

**2014 REPORT ON THE CHAPTER 71.09 RCW  
INDIGENT DEFENSE REPRESENTATION PROGRAM  
(SEXUALLY VIOLENT PREDATOR)**

**Washington State Office of Public Defense  
2014**

Washington State Office of Public Defense  
711 Capitol Way South, Suite 106  
P O Box 40957  
Olympia, WA 98504-0957

## *The Office of Public Defense Advisory Committee*

*The Honorable Bobbe J. Bridge, Chair*  
*Retired, Washington State Supreme Court*

*Professor Helen Anderson*  
*University of Washington School of Law*

*The Honorable Sherry Appleton*  
*Washington State House of Representatives*

*The Honorable Patricia Clark*  
*Retired, King County Superior Court*

*Robert Flennaugh II*  
*The Law Office of Robert Flennaugh II, PLLC*

*Gerald Hankerson*  
*President, Seattle Chapter, NAACP*

*Jane Ragland-Kirkemo*  
*Association of Washington Cities*

*The Honorable Kathy Lambert*  
*Washington State Association of Counties*

*The Honorable Mike Padden*  
*Washington State Senate*

*Sharon Paradis*  
*Retired, Benton-Franklin Juvenile Court Administrator*

*The Honorable Jamie Pedersen*  
*Washington State Senate*

*The Honorable Karen Seinfeld*  
*Retired, Court of Appeals*

*The Honorable Matt Shea*  
*Washington State House of Representatives*

## *The Office of Public Defense*

*Joanne I. Moore, Director*  
*Sophia Byrd McSherry, Deputy Director*  
*711 Capitol Way South, Suite 106*  
*P.O. Box 40957*  
*Olympia, Washington 98504-095*

## Introduction

---

Chapter 71.09 RCW provides the process by which sexually violent predators (SVP) are committed to the Special Commitment Center (SCC), and works towards various levels of release based on demonstrated rehabilitation and public safety risk levels. Attorneys and judges rely on these statutory protections, the input of field experts and the availability of community resources to inform decisions on respondents' progress in the civil commitment process.

The Office of Public Defense (OPD) has completed its second year administering the statewide Chapter 71.09 RCW Indigent Representation Program. As part of its statutory duties under RCW 2.70.025, OPD provided oversight and training to ensure that its contracted attorneys received the necessary support to effectively represent their clients and are well-versed in the latest research related to RCW 71.09 civil commitment. OPD's contracted attorneys continued to prepare and complete pre-commitment trials in a timely manner, resulting in fewer clients lingering in pre-commitment status. The SCC also continued to complete more overdue annual review reports. These reports, along with expert evaluations and use of evidence-based risk assessment tools, helped in identifying appropriate candidates for release to a less restrictive alternative (LRA). In the vast majority of cases set for LRA trials, both parties reached agreement on appropriate release conditions to an LRA based on respondents' recovery levels and community safety needs.

This report was prepared in response to the statutory requirement that OPD report annually on program operations to the Legislature, the Governor, and the Chief Justice.<sup>1</sup> This report includes time to trial for commitment trial proceedings; update on activities in Chapter 71.09 RCW defense practice; and recommendations for policy changes appropriate for the improvement of sexually violent predator proceedings. This is the second annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2014 (July 1, 2013 to June 30, 2014).<sup>2</sup>

## OPD Administration of the Program

---

OPD's group practice representation model, as described in OPD's 2012 Proposal to the Legislature, continues to be effective. OPD oversees contracts with nine firms, totaling 23 attorney FTEs, to provide representation of indigent respondents in Chapter 71.09 RCW proceedings throughout the state. Most of the OPD-contracted attorneys carry a full-time civil commitment caseload and specialize in these cases exclusively. In addition to paying the costs of indigent defense representation, OPD provides oversight necessary to effectively manage the program. OPD's role is

---

<sup>1</sup> RCW 2.70.025(6)

<sup>2</sup> The first 71.09 RCW Report (2013) to the Legislature can be found at [http://www.opd.wa.gov/documents/0183-2013\\_CC-AnnualReport.pdf](http://www.opd.wa.gov/documents/0183-2013_CC-AnnualReport.pdf)

key to ensuring that the contract attorneys have the support necessary for effective representation while carefully managing the costs of the program.

During 2014, OPD worked with the Attorney General's Office in an effort to address challenges shared by both parties. Similarly, the defense attorneys, with the assistance of OPD-contracted social workers, worked with stakeholders from the Department of Corrections (DOC), the SCC, and in the community (housing and treatment providers) to address ongoing challenges of identifying appropriate housing and support services for respondents, particularly those who are older or who are progressing through treatment and are ready to transition out of the main facility.

