

usually to an administrative act that might be

1. contrary to law or regulation;
2. unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;
3. mistaken in law or arbitrary in ascertaining facts;
4. improper in motivation or based on irrelevant considerations;
5. unclear or inadequately explained when reasons should have been revealed;
6. inefficiently performed; or
7. otherwise objectionable;

COMMENT. The statute desirably details the kinds of administrative acts whose occurrence has chiefly generated demands for the Ombudsman system. This draft sets them forth as guides, not as limitations. The Ombudsman is told to devote himself to these types of problems, but he need not feel himself confined to them if the catalog later be found to be incomplete. Subsection (3) refers to acts that rest on arbitrary ascertaining of fact. Very clearly, the Ombudsman must not attempt to be a super-administrator, doing over again what specialized administrators have already done and, if he disagrees, substituting his judgment for theirs. In some instances, however, the propriety of an administrative act may rest wholly on a factual determination that in turn rests on an exclusively flimsy foundation. As in cases that go to courts for review, the Ombudsman should not regard as "arbitrary" anything and everything with which he disagrees; but he should be in a position to say, in essence, that reasonable men would not have found the facts in the way the administrator did.

Subsection (5) is not intended to create a new legal requirement that findings of fact and conclusions of law accompany every administrative act. It means merely that official actions should be understandable and, usually, should be explained when those affected by them seek fuller understanding. Experience abroad shows that this is one of the areas most fruitfully cultivated by Ombudsman.

Subsection (6) refers to administrative acts that may lie within the zone of legality, but might nevertheless be subject to improvement.

usually in use.

...the bewildering "officials" pre-

Subsection (7) uses a catch-all phrase, "otherwise objectionable," matters as rudeness and needless delay, both of which bulk large among citizens' grievances.

(b) The Ombudsman may concern himself also with strengthening procedures and practices which lessen the risk that objectionable administrative acts will occur.

COMMENT. Subparagraph (b) makes clear that the Ombudsman should have a large and continuous interest in "preventive medicine" rather than solely in trying to abate a difficulty after it has arisen.

Section 11. *Action on complaints.* (a) The Ombudsman may receive a complaint from any source concerning an administrative act. He shall conduct a suitable investigation into the things complained of unless he believes that

1. the complainant has available to him another remedy or channel of complaint which he could reasonably be expected to use;
 2. the grievance pertains to a matter outside the Ombudsman's power;
 3. the complainant's interest is insufficiently related to the subject matter;
 4. the complaint is trivial, frivolous, vexatious, or not made in good faith;
 5. other complaints are more worthy of attention;
 6. the Ombudsman's resources are insufficient for adequate investigation; or
 7. the complaint has been too long delayed to justify present investigation of its merit.
- The Ombudsman's declining to investigate a complaint shall not, however, bar him from proceeding on his own motion to inquire into the matter complained about or into related problems;
- COMMENT. The duty to act on every complaint should not be imposed, partly because the dimensions of the work burden cannot be exactly predicted and partly because some complainants will show on their face that they are unlikely to lead to productive findings. This alone listing leaves the Ombudsman free to reject complaints.

of expense and time are realistic barriers to a complainant's pursuing the theoretically available remedies. In those instances access to the Ombudsman should not be precluded. Subsection (1) leaves the avenue open, but the traffic is still subject to control.

Another policy choice is reflected in Subsection (5) which does not require that every complaint be based on a claimed invasion of a strictly personal interest. This permits a complainant to bring to the Ombudsman's notice a matter of public rather than purely private concern. But if the complainant's concern with the subject matter is too attenuated, the Ombudsman may choose not to investigate.

Subsection (7) does not contain an explicit "statute of limitations" on complaints, though the Ombudsman is left free to reject those based on stale claims or ancient grudges. In Sweden complaints must be acted on if filed within ten years of the events in question; Denmark, New Zealand, and Norway, by contrast, require rejection of any complaint pertaining to occurrences beyond the preceding twelve months. Neither extreme seems desirable. The present drafts lays down no rule in this respect, but allows the Ombudsman to pick his way at the outset. Later, in the light of experience, he may wish to promulgate some rules of his own, as is allowed by Section 9 (b), above.

