

**LEGISLATIVE OVERSIGHT: AN ANALYSIS
OF L. 1974, CHAPTER 27,
DEPARTMENT OF THE PUBLIC ADVOCATE ACT**

New Jersey became the first state in the nation to establish a cabinet level agency for the purpose of policing government from within when the Legislature enacted Assembly Bill #1409 on May 13, 1974.¹ The landmark legislation, creating the Department of the Public Advocate,² was drafted by members of Governor Byrne's staff in order to effectuate his pledge to put government under glass,³ and make it more responsive to the needs of the citizenry. Pursuant to this mandate, Chapter 27 vests myriad responsibilities in the new department and its divisions, the intention apparently having been not only to coordinate existing governmental functions, but also to assign the performance of new duties involving a delegation of previously non-existent powers, and perhaps, to abdicate some of those formerly reposed within the Legislature itself.⁴

The positive aspects of this statutory milestone have been repeatedly demonstrated by the progress which the department

¹ N.J. STAT. ANN. 52:27E-1 *et seq.* (Supp. 1975-76) For a general description of the Department of the Public Advocate, *see*, Penn, *Advocate From Within*, TRIAL MAGAZINE, Feb., 1976, at 22.

² N.J. STAT. ANN. 52-27E-2 (Supp. 1975-76) The statute reads:

There is hereby established in the Executive Branch of the State Government a principal department which shall be known as the Department of the Public Advocate.

As used in this act, unless the context clearly indicates otherwise, the word "department" means the Department of the Public Advocate established herein.

³ Governor Byrne expressed a desire to fulfill this pledge at the outset of his administration. Directing his comments to the subject during his Inaugural Address on January 15, 1974, he said: "The task begins here and now. And it begins by using the powers of public policy to keep our state's government and our leaders honest."

⁴ Loos, MEMORANDUM TO SENATE MAJORITY LEADERSHIP ON ASSEMBLY BILL 1409, (PUBLIC ADVOCATE), April 1, 1974 at 1.

has made in its endeavors to protect the public interest⁵ since its inception two years ago. However, obscurities in the language of the Act and several restrictions which it imposes upon the state's newest agency may stunt future progress.

Section 3 of the statute provides that the Public Advocate, who is the administrator and chief executive of the department, be appointed by the Governor with the approval of the Senate.⁶ Critics of similar legislation have suggested that the position of the Public Advocate as a cabinet member, serving "at the pleasure of the Governor,"⁷ causes the office to lack the independence which is fundamental to the traditional concept of the "Ombudsman" upon which it is based.⁸

In European nations where the idea originated, the Ombudsman is an autonomous official who is paid by the state to act for individuals who have complaints against the state or its various agencies.⁹ A similar approach has been used in this country by the executive branches of a number of state governments.¹⁰

⁵ "Public Interest" is specifically defined by N.J. STAT. ANN. 52:27E-30 (Supp. 1975-76). The Statute reads:

As used in this act, public interest shall mean an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.

⁶ N.J. STAT. ANN. 52:27E-3 (Supp. 1975-76) reads:

The administrator and chief executive officer of the department shall be a commissioner, who shall be known as the Public Advocate and who shall be an attorney-at-law of this State and a person qualified by training and experience to perform the duties of his office. The Public Advocate shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve at the pleasure of the Governor during the Governor's term of office and until the appointment and qualification of the Public Advocate's successor. He shall receive such salary as shall be provided by law.

The Public Advocate may in the discretion of the Governor concurrently hold another position established in or allocated to the Department of the Public Advocate, notwithstanding any requirement of law that he devote his entire time to the duties of one position or the other. In such case the Public Advocate shall receive only the salary provided for the Public Advocate and not the salary for such other position.

⁷ *Id.*

⁸ When the enabling legislation was first introduced in its original form on February 15, 1974, as Assembly Bill 1297, an early evaluation of the bill noted several of its shortcomings. Among these was its apparent failure to afford the department an entirely independent status, which, skeptics insisted, was necessary if the agency was to function in accordance with the philosophy upon which it was premised. *Editorial* 97 N.J.L.J. 252, April 11, 1974. While the bill was amended several times before its passage, the criticisms of the earlier version still apply to the Act now in effect.

⁹ *Editorial*, 97 N.J.L.J. 252, April 11, 1974.

¹⁰ See, e.g., HAWAII REV. STATS. § 96-1 *et seq.*, and NEB. REV. STATS. § 81-8,240 *et seq.* (1971).

