State Ombudsman Legislation in the United States

Bernard Frank

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STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK*

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I. INTRODUCTION

Year after year, Ombudsman proposals have been introduced in a majority of the state legislatures in the United States. Legislation has been passed for state-wide Ombudsmen in Hawaii, Nebraska, Iowa, and Alaska. The word “Ombudsman,” Swedish in origin, means an office

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** These topics are the 23 sections of the ABA Model Act.


2. HAWAII REV. STAT. §§ 96-1 et seq. (1968) (some portions were amended in 1974; see HAWAII REV. STAT. §§ 96-1 et seq. (Supp. 1974)) [hereinafter referred to as the Hawaii statute]; NEB. REV. STAT. §§ 81-8, 240 et seq. (Supp. 1969) [hereinafter referred to as the Nebraska statute].
established by the legislature or parliament and headed by an independent, high-level public official who receives complaints from aggrieved persons against government agencies, officials, and employees; conducts an investigation; and, if the complaints are justified, recommends corrective action. The major reasons for the Ombudsman institution include:

1. The modern state, large and complex, has assumed a multitude of functions resulting from social and welfare legislation. Extensive powers and discretion have been given to government agencies and officials. The individual must be protected against administrative mistake and abuse of power.

2. The traditional concern for the guaranty of the rights of the individual has become even greater in modern society. The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the status of the individual needs additional protection.

3. The growth of government prevents communication between it and the individual. The Ombudsman tends to humanize the bureaucracy to some extent and gives the individual a sense of relationship with his government.

4. Existing mechanisms for adjusting grievances are inadequate.
   (a) The legislator has limited funds and little or no staff, does not have direct access to information and files, lacks the time and expertise, and is not known to many of his constituents as being available for such assistance; his role, in addition, is affected by political considerations.
   (b) Courts do play a major role in the correction of abuses by government. But litigation is expensive, tension-creating, and slow-moving. Courts may be precluded from hearing appeals either by law or by technicalities. Review of administrative acts is limited. Courts are basically adversary party proceedings which must operate formally—restricted by rules for the production of evidence.
   (c) Administrative agencies may have, within their structure, channels for complaint, but lack independence and impartiality.
   (d) Political considerations may prevent the complainant from obtaining a fair resolution of his grievance from the office of the

statute]; IOWA CODE ANN. §§ 601G.1 et seq. (Supp. 1974) [hereinafter referred to as the Iowa statute]; Ombudsman Act, LAWS OF ALASKA ch. 32 (1975). The three present state-wide Ombudsmen are: in Hawaii, Herman S. Doi; in Nebraska, Murrell B. McNeil; and in Iowa, Thomas R. Mayer. The Alaska legislation was passed after this article was written and, therefore, will not be discussed. This list of Ombudsmen does not include complaint-handling offices established by executive action, correctional institutional complaint-handling officials whether created by the legislature or the executive, and several Lieutenant Governors who by legislative action or on their own initiative handle complaints.

Governor which handles complaints—this office relies in great part on the agency against whom the complaint is made.

5. The Ombudsman provides the citizen with an expert and impartial agent who acts informally, without time delay, without cost to the complainant, and without the requirement of counsel or an adversary proceeding, to determine whether the complainant has been wronged by government and, if so, to recommend corrective action. He supplements and does not replace existing institutions.

6. The presence of the office of Ombudsman has value, in that its existence serves as a deterrent to the bureaucracy.

Several proposals have been advocated in recent years to establish an Ombudsman office, although these proposals have varied according to their drafter's concept of the scope of the office.

The first Ombudsman bill, House Bill 3891, was introduced in Connecticut in 1963, by Representative Nicholas Eddy who had been interested in the Ombudsman concept advocated by Ralph Nader. The first model Ombudsman statute was issued by the Harvard Student Legislative Research Bureau in 1965. Professor Walter Gellhorn, one of the nation's leading authorities on the Ombudsman, prepared an "Annotated Model Ombudsman Statute" in 1967. In the same year, the American Assembly held its program on "The Ombudsman." Its final report urged the establishment of Ombudsman offices in American local and state governments, and although it did not recommend the establishment of a single Ombudsman office for the entire federal government, it did recommend application of the concept at the federal level. Also in 1967 the American Bar Association, Section of Administrative Law, created the Ombudsman Committee. In 1969, the American Bar Association adopted at its midyear
meeting of its House of Delegates a resolution on the Ombudsman which was amended in 1971. This resolution sets forth twelve essentials which should be contained in an Ombudsman statute:\(^9\)

**BE IT RESOLVED,** That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.

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\(^9\) The International Bar Association, in addition, adopted a resolution on the Ombudsman at its 1974 Vancouver Conference.
4. That establishment of a Federal government wide ombudsman program should await findings based upon the experimentation recommended.

Be It Further Resolved, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

Other developments regarding the Ombudsman proposals eventually led to the American Bar Association's formulation of a model Ombudsman statute. The National Conference of Commissioners on Uniform Laws in or about 1968 created a special committee to prepare a Uniform Ombudsman Act, but this committee was split in opinion as to whether uniform legislation was desirable. The Ombudsman Committee, Section of Administrative Law, American Bar Association, after polling its members, concluded that a uniform statute was not needed but that a model Ombudsman statute should be prepared. Professor Walter Gellhorn gave his permission to the Ombudsman Committee to use his Annotated Model Ombudsman Statute as a base for a new model Ombudsman statute. At the request of the Ombudsman Committee, Yale Law School Legislative Services undertook to prepare a model Ombudsman statute for state government and was instructed by the Ombudsman Committee to use Professor Gellhorn's model statute as a base and conform the model to the American Bar Association Resolution essentials. Edward G. Grossman, a student at Yale University Law School, acted as project co-ordinator and prepared a first draft of a Model Ombudsman Statute for State Governments.

The ABA Model Ombudsman Statute for State Governments (Tent. Draft No. 1, 1973) was reviewed by a special Ombudsman sub-committee consisting of Stanley V. Anderson, Milton M. Carrow, Andrew N. Farley, Paul P. Flynn, Walter Gellhorn, Helen T. Ginder, Clinton J. Hall, Benny L. Kass, Martin I. Klein, L. Harold Levinson, Stephen Pierson, Benjamin N. Schoenfeld, Jerome S. Weiss, and Bernard Frank. The comments received from the sub-committee were reviewed by Bernard Frank, and the model draft number one was revised accordingly. Draft number two was submitted to the special sub-committee, and after comments had been received from its members and Edward G. Grossman, the final draft was prepared. In March 1974 copies of the ABA Model Ombudsman Statute for State Governments (1974) were sent to state legislative reference bureaus and libraries and other interested persons. State Senator Julius C. Michaelson introduced in Rhode Island in March 1974 the first bill based on the ABA Model Ombudsman Statute for State Governments (1974).

10. Included in the publication were the ABA Resolution and a bibliography on the Ombudsman prepared by Edward G. Grossman.
The purpose of this article is to discuss the American Bar Association Ombudsman Committee Model Ombudsman Statute and to compare its provisions with the Hawaii, Iowa, and Nebraska statutes.

II. THE ABA MODEL OMBUDSMAN STATUTE FOR STATE GOVERNMENTS

The ABA Model Statute contains 23 sections, annotated with comments which the Ombudsman Committee endeavored to keep brief.

In order to compare the state statutes to the ABA Model Statute, each section of the ABA Model Statute and its comments shall be printed separately, in full, as a guide to the understanding of the contrasting viewpoints on the scope of the Ombudsman office.

A. Section 1. Legislative Purpose

IT IS THE INTENT OF THE LEGISLATURE TO ESTABLISH, IN ADDITION TO OTHER REMEDIES OR RIGHTS OF APPEAL OF ANY PERSON UNDER STATE LAW, AN INDEPENDENT, IMPARTIAL, STATE OFFICE, READILY AVAILABLE TO THE PUBLIC, RESPONSIBLE TO THE LEGISLATURE, EMPOWERED TO INVESTIGATE THE ACTS OF STATE [AND LOCAL] ADMINISTRATIVE AGENCIES AND TO RECOMMEND APPROPRIATE CHANGES TOWARD THE GOALS OF SAFEGUARDING THE RIGHTS OF PERSONS AND OF PROMOTING HIGHER STANDARDS OF COMPETENCY, EFFICIENCY AND JUSTICE IN THE ADMINISTRATION OF STATE [AND LOCAL] LAWS.

COMMENT: This suggested section provides a concise description of the characteristics of the office and its goals.

If jurisdiction over political subdivisions of the state is included (see § 3(a) (4) comment), the phrase "and local" should be included. Counsel must determine whether the inclusion of the phrase "and local" will be interpreted as pre-empting to the state jurisdiction over both state and local agencies and prevent local governmental units from establishing their own Ombudsmen.

Unlike the state statutes, the ABA Model Statute contains a section on legislative purpose. As the comment indicates, it provides a concise description of the characteristics of the Ombudsman office. It is obvious that the enumeration does not contain all of the office's characteristics—some of which are the receipt of complaints from

11. The ABA Model Ombudsman Statute for State Governments (1974) is hereinafter referred to as the ABA Model Statute.
aggrieved persons against government, inspection of agencies, production of testimony and documents, access to governmental records, and issuance of reports. There was no intention or necessity to enumerate all the duties. In addition, section one sets forth the two goals of the Ombudsman—to safeguard the rights of persons and to improve the administration of laws.

B. Section 2. Short Title

THIS ACT MAY BE CITED AS "THE [NAME OF STATE] OMBUDSMAN ACT OF [YEAR]."

COMMENT. The title "Ombudsman" is both well-publicized and distinctive in character. The American state experience has varied: Hawaii, "Ombudsman"; Nebraska, "Public Counsel"; and Iowa, "Citizens' Aide." But it should be noted that in Nebraska and Iowa the term "Ombudsman" is used by the public, the media, and even by the incumbents, who found that their original titles were easily confused with other very different offices and concepts. If a term other than "Ombudsman" is selected, appropriate changes must be made throughout this Act. However, the term "Ombudsman" should be used only when the legislation provides for an independent official who receives complaints against government agencies and who, after investigation, may, if the complaints are justified, make recommendations to remedy the complaints.

The ABA Model Statute prefers the use of the term "Ombudsman." There would seem to be no purpose in using another name merely because it is alleged that Ombudsman is a foreign sounding word. Nebraska's Murrell B. McNeil has indicated clearly his preference: he has placed the term Ombudsman on the door, in the telephone directory, on letterheads, and in annual reports and brochures and has stated, "The word is new to our vocabulary, however that fact must be overcome. An advantage of the word is that once it is known to the public, the communication net is established." The annotation to section two makes it clear that the word "Ombudsman" should be applied only to those officials who come within the definition given in the comment; this definition is basically similar to the one stated at the commencement of this article. It is unfortunate, this writer believes, that the term has been and is being increasingly used throughout the world, and particularly so in the United

States, to mean any complaint-handling mechanism whether governmental or non-governmental. As a result, three views have developed:

1. An office based on the definition of Ombudsman as stated in this article and in the comment (and other somewhat similar definitions) is the only office entitled to call itself Ombudsman. This is the position taken in the ABA Model Statute and is the view held by this writer.\footnote{Id. at 30.}

2. Ombudsman means any complaint-handling mechanism—in government, in business, in consumerism, in education, anywhere, any kind, any type. There are no limitations to the term and its general application.

3. Ombudsman still means any complaint-handling mechanism, but appropriate qualifying words should be added to describe the type—thus classical Ombudsman, legislative Ombudsman, executive Ombudsman, business Ombudsman, college Ombudsman, TV Ombudsman, newspaper Ombudsman, etc.\footnote{Rowat, The Spread of the Ombudsman Idea, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 7, 35 (S. V. Anderson ed. 1968).} Then governmental Ombudsmen become classical or legislative if within the definition stated in the opening of this article and in the comment to section two; or they become executive Ombudsmen if appointed by, responsible to, and serving at the pleasure of the executive.\footnote{A. WYNER, EXECUTIVE OMBUDSMEN IN THE UNITED STATES 10-13, 307-14 (1973).} This solution is certainly preferable to the second view expressed immediately above, but encourages the adulteration as well as the proliferation because the qualifying word is rarely if at all used by the official involved. The distinction is adhered to only by the legal and political science commentators.

