The background of the cover features a photograph of the Washington State Capitol building, partially obscured by the branches of trees with green leaves and clusters of pink cherry blossoms in the foreground. The text is overlaid on this image.

WASHINGTON STATE OFFICE OF  
PUBLIC  
DEFENSE

ANNUAL REPORT FISCAL YEAR 2018

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# ADVISORY COMMITTEE

## MEMBERS

Honorable Bobbe Bridge, Chair	Washington Supreme Court, Retired
Robert Flennaugh II	The Law Office of Robert Flennaugh II, PLLC
Honorable Sherry Appleton	Washington State House of Representatives
Gerald Hankerson	Seattle NAACP
Jane Ragland-Kirkemo	Association of Washington Cities
Honorable Kathy Lambert	Washington State Association of Counties
Honorable Jamie Pedersen	Washington State Senate
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Honorable Karen Seinfeld	Washington Court of Appeals, Retired
Professor Helen Anderson	University of Washington School of Law
Honorable Mike Padden	Washington State Senate
Sharon Paradis	Benton-Franklin County Juvenile Court Administrator, Retired
Tara Simmons	Skadden Arps Fellow

# MISSION STATEMENT

"To implement the constitutional and statutory guarantees of counsel and to ensure the effective and efficient delivery of indigent defense services funded by the state."



Seal of the State of Washington at the State Capitol Building

# EXECUTIVE SUMMARY

Greetings Justices of the Supreme Court, Governor Inslee, members of the Washington State Legislature, judges, elected, officials, and residents of Washington,

Welcome to the 2018 annual report for the Washington State Office of Public Defense (OPD). This report covers Fiscal Year 2018, which ran from July 1, 2017, to June 30, 2018. I hope you will find this report to be an informative summary of this agency's activities for the year.

OPD had 17 employees for Fiscal Year 2018: a Director and a Deputy Director, nine Managing Attorneys, a Social Services Manager, and five support staff. OPD is overseen by an advisory committee made up of appointees from a range of organizations, which conducts business at quarterly meetings.

OPD's duty is to implement the right to counsel guaranteed by the United States Constitution, the Washington State Constitution and the Laws of the State of Washington, in certain cases in which the state proceeds against individuals.

The Legislature has given OPD specific responsibilities with respect to public defense in the state. Those responsibilities are, primarily:

- Implementing defense representation, through contract attorneys, for indigent parties in appeals to the Washington State Court of Appeals and the Washington Supreme Court;
- Administering grants to counties and eligible cities for improvement of trial-level public defense;
- Implementing defense representation, through contract attorneys, for indigent parents who are at risk of losing their children in dependency and termination cases; and
- Implementing defense representation, through contract attorneys, for indigent persons who are subject to civil commitment as sexually violent predators.

OPD does not supervise public defense across the entire state. Washington gives its counties and cities a great deal of autonomy in the criminal justice process. Accordingly, counties and cities supervise all public defense services for felony and misdemeanor cases in Superior, District, and Municipal courts, not subject to control by OPD.

OPD is organized into four programs based around its primary responsibilities. They are, respectively, the Appellate Program, the Public Defense Improvement Program, the Parents Representation Program, and the RCW 71.09 Program (named after the chapter of the Revised Code of Washington dealing with the civil commitment of alleged sexually violent predators).

In Fiscal Year 2018, the Appellate Program, seeing a caseload spike continue for a third consecutive year, requested funding in its biennial budget to increase its roster of full-time contractors, who are paid a monthly rate, and move the program away from reliance on part-time “contingent” contractors, who are paid per case. Appellate contract attorneys won several important victories for clients in the Washington Supreme Court, including *Seattle v. Erickson*, which held that prosecutors may not strike the sole member of a cognizable racial group from a jury without providing a race-neutral explanation. This case adds to a growing line of precedent addressing our state’s (and our country’s) longstanding problem with racial discrimination during jury selection.

In the Public Defense Improvement Program, Fiscal Year 2018 saw the first class graduate from the four-day Juvenile Defense Training Academy, an initiative by OPD to bring much-needed training in juvenile offender representation to underserved parts of Washington State.

