

**ADOPTED****AMERICAN BAR ASSOCIATION**

**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
SECTION OF STATE AND LOCAL GOVERNMENT LAW  
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE  
NATIONAL NATIVE AMERICAN BAR ASSOCIATION  
COMMISSION ON YOUTH AT RISK  
LAW STUDENT DIVISION**

**REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

1 RESOLVED, That the American Bar Association adopts and urges prompt implementation by  
2 the Administration, Congress, state governments, and tribal governments of the following  
3 recommendations contained in the November 2014 report of the U.S. Attorney General's  
4 Advisory Committee on American Indian/Alaska Native (AI/AN) Children Exposed to Violence,  
5 entitled *Ending Violence so Children Can Thrive (Ending Violence Report)*;

6  
7 1.3 Congress should restore the inherent authority of American Indian and Alaska Native  
8 (AI/AN) tribes to assert full criminal jurisdiction over all persons who commit crimes  
9 against AI/AN children in Indian country.

10  
11 1.4 Congress and the executive branch shall direct sufficient funds to AI/AN tribes to bring  
12 funding for tribal criminal and civil justice systems and tribal child protection systems  
13 into parity with the rest of the United States and shall remove the barriers that currently  
14 impede the ability of AI/AN Nations to effectively address violence in their communities.  
15 The Advisory Committee believes that treaties, existing law and trust responsibilities are  
16 not discretionary and demand this action.

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18 2.1 The legislative and executive branches of the federal government should ensure Indian  
19 Child Welfare Act (ICWA) compliance and encourage tribal-state ICWA collaborations.

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21 3.1 The White House Native American Affairs Office and executive branch agencies that are  
22 responsible for addressing the needs of AI/AN children, in consultation with tribes,  
23 should develop a strategy to braid (integrate) flexible funding to allow tribes to create  
24 comprehensive violence prevention, intervention, and treatment programs to serve the  
25 distinct needs of AI/AN children and families.

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27 4.1 Congress should authorize additional and adequate funding for tribal juvenile justice  
28 programs, a grossly underfunded area, in the form of block grants and self-governance

- 29 compacts that would support the restructuring and maintenance of tribal juvenile justice  
30 systems.  
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- 32 4.2 Federal, state, and private funding and technical assistance should be provided to tribes to  
33 develop or revise trauma-informed, culturally specific tribal codes to improve tribal  
34 juvenile justice systems.  
35
- 36 4.3 Federal, tribal, and state justice systems should provide publicly funded legal  
37 representation to AI/AN children in the juvenile justice systems to protect their rights and  
38 minimize the harm that the juvenile justice system may cause them. The use of  
39 technology such as videoconferencing could make such representation available even in  
40 remote areas.  
41
- 42 4.4 Federal, tribal, and state justice systems should only use detention of AI/AN youth when  
43 the youth is a danger to themselves or the community. It should be close to the child's  
44 community and provide trauma-informed, culturally appropriate, and individually  
45 tailored services, including reentry services. Alternatives to detention such as "safe  
46 houses" should be significantly developed in AI/AN urban and rural communities.  
47
- 48 4.5 Federal, tribal, and state justice systems and service providers should make culturally  
49 appropriate trauma-informed screening, assessment, and care the standard in juvenile  
50 justice systems. The Indian Health Service (IHS) in the Department of Health and Human  
51 Services (HHS) and tribal and urban Indian behavioral health service providers must  
52 receive periodic training in culturally adapted trauma-informed interventions and cultural  
53 competency to provide appropriate services to AI/AN children and their families.  
54
- 55 4.6 Congress should amend the Indian Child Welfare Act (ICWA) to provide that when a  
56 state court initiates any delinquency proceeding involving an Indian child for acts that  
57 took place on the reservation, all of the notice, intervention, and transfer provisions of  
58 ICWA will apply. For all other Indian children involved in state delinquency  
59 proceedings, ICWA should be amended to require notice to the tribe and a right to  
60 intervene. As a first step, the Department of Justice (DOJ) should establish a  
61 demonstration pilot project that would provide funding for three states to provide ICWA-  
62 type notification to tribes within their state whenever the state court initiates a  
63 delinquency proceeding against a child from that tribe which includes a plan to evaluate  
64 the results with an eye toward scaling it up for all AI/ AN communities.  
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- 66 4.7 Congress should amend the Federal Education Rights and Privacy Act (FERPA) to allow  
67 tribes to access their members' school attendance, performance, and disciplinary records.  
68
- 69 5.2 The Department of Justice (DOJ) and the Department of Interior (DOI) should provide  
70 recurring base funding for Alaska Tribes to develop and sustain both civil and criminal  
71 tribal court systems, assist in the provision of law enforcement and related services, and  
72 assist with intergovernmental agreements.

- 73  
74 5.3 The state of Alaska should prioritize law enforcement responses and related resources for  
75 Alaska Tribes, and recognize and collaborate with Alaska tribal courts.
- 76 5.4 The Administration for Child and Families (ACF) in the Department of Health and  
77 Human Services (HHS) and the State of Alaska Office of Children’s Services (OCS)  
78 should jointly respond to the extreme disproportionality of Alaska Native children in  
79 foster care by establishing a time-limited, outcome-focused task force to develop real-  
80 time, Native inclusive strategies to reduce disproportionality.
- 81  
82 5.5 The Department of Interior (DOI) and the State of Alaska should empower Alaska Tribes  
83 to manage their own subsistence hunting and fishing rights, remove the current barriers,  
84 and provide Alaska Tribes with the resources needed to effectively manage their own  
85 subsistence hunting and fishing.
- 86  
87 FURTHER RESOLVED, That the American Bar Association urges governmental entities, law  
88 schools, bar associations, and legal service providers to develop training which educates the legal  
89 profession on the issues and recommendations contained in the *Ending Violence So Children*  
90 *Can Thrive* Report, and to help promote the practices adopted above.



## REPORT

### I. Introduction: Building Upon Current ABA Policy

Every single day, a majority of American Indian and Alaska Native (AI/AN) children are exposed to violence.... This exposure not only contradicts traditional understanding that children are to be protected and viewed as sacred, but it leaves hundreds of children traumatized and struggling to cope over the course of their lifetime.<sup>1</sup>

In 2011, the U.S. Department of Justice (“DOJ”) commissioned the U.S. Attorney General’s National Task Force on Children Exposed to Violence. Their December 2012 *Defending Childhood* Report provided fifty-six recommendations for how best to improve our current justice and social service systems to serve children who have been exposed to any sort of violence or trauma. The American Bar Association (“ABA”) adopted all fifty-six recommendations as ABA policy in 2013.<sup>2</sup>

While the *Defending Childhood* Report made recommendations for systemic change across federal, state, tribal and territorial systems that serve youth, recommendation 1.2 called for a distinct federal task force to examine the needs of American Indian/Alaska Native (“AI/AN”) children exposed to violence.

American Indian/Alaska Native (AIAN) children have an exceptional degree of unmet needs for services and support to prevent and respond to the extreme levels of violence they experience. ... Although this task force could not adequately address the complexity of the issues, it recognizes the urgent need for further attention.<sup>3</sup>

The Attorney General’s Task Force on American Indian and Alaska Native Children Exposed to Violence was established in 2013. The Task Force was anchored by an Advisory Committee consisting of experts in the area of AI/AN children exposed to violence and federal officials from key agencies. Their November 2013 Report, entitled *Ending Violence So Children Can Thrive*, provides thirty one (31) recommendations addressing issues concerning AI/AN children exposed to violence.

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<sup>1</sup> ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, U.S. DEP’T OF JUSTICE, REPORT OF THE ADVISORY COMMITTEE ON AMERICAN INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE 72 (November 2014) [*hereinafter* ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT], full final report found at:

[http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending\\_violence\\_so\\_children\\_can\\_thrive.pdf](http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf) with Executive Summary found at:

[http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/24/aian\\_executive\\_summary.pdf](http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/24/aian_executive_summary.pdf)

<sup>2</sup> ABA, *Recommendation, Report. No. 111B* (2013) (urging implementation of the December 2012 Defending Childhood report recommendations, which call for trauma-informed approaches and practices in regard to justice system-involved children and youth who have been exposed to violence).

<sup>3</sup> NAT’L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, U.S. DEP’T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE: DEFENDING CHILDHOOD 38 (2012) [*hereinafter* DEFENDING CHILDHOOD REPORT], found at: <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>.

While many of the *Ending Violence So Children Can Thrive* Report recommendations are thematically similar to the *Defending Childhood* Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This resolution adopts fifteen (15) of those thirty one (31) recommendations as ABA policy.

