

Update on Tribal Law and Order Act (TLOA) Implementation: Continuing Opportunities and Challenges for Tribal Healing to Wellness Courts

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Tribal Law and Policy Institute

2012 NADCP Conference
Thursday, May 31st
Gaylord Opryland Resort & Convention Center/Ryman Studio J/K

Nashville, TN
3:15– 4:30PM

Presenters

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- **Charlene Jackson**, Wellness Court Consultant, Tribal Law and Policy Institute
- **Carrie Garrow**, Wellness Court Consultant, Tribal Law and Policy Institute
- **Lauren Frinkman**, Wellness Court Assistant, Tribal Law & Policy Institute

Outline of Presentation

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1. Overview of Tribal Law and Order Act (TLOA)
2. TLOA **Opportunities** for Tribal Healing to Wellness Courts
3. TLOA **Challenges** for Tribal Healing to Wellness Courts
4. Review of TLOA Provisions most relevant for Wellness Courts
5. Proposed enhanced Tribal court sentencing authority (limited DV *Oliphant*-fix) under current VAWA Reauthorization
6. Important Role of Wellness Courts in TLOA Tribal Justice Plan
7. Questions

Tribal Law & Order Act

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- Signed into law by President Obama on July 29, 2010.
- Public Law 111-211.



TLOA Overall Intent

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- **Enhanced Funding for Tribal Justice Systems**
 - authorization rather than appropriation
- **Enhanced Authority for Tribal Justice Systems**
 - enhanced Tribal court sentencing authority
- **Enhanced Federal Cooperation and Accountability**

Overall TLOA Opportunities

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TLOA has focused federal government attention on:

- American Indian/Alaska Native Criminal Justice Issues
- Tribal Law Enforcement
- Tribal Justice Systems
- Tribal Healing to Wellness Courts

TLOA Opportunities for Tribal Wellness Courts

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- Enhanced Federal Cooperation and Accountability
- Enhanced Authority for Tribal Justice Systems
- Added leverage over Tribal Healing to Wellness Court participants
- August 2011 TLOA Tribal Justice Plan highlights and prioritizes Tribal Healing to Wellness Courts as an alternative to detention

Some Overall TLOA Challenges

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- TLOA was not able to effectively address some of the most important issues due to political limitations
- TLOA was only able to provide funding *authorization* rather than *appropriation*
- Limited consultation with tribes
- So many moving parts – TLOA provisions, reports consultations, webinars, trainings, etc.

TLOA Challenges for Tribal Wellness Courts

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- Lack of capacity to implement TLOA: infrastructure and funding
- Many requirements for Tribes to enact enhanced sentencing authority
- If a tribe does enact enhanced sentencing authority, then the drug court funding violent offender prohibition would apply

TLOA Provisions

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- **Evidence sharing and declination data:**
 - Requires federal prosecutors to maintain data on criminal declinations in Indian Country, and to share evidence to support prosecutions in tribal court
- **Tribal Police Access to Criminal History Records**
 - TLOA provides tribal police greater access to criminal history databases that provide them with essential information when detaining or arresting a suspect

TLOA Provisions

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- **Federal Testimony**
 - Requires Federal Officials who work in Indian country to testify about information gained in the scope of their duties to support a prosecution in tribal court
- **Authorizes Deputization of Special Assistant U.S. Attorneys to prosecute reservation crimes in Federal courts**

TLOA Provisions

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- **Increases Deputization of Tribal and State Police to Enforce Federal Law**
- **Authorizes the Drug Enforcement Agency to deputize tribal police to assist on reservation drug raids**
- **Increases recruitment and retention efforts for BIA and Tribal police**
- **Expands training opportunities for BIA and Tribal police to receive training at state police academies and tribal, state, and local colleges – where Federal law enforcement training standards are met**

