TO: STATE AGENCIES ADMINISTERING PLANS UNDER TITLE III OF THE OLDER AMERICANS ACT OF 1965, AS AMENDED

INFO FOR: Area Agencies on Aging

SUBJECT: Supplemental Guidance in Implementation of Long-Term Care Ombudsman Program Requirement of the Older Americans Act, as Amended

BACKGROUND: The purpose of this Program Instruction is to provide further guidance and direction to the States in the implementation of the provisions of: Section 307(a) (12) and (16) and Section 321 (a) (10) of the Older Americans Act, as amended and supporting regulations, 45 CFR 1321.43, 1321.41(f), 1321.91(d), 1321.189, 1321.75. The provisions of AoA-PI-80-1, issued in October, 1979 to give preliminary guidance and clarification on several basic administrative issues regarding the Ombudsman Program, have been incorporated into this Instruction.

It should be noted that this document is issued as a Program Instruction, the type of issuance used by AoA to convey program guidance information only. It provides further clarification and procedures and methods that State Agencies should effectuate to implement the Ombudsman Program as set forth in the statute and regulations. Although it is issued as a final document, it can be revised, and comments regarding its provisions will therefore be welcome and of use to AoA.

Much of the content of this Program Instruction is based upon recommendations of the Ombudsman Task Force, which was formed in 1979 to advise AoA on implementation of the legislative mandate. Additional technical assistance material suggested by members of the Task Force and others
will be issued soon by AoA in an Information Memorandum. State and substate ombudsman programs are encouraged to rely in the interim upon the technical assistance material contained in the Program Development Handbook for State and Area Agencies on Nursing Home Ombudsman Services for the Elderly, which was issued in October, 1977 to all State and Area Agencies on Aging.
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A. STATE AGENCY ON AGING RESPONSIBILITIES - GENERAL

Section 307(a)(12) of the Older Americans Act requires each State Agency in its State Plan to provide assurances that it will carry out its statutory responsibilities under this section. Although the statute permits certain contractor organizations or another agency to perform specific aspects of the Long-Term Care Ombudsman program, the State Agency on Aging remains responsible for the performance of activities under Section 307(a)(12) of the Act. This State Agency responsibility continues notwithstanding the appointment or designation of an ombudsman as required in 45 CFR 1321.43(c) or the operation of the program by another entity.

Where the State Agency operates the Program, it must appoint an individual to serve as the State Long-Term Care Ombudsman. Where the functions of the program are contracted, or where another State agency by agreement with the State Agency on Aging performs the functions under Part A of the statute (complaint investigation, monitoring, information provision to public agencies, training, etc.), the State Agency must assure that the agency has the capacity to fulfill the requirements of the Act, and that authority and responsibility to implement the provisions of the Act vigorously and impartially are delegated to a qualified State ombudsmen as provided under Section 307(a)(12) of the Older Americans Act.

B. ADMINISTRATIVE PROVISIONS

1. Funding
   a) Matching Funds

There is no separate non-Federal matching requirement for the one percent Title III-B funds used by the State Agency to establish and operate the Ombudsman Program. All Title III funds are matched on a total statewide basis.

   b) Determining the Level of Expenditure for Ombudsman Activities -- Section 307(a)(16)

The State Agency on Aging must use a minimum of one percent of the State's Title III, Part B Social Services funds or $20,000, whichever is greater, for each fiscal year.
for conduct of its statewide ombudsman program. This sum, which may be greater than the 1% or $20,000 minimum, is computed and allocated before Part B monies are distributed to the Area Agency on Aging. This money is for the use of the State for development of the statewide program. This requirement does not apply where the State spends from State or local sources an amount equal to or in excess of the one percent or $20,000 minimum.

c) Expenditure of Monies Earmarked for Ombudsman Activities

Sections 321(a)(10) and 307(a)(16) of the Act provide for Federal Title III funding for the development of State ombudsman programs to carry out the mandate of Section 307(a)(12). This mandate requires the investigation and resolution of complaints made by or on behalf of individuals in long-term care facilities statewide. In carrying out this responsibility, States may elect to establish and designate substate units to carry out complaint investigation and resolution activities under policies and procedures established by the State Ombudsman.

As long as a State fulfills the requirements for which it is responsible under Section 307(a)(12) of the Act, it may use part or all of its ombudsman allotment to fund designated substate ombudsman programs to establish or expand the capacity to investigate and resolve long-term care complaints. (See Section F) Funds may be spent only on activities specified in 307(a)(12) A of the Act which are specifically part of a clearly identified statewide ombudsman program.

Funds to support the salary of the State Long Term Care Ombudsman may not derive from the Advocacy Assistance Grant after
FY 81. AoA discretionary Advocacy Assistance funds are supplemental and do not reduce or eliminate the requirements of 307(a)(16) to spend at least 1% or $20,000, whichever is greater, on the State Long-Term Care Ombudsman Program at the State and/or substate level.

2. Relationship of Statutory Long-Term Care Ombudsman Program and AoA Advocacy Assistance Program Discretionary Grant

The Program Instruction for the Older Americans Advocacy Assistance Program for FY 81 addresses AoA's intent regarding the inter-relationship between the Older Americans Advocacy Assistance and State Long-Term Care Ombudsman programs. Advocacy Assistance is designed, in part, to augment efforts in support of the statutory Long-Term Care Ombudsman Program at the State and local levels. Additionally, strong coordination between the Ombudsman, the Developer and legal services providers is expected. The advocacy Assistance Program, directly or in coordination with local legal services and other advocacy programs, provides a vehicle for expanding the program scope of the State Long-Term Care Ombudsman Program where necessary to assist individuals who are residents of long-term care facilities.