At the February 2015 Mid-Year Meeting, the ABA adopted Resolution 111A,<sup>4</sup> which adopted as ABA policy all thirty four recommendations (except for the new circuit court provision of recommendation 1.2) of the Indian Law and Order Commission's ("ILOC") 2013 Final Report, *A Roadmap for Making Native America Safer*.<sup>5</sup> The Advisory Committee relied heavily upon the ILOC report. Consequently, many of the Advisory Committee Report recommendations *are already policies previously approved by the American Bar Association House of Delegates*.

The remaining fifteen (15) recommendations adopted by this resolution *are directly aligned with policies previously approved by the American Bar Association House of Delegates*. For these reasons, the ABA urges prompt implementation of recommendation numbers 1.3, 1.4, 2.1, 3.1, 4.1-4.7, and 5.2-5.5, of the Advisory Committee Report as a policy matter and as a signal of their importance. These specific recommendations of the *Ending Violence So Children Can Thrive* Report are timely and significant; each is specifically referenced in Appendix I. While all thirty one *Ending Violence So Children Can Thrive* Report recommendations are consistent with ABA policy, this resolution and report specifically adopts the fifteen recommendations which are most directly connected to ABA issues and existing ABA policy.

#### I. Recommendation 1.3: Expanding Tribal Criminal Jurisdiction to Include Crimes Committed Against AI/AN Children in Indian Country

The concept of tribal sovereignty is woven through each and every issue affecting AI/AN children including the primacy of tribal governments in responding to violence experienced or witnessed by Indian children.<sup>6</sup> AI/AN people have, for more than five hundred years, endured physical, emotional, social, and spiritual genocide from European and American colonialist policy.<sup>7</sup> Today, both state and federal constraints impede tribes from exercising full authority and marshaling their full potential to address violence against children.<sup>8</sup> The result is a violent crime rate in Indian country that is more than 2.5 times the national rate.<sup>9</sup> Native youth are 2.5 times more likely to experience trauma than their non-Native peers<sup>10</sup> and are experiencing post-

<sup>4</sup> ABA, *Recommendation, Report No. 111A* (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission's 2013 report, except for the new circuit court provision of recommendation 1.2). Note that while the ABA did not specifically adopt the new circuit court provision of recommendation 1.2, the ABA did adopt the remaining provisions of the recommendation, including the need for Congress to provide a federal forum, preferably designed in consultation between the U.S. government and tribal governments, that can provide a consistent, uniform, and predictable body of case law.

<sup>5</sup> ILOC REPORT, Recommendations 1.1-1.4.

<sup>6</sup> ID., at 41.

<sup>7</sup> ID., at 39, citing BigFoot, Dolores Subia, et. al., "Trauma Exposure in American Indian/Alaska Native Children," Indian Country Child Trauma Center 1-4 (2008).

<sup>8</sup> ID., at 40.

<sup>9</sup> ID., at 38, citing Arya, Neelum and Rolnick, Addie, "A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems," *Campaign for Youth Justice Policy Brief* 1 n6 (2008).

<sup>10</sup> ID., at 38, citing ILOC REPORT at 151.

traumatic stress disorder at a rate of 22 percent; the same rate as veterans returning from Iraq and Afghanistan.<sup>11</sup>

The current “institutionally complex” criminal justice system in Indian country “lacks coordination, accountability, and adequate and consistent funding.”<sup>12</sup> Jurisdiction is cumbersome divided between sovereigns,<sup>13</sup> tribal courts are restrained in their authority,<sup>14</sup> and federal prosecutors are declining to exercise theirs,<sup>15</sup> resulting in a debilitated system unable to respond to the many and diverse needs of its children. The Advisory Committee’s recommendation 1.3 recommends that Congress restore the inherent authority of AI/AN tribes to assert their full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country.<sup>16</sup>

Congress has already taken significant steps towards this recognition. In 2010, in the Tribal Law and Order Act (TLOA), Congress relaxed the tribal court sentencing restriction from one year imprisonment to three years imprisonment.<sup>17</sup> In 2013, in the Violence Against Women Reauthorization Act (VAWA), Congress re-affirmed tribal criminal jurisdiction over non-Indians for the crimes of domestic violence, dating violence, and the violation of a protection order.<sup>18</sup> The ABA provided support for the enactment of both TLOA,<sup>19</sup> and the tribal provisions of VAWA,<sup>20</sup> as well as for full tribal territorial jurisdiction.<sup>21</sup> These expressions of support were

<sup>11</sup> *Id.*, at 38, citing ILOC REPORT at 154.

<sup>12</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 47.

<sup>13</sup> The General Crimes Act, 18 U.S.C. § 1152 (providing that federal courts have jurisdiction over interracial crimes committed in Indian country); the Assimilative Crimes Act, 18 U.S.C. § 1; the Major Crimes Act, 18 U.S.C. § 1153 (providing federal criminal jurisdiction over ten enumerated major crimes committed in Indian country that is exclusive of the states); Public Law 83-280, 18 U.S.C. § 1162 (delegating federal jurisdiction to six states over most crimes throughout most of Indian country within their state borders); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lack criminal jurisdiction over non-Indian defendants); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress, Title IX (2013) (expanding tribal criminal jurisdiction to non-Indians for the crimes of domestic violence, dating violence and the violation of protection orders so long as the defendant has certain ties to the community and the tribe provides certain due process protections).

<sup>14</sup> Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (limiting a tribe’s sentencing authority to a term of imprisonment of 1 year and/or a \$5,000 fine, or up to 3 years and/or a \$15,000 fine so long as the tribe provides five additional due process protections).

<sup>15</sup> From 2005-2009, the Government Accountability Office (GAO) found that U.S. Attorneys declined to prosecute nearly 52% of violent crimes in Indian country. U.S. GAO, *U.S. Department of Justice Declinations of Indian Country Criminal Matters*, Report No. GAO-11-167R, 3 (2010). Prior to the enactment of TLOA, United States Attorneys were not required to report their declination rates. Section 212 of TLOA now requires that they submit an annual report to Congress detailing their declination rates. According to their first report, United States Attorney Offices declined to prosecute 37% of all Indian country submissions for prosecution in 2011, and 31% in 2012. U.S. Dep’t of Justice, *Indian Country Investigation and Prosecutions 2011-2012* 5 (2013).

<sup>16</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, Recommendation 1.3.

<sup>17</sup> Tribal Law and Order Act (TLOA), Public Law 111-211, 25 U.S.C. § 1302(a)(7)(C); § 1302(b)-(d).

<sup>18</sup> Violence Against Women Reauthorization Act (VAWA), Pub. L. No. 113-4, tit. IX (2013).

<sup>19</sup> See Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725, specifically because it “provide[s] tools to tribal justice officials to fight crime in their own communities.”).

<sup>20</sup> ABA Recommendation, Report No. 301 (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided).

<sup>21</sup> ABA, Recommendation, Report No. 111A (Feb. 2015) (adopting all but one of the recommendations contained in the Indian Law and Order Commission’s 2013 report, including full tribal territorial criminal jurisdiction).

only the latest iterations of a long line of ABA policy supporting tribal sovereignty and the ability of tribes to improve justice in Indian country.<sup>22</sup>

However, neither of these prior Congressional actions adequately addresses AI/AN children exposed to violence. Specifically, the *Ending Violence So Children Can Thrive* Report notes that despite numerous and horrific findings that non-Indians are committing sexual assault in Indian country,<sup>23</sup> VAWA does not extend criminal jurisdiction over non-Indians for the crime of sexual assault, or any other crimes that may have been committed in conjunction with the domestic violence. Moreover, this expansion of criminal jurisdiction also does not include the crimes of sexual and physical abuse of AI/AN children in Indian country. This is especially alarming when 70 percent of violent crimes committed against AI/ANs involve an offender of a different race.<sup>24</sup> National studies indicate that men who batter their companion also abuse their children in 49 to 70 percent of the cases.<sup>25</sup> Furthermore, the Pascua Yaqui Tribe, after implementing VAWA jurisdiction for a year, found that a majority of their VAWA incidents involved children.<sup>26</sup> In some cases, children were the “reporting party” and one child was assaulted by the victim for reporting the incident. Unfortunately, however, VAWA jurisdiction does not include the authority to charge non-Indians for crimes that endanger, threaten, or harm children.

In light of this immense jurisdictional gap, the Advisory Committee calls for an end to this jurisdictional barricade. Congress should recognize a tribe’s authority to choose to “opt out” of the current federal and/or state criminal jurisdiction and exercise criminal jurisdiction over all persons within the tribe’s lands.