TLOA Provisions: PL 280

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- Amends mandatory “Public Law 280” (18 USC 1162 & 25 USC 1321(a))
- Prior to TLOA:
 - Retrocession required state concurrence; Secretary of Interior decided
- Now:
 - Allows for re-assumption to concurrent federal jurisdiction; no state concurrence; Attorney General decides
- DOJ issued final rule – effective January 5, 2012

TLOA Provisions: Improving Tribal Detention Programs

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- *Sec. 234. BOP Pilot, alternatives to incarceration*
- *Sec. 211. BIA-OJS Responsibilities*
 - BIA-OJS long-term plan for incarceration in Indian Country
 - ✦ Coordinate with DOJ
 - ✦ Consult with tribal leaders and tribal justice officials
- *Sec. 241. IASA Reauthorization*
 - DOI (OJS/BIE)-DOJ-HHS (IHS) long-term plan for juvenile centers
 - ✦ Consult with tribal and BIA juvenile detention centers
- *Sec. 244. Tribal Jails Program Reauthorization / Expansion*
 - DOJ long-term plan to for incarceration in Indian Country
 - ✦ Coordinate with BIA-OJS, IHS, BIE
 - ✦ Consult with tribal leaders and tribal justice officials

TLOA Provisions: Tribal Prisoner Pilot Program

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- DOJ Bureau of Prisons Tribal Prisoner Pilot Program
- Up to 100 prisoners at BOP expense
- Must be sentenced under new tribal court felony sentencing authority
- Must be for a violent crime
- Sentence must be for at least two years

TLOA Provisions: Prisoner Re-entry

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- Requires notice to Tribes when releasing a person convicted of violent crime, drug trafficking, or sex offense
- Authorizes Federal Pretrial & Probation Services to appoint officers in Indian Country

TLOA Provisions: Law and Order Commission

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- Creates new Indian Law & Order Commission to conduct a comprehensive study of Indian Country criminal justice system
- Will submit report to President & Congress



TLOA Provisions: Expanding Tribal Court Authority

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- Federal laws and Supreme Court rulings hamper tribal justice systems and force tribal communities to rely on federal and state justice systems
- Despite reliance, in 2005-09 U.S. Attorneys declined to prosecute 52% of reservation violent crimes, including 67% of crimes of sexual violence
- RESULT: Tribal courts are overseeing more violent cases, but remain subject to ICRA limit on sentencing of only up to 1 year of incarceration and \$3,000 fine

TLOA Provisions: Expanding Tribal Court Sentencing Authority

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- Enhanced tribal court sentencing authority
 - 1-3 years imprisonment, \$15,000 fine, or both
 - Tribal courts can stack sentences
 - × 9-year cap on stacked sentencing
- Protections for accused where Defendant is subject to 1+ year of detention
 - Licensed counsel for indigent defendants
 - Licensed/law trained judges
 - Trial must be recorded (audio or video)
 - Must publish laws, rules of evidence and procedure
 - Sentencing options: tribal, BOP, state, alternatives

Enhanced Sentencing Authority issues:

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- All tribal court judges or defense counsel are *not* required to meet TLOA requirements
- *Judicial* requirements are much less stringent than *defense counsel*
- “Licensed to practice law by any jurisdiction in the United States” includes tribal bar association
 - However, defense counsel requires that the bar association “applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys”
 - The provision concerning tribal court judges does not contain any similar requirement

Proposed enhanced Tribal court jurisdiction under current VAWA Reauthorization

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- Tribal court jurisdiction over non-Indians for Domestic Violence included in Senate version, but not in the House version
- Senate VAWA provisions include same protections as TLOA enhanced sentencing authority.
- Senate VAWA provisions has additional requirements including defendant must have “sufficient ties to the Indian tribe”.