The Long-Term Care Ombudsman regulations (Section 1321.43) require designation of a State Long-Term Care Ombudsman to direct activities related to Section 307(a)(12) of the Act. Effective FY 81 only one person may be designated as the Long Term Care Ombudsman in each State.
C. Organizational Location

Each State Agency on Aging may establish and operate its Long-Term Care Ombudsman Program directly, or may operate the program through contract with any public agency or other appropriate private non-profit organization except one that is:

1. responsible for licensing or certifying long-term care facilities or other residential facilities for older persons, or

2. an association, or an affiliate or agent of an association of long-term care facilities for older persons.

Other inappropriate organizations include those which to a significant extent are associated or affiliated with, or have control of or are controlled by, persons who or interests which are providers of long-term care services, facilities or supplies, or which are associations of employees working in long-term care facilities.

Such control exists where one or more individuals or another organization has the power, directly or indirectly, to influence or direct the actions or policies of the association or organization being considered for sponsorship of the ombudsman program. The term "control" includes any kind of leverage, whether or not it is legally enforceable and however it is exercisable or exercised. (It is the reality of the control which is decisive, not its form or the mode of its exercise).

In selecting a contractor, the State Agency on Aging should determine that no conflict of interest exists which might preclude the ability or willingness of the State Ombudsman of his or her designated representatives to vigorously and impartially investigate and resolve complaints and to assure quality care. The contractor should demonstrate the capability and commitment to fulfill the objectives of the ombudsman provision in the Older Americans Act.

Determination of the placement of the program, whether in-house or outside the State Agency, should consider the need for the Long-Term Care Ombudsman to exercise independence in action and judgment, free from the control of significant influence by any person or organization which seeks to interfere with vigorous and impartial investigation and/or resolution of complaints.
Where the State Agency operates any portion of the Long-Term Care Ombudsman Program within an umbrella agency which also houses a long-term care facility licensing or certifying division, the State Agency should provide assurances that the Ombudsman Program will exercise independent judgment and action in undertaking the statutory activities.

Such assurances may be reflected by any of the following:

- specific inter-organizational agreements approved at the highest level of the umbrella organization, or
- authority and responsibilities expressed in the job description of the Long-Term Care Ombudsman, and delegations of authority to the Ombudsman, or
- arrangements with independent agencies and/or external organizations with the power and freedom of action to confront problems identified by the Long-Term Care Ombudsman Program, or
- State statutes or Executive Orders addressing this issue.

D. **SCOPE OF PROGRAM**

1. **Type of Facility Covered**

The Older Americans Act, as amended, requires Long-Term Care Ombudsman Program activities to be on behalf of residents of "long-term care facilities". These facilities include:

   a) **skilled nursing facilities**, defined in section 1861(j) of the Social Security Act (42 U.S.C.A. 1395x(j));

   b) **Intermediate care facilities** as defined in Section 1905(c) of the Social Security Act (42 U.S.C.A. 1396(d)(c));
c) Nursing homes, as defined in Section 1980 (e)(1) of the Social Security Act (42 U.S.C.A. 1396(g)(e)(1), and

d) Other similar adult care homes as identified by the State Agency on Aging in the State Plan and approved by the Commissioner. This includes facilities, institutions and homes which provide shelter, care and services on an ongoing basis to individuals who are physically or mentally impaired.

2. **Primary Client Group**

In meeting its statutory and regulatory responsibilities, a long-term care ombudsman program must respond to complaints initiated by older residents of the covered long-term care facilities or to complaints by those acting directly for or on behalf of those residents, including, but not limited to family members, friends, staff of nursing homes, citizens' organizations and associations. The term resident includes individuals seeking admission to a long-term care facility if the complaint involves procedures or practices related to admission and/or the individual's entitlement to care and services under Federal and State laws and regulations.

The Long-Term Care Ombudsman may respond to complaints by non-elderly long-term care facility residents or by those acting directly in their behalf where such action will either: a) benefit older residents of that long-term care facility or older residents of long-term care facilities generally, or be the only viable avenue of assistance available to the complainant, and b) will not significantly diminish the Long-Term Care Ombudsman Program's efforts on behalf of older persons.

3. **Types of Complaints**

The Long-Term Care Ombudsman Program, in meeting its statutory responsibilities, must address the investigation and resolution of complaints relating to "administrative action" which may adversely
affect residents' health, safety, welfare and rights in the long-term care setting. Complaints "relating to administrative action" include all matters concerning any action or inaction, or decision by an owner, employee, agent of or service provider in a long-term care facility, or by a government or quasi-governmental agency, which may affect in an adverse way the health, health-related, financial, social and other services provided to residents of long term care facilities.

