



2020 REPORT
CHAPTER 71.09 RCW
INDIGENT DEFENSE
REPRESENTATION PROGRAM
(CIVIL COMMITMENT OF INDIVIDUALS CONVICTED OF
SEXUALLY VIOLENT OFFENSES)

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Chapter 71.09 RCW Indigent Defense Representation Program

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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 2020 (July 1, 2019 through June 30, 2020). 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. OPD and other stakeholders remained focused in Fiscal Year 2020 on laying the groundwork to transfer the primary development of LRA placements from defense counsel to the state Department of Social and Health Services (DSHS) to ensure fair and equitable siting across the state. The Senate Ways and Means Committee directed the Washington State Sex Offender Policy Board to review the LRA process and recommend improvements. For the first time since the statute was adopted 30 years, a comprehensive group of stakeholders reviewed the LRA process and submitted recommendations to the Legislature.

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. During the past 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.

¹ These stakeholders include the Special Commitment Center (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, Association of Washington Cities and Washington State Association of Counties, local housing providers, and community members.

While Chapter 71.09 RCW requires a respondent to present the court with an appropriate LRA placement, only DSHS has authority and financial means to contract with placements. The resources necessary for an LRA include housing, sex offender treatment and other therapeutic programs in the community, 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 places individuals conditionally released into the community at designated facilities in Kitsap, Grays Harbor, Spokane, and Walla Walla counties.

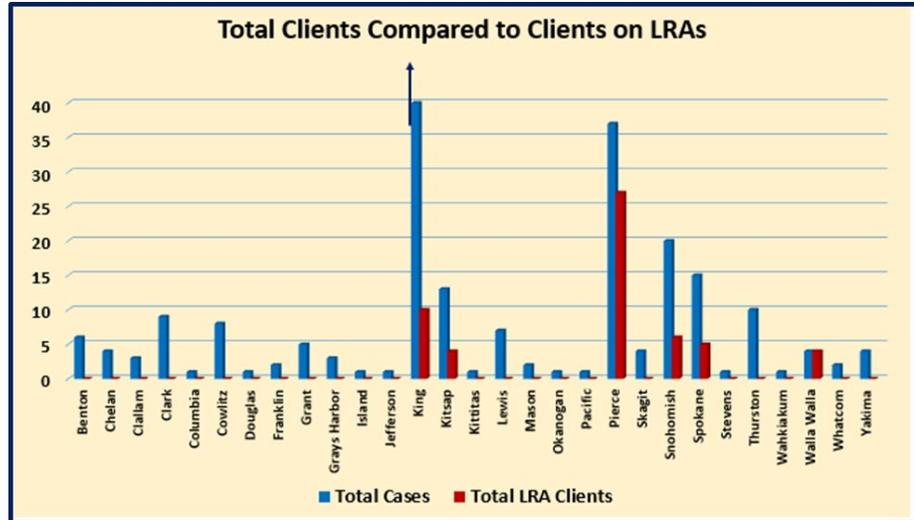


Figure 1 compares the total number of RCW 71.09 cases in each county with the number of LRAs provided for respondents.



Legislation and Stakeholder Input. After the close of the 2020 legislative session, the Senate Ways and Means Committee directed Washington’s Sex Offender Policy Board (SOPB) to investigate challenges in the current LRA process. Within this forum, stakeholders² 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.

Specialized Training. During 2020, OPD’s contracted attorneys and social workers attended several specialized OPD-sponsored continuing legal education (CLE) webinars. Topics featured were: working effectively with the Department of Corrections (DOC) to streamline conditional and unconditional releases, understanding what an attorney’s ethical responsibility is when

² Representatives of the following agencies and organizations participated in SOPB meetings: Department of Corrections, DRW, OPD, Washington Association of Criminal Defense Lawyers, Washington Defender Association, Association of Washington Cities, Washington State Association of Counties, Washington Association of Sheriffs and Police Chiefs, DSHS-SCC, DSHS-JRA, Washington Association for the Treatment of Sexual Abusers, Senate staff, and community members.

representing clients with neurological, physical, and/or developmental disabilities, and conducting “virtual” jury trials using video services.

