

# **An Overview of Tribal Sexual Assault Code Development: Justice for Victims of Sexual Assault**



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# PHILOSOPHY

- 
- Laws should come from the community
  - Attorneys do not have all the answers
  - Providing tools and examples from other tribes in a “workbook” format will facilitate the use of community resources

Tribal Sexual Assault Resource Series

# Sexual Assault and Stalking Laws

## Tribal Legal Code Resource: Sexual Assault and Stalking Laws

*Guide for Drafting or Revising  
Victim-Centered Tribal Laws Against  
Sexual Assault and Stalking*

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Tribal Court Clearinghouse: [www.tclp.org](http://www.tclp.org)

# RESOURCE GUIDE

- Designed to provide an *outline* of issues that should be considered when drafting a code or updating an existing code.
- Designed to be inclusive of a community's values.
- Includes sample language from existing tribal codes.



# RESOURCE GUIDE CAN:

- Assist tribal governments in drafting laws that address the safety need of victims
- Offers exercises to assist in the development of civil and criminal laws



# RESOURCE GUIDE CANNOT:

- 
- Teach about dynamics of domestic violence or sexual assault
  - Replace training or protocol development.
  - Provide a “model code” that can be passed unilaterally without discussion.

# WHO SHOULD WRITE THE CODE?

- 
- Survivors
  - Advocates
  - Prosecutors
  - Court personnel
  - Law enforcement
  - Leaders
  - Elders
  - Family Services
  - Medical personnel
  - Probation/Parole
  - Corrections
  - Defense attorneys
  - Food bank
  - Traditional healers
  - Churches
  - Child Protective Services
  - Housing Authority
  - School System
  - Youth Council
  - Legal Aid

# WORKING AS A TEAM

- 
- Group of “problem solvers”
  - Equal representation from various agencies
  - Completed in atmosphere of mutual respect
  - Focused on areas of mutual concern
  - Willing to explore new ways of improving laws
  - Willing to be creative and persistent
  - Willing to share the burden
  - All agencies allowed input into draft codes

# BEGINNING THE PROCESS...

- 
- Tribal Constitution
  - Current Tribal laws (*special care to note privilege/confidentiality of victim advocate records, and victim's right statutes*)
  - Tradition, customs, stories
  - Relevant federal and/or state laws (*such as federal sexual assault/state sexual assault laws that might tie in to the SORNA*)
  - Copies of any case law
  - TLPI Resource Guide

# LAYING THE GROUNDWORK

- 
- Provide community education & awareness on sexual assault
  - Understand the current issues surrounding sexual assault
  - Enlist support of community stakeholders
  - Identify people who are willing to participate in a work group
  - Possess a clear understanding of sovereignty and jurisdictional issues (*special note of the Tribal Law and Order Act and of VAWA 2013*)
  - Have and understanding of problems with regard to current tribal SA codes
  - Ensure there's an understanding of how laws are passed
  - Awareness of resources should you need them such as legal consultation

# SEXUAL ASSAULT CODE RESOURCE GUIDE – TABLE OF CONTENTS

- 
- Criminal Jurisdiction
  - Criminal Sexual Assault Statutes
  - Criminal Stalking Statute

# EACH SECTION

- 
- Overview
  - Exercises
  - Examples
  - Commentary
  - Additional Resource

# TYPES OF SEXUAL ASSAULT LAWS

## 1. Criminal

- Substantive
- Procedural
- Sanctions

## 2. Civil (Protection Orders)

## 3. Sex Offender Registration / Notification

# CRIMINAL –SUBSTANTIVE LAW

- 
- Defining sexual assault
    - What is it?
    - What are the elements of the crime?
  - Developing a broad definition
    - Rape vs. Sexual Assault

# CRIMINAL – SUBSTANTIVE LAW

## COMPARISON

*Sexual assault is forced sexual behavior*

*vs.*

*Sexual assault is sexual behavior without consent*

# CRIMINAL LAW - SANCTIONS

- Limited to 3 years incarceration, \$15,000 fine (or both)  
Stacking of offenses up to 9 years per criminal proceeding)

Changes as a result of Tribal Law & Order Act of 2010 *and require tribes to meet certain benchmarks in order to exercise this less restricted sentencing authority*

- **NO LIMITATIONS ON:**

- Probation (*probation can last no longer than the court's criminal jurisdiction over the charge*)
- Restitution
- Public apology / personal apology
- Other traditional remedies
- Banishment

# PROBLEMS WITH CURRENT CODES

- 
- Largely copied from state laws of the pre-1970s era
  - Often defines sexual assault very narrowly
  - Gender-specific – does not allow for male victims
  - Often exempt spousal rape (not a crime)
  - Limits punishments / sanctions to 3 year / \$15,000 fine
  - Tribes now starting to utilize more traditional sanctions as punishments

# PROBLEMATIC STATUTES

- 
- Marital Immunity
  - Corroboration Requirement
  - Prompt Complaint
  - “Strict Force” requirement

Other:

- Using victim’s past sexual behavior as admissible evidence
- Sentencing limitations