The ABA has a long and robust history of supporting the authority and development of tribal justice systems,<sup>27</sup> which the ABA recently strengthened by enacting Resolution 111A,<sup>28</sup> adopting

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<sup>22</sup> See generally ABA, *Recommendation, Report No. 111A* (2013) (urging the full implementation of and compliance with the Indian Child Welfare Act); ABA, *Recommendation, Report No. 108B* (Feb. 2006) (supporting federal recognition for a native Hawaiian governing entity); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 103C* (Feb. 2004) (urging Congress to address the inadequacy of health care for many American Indians and Alaska Natives); ABA Section of Environment, Energy, and Resources, *Recommendation, Report No. 110* (Aug. 2002) (endorsing the use of settlement to resolve Indian reserved water rights claims); ABA Commission on Homelessness and Poverty Steering Committee on Unmet Legal Needs of Children, *Recommendation, Report No. 105C* (Aug. 2001) (urging equitable access for foster care and adoption services for Indian children under tribal court jurisdiction); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 117B* (Aug. 1991) (concerning disproportionate effects of general federal death penalty legislation on Native Americans); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 106A* (Feb. 1990) (supporting the American Indian Religious Freedom Act); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report* (Feb. 1980) (urging strict adherence to Indian treaty obligations).

<sup>23</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 49.

<sup>24</sup> ID. at 50, citing Bureau of Justice Statistics, American Indians and Crime, 1992-2002, vi., available at [www.bjs.gov/content/pub/pdf/aic02.pdf](http://www.bjs.gov/content/pub/pdf/aic02.pdf)

<sup>25</sup> ID., citing Bancroft, Lundy, and Silverman, Jay G., *The Batterer as Parent: addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications 42-44 (2002).

<sup>26</sup> Urbina, Alfred, and Tatum, Melissa, “Considerations in Implementing VAWA’s Special Domestic Violence Criminal Jurisdiction and TLOA’s Enhanced Sentencing Authority: A Look at the Experience of the Pascua Yaqui Tribe,” Tucson, AZ 34 (Oct. 2014).

<sup>27</sup> ABA, *Recommendation, Report No. 111A* (2013) (urging the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§ 1901-63); ABA *Recommendation, Report No. 301* (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are

all but one of the recommendations of the Indian Law and Order Commission's ("ILOC") 2013 Final Report, *A Roadmap for Making Native America Safer*.<sup>29</sup> However, VAWA's special domestic violence criminal jurisdiction has set a Congressional precedent for re-recognizing tribal inherent criminal jurisdiction one offense at a time. While ILOC's recommendation for full territorial jurisdiction is ideal, adoption of the Advisory Committee's recommendation for jurisdiction over crimes committed against children as ABA policy is also necessary.

## II. Recommendations 1.4, 3.1, and 4.1: Bringing Tribal Justice Funding into Parity

Funding for tribal government systems is limited. However, funding for child maltreatment prevention and child protection efforts is especially limited in Indian country.<sup>30</sup> Meanwhile, states receive proportionately more funding for prevention and child protection, while tribes are not even eligible for the two major programs: Title XX of the Social Services Block Grant<sup>31</sup> and the Child Abuse Prevention and Treatment Act.<sup>32</sup> Instead tribes are forced to compete with each other for limited and inconsistent grants.<sup>33</sup> This is all while the United States continues to have a trust responsibility to AI/AN tribes to provide basic governmental services in Indian country, which is not discretionary but mandatory.

With no tax base and inadequate funding from the Bureau of Indian Affairs (BIA), the Advisory Committee recommends that Congress authorize additional and adequate funding for tribal juvenile justice programs in the form of block grants and self-governance compacts that would support the restructuring and maintenance of tribal juvenile justice systems.<sup>34</sup> In recommendations 1.4 and 4.1, the Advisory Committee calls for an end to this disparaging under-investment through detailed calls to action. These include that Congress should replace

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provided); Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725, specifically because it "provide[s] tools to tribal justice officials to fight crime in their own communities."); ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar and Association, *Recommendation, Report No. 117A*, 4 (Aug. 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems).

<sup>28</sup> ABA, *Recommendation, Report No. 111A* (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission's 2013 report, except for the new circuit court provision of Recommendation 1.2). *Note* that while the ABA did not specifically adopt the new circuit court provision of Recommendation 1.2, the ABA did adopt the remaining provisions of the recommendation, including the need for Congress to provide a federal forum, preferably designed in consultation between the U.S. government and tribal governments, that can provide a consistent, uniform, and predictable body of case law.

<sup>29</sup> ILOC REPORT, Recommendations 1.1-1.4.

<sup>30</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 52, citing Written Testimony of Sarah Hick Kastelic, Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Bismark, ND, December 9, 2013 at 32, available at: [www.justice.gov/defendingchildhood/nd-briefingbinder.pdf](http://www.justice.gov/defendingchildhood/nd-briefingbinder.pdf)

<sup>31</sup> Title XX of the Social Security Act, 42 U.S.C. §§ 1397-1397f, is a capped entitlement program, in which states are provided block grants to achieve a wide range of social policy goals, including to reduce dependency; to prevent or remedy neglect, abuse, or exploitation of children; to preserve and reunite families; and to provide community-based care.

<sup>32</sup> Child Abuse and Treatment Act, Pub. L. 93-247, 42 U.S.C. § 5101, et. seq., provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities.

<sup>33</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 53.

<sup>34</sup> *Id.*, Recommendation 4.1.

discretionary competitive funding with mandatory base funding for all tribes;<sup>35</sup> Congress should actually appropriate, not simply authorize this funding;<sup>36</sup> that the authority to enter into 638 self-determination and self-governance compacts should be extended to the Department of Justice and be expanded within the Department of Health and Human Services;<sup>37</sup> and duplicative and similar Department of Interior and Department of Justice tribal criminal justice programs should be consolidated.<sup>38</sup>

Recommendation 1.4 suggested implementation mechanisms include replacing grant-based and competitive Indian country criminal justice funding with mandatory base funding available equally to all tribes, funding at least equal to the levels requested by the National Congress of American Indians (NCAI) Indian Country Budget Request for FY 2015, extending self-determination and self-governance compacts to a broad range of federal agencies, a minimum 10 percent tribal set-aside for Justice Department Office of Justice Programs and Victims of Crime Act funding, and tribal consultation to determine the feasibility of consolidating tribal criminal justice programs into a single Justice Department “Indian country component”.

Recommendation 3.1 implementation mechanisms can include federal agencies consulting with tribes, working with treatment organizations to ensure services are trauma-informed, and integrating exposure to violence and suicide screening into medical, juvenile justice, and social service intakes.

Recommendation 4.1 implementation mechanisms can include a 10 percent tribal set-aside for Office of Juvenile Justice and Delinquency Prevention funding, federal funding for state juvenile consultation with tribes and consolidation within one federal agency for funding for both the construction and operation of jails and juvenile detention facilities.

In tandem, the Advisory Committee recommends that Congress maximize existing resources, by making them more efficiently available, with fewer limitations. Recommendation 3.1 calls for the integration, or braiding, of flexible funding that would allow tribes to create comprehensive programming, rather than ineffective silos. This funding should be provided for the assessment of local needs, to ensure treatments are trauma-informed, and ensure that violence trauma screening and suicide screening are part of services offered to AI/AN children during any medical, juvenile justice, and/or social service intake.<sup>39</sup>

The Advisory Committee’s calls for adequate and fair resources align with the ABA’s consistent call for investment in the justice system. In 2001, the ABA recognized the inherent disparity of limiting tribal eligibility to the Social Services Block Grant, and urged Congress to amend Part E of Title IV to provide direct access for foster care and adoption services for Indian children under

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<sup>35</sup> ID., Recommendation 1.4.A and D, and 4.1.A.

<sup>36</sup> ID., Recommendation 1.4.B, 1.4.E, and 4.1.A.

<sup>37</sup> ID., Recommendation 1.4.C. The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 25 U.S.C. § 450, authorized the Secretary of the Interior and the Secretary of Health, Education, and Welfare to enter into contracts with, and make grants directly to, federally recognized tribes, allowing tribes greater authority over how they administered the funds.

<sup>38</sup> ID., Recommendation 1.4.F.