C. Section 3. Definitions

AS USED IN THIS ACT,

(a) “AGENCY” MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF [NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH [NAME OF STATE], EXCEPT:

(1) ANY COURT, OR JUDGE AND APPURTE-NANT JUDICIAL STAFF;

(2) THE LEGISLATURE, ITS MEMBERS, ITS COMMITTEES, ITS STAFF AND ITS EMPLOYEES;
(3) THE GOVERNOR AND HIS PERSONAL STAFF;

[(4) (ALTERNATE A) ANY POLITICAL SUBDIVISION OF THE STATE;]

[(4) (ALTERNATE B) MAYORS, COUNCIL MEMBERS, AND JUDGES OF ANY POLITICAL SUBDIVISION AND THEIR PERSONAL STAFFS;]

(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.

(b) AN "ACT OF AN AGENCY" MEANS ANY ACTION, DECISION, FAILURE TO ACT, OMISSION, RULE OR REGULATION, INTERPRETATION, RECOMMENDATION, POLICY, PRACTICE OR PROCEDURE OF ANY AGENCY.

(c) "PERSON" MEANS ANY INDIVIDUAL, AGGREGATE OF INDIVIDUALS, CORPORATION, PARTNERSHIP, OR UNINCORPORATED ASSOCIATION.

COMMENT.

(a) Rather than specifying by name those agencies under the Ombudsman's jurisdiction, the Act permits jurisdiction over all state-related governmental operations and personnel (in pursuance of public function) with certain limited exceptions which should be minimized.

(a)(1) An exclusion of the judicial branch rests on its traditional independence and immunity from investigation; its internal review mechanisms (e.g., judicial conference); its continuous review by the profession (viz., Bar); and, in some states, its review by judicial commissions.

The wording ('appurtenant judicial staff') and judicious experimentation and experience should permit review of those peripheral to the adjudication itself.

(a)(2) The Legislature—an independent policy-making body; whose actions are conspicuous and subject to public scrutiny; whose tenure is subject to periodic popular review—is excluded. Committees and staff members who assist in policy formation are, likewise, excluded.

(a)(3) Elected state officials (e.g., Lt. Governor, Treasurer) who deserve exclusion for the same reasons as (a)(2) above, may be added to (a)(3) but they must be distinguished from other elected state officials who should be included and who are less immediately involved in policy-making and are engaged chiefly in administrative matters indistinguishable from those performed by non-elected officials generally. Thus, appropriate officials to be excluded may vary from state to state.
Alternatively, this exclusion might read, "(3) elected constitutional officials and their personal staff;".

(a)(4)
Alternate A. Where local jurisdiction is not included, (a)(4) should read, "(4) any political subdivision of the state".

Alternate B. If jurisdiction over a political division is included, Alternate B should be used to give an exclusion parallel to that for state officials, "[(a)(4) mayors, council members, and judges of political subdivisions and their personal staff]." 

(a)(5) The specific exclusion of multi-state entities, such as regional transportation and planning authorities, and implicit exclusion of federal agencies (including the local offices thereof) as 'agencies' are limited to 'entities of the state', are based on practical and constitutional limitations on sovereign power of the state over such agencies.

(b) "Acts of Agency" is broadly defined.

(c) "Person" is defined broadly.

The ABA Model Statute and the Hawaii, Nebraska, and Iowa statutes have sections which define several of the key words used in them. The words "agency" or "administrative agency" and "act of an agency" or "administrative act" or "administrative action" are found in all four to indicate the scope of the jurisdiction of the Ombudsman. "Person" is defined only in the ABA Model and the Iowa statutes. The descriptive "administrative" is omitted in section three of the ABA Model Statute because it might be construed as limiting jurisdiction. The scope and limitations of the jurisdiction of the Ombudsman under section 11(a), which relates to "any act of an agency," are found in the section three definitions. This same approach is found in the three state statutes.17

"Agency" in section three includes an enumeration of two groups: governmental entities and personnel. The state statutes are less detailed than section three, but there does not appear to be any significant omission in them. However, in referring to the individuals, the ABA Model Statute and the Nebraska statute refer to those "acting or purporting to act by reason of . . . connection with" the state, but Hawaii and Iowa describe those "acting or purporting to act in the exercise of . . . official duties." The former stems from the Gellhorn Model Statute (whereas the latter is based on the Harvard Model Statute) and represents a broader definition in not referring to "official duties" which may be construed as words of limitation.18


Section three sets forth four exclusions and an alternative fifth exclusion from the jurisdiction of the Ombudsman:

1. The exemption of the judicial branch, based on the court’s traditional independence, is contained in all the state statutes under review. However, the language “any court, or judge and appurtenant judicial staff” covered in both the ABA Model Statute and the Iowa statute is broader than Nebraska’s “any court” and, in this author’s opinion and that of Professor Gellhorn, eliminates any question as to whether the exemption granted the judicial system extends to courts, judges, employees, law clerks, and lawyers as officers of the court. In 1974, Hawaii amended its statute to change the exception from “a court” to “the judiciary and its staff.”

2. The legislature is also exempt in all state statutes. The ABA Model Statute is more detailed but basically covers under the legislative exception the legislators and their committees and employees, as do Hawaii and Iowa. The Nebraska statute makes no reference to a committee exemption but does include the Legislative Council. It is not believed that Nebraska’s omission creates a significant difference.

3. All the statutes are in accord with the ABA Model Statute in withdrawing from the jurisdiction of the Ombudsman complaints against the Governor and his personal staff. The comment to section 3(a)(3) points out that other elected officials might be excluded, and an appropriate alternative is suggested. The only statute to exclude a state official other than the Governor is Hawaii which in 1974 amended its statute to provide an exemption for the Lieutenant Governor and his personal staff. The question may well be asked, in view of the recent events in Washington popularly known as Watergate and the conduct of the then-President of the United States and his staff, whether the exclusion provided for the executive and his staff in Ombudsman legislation is proper. The function for an Ombudsman in government would seem to apply with equal force to scrutiny of the acts of the executive.

4. Local government exclusion from or inclusion in the Ombudsman’s jurisdiction is left to the decision of the legislature. If political subdivisions are to be excluded (as in Nebraska), appropriate language is recommended in the ABA Model Statute. If local government is to come within the jurisdiction of the Ombudsman, then the ABA Model Statute recommends that the phrase “and local” be included in the legislative purpose (section one) and further that consideration be given to exclude in the section three definition of “agency” certain local officials. Both Iowa and Hawaii have jurisdiction over

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local government, but only the Hawaii law makes provision (by a 1974 amendment) for an exclusion for mayors and councils of the various counties.24

It is appropriate to discuss at this point several problems in connection with local government. It is obvious that omitting local government from the jurisdiction of the state Ombudsman does not prevent the creation of the office by a political subdivision of the state. On the other hand, the comment to section one does raise the question (originally posed by Professor L. Harold Levinson, a member of the Ombudsman Committee) whether inclusion of local government will be interpreted as preempting to the state jurisdiction over both state and local agencies to prevent a local government from establishing its own local Ombudsman. The ABA Model Statute does not address this point, but this writer believes that the question must be answered in the affirmative. The problem of immunities of the local Ombudsman discussed hereafter under section 17 points to the desirability of state legislation covering the subject of local government. Either a state should give its Ombudsman jurisdiction over both local and state agencies or a state should have several statutes, one permitting local government to establish a local Ombudsman under the detailed provisions of a state statute and the other establishing a state Ombudsman without local jurisdiction.25

Another possible alternative suggested by Professor Levinson is to have a statute provide for a state-wide Ombudsman without local jurisdiction but to give enabling authority for any local government to establish a local Ombudsman with essentially the same attributes and powers, subject to some variations.26

5. It is made clear in the ABA Model Statute and the three state statutes that multi-state government entities are exempt from the jurisdiction of the Ombudsman.27 However, the language of the ABA Model Statute and the Hawaii statute is preferable, because of its simplicity, to the language of the Nebraska and Iowa statutes, the latter stating, "any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

6. The ABA Model Statute like Iowa does not specify an exclusion for federal agencies because it was deemed superfluous in view of constitutional limitations. However, the Hawaii and Nebraska statutes do contain such an explicit exclusion.28

25. For example, the Georgia legislature passed in 1974, H.B. 85 amending the Atlanta City Charter providing for an Ombudsman. On opinion of the City Attorney to the effect that the state law was improper, the City Council passed its own Ombudsman ordinance.
The key word “act of an agency” is defined in section 3(b) very broadly. The state statutes vary in their interpretations of agency action. Nebraska includes an agency “order,” but omits within the scope of an agency's action “failure to act, interpretation, or policy.” Hawaii omits “failure to act, rule or regulation, interpretation, or policy,” but adds that it does not include “the preparation or presentation of legislation.” Iowa covers “policy, action, or failure to act,” but adds as to the latter, “pursuant to law.”

“Person” is defined only in the ABA Model Statute and the Iowa statute, and both use the same language.

D. Section 4. Creation of Office

THE OFFICE OF OMBUDSMAN IS HEREBY ESTABLISHED.

The three state statutes use somewhat similar language with only minor differences.

E. Section 5. Nomination and Appointment

(ALTERNATE A)
THE (INSERT NAME OF LEGISLATIVE BODY) SHALL ELECT THE OMBUDSMAN BY A TWO-THIRDS VOTE OF THE MEMBERS OF EACH HOUSE PRESENT AND VOTING.

(ALTERNATE B)
THE GOVERNOR SHALL APPOINT THE OMBUDSMAN SUBJECT TO CONFIRMATION BY A TWO-THIRDS VOTE OF THE MEMBERS OF EACH HOUSE OF THE (INSERT NAME OF LEGISLATIVE BODY) PRESENT AND VOTING.

COMMENT. In foreign countries the Ombudsman has been elected by the legislature. This appears to be the method favored to date by the state legislatures which have adopted Ombudsman legislation. Alternate A follows this pattern.

However, in view of the American tradition of appointment by the Chief Executive, Alternate B provides for such appointment, subject to confirmation by the legislature.

The American Bar Association Resolution on the Ombudsman sets forth both alternatives.

The comment to section five is not accurate in stating that in foreign countries the Ombudsman has been elected by the legislature.

29. HAWAII REV. STAT. § 96-1(b) (1968); IOWA CODE ANN. § 601G.1-5 (Supp. 1974); NEB. REV. STAT. § 81-8,240(2) (Supp. 1969).
This is true only with respect to the Scandinavian countries. Appointments elsewhere vary from country to country. For example, in New Zealand the Ombudsman is appointed by the Governor-General on the recommendation of the House of Representatives. In the United States, the three states have made the selection of the Ombudsman part of a legislative process and have assigned no role whatever to the Governor, thus making it clear that the office is an arm of the legislature. Hawaii requires selection by majority vote of each house in joint session. Iowa provides for appointment by the Legislative Council with confirmation by a constitutional majority of each house. Nebraska's unicameral body selects the Public Counsel by a two-thirds vote from nominations submitted by the Legislative Council Executive Board.

The ABA Model Statute follows the ABA Resolution in setting forth two alternatives for selection—election by the Legislature or appointment by the Governor with confirmation by the Legislature—and in fixing a legislative vote of more than a majority. The ABA Resolution, when passed in 1969, originally provided for only one method—selection by the Governor with confirmation by the Legislature. This was changed in 1971 to the two present alternative methods when the Ombudsman Committee learned that in 1970 the High Commissioner of Micronesia had disapproved Ombudsman legislation on two grounds, one of which was that the proposed statute, providing for appointment by the legislature only, did not conform to the 1969 ABA Resolution.

F. Section 6. Qualifications

(a) THE OMBUDSMAN AND DEPUTY OMBUDSMAN SHALL BE PERSONS OF RECOGNIZED JUDGMENT, OBJECTIVITY AND INTEGRITY WHO ARE WELL-EQUIPPED TO ANALYZE PROBLEMS OF LAW, ADMINISTRATION, AND PUBLIC POLICY.

(b) NO PERSON WHILE SERVING AS OMBUDSMAN, ACTING OMBUDSMAN, OR DEPUTY OMBUDSMAN:

   (1) SHALL BE ACTIVELY INVOLVED IN POLITICAL PARTY ACTIVITIES;

   (2) SHALL BE A CANDIDATE FOR OR HOLD OTHER PUBLIC OFFICE, WHETHER ELECTIVE OR APPOINTIVE;

   (3) SHALL BE ENGAGED IN ANY OTHER OCCUPATION, BUSINESS, OR PROFESSION;

   (4) SHALL REMAIN IN OFFICE AFTER THE LAST DAY OF DECEMBER IN THE YEAR IN WHICH HE REACHES THE AGE OF SEVENTY YEARS.

33. 96 ABA Reports, Administrative Law Section 749-51 (1971).
COMMENT. The Ombudsman, Acting Ombudsman and Deputy Ombudsman should be full-time impartial experts in whom the public can have confidence.