However, only New Jersey has elevated its bureaucratic adversary to the cabinet level, giving the Public Advocate a broad mandate to answer the grievances of its citizens and ultimately to litigate on behalf of the public.¹¹

Ironically, it was the unique status of the department which subjected the enabling legislation to lengthy deliberation early in its history. Fear that the new bureau and its administrator were consigned with too much power led to attempts to reduce its standing to that of a conventional Ombudsman's office prior to the enactment of the bill.¹² Its opponents argued that one serving the public, particularly in a protective capacity, should be an elected official and that an operation aimed at spurring governmental action for the benefit of the citizens of the State should be completely autonomous.¹³ Even some champions of the proposal expressed concern that the legislation might be overly comprehensive.¹⁴ They questioned whether it was wise to grant such dominion and stature to an agency which would also be expected to function within the confines of the bureaucratic system with a close advisor to the governor at its head.

The effective advocacy which the Public Advocate and his staff have demonstrated to date should, however, alleviate previous doubts about the department's loyalty to the public, and prove that the unique status conferred on the office is indeed a working advantage.

Because the chief officer of the Department of the Public Advocate is a member of the Governor's cabinet, citizen representation extends even to the formulation of executive policies. Similarly, the department can act as an instrument for change in

¹¹ Although the statute itself makes no specific mention of the role of the Advocate as an "ombudsman", the idea is implicit throughout and the statement appended to the enabling legislation, Assembly Bill 1409, reads in part:

"The department will also assume an ombudsman function, investigating citizen complaints related to the functioning of State Government."

¹² The Senate State Government and Federal and Interstate Relations Committee, adhering to requests to re-examine the legislation, considered a reduction of the department's executive position prior to enactment. See *The Star-Ledger* (Newark, N.J.), April 17, 1974, at 11.

¹³ *Editorial*, 97 N.J.L.J. 252, April 11, 1974.

¹⁴ See, e.g., *Trentonian* (Trenton, N.J.), April 16, 1974, at 3.

State agencies, for it deals with these bureaucratic bodies as an equal, channeling constructive criticism where it is most needed.¹⁵

STRUCTURE

Office of the Public Defender

The strength of the Department of the Public Advocate is exerted through five divisions. The first of these, the Office of the Public Defender,¹⁶ is the only department which predates the parent agency itself. Formerly operating under the jurisdiction of the Department of Institutions and Agencies,¹⁷ the Office of the Public Defender was transferred to the Public Advocate's domain by Section 9 of Chapter 27, although the provisions of law enacted when the office was established continue to regulate its activity.¹⁸

Incentive for the creation of a larger public interest agency resulted from the favorable response which the Office of the Public Defender had received since it was conceived in 1967. As a result of this innovation, New Jersey became the first state to provide a state-wide, state-financed system designed to assist indigent persons charged with crimes or juvenile offenses. As a division of the Department of the Public Advocate, the Public Defender's office remains an extensive project, absorbing most of the funds appropriated to the department¹⁹ and utilizing the bulk of the work force which the agency employs.

During its first year under the province of the Public Advocate, the Office of the Public Defender has increased participation in trials and pleas, multiplied not guilty verdicts and favorable appellate dispositions, reduced case backlog and stepped up

¹⁵ Some state agencies have been so receptive to the recommendations of the new department that their relationships with it are now well-founded and the advantageous aspects of this development have metamorphized into mutual progress. Suggestions recently favored by the Department of Health, for example, led to the adoption of new standards for nursing home licensing. See *The Star-Ledger* (Newark, N.J.), Feb. 26, 1976, at 1.

¹⁶ N.J. STAT. ANN. 52:27E-9 (Supp. 1975-76).

¹⁷ As stated in N.J. STAT. ANN. 52:27E-44 (Supp. 1975-76), the Office of the Public Defender is transferred to the Department of the Public Advocate by virtue of the provisions of the State Agency Transfer Act, N.J. STAT. ANN. 52:14D-1 *et seq.* (Supp. 1975-76), and as such, is subject to these provisions.

¹⁸ N.J. STAT. ANN. 52:27E-9 (Supp. 1975-76) requires that those provisions of law found generally in N.J. STAT. 2A:158A-3 continue to apply to the Office of the Public Defender.

¹⁹ The total appropriation for the Department of the Public Advocate for 1976 is \$11,863,237. Of this total, \$9,969,237 is earmarked for Criminal Defense of indigents. STATE OF NEW JERSEY, FISCAL 1976 BUDGET, at 423-431.

alternative programs to jail sentences.²⁰ In addition, the input of federal funding has enabled it to expand to include representation of indigents in child abuse cases.