<sup>39</sup> ID., Recommendations 3.1, 3.1.A, 3.1.B, 3.1.C, and 4.2.

tribal court jurisdiction.<sup>40</sup> In an August 2008 resolution, the ABA urged Congress to “support quality and accessible justice by ensuring adequate, stable, and long-term funding for tribal justice systems.”<sup>41</sup> The report specifically noted that

Tribal courts play an important role in Native American communities, confronting not only issues of self-determination and sovereignty, but also many of the same problems as state and federal courts, but often with considerably fewer resources. In fact, the federal, state, and tribal court systems are interconnected, and when tribal courts are unable to deal with tribal jurisprudence, some of these matters end up being adjudicated in either the state or federal courts, sometimes with disparate results for Native Americans.<sup>42</sup>

In the ABA’s February 2015 resolution supporting the ILOC Report,<sup>43</sup> the ABA similarly called for a consolidation of duplicative tribal criminal justice programs within the DOJ and DOI; the ability to contract directly this new consolidated agency; the end of all grant-based competitive funding in favor of permanent, recurring base funding; and actual appropriation of funding by Congress to fully fund the needs of tribal justice systems.<sup>44</sup> These are the legacy of the ABA’s long and robust history of supporting the authority and development of tribal justice systems.<sup>45</sup>

### III. Recommendation 2.1 and 4.6: Implementing the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA)<sup>46</sup> established minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive

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<sup>40</sup> ABA, *Recommendation, Report No. 105C* (Aug. 2001) (urging Congress to amend Part E of Title IV of the Social Security Act to provide direct access for foster care and adoption services for tribal courts).

<sup>41</sup> ABA Section of Individual Rights and Responsibilities, Coalition for Justice, and National Native American Bar Association, *Recommendation, Report No. 117A*, 4 (Aug. 2008) (urging Congress to support quality and accessible justice by ensuring adequate, stable, long-term funding for tribal justice systems).

<sup>42</sup> *Id.* at 2.

<sup>43</sup> ABA, *Recommendation, Report No. 111A* (Feb. 2015) (adopting all of the recommendations contained in the Indian Law and Order Commission’s 2013 report, except for the new circuit court provision of Recommendation 1.2)..

<sup>44</sup> ILOC REPORT, Recommendations 3.8, 3.9, and 3.10.

<sup>45</sup> ABA, *Recommendation, Report No. 111A* (2013) (urging the full implementation of, and compliance with, the Indian Child Welfare Act (25 U.S.C. §§ 1901-63); ABA *Recommendation, Report No. 301* (Aug. 2012) (urging Congress to strengthen tribal jurisdiction to address crimes of gender-based violence on tribal lands that are committed by non-Indian perpetrators who have specific ties to the tribe, while ensuring that due process rights are provided); Letter to House Representatives, from Thomas Susman, Director of the Governmental Affairs Office of the ABA (July 20, 2010) (urging all House Representatives to vote YES for Senate Amendments to H.R. 725, specifically because it “provide[s] tools to tribal justice officials to fight crime in their own communities.”); ABA, *Recommendation, Report No. 108B* (Feb. 2006) (supporting federal recognition for a native Hawaiian governing entity); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 103C* (Feb. 2004) (urging Congress to address the inadequacy of health care for many American Indians and Alaska Natives); ABA Section of Environment, Energy, and Resources, *Recommendation, Report No. 110* (Aug. 2002) (endorsing the use of settlement to resolve Indian reserved water rights claims); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 117B* (Aug. 1991) (concerning disproportionate effects of general federal death penalty legislation on Native Americans); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report No. 106A* (Feb. 1990) (supporting the American Indian Religious Freedom Act); ABA Section of Individual Rights and Responsibilities, *Recommendation, Report* (Feb. 1980) (urging strict adherence to Indian treaty obligations).

<sup>45</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT, 49.

<sup>46</sup> Indian Child Welfare Act of 1975 (ICWA), 25 U.S.C. §§ 1901, et. seq.

homes which will reflect the unique values of Indian culture. If AI/AN children today are to be provided with a reliable safety net, the letter and spirit of ICWA must be enforced.

Unfortunately, many states do not comply with the letter or spirit of ICWA. Cultural bias, racism, and a misunderstanding of poverty reflected in legal definitions and workers' decisions to substantiate allegations of neglect make AI/AN families susceptible to biased treatment in child welfare systems.<sup>47</sup> Plainly, a decrease in ICWA compliance has resulted in an increase in foster care and adoption rates for AI/AN children.<sup>48</sup>

In recommendation 2.1, the Advisory Committee recommends that both the legislative and executive branches of the federal government should encourage tribal-state ICWA compliance, with specific recommendations for how best to achieve this compliance.<sup>49</sup> Specifically, the Advisory Committee seeks to remedy the fact that ICWA is the only federal child welfare law that does not include legislatively mandated oversight or periodic review.<sup>50</sup> Implementation mechanisms of Recommendation 2.1 include federal agency and tribal collaboration to develop a unified data-collection system on AI/AN children who are placed into foster care, and federal agency collaboration to monitor and ensure state compliance with ICWA.

In recommendation 4.6, the Advisory Committee recommends that ICWA should be extended to allow the notice, intervention, and transfer provisions of ICWA to apply not just when an Indian child is removed from their home, but also when a state court initiates any delinquency provision.<sup>51</sup>

The *Defending Childhood* Report explicitly recommends compliance with the letter and spirit of ICWA.<sup>52</sup> In addition to supporting the *Defending Childhood* Report, the ABA, also distinctly called for the full implementation of and compliance with ICWA.<sup>53</sup> The ABA's Commission on Youth at Risk identified many of these issues in their 2008 resolution on racial disparities in the child welfare system.<sup>54</sup> The *Ending Violence So Children Can Thrive* Report extends this policy by providing specific guidance on how the executive and legislative branches can ensure this compliance.

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<sup>47</sup> ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT at 75, citing Written Testimony of Terry Cross, Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Fort Lauderdale, FL, April 16, 2014 at 65.

<sup>48</sup> ID. at 79, citing Written Testimony of Sarah Hick Kastelic (Alutiiq), Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage AK, June 11, 2014 at 23.

<sup>49</sup> ID., Recommendations 2.1, 2.1.A, 2.1.B, 2.1.C, and 2.1.D (calling for a modernized unified data-collection system for ICWA and tribal dependency data, collaboration between the Administration for Children and Families and Bureau of Indian Affairs, the issuance of ICWA guidelines, and the creation of an ICWA Specialist within the Department of Justice).

<sup>50</sup> ID. at 79, citing Written Testimony of Sarah Hick Kastelic (Alutiiq), Hearing of the Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage AK, June 11, 2014 at 23.

<sup>51</sup> ID., Recommendation 4.6.

<sup>52</sup> DEFENDING CHILDHOOD REPORT, Recommendation 4.10.

<sup>53</sup> ABA, *Recommendation, Report No. 111A* (2013) (urging the full implementation of and compliance with the Indian Child Welfare Act).

<sup>54</sup> ABA, *Recommendation, Report No.107* (2008) (urging broadening federal review of racial disparities in the child welfare system).

#### IV. Recommendations 4.2-4.5, and 4.7: Strengthening Juvenile Justice

Children entering the juvenile justice system are exposed to violence at staggeringly high rates. Native youth offenders are disproportionately incarcerated in both state and federal systems.<sup>55</sup> Tribes suffer with comparable statistics of incarcerating their own Native youth. Yet many tribal communities have no tribal juvenile court system or juvenile code, and oftentimes lack the supporting service delivery system necessary to meet the specific needs of their youth. In addition, the status of AI/AN youth is unique; they may be prosecuted in three distinct justice systems: federal, tribal, and state. The Advisory Committee concluded that the standard way of juvenile justice is a failure and re-traumatizes AI/AN children.

In response, the Advisory Committee recommends a substantial reform of the juvenile justice system.

- 4.2. Firstly, developing a tribal juvenile justice system requires developing tribal codes that fit the culture and community. Federal state and private funding and technical assistance should be provided to develop or revise trauma-informed, culturally specific tribal codes to improve tribal juvenile justice systems.<sup>56</sup>
- 4.3. While access to counsel in criminal proceedings is generally considered an essential facet of due process, youth in particular need to be provided with counsel due to the impact of immaturity, the effects of exposure to violence and trauma, and caregivers who are no more likely to understand the system, rights, and process than they youth. Federal, state, and *tribal* justice systems should provide legal representation to AI/AN children in the juvenile justice systems.<sup>57</sup>
- 4.4. The use of juvenile detention as a deterrent to delinquent behavior, risky behavior, or truancy has simply been shown to be ineffective. Rather, detention of AI/AN youth should be limited to only when the youth is shown by clear evidence to be a danger to themselves or the community.<sup>58</sup>
- 4.5. Behavioral health services for AI/AN youth may be handled by different agencies with different priorities. Culturally appropriate, trauma-informed screening and care must become the standard in all juvenile justice systems that impact AI/N youth, including the for screening, assessment, and care in juvenile justice systems.<sup>59</sup>
- 4.7. Tribal access to the tribal youths' school attendance, performance, and disciplinary records.<sup>60</sup>

Like other issues affecting the core of due process, the ABA has significant policy supporting the development of juvenile justice systems, specifically policies that distinguish minors are distinct from adults. For example, in February of 2015, the ABA passed a resolution to support

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<sup>55</sup> ILOC REPORT, 157. *Tribal Youth in the Federal Justice System*, Final Report, Urban Institute, Justice Policy Center ix (2011).