(a) This sub-section expresses succinctly the desirable traits of an Ombudsman, more clearly expressing the legislative intent than by merely listing restrictions on the official. Experience points to the desirability of a legal background, but this section does not prevent the appointment of qualified, individuals from other professions.

(b) (1-3) These provisions, while insuring that the Ombudsman's work is performed on a full-time basis, inhibit politicization of his office and conflicts of interest in his outside professional contacts (whether or not for profit).

While (b)(2) inhibits an Ombudsman's using the office as an immediate political stepping-stone, some states have proposed to go further and to add a section reading, "shall not have served as a member of the Legislature for two years prior to his appointment and shall not serve as a member of the Legislature for three years following completion of the term for which he was appointed," which would prevent use of the office as a political plum as well. However, this would also unnecessarily prevent appointment of a highly qualified legislator, governor or judge; the appointment process should provide a sufficient screen against outright political favoritism.

(b)(4) This suggested section is parallel to the mandatory retirement requirement for judges in many states.

Section six, in dealing with the qualifications of the Ombudsman, describes both affirmative and negative aspects—as do the Nebraska and Iowa statutes.\textsuperscript{34} The Hawaii statute limits itself to the prohibited activities which would disqualify a person from serving.\textsuperscript{35}

The ABA Model Statute and the Nebraska and Iowa statutes agree that the basic qualities of the Ombudsman (extended to the Deputy Ombudsman only in the ABA Model Statute) are that the person be equipped or qualified to handle problems of law, administration, and public policy; the ABA Model Statute additionally mentions that the person possess "recognized judgment, objectivity and integrity." Such a catalogue delivers the message—only impartial experts who are competent, objective, and fair should apply. In the Scandinavian countries, the Ombudsman is required to be either a lawyer or a judge. The trend elsewhere does not make a legal background a mandatory requirement, and other professionals as well as lawyers and judges serve in the office. The ABA Model Statute and the three state


statutes are in accord with the latter approach. Herman S. Doi of Hawaii and Thomas R. Mayer of Iowa are lawyers. Murrell B. McNeil of Nebraska is a retired military officer who served state government in several capacities before his election as Public Counsel. As for additional qualities demanded of the Ombudsman, only Iowa has a state citizenship requirement.

The ABA Model Statute and the three state statutes restrict or prohibit certain activities by the Ombudsman. The ABA Model Statute in section 6(1) specifically extends the restrictions to the Acting Ombudsman and the Deputy Ombudsman. The Iowa statute is the most inclusive as to those persons in the Ombudsman's office who are affected by the restrictions since it specifies that neither the Citizens' Aide nor any member of his staff shall engage in the prohibited activities. However, it would seem that even without the specific inclusion of staff under the legislation being reviewed the prohibitions would apply, if not by implication, then realistically by the controls of the Ombudsman over his staff.

The ABA Model Statute covers four specific restrictions:

1. The prohibition against active involvement in political party activities is preferable to the vague "partisan affairs" involvement restriction found in the Nebraska and Iowa statutes. Hawaii's statute is silent on this point.

2. The purpose of the prohibition against campaigning for or holding other public office, whether elective or appointive, is to prevent use of the Ombudsman office as an instrument to seek other public office—whether federal, state, or local and whether or not for compensation. There is no better way to destroy the public's image of the Ombudsman office than to violate this prohibition and the prior one against political party activities. The independence of the office must be maintained. Both Nebraska and Hawaii prohibit the Ombudsman from being a candidate for or from holding any other state office. Iowa prohibits the Citizens' Aide or any member of his staff from holding any other public office of trust or profit under the laws of the State. The Iowa statute does not specifically forbid being a candidate, unless its language which prohibits active involvement in partisan affairs is so interpreted. The broader language of the ABA Model Statute is preferable.

3. The ABA Model Statute and the three state statutes seek to assure a full-time Ombudsman. Hawaii and Nebraska both prohibit engaging in "any other occupation for reward or profit," whereas Iowa prevents engaging "in any other employment for remuneration." The ABA Model Statute, which is more sweeping, covers "any other occupation, business, or profession," but it is doubtful that this enumeration produces a different result from the state statutes except the ABA Model Statute does not require that there be any reward, profit, or remuneration from the employment. It is submitted that since a major
objective of Ombudsman legislation would be to require the Ombudsman to devote full time to his office, prevent conflict between the position and other interests of the person serving as Ombudsman, and preserve the impartial character of the office, the desired approach is that of the ABA Model Statute which seeks to prevent the Ombudsman from being engaged in any occupation, business, or profession whether with or without remuneration. This language should permit lectures or writings which do not interfere with the Ombudsman's duties.

4. Only the ABA Model Statute has a provision for mandatory retirement of the Ombudsman upon his reaching a certain age. It is obvious that this does not evaluate the capacity of the individual serving as Ombudsman to continue after age seventy, but applies to the Ombudsman office the desirable concept, found in many states, of the compulsory retirement of judges. The provision for retirement benefits in section 10 (c) should be noted.

Several of the states have other restrictions on the Ombudsman's activities:

1. Hawaii and Nebraska prohibit serving as Ombudsman within two years of the last day of service as a member of the Legislature. It is difficult to understand why legislators are singled out here since the appointment process should result in the selection of a qualified Ombudsman and the elimination of undesirable candidates. Both the ABA Model Statute and the Iowa statute reject this restriction.

2. Iowa has a conflict of interest restriction and prohibits the Citizens' Aide and his staff from knowingly engaging in or maintaining any business transactions with persons employed by agencies against whom complaints may be made under the Iowa statute. This restriction would seem to be covered in section 3(b)(3) of the ABA Model Statute which prohibits the Ombudsman from being engaged in any business transactions.

G. Section 7. Term of Office

THE OMBUDSMAN SHALL SERVE FOR A TERM OF _______ YEARS AND UNTIL HIS SUCCESSOR IS APPOINTED AND QUALIFIED. [(ALTERNATE A) HE MAY BE REAPPOINTED FOR ADDITIONAL TERMS.] [(ALTERNATE B) HE MAY NOT BE REAPPOINTED FOR ADDITIONAL TERMS.]

COMMENT. A long term is desirable: to permit the Ombudsman sufficient time to become proficient at his duties; to provide a measure of independence from politics; and to provide prestige and security to attract qualified people to the position. An excessively long term (e.g., 15 years) prevents the desired periodic accountabil-
ity to the Legislature. The term should not be less than five (5) years. Either Alternate A or Alternate B should be used to make it clear the Ombudsman should be limited to one term only or may be reappointed for additional terms.

The ABA Model Statute allows the state to determine the number of years in a term, but the comment to section seven does recommend a long term which should be not less than five years. This term, of course, is subject to any state limitations on the duration of the term of a public office. Hawaii and Nebraska Ombudsman statutes provide for a six year term as compared to Iowa’s four years. Only Hawaii specifically provides for reappointment with a limitation on serving three terms. It is assumed that the silence in the Nebraska and Iowa statutes on this subject does not prevent reappointment, but it is submitted that the statute should spell out specifically whether reappointment is permitted or not to avoid any future problems. The ABA Model Statute allows the enacting state to determine whether the Ombudsman should be reappointed or not, but does not limit the number of terms. This writer is of the opinion that if the Ombudsman has functioned properly and successfully and the appointing authorities want him to continue, there should be no statutory restriction against re-election or a limitation on the number of terms that he can serve.

The ABA Model Statute provides for the Ombudsman’s term of service to continue until a successor is appointed and qualified. Hawaii amended its statute in 1974 to provide similarly that the term of service will continue until the appointment of a successor. Iowa (in addition to being the only state to specify a date for the commencement of a term—July 1 of the year of his approval by the Legislature) specifies that the Citizens' Aide continue in office until his successor is appointed by the Legislative Council. There would appear to be a gap between the termination of office (until a successor is appointed by Legislative Council) and commencement of term by the successor (July 1 of the year his appointment is approved by Legislature). Nebraska has no provision for service until a successor is appointed.

H. Section 8. Removal and Vacancy

(a) THE LEGISLATURE BY A VOTE OF TWO-THIRDS OF THE MEMBERS OF EACH HOUSE PRESENT AND VOTING MAY REMOVE THE OMBUDSMAN OR ACTING OMBUDSMAN FROM OFFICE, BUT ONLY FOR MENTAL OR PHYSICAL INCAPACITY TO PERFORM THE DUTIES OF HIS OFFICE FOR AT LEAST THREE MONTHS, OR OTHER GROUNDS SUFFICIENT FOR REMOVAL OF A JUDGE FROM STATE COURT.

(b) IF THE POSITION OF OMBUDSMAN BECOMES VACANT FOR ANY REASON, THE DEPUTY OMBUDSMAN SHALL SERVE AS ACTING OMBUDSMAN UNTIL AN OMBUDSMAN HAS BEEN APPOINTED FOR A FULL TERM.

COMMENT. (a) Removal is made difficult and for cause to prevent the sudden attacks or political threats against the office more likely to occur in this country without an Ombudsmanic tradition. Alternatively, this sub-section might provide that the Ombudsman, et al., could be removed from office according to state constitutional provisions for removal of judges or other public officials.

(b) In filling vacancies, full-term appointment is preferable to remainder-of-term appointment as it provides the desirable longer term of office.

The ABA Model Statute adopts the principle that the independence of the Ombudsman is maintained by freeing him from removal from office except for cause determined by a two-thirds vote of the Legislature. These removal procedures are followed even when the Governor may have become a part of the appointment process as under alternate B, section five. This protects the Ombudsman from removal by the Governor in the event the Governor objects to the Ombudsman's activities. The three state statutes under review concur in the principle that only the Legislature may remove the Ombudsman. Only the ABA Model Statute includes both the Ombudsman and Acting Ombudsman under these removal provisions.

The process of removal must be made difficult so that, as the comment to the Gellhorn Model Statute states, "[t]he Ombudsman should be secure but not absolutely untouchable." Two safeguards should be present: a wide consensus of legislative opinion favoring removal and specific and limited causes for removal. Hawaii and Nebraska both require two-thirds vote of the legislators (Hawaii—in joint session; Nebraska, of course, has only one chamber). Iowa, on the other hand, permits removal by a constitutional majority vote of the two houses or for reasons provided by chapter 66, 1973 Code of Iowa. It should be noted that although the Hawaii statute requires a two-thirds removal vote, the state's statute provides for appointment on a majority vote. The ABA Model Statute and the Nebraska and Iowa statutes, on the other hand, provide for the same required vote on removal as on appointment.

38. Gellhorn Model Statute, supra note 6, at 162-63.
The second safeguard relates to specific and limited causes for removal. The ABA Model Statute covers incapacity for a definite period of time or grounds which are sufficient for removal of a judge from a state court. Nebraska’s grounds are incapacity, neglect of duty, or misconduct, standards which are basically the same as Hawaii’s except that the term “disability” is used in place of the word “incapacity.” The Iowa statute does not require the legislature to have any cause for removal, but does specify by reference to chapter 66 an alternative method of removal which requires removal by court for specific reasons: willful or habitual neglect or refusal to perform the duties of his office, willful misconduct or maladministration in office, corruption, extortion, conviction of a felony, intoxication, or upon conviction of being intoxicated.40 The ABA Model Statute gives more flexibility by relating the grounds for removal to those sufficient for removal of a judge from a state court. Applying this standard to Pennsylvania, for example, would mean removal for “misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute.”41

The ABA Model Statute and the three state statutes provide for an acting Ombudsman in the event the Ombudsman position becomes vacant: Iowa, the Deputy Citizens’ Aide; Nebraska, the Deputy Public Counsel; Hawaii, the First Assistant to the Ombudsman; and the ABA Model Statute, the Deputy Ombudsman. The reasons, however, differ with respect to the cause of the vacancy: ABA Model Statute, “for any reason”; Nebraska, “for any cause”; Iowa, “absence from the state or disability”; and Hawaii, “death, resignation, ineligibility to serve, removal, or suspension from office.”

The ABA Model Statute avoids remainder-of-term appointments since the Acting Ombudsman serves until the Ombudsman is appointed for a full term, as is true also in Hawaii and Nebraska and possibly in Iowa. In Iowa, the Deputy serves as Citizens’ Aide until the vacancy is filled by the Legislative Council, but it should be noted that appointment by the Legislative Council requires approval by the Legislature and that service of such appointee begins from July 1 of the year of approval for a four-year term.

I. Section 9. Compensation

THE OMBUDSMAN SHALL RECEIVE THE SAME SALARY AND BENEFITS AS THE CHIEF JUDGE OF THE

[HIGHEST COURT OF STATE].

