in the United States;
- (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
- (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

**(d) Sentences**

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

- (1) to serve the sentence—
  - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
  - (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) 1 of the Tribal Law and Order Act of 2010;
  - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
  - (D) in an alternative rehabilitation center of an Indian tribe; or
- (2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

**(e) Definition of offense**

In this section, the term “offense” means a violation of a criminal law.

**(f) Effect of section**

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

## QUALIFYING CRIMES

TLOA and the amendments to ICRA make it clear that enhanced tribal court sentencing authority is not applicable to all crimes presented before a tribal court.

***25 U.S.C. 1302 § (b) defines those crimes to which enhanced sentences may be applied namely:***

**(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000**

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—

- (1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
- (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

By comparison, most crimes fitting the above definition would be considered felonious crimes if they occurred within a state or federal jurisdiction. Felony crimes are considered to be serious crimes and might include both violent and non-violent offenses. While the definition of a felony differs from state to state, generally speaking, a felony is a crime for which harsher sentences may apply. Examples of such crimes might include, but are not limited to:

- Burglary
- Robbery
- Weapons violations
- Murder or homicide
- Manslaughter
- Forcible rape
- Child molestation
- Aggravated assault
- Theft
- Forgery
- Counterfeiting
- Fraud
- Vandalism
- Offenses against family members

### TRIBAL CODE EXAMPLES:

Hopi Tribal Code defines “dangerous offense” and “serious offense” within their tribal code and applies enhanced sentences only to those crimes falling within said definitions.

The Confederated Tribes of the Umatilla Reservation Code distinguishes between “misdemeanors” and “felonies” and applies enhanced sentences only to those crimes that are defined as felonies.

Salt-River Pima-Maricopa Indian Community classifies offenses as Class A, Class B, Class C, Class D, and Class E. Enhanced sentences are imposed only for Class A offenses.

## CRUEL OR UNUSUAL PUNISHMENT

**25 U.S.C. 1302 § (a) provides:**

**“(a) In general**

No Indian tribe in exercising powers of self-government shall—...

(7)... (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or...”

By federal standards the Eighth Amendment, of the United States Constitution, affords a measure of individual protection against governmentally imposed punishment that is cruel and unusual. Similarly ICRA, as amended by TLOA, also prohibits punishments that by definition are cruel and unusual. Much legal debate has occurred over the definition of cruel and unusual punishment. Although TLOA or ICRA do not offer a definition for cruel and unusual punishment, tribes should develop an understanding of the United States Supreme Court cases that have addressed the definition under the Eighth Amendment. Cases that may be relevant to the implementation of enhanced sentencing authority under the TLOA include, but are not limited to:

***Trop v. Dulles, 356 U.S. 85 (1958)***

The United States Supreme Court sets forth that cruel and unusual punishments may change over time depending on whether the punishments in question offend society’s “evolving sense of decency”

***Harmelin v. Michigan, 501 U.S. 957 (1991)***

The United States Supreme Court determined that the Eighth Amendment does not specifically require a punishment be proportionate to a crime although in a concurring opinion grossly disproportionate punishment was viewed, by three justices, to violate the Eighth Amendment.

## INDIGENT DEFENSE COUNSEL

**25 U.S.C. 1302 § (c) provides that:**

**“...c) Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;...”

A requirement of TLOA and ICRA, as amended by TLOA, is that a tribe opting to impose enhanced sentencing authority must provide indigent defense counsel; however, both laws stop short of defining indigent status, effective assistance of counsel and licensure. Within the federal, and some state justice systems, the following standards and procedures apply:

### **Indigent Status**

“Since the 1963 Supreme Court *Gideon v. Wainwright* ruling, states, counties, and local jurisdictions have established varying means of providing public representation for defendants unable to afford a private attorney. To determine whether a defendant qualifies as indigent, states and localities may consider the defendant’s income level, eligibility for public assistance, and debt levels. Indigent defense is then typically provided through one or a combination of three methods: a public defender office, an assigned counsel system, or a contract system.”<sup>2</sup>

- Neither TLOA nor ICRA provide a definition for indigent status. It is clear that developing such a definition will be the responsibility of the implementing tribe.
- As tribes are developing definitions it is a good idea to include some of the preceding considerations.