***“Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho’ never so innocent.”***

**- Lord Chief Justice Sir Matthew  
Hale from the 17<sup>th</sup> Century**

***“In a rape case it is the victim, not the defendant, who is on trial.”***

**-Lord Hale**

# EXAMPLES OF STATUTORY LANGUAGE

## Marital Immunity:

- *“It shall be unlawful to intentionally, wrongfully, and without consent subject another, not his/her spouse, to any sexual contact..”*
- *“The provisions related to sexual offenses shall not apply to conduct between married persons..”*

# MARITAL RAPE IMMUNITY

## Examples of language on marital immunity

- “It shall be unlawful to intentionally, wrongfully, and without consent subject another, **not his/her spouse**, to any sexual contact.”  
(Pawnee Tribe of Indians)
- “A person who commits, or attempts to commit, an act of sexual intercourse with another **not his spouse**, where: (Maricopa Ak-Chin Indian Community of AZ)

# MARITAL RAPE IMMUNITY

- Most non-tribal American governments did not traditionally recognize that a man could rape his wife (or ex-wife). ***This means that a man forcing his wife (or ex-wife) to have sex was not considered a crime – no matter how violent.***

# OTHER EXAMPLES OF MARITAL IMMUNITY

- 
- “The provisions of the code relating to sexual offenses **shall not apply to conduct between married persons**; (Cheyenne River Sioux Tribe)
  - “Female” means a female person **who is not married to the actor**. (Confederated Tribes of Umatilla Indians)

# TRIBES THAT HAVE CODES ON SEXUAL ASSAULT OF SPOUSE

- 
- “A person commits **sexual assault of a spouse** by knowingly or intentionally engaging in sexual intercourse or oral sexual contact with a spouse **without consent of the spouse** by the immediate, imminent, or threatened use of force against the spouse or another. (Fort McDowell Mohave-Apache Tribe)

# TRIBES THAT HAVE CODES ON SEXUAL ASSAULT OF SPOUSE

- 
- Any male who shall have carnal knowledge of a woman, **whether or not his wife**, when the woman does not consent to such shall be deemed guilty of an offense and upon conviction shall be sentenced and fined. The maximum period of confinement shall be nine months and the maximum fine shall be \$500. If the woman victimized by this crime shall sustain any injury, however slight, attempting to resist or resisting the maximum period of confinement shall be one year and the maximum fine shall be \$5,000. (Fort McDermitt Paiute-Shoshone Tribe of Oregon and Nevada; Sec. 31. Rape.)

# CORROBORATION REQUIREMENT

- 
- “Whenever appropriate in any prosecution before a jury regarding a sexual offense in this Code, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to allege activities carried out in private, **when such are not otherwise corroborated.** (Cheyenne River Sioux Tribe)

# PROMPT COMPLAINT

- 
- “No prosecution may be instituted or maintained for rape, deviate sexual contact, or sexual assault unless the alleged offense was brought to the notice of the Tribal Police Department or other law enforcement official or agency **within 30 days after it’s occurrence,**” (Sault Ste Marie)
  - “No prosecution may be instituted or maintained under these provisions on sexual offenses unless the alleged offense was brought to the attention of public authority **within three months of its occurrence.**” (Cheyenne River Sioux Tribe)

# HIGH THRESHOLD FOR PROVING RAPE

- 
- “Without consent” as used in this section means (a) the victim is compelled to submit by force against himself, herself or another, or (b) the victim is incapable of consent because he or she is: mentally defective or incapacitated, physically helpless or less than 16 years old. Term “force” means the infliction, attempted infliction or threatened infliction of bodily injury or the commission of a forcible felony by the offender or the threat of substantial retaliatory action that **causes the victim to reasonably believe that the offender has the ability to execute the threat.** (Confederated Salish and Kootenai Tribes)

# OTHER EXAMPLES OF HIGH THRESHOLD TO PROVE RAPE

- 
- “Forcible compulsion” means physical force that overcomes **earnest resistance** or a threat, express or implied that places a person **in fear of immediate death or serious bodily injury** to himself or another person or in fear that he or another will immediately be kidnapped.” (Confederated Tribes of Umatilla Indians)
  - “Any person who shall have sexual intercourse with another person by forcing the other person to submit or by **threat of imminent death, serious bodily injury, extreme pain, or abduction** or who has sexual intercourse with a child under the age of sixteen years, shall be guilty of rape.” (Confederated Tribes of Colville Reservation)

# STRONGER TRIBAL STATUTES

- 
- Defining sexual assault as lack of consent
  - Varying degrees of sexual assault
  - Not necessary that victim testimony be corroborated in order to convict
  - Rape shield provisions
  - Sentencing provisions
  - Sex offender Registration and Notification

# SEXUAL ASSAULT AS LACK OF CONSENT

- 
- “A person commits sexual assault if that person intentionally or knowingly engages in sexual penetration or sexual contact with any person **without the consent** of that person.” (Little Traverse Bay Band of Odawa Indians)
  - “Any person who knowingly has sexual intercourse **without consent** with another person commits the offense of sexual intercourse without consent.” ( Blackfeet Tribe)

# VARYING DEGREES OF SEXUAL ASSAULT

- Rape in the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> degree. (Skokomish Tribe)

Offers tribal prosecutors more tools and more leverage to negotiate plea agreements.



