OREGON LAW COMMISSION

February 24, 2003 **Capitol Building, Hr. Rm. 343**
2:30 p.m. **Tapes 3-5**

MEMBERS PRESENT: **Representative Lane P. Shetterly, Chair**
Senator Kate Brown, Vice Chair
Chief Justice Wallace P. Carson, Jr.
Professor Sandra A. Hansberger
Professor Hans Linde
Attorney General Hardy Myers
Dean Symeon C. Symeonides
Professor Bernard F. Vail
Martha L. Walters

MEMBERS EXCUSED: **Steven K. Blackhurst**
Gregory R. Mowe
Professor Dominick R. Vetri
Representative Max Williams, II

STAFF PRESENT: **David R. Kenagy, Executive Director**
Wendy J. Johnson, Assistant Executive Director
Rosalie M. Schele, Administrative Assistant

MEASURE/ISSUES HEARD:

- **Approval of Minutes from February 6, 2003 Commission Meetings**
- **Executive Director's Report**
- **Presentation of Bills: (Word Usage, Juvenile PSRB & Judicial Review)**
- **Work Group Updates**
- **Other Business**

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 3, A		
01	Chair Lane Shetterly	Calls to order the meeting of the Oregon Law Commission at the Capitol Building, Room 343 in Salem at 2:37 p.m.
		Explains that the agenda will be in reverse order starting with a discussion on Juvenile Code Revision Word Usage.
		Asks for approval of the February 6th minutes of the last Oregon Law Commission meeting **(Exhibit A)**.
		Moves that the Commission approve the February 6, 2003 Commission meeting minutes. Asks for objections or changes and hearing none, the Chair approves the minutes. Vote 9-0. So ordered.
		Asks for the Executive Director's report.
23	David Kenagy	Explains that the Commission budget has had some cuts in the past, as the Commissioners had been informed previously, and

		it is an open question whether there will be any additional cuts.
		Reports that the Commission has 10 bills in House, six in the Senate, and at the end of the present meeting there may be two additional bills for a total of 18, which is about double what the Commission had last session. Explains that he is looking forward to hearings on all. At this time of the six bills on the Senate side, two have passed through the Senate Judiciary Committee, the full Senate and are on the House side; two others have passed through Senate Judiciary and are waiting arrival on the House side; the final two are waiting for amendments before presentation to the Senate Judiciary Committee with Chair Minnis.
		On the House side there are 10 bills underway. Two have passed through Judiciary Committee to the floor of the House and are on the Senate side; one bill has passed out of the Land Use Committee and has gone on to Ways and Means where it is awaiting what will probably become a trifurcation so different relating clauses can be attached to that bill. The Public Body bill is still before the General Government Committee and there are a number of amendments that have been suggested by different interest groups. The six remaining bills have various amendments pending or they are set for hearing in the next few weeks. The update completes the report on the status of the Commission's bills.
61	Chair Lane Shetterly	Thanks the Oregon Law Commission partners at Willamette for supporting the work of the Commission through the budget cuts. Assures everyone that Rep. Williams and he will continue to advocate for Oregon Law Commission funding. Asks for any questions or remarks on the Executive Director's Report.
		Continues to the Juvenile Code Revision Work Group bill, SB 69, with a presentation by Timothy Travis via telephone.
81	Timothy Travis	Points out that the SB 69 amendments **(Exhibit B)** are in three parts and are the results of the work of the Juvenile Code Revision Sub-Work Group on Word Usage. The Sub-Work Group is working on developing language for words dealing with references to people. Asks the Chair how much detail he should explain about these three parts of the voluminous amendments.
108	Wendy Johnson	Suggests that he explain the consolidation provision that was added.
111	Timothy Travis	Refers to the Juvenile Code which provides that all cases involving custody visitation in a child abuse neglect action that are before the court should be consolidated. The purpose of consolidation is to keep inconsistent orders from being entered in different courts about the same child. This means that all of the files about one child would generally be combined and come before for the desk of the referring Juvenile Judge. So the same Judge can have full power in utilizing the 419B (child abuse and neglect statutes) or the 125 (guardianship statutes) or 107 (domestic relations statutes) to be able to choose the appropriate statutes and procedures.
		Starts discussion on ORS 419B.806.
168	Wendy Johnson	Helps find the location of 419B.806 on page 44 for people to