(b) After completing his consideration of a complaint (whether or not it has been investigated) the Ombudsman shall suitably inform the complainant and, when appropriate, the administrative agency or agencies involved.

COMMENT. A decision not to investigate a complaint does not mean that it has been altogether ignored. For example, the Ombudsman and the agency involved may regard the complaint as an adequate equivalent of a petition for administrative review of which the complainant has not yet availed himself; the Ombudsman may in such a case simply forward the complaint to the appropriate appellate authority, advising the complainant that this has been done in his behalf. In other instances very extensive legal analysis may be undertaken preliminarily, leading to the conclusion that no grievance could be found to exist. In such a case the Ombudsman may be expected to write an explanatory opinion that the

mental in nature. The Ombudsman's judgment must be relied upon to determine the suitable response in those instances. All practicing Ombudsmen do in fact take great pains to communicate fully and frankly with complainants, in general. This is particularly true as to cases whose merits have been explored. The Ombudsman's findings and reasoning have powerfully shaped public opinion as well as official attitudes. Conclusions adverse to a complainant's position deserve to be well explained, as has been done consistently by all foreign Ombudsmen.

Some proposals have explicitly required that if a complaint has reached the Ombudsman through a member of the legislature, the Ombudsman must report his findings and recommendations (if any) to the legislator who had forwarded his constituent's complaint. Undoubtedly the Ombudsman, guided by ordinary tact and prudence, would routinely furnish to legislative intermediaries copies of his explanations to complainants and affected officials; making statutory provisions for simple courtesy seems unnecessary. If anything more is intended by the suggested requirement that the Ombudsman "report" to a legislator who has forwarded a constituent's complaint, the requirement should be resisted. The Ombudsman should not be perceived as a staff aide whose activities may be directed by individual legislators, to whom he must then report back.

(c) A letter to the Ombudsman from a person in a place of detention or in a hospital or other institution under the control of an administrative agency shall be immediately forwarded, unopened, to the Ombudsman.

COMMENT. A provision of this nature has commonly been included in ombudsman statutes. It provides a measure of psychological assurance that everyone may have ready access to the Ombudsman without fear of reprisal.

Section 12. *Consultation with agency.* Before announcing a conclusion or recommendation that criticizes an administrative agency or any person, the Ombudsman shall consult with that agency or person, *conversely*. No provision need be made for giving specific notice that the Ombudsman has decided to investigate, if he does so orally. He will inevitably be in communication with the administrative agency when he needs its information or opinion for

and whatever material he deems pertinent, the Ombudsman is of the opinion that an administrative agency should 1) consider the matter further, 2) modify or cancel an administrative act, 3) alter a regulation or ruling, 4) explain more fully the administrative act in question, or 5) take any other step, he shall state his recommendations to the administrative 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;

COMMENT. Though the Ombudsman will rarely have reason to make a recommendation if he does not find an error in what the administrative 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.

Section 13 (a) contemplates no entry of judgment, as it were, but simply the expression of opinion by the Ombudsman. 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 may still possess to right what the Ombudsman points out as a past mistake. Bearing in mind that consultation under Section 12 will precede recommendation under Section 13, one may safely predict that rashly critical opinions will not be expressed.

(b) If the Ombudsman believes that an administrative action has been dictated by laws whose results are unfair or otherwise objectionable, he shall bring to the [name of legislative body]'s notice his views concerning desirable statutory change.

COMMENT. This subsection makes clear that 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

opinion adverse to an administrative agency or official he shall (unless excused by the agency or official affected) include the substance of any statement the administrative agency or official may have made to him by way of explaining past difficulties or present rejection of the Ombudsman's proposals.

COMMENT. Bringing his views into the open is the Ombudsman's sole means of gaining the public's support. This section permits publication even when an agency has accepted a recommendation. Publicity may be needed to call other administrators' attention to current developments and also to remind the public at large that the Ombudsman is functioning for the citizenry's benefit. Publicity, however, occurs at the end and not at the beginning of discussions with the agency involved. Persuasion is the chief instrument in gaining administrative agencies' favorable response to suggestions. Only when persuasion fails will the Ombudsman begin to think about mobilizing the force of public opinion. To guard against one-sidedness, the Ombudsman is required to disclose the criticized agency's or official's view of the matter along with his own, when the two views differ.

