



2018 REPORT
CHAPTER 71.09 RCW
INDIGENT DEFENSE
REPRESENTATION PROGRAM
(CIVIL COMMITMENT OF INDIVIDUALS CONVICTED OF
SEXUALLY VIOLENT OFFENSES)

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Introduction

Washington law codified at Chapter 71.09 RCW establishes the legal procedure to civilly commit and provide treatment for persons convicted of sex crimes who have completed criminal sentences and are determined by a court to be at high risk for re-offending. Persons civilly committed under this law, as well as those detained pending trial, are held at the Special Commitment Center (SCC) on McNeil Island. Attorneys and judges rely on statutory standards, the input of experts, and the availability of community resources to inform decisions on respondents' progress in the civil commitment process, which typically spans years.

The Washington State Office of Public Defense (OPD) is responsible for ensuring the constitutional right to counsel for indigent respondents in these highly complex cases. Among its duties, OPD is required to report annually on program operations to the Legislature, the Governor, and the Chief Justice of the Washington Supreme Court. This is the sixth annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2018 (July 1, 2017 to June 30, 2018). As required by statute, the report includes the time to trial for commitment proceedings; an update on activities in Chapter 71.09 RCW defense practice; and recommendations for policy changes to improve the civil commitment process.

Chapter 71.09 RCW provides that civilly committed persons who demonstrate progress in treatment and meet certain criteria may be eligible for conditional release to a "less restrictive alternative" (LRA), akin to a carefully supervised halfway house. Much of the policy focus in Fiscal Year 2018 related to the appropriate siting of LRAs in proximity to necessary services and consistent with community interests in ensuring public safety.

Program Administration at OPD

State OPD continues to contract with 21 FTE attorneys and four FTE social work professionals to represent indigent respondents facing civil commitment under Chapter 71.09 RCW. Most of the OPD-contracted attorneys carry a full-time civil commitment caseload and specialize in these cases exclusively. The OPD contract attorneys and social workers are highly experienced in this unique legal practice, with some serving civil commitment clients since before OPD began administering the program in 2012. OPD has observed that continuity of representation by the same legal team promotes trusting relationships with clients and improves client participation in treatment and case planning.

In addition, OPD employs one FTE managing attorney and a .5 FTE program assistant to monitor contract performance, coordinate attorney training opportunities, and authorize payments for defense-related expert services and litigation costs as provided in Chapter 71.09 RCW. The OPD managing attorney also assists the trial court when a respondent elects to represent himself pro se

or with standby counsel, and screens for ethical conflicts of interest related to an attorney's current or former representation of RCW 71.09 respondents.

Update of Activities in RCW 71.09 Defense Practice

Organizing and implementing community-based LRAs continues to be a challenge, especially in less populous counties where necessary services are not readily available. In FY 2018 respondents' attorneys met with prosecutors and the Department of Social and Health Services (DSHS), as well as other stakeholders¹, to discuss approaches to develop LRA resources in more counties across the state. These resources include housing, sex offender treatment and other therapeutic programs, and other wraparound services such as case management, employment and education. Outside of Pierce, King and Snohomish counties, which tend to have robust community-based services, DSHS started placing individuals conditionally released into the community at designated facilities in Kitsap, Grays Harbor, Spokane, and Whatcom counties.²

Specialized Training. During 2018, OPD's contracted attorneys and social workers attended several specialized trainings, including two OPD-sponsored continuing legal education programs. Topics featured: developing evidence-based community LRAs; a summary of new 71.09 case law; and using current brain research and science associated with adolescent development in representing individuals who primarily offended as juveniles.

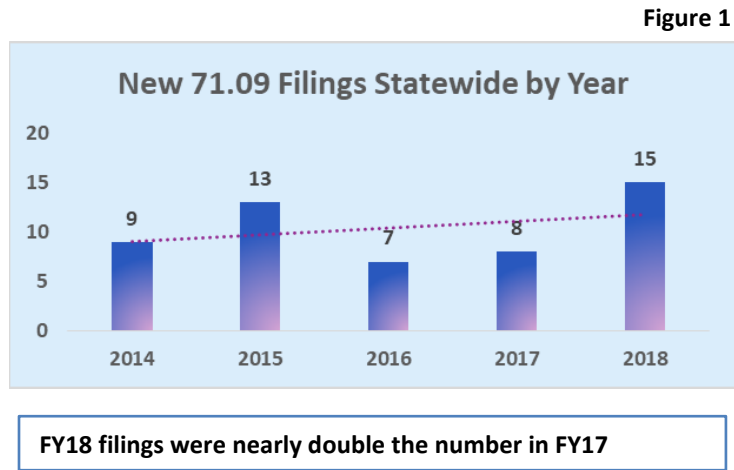
In October, the Association for the Treatment of Sexual Abusers (ATSA) hosted the world's largest annual conference for professionals working on issues related to the treatment, management, and research of sexual abuse in Vancouver, B.C. Because of the relatively close location, a majority of OPD's contracted attorneys and social workers were able to attend, as were assistant attorneys' general, King County deputy prosecutors, sex offender treatment providers (SOTPs), and forensic staff from the Special Commitment Center.

