




**The Tribal Law and Order Act
and Proposed Revisions to
the Criminal Code**




**Presented
by
The Gila River Indian
Community
Office of General Counsel**




The Tribal Law and Order Act of 2010

- Enacted by Congress on **July 29, 2010**
- Made revisions to the Indian Civil Rights Act of 1968
- Important to understand that ICRA is a major limitation of tribal sovereignty; in the absence of ICRA, tribes would have unlimited sentencing authority



The Law *Before* TLOA

Prior to TLOA, ICRA provided that no Indian tribe exercising powers of self-government shall

“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.”

25 U.S.C. § 1302(7) (repealed 2010).



ICRA *After* TLOA

25 U.S.C. § 1302(c) - If an Indian tribe wants to sentence a defendant to a “total term” of more than one year incarceration per criminal proceeding, the Indian tribe must:

- (1) Provide effective assistance of counsel;
- (2) Provide an indigent defendant with the assistance of a defense attorney licensed to practice law by any jurisdiction;



ICRA *After* TLOA

1302(c) cont.

- (3) Require that the judge have:
 - (a) Sufficient legal training, and
 - (b) Be licensed to practice law by any jurisdiction;
- (4) Make the criminal laws “publicly available;” and
- (5) Maintain a “record” of the criminal proceeding including audio.



25 U.S.C. 1302 (b) – Comparability Requirement

Under this subsection if the Indian tribe imposes a sentence greater than 1 year of imprisonment then the tribe must meet one of these additional requirements:

- (1) the defendant must have been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or
- (2) the defendant 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.



Enhanced Sentencing: A Closer Look

- Tribes which satisfy the prerequisites imposed by the federal law can impose enhanced sentences, which include imposing a maximum of 3 years and/or \$5,000 fine per offense; and can stack up to a maximum of 9 years per criminal proceeding.
- Under the comparability requirement, the Community is revising some of the offenses to be comparable to an offense punishable by more than 1 year of imprisonment if prosecuted by the U.S. or any of the states.



Overview of TLOA Process

- September 10, 2010 Community Council directed summarization of information on TLOA, with OGC as project lead.
- July 6, 2011 Community Council directed implementation of enhanced sentences under TLOA.
- In 2010 the TLOA Workgroup was formed and began meeting on a monthly basis.



- Each department participating in the TLOA Workgroup drafted white papers and projected potential budget impacts. The Community Council directed implementation of enhanced sentences.
- Continual Community Outreach: District meetings, publications in the GRIN, postings at District Service Centers, 6 Saturday work sessions and a public hearing in December of 2012.



- Continual Community Outreach: District meetings, publications in the GRIN, postings at District Service Centers, 6 Saturday work sessions, and a public hearing in December of 2012.
- Draft code reviewed by two independent outside attorneys, with their comments and suggested edits/redlines provided to TLOA Workgroup and LSC. One attorney has 20 years of experience as a Federal Public Defender.
- Rules Subcommittee meeting began meeting in 2011 to draft Rules of Evidence and Rules of Criminal Procedure for the Community.
- Sentencing Subcommittee began meeting in 2012 at direction of LSC to draft sentencing guidelines.



TLOA WORKGROUP

- ~ Office of the Prosecutor
- ~ Defense Services Office
- ~ Judicial Department
- ~ Probation Department
- ~ Police Department
- ~ Tribal Social Services
- ~ Four Rivers Indian Legal Services
- ~ Behavioral Health
- ~ LSC
- ~ Tribal Court Advocate



Outreach Efforts

- Publications in the GRIN;
- Attended District meetings;
- Held six Saturday meetings (3 in east end and 3 in west end);
- Met twice with the Council of Elders;
- Met with the Youth Council;
- Provided monthly updates to LSC and quarterly updates to Community Council;
- Held two Public Hearings on Saturday, December 15, 2012.



Brief Overview of Revisions to the Criminal Code

17 Chapters:

- **107** Criminal Offenses
- **57** Misdemeanors
- **9** Felonies
- **41** Open-ended, Wobblers or Misdeleny offenses (charged as misdemeanor, but if aggravating factor or additional element can be charged as a felony)



What are Wobbling, Open-ended, Misdeleny offenses?

- They are misdemeanor offenses that can be charged as a felony offense IF certain conditions exists.
- Either an additional element is charged to make it a felony offense OR there is an aggravating factor included on the complaint and proved beyond a reasonable doubt.



