



Washington State  
**Office of  
Public  
Defense**

# 2023 Annual Report: Chapter 71.09 RCW Indigent Defense Representation Program

(Civil Commitment of Individuals Convicted of Sexually Violent Offenses)

July 1, 2022 – June 30, 2023

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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 must report annually on program operations to the Legislature, the Governor, and the Chief Justice of the Washington Supreme Court. This is the eleventh annual report on the Chapter 71.09 RCW Indigent Defense Representation Program, covering operations for fiscal year 2023 which spanned from July 1, 2022 through June 30, 2023.<sup>1</sup>

## New Initial Commitment Filings

During fiscal year 2023, prosecutors filed eight new petitions for civil commitment across five counties, similar to the eight petitions filed across six counties in the prior fiscal year (2022). Table 1 shows the distribution of filings by county over the past two years.

Cases continue to be slightly concentrated in the most populous counties, with multiple cases in King and Pierce counties each year; while, the total number of cases remains small, but the issues presented are increasingly difficult. Recent Chapter 71.09 filings are more complex due to the combination of refiling old cases, the considerable number of historical documents, and cases being filed on those individuals with serious mental illness.

Overall, the number of new filings has slightly trended down over the last six years, but the complexity has increased. (see Figure 1).<sup>2</sup>

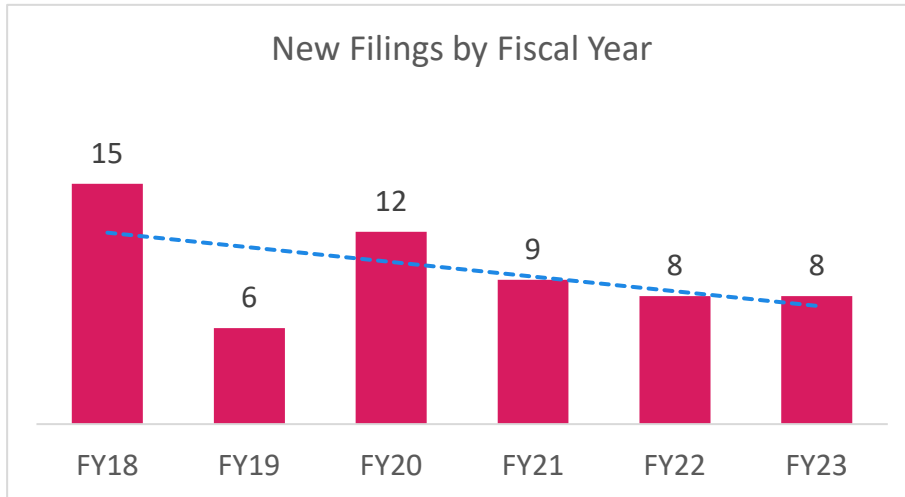
Table 1

County	FY22 Filings	FY23 Filings
Clark	0	1
Franklin	1	0
Grays Harbor	1	0
King	2	3
Lewis	0	1
Pacific	1	0
Pierce	2	2
Skagit	0	1
Spokane	1	0
<b>Grand Total</b>	<b>8</b>	<b>8</b>

<sup>1</sup> Unless otherwise noted, each reference made to a year within the scope of this report refers to the corresponding fiscal year. For example, 2023 refers to the fiscal year ending June 30, 2023.

<sup>2</sup> Data for fiscal years 2018 – 2021 in *Figure 1* is pulled from prior Annual Reports for the Chapter 71.09 RCW Indigent Defense Representation Program. These reports are publicly available on the OPD website here: <https://opd.wa.gov/about-us/reports>.

Figure 1



## Initial Commitment Trial Continuances

Pursuant to RCW 2.70.025(6), the 2012 legislature directed OPD to report on the number of continuances granted from when a petition was first filed to the conclusion of the initial commitment trial. Prior to 2012, before OPD took over the indigent representation of 71.09 respondents, the legislature expressed concern with the high number of initial commitment trial continuances. Some clients waited up to 10 years for their initial jury trial.

