

Child Protection, Custom Law, & Developing Criminal Provisions for Tribal Children's Codes

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A Victim-Centered Approach to Crimes Against American Indian/Alaska Native Children

Resource Guide and Workbook for Drafting
New or Amended Tribal Laws
on Crimes Against Children

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To understand and contextualize contemporary violence against Native children it is critical to understand the legacy and history of violence that Native peoples have experienced through continued colonization in North America. This book represents an approach for tribes to consider how different nations and states create laws to address crimes against children. We look both to our past and contemporary peoples to understand the collective wisdom for a victim-centered approach to protect our children.

-Roe Bubar, J.D.



THE NEED FOR A TRIBAL CHILDREN'S CODE RESOURCE

- In 2001, upon survey more than 50 % of CJA grantees surveyed in 2001 indicated code revisions, adding provisions or implementing a Tribal Children's Code was a high priority
- Code provisions (or lack/inadequacies) were noted to be pivotal in being able to improve investigation and prosecution of child abuse
- Code provisions were not specific to crimes against children



Our 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
- The best tribal laws often originally drafted by community members
- Many community members are capable of writing codes if given some basic guidance
- Lawyers can be helpful in refining or strengthening codes
- “Model codes” often do not address the unique needs and resources of your own community

Historical Issues in Developing Crimes Against Children Tribal Codes

■ **Boilerplate Tribal Codes**

- Developed without community input and do not adequately meet the needs of the tribal communities
- Codes not drafted through a community based code development process
- Codes do not comprehensively provide separate chapters for criminal child abuse provisions, civil dependency provisions (abuse and neglect), and juvenile delinquency

■ **Tribal vs. BIA or State managed Social Services**

- **Federal Law changes – PL 101-630 (mandated reporting, etc), multidisciplinary teams, ICWA, ASFA**

ESSENTIAL FEDERAL LAWS

- Indian Child Protection & Family Violence Prevention Act (PL 101-630) (1993)
- Adoption and Safe Families Act (ASFA) (1997)
- Victims of Child Abuse Act (1992)
- Indian Law Enforcement Reform Act (1990)
- Indian Child Welfare Act (ICWA) (1978)
- Child Abuse Prevention & Treatment Act
- Public Law 280 (1953/Amended 1968)
- Indian Civil Rights Act (ICRA) (1968)



Important Terms & Concepts

- ☞ Social Norms
- ☞ Legal Norms
- ☞ Tradition
- ☞ Current Practice
- ☞ Values: Rights of Child
- ☞ Values: Responsibility of Adults to Protect Child
- ☞ Values: Consequence for those who Harm Children or Fail to Protect them