		read.
170	Timothy Travis	Points out that with this bill all of the references on "pending" actions have been removed from that statute. ORS 419B.806(2) makes clear about any action regardless of when it is filed (in bold print on page 44). Any "pending" action should also be consolidated. This change was made in the bill in response to a recent Court of Appeals decision interpreting this statute so as to not allow consolidation.
178	Chair Lane Shetterly	Asks where the word pending is in italics, not brackets, if that indicates it has been deleted. Wants to know if the Commissioners have questions.
		Explains that the Commission has already approved this bill but it is here today for amendments to the bill and an additional approval of the amendments.
200	Wendy Johnson	Adds for there knowledge that the full Juvenile Code Revision Work Group and the Word Usage Sub-Work Group approved these amendments last Friday.
202	Chair Lane Shetterly	Requests to hear from anyone else in the room who would like to discuss these changes and, hearing no response, indicates that everyone is satisfied with these amendments.
		Moves that Senate Bill 69, as amended by the presentation of Timothy Travis today and the drafts that are before them on their desks, be presented to the 2003 Legislative Assembly with the recommendation of the Oregon Law Commission. Asks for any discussion or objections and, hearing none, the Chair approves the amendments. Vote 9-0. So ordered.
		Continues on to the Juvenile Code Revision P.S.R.B. bill and report.
224	Senator Kate Brown	Introduces Mary Claire Buckley and Kathie Berger.
227	Mary Claire Buckley	Addresses the Chair and Commissioners to explain that she is currently the Executive Director of the Psychiatric Security Review Board (P.S.R.B.) and serves as Chair of the Juvenile Code Revision P.S.R.B. Sub-Work Group. Refers to the handouts **(Exhibit C)** that contain a memo from Wendy Johnson, the report prepared by Kathie Berger, a flowchart (schematic), and the bill draft.
		Summarizes that the problem is there is no dispositional provision in the Juvenile Code as to what would happen to a juvenile who would successfully assert the insanity defense. Judges are not willing to find juveniles guilty except for insanity without a mechanism in the Juvenile Code that would assure public safety. Our directive was to come up with some mechanism and we looked at the mechanism used in the adult system. The Work Group consisted of representatives from District Attorney's offices, the Attorney General's office, Department of Human Services, defense attorneys, judges and others.
		Points out how to step through the schematic flowchart **(Exhibit C).** There was concern that the group of individuals, who could assert this defense and come under a psychiatric security review board, should be narrow; the Work Group did not want to make this insanity defense available to any youth

		who had mental problems. There are definitions in the draft to allow determination of sub-groups for the youths. For example, on page 3, line 29, the bill draft defines a serious mental condition, and on page 4 there is a definition for mental defect. There were additional concerns that other youths who were not suffering from a serious mental condition, from which they would qualify for asserting the defense, but they were a danger to others; so these dangerous youth are defined as another sub-group. For any other youth who asserts the defense but are not a substantial danger to others or do not have a serious mental condition, the court still has the same dispositional alternatives that they have had all along (i.e. transfer to a dependency petition, discharge the youth to the parents or to pursue civil commitment which is a rare but available alternative).
339	Chair Lane Shetterly	Clarifies that those last three examples are available now.
341	Hans Linde	Asks why they chose the wording "serious condition" as the term.
353	Mary Claire Buckley	Explains that there was much discussion and it was a great struggle trying to determine what language to use because family members and advocates are concerned with the issue of labeling juveniles with the terms mental diseases, illness or defects. At the Office of Mental Health and Addiction Services, they have a psychiatrist on staff that suggested this term.
370	Bernie Vail	Says, "In other words you are trying to sugar coat the bill."
372	Mary Claire Buckley	Responds, that we were "trying to make the term acceptable to all."
377	Hans Linde	Comments that the term could have a negative connotation.
379	Chair Lane Shetterly	Supposes that that negative connotation is what raises much of the problem.
383	Hans Linde	Presents a second question about the use of the word "insanity." He explains that it has been a long time since he has been involved with this but he thought that the word "insanity" had been abolished and was no longer used.
390	Mary Claire Buckley	Explains that actually it was just the opposite; the defense used to be called not guilty by reason of mental disease or defect, but the legislature in 1983 changed it to guilty except for insanity.
400	Hans Linde	Why not define it here because one would need to go the criminal code to find what the word means in this statute.
403	Kathie Berger	Points out that in section 11 of the bill draft the finding that the court needs to make is set out; a court must determine if the youth is responsible except for insanity, which is the exact test that is in the adult criminal code. It is the same wording as the criminal code.
420	Bernie Vail	Indicates that you do still use "mental disease or defect" but simply use it in a different place.
421	Kathie Berger	Clarifies that there are definitions for "mental disease and defect" and if she represents a client with either of these conditions she can assert the insanity defense, but there are several other defenses that may result from the mental disease or defect. For example, there is a diminished capacity defense.
433	Chair Lane Shetterly	Recognizes Senator Kate Brown.
TAPE 4, A		
0	Senator Kate Brown	Asserts that she wants to add to Kathy Berger's discussion on

		mental disease or defect. The Juvenile Code Revision Work Group did not want the bill to apply to the 80 or 90% of the young people who go through the juvenile delinquency systems. The Work Group wanted it narrowed, knowing the bill might be placating some of the human services advocates and, at the same time, the human services people were going to be concerned about how the bill was written because it does not apply to a broader group of young people.
7	Mary Claire Buckley	Continues her discussion. Once the youth qualifies under either of the two categories, they will be considered "a young person" (this is a new term) and placed under the jurisdiction of the Juvenile P.S.R.B. Then, the Juvenile P.S.R.B. would retain sole jurisdiction over the youth. Commends Virginia Vanderbilt who did a very good job of organizing all the details in this bill. States that it is better than the adult statutes because it sets out in a logical fashion what the board has to find at each hearing in order to maintain jurisdiction, then sets out the types of hearings, and the design sets forth a separate panel of professionals with expertise in the juvenile system.
44	Hans Linde	Refers to the situation of a person who is really addicted and asks how the person would fit under the bill.
50	Mary Claire Buckley	Explains how they struggle with this concern on a weekly basis in the adult P.R.S.B. adult system. The reason this bill uses definitions for major depression called "bipolar" and "psychotic" was to try and avoid the problem of substance abuse. By setting out the definitions as they have, addictions would be excluded under "serious mental condition" but, if someone has a substance abuse addicted and they pose a substantial danger to others by findings of the court, they may end up qualifying.
60	Hans Linde	Asks for clarification on an exclusion by the use of definitions that is not based on testimony in each individual case where one must go out and find a psychiatrist to testify that the particular addiction is based on something within the definition.
70	Kathie Berger	Declares that Professor Linde's suggestion is possible if one had a child who had a bipolar disorder and was self-medicating. Explains that the reason the Work Group tried to limit it to a person who had a serious mental condition or who posed a potential danger to themselves or someone else was that the juvenile system as it is set up is intended to be a juvenile treatment system. The idea for this bill was to try and capture those juveniles who neither the Department of Human Services (DHS), through the Child Welfare System, nor the Oregon Youth Authority (OYA), through the Juvenile Justice Close Custody System, has a good way of dealing with. The OYA does not have the treatment facilities for youths that have serious mental conditions and the DHS has treatment facilities but does not have the public safety component capabilities. The concern is that there could be someone who fits some other diagnosis but the system cannot deal with the youth because of the danger they pose or the treatment they need. There are some youth out there who do not fit into any present category.
100	Hans Linde	Asks if there was concern about the youth who poses a serious danger to oneself.

