

**NASOP Recommendations**  
**Older Americans Act Reauthorization (2010)**  
March 4, 2010

**1. Reporting Capacity**

**Issue:** While the National Ombudsman Reporting System (NORS) provides for national statistics on the complaint processing and other activities of the Long-Term Care Ombudsman (LTCO) Program, many states lack the hardware and software needed to efficiently collect and report this data to the Administration on Aging. In addition, states need the capacity to readily access this data in order to enhance program management and effective systems advocacy for residents.

**Solution:** Add language to Section 201(d)(3)(C):

201(d)(3) *The Director shall . . .*

*(C) after consultation with State Long-Term Care Ombudsmen and the State agencies, make recommendations to the Assistant Secretary regarding -- . . .*

*(ii) resources needed by Ombudsmen to collect and report program data through the National Ombudsman Reporting System, to include hardware and software that meet national standards;*

*and. . .*

*[Change current (ii) to (iii)].*

**2. Regulations Regarding Program Operations**

**Issue:** Although the Older Americans Act (OAA) currently requires the development of regulations related to LTCO training, no such requirement exists for LTCO program operations more generally. The implementation of regulations could support effective and uniform program operations.

**Solution:** Amend language in Section 201(d)(3)(L):

201(d)(3)(L) *Not later than 180 days after [the date of the reauthorization of the Older Americans Act], establish regulations applicable to the ~~training required by section 712(h)(4) of this title~~ operation of State Long-Term Care Ombudsman Programs.*

**3. National Ombudsman Resource Center**

**Issue:** The National Ombudsman Resource Center has been a valuable support for training, resources, and technical assistance to LTCO programs. Its continued success in fulfilling this mission depends on its having sufficient funding.

**Solution:** Amend language in Section 202(a)(18)(B):

202(a)(18)(B) . . . ~~make available to the Center not less than the amount of resources made available to the Long-Term Care Ombudsman National Resource Center for fiscal year 2000;~~ provide, in fiscal year 2011, not less than \$2,000,000 to carry out the functions of the National Ombudsman Resource Center. In subsequent fiscal years, such

sums as may be necessary, not less than provided in the preceding year and increased annually by a factor not less than \$100,000, shall be provided for operations of the National Ombudsman Resource Center;

#### **4. Maintenance of Effort**

**Issue:** LTCO programs need adequate resources to provide adequate services to residents of long-term care facilities.

**Solution:** Amend language in Section 306(a)(9) and Section 307(a)(9):

*306(a) . . . Each such [area] plan shall –*

*(9) provide assurances that the area agency on aging, in carrying out the State Long-Term Care Ombudsman program under Section 307(a)(9) of this title, must provide adequate funding to conduct an effective Ombudsman program in compliance with this act and will expend not less than the total amount of funds appropriated under this ~~chapter~~ Act and other sources and expended by the agency in fiscal year 2011 in carrying out such a program under this subchapter; . . . .*

*307(a)(9) The [state] plan shall provide assurances that the State agency will carry out, through the Office of the State Long-Term Care Ombudsman, a State Long-Term Care Ombudsman program in accordance with section 712 of this title and this subchapter, will provide adequate funding to conduct an effective Ombudsman program in compliance with this act, and will expend for such purpose an amount that is not less than expended by the State agency with funds received under this subchapter for fiscal year 2000, and an amount that is not less than the amount expended by the State agency with funds received under subchapter XI of this chapter for fiscal year 2000~~the total amount expended by the agency from all sources in fiscal year 2011 in carrying out such a program under this title.~~*

#### **5. Support Family Councils in Long-Term Care Facilities within National Family Caregiver Support Program**

**Issue:** Family caregivers of long-term care facility residents, need support to develop and sustain effective family councils.

**Solution:** Add language to Section 373:

*373(b) SUPPORT SERVICES.—The services provided, in a State program under subsection (a), by an area agency on aging, or entity that such agency has contracted with, shall include—*

- (1) information to caregivers about available services;*
- (2) assistance to caregivers in gaining access to the services;*
- (3) individual counseling, organization of support groups, and caregiver training to assist the caregivers in the areas of health, nutrition, and financial literacy, and in making decisions and solving problems relating to their caregiving roles;*

- (4) respite care to enable caregivers to be temporarily relieved from their caregiving responsibilities;
- (5) support to family councils of long-term care facilities; and
- (6) supplemental services, on a limited basis, to complement the care provided by caregivers.