The Parents Representation Program continued its efforts to improve legal services for indigent parents, participating in an interdisciplinary conference in Chicago, and working with the Family Justice Initiative to develop national guidelines for quality representation.

The RCW 71.09 program dealt with a spike in new civil commitment petitions in Fiscal Year 2018, with as many new petitions filed as the last two fiscal years combined. Even so, the program continued to win a significant number of agreed conditional releases for clients ready to begin their transitions back to the community.

As Justice Hugo Black wrote more than 50 years ago in the watershed case of *Gideon v. Wainwright*, “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials...this noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.” This ideal is why the right to counsel is guaranteed alleged criminals, allegedly unfit parents, and even offenders accused of being sexually violent predators. OPD strives to realize this ideal of fundamental fairness for all by working daily to improve public defense in Washington.





Leavenworth, Washington

# APPELLATE PROGRAM

Indigent appellate representation was OPD's first program, established at the agency's founding in 1996. At that time, OPD assumed responsibility for administering public defense services statewide for appeals to the Washington Court of Appeals and the Washington Supreme Court.

When a person loses their case in Superior Court, they have the right to appeal to the Court of Appeals, where a panel of three judges will decide whether the lower court's decision was valid. A case lost before the Court of Appeals can be appealed to the Washington Supreme Court. If a client is indigent and convicted of a crime, or is subject to another type of proceeding where there is a constitutional or statutory right to counsel, OPD is responsible for providing an appointed public defense attorney. OPD provides attorneys by contracting with independent lawyers and law firms across the state. OPD's contract attorneys provide representation before the Court of Appeals, and may continue cases before the Washington Supreme Court if they are unsuccessful in the Court of Appeals.

OPD's Appellate Program attorneys represent more than 1,000 indigent clients every year. Appellate Program Manager Gideon Newmark runs the day-to-day operations of the Appellate Program.

## **Continued Caseload Challenges**

Fiscal Year 2018 saw a decline in the length of cases that contributed to extraordinarily high caseloads in the past two fiscal years. Caseloads remained high, however, and OPD continued to rely on part-time contractors, known internally as "contingent" contractors, in order to meet the need for appellate public defenders. On top of the caseloads assigned to OPD's 15 mostly full-time appellate contract attorneys and law firms, the Appellate Program distributed nearly three full-time caseloads of assignments to 22 contingent contractors.

Contingent contract attorneys are paid per case, whereas OPD's regular contract attorneys are paid a fixed monthly fee for up to a maximum caseload. During periods of increased caseloads,

contingent contractors allow OPD to flexibly meet increased demand. Instead of committing to pay fixed monthly fees for attorneys who will not be needed if caseloads subside, OPD is able to pay only for the case assignments that are needed, thereby conserving public funds.

Because of the sustained high caseloads that resulted in such extensive reliance on contingent contractors for three consecutive fiscal years, OPD asked for funds in its biennial budget request, in order to permit the Appellate Program to increase its slate of regular contract attorneys and reduce its reliance on contingent contractors. While contingent contractors are qualified professionals who provide excellent representation, regular contractors are able to specialize in appeals and thus deliver the highest quality service to clients.

## Training

The Appellate Program held a continuing legal education seminar in Leavenworth, Washington entitled *Beyond the Law: Persuading Appellate Judges that your Client Deserves to Win*. This event, planned by Gideon Newmark and Travis Stearns of Washington Appellate Project, centered on training appellate attorneys to write cohesively and persuasively using the techniques of storytelling. Speakers included Matthew Taylor, a professional speaker on the power of storytelling, David Ziff of the University of Washington, Kim Gordon of Gordon & Saunders PLLC, and Prachi Davi of the ACLU of Washington. The program included extensive small-group sessions so that attorneys could both apply what they learned, and learn from each other.

## Supreme Court Wins for Clients in FY18

### Case: **Seattle v. Erickson**

Attorney: Lila Silverstein

Result: The State charged Mr. Erickson, a black man, with unlawful use of a weapon and resisting arrest. At his trial, the prosecutor excluded the only black juror using a peremptory challenge. Mr. Erickson's attorney objected, citing discrimination against the only black juror. The trial court held that because there were other people of color on the jury, striking the only black juror did not show discrimination. The Supreme Court reversed, holding that striking the sole jury member of a particular race is sufficient to show discrimination such that the prosecutor must provide a race-neutral basis for striking the juror.

