

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1067 CS State Long-Term Care Ombudsman Program
SPONSOR(S): Grimsley and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1922

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Elder & Long-Term Care Committee	7 Y, 0 N, w/CS	DePalma	Walsh
2) Governmental Operations Committee		Brown	Williamson
3) Health Care Appropriations Committee			
4) Health & Families Council			
5) _____			

SUMMARY ANALYSIS

The bill clarifies duties and responsibilities of the Office of State Long-Term Care Ombudsman and the program's state and local ombudsman councils in an attempt to fully implement the Legislature's intent in moving the program under the administration of the Department of Elderly Affairs.

The Department of Elderly Affairs reports no fiscal impact associated with this bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government --- The bill increases rulemaking authority regarding council membership. The bill requires submission of an annual report regarding the performance of the state and local councils.

Empower Families --- The bill streamlines and clarifies state and local ombudsman council duties and responsibilities. These modifications seek to more effectively serve the interests of long-term care residents, and potentially improve their quality of life.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

The History and Emergence of Ombudsman Programs

The Long-Term Care Ombudsman Program began in 1972 through implementation of five state demonstration projects funded by the Departments of Health, Education and Welfare.¹ The projects formed as a response to growing concerns over the conditions present in our nation's nursing facilities, the care provided therein, and the effectiveness of governmental attempts to actively police and force compliance with state and federal regulations. A year later, the Administration on Aging assumed administrative responsibility for the program, and in 1978 the Long-Term Care Ombudsman Program was amended into the Older Americans Act of 1965.²

Today, variations of long-term care ombudsman programs are maintained in all 50 states, the District of Columbia and Puerto Rico. The central responsibilities for all ombudsmen are outlined in Subchapter XI of the Older Americans Act³ and include:

- identifying, investigating and resolving complaints made by or on behalf of residents;
- providing information to residents about long-term care services;
- representing the interests of residents before governmental agencies and seeking administrative, legal and other remedies to protect residents;
- analyzing, commenting on and recommending changes in laws and regulations pertaining to the health, safety, welfare and rights of residents;
- educating and informing consumers and the general public regarding issues and concerns related to long-term care, and facilitating public comment on laws, regulations, policies and actions;
- promoting the development of citizen organizations to participate in the program;
- providing technical support for the development of resident and family councils to protect the well-being and rights of residents, and
- advocating for changes to improve residents' quality of life and care.

Florida's Long-Term Care Ombudsman Program

¹ *Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act*, 1995, Institute of Medicine, available at: <http://www.nap.edu/catalog/9059.html>.

² 42 U.S.C.A. s. 3001 *et seq.*

³ 42 U.S.C.A. s. 3058g.

The state's Long-Term Care Ombudsman Program ("the Program") was established as a volunteer program in 1975 and is presently administered by the Department of Elderly Affairs (DOEA).⁴ The Program is comprised of 17 local councils, one supervisory statewide council and more than 350 volunteer ombudsmen (each contributing an average of 20 hours per month). It provides advocacy and outreach services to residents of the state's long-term care facilities and their families in a variety of ways.

Program ombudsmen serve as advocates on behalf of residents in the following settings:⁵

Facility Type	Number of Facilities	Number of Beds
Nursing homes	812	80,889
Assisted living facilities	2,249	74,219
Adult family-care homes	469	2,023

Ombudsmen investigate and resolve complaints submitted by, or on behalf of, residents of these facilities who are 60 years of age or older.⁶ In 2004, a total of 7,555 complaints were investigated by state ombudsmen.⁷ The most frequent complaints made by residents of long-term care facilities were as follows:⁸

Type of Complaint	Number of Complaints
Accidents, injuries and falls	220
Improper transfer or discharge	214
Administration of medication	212
Personal hygiene	203
Call lights or requests for assistance unanswered	171

Most Frequent Complaints in Nursing Homes, 2004-2005

Type of Complaint	Number of Complaints
Administration of medication	162
Quality, quantity or variation of facility menus	139
Shortage of staff	107
Billing disputes	85
Cleanliness or housekeeping concerns	78

Most Frequent Complaints in Assisted Living Facilities and Adult Family-Care Homes, 2004-2005

In addition to its investigative capacities, the Program also is responsible for monitoring the development and implementation of federal, state and local regulations affecting long-term care facilities, recommending appropriate policy changes, and maintaining a statewide reporting system capable of collecting and analyzing data and providing information on the state long-term care facilities.⁹

⁴ *Florida's Long-Term Care Ombudsman Program: Real People Helping Real People*, presentation given by the Long-Term Care Ombudsman Program before the House Committee on Elder and Long-Term Care, February 22, 2006.