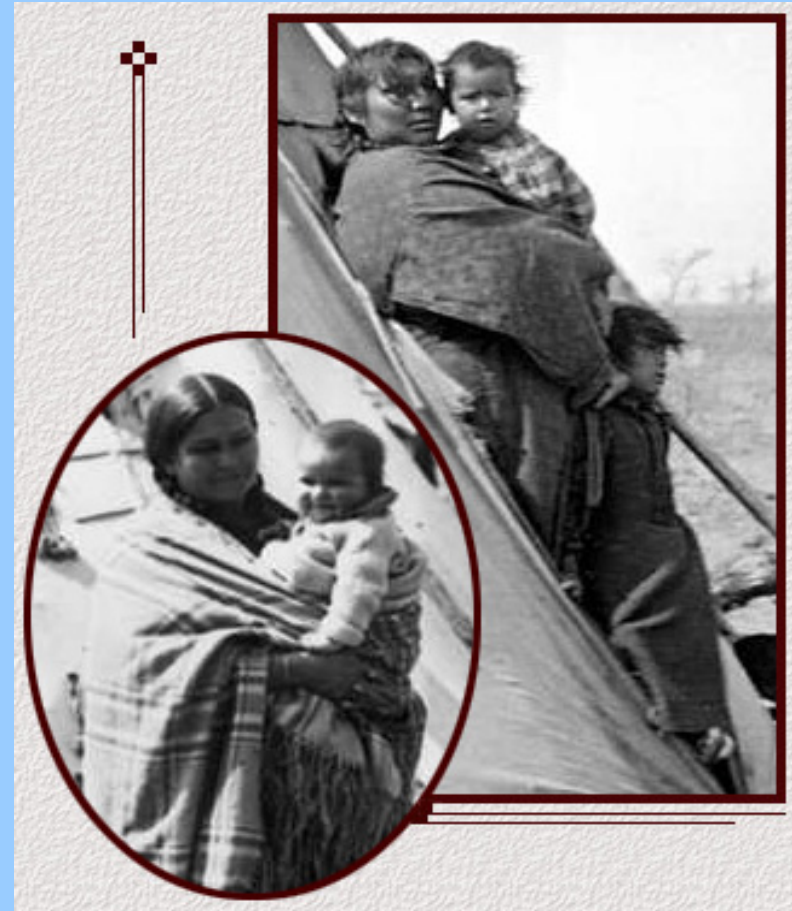
Social Norms & Legal Norms

“Social Norm”

A felt standard of proper behavior

“Legal Norm”

A felt standard of proper behavior backed by official recognition or sanction



Tradition & Current Practice

“Tradition”

**Old values or ways
of doing things**

“Current Practice”

**Current, generally
accepted ways of
doing things**

“CTGAP”

**Custom, Tradition, &
Generally Accepted
Practice**



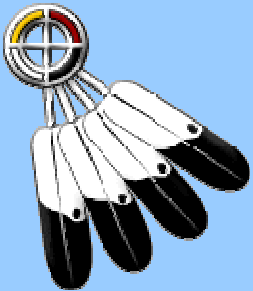
WHAT HISTORY, CUSTOMS AND CONTEMPORARY PRACTICE OF TRADITIONAL VALUES GUIDES US?



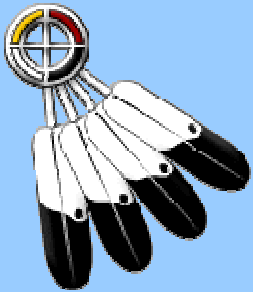
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RIGHTS OF THE CHILD



The child has a right to have adults work together to minimize the trauma to the child.



The child has a right to expect that adults involved in investigation, advocacy, adjudication and support services have been adequately trained on child abuse issues.

RIGHTS that Native children should have under law.....

⌘ Right to be believed & respected

⌘ Right to be treated with dignity

⌘ Right to competent forensic interviewers & medical examiners

⌘ Right to competent investigators

⌘ Right to physical and emotional safety

⌘ Right to support, advocacy and services that will assist healing

⌘ Right to crime victim compensation funds

EMOTIONAL & PHYSICAL SAFETY

- EMOTIONAL SAFETY is the cornerstone of healing
 - Being able to trust the adults in the “response system”
 - Being treated with respect and dignity
 - Having adults responsible for accommodating the child ~ at the child’s level & pace
 - Not the child’s job to teach adults
- PHYSICAL SAFETY and protection from alleged perpetrator (possibly temporary protection order)
 - Physical safety and comfort in child’s own home, wherever possible (remove the suspect)
 - Placement in safe & familiar environment if removal is necessary



For Example: Interviews and Medical Examinations

Respecting a Child Means that Interviews and Examinations must be conducted by a person with

- Knowledge Of The Child's Culture
- Understanding Of The Child's Developmental Ability
- Competence To Obtain & Document Forensically Sound Information
- Patience And Compassion
 - In a child – friendly setting that is appropriate for the child's age and trauma experience.



In order for Indian tribes to carry out their roles as protectors of the children they must recognize the need to embody into their written laws the appropriate criminal sanctions that assure their children protections from the many dangers Indian children face in contemporary tribal life.

- B.J. Jones, J.D.

*Director, Northern Plains Tribal Judicial Training Institute
Chief Justice, Turtle Mountain Tribal Court of Appeals
Chief Judge, Sisseton Wahpeton Tribal Court*



Resource Guide

- Designed to provide an *outline* of issues that should be considered when drafting a criminal code from the beginning, drafting new provisions for your criminal code to address child victimization, or updating an existing code.
- Designed to be reflective (inclusive) of community values.
- Includes sample language from existing tribal and state codes.

