

# **Implementation of Sections 904 and 908 of the Violence Against Women Reauthorization Act of 2013**

On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013, Public Law 113-4 (VAWA 2013). Title IX of VAWA 2013, entitled “Safety for Indian Women,” contains section 904 (“Tribal jurisdiction over crimes of domestic violence”) and section 908 (“Effective dates; pilot project”), both of which were initially drafted and proposed to Congress by the Department of Justice in 2011.

The Justice Department is now consulting with tribes on the implementation of sections 904 and 908 of VAWA 2013. The overarching question on which the Department wishes to consult is how best to structure section 908’s two-year voluntary Pilot Project for exercising tribal criminal jurisdiction over non-Indian perpetrators of domestic violence while fully protecting defendants’ rights under Federal law. To facilitate the consultation and frame the discussion with tribal governments, the Department is circulating this framing paper. It begins by presenting some background on the new law, and then it focuses on several specific issues relating to the Pilot Project.

Tribal recommendations on the points outlined below, and others, are of course most welcome. This framing paper is designed merely to raise questions about options that tribal leaders might consider, comment on, and offer alternatives to. It is not intended to be, nor should it be construed as, a statement of Department policy or the Department’s definitive interpretation of any provision of VAWA 2013.

## **BACKGROUND ON VAWA 2013’S TRIBAL CRIMINAL JURISDICTION PROVISIONS**

The purposes of sections 904 and 908 of VAWA 2013 are to decrease the incidence of crimes of domestic violence in Indian country, to strengthen the capacity of Indian tribes to exercise their sovereign power to administer justice and control crime, and to ensure that perpetrators of domestic violence are held accountable for their criminal behavior. In enacting these sections, Congress expressly authorized tribes to fill part of the jurisdictional gap involving non-Indian perpetrators created by the Supreme Court’s decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

But this new authorization is limited: It applies only to crimes of domestic and dating violence (and criminal violations of certain protection orders) that occur in Indian country, and only in cases with Indian victims, and only as to certain non-Indian defendants who have specified significant ties to the prosecuting tribe, and only when a tribe’s criminal-justice system has adequate safeguards in place to fully protect defendants’ rights under Federal law. Recognizing that many tribes may need time to

implement those safeguards, Congress set an effective date two years after the enactment of VAWA 2013 (March 7, 2015), while giving tribes that are ready sooner the opportunity to enter into a Pilot Project at the Attorney General's discretion.

The Pilot Project focuses specifically on the power of a "participating tribe" to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over certain non-Indian defendants who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. A "participating tribe" is simply a federally recognized Indian tribe that elects to exercise SDVCJ over the tribe's Indian country.

Being a "participating tribe" and exercising SDVCJ — whether as part of the Pilot Project between now and March 2015, or at any time after March 2015 — is entirely voluntary. There is absolutely no requirement, and no expectation, that any particular tribe or any specific number of tribes will choose to become participating tribes and exercise SDVCJ. The authority of U.S. Attorneys (and state/local prosecutors, where they have jurisdiction) to prosecute crimes in Indian country remains unchanged.

VAWA 2013's section 904(d) specifies the rights that a participating tribe must provide to defendants in SDVCJ cases. Specifically, a tribe must —

- Provide all applicable rights of defendants under the Indian Civil Rights Act of 1968, as amended (ICRA), which largely tracks the Federal Constitution's Bill of Rights, including the right to due process;
- If a term of imprisonment of any length may be imposed, provide the defendants' rights described in the Tribal Law and Order Act of 2010, including —
  - The right to effective assistance of counsel at least equal to that guaranteed by the Federal Constitution;
  - The right of an indigent defendant to the assistance of a licensed defense attorney, at the expense of the tribal government;
  - The right to a criminal proceeding presided over by a law-trained tribal judge who is licensed to practice law;
  - The right to have access, prior to being charged, to the tribe's criminal laws, rules of evidence, and rules of criminal procedure; and
  - The right to a record of the criminal proceeding, including an audio or other recording of the trial proceeding.
- Provide the defendants the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community and do not systematically exclude any distinctive group in the community, including non-Indians.
- Provide any persons detained by a tribal order timely notice of their rights and privileges to petition a Federal court for a writ of habeas corpus and for release from detention pending resolution of the habeas petition.

VAWA 2013's section 908(b)(1) provides that tribes generally cannot exercise SDVCJ until at least two years after the date of enactment. However, section 908(b)(2)

establishes a Pilot Project that authorizes the Attorney General, in the exercise of his discretion, to grant a tribe’s request to be designated as a participating tribe on an accelerated basis and commence exercising SDVCJ earlier. Section 908(b)(2) states in full:

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time during the 2-year period beginning on the date of enactment of this Act [March 7, 2013], an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of Public Law 90–284 [*to be codified at 25 U.S.C. § 1304(a)*] 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 204 of Public Law 90–284 [*to be codified at 25 U.S.C. § 1304*].

(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 204 of Public Law 90–284 [*to be codified at 25 U.S.C. § 1304(b)-(d)*] 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 this Act [March 7, 2015].

The Department of Justice is consulting with tribal governments about establishing procedures for tribes to request to participate in the Pilot Project pursuant to section 908(b)(2) and for the Attorney General to grant or deny those requests.

## ISSUES AND QUESTIONS FOR CONSULTATION

Adequate Safeguards to Protect Defendants’ Rights: Before approving a tribe’s request to participate in the Pilot Project and exercise SDVCJ on an accelerated basis, the new statute requires the Justice Department to determine that the requesting tribe’s criminal-justice system has “adequate safeguards” to protect defendants’ rights under Federal law.