4. Geographic Coverage

The State Long-Term Care Ombudsman Program should be statewide in character (see Complaint System Responsibilities, Section 6). Elements which demonstrate a "statewide" program include:

a) State Agency provision in its State Plan of a system for receiving and processing long-term care complaints from every part of the State. This system should include reasonable efforts to inform the public of the availability of the service.

b) The Long Term Care Ombudsman Program should either directly, or by contract or other arrangement, have the capacity to investigate and resolve incoming complaints. The State should assure that these activities will be incrementally expanded toward the objective of full State complaint coverage by the Long-Term Care Ombudsman Program by October, 1982.

c) The Long-Term Care Ombudsman may identify and designate substate programs to assist in the functional aspects of the program. (See Section F)

E. PROGRAM STRUCTURE AND FUNCTION

1. State Agency Tasks and Activities

In order to meet its statutory requirements, the State Agency on Aging must engage in the following tasks and activities and meet the following responsibilities:
a. Promulgate general rules or guidance setting forth policies, procedures and organizational framework which will govern the administration of the Ombudsman Program within the State.

b. Assure that the State Ombudsman Program is administered in compliance with The Older American Act as amended and supporting regulations.

c. Delegate sufficient authority to the State ombudsman to enable him/her to carry out activities necessary and appropriate to meet the requirements of the Act.

d. Encourage and promote public understanding and support for the full implementation of the State Long-Term Care Ombudsman Program.

e. Provide support and technical assistance to the State ombudsman in carrying out his/her duties.

2. Responsibilities and Duties of the State Long-Term Ombudsman:

The State Ombudsman must:

a. Establish and/or promulgate in accordance with law, necessary procedures for access by Long-Term Care Ombudsman Program representatives to long-term care facilities, residents and facility, State and residents records.

b. Design and implement a statewide uniform complaint documentation system.

c. In conjunction with a. and b. above, annually report to the State licensing and certifying agency, the Governor, the Commissioner, and the public on the operation of the Long-Term Care Ombudsman Program, status of complaints and resolutions, and conditions in the State long-term care facilities. This report should identify all serious, on-going issues of widespread concern and proposals for corrective action at all relevant levels of government.

d. Develop, expand and administer a statewide system to investigate and resolve complaints in a timely way.
Monitor the development and implementation of Federal, State and local laws, regulations and policies that relate to long-term care facilities in the State.

By annual report, upon request, and as necessary and appropriate provide information to public agencies about the problems and concerns of older persons in long-term care facilities; recommend changes in the long-term care system which will benefit institutional residents as a class.

Establish and maintain official files for the statewide Long-Term Care Ombudsman Program, and adopt procedures to protect the confidentiality of those files.

Publicize the Long-Term Care Ombudsman Program and provide information and education about long-term care issues in the State. Among other things this should include advising the public about or arranging for expeditious availability of current State and Federal licensure and survey documents, including Statements of Deficiencies and Plans of Correction for individual facilities.

In order to develop, expand and administer a statewide system to investigate and resolve complaints in a timely way, the State must develop resources for efficient complaint management. To accomplish this, the State Program should perform the following activities, which are listed in logical sequence:

a) Generate agreements and working relationships with relevant State agencies and Area Agencies on Aging to facilitate their cooperation and assistance to the Long-Term Care Ombudsman Program at State and substate levels;

b) Coordinate with the State Agency, where appropriate, the designation, appointment or recognition of those persons or organizations, on a State or local level, who will be active in complaint investigation and resolution;

c) Provide technical assistance and provide guidance in establishing and operating substate programs;

d) Promote public awareness of the existence of a complaint processing system;
e) Develop and provide for training on an ongoing basis for staff and volunteers.

f) Establish an in-state communication network between the State Program and substate programs.

g) Provide information, technical assistance and on-going support to assist in the resolution of complaints.

3. Delegation to a State-Created Ombudsman Program

In those cases where a State has an existing long-term care ombudsman program, created through State legislation or executive mandate, which is outside of the State Agency on Aging, the State Agency may delegate all or some of its long-term care ombudsman program functions to the State-created program unless the location of the latter is prohibited by Section 307(a)(12)(A) or inherent conflicts of interest exist. The State Agency should enter into a written agreement with that program.

The agreement should detail the specific services and functions to be provided in compliance with the Act and specify coordination with the Advocacy Assistance program where it exists. The State Agency continues to be responsible directly or by contract for the implementation of functions not undertaken by the State Ombudsman Program. Additionally, the State Agency should exercise sufficient oversight and independent judgment and freedom of action to insure the continued vigorous impartial investigation and resolution of complaints.

In those situations where State money is used in lieu of Title III funds, the State Agency on Aging continues to be responsible for the execution of the Ombudsman statutory responsibilities.

4. Coordination of Complaint Investigation and Documentation Activities

Where the State Long-Term Care Ombudsman enters into an agreement with another agency to coordinate complaint investigation and documentation activities, such arrangement should be reflected in a written agreement which specifically recognizes the continuing duty, full freedom and independence of the Long-Term Care Ombudsman to:

a. Insure the continued adequacy and responsiveness of complaint investigation and resolution, monitoring and data collection systems consistent with the Act as defined in this instruction;
b. maintain an independent capacity to investigate and resolve any complaint;

c. receive and process, on a regular basis, information related to the number, type, and source of complaints, facilities involved, etc. and the manner of complaint resolution (see Section G on Uniform Complaint Documentation System);

d. maintain by specific agreement the power, ability and right to monitor the agency’s complaint processing performance and take any action necessary to correct and improve deficiencies.