## **6. Funding Authorization for Ombudsman Services to Residents of Assisted Living**

**Issue:** The OAA expanded LTCO responsibility to board and care and similar adult residential care facilities (including assisted living facilities) in 1981. Today there are more than a million licensed “board and care and similar” beds to be served by long-term care ombudsmen.<sup>1</sup> Three decades later, there has never been funding authorized for the mandate of providing LTCO services to residents of these non-nursing facility long-term care facilities.

**Solution:** Amend language in Section 702(a) to set base funding levels, authorize funding for LTCO services for residents of assisted living, and assure adequate future funding:

*702(a) OMBUDSMAN PROGRAM.—*

*(1) There is authorized to be appropriated to carry out chapter 2, ~~such sums as may be necessary~~ for fiscal year 2011, an amount not less than \$45,500,000 for purposes of providing Long-Term Care Ombudsman services to residents of nursing facilities. and such sums as may be necessary for subsequent fiscal years. In subsequent fiscal years, such sums as may be necessary shall be authorized, increased annually by a factor not less than the percentage increase in the CPI for the preceding fiscal year.*

*(2) There is authorized to be appropriated to carry out chapter 2, for fiscal year 2011, an amount not less than \$17,500,000, for purposes of providing Long-Term Care Ombudsman services to residents of assisted living, board and care and similar facilities. In subsequent fiscal years, such sums as may be necessary shall be authorized, increased annually by a factor not less than the percentage increase in the CPI for the preceding fiscal year.*

## **7. Ombudsman Services are Not Limited by Resident’s Age**

**Issue:** Although Administration on Aging program instruction<sup>2</sup> and Centers for Medicare and Medicaid Services regulations<sup>3</sup> indicate that LTCO services are available

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<sup>1</sup> In FFY 2008, there were 50,116 facilities with 1,130,863 beds (Source: NORS)

<sup>2</sup> AoA-PI-81-8 at D.2: 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.

to all residents, the OAA defines “resident” as “older.” This inconsistency creates confusion regarding which residents are to be served by LTCO programs.

**Solution:** Amend language in Section 711(6) to clarify that all residents of long-term care facilities are to be served by the Ombudsman and representatives:

*711(6) RESIDENT.—The term “resident” means an ~~older~~ individual who resides in a long-term care facility.*

## **8. Management Role of the State Long-Term Care Ombudsman within the Office**

**Issue:** Although the Act states that the “Office shall be headed . . . by the State Long-Term Care Ombudsman,” this individual may not always have the authority to manage the Office.

**Solution:** Amend the language of Section 712(a)(2).

*712(a)(2) OMBUDSMAN. – The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long-term care and advocacy. The Ombudsman shall be responsible for the management, including the fiscal management, of the Office.*

## **9. Private and Unimpeded Access to Ombudsman Services**

**Issue:** When ombudsman representatives are present in facilities, they sometimes find that the residents lack access to communicate with the ombudsman privately and without interference.

**Solution:** Amend language in Sections 712(a)(3)(D) and (5)(B) to require that the Ombudsman and representatives ensure private and unimpeded access, thus creating an expectation that states assure such access. States determine whether this is best accomplished through state law, regulation, policy or other means.

*712(a)(3) Functions. – The Ombudsman shall serve on a full time basis, and shall, personally or through representatives of the Office . . .*

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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.

<sup>3</sup> 42 CFR § 483.10(j): “Access and visitation rights. (1) The resident has the right and the facility must provide immediate access to any resident by . . . The State long-term care ombudsman (established under section 307(a)(12) of the Older Americans Act of 1965). . .” This provision indicates no limitation regarding the age of the resident.

(D) ensure that the residents have regular ~~and~~, timely, private and unimpeded access to the services provided through the Office . . . .

712(a)(5)(B) Duties. – An individual so designated shall, in accordance with the policies and procedures established by the Office and the State agency. . . (ii) ensure that residents in the service area of the entity have regular ~~and~~, timely, private and unimpeded access to the representatives of the program. . . .

## 10. Resident and Family Councils

**Issue:** Ombudsmen and their representatives proactively encourage and assist in the development of resident and family councils. The OAA could more accurately reflect this function.

**Solution:** Amend language in Sections 712(a)(3)(H)(iii) and 712(a)(5)(B)(vi):  
712 (a)(3) Functions. – The Ombudsman shall serve on a full-time basis, and shall, personally or through representatives of the Office— . . .  
(H)(iii) ~~provide technical support for~~ actively encourage and assist in the development of resident and family councils to protect the well-being and rights of residents; and . . . .

