



2019 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.

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 seventh annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for Fiscal Year 2019 (July 1, 2018 through June 30, 2019). 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 highly secure and carefully supervised halfway house. The policy focus in Fiscal Year 2019 mirrored that of Fiscal Year 2018: the appropriate siting of LRAs in proximity to necessary services and consistent with community interests in ensuring public safety.

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. In addition, OPD employs 1 FTE managing attorney and a .35 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

Last year, OPD reported that organizing and implementing community-based LRAs continues to be a challenge, especially in less populous counties where necessary services are not readily available. During the last two years, respondents’ attorneys, the nonprofit advocacy group Disability Rights Washington (DRW), and OPD 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.

The fundamental issue that emerged from the stakeholder meetings is that equitable placement of LRAs across the state starts with DSHS. While Chapter 71.09 RCW requires the respondent to present the court with an appropriate LRA placement, the authority and financial means to contract with placements lies with DSHS. The resources necessary for an LRA include housing, sex offender treatment and other therapeutic programs, as well as wraparound services such as case management, employment, and education. In addition to Pierce, King and Snohomish counties, which tend to have robust community-based services, DSHS also started placing individuals conditionally released into the community at designated facilities in Kitsap, Grays Harbor, Spokane, Walla Walla, and Whatcom counties.²

Legislation and Stakeholder Input. After the close of the 2019 legislative session, State Representative Christine Kilduff invited 71.09 stakeholders and members of the community to participate in a workgroup studying the challenges in the current LRA system under Chapter 71.09 RCW. In June 2019, the Special Commitment Center led a 71.09 stakeholder forum. During this forum, stakeholders expressed similar visions regarding the purpose of the LRA system, which is to ensure respondents receive appropriate care and treatment and ensure adequate conditions to protect the public so respondents can safely transition back into their communities.



RCW 71.09 defense attorney Marla Polin presenting at a CLE in 2019.

Specialized Training. During 2019, OPD’s contracted attorneys and social workers attended several specialized OPD-sponsored continuing legal education (CLE) programs. Topics featured were: post-sentencing relief from legal financial obligations for clients with mental impairments, effectively communicating technical evidence to fact-finders, using depositions as an effective discovery tool, and an attorney’s ethical responsibility to craft orders of release conditions that can be followed by clients with special needs or mental impairments.

¹ These stakeholders include DSHS-SCC Administration, SCC Forensic Unit staff, DRW, the Attorney General’s Office, the King County Prosecuting Attorneys’ Office, the Pierce County Prosecuting Attorneys’ Office, the Washington Association for Treatment of Sex Abusers, the Washington State Department of Corrections, local housing providers, and community members.

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 2019, prosecutors³ filed six new petitions for civil commitment and these cases are currently in various stages of litigation and negotiation. During the first six months of Fiscal Year 2020 the State filed eight new petitions.

Continuances. RCW 2.70.025(6)(b) requires OPD to report on case continuances. Trial courts granted 10 continuances in initial commitment cases set for trial during FY19, five continuances in

Counties	# Continuances
Clark	1
King	7
Snohomish	1
Thurston	1

Table 1 identifies the counties in which continuances were granted in initial commitment cases in FY19.

FY18, eight continuances in FY17, 11 continuances in FY16, 22 in FY15, and 39 in FY14.⁴ While the number of continuances increased in FY19, the overall time to trial continued to decrease.⁵ FY18 also saw a high number of new filings (15), leading to an increase in initial commitment cases being set for trial, thereby resulting in more continuances. Some of the reasons for continuances include additional discovery provided by the State, preparing for other clients' earlier trial dates and post-commit hearings, a client's health, and judicial scheduling conflicts.

Case Outcomes. Twelve initial civil commitment proceedings were completed during FY19. Nine commitment cases were completed the previous year. As illustrated in Figure 1, the completed cases in FY19 resulted in nine new commitments to the Special Commitment Center (four through stipulation, and five through trials), and three dismissals before trial.

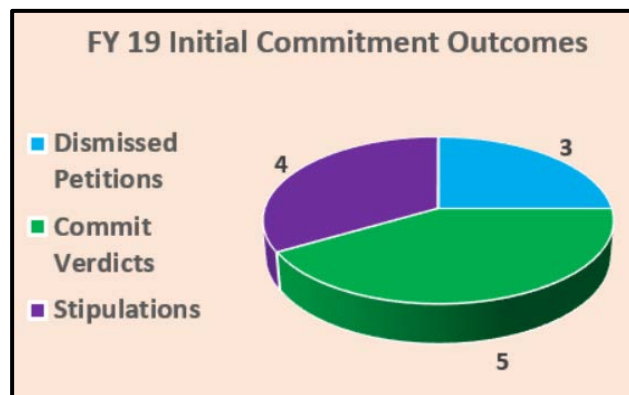


Figure 1 shows the outcomes of 12 initial commitment proceedings in the trial courts.

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 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.

⁵ The majority of initial commitment trials took place nine to 18 months after the initial petition was filed. In 2019, two initial commitment trials resulted in a hung jury. Both cases began new trials less than six months after the mistrial dates.

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 statutory definition of sexually violent predator (SVP) and must remain confined at the Special Commitment Center (SCC). Alternatively, DSHS may find that a respondent still meets the definition of SVP, but has sufficiently progressed with treatment to be conditionally released under supervision to an 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.

