



Regulatory policy design during COVID-19 pandemic

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This guidance is intended to assist government agencies in designing and implementing robust, fair, and fit-for-purpose, regulatory policies¹ that enable the fair administration of government policy during the COVID-19 pandemic.

It may be useful to read this guidance in conjunction with the Ombudsman’s [Good decision making guide](#).

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¹ Regulatory policies are used by government to set policies within delegated legislation and to give effect to legislation through operational policies and processes.

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Background

General

Ombudsmen investigate administrative decisions made in the context of policy settings. Regulatory systems and their policies can have far-reaching impacts on individuals and organisations so particular care needs to be taken in their design. The good design of regulatory policies is part of the stewardship responsibilities of government agencies under the Public Service Act 2020 that require a long-term, proactive and collaborative approach.²

Regulatory policies may need to be developed promptly in order to deal with rapidly evolving events or developments. Regulation (and legislation) to protect public health and safety has been a feature of the COVID-19 pandemic (the pandemic) for government agencies.³ This has required policies that support flexible and quick responses to changing alert levels. The challenge is to ensure that these policies are well-designed and minimise any adverse effects or unintended consequences. It is vital that policy and operational work are fully co-ordinated to ensure that the impact of policy change is properly understood.

The better designed a policy is, the less likely its implementation will result in unfairness to affected individuals or unnecessary complaints to an Ombudsman. Complaints can be stressful for parties and resource intensive for government agencies. That said, complaints also provide useful insight into how regulatory policies can be improved, as part of their ongoing evolution.

Purpose of this guide

This guidance is intended to share insights and lessons learnt from the Ombudsman's investigations, monitoring and oversight roles. It is intended to assist government agencies design and implement robust, fair, and fit-for-purpose, regulatory policies that enable the administration of government policy during the pandemic.

² Section [12\(1\)](#) Public Service Act 2020

³ For example, the [COVID-19 Public Health Response \(Alert Level Requirements\) Order \(No 9\) 2021](#) requires that all people stay at home during alert level four except for essential personal movement within their area. This order was made under [section 11](#) of the [COVID-19 Public Health Response Act 2020](#).

This document is not intended as comprehensive guidance to developing policy proposals of the sort that require legislative or regulatory change.⁴ It highlights some common principles in regulatory policy design that the Ombudsman considers **should not be departed from unless unavoidable**, and justified in the circumstances. Applying the guidance below will also help minimise, or streamline the resolution of, complaints that might be received by your agency, or by an Ombudsman.

Ombudsman's role

Much of the Ombudsman's work involves dealing with complaints from people about how a government agency's particular act or decision has affected them.⁵ However the Ombudsman can start an investigation of wider systemic issues where they see the need, even if no one has made a complaint.⁶

An Ombudsman's investigative powers include assessing the reasonableness, fairness, and legality, of individual decisions made by a government agency. An Ombudsman's jurisdiction under the Ombudsmen Act 1975 does not extend to acts or decisions of ministers of the Crown, even though ministers are subject to the Official Information Act 1982. However, it is also important to bear in mind that an Ombudsman may also assess the reasonableness or fairness of the policy, regulation, or legislation that a government agency's decisions are based on, and an Ombudsman may investigate recommendations made to a minister.⁷

If an Ombudsman finds a decision, policy, regulation, or law, is unreasonable they have wide powers of recommendation to remedy the matter. This includes recommending a government agency vary or cancel its decision, amend its policy, or reconsider the applicable law or regulation.

Preliminary considerations

The Ombudsman expects that regulatory policies are based on sound evidential basis and early consultation. This means that:

- Agency officials advising on, or deciding, policy settings should ensure that policies are, as far as possible, informed by up-to-date evidence, statistics, and other relevant information.
- Officials should have a good understanding of the operational context of the policy. Align the draft policy with all related legislation, policies and processes, and amend other internal agency policies and processes as required.

⁴ The [Department of Prime Minister and Cabinet, Treasury](#) and the [Legislation Design and Advisory Committee](#) have each issued detailed guidance in this area.

⁵ Ombudsmen Act 1975, s [13\(1\)](#).

⁶ Ombudsmen Act 1975, s [13\(3\)](#).

⁷ Ombudsmen Act 1975, s [22 \(1\)\(b\)](#).