### **Effective Assistance of Counsel**

In the case of *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court found that in order to prove legal counsel was not effective, a defendant must show:

- (1) the lawyer’s performance fell below an objective standard of reasonableness; and
- (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

Although tribes are not bound entirely by this two-prong test, it is a good idea for tribes to understand the federal test and to develop a means for determining effective assistance of counsel that is equal to or greater than this federal requirement.

### **Attorney Licensure**

Tribes are able to develop their own professional licensing standards for attorneys representing defendants in criminal cases. Licensing Standards -

- DO NOT need to include a juris doctorate requirement;
- DO NOT need to include a bar examination; and
- Should ensure or measure both competence and professional responsibility.

<b>Many U.S. jurisdictions permit an individual to seek license as an attorney without a juris doctorate namely:</b>	<b>Many U.S. jurisdictions also permit attorney licensure if the attorney was first licensed in another territory or U.S. state and no juris doctorate was required namely:</b>
<ul style="list-style-type: none"> <li>• California</li> <li>• New York</li> <li>• New Hampshire</li> <li>• Maine</li> <li>• Washington (state)</li> <li>• Wyoming (law reader)</li> <li>• Virginia</li> <li>• Vermont</li> </ul>	<ul style="list-style-type: none"> <li>• District of Columbia</li> <li>• Arizona</li> <li>• Florida</li> <li>• Hawaii</li> <li>• California</li> </ul>

<sup>2</sup> Office of Justice Programs Fact Sheet, (December 2011)

### Indigent Defense Counsel

Tribes may provide legal counsel to qualifying indigent defendants in various ways. The following are among the systems being utilized by other jurisdictions:

- **Creation of a Public Defense Office**  
The tribe would hire attorneys as tribal employees on a full-time or part-time basis
- **A contract system**  
The tribe would hire attorneys as needed on a consultant basis
- **A pro bono system**  
Members of the Tribal Bar would be required to accept court appointments for indigent defense

Based upon caseload it will be up to the tribe to determine whether any of the foregoing systems will work for them.

#### TRIBAL CODE EXAMPLES:

Oglala Sioux Tribe has established a Tribal Bar Association. See *Oglala Sioux Tribal Code Chapter 45* [<http://thorpe.ou.edu/codes/oglaala/chapter45-bar.htm>].

Navajo Nation administers a bar examination and requires applicants to meet general requirements pertaining to age, character, ethics, and have a clean criminal history. There are also specific requirements for tribal members of any Indian tribe and non-tribal members of any Indian Tribe. The Navajo Nation also requires cultural study and study specific to Navajo tribal law. See *Navajo Bar Association* at <http://www.navajolaw.org>

Umatilla Code requires that Advocates or Attorneys be members in good standing of any tribal or state bar association and be of good moral character and professional standing. See *Rule 11 The Confederated Tribes of the Umatilla Reservation Code* [<http://ctuir.org/system/files/RulesOfCourt.pdf>].

## JUDICIAL REQUIREMENTS

25 U.S.C. 1302 § (c) provides that :

“...(c) **Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—...

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;...”

In the United States there are jurisdictions where you are able to serve as a judge without having earned a juris doctorate (although you may be required to be a licensed attorney). The United States Supreme Court, California, District of Columbia, and Rhode Island are examples of such jurisdictions. Although TLOA did amend ICRA to require that a judge have both sufficient legal training and licensure, the definition, standards or procedures for both are to be defined by the implementing tribe.



- Legal training might include a juris doctorate, however it may also include:
  - Continuing legal education courses;
  - Specific judicial course through institutions such as the National Judicial College;
  - American Bar Association (ABA)-approved school or non-ABA approved (approved by the tribe can be sufficient – states do that); and/or
  - Other tribally-approved course of study under a tribally licensed attorney or judge.
- Judicial licensure is also not defined within TLOA and hence the door remains open for tribes to define or establish licensure standards within their own codes or rules. Options for judicial licensure might be based upon or take into consideration:
  - Licensure by a state board of bar examiners;
  - Licensure by a tribal board of bar examiners (tribal bar exam);
  - Juris doctorate or other formal education;
  - Informal education through continuing education providers; and/or
  - Tribal legal education pertinent to culture, custom and/or tradition.