5. Staffing at the State Level

At a minimum, each State long-term care ombudsman program should have a full-time ombudsman whose credentials are approved and/or who is officially appointed or designated the State Long-Term Care Ombudsman. The State Agency should delegate to that person the authority necessary to administer a program which implements the statutory objectives. The Ombudsman should have no duties unrelated to this position.

The Ombudsman and staff of the program and all persons in a position to significantly control or influence the program must be free of all financial or other affiliations or ties to long-term care facilities or associations which might compromise the program's efforts to vigorously and impartially investigate and resolve complaints. See Section C related to organizational location for further guidance on this subject.

The State Long-Term Care Ombudsman should minimally possess the following qualifications:

a. demonstrated experience with long-term care systems or professional training in long-term care services and institutions;

b. program development background and skills;

c. administrative, arbitration, conciliation and/or negotiation experience and skills;

d. experience or education in gerontology and/or aging programs.
F. SUBSTATE PROGRAMS

In order for the State Long-Term Care Ombudsman Program to successfully fulfill long-term care ombudsman responsibilities on a statewide basis, it may establish substate units or designate ombudsman responsibilities.

1. Organizational Location

Criteria to be used in identifying, soliciting and selecting organizations or agencies to carry out ombudsman functions on the local level include:

a) The proposed unit or principal members of its staff or membership have no conflicts of interest which would impair its ability to vigorously and impartially investigate complaints in the interests of elderly long-term care residents.

b) The proposed unit has a reputation for or a strong interest in improving long-term care for older institutionalized persons.

c) The proposed unit provides assurances in writing to the State Program that it will:

- provide/supply adequate supervision to any paid or volunteer staff;
- describe and establish lines of accountability and responsibility within its organization and the State level program for all activities in which it is engaged as local ombudsman;
- accept assignments of complaints from and make referrals of complaints to the State Long-Term Ombudsman Program in a timely manner;
- document and report, in a form specified by the State Long-Term Care Ombudsman, complaints and other requests for assistance to the State Long-Term Care Ombudsman Program in a timely manner;
- maintain ombudsman records to insure the confidentiality of the information contained in them;
- abide by procedures established by the State Long-Term Care Ombudsman Program relating to:

(1) access to facilities, residents, and residents' personal and medical records,
(ii) disclosure of residents' identities, and

(iii) disclosure of information in ombudsman files.

- participate, through its staff (paid or volunteer) or members, in training and other support events and activities organized by the State Long-Term Care Ombudsman Program;
- gather and report other information as requested by the State Long-Term Care Ombudsman Program; and
- coordinate activities with Area Agencies on Aging.

2. Substate Program Functions

Designated local ombudsman programs, as authorized by the State Long-Term Care Ombudsman, should:

a) Investigate and work to resolve complaints (see section 6 on Complaint System Responsibilities);

b) Record and report complaint information required by agreement referred to in Section 1.c) above;

c) Advise the public about, or arrange for the availability of current State, local, and Federal inspection reports, statements of deficiency and plans for correction for individual long-term care facilities in the service area;

d) Advertise the existence and function of the local and/or State Long-Term Care Ombudsman Program;

e) Additional activities which may be undertaken at the local level include but are not limited to:
   - promotion of visitation programs;
   - creation of and assistance in the development of resident, family and friends' councils;
   - sponsorship of community surveys or evaluations of long-term care facilities and the publishing of consumer information guides;
   - presentation of community education and training programs to long-term care facilities, human services workers, families, and the general public about long-term care and residents' rights issues.

3. Role of Area Agencies

Area Agencies on Aging are required under Section 1321.91 of the Regulations to "carry out activities in support of
the State Long-Term Care Ombudsman Program." Under Section 1321.75(b)(4) of the Regulations, Area Agencies may fund complaint and grievance resolution services for residents of long-term care facilities. Area Agencies may discharge their statutory responsibility under Section 306(a)(6)(D) in part by establishing or funding complaint resolution activities or other activities in support of State activities related to Section 307 (a)(12)(A)(ii) and (iii).

State Agencies should assure the active participation of Area Agencies in the State Long-Term Care Ombudsman Program's local functions. Area Agencies should, at a minimum, publicize the existence and functions of the State and local Ombudsman Programs and refer complaints to the Ombudsman or his/her designated representatives.

Additionally, AoA recommends that State Agencies encourage Area Agency participation in the program through involvement of the Area Agencies in the following activities:

- sponsoring, funding and coordinating local ombudsman programs to provide complaint investigation and resolution services for residents of long-term care facilities. (Such programs must be a designated part of the State Ombudsman network and must meet criteria developed by the State Long-Term Care Ombudsman Program and comply with any other relevant requirements of the statute, regulations and this Program Instruction.)

- soliciting the interest and promoting the development of citizen organizations around long-term care issues;

- encouraging long-term care ombudsman training on local level;

- assisting their grantees to work in conjunction with ombudsman efforts at the local, State and regional levels.

4. Role of Citizen Organizations

In organizing a statewide network, the State Long-Term Care Ombudsman may promote the development and provide for the active participation of citizen organizations in support of the program, both at the State and local levels. A few examples of ways in which citizen organizations and their members can be involved are:

- serving as designated local components of the statewide program;
participating as both trainers and trainees in ombudsman training programs;

providing volunteer personnel resources;

assisting the ombudsman program to publicize information about the long-term care system and information on long-term care issues;

preparing consumer guides to assist consumers in selecting a nursing home.