### Case: **State v. McFarland**

Attorney: Jill Reuter

Result: Ms. McFarland was convicted of burglary, as well as ten counts for theft of a firearm

and three counts for unlawful possession of a firearm. The judge sentenced her to nearly 20 years in prison, a sentence more typical of a murder case than a burglary. This unusually long sentence was due to a state law that required sentences for firearm-related convictions to be served consecutively, i.e. one after the other. The Supreme Court reversed and sent the case back for resentencing. The Court held that, notwithstanding statutory language requiring consecutive sentencing, the superior court had discretion to pronounce a lower sentence.

### Case: **State v. Barnes**

Attorney: David Koch

Result: Mr. Barnes was charged with attempting to steal a riding lawnmower. The State elected to charge him with theft of a motor vehicle, a crime that usually refers to theft of automobiles. Mr. Barnes moved to dismiss the charge, arguing that a lawnmower wasn't a motor vehicle under the theft of a motor

vehicle statute. The Supreme Court agreed in a split decision, holding that a riding lawnmower is not a motor vehicle.

### Case: **State v. Lopez**

Attorney: Tom Weaver

Result: During Mr. Lopez's criminal trial for a serious felony, his attorney suffered from severe depression. The attorney had significant financial trouble, health problems, and was facing disbarment. He missed some court appearances and was late to the others. He failed to submit briefing requested by the court. He failed to meet with the investigator helping him prepare the case. After he was convicted, Mr. Lopez fired his lawyer and hired a new one, who requested a new trial based on this poor performance. The superior court granted a new trial and the Supreme Court affirmed this decision, holding that the original attorney's poor performance violated Mr. Lopez's constitutional right to effective assistance of counsel.



Jefferson County Courthouse

# PUBLIC DEFENSE IMPROVEMENT PROGRAM

Cities and counties are responsible for delivering trial level criminal and juvenile justice services, which include providing assigned counsel for indigent defendants and juveniles charged with crimes. Public defense service structures vary throughout the state. Some jurisdictions have fully staffed public defense agencies, while others rely exclusively on contracts with independent law firms and sole practitioners to represent indigent defendants and juveniles. OPD's Public Defense Improvement Program works with these local jurisdictions to help them deliver services consistent with state and national industry standards. OPD provides local governments with technical assistance and resources on key issues pertaining to public defense administration, distributes state funds to improve local public defense, and brings training opportunities to various geographic regions. Comprised of Managing Attorneys Katrin Johnson, George Yeannakis, and Shoshana Kehoe-Ehlers, the program's staff bring a great deal of experience and creativity to this critical mission.

## **Public Defense Improvement Grants**

In Fiscal Year 2018 the Public Defense Improvement Program continued to carry out one of its core functions, distributing grants to counties and cities for the improvement of trial level public

defense. As mandated by Chapter 10.101 RCW, the program distributed state funds to each of the 38 counties that applied for the funding. In addition OPD administered its competitive grant program for cities. Thirty cities were awarded grant funds for local public defense improvements such as increased attorney compensation, reimbursement of attorney training costs, representation at preliminary appearance hearings, and increased use of investigators, experts, and social workers. OPD worked with the city and county grant recipients to make improvements to their public defense systems.

As part of its grant oversight duties, OPD's Public Defense Improvement Program managing attorneys conduct periodic site visits with counties and cities that receive funds. Site visits include observation of courtroom calendars, and meeting with public defense stakeholders such as attorneys, judges, court administrators, and public defense coordinators and agency directors. These visits provide OPD an opportunity to learn more about local public defense services across the state, and to share information and resources that are helpful to local attorneys and administrators. In Fiscal Year 2018 they visited six counties and fourteen cities.

### **Juvenile Defense Training Academy**

In Fiscal Year 2018, OPD graduated its first class of the Juvenile Defense Training Academy. Representation of juveniles is increasingly acknowledged as a specialized field that requires knowledge and skills that differ from adult criminal defense. Juvenile defenders must have an in-depth understanding of distinct statutes, case law, and court rules. Moreover, they must advise clients of the varied and often longstanding collateral consequences of juvenile adjudications which can impact access to education, employment, military service and housing. In addition, forming a meaningful representation relationship with youth can be challenging due to their cognitive developmental stages and lack of understanding of the criminal justice system.