Office of Inmate Advocacy

In an attempt to remedy major problems in the area of prison reform,²¹ Section 10 of the new Act establishes an Office of Inmate Advocacy within the Office of the Public Defender. This office has initiated a program to improve the penal system by giving correctional and detentional inmates at state, county, and municipal facilities a means of airing complaints and legally attacking adverse conditions of their confinement.²² To this end, the office is serving as *amicus* in *Avant v. Clifford*,²³ a case before the State Supreme Court dealing with due process standards for disciplinary hearings in New Jersey prisons. Significant litigation has been launched or is pending on other issues including prison procedures and parole practices.²⁴

Evidence that there were many areas beyond the scope of the Public Defender where the rights of the public went unprotected prompted the initiation of plans for a full-scale agency. Four additional sections: The Division of Mental Health Advocacy,²⁵

²⁰ NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec., 1975, at 1.

²¹ In an early interview, Stanley C. Van Ness, the Public Advocate for the State of New Jersey discussed his plans for the operation of the new department indicating that priority would be given to the field of prison reform. The Star-Ledger (Newark, N.J.), March 26, 1974, at 12.

²² An explanation of the need for the availability of these services was also offered by Public Advocate Stanley C. Van Ness when, prior to the enactment of the Statute, he stated:

At the present time, we can represent a poor person, but we can't do a thing while he is in jail if he is brought up on disciplinary charges or complains about poor treatment and lack of rights.

The Star-Ledger (Newark, N.J.), Feb. 22, 1974, at 10.

²³ See NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec., 1975, at 3.

²⁴ The question of parole for sex offenders, for example, was the basis for legal action taken in *Campbell v. N.J. Parole Board*, A 3684-73, (App. Div., April 15, 1976).

It has been found that some 75 percent of sex offenders recommended for parole release by the Special Classification Review Board are rejected by the State Parole Board. Since sex offenders do not go before the board until an exhaustive analysis is made by experts who recommend parole, there has been an apparent abuse of Parole Board discretion. NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec., 1975, at 4.

²⁵ N.J. STAT. ANN. 52:27E-21 (Supp. 1975-76).

The Division of Rate Counsel,²⁶ the Division of Citizen Complaints,²⁷ and the Division of Public Interest Advocacy,²⁸ were developed to increase the department's capacity.

Division of Mental Health Advocacy

Similar in design and purpose to the Office of the Public Defender, the Division of Mental Health Advocacy provides representation for patients in the State's mental institutions. But while the Public Defender is limited by statutory language to representation of prisoners as a class,²⁹ the Division of Mental Health Advocacy has the power to offer indigent admittees³⁰ representation on an individual basis as well.³¹

Pilot offices in Trenton and Newark provide services to any indigent patient of a public or private mental health care facility whose commitment, retention or release has interfered with his or her rights as a citizen. This means that the large number of individuals who are confined against their will are now able to oppose their incarceration in court under the department's guidelines.³² Others, who are literally strangling in red tape may now obtain assistance in speeding up the paperwork which prevents cured patients from obtaining their freedom until long after it is warranted. The pilot programs have been so successful during their first two years of existence that three more offices, designed to provide full individual services for the areas in which other

²⁶ N.J. STAT. ANN. 52:27E-16 (Supp. 1975-76).

²⁷ N.J. STAT. ANN. 52:27E-33 (Supp. 1975-76).

²⁸ N.J. STAT. ANN. 52:27E-12 (Supp. 1975-76).

²⁹ N.J. STAT. ANN. 52:27E-12 (Supp. 1975-76).

³⁰ N.J. STAT. ANN. 52:27E-23 (Supp. 1975-76) defines "indigent mental hospital admittee" as follows:

As used herein "indigent mental hospital admittee" means a person who has been admitted to and is a patient in a mental hospital, an institution for the care and treatment of the mentally ill, or a similar facility, whether public or private, State, county or local, or who is the subject of an action for admission as provided by R.S. 30:4-27 and who does not have the present financial ability to secure competent legal representation and to provide all other necessary expenses of representation.

³¹ N.J. STAT. ANN. 52:27E-24 (Supp. 1975-76) affords the individual indigent mental hospital admittee representation while class actions are permitted by N.J. STAT. ANN. 52:27E-25 (Supp. 1975-76).

³² The Star-Ledger (Newark, N.J.), Feb. 22, 1974, at 10.

major mental health facilities are located, will be opened as soon as funding becomes available.³³

The division's activities, most notably in class litigation, have made New Jersey a leader in mental health care reform. Its victory in *Carroll v. Cobb*³⁴ guaranteed the right to vote to 33 inhabitants of the New Lisbon State School who had been permitted to care for themselves with minimal supervision, but whose voting privileges had been denied.