41. PA. CONST. art. V, § 18(d).
COMMENT. This high salary reflects the responsibility and prestige of the office and should be sufficient remuneration to attract qualified people. Rather than fixing the salary at a specific sum, which would shortly become obsolete (leading inevitably to legislative wrangling), it is pegged to a judge's salary and benefits (see § 10 (c)). Of course, normal reimbursement of expenses is not included in compensation. If a specific dollar sum is desired, an additional provision is appropriate: “Compensation shall not be diminished during his tenure in office, unless by general law applying to all salaried officers of the State.” Permitting a legislative committee or council to set salary and benefits—which might fluctuate with political moods—is neither fair to applicants for the post, nor promotive of independence of the office, and may effectively abrogate stiff removal provisions (§ 8 (a)).

The ABA Resolution essential of a high salary equivalent to that of a designated top official is reflected in section nine of the ABA Model Statute which relates the Ombudsman's salary and benefits to that of the chief judge of the highest court in the state. Fixing the compensation to that paid the chief state judge did not appeal to the three state legislatures that enacted Ombudsman legislation in the United States. Hawaii relates the salary to that of a state circuit judge and is the only state to specifically provide that compensation shall not be diminished during the term of office unless by general law applying to state salaried officers. In Nebraska, the Executive Board of the Legislative Council fixes the salary of the Public Counsel. The Iowa statute lacks a specific provision, but the Citizens' Aide’s salary is fixed by the Legislative Council. The control by the Legislative Councils of Nebraska and Iowa in determining the compensation of the Ombudsman is inconsistent with the independence of the office and, as the comment to section nine indicates, may lead to an easier method of causing the removal of the Ombudsman in these states (by diminishing the salary of the office) without compliance with strict statutory provisions and safeguards regarding removal.

J. Section 10. Organization of Office

(a) THE OMBUDSMAN SHALL SELECT, APPOINT AND FIX THE COMPENSATION (WITHIN THE AMOUNT AVAILABLE BY APPROPRIATION) OF A PERSON AS DEPUTY OMBUDSMAN AND MAY SELECT, APPOINT AND FIX THE COMPENSATION (WITHIN THE AMOUNT AVAILABLE BY APPRO-

PRIATION) OF SUCH OTHER OFFICERS AND EMPLOYEES AS HE MAY DEEM NECESSARY TO DISCHARGE HIS RESPONSIBILITIES UNDER THIS ACT. ALL OFFICERS AND EMPLOYEES OF HIS OFFICE SHALL SERVE AT THE OMBUDSMAN'S PLEASURE.

(b) THE OMBUDSMAN MAY DELEGATE TO MEMBERS OF HIS STAFF ANY OF HIS AUTHORITY, POWERS, OR DUTIES EXCEPT THIS POWER OF DELEGATION AND HIS DUTY TO MAKE ANY REPORT UNDER THIS ACT. HOWEVER, THE OMBUDSMAN MAY AUTHORIZE THE DEPUTY OMBUDSMAN TO ACT IN HIS STEAD DURING ILLNESS, ABSENCE, LEAVE, OR DISABILITY.

(c) THE OMBUDSMAN AND HIS STAFF SHALL BE ENTITLED TO PARTICIPATE IN ANY EMPLOYEE BENEFIT OR RETIREMENT PLAN AVAILABLE TO STATE EMPLOYEES.

COMMENT. (a) The experimental nature of the office and the close, personal relationship engendered in such a small staff implies the Ombudsman should be free of civil service and political constraints in staff selection and retention. The Ombudsman, however, should refer to civil service salary schedules in setting comparable salaries for staff, and would naturally use state accounting facilities for payment of such (cf., § 11(j)). The appointment of a Deputy Ombudsman is compulsory, while selection of other officials, including an Assistant Ombudsman or Ombudsmen, is optional.

(b) This same desire for flexibility should permit a broad delegation of powers. The Ombudsman, however, remains responsible for the organization of his office and for whatever reports leave the office (§ 16)—unless the Deputy Ombudsman has assumed his duties in his absence or when the office is vacant (§ 8(b)). Rather than requiring within the text of the bill that such delegation be in writing, or that staff members take an oath of office, such matters should be left to the Ombudsman's discretion to impose, if found desirable, by regulation (§ 11(b)).

The ABA Model Statute proceeds on the principle that to be independent the Ombudsman must control the selection and retention of his staff.

The ABA Model Statute as well as the state statutes make the appointment of a Deputy by the Ombudsman compulsory. Only the

43. HAWAII REV. STAT. § 96-3 (1968); IOWA CODE ANN. § 601G.6 (Supp. 1974); NEB. REV. STAT. § 81-8,244 (Supp. 1969).
ABA Model Statute in section six requires the Deputy Ombudsman to have the same qualifications as the Ombudsman. The ABA Model Statute and the Nebraska law permit the Ombudsman to fix the compensation of his Deputy within the amount available by appropriation. In Hawaii, the Ombudsman must consult with and follow as closely as possible the recommendations of the Department of Personnel Services, and the salary shall not exceed the percentage limitations established by law for a deputy director of a department; in Iowa, the Citizens' Aide designates a member of his staff as the Deputy, and the salary is authorized by the Legislative Council. Only in the ABA Model Statute and the Hawaii statute is there specific provision for removal of the Deputy by the Ombudsman, but in Nebraska the power is implied from the power explicitly granted the Ombudsman, without any restrictions, to select and appoint his assistants. On the other hand, in Iowa the Citizens' Aide's power to employ and supervise all employees is limited by the authority of the Legislative Council to determine the positions and the salaries. Therefore, this language seems to limit the Citizens' Aide's right to employ, and it is not clear whether removal requires authorization from the Legislative Council. The Ombudsman has the discretion to determine the size of his staff and determine salaries within the amount of the funds available to his office under the ABA Model Statute and the Nebraska statute. Likewise, in Hawaii he may appoint his officers and employees, but he is restricted in fixing salaries in that he must consult with and follow as closely as possible the recommendations of the Department of Personnel Services. Even greater limitations are in the Iowa statute since the Citizens' Aide may employ persons only in such positions, with the exception of the Deputy, and at such salaries as shall be authorized by the Legislative Council. It is made clear in the ABA Model Statute and the Hawaii statute that staff serve at the Ombudsman's pleasure. This point is not covered at all in the Iowa law, but is implicit in Nebraska where the Ombudsman has the right to select and appoint his assistants and employees.

The broad power of delegation of authority to staff is recognized in all the statutes under review. Certain exceptions exist, however, which prohibit delegating authority to underlings. One exception, prohibiting delegating the power of delegation itself, is found in the ABA Model Statute and the Nebraska statute. A second exception in the ABA Model Statute from the power to delegate is the duty to make any report. The Iowa and Nebraska statutes exclude from the delegation power the duty to make formal recommendations to agencies and reports to the Governor and the Legislature. The Hawaii statute excludes from the Ombudsman's power to delegate the reporting of opinions and recommendations to agencies after he has completed his investigation and the publication of his opinions and recommendations to the Governor, the Legislature, or the public.
The restrictions on the Ombudsman's power to delegate would obviously cripple operations of an Ombudsman office if the Ombudsman were ill, absent, on leave, or disabled. The ABA Model Statute covers this contingency by permitting the Deputy Ombudsman to act in his stead at such times; this substitution can be made as the occasion arises or as standing regulations permit. A 1974 amendment to the Hawaii law plugs up this gap by providing that during the absence of the Ombudsman from the Island of Oahu or his temporary inability to exercise and discharge the powers and duties of his office, the power to report his opinions and recommendations to agencies and publish his opinions and recommendations to the Governor, Legislature, and the public devolves upon the First Assistant during such absence or inability. The Iowa statute provides for a substitution upon the contingencies of the Ombudsman's absence from its state or his disability, and the Nebraska Act is silent on the subject.

The ABA Model Statute and the Hawaii law both share the view that the enacting law should spell out specifically the right of the Ombudsman and his staff to participate in any employee benefit plan. The Hawaii statute limits the right of staff benefits to full-time staff, and the ABA Model Statute, by adding the language "or retirement plan available to state employees," may extend staff benefit rights to include retirement benefits.

K. Section 11. Powers

THE OMBUDSMAN SHALL HAVE THE FOLLOWING POWERS:

(a) TO INVESTIGATE, ON COMPLAINT OR ON HIS OWN MOTION, ANY ACT OF AN AGENCY WITHOUT REGARD TO ITS FINALITY;

(b) TO ADOPT, PROMULGATE, AMEND AND RE-SCIND RULES AND REGULATIONS REQUIRED FOR THE DISCHARGE OF HIS DUTIES—INCLUDING PROCEDURES FOR RECEIVING AND PROCESSING COMPLAINTS, CONDUCTING INVESTIGATIONS, AND REPORTING HIS FINDINGS—NOT INCONSISTENT WITH THIS ACT. HOWEVER, HE MAY NOT LEVY ANY FEES FOR THE SUBMISSION OR INVESTIGATION OF COMPLAINTS;

(c) TO EXAMINE THE RECORDS AND DOCUMENTS OF ANY AGENCY;

(d) TO ENTER AND INSPECT WITHOUT NOTICE THE PREMISES OF ANY AGENCY;

(e) TO SUBPOENA ANY PERSON TO APPEAR, TO GIVE SWORN TESTIMONY OR TO PRODUCE DOCUMENTARY OR OTHER EVIDENCE THAT IS REASONABLY MATERIAL TO HIS INQUIRY;

44. HAWAII REV. STAT. § 96-3 (Supp. 1974).
(f) TO UNDERTAKE, PARTICIPATE IN OR COOPERATE WITH PERSONS AND AGENCIES IN SUCH CONFERENCES, INQUIRIES, MEETINGS, OR STUDIES AS MIGHT LEAD TO IMPROVEMENTS IN THE FUNCTIONING OF AGENCIES;

(g) TO OBTAIN SUCH INFORMATION AND MAKE SUCH INQUIRIES FROM ANY AGENCY OR PERSON AS HE SHALL REQUIRE FOR THE DISCHARGE OF HIS DUTIES;

(h) TO MAINTAIN SECRECY IN RESPECT TO ALL MATTERS AND THE IDENTITIES OF THE COMPLAINANTS OR WITNESSES COMING BEFORE HIM;

(i) TO BRING SUIT IN [NAME OF COURT] TO ENFORCE THE PROVISIONS OF THIS ACT;

(j) TO ESTABLISH AND ADMINISTER A BUDGET FOR HIS OFFICE;

(k) TO CONCERN HIMSELF WITH STRENGTHENING PROCEDURES AND PRACTICES WHICH LESSEN THE RISK THAT OBJECTIONABLE ADMINISTRATIVE ACTS WILL OCCUR.

COMMENT. Powers are enumerated for clarity; additional powers of staff selection and compensation and delegation of these powers are contained in § 10.

(a) His investigatory power is limited to acts of an agency (§ 3(b)). As he can act on complaint regardless of source, he can receive anonymous or oral complaints, though his regulatory powers (subsection (b)) permit him to require complaints in writing if experience dictates. His power to investigate on his own motion is most applicable when others are unwilling to come forward (see (c) below).

(b) This broad, internal regulatory provision is relevant to many provisions in this bill. To insure accessibility (and avoid discrimination against the poor), charging of fees for his service is forbidden.

(c-d) The Ombudsman has the power to inspect any agency without notice, as advance notice might negate the value of such a visit. Such visits might provide subjects for investigation on his own motion.

(e) Protections and privileges for witnesses, regardless of whether or not they have been subpoenaed, are provided in § 18. §§ 11(i) and 19 provide means of compelling compliance. Implicitly, he and his staff are empowered to administer oaths to such witnesses.

(f) Though most of his time will be preoccupied with individual complaints, he can embark on such studies of a general nature as may improve the efficiency of agency work—alone or with other governmental bodies or non-governmental research enterprises.
(g) There is no requirement of formal hearings of an adversary nature. If a proceeding for the taking of testimony were in fact to occur, it should be perceived as an element of an investigation rather than a proceeding in the nature of a trial. Hence its content need not be the same as would normally be demanded in a formal adjudication hearing.

(h) This suggested subsection expresses the desirability of maintaining confidentiality in the Ombudsman’s investigations.

(i) The office of Ombudsman may bring suits: for a declaratory judgment to obtain jurisdiction (under §§ 3(a) and 11(a)); to enter and inspect agencies (§ 11(d)); to show cause for not appearing after subpoenaed (§ 11(e)); to enforce confidentiality provisions (§§ 13(d, e)); and to prosecute for willful obstruction or non-compliance (§ 19).