Table 2

ICT Continuances	2022 Cases	2023 Cases
Zero	5	3
One	4	2
Two	4	3
Seven	1	1
<b>Grand Total</b>	<b>14</b>	<b>9</b>

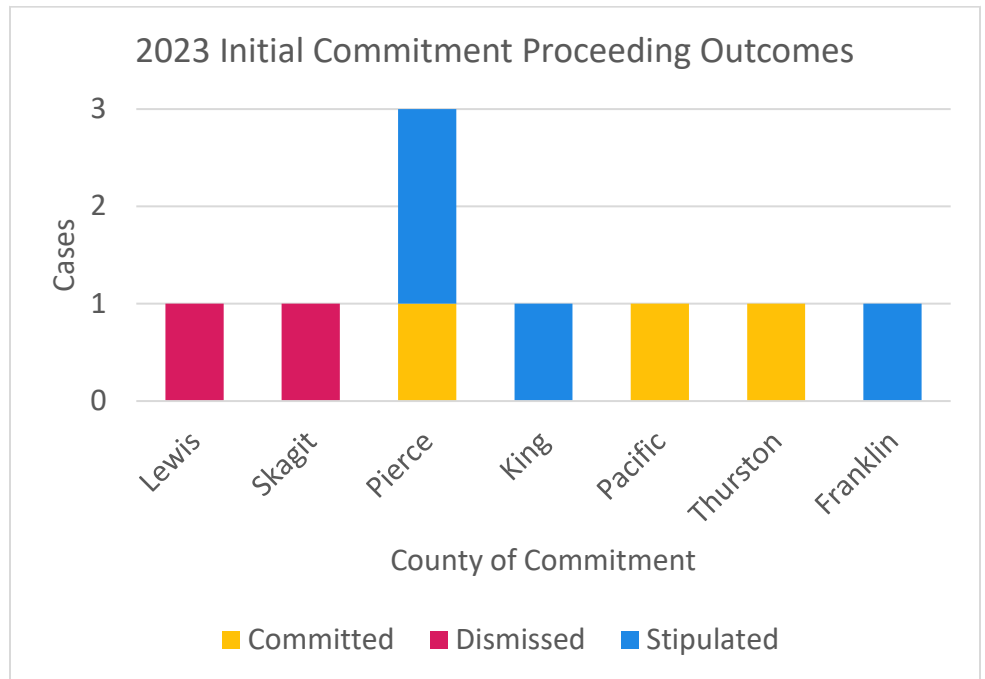
Since then, initial commitment cases are decided within the first few years. Within the nine initial commitment cases resolved in 2023, three had never been continued, similar to the five cases the previous year that had no continuances.<sup>3</sup> The other six cases were continued one to two times over the course of the entire initial commitment proceeding. There was one outlier that had a total of seven continuances over the course of the case (see Table 2).

<sup>3</sup> The Court dismissed one case at the probable cause hearing.

# Trials and Outcomes

Nine initial civil commitment proceedings<sup>4</sup> were resolved during 2023 compared to fourteen in 2022. In 2023, three cases resulted in commitment by Order of a Judge and/or by jury verdict, four clients stipulated to commitment, and two cases were dismissed prior to their initial commitment trial. Figure 2 on the next page shows these results by county of commitment.

Figure 2



## Less Restrictive Alternative Releases

While Engrossed Second Substitute Bill (ESSB) 5163 changed many aspects of the LRA process, in fiscal year 2023, all Less Restrictive Alternative (LRA) releases were negotiated between the prosecuting authority and the RCW 71.09 contracted defense attorneys.<sup>5</sup> In order for the prosecuting authority to agree to a conditional release, the state’s retained forensic expert must provide a current evaluation of the resident and their current functioning, consider the resident’s release plan and community support and then determine that an LRA is in the resident’s best interest

### Standard DOC Conditions for LRAs

Persons released to LRAs are required to follow up to 60 court-ordered conditions. Some conditions include:

- Can only live in preapproved housing. Most housing must have surveillance cameras and/or house managers. Must follow court-ordered curfew.
- Chaperoned outings into the community.

<sup>4</sup> Pursuant RCW 71.09.060, Initial commitment proceedings refers to the litigation from when a petition is first filed to when it resolves through a dismissal, trial or stipulation.

<sup>5</sup> See Appendix A for a detailed overview of the LRA process.

and that conditions can be imposed to protect the community. Examples of some of these court-ordered conditions are listed in the sidebar to the right.

