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## What Indian Tribes Can Do to Combat Child Sexual Abuse (Issue Paper)

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# Issue Paper: What Indian Tribes Can Do to Combat Child Sexual Abuse

Larry Echohawk and Tessa Meyer Santiago<sup>1</sup>

## I. The Crime of Child Sexual Abuse

One of the most destructive problems affecting children in “Indian country” today is sexual abuse.<sup>2</sup> Increasing reports of child sexual abuse and the severe impact this type of crime has on Indian youth and their families have prompted tribal leaders to voice great concern about the impact of this crime on Indian communities. Congress,<sup>3</sup> acting in response to concerns expressed by tribal leaders and pursuant to its responsibility as guardian and trustee for Indian tribes, has enacted new laws in the past fifteen years to address child sexual abuse in Indian country.<sup>4</sup> But federal legislative efforts cannot hope to defeat child sexual abuse in Indian country. Tribes must play an integral part of a successful solution.

## II. Child Sexual Abuse in America

Examining child abuse in America generally helps lay the foundation for understanding child sexual abuse in Indian country specifically. In 1999, an estimated 2, 974,000 referrals were made of children being abused or

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<sup>2</sup> BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL: AMERICA’S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 2 (2d ed. 1991) (quoting The National Center on Child Abuse and Neglect’s definition of “child sexual abuse” as “contacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another person. Sexual abuse may also be committed by a person under the age of 18 when that person is either significantly older than the victim or when the abuser is in a position of power or control over another child.”).

<sup>3</sup> *Child Physical and Sexual Abuse in Indian Country: Hearings on S. 1783 Indian Child Sexual Abuse and Prevention Act Before the Comm. on Interior and Insular Affairs*, 101st Cong. 349 (1990) [hereinafter *Child Sexual Abuse in Indian Country*] (statement of Bernie Teba, Executive Director of Eight Northern Indian Pueblos Council). “Society views as especially heinous a crime in which the victim is a child. Generally lacking both the physical and psychological strength to resist or defend themselves adequately, children can suffer trauma that leaves physical and mental scars lasting a lifetime. Our response to a crime when a child is the victim is, therefore, a matter of great concern.”

<sup>4</sup> *See, e.g.*, Indian Child Protection and Family Violence Prevention Act of 1990, 25 U.S.C. § 3201-3210 (2003) (addressing the need for reporting procedures, central registry of offenders, character investigations, and Indian child abuse treatment and prevention programs); Major Crimes Act of 1986, 18 U.S.C. § 1153 (2003) (providing for specific federal crimes covering child sexual abuse in Indian country); and Indian Law Enforcement Reform Act of 1990, 25 U.S.C. § 2801 (2003) (requiring comprehensive reporting of declinations to prosecute federal crimes in Indian country, permitting access to federal investigatory case files, and strengthening BIA law enforcement services).

neglected.<sup>5</sup> Of those almost three million referrals, 826,000 were confirmed as victims of child abuse and neglect.<sup>6</sup>

Child sexual abuse victims of all races numbered approximately 93,338 in 1999. This compares to 10,000 to 20,000 cases of child sexual abuse cases substantiated and accepted for service by agencies in the 1970's and 1980's. These statistics underscore that child sexual abuse reports and cases have increased substantially in the past twenty years, and that sexual molestation of children is still a major problem in America. Hence, the well being of America's children continues to be threatened by this horrible crime.

Both short term and long term consequences exist for sexual abuse victims. Frequently reported short-term effects include anger, hostility, poor self-esteem, conduct disorder, delinquency, inappropriate sexual behavior, teen pregnancy, truancy, poor performance in school, substance abuse, and running away.<sup>7</sup> Potential long-term impacts include sexual disturbance, depression, suicide, a tendency toward re-victimization, alcoholism, drug abuse, chronic unemployment, violence, and sexual abuse of others.<sup>8</sup>

Sexually abused children also have a high risk of becoming dysfunctional parents. As adults they may have serious difficulty trusting others and maintaining long-lasting relationships.<sup>9</sup> They also have a tendency to become involved in criminal behavior, including child sexual molestation,<sup>10</sup> when they grow up.

### III. Child Sexual Abuse in Indian Country

Some studies indicate that Native American communities experience child sexual abuse at about the same rate as the non-Indian population.<sup>11</sup> Other studies suggest that child abuse and neglect may be more frequent in Native American communities.<sup>12</sup> The fact is that reliable data regarding child sexual abuse in Indian Country is scant.<sup>13</sup>

<sup>5</sup> Recent child abuse statistics come from a fifty-one state survey conducted in 1999 by the National Child Abuse and Neglect Data System (NCANDS). See ADMINISTRATION ON CHILDREN, YOUTH, AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1999 xi (2001) [hereinafter CHILD MALTREATMENT 1999].

<sup>6</sup> Nationally, about three-fifths (60.4%) of child abuse and neglect reports are investigated. About a third of those investigations (29.2%) substantiate or indicate child abuse or neglect. In 11.3% of the substantiated cases, the victims suffered sexual abuse. Females were four times as likely to be sexual abuse victims than males.

<sup>7</sup> CATHY SPATZ WIDOM, NAT'L INST. OF JUSTICE, VICTIMS OF CHILDHOOD SEXUAL ABUSE-LATER CRIMINAL CONSEQUENCES 2 (Mar. 1995).

<sup>8</sup> COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 208-226 (1993) (listing consequences associated with child abuse and statistics regarding higher incidence of some of the problems).

<sup>9</sup> See ARROW, INC. & NAT'L AM. INDIAN COURT JUDGES ASS'N, CHILD SEXUAL ABUSE IN NATIVE AM. COMMUNITIES 7 (1985) [hereinafter CHILD SEXUAL ABUSE].