- Speedy Trial (5.104) is 180 days from arraignment, with certain exceptions that are specifically provided for in the code (delay for determination of competency, unavailability of witness or defendant, etc.).
- New provisions for determination of competency (5.209-5.214) and procedures for determination, restoration/hospitalization, and procedures if found not competent.



- Sentencing Subcommittee (Prosecutors, Defense and Judicial) created presumptive sentencing guidelines (5.407), which provide guidance but are not mandatory.
- Creation of Pre-Trial Services (5.402) to provide reports for bail considerations, and supervise release conditions for defendants released prior to trial and charged with felony offenses.
- Require inmates to participate in work crews at the discretion and direction of the jail. Can obtain credit for early release (24 hours worked = one 24 hour day).



- Commutation:
 - ~ convictions of misdemeanor offenses can apply at any time;
 - ~ convictions for felony can apply after serve 1/2 sentence; however, inmate work crew credits are restricted to application after defendant serves 3/4 sentence.



Sentencing Guidelines

- Divide offenses into 3 categories with category I more serious crimes (homicide, aggravated assault) and III less serious (false reporting, criminal damage).
- Provides guidance but is NOT binding.
- Sentencing Sub-Committee reviewed and recommended a listing of aggravating (5.407.C.7) and mitigating (5.407.C.8) factors that a judge can consider when determining a sentence.



Sentencing Guidelines

Misdemeanor (5.407.D.2):

	<u>Mitigated</u>	<u>Presumptive</u>	<u>Aggravated</u>
I	180 days	270 days	1 year
II	90 days	180 days	270 days
III	30 days	60 days	90 days

Felony (5.407.E.2):

	<u>Mitigated</u>	<u>Presumptive</u>	<u>Aggravated</u>
I	2 years	2 years, 180 days	3 years
II	1 year, 180 days	2 years	2 years, 280 days
III	180 days	1 year	1 year, 180 days



- New preliminary hearing for felony offenses to determine if there is probable cause to hold defendant over for trial.
- Bail provisions are essentially same; however, there are non-binding bail guidelines (similar to presumptive sentencing structure).
- Domestic violence is no longer a separate offense, but is used to augment an underlying offense. Offenses that can be designated domestic violence are identified in 5.710.B.1.



- Offenses designated by DV are subject to separate sentencing considerations (5.710.C) :
 - ~ First Misdemeanor: discretion of judge
 - ~ Second Misdemeanor within 5 years: must serve at least 15 days in jail;
 - ~ First Felony: must serve at least 60 days in jail
 - ~ Second Felony within 5 years: must serve at least 90 days in jail



- New offense (5.706) for elderly or vulnerable adult abuse.
- Clarification of procedures for Orders of Protections and new civil section for Orders of Protections (5.711) and Emergency Orders of Protection (5.712).



Some of the new criminal offenses:

- Receiving bribe as a witness (5.514);
- Receiving bribe by a juror (5.516);
- Possession of contraband by jail inmate (5.518);
- Delivery of contraband (5.519);
- Impersonating law enforcement officer (5.521);
- Refusing to provide truthful name when lawfully detained (5.522);
- Fraudulent use of per capita payments (5.1106);
- Making or permitting false claim for reimbursement of Community assistance services (5.1107);



- Fraudulent schemes and practices against Community (5.1108);
- Endangering human life while illegally manufacturing controlled substances (5.1202);
- Distribution controlled substance to person under age 21 (5.1204);
- Distribution/manufacturing controlled substance near school or playground (5.1206);
- Furnishing marijuana (5.1210) or tobacco (5.1211) to minor;
- NO exception for medical marijuana.



- Expanded criminal procedure chapter (39 sub - sections).
- Clarifies right to counsel and provision for indigent defendants as required for enhanced sentences (Under TLOA indigent defendants, regardless if Community member, must be provided right to effective assistance of counsel at expense of tribal government).
- Jury pool expanded to any Community member living within 100 miles of the Reservation; however, excludes elected officials, certain court and police employees.



- Clarification of procedures to forfeit weapons, explosives and drugs (5.1530).
- Victim's Rights (Chapter 17) essentially same, clarification of notice to the victim and creation of protocol to ensure notice.
- Revision to Traffic Code and DUI offenses:
 - ~ Cannot suspend or commute sentence for Extreme or Aggravated DUI.
 - ~ Mandatory jail sentences for repeat offenders and Extreme DUI.
 - ~ New offense for open alcoholic container in a vehicle.