⁵ Statistics reported in *Florida's Long-Term Care Ombudsman Program Annual Snapshot 2004-2005: Protecting Florida's Long-Term Care Residents*, provided by the Long-Term Care Ombudsman Program.

⁶ Section 400.0060, F.S.

⁷ 2004 National Ombudsman Reporting System Data Tables, accessed February 28, 2006, Department of Health and Human Services Administration on Aging, available at:

http://www.aoa.gov/prof/aoaprogram/elder_rights/LTCombudsman/National_and_State_Data/2004nors/2004nors.asp.

⁸ *Florida's Long-Term Care Ombudsman Program Annual Snapshot 2004-2005*.

⁹ *Ombudsman Services*, accessed February 28, 2006, Long-Term Care Ombudsman Program, available at:

http://ombudsman.myflorida.com/ombudsman_services.jsp.

Facility inspections¹⁰ are conducted annually by Program ombudsmen, and focus on the rights, health, safety and welfare of residents to ensure that facilities satisfy the numerous needs of their residents in compliance with state and federal regulations. In 2004-05, the Program completed a total of 2,908 inspections statewide, reflecting approximately 82 percent of Florida's licensed long-term care facilities.¹¹

The Program provides technical support for the development of resident and family councils to protect the rights of residents. Each of the state's 17 local councils also participates in community education sessions for service organizations, health and nursing home associations, and other community groups in an effort to recruit additional ombudsmen and to educate the public with information about the Program.

EFFECT OF PROPOSED CHANGES

In addition to providing a multitude of technical and conforming changes, the legislation makes several substantive modifications to Part I of Chapter 400, F.S.

Definitions

The bill provides definitions for both "local councils" and "state councils", and specifies that the "ombudsman" is appointed by the Secretary of DOEA to head the Office of State Long-Term Care Ombudsman.

Duties and Responsibilities of the Office of State Long-Term Care Ombudsman

The bill requires that residents, their representatives, and other interested citizens be informed about obtaining program services. The bill also clarifies that the Office of State Long-Term Care Ombudsman administers the state and local ombudsman councils – as opposed to merely providing "administrative and technical support." Moreover, the office is given explicit authority to establish and coordinate local councils, and an annual reporting requirement also is established (previously, the state council was responsible for submitting this report; the bill requires the state council to "assist" in preparation of the report). The report is intended to describe the activities of the office and councils, and it is required to combine and analyze complaint and facility condition data; evaluate resident problems; assess overall program success and compliance with provisions of the federal Older Americans Act; and provide recommendations for policy and regulatory changes, while also detailing any relevant recommendations supplied by local councils regarding program functions and activities. The report must be submitted to the secretary at least 30 days before the convening of a regular session, whereupon the secretary is required to submit the report to the United States Assistant Secretary for Aging, the Governor, the President of the Senate, the Speaker of the House of Representatives, the Secretary of the Department of Children and Family Services, and the Secretary of the Agency for Health Care Administration. The bill clarifies that staff members coordinating local councils are designated as representatives of the Office of State Long-Term Care Ombudsman.

Duties and Membership of the State Long-Term Ombudsman Council

The bill specifies that the State Long-Term Ombudsman Council serves as an advisory board to assist the ombudsman in reaching consensus among local councils on issues affecting either the program generally or residents individually. The bill clarifies that individual members of the state council may enter a long-term care facility involved in an appeal pursuant to newly created s. 400.0074(2), F.S. The bill deletes the requirement of DOEA to develop investigatory procedures and procedures regarding receipt and resolution of complaints.

¹⁰ As defined in s. 400.0073, F.S.

