Tribal Employment Background Checks:  
The Sixteen Year Struggle to Fulfill the Mandate of Public Law 101-630  
By Leona T. Colegrove

It is high time for the gates of Indian Country to be closed to sexual predators. In 1990, after several high-profile tribal molestation cases, federal lawmakers passed the Indian Child Protection and Family Violence Prevention Act (“the Act”).\(^1\) Its purposes was to tighten staffing procedures and clean house so that predators could no longer gain or keep employment at Tribal, IHS or BIA facilities. Unfortunately, the federal government failed to fund the millions of dollars necessary to build databases, a national offender tracking registry, and other programs to implement the Act. As a result, incidents of child sexual abuse on Indian land have not only failed to decrease but dramatically increased since 1990. While the U.S. Department of Justice reports an 18% increase in child sex abuse on the reservation, the National Indian Child Welfare Association believes that the increased percentage is much higher but that not all such cases are being reported.

1. **What does the Act require of Tribes, the BIA and IHS?**

The Act requires all tribes or tribal organizations receiving funds under the Indian Self-Determination and Education Assistance Act,\(^2\) or the Tribally Controlled Schools Act of 1988,\(^3\) conduct character investigations of any person employed, or being considered for employment, in a position that involves regular contact with or control over Indian children. The Act further mandates that tribes only employ individuals in such positions if they meet standards of character to be adopted by the Indian tribe or tribal organization establishes which are no less stringent than those of the BIA and IHS.\(^4\) Character investigations are rigorous investigations into the suitability of a person’s character to work with or have control over Indian children. Such investigations can and should include interviews with the potential employee, as well as interviews with people who have knowledge about the character of the person being investigated. Criminal background checks should also be implemented through the use of fingerprints and interlocal investigation of the person’s criminal history.

While the Act requires both BIA and IHS to prescribe minimum standards of character that current and potential tribal employees must meet to be appointed to any position involving regular contact with children,\(^5\) IHS failed to do so until 1995. The BIA did not do so until 1996. Then, for the first five or six years under the Act, Tribes had no federal regulations on which to base their own minimum standards regulations on, as contemplated by the Act.

The Act also requires IHS and BIA to compile a list of all authorized positions within IHS, that involve regular contact with or control over Indian children.\(^6\) IHS and BIA regulations must ensure that nobody in a position of regular contact with children have been found guilty of (or entered a plea of guilty or nolo contendere) to any federal, state or tribal felony, or two or more misdemeanor offenses, of the following kind: crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; crimes against persons; or offenses committed against children.\(^7\) Tribes maintain no discretion to define crimes less stringent than the definitions as defined in BIA or IHS regulations which are based on the Act.

\(^{1}\) 25 U.S.C. 3201-3211.  
\(^{3}\) 25 U.S.C. 2501.  
\(^{4}\) 25 U.S.C. 3207 (c).  
\(^{7}\) 25 U.S.C. 3207 (b).
2. **What steps should a Tribe take to ensure compliance with the Act?**

A tribe must begin by compiling a list of all positions within their respective agencies and departments, which involve regular contact with children. In developing such a list, tribes need pay special attention to jobs in child protective services, social services, health and mental health care, child care, education (both teaching and non-teaching jobs), foster care, residential care (including relative placements), recreational and rehabilitative services, detention, and correctional and treatment services programs. A tribe should not, under any circumstance, grant a person employment in any such area, if that person has been charged with an offense prohibited by the Act, even if the charges are still pending. Character investigation requirements also apply – and should apply – to volunteers as well as contract positions.

The BIA and IHS include foster or residential care takers in the list of persons required to undergo background checks. While nothing in the BIA/IHS regulations clearly state that foster parents or other types of residential placements must undergo the process, it appears that the BIA/IHS treat them as volunteers.

Tribes maintain no discretion in the case of a person who has been convicted of prohibited crimes. The tribe must not hire such a person, terminate them immediately, or place them in a position in which they have no contact with children.

Once a tribe compiles the comprehensive list of positions that fall within the purview of the Act, it must draft regulations prescribing the minimum standards of character for suitability to be employed by the tribe. BIA and IHS regulations are by design the model for tribes and tribal organizations to use when developing their own minimum standards of character and suitability for employment. Yet, because not all of the provisions in the BIA and IHS regulations are mandatory for tribes, tailoring a tribe’s regulations to meet the needs of that particular tribe is important. The tribe must ensure that both their regulations and their employment policies ensure privacy and a fair adjudication process for employees and potential employees.

Tribes must also set up a process for ensuring that employees or applicants have never been convicted of a tribal criminal offense, which would exclude them from employment under the Act. Since most tribes do not maintain criminal databases or enter their criminal conviction information into any national or even local tracking registry, this provision of the Act has proven particularly problematic for tribes. While tribes may be able to set up a system to ensure that local tribal court criminal records are reviewed, it is literally impossible to ensure that a particular tribe will have access to tribal court records.

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8 25 CFR 63.22 (b).
10 25 CFR 63.20, 63.22 and 42 CFR 136.418.
11 25 CFR 63.14 and 42 CFR 136.403(c).
12 42 CFR 136.403(d).
14 25 CFR 63.22.
16 25 CFR 63.22 (b).
17 As stated previously, under 25 U.S.C. 3207(2), a tribe’s standards of character must be no less stringent than those prescribed by the BIA and IHS through regulations.
18 25 CFR 63.24 and 42 CFR 136.413.
19 25 CFR 63.17 and 42 CFR 136.413.
conviction information from other tribes. Given the influx of non-member Indians on any given tribe’s reservation, this appears to be a huge oversight in the passage of the Act.

The implementation of the Act has been less than a success in Indian Country. In an article entitled “A Law’s Hidden Failure,” published in *American Indian Report* in January 2003, the author interviews several people with knowledge about the implementation of background checks. Available information from 1998 points to serious problems in completing these checks, including a failure to educate BIA employees about the Act. Many tribes remain unaware of the Act – let alone the law’s specific requirements for character and criminal background checks and the availability of federal resources for such efforts. Those tribes that know of the Act encounter technical difficulties in providing readable fingerprints to facilitate the criminal background. In some instances, tribes complain about the considerable expense of doing a character check given the special expertise and considerable time involved. Tribes that contracted for character checks learned the hard way that one check can cost as much as $1,500 and take months to complete. Such frustration appears to arise in fact from the BIA’s failure to publicize its obligation to pay for tribal background checks. Overall, it appears that much more information sharing and training between tribes, BIA and is required to achieve proper and consistent implementation of the Act.

3. **What consequences does a Tribe face for non-compliance with the Act?**

Tribes expose themselves to suit for injuries resulting from their non-compliance. While the federal government would probably defend a tribe under the Federal Tort Claims Act, no tribe wants to be accused of failing to adhere to the requirements of the Act and thereby failing to protect tribal youth. Tribes have worked tirelessly to enjoy their right to determine the best interests of their own children and do not need or want to be accused of falling short of the duties that go hand in hand with that right.

Further, under 25 U.S.C. 450(m), the Secretary maintains the authority to rescind any grant received under the self-determination act or the Tribally Controlled Schools Act. Where any tribal organization’s performance under a “638” grant involves the violation of the rights or endangerment of the health, safety or welfare of any person, the Secretary may rescind the grant under 25 U.S.C. 450(m), and assume control of the program involved. Adherence to the Act is not an option for the tribes, it is a requirement – and it is good tribal policy.

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