#### **TRIBAL CODE EXAMPLES:**

The Confederated Tribes of the Umatilla Reservation Code requires that a Judge meet age requirements, serve a probationary term, have a clean criminal history, be a member of a state bar, and graduate from an accredited law school.

Gila River Indian Community requires that judges meet specific education requirements as set forth in Rule 41.2 of the Gila River Code, and for enhanced sentencing cases the tribe included in its Rule at section (c) the language from the ICRA §1302(c)(3)(A)(B).

Tulalip has judicial requirements for all tribal court judges set forth in the Tulalip Code §2.05.040. The Tulalip Code §2.05.040(e) and (f) set forth some criteria for judicial licensure including being a judge from another federally recognized tribe, licensed before the Washington State Bar Association, possessing a juris doctorate from an accredited law school, a person deemed qualified by the Tribal Board of Directors, and be a member in good standing of the Tulalip Bar.

## PUBLIC AVAILABILITY OF TRIBAL LAWS

**25 U.S.C. 1302 § (c) provides that:**

**“...(c) Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—...

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and...”

TLOA includes some basic due process requirements to place people on notice of the rules that will govern their conduct. Tribes will need to make sure that they develop a system to make publicly available:

- Criminal statutes;
- Criminal rules of procedure;
- Rules of evidence;
- Court opinions; and
- Notice of intent to exercise inherent authority (not specified by the ICRA but may be deemed a best practice).

Although the statute does not define what will constitute “publicly available” tribes may consider some of the following options:

- Website/internet;
- Hard copies made available at tribal buildings, agencies, jails or libraries (i.e. National Indian Law Library); and/or
- Hard copies or electronic copies made available upon request.

### **TRIBAL CODE EXAMPLES:**

Most tribes have made their Codes publicly available by making hard copies available at designated locations as well publishing them online. Examples of tribes making laws publicly available in this manner include but are not limited to:

Gila River Indian Community (AZ);  
The Hopi Tribe (AZ);  
The Salt River Pima-Maricopa Indian Community (AZ);  
The Confederated Tribes of the Umatilla Indian Reservation (OR); and  
The Eastern Band of Cherokee (NC).

## RECORD OF PROCEEDINGS

25 U.S.C. 1302 § (c) provides that:

**“...(c) Rights of defendants**

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—...

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding....”

In criminal proceedings maintaining a record of the trial is essential to preserving issues for appeal and for ensuring that applicable legal rules and procedures are being followed. TLOA mandates that records of proceedings wherein enhanced sentences will apply, be recorded either through audio or other means. Courtroom technology will become an important component of planning and implementation for those tribes opting to exercise enhanced sentencing authority. Tribes may want to consider the following:

- Upgrading audio equipment;
- Installing audio and visual equipment in the courtroom;
- Developing a plan for routine testing and maintenance of technology; and/or
- Utilizing court reporters to maintain a written record of the proceedings.

### TRIBAL EXAMPLES:

The Hopi Nation has, through its Code, established an Office of Public Defender and has included a provision that to hold such office a person must be “...admitted to practice law before any State Supreme Court or U.S. District Court, and is in good standing.” See Hopi Tribe Code § 1.6.3(B)

[<http://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf>].

The Confederated Tribes of the Umatilla Reservation has incorporated the language from the ICRA § 1302(c), into its Tribal Criminal Code § 3.28 Defendant’s Rights and has further set forth qualifiers in Rule 11 Advocates or Attorneys

[<http://ctuir.org/system/files/RulesOfCourt.pdf>].

Gila River Indian Community has set forth in its Code that indigent defense shall be an entitlement in criminal proceedings but that those offenses to which enhanced sentences will not apply, defense counsel shall be at the defendants own expense. See Gila River Indian Community Code § 5.1505

[<http://www.gilariver.org/pdfs/criminalcode/GR-03-13%20Revised%20Title%205%20Criminal%20Code.pdf>].

## ***PURPOSE & RECOMMENDED USE OF QUICK REFERENCE TOOLS***

Tribes opting to impose enhanced sentences within their tribal justice systems, they will need to ensure that the applicable TLOA provisions or pre-requisites are met. (*Pub. L. No. 111-211, 124 Stat. 2258*). This publication includes two “quick-reference” tools to help facilitate discussion and guide the tribal code review, amendment, and development process.

The tools are organized into sections covering TLOA’s basic statutory and due process requirements for the implementation of the enhanced sentencing authority for tribal courts.