G. COMPLAINT SYSTEM RESPONSIBILITIES

1. General Guidance

Complaint processing underlies the overall structural, functional and programmatic development and orientation of the Long-Term Care Ombudsman Program. Complaints may be about long-term facilities or about any organization or agency which impacts upon the lives of long-term care residents. Instructions contained in this section must be considered in connection with the following subjects which are more fully described elsewhere:

- organization location;
- requirement for statewide complaint coverage;
- types of complaints handled;
- who may complain to Long-Term Care Ombudsman Program;
- program staffing requirements; appropriate personnel;
- publicizing complaint and other functions;
- coordination with Older Americans Advocacy Assistance Program and external advocacy and citizen organizations;
- relationship of State and substate programs;
- reliance upon volunteers;
- training requirements;
- scope of program – types of facilities covered.
2. Development of Complaint Processing Capacity

The State Long-Term Care Ombudsman Program should have a capacity to directly receive, investigate and resolve complaints about long-term care facilities. Program policy regarding complaint management may include assignment of complaints to designated units or representatives. It may be appropriate in some circumstances to refer complaints to other State regulatory agencies. The State Ombudsman should collect information on all complaints assigned or referred and thus continue to assure the inter-relationship of the complaint process with the other requirements of the Act. (307)(a)(12).

For the purposes of the Program, referral includes sending or communicating the complaint or confidential information related to a complainant/resident or his/her complaint to persons, agencies, or organizations which are separate from the State Long-Term Care Ombudsman office or any of its designated State and/or local affiliate units. Communications between State and substate ombudsman programs related to complaints are considered assignments, not referrals.

The State Agency should set forth a timetable which identifies a date when the State Long-Term Care Ombudsman Program will have full capacity to respond to complaints. This timetable should incorporate requirements related to geographic coverage (Section D-4 of this Instruction). Factors to be considered in determining a timetable include: the number, size and location of long-term care facilities within the State, the location or concentration of problem facilities in the State, State program resources and staff qualifications, types of complaints and complaint issues, and the adequacy and/or cooperation of current, other-agency complaint-handling systems.
3. Complaint Investigation

a) In a program directly handling assigned complaints, investigation responsibilities should include, but not be limited to:

- establishing personal contact with the complainant, resident, a legal representative, if necessary, or both;

- completion by the complainant and/or resident of all applicable consent to represent and release of record forms;

- identification of relevant issue areas raised by the complaint;

- documentation of the complaint in statewide data system;

- assembling all necessary facts;

- identification of applicable State and Federal law potentially violated;

- interviews with appropriate nursing home or agency personnel;

- referral to and/or review of technical (i.e. medical, nursing, law, social services, therapy, etc.) information by objective persons possessing the relevant skills or expertise;

- sequential, detailed and organized case information management;

- supervision and back-up of volunteer investigators;

- regular, periodic communication with complainant or resident related to progress of the investigation of the complaint, or for further information, and
development and implementation of a strategy
to resolve the complaint or refer for resolu-
tion.

b) The investigation of complaints involving tech-
nical questions frequently requires the assistance
or referral to a State regulatory agency. Where
a complaint is entirely or in part referred to
a State or Federal agency (e.g. health, professional
licensing, Attorney General, consumer affairs,
human services or law enforcement branch) for
investigation, the Ombudsman Program receiving
the complaint should at a minimum:

- Obtain complainant's or resident's consent
to refer complaint (except where complaint
is anonymous or identity not to be disclosed);

- Advise complainant/resident to which person(s)
agency(ies), or organizations the complaint
has been referred;

- Document basic data (see complaint documenta-
tion instructions) related to the complaint
and complainant;

- Promptly refer the complaint (ordinarily within
two days of receipt) and indicate relief sought
(complainant and ombudsman objective);

- Have a system to regularly follow up on the
progress of complaint investigation under-
taken by the agency to which the complaint
was referred;

- Insure resident/complainant participation in
the investigation;

- Insure that complainant/resident is advised
of status of investigation;

- Insure timely receipt from referral agency of
detailed report related to the complaint
investigation;

- Insure that complainant is advised of outcome
of investigation. Provide complainant/resident
with copy(ies) of investigative reports as
appropriate;

- Use State Long-Term Care Ombudsman Program approved
criteria for the verification of complaints;
. Critique, correct or contest investigative findings as appropriate, according to complainant/resident reaction to investigative findings, and on his/her behalf.

c. Complaint Referral

Complaints about the activities or conduct of State regulatory or enforcement agencies should not be referred to those same agencies for investigation and resolution. Verified but unresolved complaints concerning code or law violations which are resolved should be reported to the State licensing and/or certifying agency at least annually.

4. Complaint Verification

The State Ombudsman or his/her representative should verify complaints where the fact issues are not clear before taking action toward resolution. Verification responsibilities include many of the activities associated with complaint investigation. After an attempt has been made to verify a complaint, it may appear that a complaint has no merit. At that point the Ombudsman is obliged to explain the situation fully to the complainant and if necessary discuss alternative remedies. If the complaint is verified, either fully or partially, then the next step is resolution.