712(a)(5)(B) Duties. –An individual so designated shall. . . .—  
(vi) ~~support~~ actively encourage and assist in the development of resident and family councils;

## 11. Access to Resident Records

**Issue:** Depending on the nature of issue to be addressed for the resident, the Ombudsman or representative may need access to resident records other than medical or social records.

**Solution:** Amend language in Section 712(b)(1)(B)(i):  
712(b)(1) In general. –The State shall ensure that representatives of the Office shall have . . . (B)(i) appropriate access to review ~~the medical and social of a~~ all records concerning the resident. . . .

## 12. Ombudsman Authority with Respect to HIPAA.

**Issue:** Despite federal guidance that HIPAA should not impede LTCO services to residents, confusion continues to exist on the question of access to resident health records by the Ombudsman and representatives.<sup>4</sup>

**Solution:** Add a new paragraph at Section 712(b)(3):  
712(b)(3) For purposes of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, the Ombudsman and representatives shall be considered a

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<sup>4</sup> AOA-IM-03-01

“health oversight agency,” therefore not precluding release of residents’ clinical records to the Ombudsman or representative where the consent requirements of Section 712(b)(1)(B)(1) are otherwise met.

### **13. Identifying, Removing, and Remediating Organizational Conflicts of Interest**

**Issue:** Organizational conflicts of interest can threaten the credibility and effectiveness of the Office of the Ombudsman in serving long-term care facility residents and fulfilling OAA mandates.

**Solution:** Amend language in Section 712(a)(4) as follows to provide a more comprehensive list of examples of conflicts of interest; most of which have been recommended by the Institute of Medicine<sup>5</sup>; address conflicts within State agency operation of the Office; and provide a process for identification, disclosure and approval of remedial plans related to conflicts.

~~(712)(a)(4)Contracts and Arrangements~~ ORGANIZATIONAL PLACEMENT

(A) IN GENERAL . . .

~~(B) LICENSING AND CERTIFICATION ORGANIZATIONS; ASSOCIATIONS~~

IDENTIFYING, REMOVING, AND REMEDIATING ORGANIZATIONAL CONFLICT

The State Agency may not operate the Office or carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization where there is a conflict of interest unless such conflict has been:

(i) identified by the State agency,

(ii) disclosed by the State agency to the Administration in writing, and

(iii) remedied in accordance with this subsection.

Organizational conflicts of interest include, but are not limited to, placement of the Office in an organization that:

(i) is responsible for licensing or certifying long-term care services in the State; ~~or~~

(ii) ~~is~~ an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals;

(ii) provides long-term care services, including Medicaid waiver programs;

(iii) provides long-term care case management;

(iv) sets rates for long-term care services;

(v) provides adult protective services;

(vi) is responsible for Medicaid eligibility determination;

(vii) conducts preadmission screening for long-term care residential placements;

(viii) makes decisions regarding admission of elderly individuals to residential facilities; or

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<sup>5</sup> Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act, Institute of Medicine (1995)

(ix) serves as guardian or in another fiduciary capacity for residents of long-term care facilities.

Where a potential or actual conflict of interest is disclosed to the Administration, the Administration shall require removal of the conflict or require that an adequate remedial plan be submitted for its approval which indicates how the Ombudsman shall be unencumbered in fulfilling all of the functions enumerated in paragraph (3). Any person or entity may identify any potential organizational conflict of interest and report such to the Administration for review and approval of remedial action.

#### **14. Relationship between Representatives and the State Ombudsman**

**Issue:** The OAA establishes that the Ombudsman designates representatives of the Office. Where this relationship is not clearly understood, and communications between the Office and its representatives are limited, it can inhibit the effectiveness of the LTCO program.

**Solution:** Add new subparagraph 712(a)(5)(B):

712(a)(5)(B): Relationship with the Office.—The Ombudsman program shall be a unified program under the Office of the State Long-Term Care Ombudsman. Representatives and designated entities shall report to the Ombudsman on all ombudsman functions, duties, and programmatic issues. Case and other programmatic records maintained by representatives are the property of the Ombudsman.

[Change current (B) to (C), and continuing through the rest of paragraph (a)(5)].

#### **15. Disclosure and Confidentiality**

**Issue:** All information provided by those seeking assistance and maintained by the Ombudsman should be subject to the OAA disclosure provisions, not only information which is contained in files or records. Ombudsman and representatives should be required to maintain confidentiality of information provided by residents or complainants and not merely their identity.

**Solution:** Amend language in Section 712(d):

712(d) DISCLOSURE –

(1) IN GENERAL.—The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of ~~files~~ information maintained by the program, including records described in subsection (b)(1) or (c).