<sup>10</sup> See WIDOM, *supra* note 7, at 4-7.

<sup>11</sup> CHILD SEXUAL ABUSE, *supra* note 9, at 1.

<sup>12</sup> See Ronald S. Fischler, *Child Abuse and Neglect In American Indian Communities*, 9 CHILD ABUSE AND NEGLECT 95, 97-105 (1985).

<sup>13</sup> See Kathleen A. Earle, *Child Abuse and Neglect: An Examination of American Indian Data*, NAT'L INDIAN CHILD WELFARE ASS'N, 11-13 (2000) (discussing the unreliability of available data on child abuse and neglect in Indian country).

### A. Statistical Data

Statistical data regarding sexual abuse on Indian reservations has only been compiled for the last few years. The most comprehensive national study on child abuse in Indian country (17 states and 10 regional Indian Health Service (IHS) areas) was conducted by the National Indian Justice Center (NIJC). The NIJC found that the greatest proportion of abuse cases reported were neglect (48.9%); sexual abuse (28.1%); and physical abuse (20.8%).<sup>14</sup> Thirty-four percent of Indian children are at risk of becoming victims of abuse and neglect. However, only one in five reported cases of abuse and neglect were substantiated. Some estimate that one out of every four girls and one out of every six boys is molested in Indian country before the age of 18.<sup>15</sup>

When comparing child abuse and neglect suffered by Indian children as opposed to other race groups, it is apparent that Indian children experience neglect and abuse at a much greater rate. The United States Bureau of Justice reported in 1995 a per capita rate of one substantiated report of child abuse or neglect for every 30 American Indian children aged 14 or younger.<sup>16</sup> The per capita rate for children of any race drops to one substantiated report for every 58 children. Additionally, abuse or neglect rates increased from 1992-1995 in only the Native American and Asian population groups. Through 1998, Native American children comprise 19.8 cases per 1,000 children (second only to African Americans at 20.7)<sup>17</sup> although Native American children constitute only 1 percent of the child population.<sup>18</sup> This victimization rate is double African American and Native American children's proportion in the national population.<sup>19</sup>

### B. Risk Factors

Considering the risk factors, one would expect that the problem of child sexual abuse is greater within Indian Country than in off-reservation communities. Risk factors known to lead to sexual abuse of children include poverty, unemployment, familial stresses, and violence.<sup>20</sup> These risk factors occur at a

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<sup>14</sup> NATIONAL INDIAN JUSTICE CENTER, PHASE III, FINAL REPORT: CHILD ABUSE AND NEGLECT IN AMERICAN INDIAN / ALASKA NATIVE COMMUNITIES AND THE ROLE OF THE INDIAN HEALTH SERVICE 7 (1994) [hereinafter PHASE III: FINAL REPORT].

<sup>15</sup> See *Indian Child Protective Services and Family Violence Prevention Act: Hearing on S. 2340 Before Select Comm. on Indian Affairs*, 101st Cong. 199 (1990) (Karen Roberts Strong, Sitka Community Ass'n Human Serv. Dir., letter to Daniel K. Inouye, Chair of Select Comm. On Indian Affairs, June 26, 1999).

<sup>16</sup> See Earle, *supra* note 13, at 11.

<sup>17</sup> U.S. DEPT OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (2000).

<sup>18</sup> See Earle, *supra* note 13, at 11.

<sup>19</sup> See CHILD MALTREATMENT 1999, *supra* note 5.

<sup>20</sup> See B. Wright & W.G. Tierney, *American Indians in Higher Education: A History of Cultural Conflict*, in STRUCTURED INEQUALITY IN THE UNITED STATES: DISCUSSIONS ON THE CONTINUING SIGNIFICANCE OF RACE, ETHNICITY AND GENDER 92-106 (A. Aguirre, Jr. & D. V. Baker eds., 2000) (stating that the unemployment rate for American Indians living on the reservation is 80 percent. The percentage of American Indians living in poverty is three times the

higher rate among Native Americans living on reservations than for any other racial group in the Nation.<sup>21</sup>

Studies also show a higher incidence of child sexual abuse among families that are geographically or socially isolated.<sup>22</sup> Many Indian communities are obviously both geographically and socially isolated. Currently, in many Native American families, the extended family has broken down, and traditional child-rearing practices are no longer operational.<sup>23</sup> This family breakdown is partially due to the federal government's long lasting policy of placing Indian children in boarding schools where parental modeling was non-existent<sup>24</sup> and was in fact replaced by newly learned dysfunctional behaviors such as sexual abuse and physical punishment.<sup>25</sup> These were relatively unknown in Native American communities prior to European conquest.<sup>26</sup>

Because the extended family is often not functional, many families have had to turn to legal and social systems. These institutions, being alien to Native American culture, many times create more conflict instead of solving the problem.<sup>27</sup> Hence, Indian families are not able to meet the challenges posed by pervasive risk factors, which serve as a fertile ground for child abuse to take root and spread.

### C. Indian Child Sexual Abuse is Increasing

The rate of child sexual abuse in Indian country is increasing. According to the Bureau of Indian Affairs (BIA) Division of Social Services, in fiscal year 1994, 3,418 referrals of child sexual abuse were received.<sup>28</sup> In 1989, 909 referrals were received for sexual abuse.<sup>29</sup> It is unclear whether the incidence of child sexual abuse has more than tripled in the five-year period between 1989 and 1994, or whether more awareness of the problem has merely increased reporting.

Many tribes are in denial about the complicity of their own tribal members. Despite popular belief that federal employees in Indian schools do most of the sexual abusing, it is in reality Indian children's relatives, adult authority figures, and community members who by and large perpetuate this crime.