Beyond their performance in the courtroom, members of the department have also attended inter-agency meetings, legislative hearings and bill drafting conferences with the joint Legislative Subcommittee on Mental Health, and helped to educate the public on the plight of the mentally ill in New Jersey. These are the functions that have led to most of the division's contacts with other State agencies, the responses from which have not always been favorable.³⁵ Apparently a few departments within the State's bureaucratic network still resent the department's primary role as an overseer of their actions. Those who have recognized the rehabilitative quality of the department's work, however, have welcomed its inquiries and applauded its progress.³⁶

Division of Rate Counsel

Another component of the new department which frequently collaborates with separate State agencies is the Division of Rate Counsel. It is empowered under Article II of the statute with the authority to represent and protect the public interest³⁷ in proceedings before any state regulatory board regarding the rates charged by a state-supervised business or industry. This includes appearances before the Public Utilities Commission when a utility

³³ NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec. 1975, at 7. The inability of the department to implement these plans presently, however, has made it the target of a suit filed by Camden County Legal Services, demanding that a field office be opened immediately in Camden, and alleging a violation of equal protection standards on behalf of the indigent mentally ill of that county. *Id.* at 5.

³⁴ A. 1044-74 (App. Div., Feb. 23, 1976) Information about this action has been requested by organizations throughout the nation, including the President's Committee on the Handicapped.

³⁵ Graham, *New Jersey's Public Advocate is Coming of Age*, The Evening Times (Trenton, N.J.), Nov. 19, 1975, at A-12.

³⁶ *Id.*

³⁷ N.J. STAT. ANN. 52:27E-18 (Supp. 1975-76).

has requested a fixed rate increase, a task previously undertaken by a representative from the Attorney General's Office.³⁸

Unlike its companion divisions, the office receives no appropriations from the department's total budget. Rather, it is sustained through assessments of up to one-tenth of one percent of the revenues earned by the industry or utility applying for a rate increase.³⁹ These charges, which are stipulated in Section 19 of the statute, allow the employment of a full-time staff of attorneys and experts in related fields, and provide for the engagement of special consultants on a contractual basis when necessary.⁴⁰

The presence of rate counsel at regulatory hearings assures an adversarial proceeding in which the public's point of view is represented. From the outset, this procedure has proven successful.⁴¹ Among current unsettled actions are cases involving water, gas, and electric utilities, including a challenge filed before the Appellate Division of the Superior Court against the use of automatic rate adjustments allowed to New Jersey's utilities since the Public Utilities Commission approved an adjustment clause last year.⁴² The division, insisting that such automatic provisions shield the utilities from the scrutiny of the Public Advocate's office and eliminate the customer's opportunity to contest increases at public hearings, has attacked them as being "unwise, unworkable, unnecessary, and unfair."⁴³

Interest in establishing similar standards of fairness with other state-regulated industries has led the division to venture into

³⁸ N.J. STAT. ANN. 52:27E-20 (Supp. 1975-76) reads:

All the functions, powers and duties heretofore exercised by the Attorney General pertaining to the employment, on a temporary basis of legal counsel, experts and assistants to protect the public interest pursuant to P.L. 1951, c. 357 (C. 48:2-31.1 *et seq.*) and all amendments and supplements thereto, are hereby transferred to and vested in the Division of Rate Counsel.

³⁹ N.J. STAT. ANN. (Supp. 1975-76) delineates the procedure by which expenses of the Division of Rate Counsel are paid.

⁴⁰ N.J. STAT. ANN. 52:27E-17 (Supp. 1975-76) reads in part:

When exceptional circumstances arise, the Director of the Division of Rate Counsel, with the approval of the Public Advocate, may on a temporary basis retain such other expert assistants as are necessary to protect the public interest, pursuant to a reasonable fee schedule established in advance by the Public Advocate.

⁴¹ N.J. DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec., 1975 offers a breakdown of its utility rate cases for the first year. See page 15 of the report.

⁴² Ascolese, *Advocate Launches Court Battle on Automatic Utility Rate Boosts*, The Star-Ledger (Newark, N.J.), Feb. 17, 1976, at 1.

⁴³ *Id.*

conferences and experimental hearings to probe a spectrum of controversial subjects. The division is also continuing to explore a possible expansion of jurisdiction⁴⁴ into such matters as milk pricing and automobile insurance rates.

Division of Citizen Complaints and Dispute Settlement

The Division of Citizen Complaints and Dispute Settlement bears the closest resemblance to a traditional Ombudsman's office. It has no power to initiate litigation; rather, it acts as a clearing house for citizens, and in this capacity it has handled over 8,000 complaints.⁴⁵ If the division receives a complaint or undertakes an investigation at the request of a citizen, and concludes that the action of a state official or agency is improper, unfair, or arbitrary, it then makes recommendations to the Public Advocate who asks the affected agency to take appropriate corrective action. If judicial action is warranted, the problem is brought to the attention of one of the department's other divisions, vested with the power to take further steps in the interest of the complainant. However, most of the division's actions have not necessitated litigation. Complaints, when received through its toll-free hotline,⁴⁶ are filtered to other divisions in the department when more than a simple answer is required. If requests fall outside of the agency's control, referral to the appropriate state department and information about governmental processes pertinent to the inquiry are provided. Complaints generally deal with four broad classifications: ineffectiveness of state agencies, jurisdictional disputes between agencies, dissatisfaction with judgments or decisions rendered by agencies, and lack of response by some agencies.⁴⁷ The varied methods by which these grievances are handled makes the overall success of the division difficult to gauge. In order to

⁴⁴ Currently, jurisdiction of the Division of Rate Counsel is limited to "... proceedings before and appeals from any State product or service." N.J. STAT. ANN. 52:27E-18 (Supp. 1975-76).