Ten years after OPD assumed responsibility of the RCW 71.09 program, numerous individuals have been conditionally released under court-ordered conditions and without the expense of a complex civil trial. Prosecutors, and Chapter 71.09 RCW attorneys lead the nation in developing safe, supportive and secure conditional releases.<sup>6</sup> Attorneys operating under contracts with OPD have years or decades of experience creating LRAs, working with certified sex offender treatment providers, housing providers and community members that allow residents to be conditionally released and escorted in the community while the resident gradually reintegrates into a community setting.

ESSB 5163 requires the Special Commitment Center (SCC) engage in release planning pursuant.<sup>7</sup> Prior to this, the residents and their legal team were solely responsible for this. The impetus behind this change were concerns from legislators that releases were disproportionately impacting Pierce County. The SCC and SCTF are both located on McNeil Island in Pierce County. As such, ESSB 5163 requires that the SCC develop community LRAs with an eye towards fair share distribution across the state. Fair share means that each county must accept releases from the SCC proportionate to the number of individuals that the county commits under Ch. 71.09 RCW. The SCC's release planning effort unfortunately has been frustrated by their inability to successfully open new housing. Opening housing for individuals convicted of sex offenses is remarkably challenging. The residents' attorneys have long engaged in housing and resource

## Standard Conditions for LRAs (continued)

- Cannot attend school, work or volunteer without preapproval.
- Cannot frequent places where minors congregate.
- Treatment with a certified sex offender treatment provider.
  - Must participate in both group and one on one counseling.
  - Must be transparent with provider and progress in treatment or risk revocation.
- Supervision by DOC
  - Must comply with all written and verbal instructions.
  - Must report all violations.
  - Active GPS monitoring.
  - Only permitted to go to preapproved locations at preapproved times.
  - Polygraph testing to ensure compliance with rules of supervision.
- No contact with children or minors or victims.
- No unapproved contact with community members.
- No drugs or alcohol.
- All media including movies, video games and music must be preapproved.

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<sup>6</sup> See Sex Offender Civil Commitment Programs Network (SOCCPN) Annual Survey of Sex Offender Civil Commitment Programs 2022 available at [www.soccpn.org](http://www.soccpn.org).

<sup>7</sup> RCW 71.09.097(1)

development. The SCC now officially contracts with the housing developed prior to the 2021 passage of SSB 5163. This allows the SCC direct oversight of the day to day operations of a home.

While fiscal year 2023 was the second year that the SCC engaged in LRA planning, there is little evidence that the distribution of LRAs across counties has changed significantly. The SCC made attempts to create housing in both King and Thurston County in early 2023, but both endeavors were met with community opposition and ceased operating.

## Unconditional Releases

Sixteen clients were unconditionally released post-commitment during 2023. All of these unconditional releases (UCRs) were agreed by the parties. See [Table 3](#) to see the breakdown of releases by county of commitment. Two unconditional release trials were held in 2023. One resident remains committed and the other remains on an LRA.

While the SCC is tasked with discharge planning under ESSB 5163, all discharge plans for individuals who were discharged in 2023 were developed by OPD contract defense teams. There is disagreement over how the phrase “discharge planning” should be interpreted. Because the Courts have not weighed in on whether discharge planning refers to LRA planning or unconditional release planning, discharge planning is largely if not exclusively done by contract attorneys and contract social workers.

Finally, one Thurston County client passed away during fiscal year 2023.

*Table 3*

County	Number of UCRs in 2023
Clark	1
Cowlitz	1
Franklin	1
Island	1
King	4
Kitsap	1
Pierce	2
Skagit	1
Snohomish	2
Spokane	1
Wahkiakum	1
<b>Grand Total</b>	<b>16</b>

## Policy Recommendations

### Rescind Ch. 71.09 RCW Community LRA Residency Restriction

The Sex Offender Policy Board (SOPB) continually meets around the implementation of ESSB 5163. There have been a number of challenges, but also been collaboration between the parties. The SOPB monitored the implementation for two years and on June 30, 2023 formalized a final report to the legislature<sup>8</sup>. This report contained numerous unanimous

<sup>8</sup> [https://sgc.wa.gov/sites/default/files/public/SOPB/documents/RCW%2071.09\\_changes\\_to\\_discharge\\_planning.pdf](https://sgc.wa.gov/sites/default/files/public/SOPB/documents/RCW%2071.09_changes_to_discharge_planning.pdf)

recommendations by the SOPB, including abolishing the residency restriction prohibiting LRA housing from being within 500 feet of a daycare facility, including private home day care services. This restriction was included in a Senate floor amendment to SSB 5163 and had not been vetted or proposed by the SOPB.