(j) A provision for budgetary powers may be necessary in some states, useful in others, to insure that the Ombudsman’s budget is independent of outside (agency) administration.

(k) The Ombudsman should seek to prevent problems before they occur.

The ABA Model Statute grants broad powers to the Ombudsman, and although there are some specific differences, the same principle is also found in the state statutes under review.45

Section 11(a) in giving the Ombudsman the power to investigate “any act of an agency,” combined with section three, which defines these words, sets forth his jurisdiction. He may investigate not only on complaint made to him but also on his own initiative. The same basic language is found in the Iowa, Nebraska, and Hawaii statutes. It is the arming of the Ombudsman with investigatory power with respect to agency action complained of that makes him the unique official that he is.46 One limitation to this broad investigative power, which is found only in the Iowa statute, prohibits investigating the complaint of an employee of an agency in regard to that employee’s employment relationship with the agency. But generally, the power is extensive and may be exercised upon informally-aired grievances in that there is no requirement in the ABA Model Statute or the three state statutes that the complaints be written; nor is there a prohibition against anonymous complaints. Under his power to determine procedures for receiving and processing complaints contained in the ABA Model Statute and the state legislation, however, the Ombudsman can require that com-

45. HAWAII REV. STAT. §§ 96-4, -5, -9, -10 (1968); IOWA CODE ANN. §§ 601G.8, .9, .10 (Supp. 1974); NEB. REV. STAT. §§ 81-8,245, 246 (Supp. 1969).
plaints be in writing. For example, in Nebraska Murrell B. McNeil has concluded that a complaint must be in writing if very complex or involving charges against a state employee and that anonymous complaints against an individual will not be accepted. The Ombudsman's power to investigate is not conditioned on the finality of agency action under the ABA Model Statute and the Hawaii and Iowa statutes.

It is desirable that the Ombudsman statutes give broad discretion to the Ombudsman to determine his procedures in carrying out the functions of the office. There would seem to be no purpose in a statute detailing requirements for complaints, investigations, findings, and reports; detailed and specific requirements probably would be restrictive. There is a major difference between the ABA Model Statute and the three state statutes in that the state statutes give authority specifically to establish procedures with respect to the handling of complaints, the conducting of investigations, and the reporting of findings. The ABA Model Statute has a different approach in section 11(b) in that it gives the Ombudsman the required broad discretion to determine his procedures in carrying out the functions of his office. It provides for the Ombudsman to issue rules and regulations which are not inconsistent with the statute and indicates that these include the procedures for receiving and processing complaints, conducting investigations, and reporting his findings. This gives the Ombudsman the opportunity to fill out a blank check with respect to his rules and regulations required for the discharge of his duties. He is limited only by the requirement that the rules and regulations not be inconsistent with the statute.

Furthermore, it is inherent in the Ombudsman concept that no fees be charged by the Ombudsman in order to assure accessibility to the office. New Zealand alone, of all Ombudsman offices, provides for a charge which in practice frequently has been waived, though legislation is now pending which will eliminate the fee. Since the power to charge fees may be implied particularly where the statute provides that the Ombudsman may make his own rules and regulations, as in the case of the ABA Model Statute, it would seem best to include, as does the ABA Model Statute, a specific provision prohibiting fees for the submission or investigation of complaints. The Hawaii and Iowa statutes prohibit the levying of fees, but the Nebraska statute is silent. However, the Ombudsman does not require the payment of charges and fees by complainants in Nebraska.

Fundamental to the concept of the Ombudsman is the power to investigate the acts of an agency, and to do this in an effective manner the Ombudsman must have tools to deal with an agency. These are specifically given to the Ombudsman under sections 11(c), (d), and (g)

47. Frank, CUMBERLAND-SAMFORD L. REV., supra note 3, at 40.
of the ABA Model Statute: "to examine the records and documents of
any agency; to enter and inspect without notice the premises of any
agency; . . . [and] to obtain such information and make such inquiries
from any agency or person as he shall require for the discharge of his
duties." Both Nebraska and Iowa give these powers to the Omb-
udsman. However it should be noted that the Iowa statute limits the
right to examine the records and documents of agencies by excluding
those documents which the law specifically makes confidential; and in
both the Iowa and Nebraska statutes the requirement of inspection of
the premises of an agency omits spelling out the power to do so
without notice. The Hawaii statute does not follow the pattern of the
ABA Model Statute and the Nebraska and Iowa statutes in specifically
relating the three powers under consideration to an agency. The
Hawaii statute states generally that in an investigation the Omb-
udsman may make inquiries and obtain information as he sees fit.
However, the Hawaii statute does specifically provide for entry to
inspect agency premises without notice. In addition, the statute does
not provide the Ombudsman with a specific power to examine the
records and documents of an agency, but this power is implicit in the
 provision which permits the Ombudsman in an investigation to make
inquiries and obtain information as he thinks fit. Although the ABA
Model Statute does not expressly limit the examination of records and
documents, as Iowa does, to those not specifically made confidential by
law, Ombudsmen could not undertake, in any of their endeavors,
activities forbidden by other state statutes. Within this exclusion from
examination would be records and documents of any agency which are
classified as confidential for security purposes.

Investigation by an Ombudsman would be useless without the
power to compel the giving of testimony and the production of
evidence. The ABA Model Statute in section 11(e) and the three state
statutes under review give the Ombudsman the power to subpoena
any person to appear, to give sworn testimony, or to produce
documentary evidence. The ABA Model Statute and the Nebraska and
Iowa statutes increase the scope of this production of evidence power
to include either documents "or other evidence," and the Hawaii
statute adds "or objects." There must, however, be a relationship
between the evidence sought and the matter under investigation. This
relationship is expressed in different ways in the various statutes: ABA
Model Statute—"reasonably material to inquiry"; Hawaii—
"reasonably believes may relate to a matter under investigation"; and
Nebraska and Iowa—"deems relevant to a matter under inquiry."
Under the ABA Model Statute, the power of enforcement is found in
the general provisions of section 11(i) which permits the Ombudsman
to institute suits to enforce the provisions of the Act. However, the
Hawaii, Nebraska, and Iowa statutes have specific provisions with
respect to the enforceability of a subpoena by action in an appropriate
court. It is implicit in the ABA Model Statute that the Ombudsman and his staff be empowered to administer oaths to witnesses. The only statute with express language on the power to administer oaths is the Iowa statute giving the power to the Citizens' Aide, his deputy, and his assistants.

The power granted the Ombudsman in the ABA Model Statute in section 11(f) indicates that the statute contemplates an Ombudsman who will participate with governmental and non-governmental persons and agencies in conferences, inquiries, meetings, and studies leading to improvements in the functioning of agencies. Only the Nebraska statute gives the Ombudsman a somewhat similar power.

The ABA Model Statute gives the Ombudsman further sweeping investigatory power under section 11(g) which permits him to obtain such information and make such inquiries from any agency or person as he shall require for the discharge of his duties. Hawaii follows the same principle by stating that in an investigation the Ombudsman may make inquiries and obtain information as he thinks fit. Nebraska and Iowa do not have similar specific language except insofar as the power of the Ombudsman relates to the agency under investigation. It is assumed that the power to obtain information from any person in Iowa and Nebraska is implied from other sections of the pertinent statutes, but it would seem better to spell out the powers specifically, as is done in the ABA Model Statute.

The ABA Model Statute, in granting the Ombudsman the power to obtain information and make inquiries under section 11(g) and the power under section 11(b) to make rules and regulations, gives him the power to develop his own procedures for conducting investigations. The statute is careful to omit any reference to holding a hearing as part of an investigation because the use of the term "hearing" may carry with it the inference that administrative agency hearings were intended, which would require compliance with administrative procedure standards. It is submitted that the Hawaii and Iowa statutes do not solve this problem by referring to the Ombudsman's discretion to hold private hearings in an investigation. Reference to private hearings may be a troublesome phrase because of the uncertainty of its meaning as applied to the functions of the Ombudsman. The language of the ABA Model Statute leaves the Ombudsman free to develop a procedure that matches the uniqueness of the functions of the office of Ombudsman. The comment to section 11(g) of the ABA Model Statute aptly states,

There is no requirement of formal hearings of an adversary nature. If a proceeding for the taking of testimony were in fact to occur, it should be perceived as an element of an investigation rather than a proceeding in the nature of a trial. Hence, its content need not be the same as would normally be demanded in a formal adjudication hearing.
It is important to the functioning of the Ombudsman office that information disclosed to him in confidence not be divulged. This pattern runs throughout the ABA Model Statute and the statutes under review. The ABA Model Statute section 11(h) gives the Ombudsman the power to maintain secrecy regarding all matters including the identities of complainants and witnesses. Somewhat similar language is used in the Iowa statute except that the General Assembly, any standing committee of the General Assembly or the Governor may require disclosure of any matter through complete access to the records and files of the Citizens' Aide. Hawaii also uses the same language as does the ABA Model Statute, but adds an exclusion for disclosures necessary to enable the Ombudsman to carry out his duties and to support his recommendations. Language similar to the ABA Model Statute on confidentiality is not found in the Nebraska statute, but it does state under a section dealing with reports\(^48\) that in discussing matters with which he has dealt, the Public Counsel need not identify those immediately concerned if to do so would cause needless hardship. Of course, the confidentiality provision would be meaningless if the Ombudsman could be compelled to testify in court. This subject is discussed subsequently in connection with Ombudsman Immunities, section 17.

Only the ABA Model Statute specifically sets forth the power of the Ombudsman to bring suit to enforce the provisions of the Ombudsman Act. As was noted prior, all of the state statutes under review have provisions for court action with respect to the enforcement of subpoenas.

The ABA Model Statute alone gives the Ombudsman the power to establish and administer a budget for his office. This insures that an outside agency is not given a power of control over operations of the office which would be inconsistent with the principle of the Ombudsman as an independent officer. As a result, the Ombudsman could keep his own financial books and disburse his own funds. It should be noted, however, that in Nebraska the Ombudsman is included for administrative purposes, such as bookkeeping and supplies, within the framework of the jurisdiction of the Legislative Council.

The ABA Model Statute under section 11(k) gives to the Ombudsman the power to strengthen procedures and practices which lessen the risk that objectionable administrative acts will occur. Similar provisions are found in the Iowa statute and the Nebraska statute under sections dealing with subjects for investigation.\(^49\)

L. Section 12. Investigation of Complaints

(a) THE OMBUDSMAN SHALL INVESTIGATE ANY COMPLAINT ALLEGING THAT AN ACT OF AN AGENCY IS:

(1) CONTRARY TO OR INCONSISTENT WITH LAW, REGULATION OR AGENCY PRACTICE; OR
(2) BASED ON MISTAKEN FACTS OR IRRELEVANT CONSIDERATIONS; OR
(3) INADEQUATELY EXPLAINED WHEN REASONS SHOULD HAVE BEEN REVEALED; OR
(4) INEFFECTIVELY PERFORMED; OR
(5) UNREASONABLE, UNFAIR, OR OTHERWISE OBJECTIONABLE, EVEN THOUGH IN ACCORDANCE WITH LAW;
(b) UNLESS HE IN HIS DISCRETION DECIDES NOT TO INVESTIGATE BECAUSE:
   (1) THE COMPLAINANT COULD REASONABLY BE EXPECTED TO USE ANOTHER REMEDY OR CHANNEL, AND THEN THE OMBUDSMAN SHALL FURNISHER THE COMPLAINANT WITH WRITTEN INSTRUCTIONS ON THE PROCEDURAL STEPS TO BE TAKEN IN CONNECTION WITH SUCH OTHER REMEDY OR CHANNEL;
   (2) THE COMPLAINT IS TRIVIAL, FRIVOLOUS, VEXATIOUS, OR NOT MADE IN GOOD FAITH;
   (3) THE COMPLAINT HAS BEEN TOO LONG DELAYED TO JUSTIFY PRESENT EXAMINATION;
   (4) HIS RESOURCES ARE INSUFFICIENT FOR ADEQUATE INVESTIGATION IN WHICH CASE THE OMBUDSMAN SHALL REFER THE COMPLAINT TO THE PROPER LEGISLATIVE COMMITTEE AND THE GOVERNOR.
(c) THE OMBUDSMAN IN HIS DISCRETION MAY INVESTIGATE ANY ACT OF AN AGENCY NOT ENUMERATED IN (a).
(d) THE OMBUDSMAN'S DECLINING TO INVESTIGATE A COMPLAINT SHALL NOT BAR HIM FROM REVIEWING ON HIS OWN MOTION ACTS OF AN AGENCY WHETHER OR NOT INCLUDED IN THE COMPLAINT.

