

# Part I: Overview

## Chapter 1: How to Start a Juvenile Code Development Project

### [1.1] Introduction

Tribal nations are increasingly reassuming responsibility for their children after an era in which their nations' powers and resources were limited for a variety of reasons, many of which were not within their control. Never have Tribal Nations denied their responsibility to their children, but now they are determined to assume and/or take back control of guiding them into adulthood. It is also increasingly evident that Native youth benefit from responsible Native adult guidance, as opposed to the guidance of those who are not familiar with the strengths of Native people or with a Native vision for the future of Tribal Nations.

Tribal Nations are sovereign governments. Many tribes have asserted exclusive or concurrent criminal jurisdiction and/or civil jurisdiction over “crimes” committed by Native youth enrolled in a tribe, or living on or near tribal lands. Tribal leaders and parents are painfully aware that Native youth have embraced or have been caught up in negative activities and behaviors—many that would not have occurred in a prior era. Today, responding appropriately to the unacceptable behavior of Native youth requires that Tribal Nations accept responsibility by drafting or revising juvenile justice codes.

This resource was developed to provide a starting point for drafting or revising tribal juvenile justice laws and to acquaint the drafters with the basic elements of many juvenile justice systems. The drafters may want to form a code revision working group to draft or revise their code. In the course of drafting such a code the drafters will need to make decisions about the values that will guide their work with their youth.

This resource highlights federal and state law considerations and includes sample provisions from model tribal and state juvenile codes<sup>1</sup> and existing tribal juvenile codes<sup>2</sup>. Critical commentary on sample statutory provisions and exercises are provided to assist drafters in refining their thinking as they design the juvenile justice system best suited to their individual communities.

## [1.2] What This Resource Guide Can Do

This resource is designed to assist tribal communities in drafting laws to address youth misconduct and to assist youths and their families.

This resource is also designed to encourage the participation and commitment of the immediate family, extended family, and entities within the wider tribal community with an interest in the welfare of youth. Juvenile justice system and law reform may be accomplished with or without attorney input. Attorneys often have, unless they are well grounded in the values of the drafting community, a built-in bias for the justice system that they have studied and worked in. In many instances, this bias has been debilitating to drafters who seek a model that is not a mirror of the state or federal system. The best results come from a full community discussion of competing values, so that approaches or options are designed to meet as many needs as possible consistent with community values. Attorneys may be of assistance in the final drafting of the law, after important decisions are made by the community.

This resource is designed to guide tribal communities through the discussions necessary to create a juvenile justice code for their communities.

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<sup>1</sup> This includes relevant excerpts from the Tribal Juvenile Justice Code (1989), [http://www.tribal-institute.org/lists/juvenile\\_guide.htm](http://www.tribal-institute.org/lists/juvenile_guide.htm), which was developed by the National Indian Justice Center (NIJC) for the Bureau of Indian Affairs (BIA) in order to comply with a requirement in the 1986 Omnibus Drug and Alcohol Act (25 U.S.C. 2454) to develop a “Model Indian Juvenile Code” consistent with the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5601 et. seq.). The 1989 BIA Tribal Juvenile Justice Code influenced the drafting of many tribal juvenile statutes. Relevant excerpts are also included from the Model Tribal Juvenile Code, [http://www.cirj.org/docs/CIRJ\\_Model\\_Tribal\\_Juvenile\\_Justice\\_Code.pdf](http://www.cirj.org/docs/CIRJ_Model_Tribal_Juvenile_Justice_Code.pdf), developed by the University of Washington’s Native American Law Center as part of the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative. Efforts are currently underway by the BIA in collaboration with other federal agencies to develop a revised “Model Indian Juvenile Code” based largely upon the University of Washington Native American Law Center’s Model Tribal Juvenile Code.