The Washington State Office of Public Defense’s RCW 71.09 program supports eliminating this residency restriction recommendation for two reasons. First, the 500ft rule undermines the twin aims of ESSB 5163: to increase LRA housing and to distribute that housing in accordance with the principals of fair share. The 500ft restriction will necessitate housing in rural communities where there is no infrastructure and little to no access to services. Those being released on LRAs are often required to travel in the community with chaperones to attend sex offender treatment, sober support meetings, job retraining or other activities that foster community reintegration. Placing LRAs in rural communities will result in a lack of access to critical services and employment. This places additional costs on taxpayers since without employment, DSHS will bear the entire cost of the LRA.

Second, the 500ft restriction is unrelated to community safety. There is no empirical basis for promoting such a restriction. To the contrary, there is ample research showing that residency restrictions like the 500ft rule do not improve community safety and produce no deterrent effect.<sup>9</sup> Residency restrictions like the 500ft rule have well researched negative consequences like loss of support systems that have been shown to be a protective factor against future offending. Further, community reintegration and stability through employment has been shown to reduce recidivism.<sup>10</sup>

### **Increased funding for experts**

RCW 71.09 filings are decreasing over time, as is spending on expert services. See [Figure 3](#). Increasing expert rates will likely have a minimal impact on overall funding but will have a significant impact on those indefinitely committed, as well as community safety. When the expert rates were established in 2007, the RCW 71.09 program paid a competitive rate. However, 17 years later, expert rates have not kept up with inflation and according to the Consumer Price Index, expert rates for report writing, interviewing and testifying should be raised an additional \$100 an hour.<sup>11</sup> Further, increasing expert rates for both State experts and

Defense experts allows for better trained specialists to provide researched-based opinions impacting both individual freedoms and community safety.

*Figure 3*

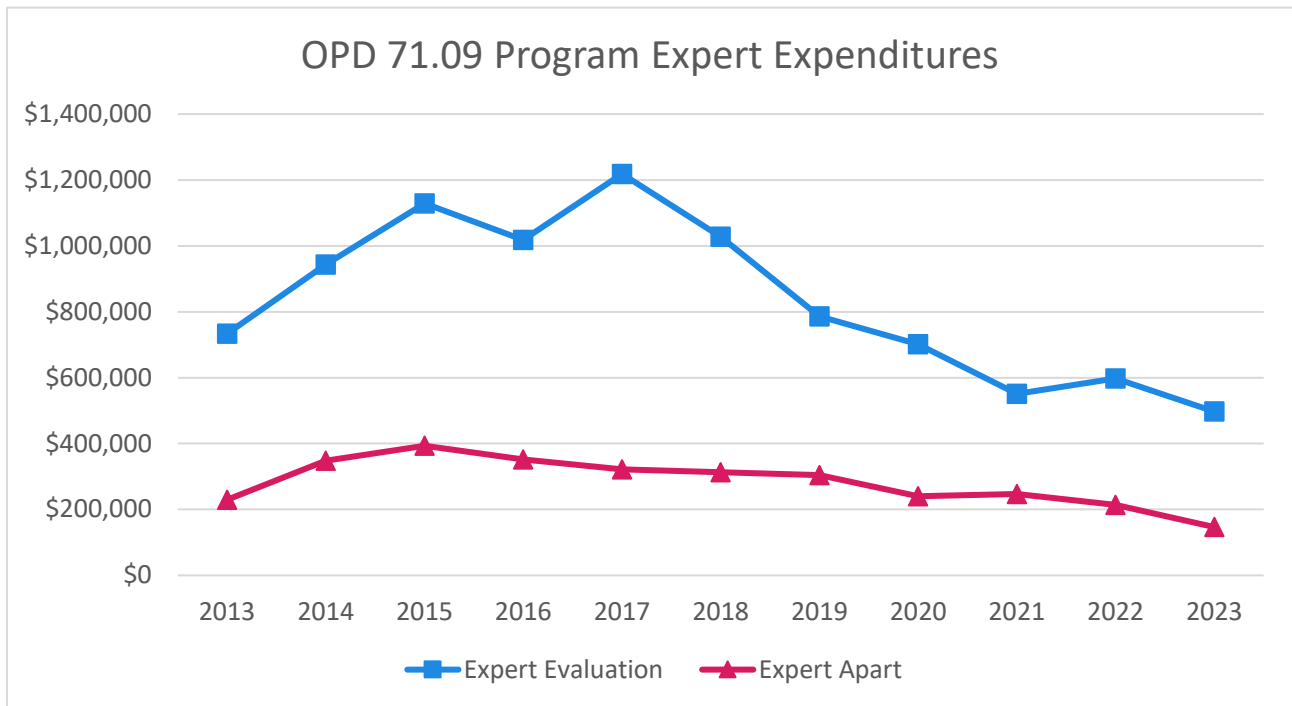
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<sup>9</sup> See [2023 SOPB Report RCW 71.09: Changes to Discharge Planning and Less Restrictive Alternative Placements in the Community](#), p. 25