¹¹ *Florida's Long-Term Care Ombudsman Program Annual Snapshot 2004-2005.*

The legislation requires council membership by election, provides for removal of council members upon majority vote, and specifies that three at-large council members be appointed by the Governor after recommendation by the DOEA Secretary in consultation with the ombudsman. Each local council is provided with the authority to elect, by majority vote, a representative from among local council members to represent council interests on the state council. Whereas previously the council position of any member missing three consecutive regular meetings was declared vacant, the bill specifies that members missing three council meetings within a one-year period “may” have their seat declared vacant by the ombudsman. The bill limits the state council chair to two consecutive one-year terms, deletes the requirement that chairs must have served as state council members for at least one year, enables the council chair to create additional executive positions as needed, and provides for removal of the council chair upon a two-thirds vote of state council members at any meeting at which a quorum is present. The bill provides that a council quorum is present if more than 50 percent of all active state council members are in attendance at the same meeting. The bill prohibits votes or binding decisions outside of a publicly-noticed meeting at which a quorum is present.

Duties and Membership of Local Long-Term Care Ombudsman Councils

In an effort to conform state law to provisions of the Older Americans Act, the bill clarifies that the local ombudsman councils function under the direction of the ombudsman. The bill also provides that the state ombudsman shall designate local councils and their jurisdictional boundaries, and may create additional local councils as necessary to ensure that state residents have adequate access to program services. Also, whereas local councils presently have a duty to represent residents’ rights before government agencies, the bill alters this dynamic by requiring a local council to “recommend” that the ombudsman and legal advocate seek administrative, legal and other remedies on behalf of residents.

The bill specifies that local council members must maintain their primary residence within boundaries of the council’s jurisdiction, establishes minimum local council membership composition, and removes a cap on the number of volunteers that each local council can recruit. The bill eliminates language in s. 400.0069(4)(b), F.S., encouraging local councils to recruit council members who are 60 years of age or older. Guidelines for application and approval of prospective council members and removal procedures for council members are provided by the legislation. The bill eliminates the limitation on the number of 1-year terms that may be served by a local council chair, authorizes the chair to create additional executive positions as needed, and provides for removal of the council chair upon a two-thirds vote of local council members.

Consolidation of Conflict-of-Interest Provisions

The bill consolidates the various conflict of interest provisions¹² scattered throughout Part I of Chapter 400, F.S., into newly-created s. 400.0070, F.S., and requires each office employee and council member to certify that he or she has no conflict of interest. This section will prohibit the ombudsman from having a direct involvement in the licensing or certification of a long-term care facility or provider, and prevents the ombudsman’s employment with, ownership of, or investment in, a long-term care facility. DOEA is required to define by rule what situations constitute conflicts of interest and the procedure by which certification of an individual indicating no conflicts of interest occur.

Program Complaint and Investigation Procedures

The bill directs the ombudsman, in consultation with the state council and following approval by the DOEA Secretary, to develop procedures for conducting facility investigations subsequent to receiving a complaint and for conducting onsite administrative assessments of state facilities. The bill deletes the requirement of long-term care facilities to post such procedures in plain view, and specifies that an administrator refusing to allow entrance to the ombudsman or any state or local council member is considered to have interfered with such individual in the performance of his or her official duties.

¹² The provisions include ss. 400.0063(2)(b), 400.0065(3), 400.0067(4), 400.0069(4)(b) and 400.0069(10), F.S.

State Council Administrative Assessments

The bill requires local councils to conduct, at least annually and in addition to investigations pursuant to a complaint, an onsite administrative “assessment”¹³ of each nursing home, assisted living facility, and adult family-care home within its jurisdiction. Local councils also are encouraged to conduct similar onsite administrative assessments of the additional long-term care facilities within its jurisdiction. The assessments are required to be non-duplicative of other state survey and inspection efforts, and shall be conducted at a time and for duration necessary to produce the information required to carry out council duties.

Advance notice is not to be provided (except for follow-up assessments), and council members physically present are required to identify themselves and cite the relevant statutory authority for the assessment. Such assessments are not to unreasonably interfere with programs and activities of facility residents, and council members may not enter single-family residential units of a facility during an assessment without the permission of the resident or that resident’s representative. The bill indicates that the ombudsman may authorize a state or local council member to assist another local council member in performing an assessment. The bill specifies that assessments may not be accomplished by forcible entry, but notes that an administrator refusing entry to representatives of the office or a council for the purpose of an assessment shall be considered to have interfered with such individual in the performance of his or her official duties.