As part of OPD's responsibility to assure that clients receive effective representation, the agency has implemented several measures to provide contract attorneys with necessary training and support, including the following:

- **Observing attorneys in court.** During 2014, the OPD managing attorney observed contract attorneys in several pre- and post-commitment trials and Frye hearings across the state.
- **Meetings with attorneys.** The OPD managing attorney met with each contract attorney in spring 2014 prior to offering a contract renewal in order to discuss the attorney's performance and any practice concerns identified by the attorney.
- **Troubleshooting case issues.** Ongoing communication allows the OPD managing attorney to identify and rectify issues that may emerge, such as working with the court when a respondent wants to appear pro se or with standby counsel, responding to trial support requests, and so forth.
- **Providing trainings to attorneys.** During 2014, OPD coordinated three continuing legal education (CLE) seminars for contract attorneys.
- **Monitoring attorney appointments to avoid conflicts of interest.** The OPD managing attorney works with the contract attorneys, the court and the state to address and resolve potential ethical conflicts of interest related to an attorney's current or former representation of RCW 71.09 respondents.

## Procedural Overview & Updates on Activities in RCW 71.09 Defense Practice

### Phase 1 – Pre-Commitment Trials

Civil commitment trials continued to be held in a timely manner during FY14.<sup>3</sup> In FY14, there were approximately 37 continuances of pre-commitment cases set for trial. RCW 2.70.025(6)(b) requires OPD to report annually on the nature of pre-commitment trial continuances.

Table 1

Party Requesting Continuances in Pre-Commitment Trials FY14						
	Defense	State	Agreed	Court	Unknown	Total
Benton			1			1
Clark					1	1
Cowlitz			1			1
Island	1					1
King	3		5	3		11
Kitsap			1			1
Clallam			1			1
Mason			1			1
Pierce	1	2	1		1	5
Snohomish		1				1
Spokane		2	3	1		6
Walla Walla	1			1		2
Whatcom		1	1			2
Yakima	1	1	1			3
<b>Total</b>	<b>7</b>	<b>7</b>	<b>16</b>	<b>5</b>	<b>2</b>	<b>37</b>

Table 1 illustrates the counties in which such continuances were granted and the party requesting the continuances. The majority of continuances were agreed upon by the court and both parties, usually for purposes of gathering additional information.

### Phases 2 and 3 -- Annual Review and Post-Commitment Trials

Annual reviews are the cornerstone upon which the constitutionality of Chapter 71.09 RCW rests.<sup>4</sup> They serve as a tool to determine whether a person continues to meet the criteria to qualify as an SVP, or has

*Annual reviews are the cornerstone upon which the constitutionality of Chapter 71.09 RCW rests.*

<sup>3</sup> In FY14, the State filed nine new petitions for civil commitment under Chapter 71.09 RCW, and OPD-contracted attorneys completed nine pending pre-commitment trials.

<sup>4</sup> See *State v. McCuisiton*, 174 Wash.2d 369, 393, 275 P.3d 1092 (2012). The Supreme Court found that the annual review phase satisfies due process, in part due to the “extensive procedural safeguards” in place requiring the state to prove beyond a reasonable doubt that the SVP is mentally ill and dangerous at the initial commitment hearing and that the state justifies continued incarceration through annual reviews. *Id.* at 388, 393.

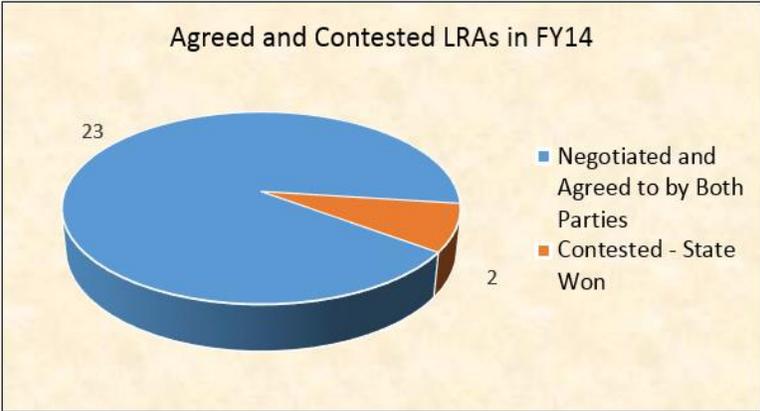
rehabilitated to the extent that he or she can be released with supervision. RCW 71.09.070 directs that each committed person shall have an annual examination of his or her mental condition by the Department of Social and Health Services (DSHS). For the annual review, DSHS determines whether the respondent continues to meet the definition of an SVP, or whether a “less restrictive alternative” (LRA) can adequately protect the community, or in extremely rare situations, whether an unconditional discharge is appropriate. In addition, regardless of DSHS’s recommendation, the respondent is permitted under RCW 71.09.090 to petition the court for release to an LRA or an unconditional discharge.