Pre-Commitment Filings, Litigation, and Negotiations

New Filings. During Fiscal Year 2020, prosecutors³ filed 12 new petitions for civil commitment in six counties. This was double the filings in Fiscal Year 2019. King, Pierce, and Spokane counties continue to see the highest number of filings across the state.

Continuances. Trial courts granted 16 continuances in initial commitment cases set for trial during FY20, 10 continuances in initial commitment cases set for trial

during FY19, five continuances in FY18, eight continuances in FY17, 11 continuances in FY16, 22 in FY15, and 39 in FY14.⁴ While the number of continuances increased in FY20, almost half were due to the courts’ suspension of trials during the COVID-19 pandemic. Reasons for non-COVID 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.

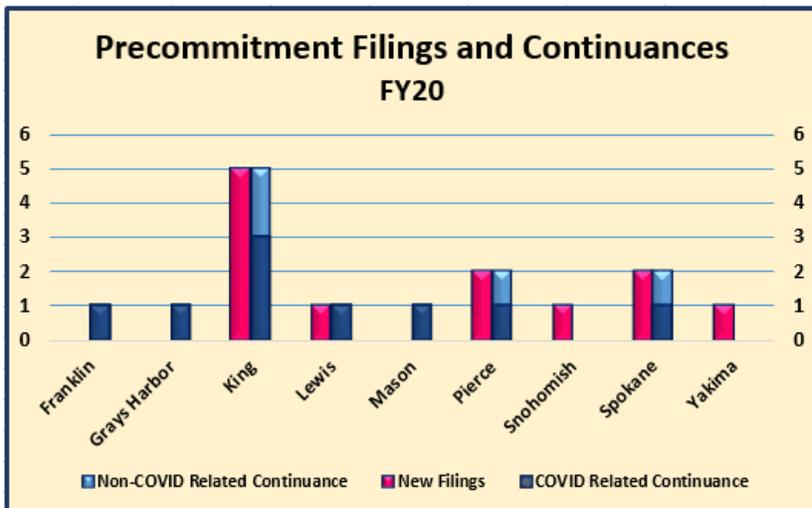


Figure 2 identifies the counties where prosecutors filed new petitions. and where initial commit trials were continued.

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.

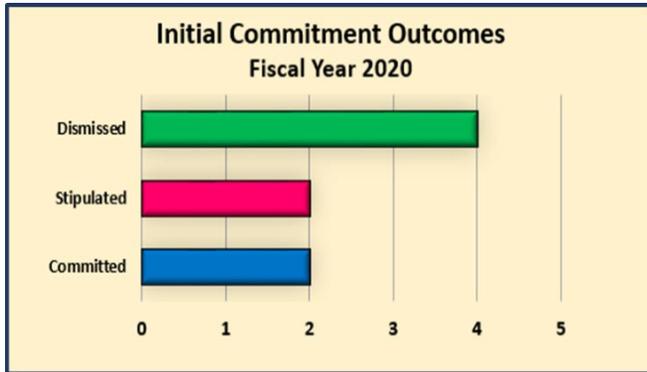


Figure 3 shows eight initial commit cases were resolved in FY20 with only two going to trial.

Case Outcomes. Eight initial civil commitment proceedings were completed during FY20. Twelve commitment cases were completed the previous year. Due to the statewide suspension of trials in March 2020, there were fewer resolutions of initial commitment cases, resulting in respondents' remaining in detainee status, unable to advance their cases. As illustrated in Figure 3, the completed cases in FY20 resulted in four new commitments to the Special Commitment Center (two through stipulation,

and two through jury trials), and four dismissals before trial.