Juvenile defenders statewide were invited to participate in the Juvenile Defense Training Academy, which included twenty-four hours of training over four days. The curriculum was based on a national model designed to improve the quality of representation at every stage of a

juvenile offender case. The graduating class of fifteen juvenile defenders came from nine different counties. The Juvenile Training Academy will again be offered in 2019, and is expected to become a standard component of the OPD Public Defense Improvement Program.

### **Regional Trainings**

Each year the Public Defense Improvement Program provides no-cost training opportunities to defenders in different regions of the state. In Fiscal Year 2018, OPD organized a combination of classroom instruction with prison facility tours. Tours occurred at the Washington Corrections Center in Shelton, the Washington State Penitentiary in Walla Walla, and the Monroe Correctional Complex. Each tour lasted approximately three hours and gave an inside look at the living quarters, isolation units, and educational and vocation programs of each facility. In addition to the tours, OPD delivered half-day trainings on topics associated with representing clients facing potential prison sentences.

### **WDA**

Effective defense representation requires attorneys to have an advanced understanding of statutes, court rules, evolving case law, sentencing provisions, and in many cases, the latest scientific research in mental health. OPD continued to contract with the Washington Defender Association (WDA) to provide case-level consultation services and to develop reference materials so that defense attorneys in all corners of the state can access the information needed to effectively defend their clients.

### **Felony and Misdemeanor Assistance**

WDA's felony and misdemeanor resource attorneys provide case-specific consultation to attorneys on matters such as trial strategy, issue spotting, evidence suppression, expert witnesses, and sentencing. They also develop and update practice advisories and other online resources, and host active criminal defense e-mail listservs.

### **Immigration Assistance**

Criminal cases can greatly impact the immigration status of non-citizens, and defense attorneys are required by law to counsel clients on the potential consequences. Yet immigration law is a complex field and very few criminal defense attorneys have that expertise. WDA immigration resource attorneys are specialized in immigration law and fill that gap. They provide case-level consultation to any defense attorney statewide. They also maintain an up-to-date directory of practice advisories and other resources, and deliver no-cost trainings to public defense attorneys and staff.

### **Death Penalty Assistance**

WDA also holds a contract to provide death penalty defense assistance. Under this contract, WDA provides training and resources for attorneys, investigators, mitigation specialists, and support staff working on capital cases.



# PARENTS REPRESENTATION PROGRAM

OPD's Parents Representation Program is a multi-disciplinary program overseeing the contract attorneys and social workers representing indigent parents in dependency, termination, and guardianship cases. These are cases in which the State seeks to take custody of a child after alleging that a parent has abandoned, abused, neglected, or is incapable of caring for their child. Children are often removed from their parents' custody and placed with relatives, with another suitable adult, or in foster care. Indigent parents have a constitutional and statutory right to counsel in these cases to protect their fundamental right to raise their children. The Parents Representation Program has been providing counsel in these cases for almost two decades, since the Legislature authorized its funding to address the typically poor quality of representation that was previously found to be the norm in dependency and termination cases.

The Parents Representation Program contracts with attorneys, law firms, and public defender organizations to represent parents in all covered counties. These contractors follow the program's enhanced practice standards, which require regular client communication, diligent efforts to help parents participate in necessary services, adequate case preparation, effective negotiation with the State, access to social workers and experts, and competent litigation when a

negotiated settlement isn't possible.

Amelia Watson, Brett Ballew, Jacob D'Annunzio, Jana Heyd and Darren Acoba are OPD's five Parents Representation Managing Attorneys. The five-person managing attorney team supports the program's contract attorneys in applying OPD's practice standards. The managing attorneys provide legal resources during litigation, monitor attorney caseloads to ensure compliance with the Supreme Court Standards for Indigent Defense, conduct in-person attorney evaluations, and provide technical support and trainings. The Parents Representation Program added five more counties into the program in Fiscal Year 2018, and had contracts with more than 170 attorneys in all 39 of Washington's counties at the end of the fiscal year.