⁴⁵ Graham, *supra* note 36, at A-12.

⁴⁶ The telephone number is: 800-792-8600.

⁴⁷ The department utilizes persuasion, publicity, and other administrative action to seek correction of problems. In addition, it is active in programs which are geared toward educating the public as to their rights and the availability of governmental services which may be helpful in preserving these rights.

The Public Advocate, Stanley C. Van Ness, has emphasized the importance of this work, explaining:

"I read the mandate of the enabling legislation for the new department to include an aggressive outreach to the community."

See 6 N.J.R. 337.

quantify the value of its services, the division commissioned a poll by Rutgers Eagleton Institute of those who had contacted the agency. The result showed that of those questioned, 64 percent were pleased with the services they had received.⁴⁸

In addition to the Office of Citizen Complaints,⁴⁹ there is within this division an Office of Dispute Settlement⁵⁰ funded by a grant from the Ford Foundation. The office is designed to provide mediation, conciliation and other third party services to local governments and community groups and organizations for the purpose of resolving disputes which involve the public interest.

Division of Public Interest Advocacy

The Division of Public Interest Advocacy is that branch of the department which is primarily responsible for handling litigation which is entered on behalf of New Jersey citizens. In this context it is most analogous to the public interest law firm. However, no organization of a similar nature may exercise its powers with freedom and diversity comparable to that with which the Division of Public Interest Advocacy is vested.⁵¹

An attorney is sent by the division to represent the interest of the public in any proceeding where it is determined that an adjudicatory or rule-making hearing of any state agency will affect a broad public interest. If necessary, the division may then institute court challenges to agency decisions or to rules promulgated by the department in question.⁵² Activities in this capacity to date have required the presence of department representatives at hearings dealing in matters such as public health, pollution, housing and education.⁵³

⁴⁸ The full results of the poll are contained in RELEASE 75-1 SPECIAL, THE EAGLETON INSTITUTE OF POLITICS, Rutgers University, July 7, 1975.

⁴⁹ N.J. STAT. ANN. 52:27E-34 (Supp. 1975-76).

⁵⁰ N.J. STAT. ANN. 52:27E-40 (Supp. 1975-76).

⁵¹ N.J. STAT. ANN. 52:27E-29 (Supp. 1975-76) reads:

The Division of Public Interest Advocacy may represent the public interest in such administrative and court proceedings, other than under the jurisdiction of the Division of Rate Counsel pursuant to Article II herein, as the Public Advocate deems shall best serve the public interest.

The sweeping jurisdiction given the Division of Public Interest Advocacy contrasts with that given the Division of Rate Counsel, N.J. STAT. ANN. 52:27E-18 (Supp. 1975-76).

⁵² N.J. STAT. ANN. 52:27E-32 (a) (Supp. 1975-76).

⁵³ NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, A REPORT ON FIRST YEAR ACTIVITIES, Dec. 1975, at 7-9.

The division may, under the statute,⁵⁴ institute litigation on behalf of the public in the name of the Public Advocate or in the name of the affected agency or group, but may not bring suits in the name of the State of New Jersey or the people thereof,⁵⁵ since this would infringe upon powers which, by law, are specifically vested in the Attorney General.⁵⁶ In many cases, however, the Attorney General has joined the Public Advocate as *amicus* in proceedings which warranted representation of the separate interest of citizens and state. These joint efforts have included such concerns as environmental protection, energy conservation and beach access. In *Van Ness v. Borough of Deal*,⁵⁷ the State Supreme Court declared it illegal and discriminatory for a municipality to exclude non-residents from the use and enjoyment of municipally-owned shorelands. A similar holding extending the public's domain to all lands above the wet sand area is being sought by the two departments in *Lusardi v. Curtis Point Property Owners Association*.⁵⁸ The Attorney General has also offered his support to the Public Advocate in actions opposing the transportation and storage of liquid natural gas in heavily populated areas because of the high degree of risk to the public's safety. A number of cases on this subject are pending before the Federal Power Commission.⁵⁹

Independently, the division has further focused its attention on a number of problem areas, including consumer protection and housing. The constitutionality of the state statute which prohibits the advertising of prescription drug prices⁶⁰ was attacked in a lawsuit filed on behalf of all consumers in the State.⁶¹ Should the department succeed in this suit, the cost of prescription drugs should decrease.