***Quick-reference overview of statutory & due process requirements.*** This Overview is provided to assist tribal teams, committees or individuals by highlighting the primary statutory requirements of the TLOA. The Overview can be used as a guide to assess tribal readiness and to provide tribes with necessary statutory references pertinent to enhanced sentencing provision of TLOA.

***Quick-reference checklist for tribal code review, amendment & development.*** This Checklist is provided to assist tribal teams, committees or individuals by providing a list of the primary code considerations that must be considered and/or incorporated prior to the tribe imposing enhanced sentences. The Checklist can be used as a guide during the tribal code review, amendment and development process.

## TRIBAL LAW AND ORDER ACT ENHANCED SENTENCING OPTION

### QUICK-REFERENCE OVERVIEW OF TLOA STATUTORY & DUE PROCESS REQUIREMENTS

In order for a tribe to impose sentences exceeding one (1) of imprisonment, a fine not exceeding \$15,000 or both as set forth in the Indian Civil Rights Act 25 U.S.C. 1302 (b)(c)(d), as amended by TLOA, a tribe must ensure that the following statutory and due process requirements are met:

	Statutory & Due Process Requirement(s)	Legal Source of Due Process Requirement
1	A defendant subject to an enhanced sentence must be accused of a qualifying offense.	25 U.S.C. § 1302 (b)
2	Defendants must be provided “effective assistance of Counsel” at least equal to that guaranteed by the United States Constitution.	25 U.S.C. §1302 (c)(1)
3	The tribe must provide “indigent defense” to qualifying defendants. Indigent defense counsel must be an attorney licensed in any jurisdiction in the United States.	25 U.S.C. §1302 (c)(2)
4	The jurisdiction licensing the defense attorney must apply “appropriate professional licensing standards” and ensure both competency and professional responsibility.	25 U.S.C. §1302 (c)(2)
5	Presiding judges must have sufficient training to preside over criminal trials.	25 U.S.C. §1302 (c)(3)(A)
6	Presiding judges in criminal proceedings must be licensed to practice law by any jurisdiction in the United States.	25 U.S.C. §1302 (c)(3)(B)
7	Tribal rules of criminal procedure, rules of evidence and criminal laws must be publicly available prior to charging of a defendant.	25 U.S.C. §1302 (c)(4)
8	Tribal Court must maintain a record of the criminal proceeding including a recording of the trial proceedings.	25 U.S.C. §1302 (c)(5)
9	<p>Any defendant sentenced to more than 1 year in imprisonment must be sentenced to:</p> <ul style="list-style-type: none"> <li>• A tribal correctional facility approved by the BIA for long-term incarceration;</li> <li>• The nearest appropriate federal facility;</li> <li>• A state or local government-approved detention or correctional facility;</li> <li>• A tribal rehabilitative center; or</li> <li>• Other alternative form of punishment as deemed appropriate by the tribal court judge.</li> </ul> <p>For a copy of the draft BIA facility guidelines for long-term incarceration visit:  <a href="http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf">http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf</a></p>	25 U.S.C. §1302 (d)

## QUICK-REFERENCE CHECKLIST FOR TRIBAL CODE REVIEW, AMENDMENT & DEVELOPMENT

This quick reference checklist has been developed to assist tribes when reviewing, amending or drafting tribal codes that will meet the due process and statutory requirements of ICRA as amended by TLOA. The checklist can be used *as you review* your existing tribal code to confirm compliance with the provisions as well as *after the tribal code is updated* to ensure all required provisions under TLOA have been addressed. Included are *critical thinking points* to help guide your discussions and/or revision process. This quick-reference checklist is intended as a guide and does not incorporate specific considerations that may be relevant to each tribal community.