- Staff who will be required to implement the policy, and affected parties, should be consulted through the policy development process.

Contents of policy

Reflect democratic and constitutional principles

Crown treaty obligations, human rights, and international law obligations, form an important part of an Ombudsman's investigation and review of agencies' practices and decisions.

This means that policy design and implementation should reflect the democratic and constitutional principles of Aotearoa New Zealand law, including the Te Tiriti o Waitangi / The Treaty of Waitangi⁸ (Te Tiriti). Policy responses should be proportionate and any restrictions on individual rights and liberties kept to the minimum. They should also be consistent with relevant international law obligations, including the United Nations Convention on the Rights of Persons with Disabilities. Policy makers must specifically consider how new policy interacts with existing rights and interests (as outlined in the available guidance).⁹ In some cases, consideration should be given to whether fairness requires transitional arrangements or other accommodations. It is also vital that policy made swiftly is communicated widely to prevent people being caught unawares or being treated unreasonably.

Clear purpose, criteria, and processes

An Ombudsman focuses on the reasonableness and fairness of a policy, and the individual decisions made under it, when considering a complaint against a government agency. Reasonableness and fairness should form the basis of any regulatory policy's overall purpose and design.

This means that regulatory policies should:

- Commence with a clear purpose statement to assist in interpretation and minimise any ambiguity in their application.
- Be accessible, and support diversity and inclusion.
- Be easy to understand and navigate. They should use plain language and sign-post key points.
- Address substantive matters before procedural matters, and deal with the general before the specific.
- Clearly identify mandatory requirements, objectives, and intended outcomes.
- Clearly state the criteria and process for decision-making.

⁸ The Ombudsman acknowledges there are two texts with different meanings.

⁹ See 4, above.

- Highlight processes to promote fairness, and escalation or complaint processes.

Sufficiently comprehensive and flexible

In general, regulatory policies should be sufficiently comprehensive to cover a range of circumstances, while retaining the flexibility to adapt to new information, and to consider exceptional individual circumstances.

Avoid using very broad discretions in policies governing operational decisions that affect the rights of individuals, as these can result in inconsistent or arbitrary decision-making. There should be clear guidance around decision-making, including the scope of any discretion. Policies should be able to accommodate unexpected circumstances or change. ‘Blanket’ or overly rigid policies that do not allow for exceptions should also generally be avoided.

In *Practical Shooting Institute NZ v Commissioner of Police* [1992] 1 NZLR 709, the High Court stated (page 78) that there were two, or possibly three, categories of discretionary powers:

(1) First there are those powers which require an individual case by case examination without any predetermined fetter on the exercise of the discretion, other than what might be explicit or implicit in such criteria as may be set out in the enabling instrument.

(2) Second there are those powers which by dint of the nature of the subject-matter justify the establishment as a matter of discretion of a carefully formulated policy, but always with the reservation that no case is to be rejected automatically because it does not fit the policy. In this category all cases must be considered to see if they are sufficiently special to warrant a departure from the general policy.

(3) The third category, if it exists at all, represents cases where the discretionary decision maker is implicitly authorised to exercise his discretion to establish for himself an immutable policy admitting of no exceptions.

In summary, the High Court considered that policies should be formulated in a manner that does not limit or ‘fetter’ the discretion of the decision-maker. Although it was appropriate for agencies to develop policies or criteria to guide decision making, no case should be rejected automatically on the basis that it did not meet the relevant criteria. All cases must be considered to see whether there were special circumstances justifying an exception to the general approach. The High Court stated that any category of decision-making that permitted no exceptions would need to be clearly authorised by the empowering legislation, describing ‘rigid policy’ as ‘the antithesis of the exercise of discretion’.

Inclusion of relevant considerations

Specify the relevant factors that the decision maker must take into account when applying the policy for the purposes of transparency and accountability. Include reference to the empowering legislation and overall government policy objectives. However, avoid using exhaustive lists as these may operate to fetter the discretion of the decision-maker.

Avenues of complaint

A complaints process should be built into all regulatory policies from the outset. The complaint process should be accessible and easy to understand. Complaints should be reviewed by someone other than the original decision-maker(s).

