

..... should avoid dealing with municipal and county affairs, In a state-wide bill providence may also dictate a fifth specific exclusion to make indisputable that interstate bodies such as the Port of New York Authority or the Delaware River water resources board are not meant to be reached, though this specificity is perhaps not really needed: "(5) any instrumentality formed pursuant to an interstate compact and answerable to more than one state." (b) "Administrative act" includes every action (such as decisions, omissions, recommendations, practices, or procedures) of an administrative agency.

Section 3. *Establishment of office.* The office of Ombudsman is hereby established as an independent agency of [insert name of state, city, or other entity]

COMMENT. Whether the Ombudsman can be a wholly independent entity or must instead be included within the Executive or the Legislative Branch depends upon the local constitution or charter. Organizational detachment is the desired estate if it can be achieved constitutionally.

Section 4. *Appointment.* The [insert title of chief executive] shall appoint the Ombudsman, subject to confirmation by two-thirds of the members of each chamber of the [insert name of legislative body] present and voting.

COMMENT. In foreign countries the ombudsman has been elected by the legislature. The governmental structure in those countries differs, however, from the American pattern. Appointive officials, whatever their nature, are customarily chosen in American jurisdictions by the Chief Executive, subject sometimes to legislative confirmation. The present proposal contemplates confirmation by an unusually substantial vote in both chambers (if two exist) rather than in the Senate alone. This is intended to stress the "political" nature of the appointment and to reflect the need for the general acceptability of the person chosen. Whether the "non-majority" be two-thirds of those voting or some other figure can, of course, be fixed in accord with local preference or precedent.

Some persons favor direct legislative selection, without participation by the Executive. Thus, a Florida bill proposes simply that the ombudsman is to be "appointed by agreement of the president of the senate and the speaker of the house subject to confirmation by a majority of the members of each chamber of the legislature." A

by an absolute majority vote, and the nominee is to be "appointed to the office of Ombudsman by concurrent resolution of the Legislature."

All the plans emphasize the desirability of "de-politicizing" the selection process.

The California plan contemplates that the joint committee will have a continuing existence and will be available for consultation by the ombudsman "as he deems necessary to the execution of his powers and duties." No matter how the office of Ombudsman may be filled, some such provision in the legislature's own internal organization would be desirable so that the ombudsman can have a regular point of contact when needed.

Section 5. Qualifications. The Ombudsman shall be a person well equipped to analyze problems of law, administration, and public policy, and shall not be actively involved in partisan affairs.

COMMENT. Efforts to define the qualities sought in an ombudsman tend to result in a catalogue of human virtues, leading one person to remark that if ever such a man were found, he would instantly be cast in bronze rather than appointed to a mundane office. Experience abroad points clearly to the desirability of the ombudsman's having a legal background because he must deal with many grievances that hinge on analysis of statutes and rulings. Requiring any specific experience or absolutely excluding any category of persons (for example, those who have recently been legislators or have held other office) seems undesirable. The consensus of opinion that will presumably support legislative confirmation should be an adequate barrier against unsuitable nominees.

Section 6. Term of office. (a) The Ombudsman shall serve for a term of five years, unless removed by vote of two-thirds of the members of each of the two chambers of the [insert name of legislative body] upon their determining that he has become incapacitated or has been guilty of neglect of duty or misconduct;

COMMENT. The Ombudsman should be secure, but not absolutely untouchable. The proposed provision would adequately guard

ombudsman has been appointed for a full term.

COMMENT. Whether the term of office should be more or less than five years is not demonstrable. Abroad, no term exceeds four years. Here, some persons believe that the detachment of the Ombudsman from the Chief Executive will be accentuated if a vacancy does not automatically coincide with the inauguration of a new mayor or governor. Some advocate an even longer term than five years. The length of the term is not very important. If the institution proves its worth, tinkering with the Ombudsman's independence would be so politically perilous as to be altogether unlikely. To guard against sudden attacks upon an incumbent, removability should be made difficult, as has been done in this draft. As for vacancies, a stopgap until a permanent appointment can be made for a full term is preferred term, as others have sometimes suggested.

In New Zealand the incumbent Ombudsman continues serving beyond the expiration of his term, unless and until a successor has qualified. Although this assures continuity of Ombudsman services, it means that the hold-over Ombudsman has no security of tenure, a circumstance that may at least theoretically expose him to undesirable pressures.