¹ These stakeholders include DSHS-SCC Administration, SCC Forensic Unit staff, the Attorney General's Office, the King County Prosecuting Attorneys' Office, the Washington Association for Treatment of Sex Abusers, and local housing providers.

² Facilities are operated by West Sound Services, Second Chance Enterprises, and the Lincoln House.

Pre-Commitment Filings, Litigation, and Negotiations

New Filings. During Fiscal Year 2018, prosecutors³ filed 15 new petitions⁴ for civil commitment and these cases are currently in various stages of litigation and negotiation. This is equal to the number of petitions filed during FY16 and FY17 combined. The last year has seen an increase in petitions filed against individuals who had been residing at Western State Hospital, which discharged three Chapter 71.05 RCW respondents with sexual criminal history. Due to the seriousness of their mental illness, the prosecuting agencies then filed Chapter 71.09 RCW petitions seeking to detain them for further treatment at the Special Commitment Center.



Continuances. RCW 2.70.025(6)(b) requires OPD to report on case continuances. Trial courts granted five continuances in initial commitment cases set for trial during FY18, continuing the decrease from eight continuances in the previous fiscal year, 11 continuances in FY16, 22 in FY15, and 39 in FY14.⁵ During the last few years, the number of continuances per respondent and the duration of continuances have decreased. This may be due in part to many respondents' early engagement in treatment. By the time a commitment case nears initial trial, the respondent will have completed at least a year of treatment at the SCC. As such, some respondents choose to stipulate to commitment, which allows them to pursue treatment with the future goal of a conditional release.

Table 1

County	Initial Commitment Continuances
King	2
Kitsap	1
Skagit	1
Snohomish	1
Total	5

Table 1 identifies the counties in which continuances were granted in initial commitment cases in FY18. Nearly all continuances were agreed by the court and both parties, usually for purposes of negotiations and trial preparation. The duration of the continuances varied.

³ The King County prosecuting attorney (KCPAO) files Chapter 71.09 RCW cases in King County. The Washington Attorney General (AGO) files Chapter 71.09 RCW cases in all other counties.

⁴ In FY18 the AGO received nine referrals and filed seven cases; KCPAO received 41 referrals and filed eight cases.

⁵ The data used for Tables and Figures in this report are derived from JIS-SCOMIS, the DSHS-SCC resident monthly rosters, and county sex offender registries.

Case Outcomes. Fourteen initial civil commitment proceedings were completed during FY18. Ten commitment cases were completed the previous year. As illustrated in Table 2, the completed cases in FY18 resulted in nine new commitments to the Special Commitment Center (four through stipulation, and five through trials), one dismissal before trial, and four trials resulting in no commitment.