<sup>2</sup> This includes relevant excerpts from the juvenile codes of the Absentee-Shawnee Tribe of Oklahoma, Eastern Band of Cherokee, Confederated Salish and Kootenai Tribes, Hopi Tribe, Kalispel Tribe of Indians, Klamath Tribes, Leech Lake Band of Ojibwe, Little River Band of Ottawa Indians, Mississippi Band of Choctaw Indians, Muscogee (Creek) Nation, Native Village of Barrow, Navajo Nation, Northern Arapaho Tribe, Oglala Lakota Nation, Organized Village of Kake, Pascua Yaqui Tribe, Rosebud Sioux Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Stockbridge-Munsee Community, Confederated Tribes of Warm Springs, White Mountain Apache Tribe, and Pueblo of Zuni. It also includes relevant excerpts from Cass County/Leech Lake Band of Ojibwe Wellness Court Memorandum of Understanding, Clayton County Juvenile Justice Collaborative Cooperative Agreement, Colorado Statutes, Connecticut Statutes, Florida Statutes, Kansas Statutes, Texas Senate Bill, Wyoming Statutes, and Vermont Rule of Family Practice.

If you are a member of a tribal council, or if you are a tribal community member who has started thinking about creating or revising a juvenile justice code, then you are ready to begin. The first decision is “Shall we do this? Shall we create a code or revise our existing code?” If the answer is yes, then using this resource as a road map for discussions will get you where you want to go.

## [1.3] What This Resource Guide Cannot Do

This resource cannot make anyone into an expert in juvenile justice, nor does it focus in depth on the substantive issues, for example, what causes delinquent conduct. It cannot “fix” your children, your families, or your community. Many questions and concerns in these areas will not be addressed in this resource.

This resource is NOT intended to be used as a template or a model code, but rather to be used as a guide by tribal communities to create a unique code tailored to each individual tribal community.

The more your tribe, its members, and the communities of interest involve themselves in these discussions, the greater the chances of having this code become a springboard to wider solutions. The work of establishing a code is limited in scope, but essential to the creation of a responsive juvenile justice system.

## [1.4] A Note on Terminology

Tribal governments use a variety of terms to describe their laws, including *statutes*, *ordinances*, and *codes*. Generally, the term *code* refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a *statute* or *ordinance*. In this resource guide, the terms will be used interchangeably in order to be relevant to a wide variety of audiences.

When using this guide, and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

- A general dictionary, such as [Merriam-Webster’s Collegiate Dictionary](#),
- A law dictionary, such as [Black’s Law Dictionary](#),
- A law dictionary for nonlawyers, such as [Law Dictionary for Non-Lawyers](#) by Daniel Oran.

A [Glossary](#) is provided in the appendix of this document to define legal terms, as those terms are used in this resource.

## [1.5] How to Use this Resource Guide

There are two principle parts in this guide:

- Part I: Overview
- Part II: Workbook

The overview portion of the resource guide provides a wealth of information on tribal juvenile justice systems, trends, and cultural awareness. It is recommended that all members of the code revision working group read the overview section or participate in a presentation that includes the information contained in the overview, so that the working group can start with some common understandings.

The workbook portion of the resource guide is designed to be used as a tool for a facilitator of the code revision working group. Each of the workbook sections is divided into five main parts:

1. Overview
2. Model Code Examples
3. Tribal Code Examples
4. Tribal Code Commentary
5. Exercises

Each section of the workbook relates to key sections of a juvenile code. The Overview briefly discusses the code sections, often referring back to a section in the Overview for additional information. The Model Code and Tribal Code Examples sections provide a review of how the model codes and other tribes have dealt with the topic in their provisions. The code examples are followed by a section called Tribal Code Commentary that discusses the Tribal Code Examples and explains key provisions or differences between examples given.

The fifth section, Exercises, is designed to help your community find the provisions that meet your needs. It will:

- Guide your look at the current code, justice systems, and situations that relate to the particular code section covered in the chapter.
- Provide questions and sometimes additional material for consideration and discussion by your working group.

The workbook section is meant to ensure that your tribe will have a juvenile code that truly fits the needs, resources, and values of your unique community.

## [1.6] Team Selection and Guidelines

Much thought should go into selecting your code drafting team, for they will be the first line of drafters and must be willing to commit the time and energy needed for this very demanding project. The following is a list of people/agencies that may be useful in drafting this code.