Children's Code Amendments:

- Clarification that any misdemeanor or felony offense can be charged in Children's Court, EXCEPT it may only be charged as a misdemeanor.
- Juvenile may be subject to felony offense if transferred and prosecuted in Adult Court.
- New procedure for probable cause hearing by Children's Court judge to determine if there is probable cause to believe a minor committed a serious offense (and if so then entire case is transferred to Adult Court).



Civil Code Amendments:

- Applicable Law: Refer to Community's Constitution and laws, but may look to other tribal, federal or state laws for guidance (currently provides if not covered then guided by laws of Arizona).
- Evidence: Refer to Community's Rules of Evidence (currently refers to state of Arizona).
- Dismissal: Clarifies failure to follow timeframe is not automatic grounds for dismissal, can be continued if in interest of justice. For mental health cases the judge should take into consideration if dismissal would be against health care provider's orders.



Amendment to Judges Pro Tempore:

- Extends appointment from 6 months to one year and allows another appointment;
- Provides clarification if appointed for enhanced sentencing under TLOA then judge must meet qualifications (licensed to practice law by any jurisdiction and have sufficient legal training).

Civil Contempt of Court:

- Creates civil contempt offense and procedure for civil contempt proceedings.



Rules Subcommittee:

- Part of the TLOA process included the creation of a Rules Subcommittee (Prosecutors, Defense, Judicial) that reviewed Arizona’s Rules of Evidence and drafted Rules of Evidence for the Community.
- Also reviewed Arizona and Federal Rules of Criminal Procedure and drafted Rules of Criminal Procedure for the Community.



Culture and Tradition:

- Issue regarding the application of culture has been raised during the TLOA process.
- Claude Jackson met with Council of Elders to discuss TLOA and cultural and traditional punitive measures.
- Suggested that could incorporate culture and tradition into misdemeanor or petty violations/sentencing.



Revisions to Criminal Code:

- Revised criminal code enacted the effective date would be January 1, 2014; however felony offenses would not be effective until June 1, 2014.
- From Jan. 1 2014 – May 31, 2014 all offenses would be considered misdemeanors, including the felony only offenses.



Does the Community have the Constitutional authority to direct enhanced sentences and allow the use of *Judges Pro Tempore*?

- Community Council's powers include the power to provide for the maintenance of law and order and the administration of justice by establishing a Community Court and police force and defining the powers and duties thereof.

(GRIC Constitution, Art XV, Sec. 1(a)(17))



- The Community's Constitution provides for elected Community member judges. (GRIC Constitution, Art. VIII, Sec. 2).
- Under the Community Council's powers to establish a Community Court and define the powers and duties thereof, the Community Council has enacted a code provision for the appointment of *Judges Pro Tempore*.
- The use of non-Community member's appointed as *Judges Pro Tempore* for cases subject to enhanced sentencing would be permissible.



- Federal law allows maximum of 3 years for any felony offense with a maximum of 9 years per criminal proceeding **IF** the tribe provides the 5 rights to a defendant.
- Elected Community Court judges could continue to hear all other cases in the Community Court, and could be assigned felony criminal cases if they are licensed by any jurisdiction in the United States and have sufficient legal training to preside over criminal proceedings.



Rights under TLOA for enhanced sentencing:

1. Right to effective assistance of counsel;
2. Indigent defendants have the right to counsel at the expense of the tribal government;
3. Judges presiding over criminal proceeding must:
 - a. Be licensed to practice law by any jurisdiction in the United States; and
 - b. Have sufficient legal training to preside over criminal proceedings
4. Prior to charging the criminal laws, rules of evidence and rules of criminal procedure must be publically available; and
5. Must maintain a record of the criminal proceeding.



Key Dates

- **Implementation of misdemeanor offenses scheduled to begin June 1, 2013**
- **Implementation of felony offenses scheduled to begin January 1, 2014**

For further updates:
 Contact the Office of the General Counsel
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Violence Against Women Act

- Recently reauthorized and signed by President Obama.
- Creates special tribal jurisdiction over crimes of Domestic Violence.
- Allows criminal jurisdiction over non-Indians if defendant resides on reservation, is employed by Community, or is spouse/intimate partner/dating partner of Community member or other Indian residing on reservation.



VAWA Continued:

- Provides for criminal jurisdiction over non-Indian defendants for domestic violence, dating violence and violations of orders of protection.
- To exert special jurisdiction a tribe must provide the 5 additional protections from TLOA.
- Community Council has not made a formal decision on this; currently in process of researching and providing additional information to LSC.



Questions and Answers