Section 7. *Salary.* The Ombudsman shall receive the same salary, allowances, and related benefits as the chief judge of the highest court of

[name of state]
COMMENT. Setting the Ombudsman's pay and perquisites at the level of the highest ranking judge will give the new office a desirably high prestige, will eliminate wrangling now and in the future about the appropriate dollar amount of the Ombudsman's salary, and will avoid the obsolescence that would soon occur if the desired salary were to be precisely stated. If the Ombudsman is connected with a governmental subdivision rather than with the state itself, some other comparison would be appropriate.

Section 8. *Organization of office.* (a) The Ombudsman may select, appoint, and compensate as he may see fit (within the amount available by appropriation) such assistants and employees as he may deem necessary to discharge his responsibilities under this Act;

administrative agencies or reports to the [insert title of chief executive] or the [insert name of legislative body].

COMMENT. This section gives the Ombudsman a free hand in staffing his office, without even the restraints of civil service and classification acts. The highly personal nature of the Ombudsman's work, coupled with its essentially experimental nature, justifies giving this leeway to so highly placed and, by hypothesis, responsible an official. For the same reasons the Ombudsman has been given a free choice about assigning duties and subdelegating powers, with the single limitation that when criticisms or proposals for change are to be voiced in a formal manner, only the Ombudsman himself may be heard (except when the Deputy Ombudsman is in full charge during the Ombudsman's disability or protracted absence).

Section 9. *Powers.* The Ombudsman shall have the following powers:

(a) He may investigate, on complaint or on his own motion, any administrative act of any administrative agency;

COMMENT. The power to investigate should be stated unqualifiedly, though later sections will indicate the grounds that justify action by him and will thus suggest the occasions on which investigation would be suitable. Experience abroad shows that efforts to define jurisdiction have caused much laborious and essentially unproductive hairsplitting; a more general grant of power to investigate will eliminate some "legalistic" analysis in the beginning of the Ombudsman's work, but his own discretion will lead him to set sensible boundaries to the areas within which he will investigate, lest he be crushed by the burden of unproductive work.

(b) He may prescribe the methods by which complaints are to be made, received, and acted upon; he may determine the scope and manner of investigations to be made; and, subject to the requirements of this Act, he may determine the form, frequency, and distribution of his conclusions and recommendations;

COMMENT. Some foreign statutes require that complaints be written. Leaving matters of this kind to the Ombudsman's choice in the light of experience is preferable. Similarly, giving the Ombudsman power to shape his own investigations is desirable; any implication that he should utilize the same method at all times should be



rather than as a proceeding in the nature of a trial. Hence its content need not necessarily be the same as would normally be demanded in a formal adjudicatory hearing.

(c) He may request and shall be given by each administrative agency the assistance and information he deems necessary for the discharge of his responsibilities; he may examine the records and documents of all administrative agencies; and he may enter and inspect premises within any administrative agency's control.

COMMENT. Experience elsewhere suggests that the Ombudsman will be given ready access to official papers or other information within the administrative agency. Cooperative working relationships have been readily established so that the Ombudsman's need for documentary material has not conflicted with the administrators' continuing need to use the same material. As for inspection of administrative offices and installations, this draft gives the Ombudsman power to inspect but imposes no duty to do so routinely, as has been required of the Ombudsmen in several Scandinavian countries.

(d) He may issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence the Ombudsman deems relevant to a matter under his inquiry.

COMMENT. Every existing Ombudsman statute provides very broadly for the use of compulsory process in order to obtain needed information. In point of fact, however, the subpoena power has virtually never been used abroad, since information has been freely given. Concern has nevertheless been expressed in this country that wide-ranging inquiries into public administration might lead to burdensome demands. Hence Section 18, below, takes pains to stress protections for witnesses, even though the occasions for bringing them into play are likely to be very few indeed.

(e) He may undertake, participate in, or cooperate with general studies or inquiries, whether or not related to any particular administrative agency or any particular administrative act, if he believes that they may enhance knowledge about or lead to improvements in the functioning of administrative agencies.

COMMENT. If foreign experience is an accurate guide, work on individual complaints will chiefly preoccupy the Ombudsman's energies and attention. Nonetheless, he should be clearly empowered to address himself to general problems (some of which, indeed, may not be reflected at all in current complaints) and should be