- Survivors of the juvenile system, including family members
- Tribal prosecutor or one who serves in the role of juvenile prosecutor
- Tribal law enforcement
- Tribal juvenile probation officer
- Social Services, including Child Protection or Indian Child Welfare workers
- Substance abuse treatment provider
- Mental health treatment provider
- Medical care personnel
- Domestic violence advocates and batterer treatment provider
- School personnel
- Tribal education department
- Corrections personnel
- Youth council representative
- Defense advocates or attorneys
- Elders
- Cultural mentor/leader
- Tribal court judges including personnel in alternative judicial systems
- Any services used for transition, job training, etc.
- Tribal council members
- Any state or federal agency interacting with Native youth relative to offenses

Indian country has been besieged with the need for code development and/or revisions in recent years. Historically, as tribal nations developed codes and courts to dispense justice, a very common practice was to simply adopt state code and change the name to a tribal name, often times not even making the name switches throughout the document. As time has gone by many of those “change the name codes” have proven to be inadequate to address the needs of tribal people and current code drafters are increasingly seeking to draft documents that reflect their tribal needs and values.

This history has created a knowledge base that allows us, the drafters of this resource, to make some suggestions for you to consider as you begin the process. The tips set out in the following text come from the successful efforts of other tribal nations.

**1. The primary work should be done by individuals known throughout the community as “problem solvers.”**

This work will not successfully reach the goal of producing a juvenile justice code if it becomes a process of finger pointing and blaming others for weakness in the current law or approach. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions, both long term and short term, to problems.

**2. There should be equal representation from various tribal agencies and advocacy programs.**

Equal representation is important. The code development process should not be the “property” of any one agency or group.

**3. The work should be completed in a setting of mutual respect.**

The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner.

**4. The agenda should be focused upon areas of mutual concern or shared interest.**

Try to focus on areas of common interest instead of differences. A shared vision such as meaningful consequences designed to address the needs of the offender, the victim, and the community to ensure a healthy community can create confidence and trust.

**5. The participants should be willing to examine not just the way things are, but also be willing to explore ways of improving the law.**

All participants must be willing to talk about and explore new ways to address the needs of youth in their community. This is a process where different people will have differing views and it is a time when it is possible to listen and learn from each other.

**6. The participants should be willing to be creative and persistent.**

To be successful, each person involved must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think outside the box.

**7. The participants must be willing to share the burden.**

This means sharing resources, training, technical assistance, and limited available funding. Alternate the locations of meetings so that the burden of hosting and/or travel does not fall on the same people.

**8. All agencies should be allowed input into drafting prior to finalization of the draft.**

All tribal agencies involved should have a chance to review the draft code before it is considered completed. Allowing for this input will help to ensure each agency remains committed to the process and eventual implementation.

**9. Consider traditional/cultural strategies and the adaption of those values to modern issues and practices.**

We are all aware that times have changed. That does not necessarily mean that values have or should change. What it does mean is that we need to do the work of updating the application of those values to today's problems.

**10. Expect to spend a great deal of time together.**

Try to be aware of applicable cultural practices, including making sure that meals are provided for lengthy meetings. Make sure that everyone is as comfortable as possible. Note that there are now substantial restrictions on the use of federal funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.

## **[1.7] How to Organize to Create a Juvenile Code**

There are several approaches to organize to start work on a juvenile code. The key is to pick one that your initial team or council thinks will be successful. Some groups have decided to do the drafting in a "retreat" format, where the "team" spends several days in a row working through the process to create a working draft. Others have established representative working groups focusing on different areas with a timeline and regular meetings scheduled to develop a draft. Another approach is to have a core group create a draft for wider circulation to representative groups and individuals, including a process for community input. Any of these approaches can use a facilitator and all should include a recorder to keep track of the work.

There is no right way or better way. The best way is the one that reflects the preference of your community. Remember, this is a very difficult and important process and taking the time to do the job right is essential. Do not rush the process. Do not cut short the input process. The code should be a document that reflects the needs and vision of the community it serves. It is not a standalone product and should not be developed as such.