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national average with 31 percent living below poverty level. Half the Native American population over 30 years of age has not completed high school.)

<sup>21</sup> See R. Ledesma and P. Starr, *Child Welfare and the American Indian Community*, in CHILD WELFARE: A MULTICULTURAL FOCUS 117-143 (N.A. Cohen ed., 2d ed. 2000) (finding that because of poverty rates, unemployment rates, health status, education levels and mortality rates Native American children experience a world far different and worse than non-Native American children).

<sup>22</sup> See Irl Carter & Lawrence J. Parker, *Intrafamilial Sexual Abuse in American Indian Families*, in FAMILY SEXUAL ABUSE 106, 110 (Michael Quinn Patton ed., 1991).

<sup>23</sup> See CHILD SEXUAL ABUSE, *supra* note 9, at 5.

<sup>24</sup> See Carter & Parker, *supra* note 22, at 106, 111-112.

<sup>25</sup> See Earle, *supra* note 13, at 11-13 (discussing the unreliability of available data on child abuse and neglect in Indian country).

<sup>26</sup> *Id.* (citing to C. Horesji, et al., *Reactions by Native American Parents to Child Protection Agencies: Cultural and Community Factors*, 62 (4) CHILD WELFARE 329-342.).

<sup>27</sup> See Fischler, *supra* note 12, at 96.

<sup>28</sup> Facsimile received from BIA Social Services Dept. (in possession of author).

<sup>29</sup> *Id.* A steady increase of child sexual abuse cases has been reported since the statistics were first collected. In 1989, 909; 1990, 1,158; 1991, 1,292; 1992, 1,343; 1993, 4,174; and 1994, 3,418.

It is impossible to accurately measure the trauma suffered by a child who is sexually abused. However, it only stands to reason that the sexual abuse of a child who already suffers from being a part of the most disadvantaged ethnic and racial group in America is likely to have a greater cumulative negative impact. Consequently, an Indian child victim of sexual abuse is likely to face a more difficult challenge in being made whole again through counseling and treatment.<sup>30</sup>

Not only is the Indian child victim more likely to suffer more aggravating trauma, but the future of the tribe is further jeopardized when a youthful tribal member suffers potential long-term harm. For the tribe to overcome the detrimental effects of the past seven generations, youthful members must be nurtured and protected from harm.<sup>31</sup>

#### **IV. What the Federal Government is Doing to Protect Indian Children from Sexual Abuse**

##### **A. Federal Trust Responsibility to Protect Indian Children**

The guardian-wardship relationship and its assertion of federal power affects many aspects of Native American lives. At times, this wardship power has been used to reduce the governmental authority of Indian tribes.<sup>32</sup> However, the doctrine of trust responsibility also imposes important obligations and responsibilities on the federal government.<sup>33</sup>

When Congress asserted federal criminal jurisdiction on Indian reservations, it also imposed upon itself the obligation to protect Indians living on the reservation from being victimized. Taking responsibility for prosecuting major felonies under the Major Crimes Act, and limiting the punishment that Indian tribes can impose for criminal offenses, requires the federal government to be accountable for providing effective law enforcement of serious criminal offenses committed on Indian reservations, including child sexual abuse.<sup>34</sup> While its legislative acts provide a foundation for protecting Indian children, the rest of this

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<sup>30</sup> See Marc H. Irwin & Samuel Roll, *The Psychological Impact of Sexual Abuse of Native American Boarding School Children*, 23 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS 461-473 (1995) (finding that “cultural and sociological forces, in fact, create greater vulnerability in Native American victims.”).

<sup>31</sup> *Id.* (finding that “the close community structure of Native-American life may increase the likelihood of victims in turn abusing still another generation.”); See, e.g., Martin van der Werf, *Child Abuse Worsens on Reservations: Molested Kids Later Become Predators*, THE ARIZONA REPUBLIC, Oct. 29, 1993, at A1.

<sup>32</sup> E.g., the General Allotment Act of 1887, 25 U.S.C. § 334 (2003); the Termination Acts of 1945-61, H.R. Con. Res. 108, Aug. 1, 1953, 67 Stat. B132; and Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588.

<sup>33</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The federal government’s trust responsibility has been described as “moral obligations of the highest responsibility and trust.” The government’s conduct “should therefore be judged by the most exacting fiduciary standards.” This exacting standard can sometimes be enforceable in judicial proceedings.

<sup>34</sup> *Child Physical and Sexual Abuse in Indian Country supra* note 3 (statement of Congressman Jim McDermott) (“When an Indian child is abused, especially in a school or facility maintained by the Federal Government, it is not only a tragedy but a direct challenge to the Congress, the Bureau of Indian Affairs, the Indian Health Service, and tribal governments to meet our responsibility.”).

article will show that without tribal initiative Congressional efforts remain unfunded and unenforced.

### B. Past Attempts to Protect Indian Children

While the Indian Child Welfare Act of 1978 (ICWA)<sup>35</sup> does not specifically mention child sexual abuse, it was Congress' first official recognition of its direct interest in protecting Indian children and contained an admission that most Indian children were not being adequately protected. Many were removed from their families by non-tribal public and private agencies and that removal turned into long-term adoptive arrangements with non-Indian homes and institutions. Additionally, states were ignoring tribal customs and traditions in making child custody determinations.<sup>36</sup> Thus, the ICWA also clarifies the importance of tribal jurisdiction in making decisions concerning the welfare of Indian children. In May of 1986, Congress amended The Major Crimes Act<sup>37</sup> to include "felonious sexual molestation of a minor."<sup>38</sup> In November of 1986, the Act was further amended to refer to specific child sexual abuse provisions in other sections of the United States Code. These sections, called Chapter 109A felonies, delineate the following crimes: aggravated sexual abuse with children,<sup>39</sup> sexual abuse,<sup>40</sup> sexual abuse of a minor or ward,<sup>41</sup> and abusive sexual contact.<sup>42</sup>