BJA Drug Courts Funding: Application of Violent Offender Prohibition

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- Any Courts – including Tribal Healing to Wellness Courts – funded under BJA *drug court specific* funding can **only serve nonviolent offenders as defined by statute**
- General rule is that Violent Offender Prohibition is not applicable to either current or prior tribal court charges since tribal courts had been unable to provide sentences for more than one year.
- Violent Offender Prohibition **applies if**
 - Adopt TLOA enhanced sentencing;
 - The specific **charge** is punishable in excess of 1 year of detention; and
 - The court receive *drug court-specific* federal funding

BJA Drug Courts Funding: Violent Offender Prohibition

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- Programs funded through this solicitation may not, with Adult Drug Court Discretionary Grant Program funding or matched funding, serve violent offenders. As defined in 42 U.S.C. 3797u-2, a “violent offender” means a person who—
 - (1) is charged with or convicted of an offense that is punishable by a term of imprisonment exceeding one year, during the course of which offense or conduct— (A) the person carried, possessed, or used a firearm or dangerous weapon; (B) there occurred the death of or serious bodily injury to any person; or (C) there occurred the use of force against the person of another, without regard to whether any of the circumstances described in subparagraph (A) or (B) is an element of the offense or conduct of which or for which the person is charged or convicted; or
 - (2) has 1 or more prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm
- A BJA Adult Drug Court Discretionary Grant Program-funded drug court may, at its own discretion and after taking a valid assessment of risk into consideration, choose to provide services to an offender that is otherwise excluded from this program if the grantee is using non-federal (including match) funding to provide the services to that offender. BJA strongly encourages the use of valid risk assessment instruments and consideration of public safety needs in this local decision making process.
- For example – using Byrne formula grant funding to serve veterans with violent charges.

BJA Drug Courts Funding: Tribal Court Application of Violent Offender Prohibition

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- **Current Charges in Tribal Court:** The violent offender prohibition only applies to a person who “is charged with or convicted of an offense that is punishable by a term of imprisonment exceeding one year.” The Indian Civil Rights Act (ICRA), 25 U.S.C. 1302(7), limited tribal courts to “in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both.” Consequently, the violent offender prohibition by its very definition would not apply to ANY current tribal court charges *unless the tribe has enacted enhanced sentencing provisions as authorized under the Tribal Law and Order Act (TLOA), the specific charge/conviction meets violent offender provisions, and the court receives drug court-specific federal funding.*
- **Prior Tribal Court Convictions:** The violent offender prohibition concerning prior convictions only applies to “prior convictions for a felony crime of violence involving the use or attempted use of force against a person with the intent to cause death or serious bodily harm”. This prior convictions provision only applies to “a felony crime”, but that is essentially the same as the “offense that is punishable by a term of imprisonment exceeding one year” language applicable to current charges since - as stated in Black’s Law Dictionary, “Under federal law, and many state statutes, any offense punishable by death or imprisonment for a term exceeding one year” constitutes a felony. Since the ICRA provides that tribal courts cannot sentence a defendant to more than one year in prison, then it should follow that prior tribal court convictions are also by definition not felonies. Consequently, an offender would not be ineligible for a drug court program based on prior convictions in tribal court *unless the tribal code defines specific applicable offenses as “felonies” or the offender was convicted for an applicable offense with TLOA enhanced sentencing in excess of one year.*
- **Prior State Court Convictions:** Tribal courts have issues concerning access to state court conviction records.

August 2011 TLOA Long Term Plan to Build and Enhance Tribal Justice Systems: Tribal Healing to Wellness Courts

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- Half of the comments received on the draft plan indicated strong support for Tribal Healing to Wellness Courts.
- Highlights Tribal Healing to Wellness Courts as the very first illustration of Indian Country alternatives to incarceration program.
- Wellness Courts are one of the most important short term resources that federal agencies will make available within six months.

CONCLUSION

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- Tribal participation is critical to effective implementation
- TLOA is clearly imperfect = does not mandate funding or overturn *Oliphant*
- But it does provide tribal courts with added tools to combat crime, and lays building blocks for greater local tribal control through stronger tribal courts

For More TLOA Information

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- NCAI Tribal Law and Order Act (TLOA) website:
tloa.ncai.org
- Tribal Court Clearinghouse: www.tlpi.org
- Walking on Common Ground:
www.WalkingOnCommonGround.org