It is important to ascertain if there are any funds available to assist in the development of the code. In-kind contributions can be important and significant: for instance, a meeting place; supply support (copying, mailing, paper, pens); any part-time staff assignment for research, note keeping, and creating drafts; covering mileage costs or providing transportation; and/or providing a meal.

It is important that all members of the team or working group be provided with a binder of existing documents that they agree to review and study before beginning their work together, including but not necessarily limited to:

- Tribal constitution and/or bylaws.
- Any existing controlling or impacting tribal/federal/state juvenile justice codes.
- All related tribal codes (family/dependency/placement/probate).
- Lay-friendly summary of Western scientific research on the human brain and adolescent development.
- Any written stories from the community concerning corrective actions involving youth in a cultural context.
- Any oral stories concerning traditional corrective actions involving youth.
- Any anthropological documentation or historical records, regarding rearing/disciplining youth, about your tribe or other tribes with whom you share cultural or linguistic ties.
- Copies of any tribal court opinions related or relevant to youths in the community.
- Any existing tribal juvenile code.

It is also important that all members of the team or working group be exposed to the latest information on adolescent brain development and its implications for juvenile justice system reform. See, for example:

- [The Teen Brain: It's Just Not Grown Up Yet](#), National Public Radio.
- [The Teen Brain](#), Harvard Magazine.
- [Teenage Brains](#), National Geographic.

Currently, even state juvenile justice systems are being reformed to take into account new scientific research with respect to the development of the human brain. The human brain is now understood to have different capacities and abilities depending upon whether it belongs to a child, an adolescent, or a young adult. Juvenile justice system reformers recommend an approximation with age as follows: that a “child” includes individuals up to age ten; that an “adolescent” includes individuals from ten to seventeen; and that a “young adult” includes individuals from eighteen to twenty-five. This brain development research has implications for tribal statutory drafting where the implication is that children ten and younger should be presumed to fall within the tribe’s dependency law (e.g., with respect to child maltreatment); adolescents should be presumed to fall within the tribe’s juvenile law (e.g., with respect to status offenses, delinquent acts, and related families-in-need-of-services [FINS] matters); and tribes should consider extending the tribal court’s juvenile jurisdiction, to be exercised at the discretion of the judge, up to age twenty-five.

Here are a few “Dos” and “Don’ts” to consider as you plan this process for developing a juvenile justice code.



## When developing your code development team, DO . . .

- Select code development team members with various viewpoints who have demonstrated interest, expertise, or experience with the juvenile justice system or issues related to youth.
- Select, if possible, members of all the disciplines who are involved in the juvenile justice system.
- Select team members who are “survivors” of the current juvenile justice system, including their family members.
- Make sure the selection process includes elders and cultural leaders.
- Select, if possible, a team member(s) who is currently in the juvenile justice system, including family members.
- Design a process that invites broad-based participation in identifying issues and making recommendations. If possible, the process should be one of consensus, as that is more likely to ensure widespread acceptance and is more in keeping with many traditional resolution practices.
- Proceed in phases with set time frames/meeting times, including a study phase in which juvenile code issues that are important to the community are identified before drafting provisions.
- Assign manageable tasks to team members or subcommittees, to be accomplished within clear time frames.
- Emphasize person-to-person communication. Develop a communication plan that ensures everyone in the work group is kept informed of the process and project status.
- If experiencing an impasse or disagreement in the work group, consider having an expert<sup>3</sup> address the issues, presenting a pro and con discussion for consideration.

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<sup>3</sup> Local experts might include, e.g., school officials who could discuss their disciplinary policies, juvenile intake/probation officers who could describe the existing juvenile intake and monitoring process, presenting officers or prosecutors who could describe what types of cases they tend to prosecute, judges who could talk about existing juvenile court processes and the realities of available dispositions, and school, law enforcement, and justice system personnel from other jurisdictions implementing model processes (loop them in by phone), e.g., precourt diversions from school or law enforcement to teen court, family conferencing at juvenile court intake, diversions to therapeutic dockets like wellness court, circle sentencing, family mediation, and peacemaking.