103	Mary Claire Buckley	States that it was concluded that a serious danger to self would not be sufficient to fit within the newly proposed juvenile PSRB disposition.
104	Kathie Berger	Explains that there are systems through DHS or OYA to take care of youth or children that are a danger to themselves but when they are a danger to others there is no system.
111	Chair Lane Shetterly	Asks for further questions and recognizes Senator Brown.
112	Senator Kate Brown	Wants to hear discussion about the fiscal impact and the concern about a whole new structure for an agency through a legislator's perspective.
118	Mary Claire Buckley	Comments that she hesitates to answer because she has not had a board meeting to discuss all this but she thinks the adult board is organized to assume this responsibility. Sees as the fiscal impact for the agency just the stipends that are provided to the board members; the part time board members are only paid a stipend for the days they come together to hear the cases. She would calculate the fiscal by taking the number of young persons who would come under the board, estimate how many hearings they would have to have and multiply that by three board member stipends. It would only be the stipends for the hearing dates that would be required plus the treatment. The Department of Human Services (DHS) has a budget and they would have to calculate funding required for the treatment.
147	Senator Kate Brown	Asks if these are new and additional costs or not.
149	Mary Clair Buckley	Claims that it could be said that these costs are already there to take care of these youths, but she thinks that the DHS/OYA position is to the contrary.
150	Kathie Berger	Addresses Senator Brown and says that she may be able to answer the question. The Work Group tried to determine how many youths would fit into this change. They took the rate of successful assertions of the insanity defense in the adult program, doubled that rate and applied it to the number of juvenile delinquency cases that are filed in Oregon every year; they came up with a number of nine youths who would be in this Juvenile P.S.R.B. program per year. "We are looking at a small number of youth." Gives her best guess that right now some of these youths are in the custody of the DHS and others are in the custody of the OYA. The problem is that there will be an additional cost for the care of these youths because the cost for housing at the Oregon state hospital would be higher than what would be paid to house a youth in a closed custody facility within the OYA; whether all would be housed at the Oregon state hospital or some other facility is unknown at this time.
178	Chair Lane Shetterly	States that this explanation by Kathie Berger answered his questions, too; the fiscal implications were defined. Says that the fiscal impact "is not an issue for the Commission" and goes on to explain what will happen next; the policy committees will be dealing with the decision to approve this bill then the Ways and Means Committee will be responsible to flush out the appropriations issue.
185	Martha Walters	Refers to section 11 on page 10 where it requires that, when the court finds a youth responsible except for insanity, the court shall order a disposition. Asks, "Is that by preponderance of

		evidence?"
194	Kathie Berger	Answers, "yes," and refers to section 11, page 10, line 31 where it specifically states that.
196	Martha Walters	Asks for more clarification, stating that the youth must prove by a preponderance of evidence the insanity defense, but there is a section regarding disposition in subsection 6, page 12, line 4. Asks, "Do they present this testimony about all this at the dispositional hearing …as to whether they really are a substantial danger?"
209	Kathie Berger	Responds, "It would probably depend on whether there was a trial or whether it was an agreement with a contested disposition." Explains if there was a trial where the court had to actually decide if the youth met the insanity defense, a lot of the testimony would be incorporated into the record for the dispositional decision because one would not want to bring the experts back to ask the same questions. If it was a stipulation that the youth was responsible except for insanity and just a contested disposition, then there may need to be testimony at the dispositional hearing.
219	Martha Walter	Asks Kathie Berger, "Do you think it should be stated there that that's a preponderance of the evidence standard" for the disposition?
221	Kathie Berger	Replies, "Yes it should and we certainly will get it down to Virginia Vanderbilt" in Legislative Counsel.
222	Chair Lane Shetterly	Wants clarification of the exact location of this discussion and asks if it is on line 6 page 12 that the phrase "by a preponderance of the evidence" needs to be added after the word "finds" and before the word "that."
226	Martha Walters	Refers to page 13, section 14, line 21 where it has, "a young person, at the time of disposition, continues to be have" which is an error in grammar.
232	Mary Claire Buckley	Explains that this document LC 1095-1 **(Exhibit C)** is the first working draft and, because it was needed for discussion in this Commission meeting, the corrections that I have listed here did not get into this copy.
240	Martha Walters	Thanks Mary Claire Buckley.
240	Chair Lane Shetterly	Asks for other questions on the Juvenile P.S.R.B. draft.
241	Kathie Berger	Perceives that it is important to have on the record one important change that has been made to the Juvenile Code by this draft; usually Juvenile Court disposition lasts until the youth is on probation until the age of 23 or if they are in closed custody until the age of 25. One change was made -- if a youth who is found to be REI (Responsible Except for Insanity), for an act that is murder or any aggravated form of murder if committed by an adult, the youth will be subject to lifetime jurisdiction by the PSRB. Their case would move over to the adult panel of the PSRB when they turn age 18. This is a major change in how we perceive juvenile court adjudication. The reason this change was made is because in Oregon we can waive juveniles as young as 12 years old for murder or an aggravated murder. States, "I don't think someone who is that age should have to face a life in prison sentence in order to get under P.S.R.B. jurisdiction for life." One of the changes is for youth 12 to 14 years of age who, at the time of the waiver