5. Complaint Resolution

Complaint resolution involves translating the results of investigation into beneficial action on behalf of the complainant/resident. This process should insure that, to the degree possible, complainant/resident or ombudsman expectations and objectives relative to the complaint are achieved. The means to be marshalled in resolving a specific complaint must be determined by the severity, character and extent of the problem. Problem resolution may be accomplished by:

- persuading or negotiating at nursing home employee level to change particular nursing home behavior, pattern or practice affecting a resident(s);


. educating a resident, relative, nursing home staff person to relieve a problem;

. effecting positive enforcement action by a regulatory agency;

. proposing regulatory or statutory changes or additions;

. communicating with community groups and professional organizations; and

. encouraging the utilization of legal services assistance by the complainant/resident(s).

Not every problem is capable of a resolution entirely satisfactory to the complainant/resident. However, all reasonable avenues of assistance to the complainant/resident, directly or by referral, should be exhausted, and if such efforts are unsuccessful, the Ombudsmen should so advise the complainant(s) and provide the individual(s) with information explaining how to proceed independently.

The resolution process should include follow-up and ongoing monitoring, as appropriate, of the situation after a reasonable period of time through contact with the complainant or resident, or otherwise where appropriate, for the purpose of determining that the causes giving rise to the complaint have not been repeated and have not reoccurred. Such follow-up should be documented in the record of the complaint.

6. Complaint System Related Issues

a) Anonymous Complaints - Complainant Identity Not To Be Disclosed

The State Long-Term Care Ombudsman Program should accept both anonymous complaints and complaints from persons who do not wish to have their identities disclosed. Where either of these situations occurs, program staff should advise the complainant about limitations in the ability of the Program to investigate and resolve the issue; however, in certain instances the Program may be able to proceed without disclosing the complainant's identity, and must do whatever is possible under these circumstances.
b) Access to Facilities and Residents

The State must establish and enforce procedures which create an orderly system for ombudsman admission to and presence in long-term care facilities. The procedures established by the State should recognize that long-term care facility residents have inherent Constitutional rights of access to and information from ombudsmen while respecting the residents' routine receipt of care in the facility.

These procedures should comply with applicable State law and Federal laws and regulations and include the following provisions and guidelines for program representatives:

- Equal access to facilities and residents by all authorized representatives of the State Long Term Care Ombudsman Program;

- Access in direct response to a complaint received from a resident of that facility or from someone complaining on his/her behalf;

- The ombudsman or his/her representative should normally report his/her presence in the facility and upon request, produce identification which establishes an affiliation with the Long-Term Care Ombudsman Program;

- If the resident's room does not permit private consultation to occur between ombudsman and resident or if such consultation infringes the rights of roommates, then the ombudsman or his delegate should request an appropriate private place for such meeting. The resident(s) and ombudsman may also meet in any common area of the facility unless their presence there would infringe upon the privacy or other rights of other residents;
Facility staff may refuse or terminate an ombudsman visit with a resident only where such a visit is a direct threat to the health and safety of the resident and that information is documented by his/her physician in that resident's medical records. An exception to this rule occurs when the resident, willfully and knowingly, with full information related to his medical condition, waives medical advice and chooses to meet the ombudsman in spite of the risk. In such situations, the facility may request that the resident sign an appropriate written statement in which he/she takes responsibility for his/her actions.

The State Ombudsman should assure that long-term care facilities understand the ombudsman access procedures and adopt policies implementing ombudsman access in compliance with those procedures.

c) Access to Resident Records

The State must in accordance with State law establish and formalize procedures that provide for access by the Ombudsman and persons designated by the Ombudsman to the personal and medical records of residents of long-term care facilities. These procedures should accommodate the needs of the Ombudsman Program for access to information and the residents' right of privacy for their records.

If State ombudsman legislation or other legislation addresses these issues, State Agency procedures will be deemed to comply with the access to records requirement of the statute and regulations in so far as the ability of the Ombudsman and his/her designee to inspect, review or copy residents' records is not diminished.

"Appropriate access" to resident records should reflect at least the following criteria:

1. Access to medical or personal records should be sought only where required to fully investigate:
. a specific complaint made by or on behalf of a resident or residents, or;

. information about the conditions of the long-term care facility generally;

(11) Except in emergency situations, the Ombudsman or his/her designee shall obtain and supply to the facility the permission, authority or consent of the individual (or his/her legal representative) whose records are to be inspected prior to reviewing those records. Such authorization should be in writing, where possible, but may be conveyed to records staff of the long-term care facility orally or otherwise by the resident or legal representative unless this violates State law.

(iii) In emergency situations, the Ombudsman or his/her designee may secure information in a medical or personal record of a resident or residents without obtaining prior resident authority:

. where permitted by State law; or

. by arranging for the record to be reviewed by authorized State or local health or human services personnel for the purpose of verifying or disclosing the existence of problems associated with the complaint; or

. may take appropriate legal action to secure information in the resident's record.

(iv) The inspection of records shall be accomplished in conformance with State law in as private an area of the facility as possible, and, except in emergency situations, during ordinary business hours at the facility.

d) Disclosure of Resident Information

(1) Title III regulations require that persons who gain access to residents' records shall not discuss or disclose
information in the records or disclose a resident's identity outside of the Ombudsman Program (State or Local) of which they are a part, unless

- the resident or complainant or legal representative has consented to such disclosure, and

- specifies to whom the information may be disclosed, or

- a court orders the disclosure.