COMMENT. (a), (b) and (c). The Ombudsman has the duty to investigate any complaint which alleges the acts of an agency enumerated in (a) but has the discretion to decline to investigate for reasons stated in (b). He is not limited to the type of problems enumerated in (a) and has the discretion under (c) to investigate any act of an agency not enumerated in (a).

(b) Paragraph (b)(1) reiterates that the Ombudsman is not a substitute for agency's internal complaint procedures, nor can he be expected to absorb all the complaints that agencies generate. Citizens would normally exhaust such avenues before approaching the Ombudsman; however, the Ombudsman can waive this exclusion whenever he believes that he may provide a faster
and more just method of review. Paragraph (b)(3) provides a flexible statute of limitation which the Ombudsman may determine by regulation (§ 11(b)). Paragraph (b)(4) rechannels those complaints too ambitious or time-consuming (e.g., complex local complaints) for effective investigation.

(d) A series of complaints, though themselves inappropriate for investigation, may reveal acts which should be investigated on the Ombudsman's own motion.

Section 12 makes it clear that:

1. The acts which may give rise to complaints, described in (a)(1) to (5) inclusive, are set forth as guides and not as limitations; this question is resolved by the statement in (c) that the Ombudsman has discretion to investigate any act of an agency not included in (a).

2. The Ombudsman has a duty to investigate under the wording of (a), but he is relieved of this duty if the matter complained of falls into one of the four enumerated reasons under (b), and then he has the discretion whether or not to investigate.

Both Iowa and Nebraska have a different structural approach, but the result is not different from the above analysis of section 12. In one section, these two statutes also enumerate types of acts which cause grievances and use language which indicates that the Ombudsman is not limited to investigating those specifically set forth. The Nebraska statute states that "[i]n selecting matters for his attention, the Public Counsel shall address himself particularly to an administrative act that might be . . . ." The Iowa statute states "[a]n appropriate subject for investigation by the office of the Citizens' Aide is an administrative action that might be . . . ." In another section, Nebraska and Iowa statutes provide that he shall investigate unless he finds that for the enumerated reasons he need not investigate. Both statutes imply that in this situation, he has the discretion to investigate or not.

Hawaii offers a third approach with perhaps different results. In a separate section, Hawaii also sets forth acts which are appropriate subjects for investigation, but in another section makes it clear that when investigating complaints or investigating on his own motion, the Ombudsman is limited to the enumerated appropriate subjects. Even though the Hawaii statute indicates as appropriate subjects for investigation administrative acts of an agency "which might be" (emphasis added) any of the enumerated subjects of investigation, this commentator's conclusion has not changed that the Hawaii statute ends up with limitations and not guides. Furthermore, in 1974 the Hawaii statute was amended to provide that the Ombudsman "may" (instead


51. HAWAII REV. STAT. §§ 96-6, -8 (1968).
of "shall") investigate complaints which he determines to be an appropriate subject for investigation. Under this new Act he does not have a mandatory duty to investigate even if the matter is an appropriate subject for investigation. This writer believes that the Ombudsman should investigate every complaint if the action complained of comes within a described action, but he may be relieved of this duty by basing his refusal to investigate on the specific grounds provided him by statute. The ABA Model Statute follows this principle.

Both the Iowa and Nebraska statutes require a suitable investigation. The question may be asked whether the word "suitable" sets a standard of investigation. However, it should be noted that in both states the statutes elsewhere give the Ombudsman the power to determine the scope and manner of the investigation.

The agency actions causing grievances are enumerated through five categories in subsection (a). The enumeration varies from state to state with additions, deletions, and changes in language. The ABA Model Statute list seems complete, and it would be difficult to give an example of an act of an agency not covered in the statute, particularly in view of the catch-all language of (5), which includes agency acts that are "unreasonable, unfair, or otherwise objectionable, even though in accordance with law." The ABA Model Statute in subsection (b) sets forth four reasons which give the Ombudsman discretion to decline to investigate even though the act complained of comes within subsection (a). Nebraska and Iowa also permit him to decline jurisdiction, though for seven enumerated reasons which in both statutes are substantially the same. The Hawaii statute does not have a similar provision. The first reason—the availability of another remedy or channel—is found in the Iowa and Nebraska statutes, but only the ABA Model Statute gives the complainant a helping hand if the Ombudsman declines to investigate on this ground. Under (b)(1), the Ombudsman must furnish the complainant with written instructions on the procedural steps to be taken in connection with such other remedy or channel. An Ombudsman may in practice do this, but it is far better to have a statutory requirement that he do so. The other three reasons given in (b)(2) to (4), inclusive, are found also in the Iowa and Nebraska statutes. Both statutes also add other reasons, described below, not given in the ABA Model Statute. With respect to a grievance pertaining to a matter outside of the power of the Ombudsman, if the Ombudsman has no jurisdiction with respect to the complaint, he has no other choice than to reject the complaint without investigation. As to lack of sufficient interest on the part of the complainant, attention should be focused on the subject matter of the complaint not on the person who brought the complaint, and a public-minded citizen

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52. HAWAII REV. STAT. § 96-6 (Supp. 1974).
without any personal interest should be permitted to complain concerning an act of an agency. The reason that other complaints are more worthy of attention would seem to be covered in the ABA Model Statute under trivial or frivolous complaints. It should be noted that the ABA Model Statute is unique in providing specifically that in the event the Ombudsman decides not to investigate he shall refer the complaint to the proper legislative committee and the Governor. Although it might be considered implicit within the Ombudsman’s power to investigate on his own motion that he would be permitted to inquire into related matters where he declines a complaint, the ABA Model Statute specifically spells out that the Ombudsman may proceed in this situation. Both the Nebraska and Iowa statutes also contain specific language permitting the Ombudsman, after his declining to investigate a complaint, to proceed on his own motion to inquire into related problems. The Hawaii statute does not contain such specific language. However, section 96-6(b) does by implication give the same power allowing the Ombudsman to proceed on his own motion to inquire into related matters if he reasonably believes that an appropriate subject for investigation under section 96-8 exists.

M. Section 13. Rights of Complainant—
Communication with Complainant

(a) AFTER THE OMBUDSMAN HAS DECIDED WHETHER OR NOT TO INVESTIGATE A COMPLAINT, HE SHALL SUITABLY INFORM THE COMPLAINANT.

(b) THE OMBUDSMAN SHALL, IF REQUESTED BY THE COMPLAINANT, REPORT THE STATUS OF HIS INVESTIGATION TO THE COMPLAINANT.

(c) AFTER INVESTIGATION OF A COMPLAINT, HE SHALL SUITABLY INFORM THE COMPLAINANT OF HIS CONCLUSION OR RECOMMENDATION AND, IF APPROPRIATE, ANY ACTION TAKEN OR TO BE TAKEN BY THE AGENCY INVOLVED.

(d) A LETTER TO THE OMBUDSMAN FROM A PERSON HELD IN CUSTODY—INCLUDING BY DETENTION, INCARCERATION AND HOSPITALIZATION—BY AN AGENCY SHALL BE FORWARDED IMMEDIATELY, UNOPENED, TO THE OMBUDSMAN. A LETTER FROM THE OMBUDSMAN TO SUCH PERSON SHALL BE IMMEDIATELY DELIVERED, UNOPENED, TO THE PERSON.

(e) NO PERSON WHO FILES A COMPLAINT PURSUANT TO THIS ACT SHALL BE SUBJECT TO ANY PENALTIES, SANCTIONS OR RESTRICTIONS IN CONNECTION WITH HIS EMPLOYMENT BECAUSE OF SUCH COMPLAINT.

COMMENT.

(a), (b) & (c) These sub-sections give the Ombudsman a general duty to inform the complainant of the status of his complaint. The experience and judgment of the Ombudsman will determine the suitable response to be made.

(e) This sub-section provides assurance that there will be no reprisals for filing complaints.

Keeping the complainant informed is vital to the successful functioning of an Ombudsman office. Section 13 of the ABA Model Statute develops a consistent pattern of notification at three stages:

1. After the Ombudsman has decided whether or not to investigate a complaint. The Hawaii and Iowa statutes basically have the same requirement. The ABA Model Statute does not impose the duty to give reasons when the Ombudsman decides not to investigate as do the Hawaii and Iowa statutes. Only the latter statute sets a time limit for notification—60 days. The method of informing the complainant is left to the discretion of the Ombudsman under the ABA Model Statute (but it must be suitable) and the Hawaii statute. Only Iowa requires the notice to be in writing.

2. On request of complainant, report status of investigation. The Iowa statute imposes the same duty to report the status on request, but, in addition, allows reports to be made “as appropriate,” thus indicating the Ombudsman’s discretion to report the status at any time. The latter is implicit in the power found in the ABA Model Statute and the three statutes to establish procedures discussed under section 11.

3. After investigation, inform complainant of conclusions or recommendation. The state statutes vary greatly from the ABA Model Statute on this point. The Hawaii statute which covered stage one of the possible stages of notification next requires notification of both the Ombudsman’s and the agency’s action “[a]fter a reasonable time has elapsed.” This writer assumes this time period to mean that notification be made after the Ombudsman has reported his opinion and recommendations to the agency. Iowa’s language mandates that “after completing his consideration of a complaint, whether or not it has been investigated, the citizens’ aide shall without delay inform the complainant . . . .” The Nebraska statute is similar to Iowa’s except that the notification provision omits “without delay,” although the complainant must still be “suitably inform[ed].” Informing the complainant of action taken by the agency is found only in the Hawaii law and ABA Model Statute, the latter also including action to be taken by the agency.

One of the unique features of the Ombudsman concept is to permit persons in custody (whether in prisons, hospitals, or other institutions) to make complaints without fear of reprisal. The ABA Model Statute, as does the Iowa law, supplies protection by insisting that the mail be forwarded immediately and unopened to the Ombudsman from where a person is held in custody and from the Ombudsman back to that person. The Hawaii statute protects only mail going to the Ombudsman from the person in custody. The Nebraska statute does not contain any provision on this subject. However, the Nebraska Ombudsman has indicated that the Nebraska Prison Administration does not censor incoming or outgoing mail between prisoners and the Ombudsman.

The ABA Model Statute protects an employee in private or public employment from being subject to penalties, sanctions, or restrictions in connection with his employment because he filed a complaint. Of the three state statutes under review, only the Nebraska statute has a provision relating to this type of discrimination, but limits the protection to state employees filing complaints.

N. Section 14. Rights of Agency

(a) IF THE OMBUDSMAN DECIDES TO INVESTIGATE A COMPLAINT, HE MAY, IF HE DEEMS IT APPROPRIATE, SUITABLY INFORM THE AGENCY INVOLVED.

(b) BEFORE ANNOUNCING OR REPORTING A CONCLUSION OR RECOMMENDATION THAT CRITICIZES OR IS ADVERSE TO AN AGENCY, THE OMBUDSMAN SHALL CONSULT WITH THAT AGENCY AND PERMIT THE AGENCY REASONABLE OPPORTUNITY TO REPLY.

(c) IF ANY REPORT THAT HE ISSUES CRITICIZES OR IS ADVERSE TO AN AGENCY, THE OMBUDSMAN SHALL INCLUDE ANY BRIEF STATEMENT THE AGENCY MAY PROVIDE.

COMMENT. (a), (b) & (c) These subdivisions insure that the Ombudsman has the views of the affected agency in mind to guard against oversight and bias. Under (a) it is discretionary with the Ombudsman to give notice to an agency before investigating a complaint and such notice will depend upon whether it will aid or hinder investigation; (b) further protects the agency by giving it reasonable time to reply to criticism. (c) In his special, general interim, and annual reports (§ 16), the

60. HAWAII REV. STAT. § 96-18 (1968).
61. Frank, CUMBERLAND-SAMFORD L. REV., supra note 3, at 44.
Ombudsman is required to provide the agency's rebuttal (if any). Rather than permitting the Ombudsman to summarize the agency's reply, the agency has been limited to a "brief" statement which shall be printed unedited (regulations as to what is "brief" might be promulgated under § 11(b)).

The success of the office of the Ombudsman depends upon the independence, objectivity, competence, and fairness of the official. He may be a watchdog for the people who will hold government accountable, but he is not an adversary. The investigation by an Ombudsman must be impartial, and some degree of protection against erroneous action by the Ombudsman is required. Rights of the agency are set forth in section 14.