		hearing, the court decides that this person is found to be responsible except for insanity; the court would have the ability to keep them in the juvenile system but ultimately under lifetime supervision of the P.S.R.B.
276	Chair Lane Shetterly	Asks, in lifetime supervision by the P.S.R.B., does the youth still remain under the jurisdiction of the juvenile court.
278	Kathie Berger	Responds with "No" because the juvenile court jurisdiction ends at the time of the transfer of the case to the P.S.R.B. We didn't want people running from the P.S.R.B. to the juvenile court contesting every decision made by the board because that would make the board essentially useless.
287	Chair Lane Shetterly	Agrees with the idea because there should not be a person fifty years old in the juvenile system (although, stating in jest, statutorily he could be defined as a "young person").
293	Mary Claire Buckley	Wants on the record that the Attorney General's office did have concern about this provision although the District Attorney thought that if there was a rational basis for our distinction that it would hold up. There were also advocates in our Work Group who were not happy with the increase in jurisdiction from 25 years to a lifetime.
304	Senator Kate Brown	Brings up another concern, referring to section 35 where a child under the jurisdiction of the P.S.R.B. is still in the legal custody of his/her parents and wants to know, "what if the parents are not complying with orders of the P.S.R.B. board?"
311	Mary Claire Buckley	States, "Senator Brown, as you may well know these are the two issues that probably caused this Work Group the most consternation." The juvenile court will make an initial determination whether the parents are willing and able to continue their role and, if so, they will remain in legal custody. She was concerned that that cooperation or agreement might change when needing to get parents' approval for many details such as changing medications and she could foresee some problems with the parents not agreeing. The Work Group is working with Legislative Counsel to assure that the consent at the time of the court is ongoing or irrevocable so there is a clear understanding that the board's decisions with regards to treatment or placement cannot be second-guessed. There will be some provision in the statutes to address this concern.
346	Chair Lane Shetterly	Recognizes Martha Walters.
349	Martha Walters	Inquires about the topic, disposition for life, and asks, "is there any discretion in the court to order [it] for a shorter time than life or is it absolutely required?"
354	Mary Claire Buckley	Explains that the board has the ability to discharge someone prior to the lapse of the jurisdiction if they show that they either are no longer suffering from a mental condition or are no longer a danger to others. So that is how it would be handled after a number of years.
364	Martha Walters	Asks if there has been some controversy over a court finding a juvenile who fits into one of those two categories and assigning them to life term.
371	Mary Claire Buckley	Indicates that in the juvenile system all rules and laws take them up to the age of 25 years and they have made a subgroup to extend the age in these two cases.
374	Martha Walters	Questions whether the people who object would be more

		amenable if there was some discretion by the court to decide the term of the disposition.
378	Mary Claire Buckley	Thinks that it was addressed in the Work Group meeting as the board having the option later on because, once the court turns a juvenile's case over to the board, the board has sole authority over the case for the rest of time.
387	Bernie Vail	Asks whether it is logical that if the court makes the determination that the juvenile has a serious mental condition that they are conceding that they do not have the ability to make the determination that they need to make as to 23, 25 or what years.
395	Hans Linde	Comments that the board can make successive orders over time so he wants to know if that applies to each new order as well.
405	Mary Claire Buckley	Says, it is "any order that is issued as a result of a hearing." If the board modifies someone's conditional release plan, it has not been a matter for appellate review at this time.
411	Hans Linde	Asks, "Why not?"
412	Mary Claire Buckley	Indicates that modifications as they stand now are things like a change of address. Only adverse orders they have would be appealable.
421	Kathie Berger	Supports the discussion by saying that the Work Group took into consideration that the appellate section of the bill is closely tied to the adult rights to appeal under the adult P.S.R.B. The standard of review would be an abuse discretion standard not a *de novo* standard review of the board's decision as it would be if the review came under the juvenile code.
TAPE 4, A		
03	Chair Lane Shetterly	Asks for any more comments and asks, if not, is there a motion.
13	Kate Brown	**Moves that LC 1095-1 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, including the amendment made to section 11, subsection 6, on page 12, lines 4, 5 and 6 with the words 'preponderance of evidence' and the amendments in the memo from Mary Claire Buckley (Exhibit D).**
19	Chair Lane Shetterly	Notes that it is not the time to approve the report because it is just a draft. **States that a motion has been made that LC 1095-1 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, including the amendment made to section 11, subsection 6,on page 12, lines 4, 5 and 6 with the words 'by a preponderance of the evidence' and the amendments in the memorandum from Mary Clair Buckley with no date. (Exhibit D).** **Vote 9-0. So ordered.**
47	Kate brown	Thanks Mary Claire Buckley, Kathie Berger and Virginia Vanderbilt for doing such an incredible job.
51	Chair Lane Shetterly	Thanks Wendy Johnson for the informative flowchart. (A murmur of agreement passes through the room.) Jests, "Hardy will understand when I say [the flowchart] is not as bad as HIPPA!" Indicates that the next item for discussion is Judicial Review of