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 FY20, courts approved 22 community placement LRAs negotiated by the State and the defense. While no LRA trials took place during FY20, defense attorneys must always litigate a number of issues to reach the point of a court ordered release. 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

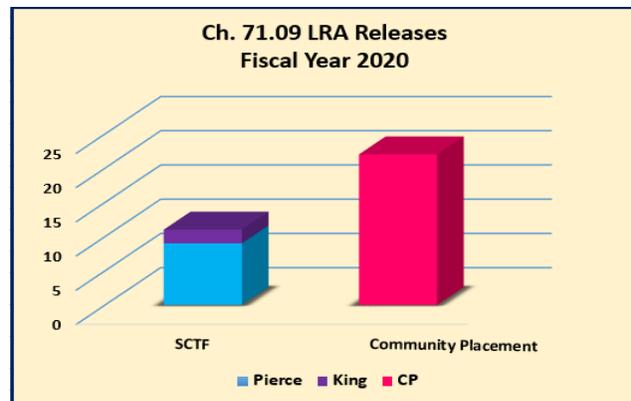


Figure 4 shows the defense negotiated 22 community LRAs and 11 placements at the SCTFs.

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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.

The SCC also authorized nine releases to the two Secure Community Transition Facilities (SCTFs) run by DSHS; two were placed at the King County SCTF, and nine at the Pierce County facility.

Outcome	Total
Unconditional Release from Trial Verdict	1
Unconditional Negotiated Release	14
Recommitment from Trial Verdict	0
Statewide Total	15

Table 5 shows all but one unconditional discharge resulted from negotiations between the parties.

Unconditional Discharge. In FY20, 14 respondents achieved unconditional discharge by negotiated agreement of both parties, and one achieved release by trial verdict. Unconditional release trials are not common. There were no trials during FY20 where the verdict was recommitment to the SCC.

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 subject to DOC supervision are required to follow an exhaustive list of conditions.⁵

Developments and Challenges in 2020

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 2020, 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.

⁵ 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.

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, 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 facility 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.

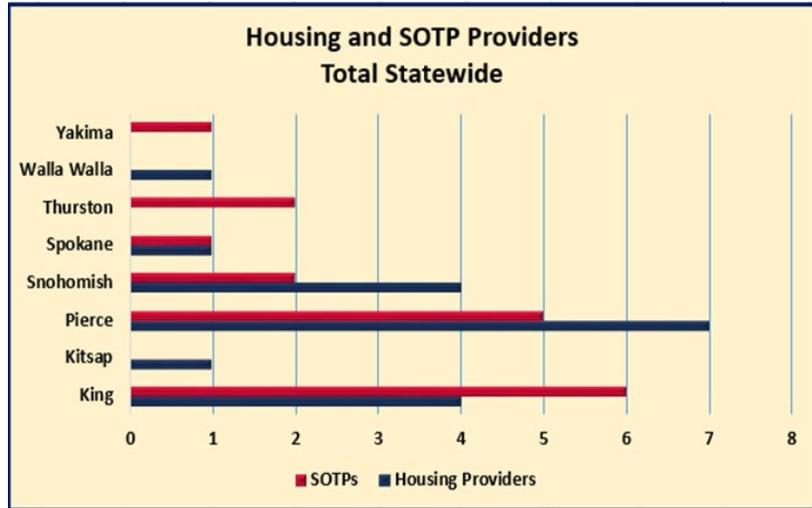


Figure 6 shows that there are only six counties with 71.09 housing, six counties with 71.09 SOTPs, and only four with both.

Policy Recommendations

RCW 2.70.025 directs OPD to make recommendations for public policy changes that may improve Chapter 71.09 RCW civil commitment proceedings.

For this report, OPD endorses the policy recommendations developed by the Washington Sex Offender Policy Board and published in its November 2020 report to the Legislature. The SOPB recommendations represent a broad stakeholder consensus to improve the LRA process.