<sup>56</sup> ID., Recommendation 4.2.

<sup>57</sup> ID., Recommendation 4.3.

<sup>58</sup> ID., Recommendation 4.4

<sup>59</sup> ID., Recommendation 4.5.

<sup>60</sup> ID., Recommendation 4.7.

government-appointed counsel for unaccompanied children in immigration proceedings,<sup>61</sup> and a resolution urging government to refrain from using shackles on juvenile in court, unless a judge order it.<sup>62</sup> In 2014, the ABA adopted policy urging the development and adoption of trauma-informed, evidenced-based approaches and practices on behalf of justice system-involved children and youth who have been exposed to violence.<sup>63</sup> In 2012, the ABA Center on Children and the Law helped to develop and publish a practice guide for attorneys who work with children and youth, entitled, *Identifying Polyvictimization and Trauma Among Court-Involved Children and Youth: A Checklist and Resource Guide for Attorneys and Other Court-Appointed Advocates*.<sup>64</sup> Moreover, the ABA adoption of the *Defending Childhood* Report recommendations includes support for the use of trauma-informed practices for youth in the juvenile justice system.<sup>65</sup> The *Defending Childhood* Report recommends that youth entering the juvenile justice system be screened for exposure to violence in accordance with trauma-informed practices.<sup>66</sup>

#### V. Recommendations 5.2: 5.5: Serving Alaska Natives

Issues related to Alaska Native children exposed to violence are different from other American Indian children for a variety of reasons, including regional vastness and geographical isolation, extreme weather, exorbitant cost of transportation, lack of economic opportunity and access to resources, and a lack of respect for Alaska Native history and culture.<sup>67</sup> Alaska Natives are disproportionately affected by violent crime and Alaska Native children are, of course, disproportionately exposed to that violence.<sup>68</sup> Less than ½ of remote Alaska village are served trained state law enforcement, and the centralized state judicial system offers only a handful of staffed magistrate courts outside of hub communities.<sup>69</sup> Congress has repeatedly exempted Alaska from significant tribal legislation, including recent legislation aimed at reducing violent crime in Indian country—and thereby reducing AI/AN children’s exposure to that violent.<sup>70</sup>

The Advisory Committee recommends Alaska Tribes are best positioned to effectively address the issues facing their communities, and that they should be empowered to do so:

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<sup>61</sup> ABA *Recommendation, Report No. 1113* (Feb. 2015) (supporting government-appointed counsel for unaccompanied children in immigration proceedings, specifically urging immigration courts to not conduct hearings unless an unaccompanied minor has an opportunity to consult with counsel).

<sup>62</sup> ABA *Recommendation, Report No. 107A* (Feb. 2015) (urging governments to refrain from using shackles on juveniles in court, unless a judge order it).

<sup>63</sup> ABA *Recommendation, Report No. 109B* (Feb. 2014) (urging the development and adoption of trauma-informed, evidenced-based practices for on behalf of justice system-involved children and youth).

<sup>64</sup> LISA PILNIK & JESSICA R. KENDALL, *IDENTIFYING POLYVICTIMIZATION AND TRAUMA AMONG COURT-INVOLVED CHILDREN AND YOUTH: A CHECKLIST AND RESOURCE GUIDE FOR ATTORNEYS AND OTHER COURT-APPOINTED ADVOCATES 2* (Safe Start Ctr., Office Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice 2012).

<sup>65</sup> ABA, *Recommendation, Report. No. 111B* (2013).

explaining that the Task Force recommendations on trauma-informed practices align with existing ABA policy).

<sup>66</sup> *DEFENDING CHILDHOOD REPORT*, at 176 (recommending that “trauma-informed screening, assessment, and care” should be “the standard in juvenile justice services”).

<sup>67</sup> *ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT*, 130.

<sup>68</sup> While only 17.3% of the child population, Alaska Native children constitute 50.1% of all children in out-of-home placements and 62.3% of all children in foster care. *Id.* at 132- 33.

<sup>69</sup> *Id.* at 133, citing S. 1474, 113th Cong. 2d. Sess. (2014), Sec. 2(A)(9)-(11).

<sup>70</sup> *Id.* at 130.

- 5.2. The development, enhancement, and sustainment of Alaska tribal courts, and truly cooperative relationships between the State of Alaska and Alaska tribes are absolutely essential in reducing violent crime and protecting Alaska Native children from violence and exposure to violence. The Department of Justice and the Department of Interior, should provide recurring base funding for Alaska Tribes to develop and sustain their tribal court systems and assist in the provision of law enforcement;<sup>71</sup>
- 5.3. Only a handful of tribes in Alaska have any law enforcement presence. The State of Alaska should prioritize law enforcement responses for Alaska tribes, and recognize and collaborate with Alaska tribal courts,<sup>72</sup> which should include following existing federal law requiring the State of Alaska to enforce tribal protection orders without first having the victim “register” or “file” that protection order.<sup>73</sup>
- 5.4. Alaska Native children constitute 17.3 percent of the state child population; however, Alaska Native children comprise 62.3 percent of all children in out-of-home placements.<sup>74</sup> The federal government and the State of Alaska should jointly respond to the *extreme* disproportionality of Alaska Native children in foster care by establishing a time-limited, outcome-focused task force to develop real-time, Native inclusive strategies to reduce disproportionality;<sup>75</sup>
- 5.5. Subsistence hunting, fishing, and gathering are not only a part of everyday life for Alaska Natives, but for many Alaska Natives it is literally the subsistence on which their families survive. Like language and cultural traditions, it has been passed down from one generation to the next and is an important means of reinforcing tribal values and traditions. The Department of Interior and the State of Alaska should empower Alaska Tribes to manage their own subsistence hunting and fishing rights, remove the current barriers, and provide Alaska Tribes with the resources needed to effectively manage their own subsistence hunting and fishing.<sup>76</sup>

Implementation mechanisms of these recommendations can include providing state law enforcement officials onsite in villages, prioritizing village-based services, State of Alaska recognition and collaboration with Alaska tribal courts, self-governance intergovernmental agreements with Alaska tribes, sufficient DOJ and DOI funding to meet these needs, and better federal, State and tribal collaboration on public safety measures.

The ABA has already endorsed the Advisory Committee’s recommendation 5.1 when it adopted the Indian Law and Order Commission’s recommendations. This includes that Congress take legislative action to ensure that Alaska Native lands are treated as Indian country, like most other tribal land in the United States.<sup>77</sup> Beyond the ILOC Report, the ABA has repeatedly identified Alaska Natives as distinct peoples in possession of inherent sovereignty worthy of protection.<sup>78</sup>

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<sup>71</sup> ID., Recommendation 5.2.

<sup>72</sup> ID., Recommendation 5.3.

<sup>73</sup> ID., Recommendation 5.3.C and at 145.

<sup>74</sup> ID. at 146.

<sup>75</sup> ID., Recommendations 5.4.

<sup>76</sup> ID., Recommendations 5.5.

<sup>77</sup> ILOC REPORT, Recommendations 2.1, 2.2, and 2.3.

<sup>78</sup> See ABA, *Recommendation, Report No. 108B* (Feb. 2006) (supporting federal recognition for a Native Hawaiian governing entity by arguing for Hawaiian self-determination and self-governance at least equal to that which Alaska

## VI. Conclusion

The recommendations of the *Ending Violence So Children Can Thrive* Report regarding AI/AN children exposed to violence seek to better identify and serve our future Native. These recommendations include embracing culturally-relevant evidenced-based practices, easing the restraints on tribal sovereignty, and bring tribal investment into parity with state and territories. These approaches align with ABA policy that has long stood for both a responsive juvenile justice system and meaningful tribal self-determination. These recommendations address ills that have afflicted Indian country for over 200 years. It is incumbent that we enable tribal governments to provide for their children in their own communities.