		Government Actions and there are several reports. The main report is from Hardy Myers and there are three alternative view reports from Janice Krem, Steven Schell, and a group with Ruth Spetter, Paul Elsner and Scott Parker.
73	Scott Parker	Asks Scott Parker who has his arm in a cast if his "arm has been twisted" to withdraw his alternative view. Claims that, to the contrary, it is becoming more painful (laughter follows).
74	Chair Lane Shetterly	Recognizes the Attorney General, Hardy Myers, who is to discuss the Judicial Review of Government Action Work Group.
74	Attorney General Hardy Myers	Offers a brief historical note that the Judicial Review of Government Action Work Group entered the agenda of the Oregon Law Commission in the 1999-2001 Biennium and produced a measure, which the Commission advanced, though it was not approved in that 2001 Session. Then, "appropriately so," the Commission asked that we continue the subject for this 2003 Session. Refers to the remarkable observation of Former Chief Justice Peterson in *Forman v. Clatsop County* [297 Or 129, 133,681 P2d 786,788 (1984)] **(Exhibit E)**, which is in the Judicial Review Procedures Act Report (HB 3027) on page 3 and states: "If a person intended to create an inefficient, unpredictable, ineffective, expensive, unresponsive system for review of governmental acts, he or she would use the system we have in Oregon as a perfect model. Ours is senseless and cries out for revision." Relates that the current system, though it has some minor revisions, has been relatively unchanged in the 20 years since Chief Justice Peterson's writing. So, what they have before the Commission today is the second biennium's work on this issue and, as the alternative views make clear, he thinks this bill (HB 3027) has "a solid new proposal" with the points of disagreement related precisely in the Alternative View Reports. It is a major step forward to have, written in a "text-based, language based" form, the issues that are teed up for consideration.
120	Philip Schradle	Passes the continued presentation to Philip Schradle. Introduces himself as the Special Counsel to the Attorney General and mentions the great work of Oregon Law Commission staff, David Kenagy, Wendy Johnson and Rosalie Schele, who have taken a lot of time and effort assisting in the completion of this project; they helped with persistence, with good humor and grace, and with remarkable good cheer. It has been a long-term project and he feels he would be incredibly remiss not also to mention the contributions of Dave Heynderickx from the office of Legislative Counsel. Many times members of the Work Group turned to Dave and asked him to put their hours of discussion into words and, to the amazement of all, he always did. Emphasizes the many, many hours of work Dave has spent on this Work Group (Phil knows, having spent many with him), and thanks Dave for his great help. Another person he wants to note is Judge David Brewer from the Court of Appeals. Both in terms of his knowledge in

addition to his demeanor, he has brought a problem-solving approach to get to the core of many issues. He is a very remarkable person.

Relates that the problem that HB 3027 is addressing can be stated simply -- to bring under "one tent" the way to go about getting judicial review of all government action. It is a simple proposition but is broad in scope because it attempts to bring together in one form of judicial review what currently exists for both state and local government. Much is covered in the review provisions of the Administrative Procedures Act (APA), but they are extremely brief and do not go into sufficient detail. This bill is an attempt to get administrative judicial review and general civil judicial review proceedings to be triggered by the same mechanism and reviewed with the same format. Local government actions currently review under a plethora of writs and some are archaic in nature. What has been crying out for a long time, has been simplified by this bill. It covers some 30 sections of the statues which makes the bill about a total of about 340 pages, with 310 being conforming amendments. It has not drawn a consensus from everybody and part of the reason for that is there is a pull and push effect between state and local government. On the state front there is a feeling that the APA has cured all problems for all times; however there are still many open-ended questions under the APA. On the local government front, the fear is that the bill is trying to make reviewable things that were never reviewable before. The goal of the bill is not to make the outcome of the judicial review proceedings any different, rather it is to simplify the process and to make a roadmap on how to conduct the judicial review proceeding.

Commends every single individual from this Work Group with their willingness to confront issues, be advocates for their beliefs about different positions and to look at the a bigger picture about that which we are trying to accomplish. Everyone acted fairly to come to grips with the reality of the situation. Local government has concerns that the definitions of governmental actions, administrative acts and enactments are so broad they will be subjected to judicial review proceeding where they are not at this time. They believe that what one will see down the line is that the driving force will be what government did or didn't do for them.

Highlights some of the structure of the bill that is in a chronological manner, beginning with a set of definitions. Refers to the section-by-section description on page 10 of the report to see the bill's structure. Believes there are legitimate policy reasons for all of the listed exemptions from the bill. The notice of appeal is intended to be a very simple process so that there is one unified form of notice of appeal to get you into court.