A challenge to a grant made to Edison Township under the Housing and Community Development Act⁶² was the basis of

⁵⁴ N.J. STAT. ANN. 52:27E-32 (b) (Supp. 1975-76).

⁵⁵ N.J. STAT. ANN. 52:27E-42 (Supp. 1975-76).

⁵⁶ The Attorney General is, by law, empowered to "exclusively attend to and control all litigation and controversies to which the State is a party or in which its rights or interests are involved." N.J. STAT. ANN. 52:17A-4 (c) (Supp. 1975-76).

⁵⁷ 139 N.J. Super. 83, — A. 2d — (Ch. Div. 1975).

⁵⁸ 138 N.J. Super. 44, — A. 2d — (App. Div. 1975).

⁵⁹ DEPARTMENT OF THE PUBLIC ADVOCATE, 1975 ANNUAL REPORT OF THE DIVISION OF PUBLIC INTEREST ADVOCACY, at 3.

⁶⁰ N.J. STAT. ANN. 45:14-12 (c) (Supp. 1975-76).

⁶¹ *New Jersey Council of Senior Citizens v. Board of Pharmacy*, C-4409-75 (Ch. Div., filed Aug. 5, 1975).

⁶² 42 U.S.C.A. § 5301 *et seq.* (Supp. 1976).

*Edison Branch of the NAACP v. Edison.*⁶³ Here the division participated on the ground that there was inadequate citizen participation in the funding application process and that the grant was used for purposes inconsistent with needs of low and moderate income persons. The first suit of its kind in the country, the matter was recently settled out of Court in favor of the plaintiffs.⁶⁴

Intervention in the plaintiff's case after the landmark State Supreme Court decision in *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*⁶⁵ led to successful representation before the U.S. Supreme Court⁶⁶ and to present action in the state courts to implement the order of the New Jersey Supreme Court.

Much of the momentum which the office has gathered through significant cases such as these, however, has been offset by claims that the Advocate is abusing the power bestowed upon him by Section 31 of the statute. According to this provision, "the Public Advocate shall have sole discretion to represent or refrain from representing the public interest in any proceeding,"⁶⁷ and critics have suggested that its administrator may be choosing his cases to display the department in a limelight of publicity.⁶⁸

It seems clear that many interdepartmental difficulties might have been avoided had the enabling legislation been drafted to include limits on the Advocate's apparently unchecked power to determine which interests to represent. With the exception of a few obscure guidelines, the language of the statute provides no formula by which the Advocate must select his cases, and perhaps, more importantly, it offers no information to those affected as to how decisions were actually made. A recent challenge to the Advocate's broad discretionary powers was struck down by the Appellate Division in *Edmond v. Department of the Public Advocate*.⁶⁹

⁶³ A-1461-75 (App. Div., filed Aug. 19, 1975).

⁶⁴ *Id.*

⁶⁵ 110 N.J. Super. 164, 290 A. 2d 465 (App. Div. 1974).

⁶⁶ 96 S. Ct. 18 (1975).

⁶⁷ N.J. STAT. ANN. 52:27E-31 (Supp. 1975-76).

⁶⁸ Graham, *supra* note 36, at A-12.

A spokesman for the department attributed comments of this nature to the Advocate's status as "the new kid on the block," adding that much of this skepticism has been quelled through the Advocate's dealings with those who had previously been intimidated by his role as the people's watchdog. Once his contacts overcome their fear of the Advocate's ultimate power to litigate if he chooses, and recognize that the department is geared toward a reasonable exercise of its power to litigate, negotiations are possible. Interview with Allen Drake, Public Information Officer, Department of the Public Advocate, March 5, 1976.

⁶⁹ 137 N.J. Super. 82, 347 A. 2d 812 (App. Div. 1975).

The plaintiff had argued that the Public Advocate, as servant of the public interest, could not refuse to represent him in his action to reopen a case before the Division of Civil Rights. The Appellate Division affirmed the lower court's rejection of the plaintiff's arguments, and in so doing, affirmed the broad discretionary powers vested in the Advocate under Chapter 27E.⁷⁰

If the public interest is to be measured by differing standards each time it is challenged, the flaws in the provision may well defeat the overall purpose of the act—that of serving the public interest. Despite the existence in the cases in which the department, since its creation, has offered representation of general criteria for evaluating claims, the guidelines are, at best, vague and open to varying interpretation.⁷¹ Until the existing guidelines are strengthened and incorporated into the statute, representation will remain an inefficient and sometimes less than equitable case-by-case proposition.

