

Tribal Code Development Checklist for Implementation of Special Domestic Violence Criminal Jurisdiction

Last updated: August 2014

This checklist is designed as a tool to assist tribal governments seeking to develop tribal codes that implement Special Domestic Violence Criminal Jurisdiction (SDVCJ) over all persons with their jurisdiction, pursuant to Section 904 of the [Violence Against Women Reauthorization Act of 2013](#), Public Law 113-4, codified in the [Indian Civil Rights Act](#) at 25 U.S.C. 1304.

This is *not* a definitive guide to SDVCJ full implementation requirements, but is intended as aid to drafting tribal codes that comply with federal law. Tribes are advised to consult with the text of the law to ensure that tribal laws, policies, procedures, and practices conform with the entirety of VAWA Section 904 requirements. Tribal governments will likely be amending existing criminal codes, and every tribe faces different circumstances, so tribes will need to develop codes that are tailored to those unique needs. There are a variety of ways to draft tribal codes that comply with federal law.

This checklist includes VAWA Section 904's statutory requirements, along with a separate list of other matters that may be important for each tribe to consider. Some "mandatory" items aren't statutorily required but are practically necessary. (For example, it may be possible to draft a tribal code without a definitions section, but definitions are likely needed because of the technical definitions in the federal statute).

This version includes citations to existing tribal codes implementing the new law ([Umatilla Criminal Code](#); [Pascua Yaqui Tribal Codes](#); and [Tulalip Tribes](#)). While the [Eastern Band Cherokee](#) are still in the process of amending their code to include provisions of VAWA 2013, they have implemented TLOA's enhanced sentencing and relevant citations are included. We will add new citations as additional tribal codes are available. In the future, the checklist could be adapted to include space for users to fill in their jurisdictions' statutes, policies, and procedures.

VAWA Section 904 becomes fully effective on March 7, 2015. Until then tribes wishing to implement the law must receive approval from the Attorney General pursuant to the Pilot Project identified in VAWA Section 908. On November 29, 2013, the DOJ published the [Final Notice](#) for the Pilot Project for Tribal Jurisdiction over Crimes of Domestic Violence. Appended to the Final Notice is the

[Application Questionnaire](#) by which tribes can request approval to implement SDVCJ on an accelerated basis (i.e., before March 7, 2015). [View approved application questionnaires and materials](#) of the three approved pilot tribes (Umatilla, Pascua Yaqui, and Tulalip tribes).

Required or Necessary Elements of a Tribal Code and Procedures

1) Constitution

Review the tribal constitution to ensure that there are no barriers to the assertion of SDVCJ.

See, [Fort Peck Tribes](#), Article VII, section 5 amended language referencing jurisdiction: “governing the conduct of ~~the members of the Tribes and non-member Indians residing~~ **persons** within the jurisdiction of the Tribes.”

2) Definitions

See, 25 USC 1304(a).

See, [Umatilla Criminal Code](#), Section 1.01(W), (X) and (Y).

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.100.

3) Statement of Tribal Jurisdiction

See, 25 USC 1304(b).

See, [Umatilla Criminal Code](#), Section 1.02(B) and (C).

See, [Pascua Yaqui Code](#), 3 PYTC 1-1-20.

See, [Tulalip Tribes](#) Criminal Code, Sections 4.25.040(4) and 4.25.050.

See, Eastern Band of Cherokee Criminal Code, Section 14-1.5.

4) Offenses: Domestic and Dating Violence, Violations of Protective Orders

See, 25 USC 1304(c).

See, [Umatilla Criminal Code](#), Part X, Crimes of Domestic or Family Abuse.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.050.

See, Eastern Band of Cherokee Criminal Code, Section 14-40.1.

5) Rights of Defendants

a. General Application of Indian Civil Rights Act

See, 25 USC 1304(d)(1).

See, [Umatilla Criminal Code](#) Section 3.28(A).

See, [Pascua Yaqui Code](#), 3 PYTC 2-2-310; also Constitution Article I - Bill of Rights.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.040(2).

See, Eastern Band of Cherokee Criminal Code, Section 15-7.

b. Jury Drawn from Fair Cross Section

See, 25 USC 1304(d).

See, [Umatilla Criminal Code](#) Section 3.19 and 3.28.

See, [Pascua Yaqui Code](#), 3 PYTC 2-1-160

See, [Tulalip Tribes](#) Criminal Code, Section 2.05.110.

c. Notice of Right to Habeas Corpus and Petition for Stay of Detention

See, 25 USC 1304(e)(3).

See, [Umatilla Criminal Code](#) Section 3.11(D) and 3.28 (and related notice for defendants).

See, [Pascua Yaqui Code](#), 3 PYTC 2-2-180; also 3 PYTC 2-2-310.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.040(3).

d. Right to Counsel

See, 25 USC 1302(c).

See, [Umatilla Criminal Code](#) Section 3.11(D) and 3.28.

See, [Tulalip Tribes](#) Criminal Code, Sections 2.05.30(8), (10); 2.25.070(3).

See, Eastern Band of Cherokee Criminal Code, Section 15 Appendix A, Rule 26.

- e. Qualifications of Judges – procedures could be outside of tribal code.
 See, 25 USC 1302(c).
 See, [Umatilla Court Code](#) Section 2.02.
 See, [Pascua Yaqui Code](#), 3 PYTC 2-2-313.
 See, [Tulalip Tribes](#) Criminal Code, Section 2.05.040.
 See, Eastern Band of Cherokee Criminal Code, Section 7-8.