(ii) Disclosure of information or the identity of an individual should only occur, consistent with the provisions of (d)(1) above, where such disclosure:

- is required to properly investigate and resolve a complaint, or

- assists in the execution of the other ombudsman program requirements of Section 307 (12)(A) and (C).

(iii) Where complainants are reluctant to grant consent to inspect personal or medical records, or do not wish their identities to be disclosed, the Ombudsman or his/her representative should advise the complainant about possible limitations in the ability of the Long-Term Care Ombudsman Program to investigate and resolve the problem. However, efforts on behalf of the complainant should be pursued where the complaint may be investigated and resolved without revealing that person's identity and without recourse to his/her records. (See Section (a) above)

(iv) The State Agency's procedures for access to resident's records should also include procedures for copying resident records at a reasonable charge upon reasonable advance notice to the facility.
(v) All staff and other representatives of State and substate long-term care ombudsman programs who handle complaints must receive training on access to records and confidentiality issues.

e) Relationship to Complaint Handling Responsibilities of State Licensing or Certifying Agency or State Health Care Complaint Systems

The intent of the Long-Term Care Ombudsman provisions of the Older Americans Act Amendments is to insure a complaint investigation and resolution system which is responsive to the problems and concerns of older persons who reside in long-term care facilities. The development of the capacity to undertake these activities under the Act is in no way meant to relieve another State Agency of any statutory responsibilities related to responding to long-term care complaints, nor is it contemplated that unnecessary duplication of effort by or competition between the State Ombudsman and licensing or certifying agency occur.

Although each program must respond to complaints, there is a significant difference in the purpose each has in doing so. A State regulatory agency's primary concern and focus relates to the continued compliance by licensed or certified health care providers with State and Federal (and sometimes local) laws and regulations. The Long-Term Care Ombudsman, although interested in facilities' compliance with law, works on behalf of long-term care residents and is responsible for improving their condition and seeking satisfactory resolutions to their problems.

These roles can be supportive of each other. Long-term care ombudsmen should report suspected violations of law or "code" requirements to the appropriate licensing or certifying agency. Ombudsmen are strongly encouraged to utilize the technical skills and resources of State regulatory agencies in the investigative and complaint resolution processes. These capabilities generally cannot be matched by the Ombudsman Program.
Regulatory agencies frequently lack the authority and time to adequately investigate and resolve complaints which do not raise issues of code compliance. Such problems are more appropriately handled by the Long-Term Care Ombudsman Program, leaving the licensing authority with more time to meet its law enforcement responsibilities.

The Long-Term Care Ombudsman Program should regularly report to the licensing or certifying agency (Section 307(a)(12)(C)) as well as monitor its activities in the implementation of laws, regulations and policies (Section 307(a)(12)(A)(ii)). This communication should be aimed at improving the system for those who use it - long-term care residents. The Ombudsman Program should help identify particular long-term care problems which the agency might address and should provide constructive analysis about how the agency might be more responsive to long-term care consumers.

The State Agency on Aging should seek inter-agency agreements to facilitate cooperation and the development of effective working relations with the State's licensing or certifying unit. Where the Program is contracted or its functions delegated, the State Agency should promote the necessary communication between contractor/delegee and the relevant State agencies.

H. MAINTENANCE OF OMBUDSMAN RECORDS

The State Agency must establish procedures which govern the maintenance and disclosure of information collected by the Ombudsman Program. Such procedures should meet the following criteria:

1) A State Long-Term Care Ombudsman Program should maintain records related to:

   . complaints received by or on behalf of long-term care residents;

   . the development and implementation of Federal, State and local laws, regulations and policies affecting long-term care facilities in the State;

   . public information on the problems of older persons in long-term care facilities;

   . the organization and development of a statewide ombudsman network;
the development and provision of training to representatives; and

long-term care facilities and other provider information.

2) For the purposes of the State Long-Term Care Ombudsman Program, the person appointed or designated by the State Agency as the State Long-Term Care Ombudsman should be the custodian of the Program's records. Requests for the disclosure of information other than those ordered by a court should be approved or disapproved by the State Ombudsman, consistent with #3, below.

3) Consistent with the requirements of Section 1321.19 of the Regulations and subject to the considerations of 4 below, no record or information maintained by the State Long-Term Care Ombudsman Program which identifies a resident/complainant may be disclosed (except during the course of a complainant/resident authorized complaint investigation and resolution process) unless:

the complainant or resident has consented in writing to the disclosure of his/her identity for a time-certain, specific or general purpose and has indicated, in writing, to whom such disclosure may be made, or

a court orders the disclosure.

4) Generally, only resident complaint and law and/or facility monitoring files will contain confidential or sensitive information. Such records should be stored in files or cabinets which are locked when not in use. Access to these files must be limited to persons selected by the Ombudsman.

The records to be safeguarded include, but are not limited to:
notes of interviews with or affidavits by complainants;

all copies of residents' medical records or diagnoses;

all state long-term care ombudsman program or other Agency office memorandum which are developed in the process of evaluating and resolving residents' complaints;

all photographs, video tapes, tape recordings, etc. of complainants/individuals;

information containing unverified complaints about long-term care facilities, long-term care facility owners, administrators, staff or other professionals involved in the long-term care system; and

investigative materials and other information which are drafted and organized in the process of monitoring the development and implementation of laws, regulations and policies affecting long-term care.

5) Inactive case records should be maintained by the Program for no less than two years.