Extensive steps beyond the annual review are required to earn release to an LRA. When a respondent files a petition, the court sets a “show cause” hearing to determine whether probable cause exists to warrant a trial. This constitutes Phase 2 of the litigation process. If the court finds probable cause, a trial is set. The court will find probable cause if the state fails to meet its burden or, alternatively, if the respondent establishes probable cause to believe his “condition has so changed”<sup>5</sup> that he no longer meets the definition of an SVP or that release to a less restrictive alternative would be appropriate.

*Use of evidence-based research and assessment tools ensures that respondents are only released to LRAs when the risk to public safety is low and manageable.*

Once a judge has determined that probable cause exists, the state and the defense litigate the issue of whether the respondent meets the standards for an LRA. In FY14, courts granted 23 LRAs. Each one was agreed upon by the state and the defense, based on psychological testing and evaluations of the respondents as well as availability of resources in the communities to which they were released. Two LRA contested trials occurred in FY14, and both were won by the state. See Table 2.

Table 2



In FY14, 25 LRAs were resolved.

<sup>5</sup> RCW 71.09.090(4)(a).

Similar to achieving LRAs, when a respondent wishes to progress from an LRA to an unconditional discharge, he or she must petition the court for a show cause hearing. Again the annual review results, along with other information, are evaluated by the court to determine whether probable cause exists. If so, the court will set the matter for trial.

In the time leading up to trial, both parties continue to use experts for purposes of evaluating the respondent's eligibility for unconditional discharge. Like LRAs, in the majority of these cases, both sides negotiate and agree to unconditional discharges. In FY14 five respondents successfully petitioned for unconditional release trials after demonstrating probable cause. Three were granted unconditional discharges that were agreed upon by both parties, based on psychological testing and evaluations, as well as availability of resources in the communities to which they were released. Two cases proceeded to trial, and the respondents were recommitted.

## Increased Activity in Post-Commitment Hearings in FY14

---

The number of post-commitment hearings rose in FY14.<sup>6</sup> Several factors influenced the increase: the reduction of the backlog of overdue annual review; aging respondents who pose less risk to the community; respondents' increased incentive to actively engage in treatment; and a new requirement for Frye hearings to determine the reliability of risk-assessment tools.

### Reduction in Backlog of Annual Review Evaluations

Increased hearings and releases from the SCC may be attributable to the combination of emerging psychological research on re-offense risk rates, along with reductions in annual review backlogs. As described earlier, each respondent is entitled to an annual review. In recent years, the SCC has reduced a backlog in its annual review production.<sup>7</sup> With annual reports in hand, the state and defense counsel can move more productively towards identifying appropriate placements.

For many years, RCW 71.09 cases idled. There was little research on the future risk of sexually violent predators after their commitment. Recent research, along with judicial oversight ensuring the constitutional rights of the respondents, has triggered a shift in the movement of RCW 71.09 cases. The research helps the court determine if a respondent is ready to move on and if the risk to public safety is low and manageable. This shift has required increased involvement by the courts, attorneys and experts who evaluate the respondents.

---

<sup>6</sup> In FY13, the state and defense resolved 12 LRA trials, and in FY14 they resolved 23 LRA trials.

<sup>7</sup> WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SPECIAL COMMITMENT CENTER FOR SEXUALLY VIOLENT PREDATORS: POTENTIAL PATHS TOWARD LESS RESTRICTIVE ALTERNATIVES 21 (2013) *available at* [http://www.wsipp.wa.gov/ReportFile/1118/Wsipp\\_Special-Commitment-Center-for-Sexually-Violent-Predators-Potential-Paths-toward-Less-Restrictive-Alternatives\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1118/Wsipp_Special-Commitment-Center-for-Sexually-Violent-Predators-Potential-Paths-toward-Less-Restrictive-Alternatives_Full-Report.pdf).

## Aging Population at the SCC

Commitment was once a life sentence. Prior to FY05, only two avenues led to release from the SCC: (1) not meeting the criteria for civil commitment at the commitment trial and (2) death. Recidivism by sex offenders – particularly those who target adult victims – has been determined to be very low after age 60.<sup>8</sup> Consequently, at their annual reviews many older SCC respondents no longer meet the criteria for civil commitment or have reached the point where they are ready for an LRA or unconditional release.<sup>9</sup>

Older respondents made up the majority of unconditional releases during the last three years, and the number of aging respondents at the SCC is expected to increase. Consequently, the number of older respondents, particularly over the age of 70, is expected to result in age-related health care issues and their associated costs will increase as time goes by.<sup>10</sup> Age related health care issues can slow the legal process considerably for these respondents, resulting in long delays. Some respondents have died from age-related health issues while awaiting trial or release to an LRA.