Further jeopardizing the fate of the Office of Public Interest Advocacy, and indeed the department as a whole, are two restrictive amendments,⁷² inserted in order to compromise⁷³ initial opposition to the bill. Prolonged debate concerning the Advocate's far-reaching powers⁷⁴ led to the adoption of Section 46, which demands that the two most innovative components of the department, the Office of Inmate Advocacy and the Office of Public Interest Advocacy, present a detailed report to the Governor and each member of the Legislature annually, and more significantly, that these two offices terminate on December 1, 1978, unless extended by act of the Legislature.

The rationale behind the Legislature's singling out of these two offices for review and possible passive elimination may be found in the fact that the only two offices which are required by law to prove their worth on paper are those through which the Advocate is fully permitted to exercise his discretionary powers to litigate.⁷⁵

⁷⁰ *Id.* at 83, 347 A. 2d at 813.

⁷¹ Currently, guidelines gleaned from the cases include who and how many persons are affected by the suit, the seriousness of the issue, and whether the claimant can be adequately represented through some other available source.

⁷² N.J. STAT. ANN. 52:27E-46 (Supp. 1975-76) and N. J. STAT. ANN. 52:27E-43 (Supp. 1975-76). *See also*, Bergen Record (Hackensack, N.J.), April 30, 1974 at 4.

⁷³ Trentonian (Trenton, N.J.), April 30, 1974 at 3.

⁷⁴ The Star-Ledger (Newark, N.J.), May 7, 1974 at 1.

⁷⁵ N.J. STAT. ANN. 52:27E-31 (Supp. 1975-76) is the only section of the law which specifically vests in the Public Advocate discretion whether to "represent or refrain from representing the public interest in any proceeding." N.J. STAT. ANN. 52:27E-12 (Supp. 1975-76) includes such a vesting of discretion in the Office of Inmate Advocacy within the section defining duties of that office.

And, while the concern which many legislators expressed as to the unbridled power of the Advocate may have been justified, their attempts to remedy this situation seem basically ineffective.

In addition to the statutorily mandated elimination of two of the offices of the Public Advocate's Department, the Legislature can exert control over the department, as it can over the operations of any state office, through its powers, of appropriation. By merely reducing budget appropriations, the Legislature can eliminate programs it finds distasteful without waiting for the statutory deadline or resorting to the drastic step of repeal. This fiscal intervention has already been felt by the office of Inmate Advocacy which may cease operations well before its legislative authority runs out because of a shortage of funds.⁷⁶ Since the Legislature can and does continually impose fiscal control over all departments of the state, the additional imposition of annual reporting and automatic termination serve only to underline the apparent fear of these offices by the Legislature.

While this section adds nothing significant to the powers of termination which the Legislature already possesses, it may prove to have an adverse effect upon the agency itself, weakening it through the infliction of unnecessary operational handicaps. Although all state agencies are subject to financial regulation by the Legislature, the office of the Public Advocate is forced to work under the additional threat of automatic dissolution. This may recognizably hamper efforts to recruit and retain employees or to initiate any comprehensive long range administrative policies.⁷⁷

Apprehension that the department might become a monster and strike back at its creators provoked the adoption of a second amendment,⁷⁸ also aimed at placating the cautious, but again hampering the agency's ability to completely fulfill its purpose.

⁷⁶ DEPARTMENT OF THE PUBLIC ADVOCATE, 1975 ANNUAL REPORT OF THE DIVISION OF PUBLIC INTEREST ADVOCACY. See also, Graham, *supra* note 36, at A-12.

⁷⁷ Graham, *supra* note 36, at A-12.

⁷⁸ The Public Advocate himself has confirmed these hardships, indicating that the amendment "creates the impression, real or apparent that you're constantly under scrutiny," and expressing his doubts as to whether this created a healthy atmosphere in which to work. The Star-Ledger (Newark, N.J.), April 17, 1974 at 11.

⁷⁹ For example, many argue that the Legislature has been in derogation of its duty to implement the New Jersey Supreme Court ruling in *Robinson v. Cahill*, 62 N.J. 473, 303 A. 2d 273 (1973), since it was first handed down three years ago. To the date of this writing, the problem of public school funding in New Jersey has partially been solved by the enactment of P.L. 1976, c. 47, "New Jersey Gross Income Tax Act", on July 3, 1976, but successful implementation of this plan remains questionable.