1. What factors should the Justice Department consider in making this determination?
2. In criminal proceedings in which the tribe exercises SDVCJ, the new statute requires that the tribe provide to the defendant the right to a trial by an impartial jury that is drawn from sources that reflect a fair cross-section of the community

and do not systematically exclude any distinctive group in the community, including non-Indians.

- a. How can a requesting tribe demonstrate compliance with this requirement?
- b. How should the people belonging to “the community” be defined for these purposes? Will the answer vary by tribe?
- c. What steps should a requesting tribe take to maintain an accurate, updated list of all potentially eligible jurors for SDVCJ cases?
- d. What steps should a requesting tribe take to ensure non-Indian participation in jury pools for SDVCJ cases?

The Justice Department would appreciate hearing examples from tribes that already have non-Indians serving on their juries.

3. In criminal proceedings in which the tribe exercises SDVCJ and a term of imprisonment of any length is or may be imposed, the new statute requires that the tribe, 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. How should the Justice Department evaluate whether a jurisdiction applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys?
4. In criminal proceedings in which the tribe exercises SDVCJ and a term of imprisonment of any length is or may be imposed, the new statute requires that the judge presiding over the criminal proceeding both is licensed to practice law and has sufficient legal training to preside over criminal proceedings. How should the Justice Department evaluate whether a judge’s legal training is sufficient to preside over criminal proceedings?
5. The new statute requires tribes to provide to defendants in SDVCJ proceedings “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 [SDVCJ] over the defendant.” Are there rights other than those enumerated in the Indian Civil Rights Act of 1968, as amended by the Tribal Law and Order Act of 2010 and by VAWA 2013, that a requesting tribe should provide to non-Indian defendants in SDVCJ cases?
6. How can a requesting tribe establish that it guarantees the equal protection of its laws to Indian defendants who are not subject to SDVCJ?
7. Should the Justice Department assess the capacity of the requesting tribe in SDVCJ cases to effectively investigate, prosecute, and sentence domestic-violence

offenses, dating-violence offenses, and criminal violations of protection orders in a manner that ensures victim safety and offender accountability? If so, how should this be evaluated?

8. Should the Justice Department, in coordination with the Department of the Interior, assess the capacity of the requesting tribe to jail or imprison defendants in SDVCJ cases? If so, how should this be evaluated?
9. Should the Justice Department consider whether the requesting tribe's chief prosecutor has developed formal or informal policies with the relevant U.S. Attorney's Office (or, where the State has concurrent jurisdiction, the relevant state or local prosecutors) for coordination, cooperation, abstention, and/or deferral in cases where more than one government seeks to investigate or prosecute the same defendant for substantially the same act or acts?

The Justice Department's Process for Considering Requests: The questions above focus on *substantive* requirements. The Justice Department is also interested in hearing from tribes about the *process* for request and approval when a tribe would like to participate in the Pilot Project and exercise SDVCJ on an accelerated basis.

1. What process should the Justice Department use in making its assessment? What constraints does the Pilot Project's two-year time limit impose?
2. Would it be preferable to have a process that requires Justice Department personnel to make site visits and engage in extensive investigation into a requesting tribe's criminal-justice system? Or would it be preferable to rely primarily on tribal "self-certification," that is, a process in which the requesting tribe provides written answers to detailed questions about its criminal-justice system, the tribe's leader, attorney, and chief judicial officer certify the completeness and accuracy of the answers, and Justice Department personnel rely principally on these answers and thus need to engage in only limited follow-up inquiries?
3. How should the Justice Department balance the desire to maximize tribal participation in the Pilot Project with the desire to maximize the opportunity for tribes to collaboratively develop "best practices," plan programmatic reforms, and revise criminal codes and rules of criminal procedure, in order to minimize the risk that a Pilot Project tribe applies the new statute in a manner that arguably violates Federal law?
4. Should the Justice Department create a panel of tribal experts to participate in the assessment process? What would be the best approach to creating such a panel?

5. Would it be preferable for the Justice Department to encourage the development of a *single* model for criminal code provisions and rules of criminal procedure that all tribes exercising SDVCJ could adopt? Or would it be preferable for the Justice Department to facilitate intertribal efforts to develop *multiple* model code provisions and model rules, with different versions tailored to each participating tribe's particular needs, preferences, and traditions?
6. How should Pilot Project tribes' experiences developing best practices for exercising SDVCJ, including new tribal criminal code provisions and rules of criminal procedure, be collected and shared with other (non-Pilot Project) tribes that may wish to commence exercising SDVCJ in 2015 or beyond? Can the Justice Department facilitate this information-sharing among tribes?
7. What role should the Department of the Interior play in considering tribal requests to participate in the Pilot Project and exercise SDVCJ on an accelerated basis?
8. Should the Justice Department develop a mechanism and metrics for evaluating the Pilot Project? If so, what should be evaluated? How should success be defined?
9. Please identify any recent Federal pilot program or demonstration project that was particularly well structured and implemented.

Consultation with "Affected Indian Tribes": The new statute requires the Justice Department to consult with "affected Indian tribes" before granting or denying any tribe's request to participate in the Pilot Project and exercise SDVCJ on an accelerated basis.

1. Which tribes would be sufficiently "affected," so that the Justice Department should consult with them about a request from a particular tribe?
2. What form should that consultation take?
3. Should other nontribal stakeholders have an opportunity to provide input? If so, who?

Other Potential Issues: Are there other constitutional, legal, or policy issues that the Justice Department should consider as it establishes the procedures for tribes to request participation in the Pilot Project and for the Justice Department to grant or deny them?