**Mark I. Schickman, Chair**

ABA Section of Individual Rights and Responsibilities

August 2015

## APPENDIX I

ENDING VIOLENCE TO CHILDREN CAN THRIVE RECOMMENDATIONS<sup>79</sup>**Chapter 1 – Building a Strong Foundation**

- 1.1 Leaders at the highest levels of the executive and legislative branches of the federal government should coordinate and implement the recommendations in this report consistent with three core principles—Empowering Tribes, Removing Barriers, and Providing Resources—identified by the Advisory Committee.
- 1.2 The White House should establish—no later than May 2015—a permanent fully-staffed Native American Affairs Office within the White House Domestic Policy Council. This new Native American Affairs Office should include a senior position specializing in AI/AN children exposed to violence. This office should be responsible for coordination across the executive branch of all services provided for the benefit and protection of AI/AN children and the office lead should report directly to the Director of the Domestic Policy Council as a Special Assistant to the President. The Native American Affairs Office should have overall executive branch responsibility for coordinating and implementing the recommendations in this report including conducting annual tribal consultations.
- 1.3 Congress should restore the inherent authority of American Indian and Alaska Native (AI/AN) tribes to assert full criminal jurisdiction over all persons who commit crimes against AI/AN children in Indian country.
- 1.4 Congress and the executive branch shall direct sufficient funds to AI/AN tribes to bring funding for tribal criminal and civil justice systems and tribal child protection systems into parity with the rest of the United States and shall remove the barriers that currently impede the ability of AI/AN Nations to effectively address violence in their communities. The Advisory Committee believes that treaties, existing law and trust responsibilities are not discretionary and demand this action.
- 1.4.A Congress and the executive branch shall provide recurring mandatory, not discretionary, base funding for all tribal programs that impact AI/AN children exposed to violence, including tribal criminal and civil justice systems and tribal child protection systems, and make it available on equal terms to all federally recognized tribes, whether their lands are under federal jurisdiction or congressionally authorized state jurisdiction.

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<sup>79</sup> REPORT OF THE ATTORNEY GENERAL’S ADVISORY COMMITTEE ON AMERICAN INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE: ENDING VIOLENCE SO CHILDREN CAN THRIVE, U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (Nov. 2014) [*hereinafter* ENDING VIOLENCE SO CHILDREN CAN THRIVE REPORT], available at: [www.justice.gov/defendingchildhood/task-force-american-indian-and-alaska-native-children-exposed-violence](http://www.justice.gov/defendingchildhood/task-force-american-indian-and-alaska-native-children-exposed-violence). Please note that all of the recommendations of the Ending Violence So Children Can Thrive Report are listed here, and that this ABA resolution adopts all of these recommendations. However, notes and other commentary to these recommendations found in the Ending Violence So Children Can Thrive Report have been omitted here.

- 1.4.B Congress shall appropriate, not simply authorize, sufficient substantially increased funding to provide reliable tribal base funding for all tribal programs that impact AI/AN children exposed to violence. This includes tribal criminal and civil justice systems and tribal child protection systems. At a minimum, and as a helpful starting point, Congress shall enact the relevant funding level requests in the National Congress of American Indians (NCAI) Indian Country Budget Request for FY 2015.
- 1.4.C Congress shall authorize all federal agencies, beginning with the Department of Justice (DOJ), to enter into 638 self-determination and self-governance compacts with tribes to ensure that all tribal system funding, including both justice and child welfare, is subject to tribal management. Further, the Department of Health and Human Services (HHS) should fully utilize its current 638 self-determination and self-governance authority to the greatest extent feasible for flexible funding programs in the Department of Health and Human Services (HHS) beyond the Indian Health Service (IHS) and seek additional legislative authority where needed.
- 1.4.D Congress shall end all grant-based and competitive Indian country criminal justice funding in the Department of Justice (DOJ) and instead establish a permanent, recurring base funding system for tribal law enforcement and justice services.
- 1.4.E Congress shall establish a much larger commitment than currently exists to fund tribal programs through the Department of Justice's Office of Justice Programs (OJP) and the Victims of Crime Act (VOCA) funding. As an initial step towards the much larger commitment needed, Congress shall establish a minimum 10 percent tribal set-aside, as per the Violence Against Women Act (VAWA) tribal set-aside, from funding for all discretionary Office of Justice Programs (OJP) and Victims of Crime Act (VOCA) funding making clear that the tribal set-aside is the minimum tribal funding and not in any way a cap on tribal funding. President Obama's annual budget request to Congress has included a 7 percent tribal set-aside for the last few years. This is a very positive step and Congress should authorize this request immediately. However, the tribal set-aside should be increased to 10 percent in subsequent appropriations bills. Until Congress acts, the Department of Justice shall establish this minimum 10 percent tribal setaside administratively.
- 1.4.F The Department of Justice (DOJ) and Department of Interior (DOI) should, within one year, conduct tribal consultations to determine the feasibility of implementing Indian Law and Order Commission (ILOC) Recommendation 3.8 to consolidate all DOI tribal criminal justice programs and all DOJ Indian country programs and services into a single "Indian country component" in the DOJ and report back to the President and AI/AN Nations on how tribes want to move forward on it.
- 1.5 The legislative branch of the federal government along with the executive branch, under the direction and oversight of the White House Native American Affairs Office, should provide adequate funding for and assistance with Indian country research and data collection.

- 1.6 The legislative and executive branches of the federal government should encourage tribal-state collaborations to meet the needs of AI/AN children exposed to violence.
- 1.7 The federal government should provide training for AI/AN Nations and for the federal agencies serving AI/AN communities on the needs of AI/AN children exposed to violence. Federal employees assigned to work on issues pertaining to AI/AN communities should be required to obtain training on tribal sovereignty, working with tribal governments, and the impact of historical trauma and colonization on tribal Nations within the first sixty days of their job assignment.

## **Chapter 2 – Promoting Well-Being for American Indian and Alaska Native Children in the Home**

- 2.1 The legislative and executive branches of the federal government should ensure Indian Child Welfare Act (ICWA) compliance and encourage tribal-state ICWA collaborations.
  - 2.1.A Within two years of the publication of this report, the Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), the Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), and tribes should develop a modernized unified data-collection system designed to collect Adoption and Foster Care Analysis and Reporting System (AFCARS) (ICWA and tribal dependency) data on all AI/AN children who are placed into foster care by their agency and share that data quarterly with tribes to allow tribes and the BIA to make informed decisions regarding AI/AN children.
  - 2.1.B The Secretaries of the Department of Interior (DOI) and Health and Human Services (HHS) should compel BIA and ACF to work together collaboratively to collect data regarding compliance with ICWA in state court systems. The ACF and BIA should work collaboratively to ensure state court compliance with ICWA.
  - 2.1.C The BIA should issue regulations (not simply update guidelines) and create an oversight board to review ICWA implementation and designate consequences of noncompliance and/or incentives for compliance with ICWA to ensure the effective implementation of ICWA.
  - 2.1.D The Department of Justice (DOJ) should create a position of Indian Child Welfare Specialist to provide advice to the Attorney General and DOJ staff on matters relative to AI/ AN child welfare cases, to provide case support in cases before federal, tribal, and state courts, and to coordinate ICWA training for federal, tribal, and state judges; prosecutors; and other court personnel.
- 2.2 The Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), the Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), and tribes, within one year of the publication of this report, should develop and submit a written plan to the White House Domestic Policy Council, to work collaboratively and efficiently to provide trauma-informed, culturally appropriate tribal

child welfare services in Indian country

- 2.3 The Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS), Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), and tribes should collectively identify child welfare best practices and produce an annual report on child welfare best practices in AI/AN communities that is easily accessible to tribal communities.
- 2.4 The Indian Health Service (IHS) in the Department of Health and Human Services (HHS), state public health services, and other state and federal agencies that provide pre- or postnatal services should provide culturally appropriate education and skills training for parents, foster parents, and caregivers of AI/ AN children. Agencies should work with tribes to culturally adapt proven therapeutic models for their unique tribal communities (e.g., adaptation of home visitation service to include local cultural beliefs and values).
- 2.5 The Bureau of Indian Affairs (BIA) in the Department of the Interior (DOI), tribal social service agencies, and state social service agencies should have policies that permit removal of children from victims of domestic violence for “failure to protect” only as a last resort as long as the child is safe.
- 2.6 The Secretary of Health and Human Services (HHS) should increase and support access to culturally appropriate behavioral health and substance abuse prevention and treatment services in all AI/AN communities, especially the use of traditional healers and helpers identified by tribal communities.