- f. Recording of Proceedings – procedures could be outside of tribal code.
 See, 25 USC 1302(c).

- g. Publication of Laws – procedures could be outside of tribal code.
 See, 25 USC 1302(c) – including laws, regulations, interpretive documents, rules of evidence and rules of criminal procedure.
 See, Confederated Tribes of the Umatilla Indian Reservation, <http://ctuir.org/laws.html>.
 See, Pascua Yaqui Code, 1 PYTC 4-70, http://www.pascuayaqui-nsn.gov/static_pages/tribalcodes/.
 See, Tulalip Tribes, <http://www.codepublishing.com/wa/Tulalip/>;

<p>Additional Matters for Consideration Related to Tribal Code Development</p>

- 1) Legislative Findings.
 See, [Tulalip Tribes](#) Criminal Code, Section 4.25.020.
 See, [Umatilla Criminal Code](#), Appendix A: Legislative History.

- 2) Savings Clause: See, [Tulalip Tribes](#) Criminal Code, Section 4.25.090: “This Chapter takes effect on the date approved by the Tulalip Board of Directors and does not extinguish or modify any civil or criminal liability or enforcement of such penalty or forfeiture that existed on or prior to the effective date of this Chapter and such code shall be treated as still remaining in force for the purpose of sustaining any proper action or

prosecution for the enforcement of such civil or criminal action, enforcement of any penalty there from, forfeiture or liability.”

- 3) Victims’ Rights, Safety and Accountability: Tribes are strongly encouraged to provide victim services and secure victim rights in order to enhance victim safety, support victim participation in prosecutions, and prevent future violence. While many of the requirements necessary to exercise SDVCJ protect the rights of defendants, tribes should also implement laws, policies, and practices that keep victims and their children safe and hold offenders accountable. Training and collaboration among law enforcement, prosecutors, court personnel, victim advocates and others are key to promoting best practices in this area.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.410, and sections 4.25.130; 4.25.350; and 4.25.400.

See, Federal Victims’ Rights Act, [18 U.S.C. 3771](#).

- 4) Mandatory Arrest provision.

See, [Umatilla Criminal Code](#) Section 4.85(C).

See, [Tulalip Tribes](#) Criminal Code, Sections 4.25.150 and 4.25.200.

- 5) Domestic Violence Offender Gun Bans

A number of jurisdictions are restricting the gun rights of convicted domestic violence offenders and persons subject to protective orders.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.190.

- 6) Notice and Community Engagement

- Notice will advance goal of creating deterrent.
- Key opportunity to educate about domestic violence.
- Develop community support for changes in tribal codes.
- Non-Indians within tribal community will be on the juries and subject to tribal laws.

- If tribal employees included, consider notice in human resource materials.
 - Notice an element of consent argument regarding jurisdiction.
- 7) Guidance for Law Enforcement on Detaining Non-Indian Offenders and DV Generally: Tribal police should receive guidance and training on promoting victim safety while exercising the authority to arrest and detain offenders and affording the right to due process. Training may also be needed for other tribal employees, social services, etc.
- 8) Detention
Review and determine status of tribe’s detention facilities, including any limitations on detention of non-Indians. Review health care and treatment policies for inmates. Consider needs for medical parole.
- 9) Jury Selection Plan.
Tribes may wish to develop a jury selection plan that explains how the tribal court will choose a jury pool that represents a fair cross section of the community. The plan may address the “community” that will be subject to jury summons.
- 10) Separate Domestic Violence Court or Docket
Some tribes are considering the development of a separate Domestic Violence Court or docket, to ensure that all DV offenders are treated equally, and to ensure appropriate services and protections are provided to victims and offenders.

See, [Tulalip Tribes](#) Criminal Code, Title 4.25, Article III.
- 11) Probation
Tribal code provisions on probation may need review to ensure that tribal courts are able to impose conditions on the probation of non-Indian defendants.

12) Juvenile Codes

Tribal code provisions on juveniles may need review to address situations where a non-Indian juvenile could be treated as an adult for domestic or dating violence offenses.

See, [Tulalip Tribes](#) Criminal Code, Section 4.25.460.

13) Complaint – Elements of a charging document

See, [Umatilla Criminal Code](#), Section 3.03.

14) Federal Criminal Databases

Tribal code could address the provision of information on tribal convictions and protective orders to the National Criminal Information Center (NCIC) and other criminal information databases in order to facilitate sentencing for repeat offenders and assist in the enforcement of protective orders.

15) Relationship to Customary and Traditional Laws

Many tribes have customary and traditional laws that are important to protect. A full system of defendant's rights is not required if there is no sentence of incarceration. Temporary or permanent exclusion from reservation could be conditioned on sentencing to treatment or rehabilitation. Some questions were raised, however, regarding the need for strict oversight of DV offenders.

16) Retaining existing tribal justice systems

Some tribes may need to retain their existing justice systems and implement SDVCJ as a stand-alone offense that would be applied only as needed.

17) Neutral Language

Use of term "person" vs. "Indian" or "non-Indian"

See, [Tulalip Tribes](#) Criminal Code, Title 4.25 (uses "person" throughout).

18) Individual Tribal Consultation

The Department of Justice has indicated that it is willing to consult with any tribe on particular issues that arise during the development of their tribal code. Contact otj@usdoj.gov.