(2) ~~IDENTITY OF COMPLAINANT OR RESIDENT.~~ The procedures described in paragraph (1) shall—

(A) provide that, subject to subparagraph (B), the files and records or other information described in paragraph (1) may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose ~~the files and records~~ such information); ~~and~~

*(B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such ~~files or records~~ information unless --*

*(i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;*

*(ii) (I) the complainant or resident gives consent orally; and*

*(II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or*

*(iii) the disclosure is required by court order; and*

*(C) require that the Ombudsman and representatives hold all communications with those seeking assistance in strict confidence and take all reasonable steps to safeguard the confidentiality of information provided by residents or complainants.*<sup>6</sup>

## **16. Avoiding State Ombudsman Individual Conflicts of Interest**

**Issue:** Individual conflicts of interest can threaten the credibility and effectiveness of the Office of the Ombudsman in serving long-term care facility residents and fulfilling OAA mandates.

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<sup>6</sup> Adapted from International Ombudsman Association standards which state:

“The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

The Ombudsman does not disclose confidential communications unless given permission to do so in the course of informal discussions with the Ombudsman, and even then at the sole discretion of the Ombudsman; the Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual’s express permission; the Ombudsman takes specific action related to an individual’s issue only with the individual’s express permission and only to the extent permitted, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.

Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue.”

See also, American Bar Association Ombuds Standards, 2004:

“Confidentiality. An ombuds does not disclose and is not required to disclose any information provided in confidence, except to address an imminent risk of serious harm. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds’s office. An ombuds does not reveal the identity of a complainant without that person’s express consent. An ombuds may, however, at the ombuds’s discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombuds should discuss any exceptions to the ombuds’s maintaining confidentiality with the source of the information.”

**Solution:** Amend language in Section 712(f)(3) as follows to provide more comprehensive prohibitions of conflicts of interest, consistent with recommendations of the Institute of Medicine.<sup>7</sup>

712(f) *CONFLICT OF INTEREST.* – *The State agency shall— . . .*

(3) *ensure that the Ombudsman – . . .*

*(C) is not employed by, or participating in the management of, a long-term care facility; or related organization, nor has been employed by such entity within the last two years; ~~and~~ . . .*

*(E) does not have management responsibility for, nor operates under the supervision of, adult protective services;*

*(F) does not serve as guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity. This does not prohibit an individual from serving as fiduciary for his or her family members in his or her personal capacity; and*

## 17. Professional Training of the State Ombudsman

**Issue:** Although the OAA requires adequate training of representatives of the Office, there is no provision related to training of the State Ombudsman. Some State Ombudsmen have never received basic new State Ombudsman training or professional development opportunities provided by the Administration on Aging specifically for this purpose.

**Solution:** Amend language in Section 712(h)(4):

712 (h) *ADMINISTRATION.* – *The State agency shall require the Office to – . . .*

*(4) ensure that the Ombudsman attends training provided by the Administration on Aging through the National Ombudsman Resource Center established in section 202(a)(18);*

[Change current (4) to (5), and continuing through the rest of paragraph (h)].

NOTE: If the Elder Justice Act provisions related to training of ombudsmen become law, attendance at such training should be included in this Section as well.

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<sup>7</sup> Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act, Institute of Medicine (1995)

## 18. Grant Requests

NASOP requests the Assistant Secretary to fund the following grants to support the core services of the LTCO program for long-term care residents:

- Conduct an ombudsman staffing study to evaluate and recommend the staffing levels necessary to meet OAA requirements. Such study should consider findings and recommendations of *The Role of Ombudsmen in Assuring Quality for Residents of Long-Term Care Facilities* (National Health Policy Forum, 2009); *The Long-Term Care Ombudsman Program: Rethinking and Retooling for the Future* (National Association of State Long-Term Care Ombudsman Programs, 2003); and *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, (Institute of Medicine, 1995)
- Conduct a Home Care Ombudsman demonstration project to evaluate the feasibility and impact of such advocacy operations on existing long-term care ombudsman programs, their current duties and functions, and relationships with state units on aging and area agencies on aging in providing home and community based services.
- Conduct an evaluation of ombudsman involvement in the Money Follows the Person project. LTCO program involvement in this project has varied widely among states. Evaluation of effectiveness of ombudsman involvement would be helpful in order to continue to move this initiative forward toward the best outcomes for residents transitioning into community settings.
- Create demonstration programs to develop and promote training programs for long-term care ombudsmen to focus on mental health disabilities and conditions, including dementia, that affect decision making capacity of long-term care facility residents.