Social Services Manager Mike Heard, the sixth member of the Parents Representation team, provides further support to contract attorneys by managing a group of social workers and social services specialists under contract with OPD. Mike provides both formal and informal training for the social workers, who give OPD's contract attorneys access to client support, social work theory, and resources in the community. At the end of Fiscal Year 2018, there were 40 OPD social workers in the Parents Representation Program counties.

for attorneys who can't attend a training in person.

### **National Trainings and Initiatives**

In May 2018, The Parents Representation Program participated in the first convening of the Interdisciplinary Parent Representation Conference hosted by the American Bar Association National Parent Alliance in Chicago. OPD's social services manager co-chaired this conference. Several of the program's managing attorneys presented at various conference sessions at this national event.

Program managers and OPD Director Joanne Moore participated on committees for the Family Justice Initiative (FJI), a national project launched by the National Center for State Courts to assure high-quality attorneys for every parent and child in child welfare proceedings. Work with the FJI included co-chairing the Quality Work Group to create a national list of the attributes of high-quality representation and to create how-to guides for states to implement those attributes.

### **Statewide Parent Representation Attorney and Social Worker Trainings**

On June 3–4, 2018, the Parents Representation Program hosted a one and a half day training entitled Defending Washington Families at the Wenatchee Convention Center. A half-day "Nuts and Bolts" training was offered to newer contract attorneys the morning before the main conference. The larger day and a half conference began with speaker and expert Delilah Bruskas presenting on the harm done to children by removing them from their parents. A variety of breakout sessions were then offered on topics that included depositions, encouraging cooperation between birth parents and foster parents, contesting shelter care hearings, case law and legislation updates, ethics, trial strategies for representing incarcerated parents, working with parent allies, appeals, and many others. Approximately 176 attorneys and social workers attended the conference. Thirty-five newer attorneys attended the Nuts and Bolts training.

In an effort to increase the reach of its training programs, OPD recorded two lectures from the Wenatchee training and made them available online as podcasts. The Parents Representation Program planned to expand on this effort and produce more online training content in the future

### **Continuing Efforts and Initiatives**

The Parents Representation Program continued its ongoing efforts to ensure top quality representation of parents in covered counties in Fiscal Year 2018. This involved in-person visits to almost 160 contract attorneys in every covered county. Managing attorneys observed contract attorneys in court and met with them to review their performance and compliance with the program's rigorous standards.

Program managers continued the program's work with the Department of Social and Health Services to improve and implement parent-friendly policies. The Department finds out-of-home placements for children who can't live in their parents' home during the dependency case due to alleged safety issues. While the juvenile courts have final say on where children are placed and how often the parents may visit them, the Department's recommendations carry great weight. Thus, the Department enacting policies designed to promote reunification of parents and children is vital to successful parent representation. In Fiscal Year 2018, OPD continued to participate in joint projects with the Department and the courts to implement a new, more family-friendly visitation policy and ensure that parents are allowed the visitation that meets the developmental needs of their children.

In a similar vein, program managers worked constructively with the Department on issues related to incarcerated parents. When parents are in jail or prison, parents and children do not lose their right to have contact with each other. But incarceration poses difficulties for visitation, which OPD and the Department are working to address on an ongoing basis.

Program managers also worked with the Department on policies related to background checks; background checks are performed on relatives who may be able to care for children during a dependency. Placement with relatives can greatly increase the chances of reunification and can vastly reduce the trauma on children of being separated from their parents during a dependency case.



# RCW 71.09 PROGRAM

Since 2012, OPD has been responsible for providing defense attorneys 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. These services had previously been provided by the Department of Social and Health Services (DSHS) until the Legislature transferred the program to OPD.

To hold individuals at the SCC, the State must file a petition in Superior Court alleging that a person is both mentally ill and likely to engage in future actions of sexual violence as a result of their illness. The indigent respondent is entitled to a jury trial where the State must prove these allegations. If committed, the respondent has the right to an annual review of commitment status. If the annual review evaluation shows that the person should be unconditionally discharged or released to a less restrictive alternative (LRA) treatment setting, such a release can take place with the State's consent, or else there is a contested trial. The judge or jury looks at whether (1) the respondent continues to meet the statutory criteria for civil commitment, or (2) whether the respondent has demonstrated a change through treatment such that an LRA is in the best interests of the respondent and protections can be put in place for the safety of the community.