A complaints process provides individuals or parties with a mechanism to challenge administrative decisions made under policies. This ensures that complaints are dealt with in a fair and consistent manner and adds credibility to policies.¹⁰

A feedback loop should also be established to ensure that any lessons learnt from complaints received about a policy are used to improve it.

Administration of policy

Retaining records and reasons for decisions

Keep records of all decisions made under a policy, including the reasons for those decisions, and communicate these with the complainant, applicant or enquirer. Also retain records of complaints received about a policy and the responses provided.

It may be tempting to ‘*cut corners*’ by bypassing paper work in a busy government agency environment. Any failure to maintain good records and communicate reasons for decisions is a false economy – decisions made ‘*on the fly*’ are less likely to be well thought through and risk generating resource intensive complaints.

In the absence of documentation, government agencies will likely have difficulty justifying their position, and run the risk of breaching the law, such as non-compliance with the Public Records Act 2005.¹¹ It can also make dealing with, and responding to, complaints or requests for review more challenging.¹²

Transparency and proactive release of operational policies

Government agencies should make sure that operational policies are communicated to all staff, together with any necessary instructions and support to apply them. Any such instructions should be appended to the policy and also made accessible to the public. There

¹⁰ The Ombudsman publication [Effective complaint handling](#) provides guidance for government agencies on developing and operating an effective complaints process.

¹¹ Section [17\(1\)](#) of the Public Records Act 2005 requires an agency to ‘*create and maintain full and accurate records of its affairs in accordance with normal, prudent business practice*’.

¹² In *Singh v Chief Executive, Department of Labour* [1999] NZAR 258, at 262-263, the Court of Appeal noted that reasons provide assurance to those affected that their evidence and arguments have been properly assessed, and assist in deciding whether there is a basis to challenge the decision.

should be clear and transparent guidance for officials in relation to any formal enforcement action.

Government agencies should consider proactively releasing their policies and processes to the public, making sure they are readily discoverable on their websites in an accessible and usable form.¹³ This is consistent with the right of access to *'internal policies, principles, rules or guidelines'* under section 22 of the Official Information Act 1982.

Any changes in published policy settings, including amendments, should be made with reference to the original policy making process that was followed, and communicated to staff and the public. Informal, unpublished internal policies are likely to be regarded by the Ombudsman as unreasonable or contrary to law. They are likely to lack the required level of authority, credibility and transparency.

Monitoring and review of policy

Regulatory policies should be continually monitored for their efficacy – and modified or replaced, depending on the circumstances. This aligns with the responsibility of chief executives of government agencies to maintain the currency of any legislation administered by that agency.¹⁴ This also aligns with the Government Regulatory Management Strategy, which requires regulatory system reporting by major regulatory departments.¹⁵

Consider establishing a formal review period for all regulatory policies. Government agencies may want to explicitly refer to *'piloting'* a new policy, clearly signalling that it is being trialled and is subject to review. All policies developed through a fast-track process should be subject to thorough post-implementation review. There should also be transparent monitoring and phasing-out of emergency measures.

Government agencies should proactively address any unintended outcomes of a policy during its earlier phases, and ensure that any adversely affected individuals or parties are notified of any remedies.

Agency officials should use a variety of tools to determine how well a policy is working and what areas need improvement. These include:

- Comprehensive evaluation to ensure that the policy is achieving the intended outcomes using the relevant indicators.

¹³ See the Ombudsman publication [Proactive release: Good practices for proactive release of official information](#) for guidance about ensure information published on line is accessible to everyone, including disabled people, in accordance with New Zealand's obligations under the United Nations Convention on the Rights of Persons with Disabilities.

¹⁴ See section [52\(1\)\(d\)\(ii\)](#) of the Public Service Act.

¹⁵ For information about this see: <https://www.treasury.govt.nz/information-and-services/regulation/regulatory-stewardship/keeping-regulation-fit-purpose/regulatory-system-reporting>

- Formal and informal feedback processes – both for the officials implementing the policy, and the individuals subject to the policy.
- Monitoring trends and outcomes of complaints made under the policy (internal and external complaints), and feeding these back into the ongoing design of the policy, especially where they reveal flaws or loopholes in the policy.
- Conducting regular quality assurance reviews of decisions made under the policy.
- Regularly triangulating the data and updating the policy where necessary.