JURISDICTIONAL CONSIDERATIONS		
<b>Does the tribal constitution, statutes, cases or treaties define the jurisdictional boundaries of the tribe?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Tribal territorial jurisdiction should be defined by treaty, constitution, statute or other legal document</i></li> </ul>		
<b>Does the current tribal code limit personal jurisdiction to only members?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Code will need to include jurisdiction to prosecute both members and non-members if the tribe plans to maximize the exercise of tribal jurisdiction.</i></li> </ul>		
<b>Does the criminal code currently define, reference or incorporate the provisions of the ICRA as amended by TLOA?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Amendments to the tribal criminal code will need to reflect sentence enhancements of TLOA.</i></li> </ul>		
<b>Does the current tribal code define felony offenses or otherwise set forth which crimes shall subject a defendant to enhanced sentencing?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>The tribal code may need to be amended to include and define which crimes will subject a defendant to more than 1 year in imprisonment (including any combination of detention and community-based corrections), fines of up to \$15,000 or both.</i></li> <li>○ <i>To be subject to enhanced sentencing the crime charged by the tribe must be the same or comparable to:</i> <ul style="list-style-type: none"> <li>○ <i>An offense for which the defendant was previously convicted (consider what will constitute “proof” of a prior conviction and whether this will be established on the record at a preliminary hearing; an element that must be proven at trial; or made part of the record as part of a plea of guilty); or</i></li> <li>○ <i>An offense punishable by more than a year in federal or state jurisdiction(s).</i></li> </ul> </li> </ul>		
<b>Does the current tribal code define its jurisdiction to prosecute felony offenses?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>The tribal code may need to be updated to reflect sentence enhancements of TLOA.</i></li> </ul>		
<b>Does the current tribal code provide defendants’ rights, including the right to effective legal counsel?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>The tribe must provide defendants the right to effective legal counsel. (Equal or greater to that guaranteed by the U.S. Constitution)</i></li> <li>○ <i>The tribe should establish some base criteria to would assist the trier of fact in determining whether legal counsel was or was not effective.</i></li> </ul>		

Indigent Defense Code Considerations		
<b>Does the current tribal justice system have a mechanism for a public defender program or legal defense component?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<b>Does the tribe have a definition for “indigent”?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Criminal defendants must be provided access to effective legal counsel at the tribe’s expense if they are indigent.</i></li> </ul>		
<b>All criminal defendants must be provided effective legal counsel (equal to or greater than that guaranteed by the United States Constitution). Does the tribe have a definition or minimum requirements for “effective assistance of counsel”?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Defense counsel needs to be licensed to practice law in any jurisdiction of the United States that applies professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;</i></li> <li>○ <i>Under federal standards, effective assistance of counsel means:</i></li> <li>○ <i>Attorney performance was deficient;</i></li> <li>○ <i>The deficiency prejudiced the defendant; and</i></li> <li>○ <i>But for the deficiency the result of the trial would have been different</i></li> </ul> <p><i>See Strickland v. Washington, 466 U.S. 668 (1984)(setting forth a federal standard for effective assistance of counsel).</i></p>		
<b>Does the tribe have established codes of conduct or ethical rules applicable to licensed attorneys and public defenders?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>The tribe may want to consider development and implementation of tribal bar membership and include TLOA requirements to bar qualifications.</i></li> </ul>		
JUDICIAL QUALIFICATIONS		
<b>Does the tribal judicial code or judicial policy require judges presiding over criminal proceedings to be licensed to practice law in any jurisdiction of the United States?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>Does the tribe have its own licensure process for tribal judges?</i></li> <li>○ <i>Does the tribe have a bar examination; is there an application process; are judges elected or appointed?</i></li> <li>○ <i>Qualifications for judicial licensure that tribes may consider include but are not limited to:</i> <ul style="list-style-type: none"> <li>○ <i>A course of study followed by an examination;</i></li> <li>○ <i>Juris Doctorate or other formal education;</i></li> <li>○ <i>Bar examination score (tribal bar or bar of another jurisdiction); and</i></li> <li>○ <i>Age, knowledge of tribal law, customs and traditions.</i></li> </ul> </li> <li>○ <i>If the tribe does not have a licensure process, are the procedures of other jurisdictions followed or incorporated?</i></li> </ul>		
<b>Does the tribe have established ethical standards or rules of conduct applicable to tribal judges? (Optional)</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No