## Court Mandates Proof that Assessment Tools are Evidence-Based

Division III of the Court of Appeals<sup>11</sup> recently decided that a risk actuarial tool commonly used by the state – the SRA-FV – impermissively was not subjected to required peer review to determine its effectiveness in predicting a respondent’s future dangerousness. This ruling has had an impact across the field as an additional evidentiary hearing (commonly known as a Frye<sup>12</sup> hearing) has been required in individual cases to determine the SRA-FV’s reliability. Expert reports and testimony at these hearings were a source of increased expenditures in FY14.

## Expert Costs Correspond to Post-Commitment Releases to LRAs

The increased availability of annual review reports, research on respondent risk levels, and other factors present in recent RCW 71.09 litigation have caused the upturn in court post-commitment activities. State and defense experts play an indispensable role in determining whether respondents may appropriately transition to LRAs, as well as deciding what levels of services must be provided in LRAs. The increased litigation, therefore, has resulted in increased expert services. During FY14, the number of agreed LRAs and unconditional releases have correspondingly increased. In FY14, expert service expenses for phase 2 and phase 3 LRA hearings increased by about 40 percent, from \$569,811.65 in FY 2013 to \$962,539 in FY14. As noted earlier, most LRAs in 2014 were decided through agreement after the state and defense expert opinions were considered by the parties.

---

<sup>8</sup>WASHINGTON STATE INSTITUTE OF PUBLIC POLICY, DSHS SPECIAL COMMITMENT CENTER: POPULATION FORECAST, REVISED 8 (2012), available at [http://www.wsipp.wa.gov/ReportFile/1109/Wsipp\\_DSHS-Special-Commitment-Center-Population-Forecast-Revised\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1109/Wsipp_DSHS-Special-Commitment-Center-Population-Forecast-Revised_Full-Report.pdf).

<sup>9</sup> *Id.* at 12.

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *In re Detention of Ritter*, 177 Wash.App. 519, 312 P.3d 723 (2013).

<sup>12</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* requires that courts hold a hearing to determine whether evidence deriving from a scientific theory or principle has achieved general acceptance in the relevant scientific community. *Id.* at 1014.

Table 3



The increased use of expert services in FY 14 correlated with the increase in LRA hearings, almost all of which were agreed by the parties.

## Policy Recommendations

---

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve SVP civil commitment proceedings.<sup>13</sup> Based on a review of SVP policy discussions over the years as well as recent observations of the civil commitment process, OPD believes the following recommendations would enhance defense efficiencies during the process and improve the system’s overall effectiveness.

- **Allow audio recording or attorney observation of respondents’ annual review evaluations.** This request was first presented to the 2013 Legislature in House Bill 1081. It would permit defense counsel to make an audio recording of or personally observe the annual review examination of a respondent, at the respondent’s request. This would allow defense counsel to have first-hand knowledge of the SCC evaluation, rather than have to rely on sometimes inconsistent accounts of the interview as perceived by the evaluator and the respondent. During the 2014 legislative session, a similar provision was included in Substitute Senate Bill 5965.

---

<sup>13</sup> RCW 2.70.025(6)(c).

- **Develop and provide appropriate treatment for SCC respondents with special needs.** Lack of adequate treatment for respondents with special needs<sup>14</sup> continues to be an ongoing concern for OPD-contracted defense attorneys and other stakeholders as discussed in OPD's 2013 annual report. In 2014, the watchdog organization Disability Rights Washington (DRW) visited the SCC several times and met with respondents identified as having a disability. DRW has expressed concern about the treatment of respondents with disabilities, including access to appropriate treatment programs and other services, and plans to continue monitoring this in 2015.
- **Provide for an ombudsman or independent body to monitor the care and treatment of respondents under the care of DSHS.** In 2012, the Legislature amended Chapter 71.09 RCW to exclude certain activities as beyond the scope of representation for an OPD-contracted attorney providing indigent defense services in sexually violent predator civil commitment proceedings. These limitations include investigation or legal representation challenging the conditions of confinement at the SCC or any secure community transition facility, and legal representation or advice regarding filing a grievance with DSHS as part of its grievance policy or procedure.<sup>15</sup> As such, the respondents' only recourse is to file a grievance on their own. Many respondents are unable to read and write, have serious mental health issues, including lack of competency, and have cognitive and developmental disabilities. Others have serious medical disabilities, including cancer and dementia. An ombudsman or other independent body would help ensure respondents are able to raise these important issues.

---

<sup>14</sup> Special needs include: severe mental illness, cognitive impairments, fetal alcohol syndrome, developmental disabilities, dementia, and non-English speaking and American Sign Language speaking.

<sup>15</sup> RCW 71.09.045(1) and (3).