Table 2

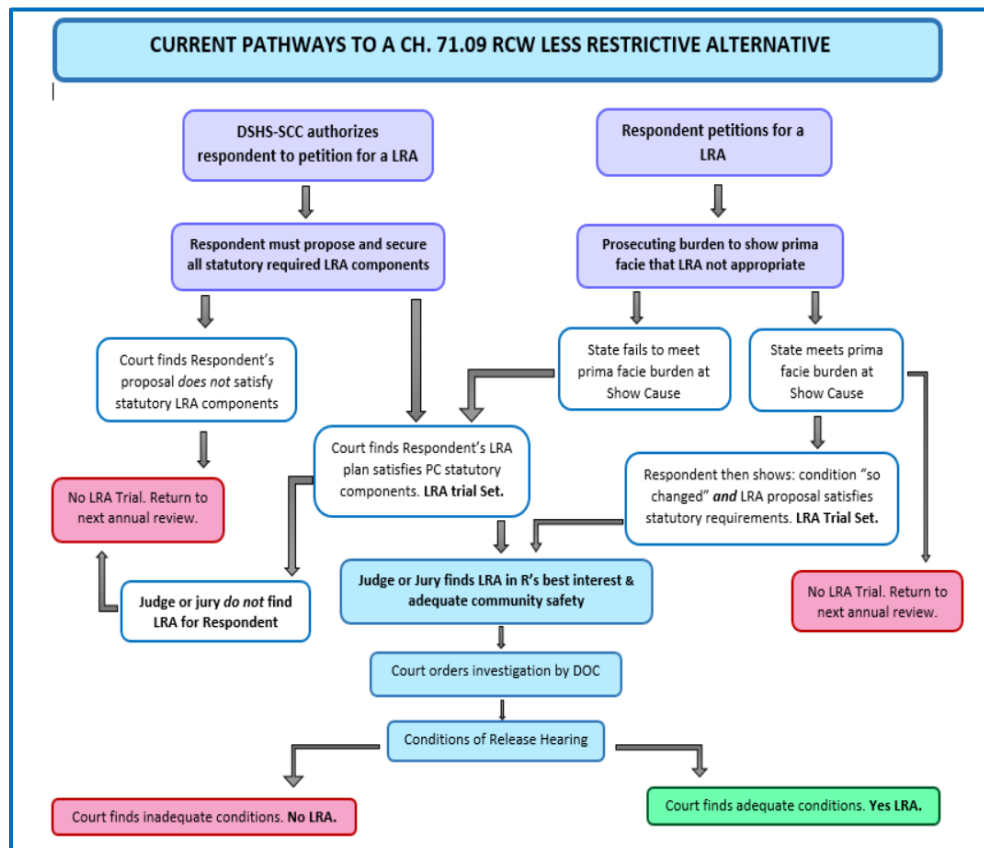
Commitment Trial Outcomes for FY18	Number
Verdict of Commitment	5
Stipulation to Commitment	4
Verdict of No Commitment	4
Dismissal of Commitment Petition	1

Annual Review and Post-Commitment Litigation and Negotiation

Annual Review.

Each respondent is entitled to an annual case review in which DSHS assesses whether the respondent continues to meet the definition of sexually violent predator (SVP) and must remain confined at the Special Commitment Center. Alternatively, DSHS may find that a

Figure 2



respondent still meets the definition of SVP, but has sufficiently progressed with treatment to be

conditionally released under supervision to a “less restrictive alternative” (LRA). In addition, regardless of DSHS’s annual review recommendation, the individual respondent is permitted under RCW 71.09.090 to petition the court for release to an LRA or an unconditional discharge. See Figure 2 for a diagram of the current post-commitment process associated with LRAs.

Less Restrictive Alternative. Guided by expert evaluation and analysis for each respondent, the parties often are able to avoid trial and negotiate conditions for an appropriate LRA that meets the respondent’s needs and ensures public safety. In FY18, courts approved 17 LRAs negotiated by the state and the defense. In addition, four contested LRA trials were held in FY18; the defense won one and the state prevailed in three. See Figure 3.

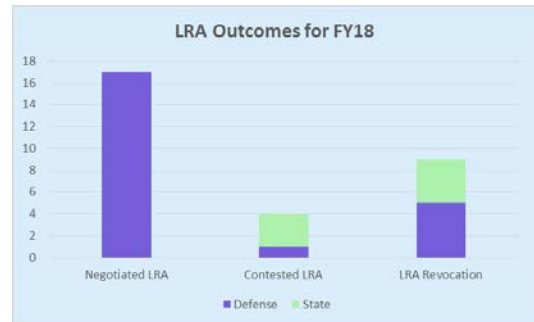
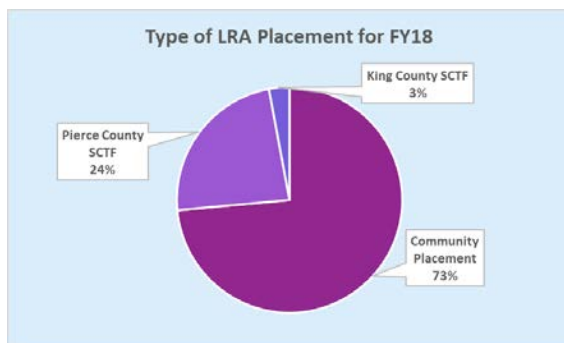


Figure 3

Figure 4



The community supervision associated with an LRA under Chapter 71.09 RCW is stricter than Department of Corrections community supervision imposed on criminal defendants, including non-71.09 level three sex offenders. When a 71.09 respondent is approved for conditional release from commitment at the SCC to an LRA, the court imposes terms and conditions, which if violated, can lead to revocation and/or modification of the LRA.

The court also may revoke/modify an LRA when the respondent needs additional treatment or specialized care. Respondents who demonstrate sustainable progress in their LRA can petition the court to decrease their LRA conditions as they move closer to unconditional discharge. This is also referred to as a step-down LRA.