The preliminary motion to dismiss is new for the APA practitioners though not new for local government or for civil litigation. On the qualified petitioners front, the bill is very broad in granting associational and representational standing.

On the state front, there are also federal law standing requirements, as under the Clean Water and Clean Air Acts, to have enough citizens' participation to qualify. Thinks there are policy reasons to have broad associational and representational standing. Sections 8 and 9 (ripeness and exhaustion) are new provisions, as well. Venue and record are intended to follow the same format. The petition for review is a new document on the local government front; the mechanism the bill is trying to set up here is a brief notice of appeal with a preliminary motion to dismiss so that legal issues that are decided early will result in claims that are dismissed early. Section 16, on stays, is a controversial issue and we tried to merge provisions to come up with the best organizational approach, but some people think it changes things.

Section 17 is the heart of the bill. It sets out the grounds for review, and the claims for relief. Some think it narrows the existing grounds for review, but he does not think that.

Section 18 covers conduct at a proceedings; this has been controversial from the state government front. It is addressed in the report as to how a circuit court goes about reviewing a government action when there is the claim that there is additional evidence that should be considered (and the circuit court agrees that there is additional evidence to consider). The Act encourages development of records and resolution of disputes in proceedings in front of the government unit charged with addressing such matters before making costly court proceedings to resolve disputes. This is the most substantive change in respect to current practice.

Sections 19 concerns reconsideration and provides for the opportunity to seek reconsideration from the government unit. There is an anomaly currently under the Administrative Procedures Act (APA); if you sought reconsideration, it could be deemed denied by the government and thus works as a trap for the unwary. They tried to clean it up with language in the bill.

Wants to clear up that what the Work Group wanted was to have status quo with respect to attorneys' fee entitlements. In a couple of the alternative view reports, it seems that some thought that the fee provisions were being repealed. What happened is that the location of attorney fees was changed but not removed and there was no change to the content. Hopefully that will not be confusing to the Commissioners.

In the report there is a wrong citation in section 14, on page 16, that should refer to section 59.

TAPE 4, B

27	Chair Lane Shetterly	Asks for clarification of this error.
28	Philip Schradle	Explains that in the report there are wrong citations in section 14 on page 16, that should refer to section 59 (where 183.480 amendments reside), not section 28.
31	Chair Lane Shetterly	Thanks Phil Schradle.
32	Philip Schradle	Refers again to the report and explains that it has a detailed

		section by section analysis. The thrust of the bill is to provide a unified and uniform mode of seeking judicial review and outline a roadmap of procedures and processes for the reviewing courts to use. Thinks ultimately this bill would save everybody money. This bill would provide mechanisms to a smoother route to judicial review and help get claims out early. Thinks that now judicial review is triggered too early and this bill will help the court system because there would be less time expended on evidence collection. Overall this will serve everyone's best interests.
		Thinks, in conclusion, that the bill as proposed is the best and most appropriate approach to judicial review, asks if there are questions.
71	Chair Lane Shetterly	Recognizes Professor Bernie Vail
72	Bernie Vail	Wants clarification because he thought this bill would effectively abolish the writ of mandamus and instead provide an exclusive remedy. Asks for examples.
75	Philip Schradle	States that it does not abolish the writ of mandamus; it is left there but almost all government action that would be challenged through the writ of mandamus is brought under the bill. There are lists of some 35 exemptions of government actions that are not covered by the bill.
85	Bernie Vail	Asks, "Why leave that loophole in existence?"
86	Dave Heynderickx	The mandamus that we have in our statute is not limited to public bodies; it can be used against corporations under the existing laws.
88	Bernie Vail	Replies that he is not worried about that but instead is concerned in terms of government actions.
90	Philip Schradle	Answers that in the list of exemptions that is set out at the beginning of the bill, contract actions and tort claims are listed. These are different than trying to invalidate the government action or order; these are not the type of action covered in the bill. A more specific exemption example is the review of unemployment insurance benefits because the Work Group did not want to trigger direct judicial review of orders that should go through the Employment Appeals Board process. Another example is the Board of Parole, which is presently exempt from the judicial review proceedings under the APA but the Board of Parole statute itself sets up fairly analogous judicial review provisions. Emphasizes that what they did not want to do was to upset those policy decisions that have already been made; these are unique bodies that are already in place and this is the generic reason for the list of exemptions. Another example is child support that has its own restricted timelines and the Work Group did not want to upset the specialized sets of policies that the legislature has already enacted.
114	Bernie Vail	Points out that he was reading the alternative view reports and wants to understand the relationship between this bill and the Administrative Procedures Act (APA) by asking, "as far as actions currently challengeable under the APA, would they also be challengeable under this act?"
125	Philip Schradle	Answers, "Yes, absolutely, and things that aren't currently reviewable under the APA would also be reviewable under this act."