If the defendant is an Indian and the crime is incest or a Chapter 109A felony, then the Major Crimes Act provides for federal jurisdiction over these cases. However, concurrent jurisdiction exists with the tribe. Because of spotty federal prosecution, the BIA intentionally encourages and approves tribal ordinances that assert concurrent jurisdiction over offenses listed in the Major Crimes Act.<sup>43</sup> To provide a deterrent effect to tribal court punishments, Congress increased the penalty authority of the tribes from six months imprisonment and

<sup>35</sup> Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963 (2003) (clarifying jurisdiction over adoption and custody of Indian children. The Act grants exclusive tribal jurisdiction over custody and adoption proceedings of Indian children who were domiciled on or resided on their reservation or who are wards of the tribe.).

<sup>36</sup> 25 U.S.C. § 1901(2)-(5) (2003).

<sup>37</sup> 18 U.S.C. § 1153 (2003).

<sup>38</sup> *Sexual Abuse of Indian Children: Hearing on H.R. 3826 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 1-2 (1986).

<sup>39</sup> 18 U.S.C. § 2241(c) (2003) (defined as any "sexual act" with a child under the age of 12 years. "Sexual act" is defined as intercourse, and oral and anal sodomy. Maximum sentence is life imprisonment.).

<sup>40</sup> 18 U.S.C. § 2242 (2003) (defined as sexual abuse by threats or sexual abuse of a person unable to consent, i.e., is either incapable of appraising the conduct, or physically incapable of declining to participate in the sexual act.).

<sup>41</sup> 18 U.S.C. § 2243 (2003) (defined as any "sexual act" where the victim is at least 12 years old but younger than 16, and the perpetrator is at least 4 years older than the victim. Maximum sentence is five years.).

<sup>42</sup> 18 U.S.C. § 2244 (2003) (defined as fondling and other sexual touchings not rising to the level of a "sexual act." If accompanied by force, the maximum sentence is 10 years. If no force is used, and the victim is between 12-15, the maximum sentence is 2 years.).

<sup>43</sup> Memorandum from Walter K. Mills, Assistant Secretary of Indian Affairs, to Phoenix Acting Area Director of Tribal Operations (Apr. 1987) (compiled in NAT'L INDIAN JUSTICE CENTER, TRIBAL/FEDERAL COORDINATION OF CHILD SEXUAL ABUSE CASES: RESOURCE PACKET, 30 (1999)) [hereinafter RESOURCE PACKET].

\$500 fine to one-year imprisonment and \$5,000 fine.<sup>44</sup> Congress also fixed the Supreme Court decision in *Duro v. Reina*<sup>45</sup> and enacted legislation affirming a tribe's criminal jurisdiction over non-member Indians who commit offenses while on the reservation of that tribe.<sup>46</sup>

### C. Specific Child Sexual Abuse Programs and Legislation

Several acts passed in 1990 broadened the power of the federal government to protect Indian children from sexual abusers.

The 1990 Indian Child Protection and Family Violence Prevention Act<sup>47</sup> was Congress' first real attempt to address the issue of child sexual abuse on Indian reservations. The Act requires mandatory reporting of abused Indian children,<sup>48</sup> ensures that effective preventative measures are taken to prevent abuse, provides training for the investigation of child abuse cases and treatment for the victims of family violence, and establishes tribal programs to protect Indian children and to reduce the family violence occurring in Indian country.<sup>49</sup>

This Act also aimed at reducing the perpetration of child sexual abuse by federal employees. To that effect, it instituted mandatory background checks on all federal employees in Indian country.<sup>50</sup> The Act requires that a database be kept of all reported incidents of abuse. It also points toward the need for a central registry for reported incidents of abuse.

This Act also authorizes the creation of the Indian Child Protection and Family Violence Prevention Program which funds on-reservation treatment and prevention programs for both child abuse and neglect and family violence. The program can include services such as purchasing equipment for investigations and treatment programs, training and employing investigative staff, providing shelters for battered women and abused children, establishing multi-disciplinary teams, and developing tribal child protection codes.

The Indian Law Enforcement Reform Act of 1990<sup>51</sup> created within the BIA a law enforcement division responsible for carrying out federal law enforcement responsibilities within Indian country. This law enforcement division did not alter any standing jurisdiction of the tribes, states, or federal government. It

<sup>44</sup> 25 U.S.C. § 1302(7) (2003) (amended in 1986 from \$500 and six-months imprisonment).

<sup>45</sup> *Duro v. Reina*, 495 U.S. 676 (1990) (holding that "tribes have powers of internal self-governance, and consequently retain jurisdiction only over members who commit misdemeanor crimes, but not over non-members.")

<sup>46</sup> Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified as amended at 25 U.S.C. § 1301(2) (2003)).

<sup>47</sup> Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 104 Stat. 4544 (1990) (codified as amended at 25 U.S.C. § 3201 (2003)).

<sup>48</sup> *Id.* The report can be filed with local law enforcement or with the BIA National Child Abuse Prevention Hotline. If the report involved either an Indian child or an alleged Indian abuser, then the local agency is required to report immediately to the FBI. Failure to immediately report results can result in a \$5,000 fine and/or six months imprisonment.

<sup>49</sup> See generally U.S. DEP'T OF INTERIOR AND BUREAU OF INDIAN AFFAIRS, CHILD PROTECTION HANDBOOK: PROTECTING AMERICAN INDIAN/ALASKA NATIVE CHILDREN I (1998).

