

The Indian Civil Rights Act, as Amended by the Violence Against Women Reauthorization Act of 2013

The Violence Against Women Reauthorization Act of 2013 makes several amendments to the Indian Civil Rights Act of 1968 authorizing tribes to exercise special domestic-violence criminal jurisdiction. To assist tribes in understanding these important changes to federal law, NCAI provides the following demonstration of how the new law will amend the Indian Civil Rights Act.

This document is intended only as a guide for tribal leaders on the reauthorization of the Violence Against Women Act. It is not an official version of either the Indian Civil Rights Act or the Tribal Law and Order Act. You should consult federal legal sources once the Act has been codified to see where and how the provisions of the Violence Against Women Reauthorization Act of 2013 are incorporated.

Immediately below this paragraph is the section of VAWA which specifies the effective date that tribes will be eligible to exercise special domestic-violence criminal jurisdiction, which will be two years after the VAWA reauthorization's enactment. There will also be a pilot project that will allow tribes to ask the U.S. Attorney General to exercise this special jurisdiction on an accelerated basis.

SEC. 908. EFFECTIVE DATES; PILOT PROJECT.

(a) GENERAL EFFECTIVE DATE. — Except as provided in section 4 and subsection (b) of this section, the amendments made by this title shall take effect on the date of enactment of the Violence Against Women Reauthorization Act of 2013.

(b) EFFECTIVE DATE FOR SPECIAL DOMESTIC-VIOLENCE CRIMINAL JURISDICTION. —

(1) IN GENERAL. — Except as provided in paragraph (2), subsections (b) through (d) of section 1304 of title 25, United States Code, shall take effect on the date that is 2 years after the date of enactment of the Violence Against Women Reauthorization Act of 2013.

(2) PILOT PROJECT. —

(A) IN GENERAL. — At any time during the 2-year period beginning on the date of enactment of the Violence Against Women Reauthorization Act of 2013, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under subsection (a) of section 1304 of title 25, United States Code, on an accelerated basis.

(B) PROCEDURE. — The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has

adequate safeguards in place to protect defendants' rights, consistent with section 1304 of title 25, United States Code.

(C) EFFECTIVE DATES FOR PILOT PROJECTS. – An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsections (b) through (d) of section 1304 of title 25, United States Code, on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of the Violence Against Women Reauthorization Act of 2013.

The Indian Civil Rights Act, as Codified

Title 25, U.S.C.

§ 1301. Definitions

For purposes of this subchapter, the term –

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;

(3) "Indian court" means any Indian tribal court or court of Indian offense; and

(4) "Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

§ 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
 - (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) 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.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction Over Crimes of Domestic Violence

(a) Definitions – In this section:

(1) **DATING VIOLENCE.** – The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(2) **DOMESTIC VIOLENCE.** – The term ‘domestic violence’ means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family- violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) **INDIAN COUNTRY.** – The term ‘Indian country’ has the meaning given the term in section 1151 of title 18, United States Code.

(4) **PARTICIPATING TRIBE.** – The term ‘participating tribe’ means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) **PROTECTION ORDER.** – The term ‘protection order’ –

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION. – The term ‘special domestic violence criminal jurisdiction’ means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) SPOUSE OR INTIMATE PARTNER. – The term ‘spouse or intimate partner’ has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of the Criminal Jurisdiction –

(1) IN GENERAL. – Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION. – The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY. – Nothing in this section –

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country;
or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) EXCEPTIONS. –

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS. –

(i) IN GENERAL. – A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) DEFINITION OF VICTIM. – In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term ‘victim’ means a person specifically protected by a protection order that the defendant allegedly violated.

(B) DEFENDANT LACKS TIES TO THE INDIAN TRIBE. – A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant –

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(I) a member of the participating tribe; or

(II) an Indian who resides in the Indian country of the participating tribe.

(c) Criminal Conduct — A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

(1) DOMESTIC VIOLENCE AND DATING VIOLENCE. — An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

(2) VIOLATIONS OF PROTECTION ORDERS. — An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18, United States Code.

(d) Rights of Defendants — In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c);

(3) the right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) Petitions to Stay Detention –

(1) IN GENERAL. – A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further detention of that person by the participating tribe.

(2) GRANT OF STAY. – A court shall grant a stay described in paragraph (1) if the court –

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(3) NOTICE. – An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303

(f) Grants to Tribal Governments – The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments) –

(1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including –

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a

participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

(g) Supplement, Not Supplant – Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(h) Authorization of Appropriations – There are authorized to be appropriated \$5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.