126	Bernie Vail	Asks, if this judicial review bill passes, "what would be reviewable under the APA that would not be reviewable under this bill?"
128	Philip Schradle	States, "absolutely nothing" although with this bill the judicial review provisions any order or rule that was reviewable by the APA would now be reviewed by the judicial review instead.
134	Bernie Vail	Continues to seek clarification by asking, "what does the APA still apply to?" Explains that initially the premise was that there were too many alternative remedies and says, "it looks like we are just creating a new alternative remedy."
138	Philip Schradle	Explains that 99% of the Administrative Procedures Act (APA) deals with what state agencies need to do.
141	Bernie Vail	Emphasizes that he is referring only to the sense of review.
143	Philip Schradle	Remarks that the only three provisions in the APA that refer to judicial review are 1834.80 (challenge to final orders and provides interlocutory relief in some circumstances), 1834.82 (sets the stage for contested case orders), and 1834.84 (sets the stage for final order challenges other than contested case orders). These three provisions would be eliminated with this new bill.
150	Bernie Vail	Affirms that it is understood now.
151	Chair Lane Shetterly	Recognizes Commissioner Hansberger.
152	Sandra Hansberger	Reiterates that she knows that the bill is to simplify the process but asks, "Why is it we are requiring the statement of errors in the notice of appeal?" And, "have you considered the impact that might have on parties who are unrepresented by counsel before the agency" and explains that the time they have to prepare the notice of appeal would probably be before the attorney had time to review the record.
165	Philip Schradle	Answers that thought was given to all this. The rationale for having a brief statement of alleged errors was to set up the basis for the challenge. Without that there would be no opportunity for the motion to dismiss practice to work. It was an attempt, not to get meritorious claims out but, to get an understanding of the basis for the claim so, if there is a matter of law proposition as to why the person is jurisdictionally not correctly before the court, there are some failsafes built in. Without such a mechanism in place there is no efficient way to get implausible unmeritorious claims determined early.
188	Sandra Hansberger	States that under section 19, it allows the agency to withdraw its decision after the practitioner has filed a brief and up until oral argument. Allowing the agency to withdraw its decision after a brief has been filed seems like giving the governmental entity multiple opportunities.
204	Philip Schradle	Agrees, "You are correct to the extent that we attempted to mirror current law fairly closely with that provision in terms of timing" however, there are some tensions that pull in different directions if you would change the current *status pro* proposition.
246	Sandra Hansberger	Asserts that that is her concern that at the beginning of this process when there is a possible notice of appeal that requires a statement of errors (she is referring to early-on unrepresented individuals in the process), I would assume the agency would closely examine its order. Then to allow it again, towards the

		end of the process after a brief has been filed, seems like it gives it a double hit and also the practitioner bears all the expense.
258	Philip Schradle	Emphasizes that there are some additional practical ramifications of changing the current *status pro* on some other fronts. He does not know how local government handles their cases but what is being discussed here are challenges on contested cases only. With respect to contested case challenges, right now under the current APA review proceedings, until the practitioner's brief comes in, there is no opportunity to see either the claims of error or the argument in support of those claims of error. Even under the provisions of the new judicial review bill one might have a brief statement of the claimed error but not the argument that supports it. The time that gets articulated is usually in the brief. Knows that there are cases that the mere allegation of the error should alert the agency and their office to the merits of that then, hopefully in those cases, the matter would be resolved early.
293	Sandra Hansberger	Says, "but it adds an additional layer at the beginning."
294	Philip Schradle	Replies in the affirmative.
295	Chair Lane Shetterly	Asks Scott Parker to come forward if he would like
297	Scott Parker	Responds that he would like to leave his statements to his report.
300	Chair Lane Shetterly	Asks other people if there are any other statements or further questions. Since this is the last day to move this into the stream for consideration of the current legislative assembly, he suggests the possibilities as follows: 1. Render it dead or 2. Make a motion to present LC 1564 with the recommendation of the Oregon Law Commission and, in fairness to those people who wrote the alternative views, recommend it with those alternative reports. Asks Commissioner and Chair of the Judicial Review Work Group, Hardy Myers, if he thinks that fair
340	Hardy Myers	Agrees with the proposed form of the motion, subject to the approval of the Commission.
350	Martha Walters	Wants to know what the motion would mean in respect to continue working on the bill.
354	Chair Lane Shetterly	Explains that it would be much the same as what was done with the last one, which was to continue to pursue work on amendments as this moves forward.
367	Martha Walters	Agrees with the idea. Commends Philip Schradle on all his work and efforts. Contends that, if the Work Group would continue to work on the changes and amendments, the legislature would not have to struggle with some of the issues.
377	Sandra Hansberger	Asks, "if we pass the bill forward, the Work Group would continue to work during that process?"
381	Chair Lane Shetterly	Explains that the Work Group would be asked to help clarify areas that the legislators find confusing.
398	Attorney General Hardy Myers	Expects to be in contact with the chair of the committee where the bill is assigned.
410	Chair Lane Shetterly	Needs to recognize that the Oregon Law Commission Work