<sup>50</sup> See Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4808 (codified as amended at 42 U.S.C. § 13041 (2003)).

<sup>51</sup> See generally 25 U.S.C. §§ 2801-09 (2003).

did require that any federal agency that declines to prosecute a violation of federal law in Indian country (Federal Bureau of Investigation (FBI), BIA or U.S. Attorney's office) must report "with particularity" to the affected Indian tribe the reasons why the prosecution was declined.<sup>52</sup> This particularized reporting is a change from previous approaches, which required no report or letter detailing reasons for declining to prosecute.

In 1990, Congress also passed the Crime Control Act.<sup>53</sup> Part of the act mandated that professionals report child abuse that happens on federal land (i.e., reservations) or in federal facilities.<sup>54</sup> Congress also authorized the creation of special technical training grants to be given to organizations who have the capacity to reach a broad sector of the population and have the experience in providing training.<sup>55</sup> Grants can also be made to juvenile and family courts to improve judicial systems' handling of child abuse cases.<sup>56</sup>

In conjunction with President Clinton's April 1994 Executive Memorandum<sup>57</sup> on Government-to-Government Relations between the United States and Indian Tribes, the Office of Tribal Justice was established within the Department of Justice (DOJ). Out of this office, various tribal court initiatives were developed, including the Tribal Courts Project to assist Indian tribes in developing and strengthening their justice systems and obtaining needed funds. The Tribal Court's project is a valiant effort at increasing tribal self-government.<sup>58</sup> The project does not need Congressional funding, only Congressional approval, which it has received. The project is being funded directly through the Justice Department.

The Tribal Court Project focuses on creating incentives for both Indians and non-Indians to use the tribal courts. This includes improving the caliber of judges, increasing resources available to tribal governments and strengthening the tribal court system.<sup>59</sup>

Lastly, in December of 2000, President Clinton signed into effect Public Law 106-559, the Indian Tribal Justice and Legal Assistance Act of 2000. This Act is designed to strengthen and enhance tribal justice systems.<sup>60</sup>

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<sup>52</sup> 25 U.S.C. § 2809(a)(b) (2003).

<sup>53</sup> Victims of Child Abuse Act, 42 U.S.C. § 13021 (2003).

<sup>54</sup> 42 U.S.C. § 13031(a) (2003).

<sup>55</sup> 42 U.S.C. § 13023(a) (2003).

<sup>56</sup> 42 U.S.C. § 13023(b) (2003).

<sup>57</sup> See Remarks to Native American and Alaskan Tribal Leaders, 1994 PUB. PAPERS 800 (1994).

<sup>58</sup> See *Tribal Courts Project Established in DOJ*, 8 TRIBAL CT. REC. 27 Winter-Spring 1995 (reprinting the complete text of the DOJ's November 14, 1994 memorandum announcing the Tribal Courts Project).

<sup>59</sup> *Id.* The project focuses on 1) expanding tribal court jurisdiction, 2) improving the ability of tribal judges, court personnel and the whole judicial system, 3) increasing the willingness of non-Indians to use tribal courts in resolving disputes, 4) increasing the resources available to tribal governments, 5) improving the relationships between federal and state law enforcement, and 6) strengthening and maintaining tribal courts.

<sup>60</sup> See Recently Passed "Indian Tribal Justice Technical and Legal Assistance Act" Expected to Strengthen and Improve Tribal Justice Systems, NARF LEGAL REVIEW, Winter/Spring 2000, at 1-2 [hereinafter Indian Tribal Justice Technical and Legal Assistance Act]. Under the Act, the U.S. Attorney General is authorized to award grants and technical assistance to Indian tribes wishing to develop and upgrade the operation of tribal courts. These grants include Tribal Justice Training and Technical Assistance Grants; Tribal Civil Legal and Criminal Assistance Grants; and Grants to tribal courts to develop, enhance, and continue operating tribal justice systems. In effect, the law makes those organizations, which have worked voluntarily for years to establish tribal justice systems eligible for

These federal initiatives create a stronger tribal justice system capable of adequately and professionally investigating and prosecuting child sexual abuse in Indian country. However, the challenge remains to convince Congress and the Bush administration to actually provide the funding for these tribal court initiatives.

#### V. What Indian Tribes Can Do To Combat Child Sexual Abuse

While the federal government is aware of child sexual abuse and has taken steps to prevent it, its efforts are by no means exclusive. Indian tribes should not rely on the federal government to do all that is necessary to protect Indian children. Indian tribes can do many things to supplement the efforts of the federal government to protect Indian children from sexual abuse. These include creating a multi-disciplinary and multi-jurisdictional approach to child sexual abuse prevention and prosecution, vigorously pursuing federal funding opportunities, taking advantage of the Department of Justice's resources, upgrading tribal laws to accurately encompass child sexual abuse offenses, and lobbying Congress to appropriate funding for previously unfunded programs.

##### A. Think Multi-disciplinary and Multi-jurisdictional

A successful child sexual abuse prevention and prosecution program is multi-disciplinary and multi-jurisdictional. The federal government has a well-established pattern of combining with local and state officials to create multi-jurisdictional task forces. The FBI, Drug Enforcement Agency (DEA) and Alcohol, Tobacco & Firearms (ATF) have all established programs with local and state officials to target gang violence, drug-trafficking and violent fugitives. The local units provide street contacts and local intelligence while the federal officers provide technical expertise—wiretapping, access to grand jury proceedings, and familiarity with federal laws like the Racketeer Influenced and Corrupt Organizations Act (RICO)—that otherwise might not be available to local forces. Such a sharing of resources creates an efficient and blanket response to drugs and drug-related crimes. An example of an effective multi-jurisdictional task force on the reservation was implemented in Arizona. Federal officials and the Navajo Nation agreed to assign a special task force to fight violent crime on the Navajo Reservation. The agreement is called Operation Safe Trails.<sup>61</sup> The task force is made up of four FBI agents, 12 Navajo criminal investigators, and a representative from the U.S. Attorney's office.<sup>62</sup> Under the agreement, Navajo investigators will receive training at the FBI academy in homicide, child sex abuse, and crime scene investigations. The agreement combines the expertise of the FBI with the Navajo officers' knowledge of local customs, language, and geography.