I. STATEWIDE UNIFORM REPORTING AND DOCUMENTATION SYSTEM

The State Agency must assure that the Ombudsman Program establishes a system that documents the receipt of, collects and analyzes information on complaints about and conditions in long-term care facilities in the State. State systems should have the following characteristics and be capable of reporting the following information:

(i) The same documentation and reporting system should be utilized by the State and substate units or representatives designated by the State Long-Term Care Ombudsman.

Designated substate ombudsman units should be required to:
process complaint information on forms designed by the State Long-Term Care Ombudsman Program, and

collect and report aggregate information about complaints handled to the State Long-Term Care Ombudsman at least once every three months.

(ii) The State Long-Term Care Ombudsman may review the complainant files only for purpose of monitoring quality control, or of the request of a complainant. The State Program may require local programs to submit the names of long-term care facilities which exhibit a pattern or series of significant problems relating to long-term care for older persons. This is in addition to the information listed in (v) below.

(iii) The complaint documentation system at the substate unit level should include information detailing the complaint investigation and resolution process, whether and which complaints are referred, whether a satisfactory resolution was accomplished, and the results of following up a resolved complaint or an investigation which was referred to another agency/organization.

(iv) In addition to documenting formal complaints, each substate ombudsman program should record and report to the State Program:

- problems reported about the care of older persons in long-term care facilities (those not filed as formal complaints),
- the number of requests for information and assistance, and the type of requests, and
- any apparent barriers to effective response to complaints.
(V) The complaint documentation and reporting system should include a statewide uniform numerical coding system and should provide for the collection, aggregation, and analysis of the following information related to complaints:

- who initiated the complaint (resident, relative, friend, facility staff, ombudsman, physician, other professional, or other?)

- name of facility involved;

- type of facility (skilled, intermediate, boarding home, adult care, residential care, etc.)

- is facility Medicaid or Medicare certified, or both?

- type of complaint (concise description of immediate problem to be resolved; what is actual cause of complaint?)

- billing status of resident - Medicaid, Medicare, Private Pay, V.A., and other third party payment;

- how complaint was received (telephone, in person, by mail, referral from..., etc.);

- source of referral (media, friends or relatives, previous contact, professional; not employed by nursing home, staff of nursing home, or others);

- was complaint verified?

- was complaint resolved? (yes, partially or no)

- was complaint followed up?

- did follow-up indicate reoccurrence or continued resolution of problem?
was ombudsman satisfied with resolution?

was complainant satisfied with resolution?

J. ANNUAL REPORT

In compliance with Section 307(a)(12)(C) of the Older Americans Act, beginning October 30, 1981 and annually thereafter, States must submit a report on complaints about conditions in long-term care facilities to the Commissioner on Aging, and to the agency or agencies of the State responsible for licensing or certifying long-term care facilities. The State Long-Term Care Ombudsman should distribute this report to the public and to other agencies and organizations involved in long-term care issues. These include but are not limited to the following: the State Medicaid agency, regulatory agencies governing licensure of health care professionals, associations of health care facilities and workers, advocacy and legal services networks, professional organizations, the Area Agencies on Aging and the regional and State health planning entities.

The annual report should aggregate the data acquired in Section 5 part (e), (iii), (iv) and (v) and be accompanied by a narrative statement which

- describes and analyzes the statistics collected,
- indicates the number of substate long-term care programs reporting to the State; the number of facilities covered by these programs; and number and activity of paid staff and volunteer staff (not counting friendly visitors) involved at State and local level,
- indicates the extent of involvement and participation by Area Agencies on Aging in the ombudsman program,
- categorizes complaints according to their frequency and severity,
- identifies particularly deficient facilities, chain operators or other providers of care.
recognizes long-term care issues areas of widespread concern within the State, makes recommendations for the resolution (on State and Federal levels) of significant problems found to exist in the State, and provides information about the other activities and/or accomplishments of the State Long-Term Care Ombudsman Program.

K. APPROACH TO MAJOR LONG TERM CARE ISSUES

The State Unit on Aging, independently and through coordination between its State Long-Term Care Ombudsman Program should engage in significant activities related to issues on behalf of elderly institutionalized persons. Such activities include and augment the initiatives under the requirements of Sections 307 (a)(12)(A)(i), (ii), (iii) and (C) of the Act. These activities are also squarely within the State Agency's responsibilities in Section 305(a)(1)(D) of the Act.

Such efforts consist of the identification of major concerns that affect large numbers of long-term care institutionalized older persons within the State and the aggressive advancement (at all relevant levels of government) of changes necessary in laws, regulations or policies to strengthen the legal position and enforcement of that position for institutionalized older persons.

L. TRAINING

The development and provision of regular training support for staff on the State and local levels is essential to the continuing successful operation of long-term care ombudsman programs. The Long-Term Care Ombudsman Program and the State and Area Agencies on Aging should ensure that persons with complaint investigation and resolution responsibilities who are affiliated with ombudsman programs receive training in the amount and frequency necessary to fulfill those responsibilities.
EFFECTIVE DATE: January 19, 1981

INQUIRIES: State Agencies should address inquiries to Directors, Office of Aging, Regional HHS Office.

Area Agencies on Aging should address inquiries to State Agencies on Aging

Nutrition Services Providers should address inquiries to their grantor (State or Area Agencies on Aging).

[Signature]
Robert Benedict
Commissioner on Aging