### **Chapter 3 – Promoting Well-Being for American Indian and Alaska Native Children in the Community**

- 3.1 The White House Native American Affairs Office (see Recommendation 1.2) and executive branch agencies that are responsible for addressing the needs of AI/AN children, in consultation with tribes, should develop a strategy to braid (integrate) flexible funding to allow tribes to create comprehensive violence prevention, intervention, and treatment programs to serve the distinct needs of AI/AN children and families.
  - 3.1.A The White House Native American Affairs Office, the U.S. Attorney General, the Secretaries of the Department of Interior (DOI) and Health and Human Services (HHS), and the heads of other agencies that provide funds that serve AI/AN children should annually consult with tribal governments to solicit recommendations on the mechanisms that would provide flexible funds for the assessment of local needs, and for the development and adaptation of promising practices that allow for the integration of the unique cultures and healing traditions of the local tribal community.
  - 3.1.B The White House Native American Affairs Office and the U.S. Attorney General should work with the organizations that specialize in treatment and services for traumatized children, for example, National Child Traumatic Stress Network, to ensure that services for AI/AN children exposed to violence are trauma-informed.

- 3.1.C The White House Native American Affairs Office should coordinate the development and implementation of federal policy that mandates exposure to violence trauma screening and suicide screening be a part of services offered to AI/AN children during medical, juvenile justice, and/or social service intakes.
- 3.2 The Department of Justice's National Institute of Justice (NIJ) and other Justice Department agencies with statutory research funding should set aside 10 percent of their annual research budgets for partnerships between tribes and research entities to develop, adapt, and validate trauma screens for use among AI/AN children and youth living in rural, tribal, and urban communities. Trauma screens should be tested and validated for use in schools, juvenile justice (law enforcement and courts), mental health, primary care, Defending Childhood Tribal Grantee programs, and social service agencies and should include measures of trauma history, trauma symptoms, recognizing trauma triggers, recognizing trauma reactions, and developing positive coping skills for both the child and the caregivers.
- 3.3 The White House Native American Affairs Office and responsible federal agencies should provide AI/AN youth-serving organizations such as schools, Head Starts, daycares, foster care programs, and so forth with the resources needed to create and sustain safe places where AI/AN children exposed to violence can obtain services. Every youth-serving organization in tribal and urban Native communities should receive mandated trauma-informed training and have trauma-informed staff and consultants providing school-based trauma-informed treatment in bullying, suicide, and gang prevention/intervention.
- 3.4 The Secretary of Housing and Urban Development (HUD) should designate and prioritize Native American Housing Assistance and Self-Determination Act (NAHSDA) funding for construction of facilities to serve AI/AN children exposed to violence and structures for positive youth activities. This will help tribal communities create positive environments such as shelters, housing, cultural facilities, recreational facilities, sport centers, and theaters through the Indian Community Development Block Grant Program and the Housing Assistance Programs.
- 3.5 The White House Native American Affairs Office should work with the Congress and executive branch agencies in consultation with tribes to develop, promote, and fund youth-based afterschool programs for AI/AN youth. The programs must be culturally based and trauma-informed, must partner with parents/ caregivers, and, when necessary, provide referrals to trauma-informed behavioral health providers. Where appropriate, local capacity should also be expanded through partnerships with America's volunteer organizations, for example, AmeriCorps.
- 3.6 The White House Native American Affairs Office and the Secretary of Health and Human Services (HHS) should develop and implement a plan to expand access to Indian Health Service (IHS), tribal, and urban Indian centers to provide behavioral health services to AI/AN children in schools. This should include the deployment of behavioral health services providers to serve students in the school setting.

## **Chapter 4 – Creating a Juvenile Justice System that Focuses on Prevention, Treatment, and Healing**

- 4.1 Congress should authorize additional and adequate funding for tribal juvenile justice programs, a grossly underfunded area, in the form of block grants and self-governance compacts that would support the restructuring and maintenance of tribal juvenile justice systems.
  - 4.1.A Congress should create an adequate tribal set-aside that allows access to all expanded federal funding that supports juvenile justice at an amount equal to the need in tribal communities. As an initial step towards the much larger commitment needed, Congress should establish a minimum 10 percent tribal set-aside, as per the Violence Against Women Act (VAWA) tribal set aside, from funding for all Office of Juvenile Justice and Delinquency Prevention (OJJDP) funding making clear that the tribal set-aside is the minimum tribal funding and not in any way a cap on tribal funding. President Obama’s annual budget request to Congress has included a 7 percent tribal set aside for the last few years. This is a very positive step and Congress should authorize this request immediately. However, the tribal set-aside should be increased to 10 percent in subsequent appropriations bills. Until Congress acts, the Department of Justice should establish this minimum 10 percent tribal set-aside administratively.
  - 4.1.B Federal funding for state juvenile justice programs should require that states engage in and support meaningful and consensual consultation with tribes on the design, content, and operation of juvenile justice programs to ensure that programming is imbued with cultural integrity to meet the needs of tribal youth.
  - 4.1.C Congress should direct the Department of Justice (DOJ) and the Department of Interior (DOI) to determine which agency should provide funding for both the construction and operation of jails and juvenile detention facilities in AI/AN communities, require consultation with tribes concerning selection process, ensure the trust responsibilities for these facilities and services are assured, and appropriate the necessary funds.
- 4.2 Federal, state, and private funding and technical assistance should be provided to tribes to develop or revise trauma-informed, culturally specific tribal codes to improve tribal juvenile justice systems.
- 4.3 Federal, tribal, and state justice systems should provide publicly funded legal representation to AI/AN children in the juvenile justice systems to protect their rights and minimize the harm that the juvenile justice system may cause them. The use of technology such as videoconferencing could make such representation available even in remote areas.
- 4.4 Federal, tribal, and state justice systems should only use detention of AI/AN youth when the youth is a danger to themselves or the community. It should be close to the child’s community and provide trauma-informed, culturally appropriate, and individually tailored services, including reentry services. Alternatives to detention such as “safe houses” should be significantly developed in AI/AN urban and rural communities.

- 4.5 Federal, tribal, and state justice systems and service providers should make culturally appropriate trauma-informed screening, assessment, and care the standard in juvenile justice systems. The Indian Health Service (IHS) in the Department of Health and Human Services (HHS) and tribal and urban Indian behavioral health service providers must receive periodic training in culturally adapted trauma-informed interventions and cultural competency to provide appropriate services to AI/AN children and their families.
- 4.6 Congress should amend the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the tribe and a right to intervene. As a first step, the Department of Justice (DOJ) should establish a demonstration pilot project that would provide funding for three states to provide ICWA-type notification to tribes within their state whenever the state court initiates a delinquency proceeding against a child from that tribe which includes a plan to evaluate the results with an eye toward scaling it up for all AI/ AN communities.
- 4.7 Congress should amend the Federal Education Rights and Privacy Act (FERPA) to allow tribes to access their members' school attendance, performance, and disciplinary records.

## **Chapter 5 – Empowering Alaska Tribes, Removing Barriers, Providing Resources**

- 5.1 The federal government should promptly implement all five recommendations in Chapter 2 (Reforming Justice for Alaska Natives: The Time Is Now) of the Indian Law and Order Commission's 2013 Final Report, A Roadmap for Making Native America Safer, and assess the cost of implementation. This will remove the barriers that currently inhibit the ability of Alaska Native Tribes to exercise criminal jurisdiction and utilize criminal remedies when confronting the highest rates of violent crime in the country.
- 5.1.A (*Indian Law and Order Commission Recommendation 2.1*): Congress should overturn the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, by amending the Alaska Native Claims Settlement Act (ANCSA) to provide that former reservation lands acquired in fee by Alaska Native villages and other lands transferred in fee to Native villages pursuant to ANCSA are Indian country.
- 5.1.B (*Indian Law and Order Commission Recommendation 2.2*): Congress and the President should amend the definitions of Indian country to clarify (or affirm) that Native allotments and Native-owned town sites in Alaska are Indian country.
- 5.1.C (*Indian Law and Order Commission Recommendation 2.3*): Congress should amend the Alaska Native Claims Settlement Act to allow a transfer of lands from Regional Corporations to Tribal governments; to allow transferred lands to be put into trust and included within the definition of Indian country in the Federal criminal code; to allow Alaska Native Tribes to put tribally owned fee simple land similarly into trust; and to

channel more resources directly to Alaska Native Tribal governments for the provision of governmental services in those communities.