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federal funding. The Act also allows tribes to access supplemental funding to improve the tribal justice system infrastructures.

<sup>61</sup> See *Indian Child Protection and Family Violence Prevention Act: Hearing on the Implementation of the Indian Child Protection and Family Violence Prevention Act Before the Senate Comm. on Indian Affairs*, 104th Cong. 16 (1996).

<sup>62</sup> See Chris Moeser, *Navajos Sign Agreement to Fight Reservation Crime*, THE PHOENIX GAZETTE, Mar. 5, 1995, at B2.

This multi-jurisdictional approach would work efficiently and well to investigate child sexual abuse on the reservation. Federal agents provide expertise in the investigation, interrogation, and prosecution of child sexual abusers while tribal law enforcement and court officers provide cultural and local expertise in dealing with victims, offenders, and affected families. Additionally, local counties and cities could be included to provide access to superior services and facilities that would ease the investigation of what is always a painful crime.<sup>63</sup> (This state response is particularly necessary when the reservation is a P.L. 280 reservation with responsibility for child welfare, health and safety entrusted under P.L. 280 to the state in the stead of the federal government.)

### **B. Use Federal Aid and Resources to Create Tribal Programs**

Congress has enacted several laws that entitle tribes to federal aid in the form of personnel, programs, money and resources. Tribes need to take advantage of this assistance.

Perhaps the program that has been most beneficial to Indian tribes was established in 1984 through the Victims of Crimes Act (VOCA).<sup>64</sup> The Act expanded crime victim assistance and compensation programs by establishing funding for diverse programs that benefit victims of crime. The majority of funding for this office comes from the Crime Victims Fund, established by VOCA. Monies from criminal fines, forfeited bail bonds and penalty fees support crime victim programs throughout the country. In 1998, \$324,038,486 was collected for crime victim services.<sup>65</sup> Victim services include crisis intervention, counseling, emergency shelter, criminal justice advocacy and emergency transportation.

VOCA money aids tribes in two ways. First, 1.5 million dollars of the first 10 million collected in each fiscal year after administrative costs is given to the Office for Victims of Crime (OVC) to help Native Americans improve the investigation and prosecution of child abuse cases, particularly child sexual abuse. Other monies are given to states who may subgrant to Indian tribes in order to establish "on-reservation services" for Federal crime victims in Indian country.<sup>66</sup>

Second, OVC funds two Indian Country discretionary grant programs, The Children's Justice Act Partnerships for Indian Communities (CJA) Grant Program and the Victim Assistance in Indian Country (VAIC) Grant Program.<sup>67</sup>

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<sup>63</sup> Bannock County, Idaho has a state of the art investigation room specially set up to interview child victims of sexual abuse. A multi-jurisdictional response to child sexual abuse would make this room available to the Shoshone-Bannock investigators who work from the neighboring Fort Hall Reservation in southeastern Idaho.

<sup>64</sup> Victims of Crimes Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170.

<sup>65</sup> U.S. DEPT OF JUSTICE, OVC FACT SHEET: VICTIMS OF CRIME ACT VICTIMS FUND, <http://www.ojp.usdoj.gov/ovc/publications/factshts/cvfvca.htm> (visited May 16, 2001).

<sup>66</sup> Programs that have been developed for Native American victims include 1) an emergency fund available to U.S. attorneys for services to victims in Federal prosecutions, 2) a grant program to fund victim assistance programs in remote areas of Indian reservations, 3) the Children's Justice Act Program for Native Americans to improve investigation and prosecution of child sexual abuse cases, and 4) training opportunities for victim assistance providers.

<sup>67</sup> See Office of Victims of Crimes, Victims of Crimes Grants and Funding, <http://www.ojp.usdoj.gov/ovc/fund/welcome.html> (visited June 13, 2001).

The Children's Justice Act Program for Native Americans (CJA) was established in 1989 and is administered by the Department of Health and Human Services. The CJA program is the only source of federal funding for tribes that focuses on improving the investigation, prosecution, and handling of child abuse cases. Less than one million dollars<sup>68</sup> is available annually for the CJA program. Through CJA, grants are made directly to tribes to assist in the development and operation of programs to improve the handling of child abuse cases in Indian country. The VAIC program makes grant awards directly to Indian tribes to establish reservation-based victim-assistance programs in remote Indian Country areas. These awards are granted on a competitive basis dependant upon matched contributions from tribal programs.<sup>69</sup> Approximately 28 percent of OVC's funding for VAIC is used to support child abuse services. About one million dollars is available to all VIAC programs including those devoted to child sexual abuse.<sup>70</sup>

The Department of Justice has resources to aid in the establishment of child sexual abuse prosecution teams. Ironically, much of the change in the way the law protects Indian children has not come from the BIA but from the DOJ, in particular Attorney General Janet Reno.<sup>71</sup> She implemented special prosecutors, expanded the DOJ Child Exploitation and Obscenity Section to Indian Country, and began the Tribal Courts projects. She also instituted the Office of Tribal Justice to coordinate all the DOJ programs in Indian Country.

