

# Exploring the Requirements for Implementing the Enhanced Sentencing Provisions of the Tribal Law and Order Act of 2010

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## The Tribal Law & Order Act of 2010

- Enacted as Pub. L. No. 111-12, tit. II 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or punishment greater than imprisonment for a term of one year and a fine of \$5,000 or both.” 25 U.S.C. § 1202(7) (repealed 2010).
- Subject to conflicting interpretations – compare *Spears v. Red Law Band of Chippewa Indians*, 363 F.Supp.2d 1176 (D. Minn. 2005) with *Bustamante v. Valenzuela*, 715 F.Supp.2d 960 (D. Ariz. 2010).

## More on the Law *Before* TLOA

- A case on consecutive sentencing made its way to the 9<sup>th</sup> Circuit – *Miranda v. Anchondo*, 684 F.3d 844 (9th Cir. 2012), which upheld consecutive sentencing under the “old” ICRA
- Because it was decided after TLOA was enacted, easy to assume that it applies or has some precedential value; it applies to pre-TLOA cases only

## More on the Law *Before* TLOA

- Mention of TLOA in *Miranda*: “. . .if a tribal court metes out this enhanced punishment in a “single criminal proceeding,” the defendant must receive something akin to the full panoply of procedural rights that would be due a criminal defendant prior to conviction.” 684 F.3d at 849 n. 4 (emphasis added).

## 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, it must:
  - Provide effective assistance of counsel
  - Provide an indigent defendant with the assistance of a defense attorney licensed to practice law by any jurisdiction
  - Require that the judge have (1) sufficient legal training and (2) be licensed to practice law by any jurisdiction

## ICRA *After* TLOA

- **1302(c)** cont.
  - Make the criminal laws “publicly available”
  - Maintain a “record” of the criminal proceeding including audio
- The 1302(d) “sleeper” requirement for sentences in excess of one year:
  - Tribal correction/detention facility approved by BIA for long-term incarceration

## 25 U.S.C. § 1302(c) Requirements

**(1) Provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.**

## Effective Assistance of Counsel

- *Strickland v. Washington*, 466 U.S. 668 (1984)
- (1) attorney's performance was deficient
- (2) attorney's deficient performance prejudiced the defendant
- (3) But for the attorney's deficient performance, the result of the trial would have been different
- **Competent attorney performance**

## 25 U.S.C. § 1302(c) Requirements

- (2) Provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.**

## Licensed Defense Attorney

- Licensed to practice law in *any* jurisdiction
- Applies professional licensing standards
- Ensures competence
- Professional responsibility

## Licensed to practice “by any jurisdiction”

- Licensed to practice law in *any* jurisdiction
  - Use of “jurisdiction” not state
  - **Q.** Will a tribal attorney licensing scheme meet this requirement?

## “Professional licensing standards”

- “Vanity” licensing is not sufficient
- ANSI Standard 1100 (March 2009) for certifying organizations:
  - Assessment based on industry knowledge
  - Grant a limited credential to anyone who meets the standard
- Course of study + examination

## Competence and Professional Responsibility

- Not enough to have a licensing scheme
- Formal mechanisms to ensure attorney competence
  - CLE requirements
  - Disciplinary mechanism

## 25 U.S.C. § 1302(c) Requirements

**(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.**

## Judge Requirements

- License is not enough
- Sufficient “legal training” to preside over criminal proceedings
  - Initial training of judges
  - CE requirements



## Licensing Requirements

Q. What about prosecuting attorneys?

### 25 U.S.C. § 1302(c) Requirements

**(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 of the tribal government.**

## Criminal Laws Publicly Available

- **Q.** What does “publicly available” mean?
  - **Q.** Is Internet publication sufficient?
  - Make laws available on request
  - Use of local law schools
  - Available to inmates
- **Q.** Does “interpretative documents” include court decisions?

## 25 U.S.C. § 1302(c) Requirements

- (5) Maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.**

## Maintaining a Record

- Developing rules for maintaining record
- Preparation, certification, filing of the record
- Transmission of record on appeal

## 25 U.S.C. § 1302(d)(1)(A) “Sleeper” Requirement

- . . . a tribal court may require the defendant—(1) to serve the sentence—(A) in a tribal correction center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the BIA not later than 180 days after July 29, 2010.

## Detention Issues

- TLOA (§ 1302(d)) requires the BIA to develop guidelines for long-term incarceration no later than 180 days after July 29, 2010
- BIA circulated *BIA Adult Detention Facility Guidelines* (Draft) in December 2010
- <http://tloa.ncai.org/>
- “Facilities demonstrating compliance with Guidelines may be eligible for approval by the BIA to serve as long-term (up to 9 years) incarceration facilities.”

## Detention Issues

- BIA ADF-7C-02 requires personnel policies to include EEO and compliance with the ADA
- Compliance with ACA standards
- Compliance with Prison Rape Elimination Act (“PREA”)

## Other Issues

- Issues in felony cases not addressed by TLOA
  - Preliminary hearing
  - Aggravating circumstances
- Effect of TLOA on current ICRA provisions
  - 1302(a)(10) – trial by jury “upon request”
  - **Q.** Can jury be deemed waived if not requested?
  - ICRA history unclear

## Status of Implementation

- GAO-12-658R Tribal Law and Order Act (May 30, 2012)
- Surveyed 171 tribal courts (out of 566); 109 responded
- Of the 109, none were exercising enhanced authority
- 36 tribes reported plans to implement (6%)

## Status of Implementation

- 70 tribes reported implementing at least “half the requirements” necessary for exercising
- Jail requirements not considered in report
- Tribes most frequently reported lack of funds as reason for not implementing enhanced sentencing provisions of TLOA

## QUESTIONS?

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