Unconditional Discharge. When the court determines that a respondent no longer meets the SVP criteria under Chapter 71.09 RCW, he or she is released without conditions. However, many discharged respondents will be supervised by the Department of Corrections (DOC) for up to two years related to their underlying criminal sentence. Respondents subject to DOC supervision are required to follow a long list of conditions, including: GPS monitoring, sex offender registration, point to point check-ins, community sex offender treatment, regular check-ins with a community corrections officer, employment, travel restrictions, polygraphs, restricted internet use, and prohibited use of alcohol and non-prescribed medications. A respondent requests the court to order unconditional discharge by petitioning the court for a show cause hearing. DSHS’ annual review results, along with other information, are evaluated by the court to determine whether

probable cause exists to support further consideration of the respondent's petition. If so, the court sets the matter for trial. The majority of unconditional discharges are negotiated by the parties without a trial.

In FY18, 13 respondents achieved unconditional discharge by negotiated agreement of both parties. As the 71.09 practice evolves into post-commitment conditional releases, there are fewer contested petitions for unconditional discharge. Because the number of conditional releases has increased, and more individuals have been successful on their step-down LRAs, the need for a contested unconditional discharge trial has decreased.

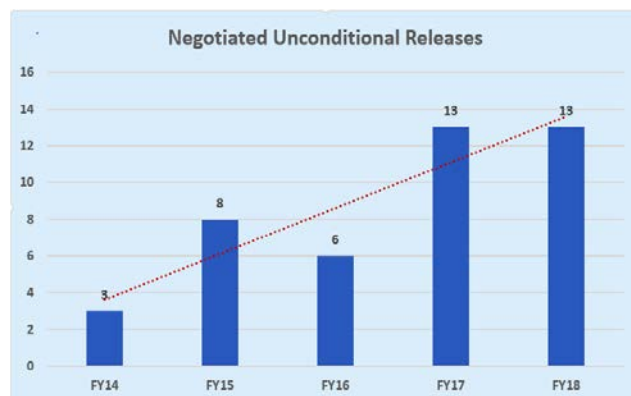


Figure 5

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve Chapter 71.09 RCW civil commitment proceedings. Based on policy discussions over the years as well as recent observations of the civil commitment process, OPD recommends the following to improve the system's overall effectiveness:

- **Streamline Less Restrictive Alternatives and update Chapter 71.09 RCW**

During the last year, 71.09 stakeholders met and collaborated on proposals to ensure that individuals ready for an LRA are conditionally released in a safe and timely manner. Because Chapter 71.09 RCW was originally drafted for individuals in need of long-term detention, conditional releases were rare in the early years. The systemic infrastructure necessary to create and sustain successful LRAs has been fragmented in its development.

In 1990, Washington was the first state to enact a civil commitment statute for those convicted of sexually violent offenses. Since then, 19 other states have enacted similar statutes. Wisconsin and New Jersey recently amended their statutes to incentivize and streamline LRAs. Research during the last 10 years shows indefinite commitment is not always necessary to ensure public safety, and that individuals benefit from gradual conditional release.

Disability Rights Washington (DRW) and the Washington Defender Association (WDA) have drafted a legislative proposal with input from a variety of stakeholders to address the need for a formalized LRA process and to incentivize well-supported LRAs throughout the state.

- **Fund release plan specialists for DSHS-SCC**

As more respondents progress in treatment and prepare for an LRA or unconditional release, there is an increasing need for a specialized position to assist with locating appropriate community housing, securing certified sex offender treatment providers, arranging court-ordered transportation and chaperone services, enrolling eligible respondents in federal and state benefits, and various other services to support successful transition from the SCC to the community. DSHS-SCC has requested funding for this position in their last two budget requests to the Legislature.

- **Develop chaperone services for Less Restrictive Alternatives**

Pursuant to RCW 71.09.200-230, "Escorted leave" means a leave of absence from a facility housing persons detained or committed pursuant to this chapter under the continuous supervision of an escort. "Escort" means a correctional officer or other person approved by the superintendent or the superintendent's designee to accompany a resident on a leave of absence and be in visual or auditory contact with the resident at all times. This section of the statute was intended for short, infrequent trips from McNeil Island for medical visits or attendance at a funeral of a family member.

During the last five years, DSHS has administratively extended this "Escort" provision to individuals conditionally released anywhere in the state. The majority of conditional release orders require the respondent to locate an approved chaperone or chaperones to accompany him or her on any trip outside of the court-approved placement. Locating, hiring, and training these chaperones falls on the defense legal team. Because DSHS has now made this a requirement for conditional release, it should be responsible for developing a pool of well-trained chaperones across the state. A lack of chaperones has created a significant obstacle to developing LRAs.