

Enhanced Sentencing under TLOA: *Ramifications for implementing SORNA*

INTRODUCTION

The Tribal Law & Order Act of 2010 (TLOA)ⁱ provides federally recognized Indian tribes the option to enhance sentences in criminal cases. Whereas previously tribes were limited to imposing sentences up to 1 year imprisonment, fines up to \$5,000, or both; tribes implementing enhanced sentencing under TLOA may impose sentences up to 3 years imprisonment, fines up to \$15,000, or both. Tribes may also stack sentences for multiple offenses in one proceeding to up to 9 years. Enhanced sentencing is not limited to imprisonment and can include community supervision such as parole or probation.

The decision to enact enhanced sentencing is entirely at the tribe's discretion. However, in order to exercise enhanced sentencing, a tribe must meet certain requirements – from tribal court standards to qualifying offenses to detention criteria.

Furthermore, a tribe's adoption of TLOA and decision to exercise enhanced sentencing authority may potentially impact a tribe's implementation of the Sex Offender Registration and Notification Act (SORNA). The extent of the impact will depend on how a tribe tiers its registerable sex offenses.

This dispatch is being provided as a brief overview of the requirements to adopt enhanced sentencing and to highlight possible ramifications to SORNA implementation.

TLOA REQUIREMENTS

The TLOA requirements that must be met in order for a tribe to exercise enhanced sentencing authority are multifaceted:

- Court must be a 'court of record'.
- Judge has sufficient legal training for a criminal proceeding.
- Judge is licensed to practice law by any jurisdiction in the U.S.
- Defendant is provided the right to 'effective assistance of counsel' at least equal to the U.S. Constitution.
- An indigent defendant is provided legal counsel at the expense of the tribe.
- Defense counsel is licensed to practice law by any jurisdiction in the U.S. that applies appropriate standards and ensures competency and professional responsibility.
- Defendant is not subject to excessive bail, excessive fines, or cruel and unusual punishment.
- Tribal laws are publicly available – including all criminal laws, rules of evidence, and rules of procedure.
- Detention facility must meet certain criteria.ⁱⁱ

Enhanced sentencing can only be applied in the following circumstances:

- Defendant has previously been convicted of the same or comparable offense by any jurisdiction in the U.S.; or
- Defendant is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year imprisonment if prosecuted by the U.S. or any of the States.ⁱⁱⁱ

In other words, enhanced sentencing can only be applied to recidivists or to offenses that would generally be considered felonies under federal or any state law. Ultimately, it is the tribe's decision to implement enhanced sentencing authority and determine which tribal offenses will qualify. A tribe

may decide to apply enhanced sentencing authority only to serious violent offenses against a person and not to any other offenses. It is not an all or nothing implementation. However, tribes should consider possible ramifications to other areas of their code.

SORNA IMPLICATIONS

Tribes that adopt TLOA and exercise enhanced sentencing authority should be cognizant of the potential effect on their SORNA programs.

SORNA requires that sex offenses be classified based on the nature of the offense of conviction, established through a baseline three-tier classification system. Tier I offenses generally include only misdemeanor offenses not punishable by more than one year in jail – whereas Tier II and Tier III offenses are more serious offenses punishable by more than one year in jail.

It is important to remember that the three-tiered classification requirement is one of substance, not form. There is no requirement to actually label a jurisdiction's sex offenders. SORNA's requirements are met so long as sex offenders who satisfy the criteria for placement in a particular tier are subjected to at least the minimum registration duration and frequency requirements:

- Tier I: once a year for 15 years
- Tier II: once every 180 days for 25 years
- Tier III: once every 90 days for life

Because tribal courts were previously limited to imposing sentences of only one year in jail, tribes were afforded the option of tiering all of their tribal sex offenses as Tier I offenses – regardless of the seriousness of the offense.

However, with the advent of TLOA, if a tribe chooses to apply enhanced sentencing to its registerable sex offenses, the tribe must also ensure that the respective

tiers of those sex offenses comport to SORNA requirements. A tribe implementing enhanced sentencing to its registerable sex offenses can no longer automatically tier all of its tribal offenses as Tier I offenses. This is because the tribal sex offenses would now carry a sentence of more than one year in jail, which would necessitate that each offense be tiered according to the nature of the offense as delineated under SORNA and the Attorney General Guidelines.

Enacting enhanced sentencing authority not only impacts the way a tribe must tier its own sex offenses but also affects the manner in which other SORNA jurisdictions must tier tribal offenses from a tribe that has adopted enhanced sentencing. An offender with a predicate tribal conviction in which enhanced sentencing was applied who relocates to another jurisdiction must be tiered according to SORNA's three-tiered classification system. The receiving jurisdiction can no longer sweepingly tier all offenders with tribal convictions as Tier I.

Tribes should also keep in mind the possible financial impact on their SORNA programs, as well as effect on dedicated staff time and resources. An offender that was previously tiered as Tier I who is now required to be tiered as Tier III will require at least four times the amount of in-person appearances in a year and will be required to register for life – potentially decades longer than the previous 15 years as a Tier I.

Tribes have always had the discretion to implement more extensive registration and notification requirements and a number of tribal jurisdictions have chosen to go beyond the minimum requirements under SORNA. In such circumstances, there may be little to no impact at all. Nonetheless, tribes should review their code and policies and procedures as it relates to tiering of tribal offenses to ensure they continue to meet the minimum standards of SORNA.

ⁱ Pub.L. 111-211, H.R. 725, 124 Stat. 2258, enacted July 29, 2010. TLOA amended the Indian Civil Rights Act, codified as amended at 25 U.S.C. §§ 1301 et seq.

ⁱⁱ The detention criteria is detailed in 25 U.S.C. § 1302(d).

ⁱⁱⁱ Note that the offense may be comparable to an offense in *any of the States* – it need not be comparable to an offense in the State or States in which a tribal jurisdiction is located.