<b>Does the tribal judicial code or judicial policy include judicial qualifications?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ Does the tribe require judges be of a certain age?</li> <li>○ Does the tribal require cultural competency? If yes, how will that be established?</li> <li>○ The tribal code or judicial policy should define “sufficient legal training” that is required for judges who preside over criminal proceedings.</li> <li>○ Options might include, Juris Doctorate, informal education, tribal legal education or other similar means</li> </ul>		
<b>CRIMINAL LAWS, RULES OF PROCEDURE, RULES OF EVIDENCE</b>		
<b>Does the tribal code include established rules of criminal procedure?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<b>Does the tribal code include established rules of evidence?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<b>Does the tribe make publicly available criminal laws, rules of evidence, and rules of criminal?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ Prior to charging the defendant under the enhanced sentencing of TLOA, the tribe must make the following documents available to the public: <ul style="list-style-type: none"> <li>○ Criminal Laws;</li> <li>○ Rules of Evidence; and</li> <li>○ Rules of Criminal Proceedings, including the rules governing the recusal of judges.</li> </ul> </li> <li>○ Rules of procedure may need to be updated to include rules applicable to the appointment of defense counsel as well as rules or procedures to guide the Court and Court personnel when screening for indigence.</li> </ul>		
<b>RECORD OF TRIAL</b>		
<b>Does the tribal court have a mechanism to maintain a record of the criminal proceeding?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ This includes an audio or other recording of the trial proceedings.</li> <li>○ This also includes providing a means for capturing, maintaining and transmitting records on appeal;</li> <li>○ Option to maintain records of proceedings include but are not limited to: <ul style="list-style-type: none"> <li>○ Court reporters;</li> <li>○ Audio recorders; and/ or</li> <li>○ Audio/ visual recorders.</li> </ul> </li> <li>○ Tribes should consider whether cultural issues might arise in some cases that may warrant the tribe having alternative means to maintain a record. (For example, some cultures may oppose the capture of a likeness through video recording. In such cases alternative means to video recordings should be made available.)</li> </ul>		
<b>QUALIFYING CRIME</b>		
<b>Does the statutory crime qualify for an enhanced sentence to be imposed?</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ The defendant must have qualifying prior conviction; or</li> <li>○ The defendant must be charged with a crime subject to more than a 1 year term of imprisonment within the United States or any of the States.</li> </ul>		



<p><b>Does the enhanced sentencing option require that the defendant have been previously convicted of the same or comparable offense by any jurisdiction in the United States?</b></p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>The tribe may want to consider whether the prior convictions were “counseled convictions”</i></li> <li>○ <i>The tribe may also want to include prior convictions as a pre-requisite in sentencing option provisions of the tribal code</i></li> </ul>		
<p><b>Does the criminal offense subjecting the defendant to an enhanced sentence compare to an offense that would be subject to more than 1 year of imprisonment if prosecuted by the United States or an of the States?</b></p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>One way to accomplish may be to classify offenses as misdemeanors or felonies</i></li> </ul>		
<b>SENTENCING AND DETENTION PROVISIONS</b>		
<p><b>Does the tribal code reflect new sentencing guidelines for felony charges?</b></p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<ul style="list-style-type: none"> <li>○ <i>This includes stacking sentences on multiple offenses (total term of imprisonment may not to exceed 9 years according to TLOA and ICRA as amended).</i></li> </ul>		
<p><b>Does the tribe have a mechanism in place for long-term incarceration?</b></p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>Options:</p> <ul style="list-style-type: none"> <li>○ <i>The tribe may use its own tribal correctional facilities if it meets the BIA’s criteria for long-term incarceration.</i> <ul style="list-style-type: none"> <li>○ <a href="http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf">http://tloa.ncai.org/documentlibrary/2011/02/BIA%20Adult%20Detention%20Facility%20Guidelines%20Dec%202010%20SOL.pdf</a></li> </ul> </li> <li>○ <i>The tribe may apply to the United States Department of Justice Bureau of Prison’s TLOA Tribal Prison Pilot Project to house inmates in a federal corrections center.</i></li> <li>○ <i>The tribe may enter into an agreement with local or state correctional facilities to house long-term inmates.</i></li> <li>○ <i>The tribe may utilize a tribal alternative rehabilitation centers for long-term sentences.</i></li> </ul>		
<p><b>Does the tribal code include alternatives to incarceration allowing judges latitude in sentencing, which includes imposing alternate forms of punishment?</b></p>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
<p>Examples</p> <ul style="list-style-type: none"> <li>○ <i>Drug Courts/ Tribal Healing to Wellness Courts</i></li> <li>○ <i>Rehabilitation Centers</i></li> <li>○ <i>Probation/ Parole</i></li> <li>○ <i>Work/ School Release Programs</i></li> <li>○ <i>Transitional Living/ Halfway Houses</i></li> <li>○ <i>Day Reporting/ Day Treatment Centers</i></li> <li>○ <i>Electronic Monitoring Programs</i></li> <li>○ <i>Intensive Supervision Programs</i></li> </ul>		