		Group is the more knowledgeable and could work with the Legislative committee chair to advance the bill.
419	Martha Walters	Thinks it would be helpful for the group to learn the ideas of the Commissioners, maybe not today, but asks if there would be a way to benefit from everyone's ideas.
TAPE 5, A		
03	Hans Linde	Explains that the Work Group spent a lot of time on issues and a lot of questions so the people who were not in the group could benefit from knowing what was discussed. They probably need to work on the question of getting the bill passed. Fixing details is not going to get the bill passed because these are two different levels of concerns. As far as the details are concerned, "yes, we can go back and see what pieces can be compromised." Ultimately, rather than letting other groups submit alternative texts, the best thing we could do is to list policy choices. The Legislators could then see the policy choices.
48	Chair Lane Shetterly	Suggests that we have a finished product here and can move forward now or wait until 2005. At least for today our choice is probably the choice of the package before us or to defer it until 2005.
		Recognizes Chief Justice Carson.
62	Chief Justice Wallace P. Carson	Would like to move forward with the motion.
		Moves that LC 1564 be presented to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, along with Hardy Myers' and Philip Schradle's Report and the other three Alternative View Reports. Also there is a conceptual amendment to change page 16 of Hardy Myers' and Philip Schradle's Report to read "Section 59" instead of "Section 28".
72	Chair Lane Shetterly	Clarifies the authors of the three alternative reports as 1. Janice Krem, 2. Steven Schell, and 3. a group of people including Ruth Spetter, Paul Elsner, and Scott Parker.
79	Symeon Symeonides	Explains that it is hard to adopt 4 different views at the same time.
84	Chief Justice Wallace P. Carson	Agrees.
86	Martha Walters	Thinks that the Commission does not want to adopt one as opposed to the others because there was not a majority view of the Work Group and says, "instead, we just should transmit all four of them" to accompany the bill.
88	Symeon Symeonides	Suggests that the main report might be the main view.
91	Martha Walters	Defers to the Attorney General on that issue.
92	Attorney General Hardy Myers	Emphasizes that his report is merely explaining the bill so we could adopt the report and include the alternative view reports.
95	Sandra Hansberger	Appears that we are in uncharted territory and would like to have the bill go to the legislature with those alternative views because they need to be considered. If she is voting that the Commission has acknowledged all the reports she would feel comfortable with that.
110	Chair Lane Shetterly	Tries to find words that are acceptable for this motion.
120	Martha Walters	Thinks the alternative view reports express the Work Group views because they are less than a majority.

123	Chair Lane Shetterly	Responds that the reports need to get somewhere.
128	David Kenagy	Clarifies that through the vote they could be adopting the one report, which defines the bill, and agreeing to transmit the alternative view reports. Then each time the entire packet would arrive for a hearing- all would go together.
139	Martha Walters	Wants it to be known that she may agree on parts of each report, even the alternative view reports, if they had an opportunity to fully discuss them.
144	Bernie Vail	Asks if there is a way for the Commission to say as a whole that the Commission does not agree on everything in the reports.
156	Chair Lane Shetterly	Explains that in a Legislative Committee it may not be important that the Commission did agree with everything so maybe we should let all the reports speak for themselves.
170	Symeon Symeonides	Gets the sense that they want to send the bill through but do not know what to do about the four reports. Perhaps we could adopt the bill and a compromise might be to say we are just going to send along the accompanying reports.
177	Chair Lane Shetterly	Wants to bifurcate the motion as suggested. Restates the motion.
		States that a motion has been made to present LC 1564 to the 2003 Legislative Assembly, with the recommendation of the Oregon Law Commission, without amendments.
		Asks for questions or discussion and hearing none, it passes.
		Vote 9-0. So ordered.
191	Attorney General Hardy Myers	Asks if they can submit the report and three alternative view reports **(Exhibit E)** to accompany the bill.
197	Chair Lane Shetterly	Agrees with the idea and it was his suggestion as well.
201	Attorney General Hardy Myers	**Moves that the Report accompany LC 1564 as well as the three Alternative View Reports.**
210	Chair Lane Shetterly	**Moves that there is a motion to submit Philip Schradle's Report as well as the other three Alternative View Reports (authored by 1. Janice Krem, 2. Steven Schell, and 3. Group of people including Ruth Spetter, Paul Elsner, and Scott Parker) to accompany the bill.**
		Asks for any discussion and notes the main report will speak for itself but wants to know if there is any objection about the motion stated in this form.
225	David Kenagy	Informs the Commissioners of a procedure that occurs after a report is approved by the vote of the Oregon Law Commission. A phrase, which states that this report was approved on this date, is typed at the bottom of the first page of the report. But, in this case it would state that the report was submitted, not approved, to the Legislative Assembly by action of the Oregon Law Commission. All would be advanced with that language.
235	Chair Lane Shetterly	Asks again if there is discussion or questions and hearing none, informs the Commissioners that the motion carries.
		Vote 9-0. So ordered.
		Asks if there is anything to report on the agenda item, Update of Work Groups.
240	David Kenagy	Not at this time.
242	Chair Lane Shetterly	Informs everyone that the next meeting is June 13th and adjourns at 4:50.

Submitted By,

Rosalie M. Schele,
Administrative Assistant

Reviewed By,

David R. Kenagy,
Executive Director

EXHIBIT SUMMARY

A – Minutes from Oregon Law Commission Meeting of February 6, 2003, 10 pages.
B – Juvenile Code Revision Work Group-Word Usage SB 69 Draft A, B, & C dated Feb. 21 2003, 165 pages.
C – Juvenile Psychiatric Security Review Board Sub-Work Group -Memo from Wendy J. Johnson, Draft Report, Juvenile PSRB Flowchart, and Draft of LC 1095, 59 pages.
D – Memo: Amendments to LC 1095-1 from Mary Claire Buckley, Executive Director of the P.S.R.B. (no date)-3 pages.
E – Judicial Review of Government Actions Work Group-Report by Attorney General Hardy Myers & Philip Schradle-24 pages, 3 Alternative View Reports (by Janice Krem-9 pages; by Steven R. Schell-13 pages; by Ruth Spetter, Paul Elsner and Scott Parker-5 pages), and Draft of LC 1564, 65 pages.