1. If the Ombudsman decides to investigate, he may, in his discretion, notify the agency. The notice is required only to be "suitable" and, therefore, can be made by telephone, by letter, or in person. If the Ombudsman is of the opinion that such notice would hinder his investigation, he need not inform the agency involved. In Hawaii and Iowa, the Ombudsman must notify the involved agency if he decides to investigate.63 No similar provision is found in the Nebraska statute. However, both the Nebraska and Iowa statutes require the Ombudsman to notify the agency involved after the Ombudsman has completed his consideration of the complaint, whether or not it has been investigated.64

2. Before announcing or reporting a conclusion or recommendation that is critical or adverse to an agency, the Ombudsman must consult with that agency and permit the agency reasonable opportunity to reply. This right to consult and reply may be extended to individuals since it should be noted that the definition of agency in the ABA Model Statute includes individuals as well as governmental entities. Consultation is also required in the Hawaii, Iowa, and the Nebraska statutes,65 and the three state statutes have provisions for reply by the agency as well.66

3. If the Ombudsman issues any report that is critical of or adverse to an agency, the report must include any brief reply made by the agency. This same safeguard is found in the three state statutes. In Hawaii, the publication of recommendations must include any agency reply, and by implication so must any other report if it criticizes a named agency.67 Iowa, with great detail, specifically covers in three

63. HAWAII REV. STAT. § 96-7 (1968); IOWA CODE ANN. § 601G.13 (Supp. 1974).
67. HAWAII REV. STAT. § 96-13 (1968).
sections the attaching of unedited replies unless excused by the agency or official affected.  

O. Section 15. Recommendations

(a) IF, AFTER INVESTIGATION, THE OMBUDSMAN IS OF THE OPINION THAT AN AGENCY SHOULD:
   (1) CONSIDER THE MATTER FURTHER,
   (2) MODIFY OR CANCEL AN ACT,
   (3) ALTER A REGULATION, PRACTICE, OR RULING,
   (4) EXPLAIN MORE FULLY THE ACT IN QUESTION,
   (5) RECTIFY AN OMISSION, OR
   (6) TAKE ANY OTHER ACTION,
   HE SHALL STATE HIS RECOMMENDATIONS AND REASONS THEREFOR TO THE AGENCY. IF THE OMBUDSMAN SO REQUESTS, THE AGENCY SHALL, WITHIN THE TIME HE HAS SPECIFIED, INFORM HIM ABOUT THE ACTION TAKEN ON HIS RECOMMENDATIONS OR THE REASONS FOR NOT COMPLYING WITH THEM. AFTER A REASONABLE PERIOD OF TIME HAS ELAPSED, THE OMBUDSMAN MAY ISSUE A REPORT.
   (b) IF THE OMBUDSMAN BELIEVES THAT AN ACTION HAS BEEN DICTATED BY LAWS WHOSE RESULTS ARE UNFAIR OR OTHERWISE OBJECTIONABLE, AND COULD BE REVISED BY LEGISLATIVE ACTION, HE SHALL BRING TO THE (INSERT NAME OF LEGISLATIVE BODY)'S AND AGENCY'S NOTICE HIS VIEWS CONCERNING DESIRABLE STATUTORY CHANGE.
   (c) IF THE OMBUDSMAN BELIEVES THAT ANY PERSON HAS ACTED IN A MANNER WARRANTING CRIMINAL OR DISCIPLINARY PROCEEDINGS, HE SHALL REFER THE MATTER TO THE APPROPRIATE AUTHORITIES WITHOUT NOTICE TO THAT PERSON.

COMMENT.

(a) Though the Ombudsman will rarely have reason to make a recommendation if he does not find an error in what the agency has done or neglected to do, he should remain free to suggest improvements in method or policy even when the existing practice may be legally permissible. Thus he may facilitate one agency's learning about and taking advantage of the experience of another. This sub-section contemplates no entry of judgment, as it were, but simply the expression of opinion by the Om-

budsman. He is not a superior official, in a position of command. He cannot compel a change in an administrative act. His recommendation may, however, induce an agency to exercise whatever power it itself may still possess to right what the Ombudsman points out as a past mistake.

(b) The Ombudsman's duty extends beyond simply finding that an administrator acted in accord with existing statutory law; if the law itself produces unjust results, he should bring this to legislative notice. He is not meant to be a general social reformer, but he does have an obligation to take note of statutory provisions that cause unexpectedly harsh administration.

(c) In Sweden the Ombudsman has power to prosecute miscreant officials. Here the Ombudsman has the duty of forwarding pertinent allegations to the appropriate agency, civil service office, or the attorney general. As such reporting might be construed under § 14(a) to require informing the person of such allegations—which, prematurely, might hinder adequate investigation—he is empowered to do this without notice to the individual involved. If the individual has testified before the Ombudsman, such testimony would bear the same privileges as testimony in court (§ 18).

The ABA Model Statute makes it clear that the Ombudsman has no power to give orders or make decisions or render judgments. His weapons are the issuance of recommendations and reports. Section 15(a) deals with the Ombudsman's recommendations with reasons to an agency after his investigation has led him to an opinion that the agency should take action of the type described in section 15(a); all possible action that the agency should take is included within this section since it concludes with the catch-all that the Ombudsman may find that the agency should "take any other action." There is no requirement that an error be found before the Ombudsman can make a recommendation since it is conceivable that an Ombudsman can find no fault and yet be convinced that some action should be taken by the agency. All three state statutes provide for recommendations to an agency if the Ombudsman finds or believes that specified agency action should be taken.²⁹

The wording of the described action varies from statute to statute, but the only significant differences concern 15(a)(3) and (5) of the ABA Model Statute. The recommendation by the Ombudsman to the agency to alter "a regulation, practice, or ruling" becomes in the Hawaii statute "[a] Statute or regulation," in the Iowa statute "[a] rule," and in the Nebraska statute "a regulation or ruling." It should

be observed with respect to Hawaii's language that although an agency cannot alter a statute, since alteration of statutes is a matter for the legislators, conceivably it can recommend to the legislature a change.

The approach of section 15(b) of the ABA Model Statute would seem preferable since specific provisions are included to provide notice of the needed change to the legislature and to the agency should the Ombudsman find that a law needs to be altered. Only the ABA Model Statute specifies actions recommended by the Ombudsman to the agency for the rectification of an omission since the definition of "act of an agency" in the ABA Model Statute includes "failure to act" and "omission." It is also unique in requiring that recommendations be accompanied by reasons. The Hawaii statute is similar to the ABA Model Statute in requiring recommendations after investigation. The Nebraska and Iowa statutes have a slightly different approach but the result should be the same. Under the Nebraska statute and the Iowa statute, a recommendation is made after the Ombudsman has considered the complaint and whatever material he deems pertinent. The ABA Model Statute and the three state statutes under review do not let the matter drop with the reporting of the recommendations to the agency. All the statutes require the agency to notify the Ombudsman of any action taken on his recommendations if the Ombudsman so requests. The ABA Model Statute, the Nebraska statute, and the Hawaii statute permit the Ombudsman to specify the time within which the agency shall notify him. Only the Iowa statute sets a specific time deadline—20 working days. The Nebraska and the Iowa statutes join the ABA Model Statute in requiring that if the agency decides not to comply with the recommendations of the Ombudsman the agency state the reasons.

The weapon of the recommendation is further sharpened in the ABA Model Statute and in the three state statutes by permitting the Ombudsman to publish his recommendations. Only the ABA Model Statute and the Hawaii statute set forth that publication may occur after a reasonable time has elapsed, meaning a reasonable time after the recommendations to the agency or after the time specified for reply if the Ombudsman has requested a reply. There is no requirement in the ABA Model Statute and the state statutes that publication of the recommendations be made only if the Ombudsman deems the action taken by the agency as inadequate and inappropriate.

The ABA Model Statute and the three state statutes do not require that the publication of recommendations be mandatory, and this is left to the discretion of the Ombudsman. If recommendations are issued, the ABA Model Statute and two of the state statutes do

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70. HAWAII REV. STAT. § 96-12 (1968); IOWA CODE ANN. § 601G.16 (Supp. 1974); NEB. REV. STAT. § 81-8,249(1) (Supp. 1969).
71. HAWAII REV. STAT. § 96-13 (1968).
require a wide distribution. Under the ABA Model Statute, section 16, the report must be distributed to the governor, to the legislature, and to the public. The Ombudsman has the discretion to have a wider distribution to legislative committees and to agencies. The same general reasoning is applicable to the Nebraska statute at section 81-8, 250 and the Iowa statute at section 601G.17. The Hawaii statute, section 96-13 is different since the Ombudsman may publish his recommendations to any of the groups enumerated, the governor, legislature, and the public. Since the Ombudsman has considerable discretion, he can make the distribution narrow or wide. Hawaii, therefore, does not require a wide distribution.

The ABA Model Statute takes the position that if the Ombudsman is of the opinion that agency action has been dictated by existing laws whose results are unfair or otherwise objectionable and the situation could be revised by legislative action, he is required to bring this matter to the attention of the legislature and the agency and to express his views concerning desirable statutory change. Somewhat similar language is contained in the Nebraska and Iowa statutes except there is no requirement that it be brought to the attention of the agency.

It has previously been noted that generally the Ombudsman cannot prosecute in any jurisdiction with the exception of Sweden and Finland, and even in these countries prosecution is infrequent. However, the ABA Model Statute does provide that if the Ombudsman believes that any person has acted in a manner warranting criminal or disciplinary proceedings, he must refer the matter to the appropriate authorities without notice to that person. The Nebraska and Iowa statutes are in line with this general principle expressed, except that Iowa refers to the Ombudsman's reporting of "any public official, employee or other person" to the appropriate authorities and Nebraska limits itself to the reporting of "any public officer or employee"; neither state provides for reference to the authorities without notice to the party. Hawaii, on the other hand, limits referral to authorities on the grounds of breach of duty or misconduct by an officer or employee of an agency.

P. Section 16. Reports

THE OMBUDSMAN MAY FROM TIME TO TIME AND SHALL ANNUALLY REPORT ON HIS ACTIVITIES TO THE GOVERNOR, TO THE LEGISLATURE, OR ANY OF ITS COMMITTEES, TO THE PUBLIC AND, IN HIS DISCRETION, TO AGENCIES.

COMMENT. Bringing his moves into the open is the Ombudsman's sole means of gaining the public's support.

Under this section, he may publish his recommendations in separate special reports or he may issue general interim reports in his discretion. The annual report, whose release date would be set by the Ombudsman (Paragraph 11(b)) is mandatory. He need not identify individuals in his report (§ 11(h)), but must reprint brief replies of agencies which he criticizes (§ 14(c)).

The Ombudsman may make a number of reports, an essential characteristic of his office. Three sections of the ABA Model Statute are concerned with reports: Under section 11(b), the Ombudsman has the power to develop rules and regulations for the discharge of his duties, including the procedures for reporting his findings; under section 15(a), the Ombudsman is authorized to issue a report after he has stated his recommendations to an agency; and under section 16, the subject of reports is fully developed. The Ombudsman may from time to time issue reports with respect to his recommendations, special reports, and general interim reports. However, an annual report is mandatory. Under section 14(c), the Ombudsman must include in his report any brief statement the agency may provide if he issues a report which criticizes or is adverse to an agency.

The state statutes do not follow the ABA Model Statute in devoting a single section to the time and distribution of all reports. Generally, the three state statutes cover the publication of recommendations in one section and the annual report in another.76 Iowa and Nebraska statutes imply that, as in the ABA Model Statute, the Ombudsman has discretion to decide to issue reports of recommendations, special reports, and general interim reports since, in referring to the mandatory annual report, the statutes indicate that this annual report is "[i]n addition to whatever reports he may make from time to time."77 The publication of recommendations by the Ombudsmen in Hawaii, Iowa, and Nebraska has been discussed under section 15.

It has been noted that annual reports are compulsory under the ABA Model Statute and the three state statutes. Both the Iowa and Nebraska statutes set a definite time for reporting: Iowa—by February 15th of each year; and Nebraska—on or about February 15th of each year. The ABA Model Statute proceeds on the theory that the Ombudsman should be free to determine his own schedule for preparing and filing his annual report, and the statute avoids deadlines which may create problems.

As to the extent of distribution of the annual report, the widest

distribution is found in the ABA Model Statute—Governor, Legislature, any of its committees, the public, and, in the discretion of the Ombudsman, agencies. The three state statutes vary: Hawaii—Legislature and the public; Nebraska—Legislature and the Governor; and Iowa—General Assembly and the Governor.