Washington law gives indigent civilly committed persons the right to counsel at every stage of the proceedings against them, including for each

year's annual review. OPD provides counsel, and does so by contracting with a small, dedicated group of attorneys. The RCW 71.09 Program is overseen by Managing Attorney Shoshana Kehoe-Ehlers. Shoshana maintains the program's quality of representation by carefully monitoring attorney caseloads and meeting individually with attorneys to discuss their performance. She also consults on issues that arise during cases and conducts training on handling RCW 71.09 cases for judges, judicial staff, and attorneys. Shoshana also works on legislation related to the RCW 71.09 process, advocating for systemic improvements that both protect the rights of the civilly committed and enhance public safety.

In Fiscal Year 2018, OPD maintained 15 contracts for RCW 71.09 attorneys and social services providers, for a total of 21 full-time equivalent positions. RCW 71.09 social workers help clients: develop safe release plans, engage in treatment,



There were as many new filings in FY18 as in the previous two fiscal years combined

and navigate public assistance options to ensure their basic needs are met when they are released into a LRA, or when they are unconditionally released.

### SCC Admissions and Discharges

During Fiscal Year 2018, prosecutors filed 15 new petitions for civil commitment, as many as were filed in Fiscal Years 2016 and 2017 combined. These cases are currently in various stages of litigation and negotiation. Furthermore, fiscal year 2018 saw an increase in petitions filed against patients who had been committed to Western State Hospital, one of Washington’s two state mental hospitals. Western State released three individuals with sexual criminal histories, and prosecuting agencies filed petitions seeking to detain them as sexually violent predators for further treatment at the Special Commitment Center.

This fiscal year, 13 respondents achieved unconditional discharge from the Special Commitment Center by negotiated agreement with the State. 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 LRAs, the need for a contested unconditional discharge trial has decreased.

### Community Placement and Transition

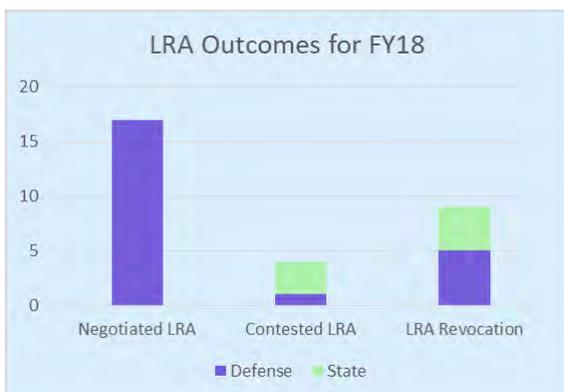
Organizing and implementing community-based LRAs continues to be a challenge, especially in less populous counties where necessary services

are not readily available. In Fiscal Year 2018, respondents’ attorneys met with prosecutors and DSHS, as well as other stakeholders, to discuss approaches to develop LRA resources in more counties across the state. These resources include housing, sex offender and other therapeutic programs, and 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. These facilities were cultivated by OPD’s contract defense attorneys and social workers.

### Specialized Training

During 2018, OPD’s contract attorneys and social workers attended several specialized trainings, including two OPD-sponsored continuing legal education programs. Featured topics included: developing evidence-based community LRAs, a summary of new 71.09 case law, and using current brain research and science on juvenile development when representing clients who primarily offended as juveniles.

In October, in Vancouver, B.C., 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. Because of the relatively close location, a majority of OPD’s 71.09 contract attorneys and social workers were able to attend, as were assistant attorneys’ general, King County deputy prosecutors, sex offender treatment providers, and forensic staff from the Special Commitment Center. As the only national and international conference dedicated to the management and treatment of sex offenders, the ATSA conference being held in Vancouver was an important opportunity for OPD contractors to engage with other professionals on the current science and best practices in the field.



The majority of new LRAs in FY18 continue to be negotiated between the client and the State