Less Restrictive Alternative. In FY19, courts approved 27 LRAs negotiated by the State and the defense. In addition, the defense secured five contested LRAs in FY19 and the state prevailed in one LRA trial.

The community supervision associated with an LRA under Chapter 71.09 RCW is stricter than the Department of Corrections (DOC) 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. In FY 19, 18 respondents achieved unconditional discharge by negotiated agreement of both parties. 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 respondents will be supervised by DOC for up to two years related to the underlying criminal sentence. Respondents

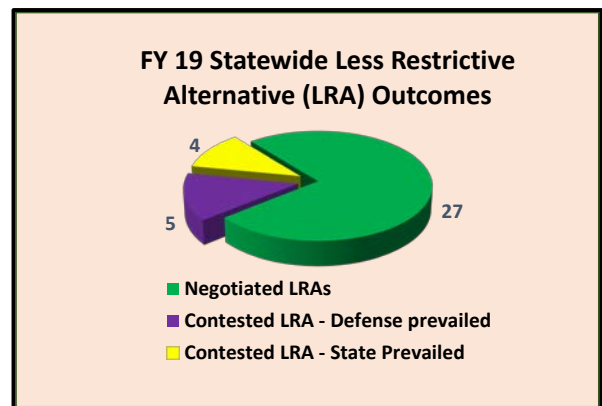


Figure 2. Courts order LRAs only when the residents have demonstrated successful completion of treatment at the SCC, and the placement poses no risk to the community.

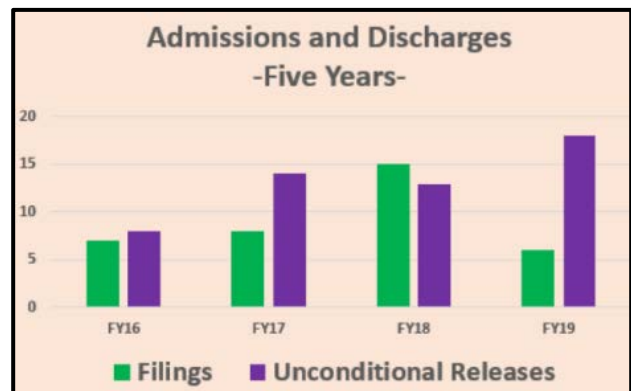


Figure 3. Discharges slightly outnumber filings resulting in a steady flow of reentries into the community.

subject to DOC supervision are required to follow an exhaustive list of conditions.⁶

Developments and Challenges in 2019

Developments. The length of time from filing a civil commitment petition to achieving unconditional discharge has decreased over the years. Between 2007 and 2012, 26 respondents were unconditionally released. Between 2013 and 2019, 66 respondents were discharged. During this period, the defense bar also has succeeded in reducing the number of detainees waiting for trial or resolution to their initial commitment. These developments are consistent with the statute's rehabilitative goals.

Challenges. As more persons demonstrate eligibility for release from total confinement at the SCC, the overriding challenge has become a lack of appropriate community housing – for LRAs as well as for unconditional discharges. As soon as a court orders conditional release to an LRA, that individual no longer meets the statutory criteria to be held in total confinement at the SCC. Unfortunately, under the current LRA system though, the burden to locate suitable housing largely falls on defense counsel yet the authority and financial means to contract with placements lies solely with DSHS.

With another community LRA housing facility⁷ at risk due to local zoning restrictions, and the recent closure of a facility designated for respondents who are part of the class-action federal lawsuit brought by DRW, the available housing in the community will be substantially reduced, making it much more difficult for DSHS to meet its obligations under the statute.

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for policy changes that may improve Chapter 71.09 RCW civil commitment proceedings. In December 2019, the defense, prosecution, and DRW provided Representative Kilduff with draft legislation to address the challenges discussed above. Some of these recommendations are born out of the 2017 federal settlement between DSHS and

⁶ This includes: 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. For a detailed description of standard release conditions, please see OPD's Ch.71.09 RCW FY2015 Report to the Legislature http://www.opd.wa.gov/documents/0357-2015_CC-Report.pdf.

⁷ In 2017, DSHS-SCC entered into a contract with a community housing provider in Poulsbo, Washington. The first residents moved into the house in early 2018. In November 2018 the city council passed a zoning ordinance that would effectively shut down the home as a 71.09 LRA provider. The ordinance is being appealed. <https://www.kitsapsun.com/story/news/2018/12/03/sex-offender-group-home-outside-poulsbo-raising-concerns/2198139002/>

DRW. OPD expects the changes included in the bill will improve the system's overall effectiveness, and recommends its passage. The following is a summary of the proposed changes:

- Remove statutory barriers to placement in the Community Protection Program (CPP) as an LRA for clients with special needs. Removing the statutory barrier will allow discussion with DSHS-Developmental Disability Administration (DDA) about the feasibility of using the program for certain LRAs.
- Direct the SCC to engage in individualized discharge planning as part of its treatment planning process for residents.
- Shift some burdens for LRA planning within the annual review process, with an emphasis on proportional "fair share" release among the counties rather than requiring release to the individual's county of commitment.
- Add details regarding DOC's review of proposed housing in relation to schools/ children.
- Provide incentives for community-based sex offender treatment providers to work in underserved areas and provide care to residents on LRAs.
- Provide for a report by the Washington State Institute for Public Policy (WSIPP) to assess LRA needs statewide with an analysis of "fair share" distribution among the counties.