- 5.1.D (*Indian Law and Order Commission Recommendation 2.4*): Congress should repeal Section 910 of Title IX of the Violence Against Women Reauthorization Act of 2013 (VAWA Amendments), and thereby permit Alaska Native communities and their courts to address domestic violence and sexual assault committed by Tribal members and non-Natives, just as in the lower 48.
- 5.1.E (*Indian Law and Order Commission Recommendation 2.5*): Congress should affirm the inherent criminal jurisdiction of Alaska Native Tribal governments over their members within the external boundaries of their villages.
- 5.2 The Department of Justice (DOJ) and the Department of Interior (DOI) should provide recurring base funding for Alaska Tribes to develop and sustain both civil and criminal tribal court systems, assist in the provision of law enforcement and related services, and assist with intergovernmental agreements.
  - 5.2.A As a first step, the DOJ and the DOI should—within one year—conduct a current inventory and a needs/cost assessment of law enforcement, court, and related services for every Alaska Tribe.
  - 5.2.B The DOJ and the DOI should provide the funding necessary to address the unmet need identified, and ensure that each Alaska Tribe has the annual base funding level necessary to provide and sustain an adequate level of law enforcement, tribal court, and related funding and services.
  - 5.2.C Congress should enact legislation along the lines of the current bipartisan bill sponsored by both Alaska senators (S. 1474 to be titled Alaska Safe Families and Villages Act of 2014) that supports the development, enhancement, and sustainability of Alaska tribal courts including full faith and credit for Alaska tribal court acts and decrees and the establishment of specific Alaska tribal court base funding streams and grants to Alaska Native Tribes carrying out intergovernmental agreements with the state of Alaska.
  - 5.2.D The federal government should work together with Alaska Tribes and the state of Alaska to improve coordination and collaboration on a broad range of public safety measures that cause Alaska Native children to be exposed to high rates of violence.
- 5.3 The state of Alaska should prioritize law enforcement responses and related resources for Alaska Tribes, and recognize and collaborate with Alaska tribal courts.
  - 5.3.A The state of Alaska should prioritize the state law enforcement response and resources for Alaska Tribes. At a minimum, there must be at least one law enforcement official onsite in each village.

- 5.3.B The state of Alaska should prioritize the provision of needed village-based services including village-based women’s shelters (which allow children to stay with their mothers), child advocacy centers, and alcohol and drug treatment services.
- 5.3.C The state of Alaska should recognize and collaborate with Alaska tribal courts including following existing federal laws designed to protect Alaska Native children and families such as VAWA protection order authority, which requires states to recognize and enforce tribal protection orders that have been issued by tribal courts—including Alaska Native tribal courts—without first requiring a state court certification of the tribal protection order.
- 5.3.D The state of Alaska should enter into self-governance intergovernmental agreements with Alaska Tribes in order to provide more local tools and options to combat village public safety issues and address issues concerning Alaska Native children exposed to violence.
- 5.4 The Administration for Child and Families (ACF) in the Department of Health and Human Services (HHS) and the State of Alaska Office of Children’s Services (OCS) should jointly respond to the extreme disproportionality of Alaska Native children in foster care by establishing a time-limited, outcome-focused task force to develop real-time, Native inclusive strategies to reduce disproportionality.
- 5.5 The Department of Interior (DOI) and the State of Alaska should empower Alaska Tribes to manage their own subsistence hunting and fishing rights, remove the current barriers, and provide Alaska Tribes with the resources needed to effectively manage their own subsistence hunting and fishing.

**GENERAL INFORMATION FORM**

Submitting Entity: ABA Section of Individual Rights and Responsibilities

Submitted By: Mark I. Schickman, Chair  
ABA Section of Individual Rights and Responsibilities

James C. Hanks, Chair  
ABA Section of State and Local Government Law

Angela C. Vigil, Chair  
ABA Commission Domestic and Sexual Violence

Mary Smith, President  
National Native American Bar Association

Vanessa P. Williams, Chair  
ABA Commission on Youth at Risk

Aaron Sohaski, Chair  
ABA Law Student Division

1. Summary of Resolution(s).

This Resolution and Report urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement specific identified recommendations contained in the November 2014 Report of the U.S. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, entitled *Ending Violence so Children Can Thrive*. This Resolution and Report also calls on the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training which educates the legal profession on the issues and recommendations contained in the *Ending Violence So Children Can Thrive* Report, and to help promote the practices proposed in the Report.

2. Approval by Submitting Entity.

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Resolution and Report during its spring meeting on April 25, 2015.

The Council of the Section of State and Local Government Law approved the filing of this Resolution and Report during its spring meeting, April 23-26, 2015.

The Commission on Domestic and Sexual Violence voted to approve the filing of this Resolution and Report on May 5, 2015.

The Commission on Youth at Risk voted to approve the filing of this Resolution and Report on April 30, 2015.

The Law Student Division approved the filing of this Resolution and Report.

The National Native American Bar Association approved the filing of this Resolution and Report during its annual meeting on April 8, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

This Resolution builds upon the fifty-six recommendations contained in the December 2012 *Defending Childhood* Report prepared by the National Task Force on Children Exposed to Violence, which were adopted as ABA policy in 2013 (2013 AM 111B), for how best to improve our current justice and social service systems to serve children who have been exposed to any sort of violence or trauma. While many of the *Ending Violence So Children Can Thrive* Report recommendations are thematically similar to the *Defending Childhood* Report recommendations, they provide additional insight into the particular needs of AI/AN children and the systems that serve them. This Resolution also builds upon the thirty four recommendations contained in the November 2013 *A Roadmap for Making Native America Safer* Report prepared by the Indian Law and Order Commission, which were adopted (except for the new circuit court provision of recommendation 1.2) as ABA policy in 2015 (2015 MM 111A).

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

The Report is not late filed, but the Resolution should be considered at the 2015 Annual meeting because many of the *Ending Violence So Children Can Thrive* Report recommendations are directly aligned with policies previously approved by the American Bar Association House of Delegates. The fifteen identified recommendations of the *Ending Violence So Children Can Thrive* Report are timely and significant.

6. Status of Legislation.

There is no relevant legislation pending.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The sponsoring entities will work with the ABA's Governmental Affairs Office to actively engage in federal and state legislative activities related to this issue.

8. Cost to the Association.

None.

9. Disclosure of Interest.

There are no known conflicts of interest.

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10. Referrals.

This Resolution and Report has been referred to the following entities:

Section of Tort Trial and Insurance Practice  
Section of Litigation  
Criminal Justice Section  
Judicial Division  
Young Lawyers Division  
Government and Public Sector Lawyers Division  
Solo, Small Firm and General Practice Division  
Center for Racial and Ethnic Diversity  
Coalition on Racial and Ethnic Justice  
Council for Racial & Ethnic Diversity in the Educational Pipeline

11. Contact Name and Address Information.

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution and Report urges the United States Administration, the United States Congress, state governments, and tribal governments to promptly implement specific recommendations contained in the November 2014 Report of the U.S. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, entitled *Ending Violence so Children Can Thrive*. This Resolution and Report also calls on the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training which educates the legal profession on the issues and recommendations contained in the *Ending Violence So Children Can Thrive* Report, and to help promote the practices proposed in the Report.

### 2. Summary of the Issue that the Resolution Addresses

The Attorney General's Task Force on American Indian and Alaska Native Children Exposed to Violence was established in 2013. The Task Force was anchored by an Advisory Committee consisting of experts in the area of AI/AN children exposed to violence and federal officials from key agencies. Their November 2013 Report, entitled *Ending Violence So Children Can Thrive*, provides sixty recommendations on addressing issues around AI/AN children exposed to violence.

The *Ending Violence So Children Can Thrive* Report focuses its recommendations on empowering tribes to better serve AI/AN children exposed to violence. However, because tribal governments are vastly implicated by federal laws, many of the *Ending Violence So Children Can Thrive* recommendations are directed at specific legislative and/or executive action.

The Advisory Committee's recommendations call upon both the executive and the legislative branches of government to coordinate in implementing the Report's recommendations that are consistent with three core principles—(1) empowering tribes, (2) removing barriers, and (3) providing resources.

### 3. Please Explain How the Proposed Policy Position will address the issue

This Resolution will encourage the U.S. Administration and Congress, as well as state, local, and tribal governments, to promptly implement all the recommendations offered in the *Ending Violence So Children Can Thrive* Report, and urges the American Bar Association to work with governmental entities, law schools, bar associations, and legal service providers to develop training on the issues and recommendations contained in the Report and to help promote the practices proposed in the Report.

### 4. Summary of Minority Views

No minority views or opposition have been identified at this time.