Complaint Notification and Resolution Procedures

The bill requires that complaints verified as a result of an investigation or assessment and determined to require some measure of remedial action be identified in writing to the long-term care facility administrator, whereupon target dates for taking appropriate remedial action shall be established. The bill specifies that a local council chair who believes a resident's rights or welfare is being jeopardized notify the ombudsman or legal advocate. Similarly, an ombudsman who believes a facility or its employee has committed a criminal act is required to inform local law enforcement officials.

The bill deletes certain recourses available to the state council in the event a facility fails to take action upon a complaint referred to the state council by a local council, including a provision allowing for recommended agency rule and licensure changes, and a provision permitting referral of the complaint to the state attorney for prosecution. The bill specifies that a state council chair who believes residents’ rights or welfare are being jeopardized shall notify the ombudsman or legal advocate.

Access to Facilities, Residents and Records

The legislation requires long-term care facilities to provide the office, councils and council members access to any portion of the facility, any resident, and his or her medical and social records for review as necessary to investigate or resolve a complaint. The bill clarifies that access to resident medical and social records necessary to investigate or resolve a complaint will be granted only if a legal representative of the resident refuses to give permission, the office has reasonable cause to suspect that such representative is not acting in the best interests of the resident, and the state or local council member obtains the approval of the ombudsman.

Also, the bill provides access to administrative records, policies and documents and, upon request, copies of all licensing and certification records pertaining to a facility. The bill deletes a provision allowing access to resident records where the office has reasonable cause to believe a legal representative who has refused such access is not acting in the best interests of the resident.

¹³ Presently, annual “inspections” of long-term care facilities are required by s. 400.0073, F.S., and are structurally similar to the requirements for administrative assessments in the bill.

Department Funding¹⁴

The bill directs the department to meet costs of the program through funds appropriated to it and to include the costs associated with the program when developing its budget requests for consideration by the Governor. The bill allows the department to divert from the federal ombudsman appropriation an amount equal to the department's administrative cost ratio, and directs the remaining allotment from the Older Americans Act to fund direct ombudsman activities.

Statewide Uniform Reporting System

The bill shifts responsibility from DOEA to the office for maintenance of a statewide uniform reporting system, intended to collect and analyze complaint and facility condition data. Similarly, the responsibility for quarterly publishing and making available information pertaining to the number and type of complaints received is shifted from the state council to the office.

Training Requirements

The bill specifies that all council members receive a minimum of 20 hours of training upon employment with the office or approval as a council member, and 10 hours of continuing education per year thereafter. The bill requires the ombudsman to approve training curriculum and indicates that such training should address, at a minimum and in addition to other training requirements, resident confidentiality and any other topic recommended by the secretary. The bill prohibits individuals from holding themselves out as representatives of the State Long-Term Care Ombudsman Program, or conducting any program duties, unless first satisfying the training detailed in s. 400.0091, F.S., and becoming certified by the ombudsman.

C. SECTION DIRECTORY:

Section 1 amends s. 400.0060, F.S.; providing definitions.

Section 2 amends s. 400.0061, F.S.; revising Legislative findings and intent.

Section 3 amends s. 400.0063, F.S.; relating to the designation and duties of the ombudsman and legal advocate.

Section 4 amends s. 400.0065, F.S., providing duties and responsibilities of the State Long-Term Care Ombudsman Program.

Section 5 repeals s. 400.0066, F.S., relating to the Department of Elderly Affairs' funding of the Office of State Long-Term Care Ombudsman; transfers portions of section to newly-created s. 400.0087, F.S.

Section 6 amends s. 400.0067, F.S., providing duties and membership criteria for the State Long-Term Care Ombudsman Council.

Section 7 amends s. 400.0069, F.S., providing duties and membership criteria for local long-term care ombudsman councils.

Section 8 creates s. 400.0070, F.S., relating to ombudsman conflicts of interest.

Section 9 amends s. 400.0071, F.S., relating to State Long-Term Care Ombudsman Program complaint procedures.