# NO CORROBORATION TO VICTIM TESTIMONY

- “In order to convict a person of any crime ... it shall **not be necessary that the testimony of the alleged victim be corroborated.**” (Skokomish Tribe)

# RAPE SHIELD PROVISIONS

- “Evidence of the **victim’s past sexual behavior** including but not limited to the victim’s marital history, divorce history, or general reputation of promiscuity, non-chastity, or sexual mores contrary to tribal community standards **is inadmissible on the issue of credibility and is inadmissible to prove the victim’s consent except,,**” (Skokomish Tribe)

# OTHER RAPE SHIELD LAWS

- **“No evidence concerning the sexual conduct of the victim is admissible** in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.” (Salish and Kootenai Tribes)

# SENTENCING PROVISIONS

## Banishment laws

- **Rape in the first degree shall be punishable by** a fine not to exceed Fifteen Thousand Dollars or by a term of imprisonment in the tribal jail not to exceed three years; or by **banishment for a period of not less than five years nor more than life; or any combination of the above.**”  
(Absentee-Shawnee Tribe)

Note: Some tribes have not updated their codes and still have limited punishment of 6 months or a \$500 fine, the original limitation as provided in the original 1968 enactment of Indian Civil Rights Act. (ICRA)

# VICTIM CONFIDENTIALITY

- 
- Some jurisdictions have passed laws to protect private conversations between sexual assault victims and their advocates
  - Some jurisdictions have determined that these communications should always be strictly confidential.
  - Other jurisdictions have decided that they should be made available to the defense in a criminal case under special circumstances

# POINT OF DISCUSSION

- 
- What is the role of advocates in your community?
  - Should discussions between advocates and victims be kept private? Why?
  - Does your tribal code protect other forms of communication?
  - Should a defendant be able to read a victim's file in a shelter or other program?
  - Should a defendant be able to require advocates to testify about what they see and hear?

# TRIBAL CODE EXAMPLES OF VICTIM- ADVOCATE PRIVILEGE

- A victim of domestic violence may refuse to disclose, and may prevent an advocate, elder, or medicine person from disclosing, confidential oral communications between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived. (Oglala Sioux Tribe & Turtle Mountain Band of Chippewa Indians Domestic Violence Code)

# LIMITATIONS ON UTILIZING TLOA ENHANCED SENTENCING AND/OR VAWA SPECIAL DOMESTIC VIOLENCE

## CRIMINAL JURISDICTION

Limitations	TLOA	VAWA
<p><u>Particular Offenses Only:</u> Defendant must either (1) previously have been convicted of same or comparable offense by any jurisdiction in U.S.; or (2) is being prosecuted for a “felony” (an offense that would be punishable by more than 1 year imprisonment if prosecuted by U.S. or any of the States).</p>	✓	
<p><u>Particular Offenses Only:</u> Defendant must be prosecuted for either (1) domestic violence, (2) dating violence, or (3) violation of a protection order.</p>		✓
<p><u>Particular Defendants Only:</u> Defendant must have sufficient ties to the community, which could be either (1) residence on the reservation, (2) employment on the reservation, or (3) a relationship with a tribal member or Indian resident.</p>		✓

# DUE PROCESS PROTECTIONS REQUIRED BY TLOA AND/OR VAWA

TLOA and VAWA Due Process Requirements		TLOA	VAWA
1.	Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.*		
2.	Tribal government provides, at their expense, to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.*		
3.	Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*		
4.	Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.*		
5.	Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants are licensed to practice law by any jurisdiction in the United States.*		

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
6.	The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.*	✓	✓
7.	Tribal court maintains a record of the criminal proceeding, including an audio or other recording.*	✓	✓
8.	Any defendant sentenced to greater than 1-year imprisonment to be served in a tribal facility, that facility must pass the BIA jail standards for long-term incarceration.	✓	
9.	Tribal court provides the defendant the right to a trial by an impartial jury.		✓
10.	Tribal court ensures that the jury pool reflects a fair cross section of the community.		✓
11.	Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		✓

\*Note: These due process protections are required under TLOA. But, they are only required under VAWA if a term of imprisonment of any length may be imposed.

TLOA and VAWA Due Process Requirements		TLOA	VAWA
12.	Tribal court ensures that anyone detained under the special domestic violence criminal jurisdiction is “timely notified” of his/her rights and responsibilities.		
13.	Tribal court ensures that a defendant is notified of their right to file “a petition for a writ of <i>habeas corpus</i> in a court of the United States.”		
14.	Tribal court ensures that “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” are provided.		
15.	Tribal court ensures that “all applicable rights under the special domestic violence criminal jurisdiction provisions” are provided.		

# OTHER RESOURCES

- Tribal Court Clearinghouse

[www.tlpi.org](http://www.tlpi.org)

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