Section 15. *Reports.* In addition to whatever reports he may make from time to time, the Ombudsman shall on or about February 15 of each year report to the [name of legislative body] and to the [title of the chief executive] concerning the exercise of his functions during the preceding calendar year. In discussing matters with which he has dealt, the Ombudsman need not identify those immediately concerned if to do so would cause needless hardship. So far as the annual report may criticize named agencies or officials, it must also include the substance of their replies to the criticism.

Section 16. *Disciplinary action against public personnel.* If the Ombudsman has reason to believe that any public official, employee, or other person has acted in a manner warranting criminal or disciplinary proceedings, he shall refer the matter to the appropriate authorities.

Section 17. *Ombudsman's immunities.* (a) No proceeding, opinion, or expression of the Ombudsman shall be reviewable in any court;

immunity from harassment by lawsuit that is shared by judges and many other officials. It does not preclude criminal prosecution where serious misconduct ever to be brought to light; moreover, Section 6 provides for removal from office where the Ombudsman to be found miscreant.

(c) Neither the Ombudsman nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce this Act.

COMMENT. Subsection (c) saves the Ombudsman's office from the awkwardness of interrupting its on-going work in order to testify about matters concerning which it may have received information (often given in confidence). The subsection does not, however, preclude the Ombudsman's testifying in proceedings needed to enforce the Act, such as an action to compel compliance with a subpoena or a prosecution against a violator under Section 19, below. The subsection does prevent his being used as an adjunct to private litigation.

Section 18. *Rights and duties of witnesses.* (a) A person required by the Ombudsman to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the courts of this state:

(b) A person who, with or without service of compulsory process, provides oral or documentary information requested by the Ombudsman shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

(c) If a person refuses to respond to the Ombudsman's subpoena, refuses to be examined, or engages in obstructive misconduct, the Ombudsman shall certify the facts to the [insert name of suitable court]. The court shall thereupon issue an order directing the person to appear before the court to show cause why he should not be punished as for contempt. The order and a copy of the Ombudsman's certified statement shall be served on the person.

Mr. Gregorio M. Borja moved to place Proposition No. 27A on the order of third reading. Seconded and discussion held thereon.
Mr. Francisco R. Santos moved to amend said proposition as follows:

Page 1, line 5, strike out the words "within the legislature".
Motion seconded and discussion held thereon.

Mr. President put the question whether the Convention would agree to Mr. Santos' motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Mr. Joseph F. Ada moved to amend said proposition as follows:
Page 1, line 8, strike out the word "six" and insert the word "four".

No second, motion defeated.

Mr. Joseph F. Ada moved to amend said proposition as follows:
Page 1, line 10, after the word "administrative" insert the words "legislative and judicial".

No second, motion defeated.

Mr. Francisco B. Aguon moved to amend said proposition as follows:
Page 1, line 9, strike out the word "three" and insert the word "two".

No second, motion defeated. Discussion continued.
Mr. Joseph F. Ada moved to amend said proposition as follows:

Page 1, line 10, strike out the words "agencies and departments" and insert the words "the three branches".
Motion seconded and discussion held thereon. *Discussion continued.* Mr. Ada withdrew his motion.

favor thereof. (Discussion continued)

Mr. Adrian C. Sanchez moved to refer said proposition back to the Executive Committee. Seconded and discussion held thereon.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the negative, a majority of the delegates elected to the Convention and present not voting in favor thereof. (Discussion continued)

Mr. Adrian C. Sanchez moved to pass said proposition on file until next session. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Proposition Nos. 19 & 30

Mr. Joseph F. Ada moved to pass Proposition Nos. 19 and 30 on file. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Proposition No. 7

Mr. Gregorio M. Borja moved to pass Proposition No. 7 on file. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Proposition No. 15

Mr. Joseph F. Ada moved to place Proposition No. 15 on the order of third reading. Seconded *and discussion held thereon.*