In 1992, the U.S. Department of Justice Criminal Division expanded the role of the Child Exploitation and Obscenity Section (CEOS) to provide aggressive prosecution of child sexual abuse in Indian Country and federal lands.<sup>72</sup> The department provides specialized expertise, supervises the enforcement of federal criminal statutes, and provides both direct and indirect support to United States Attorneys. The CEOS attorneys participate either as trial teams or in advisory roles, and also maintain litigation support services.

### C. Upgrade Tribal Laws and Judicial Response Systems

Tribes should upgrade their laws to allow them to respond to child sexual abuse crimes in a more effective manner:

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<sup>68</sup> See Office of Justice Programs, Dept. of Justice, Office of Justice Programs Fiscal Year 2000 Program Plans: Resources for the Field, Chapter 11 (April 2000), <http://www.ojp.usdoj.gov/00progplan>.

<sup>69</sup> Technical assistance is available for help in filling out the application package. See Office of Victims of Crimes, Victim Assistance in Indian Country (VAIC): Questions and Answers 2, <http://www.ojp.usdoj.gov/ovc/publications/factshts/vaic.htm> (visited June 27, 2001).

<sup>70</sup> See Office of Victims of Crimes, Victim Assistance in Indian Country Discretionary Grant Program Fact Sheet 1, <http://www.ojp.usdoj.gov/ovc/publications/factshts/viacc2.htm> (visited June 27, 2001).

<sup>71</sup> See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995) ("Tribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities. Fulfilling the federal government's trust responsibility to Indian nations means not only adequate federal law enforcement in Indian country, but enhancement of tribal justice systems as well.").

<sup>72</sup> See RESOURCE PACKET, *supra* note 43, at 64. The Dept. of Justice added seven criminal lawyers with expertise in child sexual abuse in Indian country to the Child Exploitation and Obscenity Division of the DOJ's criminal division. See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, OVC BULLETIN: IMPROVING TRIBAL/FEDERAL PROSECUTION OF CHILD SEXUAL ABUSE CASES THROUGH AGENCY COOPERATION 7 (undated).

1. Tribal codes should incorporate the maximum punishment now allowed by Congress (1 year in jail and/or \$5000 fine).

1. Tribal courts can relax evidentiary laws to better accommodate the needs of child witnesses. In response to an increasing number of child sexual abuse cases and the special difficulties surrounding these cases, state and federal lawmakers in recent years have been aggressive in enacting legislation to better protect children from sexual molestation and to assist criminal prosecutors and investigators in handling child sexual abuse cases. Among these enactments are statutory laws requiring speedy prosecution of child sexual abuse cases,<sup>73</sup> allowing leading questions to be asked of child witnesses,<sup>74</sup> permitting a child's hearsay statements to be admitted into evidence,<sup>75</sup> and allowing a child's previously videotaped deposition or preliminary hearing testimony to be presented at trial.<sup>76</sup>

1. Tribal codes should adequately classify and define child sexual abuse crimes. Misconceptions exist about the amount of penetration required to commit a sexual act.<sup>77</sup> Federal codes distinguish between sexual acts and sexual conduct, and fully cover the concept of "penetration."<sup>78</sup> Tribes should carefully consider the existing federal code and use it as a guideline to creating tribal codes that adequately cover the kinds of behavior that occurs in child sexual abuse cases. Offenses also need to be expansively described. Washington State recently expanded the statutory definition of incest to include family members beyond the immediate family. Other states have criminalized the sexual exploitation of children and revised their criminal codes to incorporate the expanded definition into sexual abuse of a child.

1. Tribal codes or constitutions should be written to protect the rights of crime victims. In 1996, President Clinton championed the Victim's Rights Constitutional Amendment.<sup>79</sup> This Amendment sought to guarantee victims of crimes certain rights in the criminal proceedings that resulted from the crime.<sup>80</sup> Particular rights include the right "to be told about public court proceedings and to attend them; to make a statement to the court about bail, about sentencing, about accepting a plea if the victim is present, to be told about parole hearings to attend and to speak; notice when the defendant or convict escapes or is released, restitution from the

<sup>73</sup> See, e.g., WIS. STAT. ANN. § 950.055(2)(a) (1996); IDAHO CODE § 19-110 (1989).

<sup>74</sup> See, e.g., CAL. EVIDENCE CODE § 767(b) (1995).

<sup>75</sup> See IDAHO RULES OF EVIDENCE 803 (2000) (stating that hearsay statements by children concerning matters of sexual abuse are judged by whether the child declarant was particularly likely to be telling the truth when the statement was made).

<sup>76</sup> See Children's Justice Act, S. 140, 99th Cong. 1st Sess. (1985). Some states allow for the taking of child testimony through a 2-way television transmission out of the presence of judge, jury, and defendant. The child witness is still subject to cross-examination at the place of taping. See, e.g., IDAHO CODE § 19-3024A (2000).

<sup>77</sup> See JOHN SCHNEIDER, ABUSED CHILDREN IN INDIAN COUNTRY: THE FEDERAL STATUTES 2 (1999).

<sup>78</sup> See 18 U.S.C. § 2246(2)(A)-(D) (2003) (describing sexual acts); 18 U.S.C. § 2246(3) (2003) (describing sexual contacts).

<sup>79</sup> See Remarks by the President at Announcement of the Victim's Rights Constitutional Amendment, June 25, 1996, <http://www.ojp.usdoj.gov/ovc/publications/infores/conamdbc.txt> (visited May 16, 2001).

<sup>80</sup> *Id.*

defendant, reasonable protection from the defendant and notice of these rights.” Although the amendment was withdrawn in the Senate days before debate was to begin on the floor, the principles behind the amendment remain vital to the well-being of victims, particularly children. Tribes would do well to create code designed to protect crime victim’s rights.