Section 10 amends s. 400.0073, F.S., relating to council investigations.

¹⁴ Portions of these funding requirements are contained in s. 400.0066, F.S., which the bill proposes to repeal and re-create in s. 400.0087, F.S.

Section 11 creates s. 400.0074, F.S., relating to onsite administrative assessments.

Section 12 amends s. 400.0075, F.S., relating to complaint notification and resolution procedures.

Section 13 amends s. 400.0078, F.S., relating to citizen access to State Long-Term Care Ombudsman Program services.

Section 14 amends s. 400.0079, F.S., relating to reporter and ombudsman immunity.

Section 15 amends s. 400.0081, F.S., relating to facility and records access.

Section 16 amends s. 400.0083, F.S., relating to interference, retaliation and penalties.

Section 17 repeals s. 400.0085, F.S., relating to penalties; incorporates provision into s. 400.0083, F.S.

Section 18 amends s. 400.0087, F.S., relating to department funding and oversight.

Section 19 amends s. 400.0089, F.S., relating to complaint data reports.

Section 20 amends s. 400.0091, F.S., relating to training curriculum and requirements.

Section 21 provides that the act is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a state expenditure.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Additional rulemaking

Section 8 of the bill requires the department to promulgate a rule to define situations that constitute a "conflict of interest", and the procedure by which an individual certifies that he or she has no conflict of interest.

Potential rulemaking issues

Section 400.0087, F.S., currently grants the department rulemaking authority to monitor the local councils. Section 400.0071, F.S., requires the council to "recommend to the ombudsman and the secretary" any procedures applicable to the state or local councils.

Under the current bill, the department's rulemaking authority is removed. The bill requires the state ombudsman, in consultation with the council, to "develop state and local procedures" for investigations and administrative assessments. The bill continues, "[t]he ombudsman shall implement all procedures developed under this section after receiving approval from the secretary."

It is unclear whether the policies created by the ombudsman require promulgation by rule. If yes, the bill should grant the department the appropriate rulemaking authority to implement the requirements under this section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other comments – State Council

Units within the executive branch are defined in chapter 20, F.S., in order to provide a uniform nomenclature. Section 20.03(7), F.S., defines the term "council" or "advisory council" to mean "an advisory body created by specific statutory enactment and appointed to function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives."

The bill provides that the state council is to "serve as an advisory body." The bill, however, further provides that the state council may not vote on or make any binding decisions "outside of a publicly noticed meeting." It is unclear why an "advisory body" would make binding decisions, which appears to conflict with the bill's designation of the council as an advisory body and the statutory definition of "council."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its March 8, 2006 meeting, the Committee on Elder and Long-Term Care adopted four amendments to HB 1067, which:

- restored language in the current definition of “resident”¹⁵ providing that, for purposes of long-term care ombudsman services, a resident must be 60 years of age or older. Deleting this language conflicted with the jurisdiction of the Statewide Advocacy Council.¹⁶
- deleted bill language to s. 400.0063, F.S., indicating that the office’s legal advocate was to serve as legal counsel to the state and local ombudsman councils and members in conjunction with DOEA’s legal counsel. This would have raised a possible conflict of interest relating to representation.¹⁷
- deleted bill language specifying that state council members serve at the pleasure of the Governor.
- clarified a provision in s. 400.0081(1)(c) to indicate that, prior to obtaining access to resident medical and social records pursuant to a facility investigation or resolution of a complaint, a legal representative of the resident must refuse to grant access, the office must have reasonable cause to believe that the representative is not acting in the best interests of the resident and the state or local council member must obtain the approval of the ombudsman. In addition to conforming this section to requirements found in 42 U.S.C.A. 3058g(b)(1)(B)(ii) of the Older Americans Act, this also served to clarify that all of the above requirements --- and not merely one requirement – must be satisfied by the office, council or council member prior to obtaining access to such records.

The Committee favorably reported a Committee Substitute.

¹⁵ S. 400.0060(7), F.S.

¹⁶ See generally s. 402.164(2)(b), F.S.

¹⁷ See rules 4-1.13 and 4-5.1, Rules Regulating the Florida Bar.