### Conclusion

TLOA provides a critical opportunity for tribes to acquire the tools they need to build stronger tribal justice systems to improve public safety. The quick-reference overview and quick-reference checklist emphasize some of the specific questions and considerations that are pertinent to the review, amendment, and development of tribal codes as tribes opt to implement the enhanced sentencing provisions of TLOA.

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**Project Overview:** *Tribal communities face a daunting task of providing safety for tribal communities where violent crime exists, according to a 2004 Department of Justice, Bureau of Justice Statistics Report, 2.5 times higher than the national norm. The Tribal Law and Order Act of 2010 (TLOA) sought to enhance the provision of justice in Indian Country as a means to address the increasing crime rates by allowing for tribes to enhance their sentencing authority and encouraging tribes to seek out alternatives to incarceration/correctional options. However, while these provisions are necessary and welcomed by many tribal justice agencies, little guidance has been developed on how to implement the strategies encouraged by TLOA.*

**Throughout this 24-month project, The 2012 TCCLA Training & Technical Assistance partners will:**

- *Develop and disseminate a training needs assessment to adequately assess the training and technical assistance needs of grantees funded under the Tribal Civil and Criminal Legal Assistance Grant;*
- *Deliver two national/regional trainings sessions comprised of jurisdictional teams (prosecutors, judges, defense and community corrections personnel);*
- *Provide onsite technical assistance to up to three tribal jurisdictions ready to take the next step, beyond training, to implementation;*
- *Provide office-based technical assistance to up to 30 tribes;*
- *Develop and disseminate three project-related publications; and*
- *Deliver six webinars.*

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**For more information on this project, including the above deliverables, please visit our project page by clicking the link below:**

[Tribal Civil & Criminal Legal Assistance Program](#)

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## RESOURCES

United States Department of Justice, TLOA: <http://www.justice.gov/tribal/tloa.html>

United States Department of Justice, Bureau of Justice Assistance TLOA Website: [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=88](https://www.bja.gov/ProgramDetails.aspx?Program_ID=88)

Tribal Justice and Safety at the Department of Justice: <http://www.justice.gov/tribal>

Indian Law and Order Commission: <http://www.aisc.ucla.edu.iloc/>

BIA Office of Justice Services: <http://www.bia.gov/WhoWeAre/BIA/OJS/index.htm>

National Institute of Justice: <http://www.nij.gov/topics/tribal-justice/>

## TRAINING AND TECHNICAL ASSISTANCE PROVIDERS

American Probation and Parole Association: [www.appa-net.org](http://www.appa-net.org)

Tribal Judicial Institute: <http://law.und.edu/tji/>

National Tribal Judicial Center: <http://www.judges.org/ntjc/>

National Congress of American Indians TLOA website: <http://tloa.ncai.org/>

National American Indian Court Judges Association: <http://www.naicja.org/>

## ADDITIONAL RESOURCES

National Indian Law Library: <http://www.narf.org/nill/resources/tloa>

The National Parole Resource Center: <http://nationalparoleresourcecenter.org>

National Reentry Resource Center (NRCC) Tribal Affairs: <http://www.csgjusticecenter.org/reentry/issue-areas/tribal-affairs>

NRCC Main web page: <http://csgjusticecenter.org/jc/category/reentry/nrcc/>

PRC Development of PREA Related Products in Indian Country: [http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode\\_IV\\_ProjectDetail&wps\\_key=386afa46-0796-4e80-8aa6-73afdee32923](http://www.appa-net.org/eweb/Dynamicpage.aspx?webcode_IV_ProjectDetail&wps_key=386afa46-0796-4e80-8aa6-73afdee32923)

Resource Center for the Elimination of Prison Rape (PREA Resource Center or PRC): <http://www.prearesourcecenter.org/>

Repository for Tribal Community Corrections Personnel: [http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VH\\_TribalRepository](http://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VH_TribalRepository)

Walking on Common Ground: <http://www.walkingoncommonground.org/>

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