1. Tribes should require mandatory reporting of child sexual abuse under tribal law. The federal government already has a mandatory reporting of child abuse policy for all federal employees in Indian country. Tribes should require that any person in a position of authority have the legal duty to report child sexual abuse occurring in Indian Country or to Indian children.

1. Tribes should require background checks as a condition of employment of those who may be working with children. The federal standard established in 1990 by P.L. 101-647 Crime Control Act, Child Care Worker–Employee Standard Background Checks, should become a tribal standard.

Tribes should lobby Congress for increased federal funding for child sexual abuse prevention and prosecution programs. While significant work has been accomplished through general funds distributed by the Office of Victims of Crimes,<sup>81</sup> when it comes to appropriating monies specifically through line item legislation, Congress has been reluctant to fund federal-tribal programs. Federal commitment to the programs outlined in the Indian Child Protection and Family Violence Prevention Act was questionable in the beginning. From 1992-1995, none of the provisions of the Act had been implemented.<sup>82</sup> But a reappropriations bill extending funding through 1997 was passed by the House and the Senate in June 1995.<sup>83</sup> Funding was, however, not forthcoming.<sup>84</sup> (A significant part of the problem was the BIA’s refusal to begin drafting regulations without first receiving

<sup>81</sup> In 1997, discretionary grants for Victim Assistance in Indian Country (VAIC) was funded to \$775,000. CJA discretionary grants rose in funding from \$597,606 in 1995 to \$1.5 million in 1997. See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS PARTNERSHIP INITIATIVES IN INDIAN COUNTRY 19-20 (1997). Various other programs were funded in 2000 by the OVC including \$50,000 to establish Children Advocacy Centers in Indian Country and \$25,000 for Indian Country Child Protection Team Training. See Office of Justice Programs, Dept. of Justice, Office of Justice Programs Fiscal Year 2000 Program Plans: Resources for the Field, Chapter 11 (April 2000) <http://www.ojp.usdoj.gov/00progplan>.

<sup>82</sup> By 1995, all the BIA had produced under the Act was two informational videos, a telephone hot line, and it had begun a feasibility study for a central registry. These activities consumed 5 million of the 40 million dollars earmarked for Indian programs and services. See Michael Stachall & David Bowermaster, *The Worst Federal Agency*, U.S. NEWS AND WORLD REPORT, Nov. 28, 1994, at 63.

<sup>83</sup> In June 1995, a bill to reauthorize appropriations for certain programs under the Act was passed by both the House and the Senate. See Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 104 Stat. 4551, 4552, 4556 (1990) (codified as amended at 25 U.S.C. §§ 3208(e), 3209(h), 3210(i) (2003)) (amendment striking “and 1995” and inserting “1995, 1996, and 1997”).

<sup>84</sup> See Indian Child Protection and Family Violence Prevention Act, S. Rep. No. 103-394, at 1 (1994) (statement of John McCain, Chairman, Comm. on Indian Affairs) (“It has been 6 years since Congress enacted a law protecting Indian children from physical and sexual abuse. Since its enactment, we have yet to see the Federal Government provide the resources necessary to develop adequate prevention and treatment programs for the young victims of physical and sexual abuse on Indian reservations.”).

appropriations even though Congress had specifically stated that a plan would be needed first before funding was released).<sup>85</sup>

The BIA also requested only a one time \$500,000 out of 58.4 million dollars annually appropriated under the Indian Tribal Justice Act.<sup>86</sup> Congress had allowed for annual appropriations from 1994—2000 to strengthen tribal court systems.<sup>87</sup> By 1998, the BIA had only requested \$500,000 in funding to perform the comprehensive survey of tribal judicial systems as requested by Congress. No other funding had been appropriated to actually implement programs, and as of Spring 2001, no funding has yet been approved.<sup>88</sup>

The Indian Tribal Justice Act and the December 2000 Indian Tribal Justice Technical and Legal Assistance Act both remain unfunded. Already 58.4 million dollars per year over the past six years should have been requested by the BIA to improve tribal justice systems.<sup>89</sup> Instead, all tribal justice systems (254 Indian court systems in all) exist on 12 to 14 million dollars annually. That amounts to \$48,000 per court system—far short of what it takes to run an effective state court system.

#### IV. Conclusion

The future of the tribe depends on the prevention and aggressive prosecution of child sexual abuse. In this era of self-determination, tribes must take the initiative. Congress has passed legislation to create tribal programs and increase the quality of justice systems. Tribes cannot allow the federal government to shoulder the entire burden of prevention and prosecution of child sexual abuse. Tribes should supplement the efforts of the federal government by doing all they can do to request funding, create programs to prevent child sexual abuse, and promulgate tribal codes that help prosecute offenders.

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<sup>85</sup> See S. Rep. No. 103-394, at 6 (1994).

<sup>86</sup> Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631).

<sup>87</sup> See Ted Quasula, *Will Republican Coup Destroy Gains in Indian Country?*, 8 TRIBAL CT. REC., Winter/Spring 1995, at 6-7 (summarizing the NAICJA legislation's authorizations: "1. \$50 Million for base funding for Tribal Courts; 2. \$7 Million for training, enhancement of tribal justices, technical assistance, etc.; 3. \$500,000 for administrative expenses for Tribal Judicial Conferences; 4. \$500,000 for administrative expense [sic] for the Office [Section 3611 of the Act establishes within the BIA the "Office of Tribal Justice Support"]; 5. \$400,000 for survey (one time only). [Section 3612 of the Act authorizes the Secretary of Interior to contract with a non-federal body to conduct surveys of tribal justice systems].").

<sup>88</sup> See Indian Tribal Justice Technical and Legal Assistance Act, *supra* note 60, at 1.

<sup>89</sup> See Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 148-49 (1995).