<sup>10</sup> See [2023 SOPB Report RCW 71.09: Changes to Discharge Planning and Less Restrictive Alternative Placements in the Community](#), p.26

<sup>11</sup> [https://www.bls.gov/data/inflation\\_calculator.html](https://www.bls.gov/data/inflation_calculator.html)





Current funding for expert witnesses is inadequate. Expert rates have not increased in over 17 years, while case complexity continues to grow due to easier access to historical documents and refiling of dismissed cases, and increased filings on those with serious mental health diagnoses<sup>12</sup> This requires experts (both prosecution and defense) to spend more time reviewing records and conducting interviews, at times leading to more requests for continuances and longer trials.

Stagnant rates and outdated caps also increase litigation. A recent case exemplifies how inadequate compensation and dated statutory funding caps can lead to retrials and undermine the justice system's efficiency. In fiscal year 2022, defense attorneys successfully challenged the state's expert witness, resulting in an acquittal. However, due to a provision allowing a second trial if new evidence arises, the prosecution refiled the case two years later with a different expert. This highlights a key issue: stagnant rates incentivize refiling cases rather than achieving finality. The system ends up spending more time and resources on retrials due to limitations that have not kept pace with rising costs and changing circumstances.

Further, a different Court rejected the State's expert conclusion at a probable cause hearing leading to a dismissal. While State experts are not bound by the same funding caps that

<sup>12</sup> The average volume of records in refiled cases is around 20,000 pages. Further, cases where persons have been committed for longer than a decade are increasingly common. Those cases typically average anywhere from 15,000 to 25,000 pages of records.