It has already been noted that under the ABA Model Statute, the Ombudsman need not identify individuals in his reports (section 11(a)), but must reprint brief replies of agencies which he criticizes (section 14(c)). Iowa and Nebraska in the section on annual reports provide that the Ombudsman need not identify specific persons or agencies (Iowa) or those immediately concerned (Nebraska) if to do so would cause needless hardship. It should be noted that the Iowa statute includes within this non-disclosure provision the identity of agencies. It is difficult to understand why governmental entities should be further protected since agency replies to criticism may be printed. The provision in the ABA Model Statute that the Ombudsman must reprint in his reports brief replies of agencies which he criticizes has been discussed under section 14(c). Iowa and Nebraska, in the sections on the annual report, require the inclusion of replies if agencies or officials are criticized; Iowa alone, however, requires the replies to be unedited and eliminates inclusion of replies if excused by the agency or official affected. Hawaii has no specific requirement that replies of agencies be included in annual reports, although this could be implied from the section on publication of recommendations.78

Q. Section 17. Ombudsman’s Immunities

(a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;
(b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.
(c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPelled TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

COMMENT. (a) Sub-section (a) precludes judicial review of the Ombudsman’s work, unless, of course, he has violated the Act.
(b) This sub-section avoids litigation and harassment by an uncooperative agency, but does not preclude

78. HAWAII REV. STAT. §§ 96-13, -16 (1968).
prosecution for serious misconduct, or removal from office (§ 8(a)).
(c) This sub-section acts with § 11(h) to protect the secrecy and confidentiality of information obtained—in order to instill public confidence in his work; it also prevents unnecessary interruptions of his work to testify, while allowing him to proceed in court whenever necessary (§ 11(i)).

Section 17(a) precludes judicial review of the proceedings, conclusions, recommendations, or reports of the Ombudsman or members of his staff. Judicial review is likewise forbidden in the Nebraska statute and the Hawaii statute except if in Hawaii the Ombudsman contravenes the provisions of the statute. The Iowa law is silent on the subject. It would seem to be implicit in the ABA Model Statute and the Nebraska statute that if the Ombudsman violates the Ombudsman statute his actions are subject to court review.

Section 17(b) further provides that the Ombudsman and staff shall have the same immunities from civil and criminal liabilities as a judge of the state. Somewhat similar language is used in the Hawaii statute except staff are omitted. Iowa provides for no civil action except removal from office under Iowa law against the Citizens' Aide or his staff unless an act or omission is actuated by malice or is grossly negligent. There is no provision in the Nebraska statute with respect to immunity from civil and criminal liabilities.

Section 17(c) specifically gives the Ombudsman and his staff immunity from being compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except such testimony or evidence that might be necessary to enforce the Act. Somewhat similar language is used in the Nebraska statute as to both judicial or administrative proceedings and in the Hawaii and Iowa statutes as to court proceedings. As written, the Ombudsman and his staff may voluntarily testify, but cannot be compelled to do so at least in the state courts. It is the inability to compel the Ombudsman and his staff to testify in the state courts which protects the confidentiality of the information obtained by the Ombudsman. Application of the privileged communication immunity by statute to the activities of the Ombudsman is important to the Ombudsman office. However, it is submitted that the state Ombudsman and his staff can be compelled to testify in the federal courts—a problem which would have to be

79. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968).
80. HAWAII REV. STAT. § 96-17 (1968).
82. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968); IOWA CODE ANN. § 601G.20 (Supp. 1974).
82a. Raymond A. Cornell, Deputy Citizen's Aide for Corrections, Iowa, was subpoenaed to
resolved by appropriate federal legislation. That a complaint-handling official appointed by, responsible to, and serving at the pleasure of the executive has no immunity at all, is one of the reasons the use of the term “Ombudsman” should be confined to those coming within the definition given at the outset of this article.

R. Section 18. Witnesses' Privileges

ANY PERSON REQUIRED TO PROVIDE INFORMATION UNDER THIS ACT SHALL BE PAID THE SAME FEES AND TRAVEL ALLOWANCES AND ACCORDED THE SAME PRIVILEGES AND IMMUNITIES, INCLUDING RIGHT OF ASSISTANCE OF COUNSEL, AS WITNESSES WHOSE ATTENDANCE HAS BEEN REQUIRED IN THE [NAME OF COURT]

COMMENT. Although nearly all testimony will be in private and confidential, witnesses required to testify (whether or not by subpoena) are given judicial privileges and immunities. A provision that, “However, a representative of an agency during business hours shall not be entitled to such fees and allowances” might be included to avoid possible double payment of public servants during working hours.

Protection of witnesses is provided for in the ABA Model Statute and the statutes under review. The most sweeping provision is section 18 of the ABA Model Statute. The Nebraska statute states that a witness required by subpoena to provide information has the same privileges as mentioned above. The Iowa statute grants the same privileges whether or not the witness is compelled to testify by compulsory process except that officers and employees of an agency are not entitled to fees and allowances. The Hawaii statute has no provision on witnesses’ privileges. As previously noted, the Ombudsman has the discretion to protect the identities of witnesses in the ABA Model Statute and all the state statutes.

S. Section 19. Obstruction

ANY PERSON WHO WILLFULLY OBSTRUCTS OR HINDERS THE PROPER AND LAWFUL EXERCISE OF THE OMBUDSMAN'S POWERS, OR WILLFULLY testify in the United States District Court for the Southern District of Iowa, Central Division, in Warner S. Kelly v. Lou V. Brewer, Civil Action File No. 73-177-2. On a motion to quash the subpoena on the ground that Mr. Cornell had a statutory immunity from being compelled to testify, William C. Hanson, Chief Judge, overruled the motion on April 28, 1975. Subsequently the plaintiff withdrew the subpoena on the ground that Mr. Cornell had agreed voluntarily to testify in the case in camera.

83. See Frank, CUMBERLAND-SAMFORD L. REV., supra note 3, at 47-48.
84. NEB. REV. STAT. § 81-8,245(4) (Supp. 1969).
MISLEADS OR ATTEMPTS TO MISLEAD THE OMBUDSMAN IN HIS INQUIRIES, SHALL BE SUBJECT TO A FINE OF NOT MORE THAN ONE THOUSAND DOLLARS ($1,000.00).

COMMENT. Counsel must determine in each state whether necessity exists for indicating the court in which proceedings are to be brought and upon whose initiative.

Section 19 provides a penalty for obstruction of the Ombudsman's activities and can be enforced under section 11(1) of the ABA Model Statute. The same concept of a penalty is found in the three statutes under review. The Iowa statute is substantially the same, as is the Nebraska statute except that it provides for the offense of a misdemeanor with a fine of one thousand dollars ($1,000) upon conviction. The Hawaii statute has somewhat different language covering a person who willfully hinders the lawful actions of the Ombudsman or his staff or willfully refuses to comply with their lawful demands; yet the same monetary fines as the others may be imposed. This commentator raises the question in the case of Hawaii whether an intentional refusal of an agency to comply with recommendations of an Ombudsman, which after all is a lawful demand, is a willful refusal to comply. The ABA Model Statute language is preferred since this problem is avoided.

T. Section 20. Relation to Other Laws

THE PROVISIONS OF THIS ACT ARE IN ADDITION TO AND DO NOT IN ANY MANNER LIMIT OR AFFECT THE PROVISIONS OF ANY OTHER ENACTMENT UNDER WHICH ANY REMEDY OR RIGHT OF APPEAL IS PROVIDED FOR ANY PERSON, OR ANY PROCEDURE IS PROVIDED FOR THE INQUIRY INTO OR INVESTIGATION OF ANY MATTER. THE POWERS CONFERRED ON THE OMBUDSMAN MAY BE EXERCISED NOTWITHSTANDING ANY PROVISION IN ANY ENACTMENT TO THE EFFECT THAT ANY ADMINISTRATIVE ACTION SHALL BE FINAL OR UNAPPEALABLE.

Section 20 clearly sets forth that the Ombudsman office is a supplemental remedy and is in addition to other remedies or rights of appeal—a principle also covered in section one with respect to legislative purposes. This section also establishes the principle that the Ombudsman powers are not inhibited by statutory enactments providing that any administrative action shall be final or unappealable. None of the state statutes under review contain a similar provision.

U. Section 21. Appropriation

THE SUM OF $________, OR SO MUCH THEREOF AS MAY BE NECESSARY, IS HEREBY APPROPRIATED OUT OF THE GENERAL FUNDS OF THE STATE FOR THE FISCAL YEAR ENDING ________ FOR THE PURPOSE OF CARRYING OUT THIS ACT.

COMMENT. This section should be included where required by the fiscal regulations or practice of the state. If inclusion of such section is not necessary, its omission is recommended.

Although section 21 relates to appropriations, the comment to the section states that if inclusion of such section is not necessary, its omission is recommended. Only the Iowa statute as enacted had a provision with respect to appropriation. In 1974, the Hawaii statute was amended to provide that funds for the support of the Office of the Ombudsman shall be provided for in the Act covering the expenses of the Legislature.

V. Section 22. Effective Date

THIS ACT SHALL TAKE EFFECT IMMEDIATELY UPON ENACTMENT.

COMMENT. The Act really becomes effective only after appropriation has been made and an Ombudsman has taken office.

It is, of course, obvious that the Act becomes operational only after appropriation has been made and an Ombudsman has taken office. In Nebraska, the Public Counsel Bill was approved by the Governor on June 29, 1969. The unicameral legislature elected Murrell B. McNeil as Public Counsel on May 5, 1971, and he took office on June 1, 1971. The law in Hawaii became effective on June 24, 1967. Herman S. Doi was appointed Ombudsman on April 17, 1969, and took office July 1, 1969. In Iowa, the Citizens' Aide Statute was signed by the Governor on April 20, 1972. Lawrence Carstensen, who had been serving since October 1, 1970, as Citizens' Aide, an office created by the Governor, was appointed as Citizens' Aide under the statute and took office as the statutory Citizens' Aide on July 1, 1972.

W. Section 23. Severability

IF ANY PART OF THIS ACT SHALL BE DECLARED INVALID, ALL OTHER PARTS SHALL REMAIN IN FULL FORCE AND EFFECT; THE PROVISIONS OF THIS ACT ARE DECLARED TO BE SEVERABLE.

No discussion need be made on this section, which is not contained in any of the state statutes under review.

87. HAWAII REV. STAT. § 96-3 (Supp. 1974).
III. Conclusion

State legislators concerned with the drafting of Ombudsman legislation have various guides to follow: the Gellhorn, the Harvard, and the ABA Model Statutes as well as the Hawaii, Nebraska, and Iowa laws. The latest of these—the joint project of the Ombudsman Committee, Section of Administrative Law, American Bar Association, and the Yale Law School Legislative Services—built on the foundations of the Gellhorn product and conforming to the twelve essentials of the American Bar Association Ombudsman resolution is the most complete and thorough. It represents the work product of law students, lawyers, law professors, and Ombudsman experts. It has frequently been pointed out by commentators that “since the Ombudsman is easily adaptable to the differing needs of various countries, each nation has made its Ombudsman to its own fashion.”\(^8\)

The same statement would apply to states or, for that matter, regions and provinces. But in the United States there is no reason that a state-wide Ombudsman statute should differ from the twelve essentials of the ABA resolution. The ABA Model Statute puts the requisite flesh on to the skeleton of the resolution, but it must be, if necessary, adjusted to meet the needs and requirements of a particular state. The 1974 International Bar Association—American Bar Association Ombudsman Committees Development Report shows that the strongest surge toward the Ombudsman system is at the state, region, and province level: Australia (States of South Australia, Queensland, Victoria, Western Australia, and New South Wales), Canada (Provinces of Alberta, Manitoba, New Brunswick, Nova Scotia, Quebec, and Saskatchewan), Federal Republic of Germany (State of Rhineland-Palatinate), India (States of Bihar, Maharashtra and Rajasthan), Italy (Region of Tuscany), and the United States (Hawaii, Iowa, and Nebraska).\(^9\) The United States with only three states out of fifty runs far behind Australia and Canada where a majority of the states or provinces have Ombudsmen in office. But the score card in the United States shows a flood of Ombudsman proposals into the state legislative houses.\(^9\) This torrent shows the concern of some state legislators to create an institution that will help to adjust the complaints of aggrieved citizens against the bureaucracy of the modern state. The majority of the legislators do not yet understand that to protect the individual against administrative mistake and abuse of power more is needed than the existing remedies—the courts, the legislatures, the executive, the administrative courts, and the administrative agencies. They do not yet understand that only the legislature can provide an independent and impar-

\(^8\) Frank, AD. L. REV., supra note 3, at 477.
tial office with responsibility to the legislature as an aid in its functions of supervising the executive branch and the administrative agencies.91