## When developing your code development team, DON'T . . .

- Select code development members based *only* on their positions within the tribal judicial system.
- Overlook the current science on adolescent brain development.
- Disregard the importance of traditional beliefs, values, approaches, and/or customary law.
- Devote resources to drafting before consensus is reached concerning priority issues and recommendations.
- Be discouraged by lack of participation or lack of progress.
- Delay too long before dividing the work of the team into tasks that can be accomplished within the time frames established.
- Get bogged down in what you cannot accomplish, or resources you do not currently have but need or want.
- Let difficult or divisive issues be resolved by forcing a change in the law or maneuvering to avoid public meeting and discussion that would provide a wider range of opinions.

## [1.8] Problem Evaluation/Needs Assessment

Fact gathering is necessary before starting the actual work of drafting a new code. The need for legal, historical, cultural, and scientific research is described in the previous section. However, it is also necessary to do some basic fact gathering. The following information will be helpful:

- How many children up to age ten are enrolled members, or may be eligible for enrollment (some tribes have set ages for becoming enrolled)?
- How many adolescents ages ten to seventeen are enrolled members or may be eligible for enrollment?
- How many young adults ages eighteen to twenty-five are enrolled members or may be eligible for enrollment?
- How many of the children, adolescents, and young adults in the preceding age ranges are members of other tribes residing on reservation?
- How many of the children, adolescents, and young adults in the preceding age ranges, are children of members, but not eligible for membership?
- How many enrolled children, adolescents, and young adults (of any Indian nation) living in your Nation are currently involved with the delinquency system either on or off the reservation? Keep separate statistics for your nation and other tribal nations and on- and off-reservation actions.

- Provide an estimate of the number of all children, adolescents, and young adults who are enrolled (age break down) and who are involved in the dependency system (include adolescent and young adult parents).
- List the location and type of every placement option used for tribal and/or Indian children, adolescents, and young adults including nontribal reservation residents.
- Identify schools on reservation or off reservation used for children, adolescents, and young adults. (If possible school-based services should be identified for each school.)
- Identify all mental health assessment options (consider those that focus on trauma symptoms, dual diagnosis, and ongoing treatment options).
- Identify all health facilities that can do assessments regarding sexual abuse and can assess whether the individual is of danger to his- or herself and/or others. (A full assessment would include a suicide assessment and immediate acting out potential.)
- Identify any and all hotlines that are applicable or could be applicable.
- Identify all inpatient/outpatient options (on and off reservation) for treatment of substance abuse for children, adolescents, and young adults.
- Make note of distance to all inpatient/outpatient options off reservation.
- Identify any case managers in any system currently with tribal children, adolescents, and/or young adults in their caseload: domestic violence, substance abuse, and social services, including those with transitional caseloads.
- The team should visit the nearest commonly accessed juvenile and dependency courts to view hearings, that include, where relevant, tribal, state and federal courts. The team when observing should pay particular attention to what “parts” are necessary and what parts could change, for example, must a judge sit on a bench with a robe or can she sit at a table.
- The team should tour commonly used treatment and detention facilities and group homes. The team needs to decide whether these facilities and approaches are the ones it is comfortable with for tribal children, adolescents, young adults, and their families.
- Probation officers and police officers, who are assigned to these individuals, should be contacted to determine what resources they can bring to the table.
- All available programming for children, adolescents, and young adults should be listed, either tribal or community based.

As a starting point, it is important to know what options are available. At this juncture you may need to remind the team not to get bogged down in feeling bad about any perceived lack of resources. Every community has to start somewhere. Part of the process of developing a juvenile code will be to raise community awareness of the issues affecting tribal youth. The team can continue to work on other system improvements after developing the code.

It will become clear early on that the issues of juvenile justice are impacted not just by the law, but also by systems, including the tribal and local community system available to guide children to adulthood. Tribal people once had intact systems and community supports for successfully raising and mentoring youth, and we can again if we have the will, or develop the will, to recreate these systems and supports.