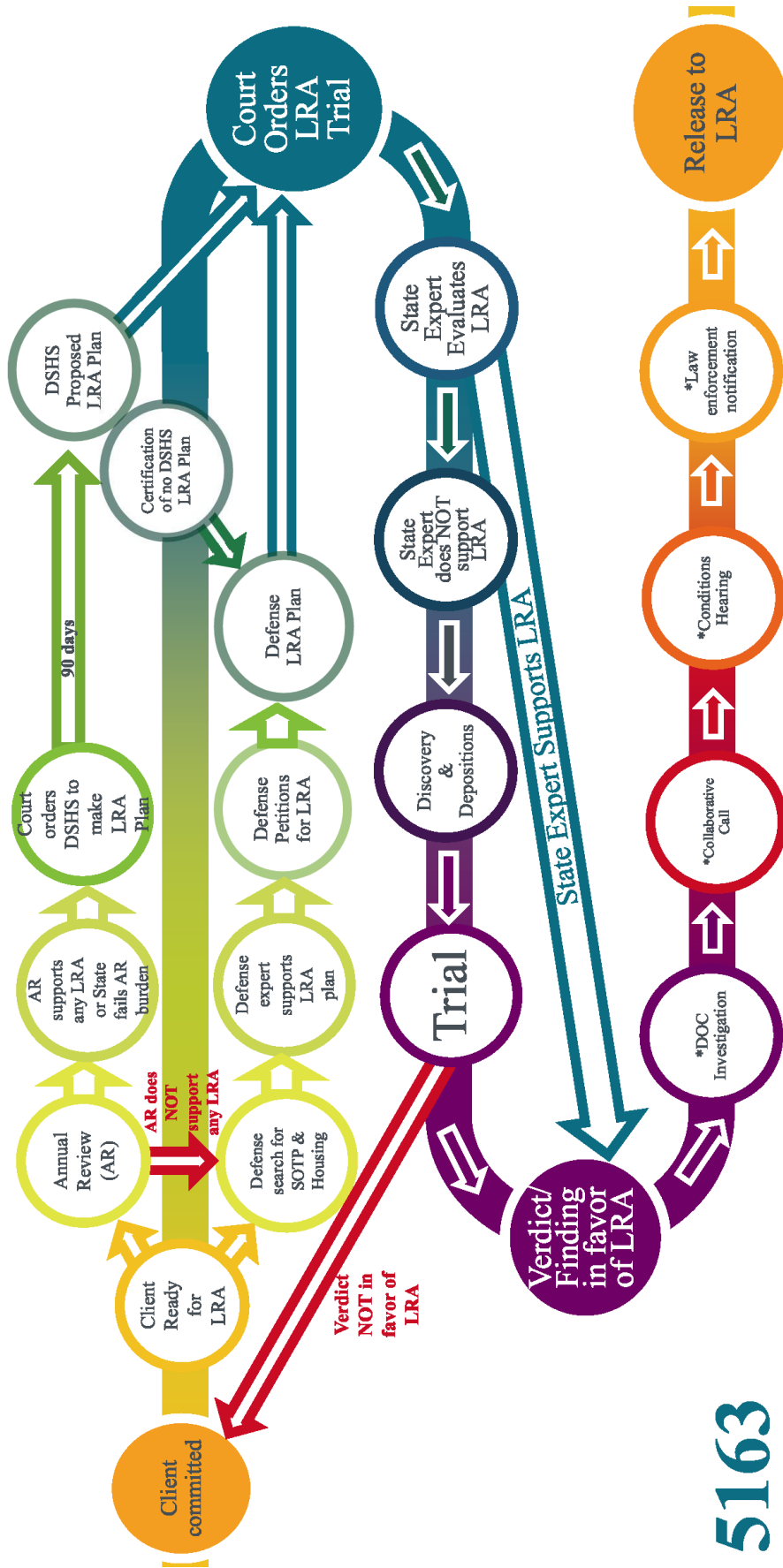
defense experts are subject to, the stagnant rates have created a vacuum of qualified experts on both the State and the Defense.

Further, the current statutory expert funding scheme has equal protection implications to those civilly committed. These dated caps create disparate treatment between defense and prosecution. State-appointed experts face no funding limitations under RCW 71.09.055, while defense attorneys are restricted by outdated funding caps. This creates an uneven playing field that the privileges and immunities clause was designed to prevent. As such, the court has rejected the opinions of defense experts who are required to provide expert evaluation services under the 2012 funding caps regardless of the volume of records.<sup>13</sup> It is not uncommon for the state's experts to receive two to three times more funding than what the legislature provides defense. And unlike defense, the state is not required to seek court approval for expert funding. Anytime defense wants to exceed the statutory caps, they must obtain a court order authorizing the increase.

When this happens, civilly committed individuals remain committed at the SCC despite being ready for a less restrictive alternative or an unconditional release. Increasing funding now is necessary to protect the rights of those facing civil commitment, but because expert spending is decreasing overall, any changes to the Chapter 71.09 RCW budget are sustainable in the long term.

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<sup>13</sup> See RCW 71.09.055



# 5163 LRA Process

## Sources

Sex Offender Policy Board. (2023). *RCW 71.09: Changes to Discharge Planning and Less Restrictive Alternative Placements in the Community*. Retrieved from [https://sgc.wa.gov/sites/default/files/public/SOPB/documents/RCW%2071.09\\_changes\\_to\\_discharge\\_planning.pdf](https://sgc.wa.gov/sites/default/files/public/SOPB/documents/RCW%2071.09_changes_to_discharge_planning.pdf)