Under Section 43 of the Statute, the department is precluded from suing the Legislature or its members. This prohibitive aspect of the new law may substantially impair the agency in its efforts to protect the public interest.⁷⁹ On the other hand, the Legislature argued in favor of the restrictive amendment, stating that a legislative body constantly in danger of suit—and also under a duty to protect the interests of the State’s citizens—could not adequately or meaningfully serve its constituents.⁸⁰ Indeed, the amendment prohibiting suits against the Legislature or legislators was added after its non-inclusion was termed “needless political suicide”.⁸¹ The theory that a gubernatorial appointee should not have the power to oversee the actions of a body elected by the public at large does have some merit, but it appears that the Legislature ignored an even more fundamental issue while acting instinctively toward self-preservation. The duty which the Public Advocate owes to the citizens of New Jersey appears to have been overlooked, and since the Legislature and the Public Advocate serve a common interest in this respect, it would seem rational that their ability to question one another’s actions in the interest of the public should also coincide. The successful implementation of this type of legislation would, admittedly, depend upon the reasonable exercise of review powers by the department and the Legislature alike, and could not work unless some guidelines for the exercise of discretion by the Advocate were provided in the statute. In any case, the fiscal control which the Legislature retains over the department would serve sufficiently to hold the department in check.

Conclusion

The initiation of any untried proposal is always coupled with a period of experimentation, and during its first two years in existence the department appears to have demonstrated its value

⁷⁹ N.J. STAT. ANN. 52:27E-43 (Supp. 1975-76).

⁸⁰ Loos, MEMORANDUM TO THE SENATE MAJORITY LEADERSHIP ON ASSEMBLY 1409 (PUBLIC ADVOCATE), April 1, 1974 at 10.

⁸¹ *Id.*

with achievements far outweighing failures.⁸² This is, for the most part, equally true of the enabling legislation. The service which it has fostered to date has garnered it praise not only from its beneficiaries, but also from supporters in other parts of the country, many of whom have expressed interest in establishing similar agencies within their own state governments.⁸³

In Wisconsin, legislation which would establish a Consumer Affairs Department, the head of which would be a cabinet level officer, is now pending.⁸⁴ On a nationwide scale, the department has been contacted by several public interest groups, including Common Cause, which are interested in developing model legislation to foster and encourage additional projects of this nature. Justice Thurgood Marshall of the United States Supreme Court added his praise for the Department of the Public Advocate when he stated:

Both government and public interest practices offer significant and rewarding opportunities to serve the community, and here in New Jersey the line between the two is happily blurred by the existence of the Department of the Public Advocate. In this State it is possible for a government attorney not only to serve in traditional government roles but also to serve as a public defender of indigent criminal defendants, as a representative of the mentally-ill or of prisoners or as counsel for consumers in rate-making proceedings. All these services, and more—including fulfilling its general mandate to represent the public interest—are provided by the Department of the

⁸² One of the agency's most recent efforts will hopefully further Governor Brendan Byrne's campaign pledge to put government under closer public scrutiny by enforcing L. 1975, c. 231, the "Sunshine Law," which opens all administrative hearings and meetings to the public. In the first civil suit under this law, the department is seeking to overturn the appointment of a board member by the East Windsor Township Board of Education on the grounds that the meeting at which the appointment was made was not properly advertised beforehand as the law requires. See *The Star-Ledger* (Newark, N.J.), April 3, 1976 at 3.

For an account of the department's other accomplishments, see *NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, THE FIRST EIGHTEEN MONTHS*, March, 1976.

⁸³ Some thirty states have already contacted the department, requesting information about the operation and its respective divisions, and several have taken steps toward the passage of legislation based upon the provisions of Chapter 27. Pierce, *N.J. Public Advocate Sets Pattern for U.S.*, *Sunday Times Advertiser* (Trenton, N.J.), Feb. 29, 1976.

⁸⁴ The Wisconsin legislation, proposed in June 1975, would repeal sections 20.525 (4) and 115.31 (6) of the Wisconsin Statutes and create sections 15.50, 15.501, 20.255 (1) (t), 115.36, and Chapter 214 of the statutes, relating to the creation of the cabinet-level Department of Consumer Affairs. It would also authorize an appropriation of \$250,000 for the fiscal year ending June 30, 1977 to fund the new department. The act would take effect on July 1, 1976.

Public Advocate, and this enlightened view of the duty of government to provide for the representation of traditionally unheard interests places New Jersey in the forefront of the States of the Nation.⁸⁵

In spite of this praise, the enabling legislation does contain some trouble spots which could hamper or even terminate the work which has earned the department its high marks. Most important, though, is the fact that the Legislature has taken the giant first step toward providing meaningful citizen input into the process of government. In itself, this is a laudable accomplishment. It is hoped that this participation will be enhanced and fortified, rather than contracted, as the enabling legislation is modified to suit future needs.

Christine A. Heffner

⁸⁵ Remarks of Mr. Justice Marshall at the Dedication of Seton Hall Law Center in Newark, N.J., May 3, 1976.