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TRIBAL CODE CONSIDERATIONS

- ✓ Provisions to address temporary protection orders preventing suspect from access to child during investigation, and possible extensions
- ✓ Provisions to assure that access to crime victim compensation funds is not barred if charges are not filed, or prosecution is declined
- ✓ Provisions requiring interagency coordination and cooperation (MDT) in matters involving criminal abuse investigations
- ✓ Provisions directing conduct of investigations to minimize trauma to child (possibly protocol rather than code)

Resource Guide Can:

- Assist tribal governments in drafting laws that address the victimization of children
- Offers exercises to assist in the development of criminal laws

(NOTE: see Civil Code Development Guide for civil law)



Resource Guide CANNOT:

- Teach about dynamics of child victimization or the effects of victimization on children.
- Replace specific training needed by each discipline in the response system
- Be a substitute for interagency or interdisciplinary child abuse protocol development.
- Give Tribe a “model code” to pass without going through the exercises and discussion.



GETTING STARTED: Key Tools

- Tribal Constitution
- Current Tribal laws
- Tradition, customs, stories
- Relevant federal and/or state laws
- Copies of any relevant case law
- Interagency agreements re investigations
- Resource Guide



CODE WRITING BY MULTI-DISCIPLINARY TEAM!



***I have seen that
in any great
undertaking it is
not enough for a
man to depend
simply upon
himself.***

*Isna La-wica (Lone
Man), Teton Sioux, late
19th century.*

Steps in the Code Development Process

1. Get the “right” people together
2. Review current law
 - a. Identify problems and issues with current law
 - b. Identify strengths of current law
3. Review your Tribe’s culture & traditions
4. Review what other tribes have done
5. Decide on what will work for you community

Child Victimization Code Development

“DOs”

- Select core drafting members from diverse representation
- Incorporate perspective of child abuse survivors
- Design a process that assures examination of social norms and includes broad-based participation
- Prioritize issues to be addressed before drafting
- Assign manageable tasks
- Set time frames and stay with them
- Emphasize practical and creative solutions
- Commitment to communication

Code Development “DONTs”

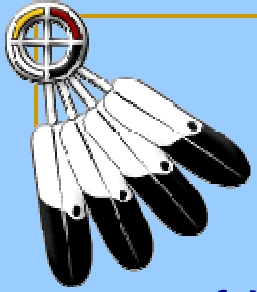
- Select members based on political status or job title
- Disregard traditional beliefs and custom law
- Start drafting before consensus is reached on priority issues
- Be discouraged by lack of participation
- Emphasize jurisdictional limitations
- Address difficult issues solely through law reform

COMMUNITY READINESS TO SUPPORT TRIBAL CODE?

Before Tribal codes can effectively address crimes against children....

- ❑ Judges and other court personnel must be trained in understanding child abuse issues
- ❑ Community must support tough treatment of those who abuse children
- ❑ Services and support must be available to children & families





This “Crimes Against American Indian/Alaska Native Children Resource Guide”... is the best model yet of how Indian children can be protected by Indian tribes in a manner that achieves both the goal of protecting the sacredness of children while assuring due process protections for those accused of committing crimes against children. It is much more than a model code.It is a process that tribal governments and their members can utilize to achieve the goal of enacting a culturally-appropriate criminal code that both assures the sacredness of Indian children and complements federal and state prosecutions of serious crimes against Indian children. The “Guide” attempts to incorporate federal and state law, where appropriate, but ultimately strives for the tribal voice to protect children.

from the Guide Forward, by B.J. Jones, J.D.

For More Information . . .

TLPI believes in providing resources free of charge, or at minimal cost, whenever possible. We are available to assist Tribes in Tribal code development or revisions.

For a downloadable copy of the **NEW** Resource Guide and Workbook for Drafting New or Amended Tribal Laws on Crimes Against Children

Visit www.tlpi.org

Or contact: Diane Payne, Children's Justice Specialist ~
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