

## SUPPLEMENTARY MATERIAL

### Designing purpose provisions and statements of principle

#### Purpose clauses

*Purpose clauses should be designed with a clear function, with restraint, and to be consistent with the substantive provisions*

Purpose clauses are increasingly used in legislation for 1 or more of the following key reasons:

- *communication reasons* – to make the basic purpose of a regime clear to a reader before they get into the detailed provisions, so as to help them understand and apply the legislation
- *signaling reasons* – to set the direction of a regime and often to signal a change in the high-level policy approach
- *concrete administrative or legal reasons* – either, at a high level, to set a basis for implementing, monitoring, and assessing the performance of a regime or, at a more micro-level, to form a basis for statutory criteria or tests for discretions under a regime
- *interpretative reasons* – to guide the interpretation of the legislation.

When you are designing purpose clauses, it is important to keep all these functions in mind. These functions are not mutually exclusive, but not all are relevant to all legislation, and some carry greater risks than others.

A purpose clause should only be used when it will perform a useful function for the particular legislation to which it applies, and when it has been designed to avoid the risks set out below.

Purpose clauses can seem an attractive way to directly communicate the policy intent of legislation. However, there are risks:

- purpose clauses have a *legal* effect on the nature of powers and duties under the legislation and agencies tasked with implementing it (as the last 2 functions make clear). This makes it important that you design purpose clauses with restraint and care and, in particular, that you avoid vague aspirational or political statements
- purpose clauses cannot do substantial legal work. Purpose clauses must not do the “heavy lifting” in the regime in themselves. They need to reflect, and be implemented through, substantive provisions. They are not a substitute for substantive provisions. A purpose clause often explains “why” the law is being enacted, while the substantive provisions provide for “what” is required
- it is also important that purpose clauses do not go beyond what the substantive provisions can realistically deliver. Doing so, can result in unrealistic expectations (and disillusion with the legislation) for users further down the track.

As stated in Chapter 2, you need to consider the purpose clause (if there will be one) early in the legislative development process. This can help you to uncover any underlying policy uncertainty or misunderstandings that are better dealt with at the beginning of the process. It can help you to keep the main objectives of the policy in mind as a bill is developed. It can also be a benchmark for testing the substantive provisions.

Purpose clauses come in a range of different types: from those that merely describe the legal effect or mechanisms of the Act to those that set out the broader policy rationale, context, or objectives that the Act will achieve. Most purpose clauses combine elements of both types. The examples provided in this supplementary material are not model clauses, but illustrate the different types of purpose clauses described above and the issues that flow from them.

*Purpose clauses that describe the legal means or effect of legislation*

This type of purpose clause is largely intended to communicate the effect of legislation. It is similar to an “overview” or “outline” clause as it merely gives a high-level description of the contents of the Act.

It may describe the legal mechanisms or overall legal effect of an Act (ie, the “how” or “what”). It generally does not explain the policy reason for the contents (the “why”) or the broader policy objectives that the Act is designed to achieve.

This type of clause may be useful as an aid for readers, by summarising and highlighting key features of the legislation. They are not as risky as policy purpose clauses described below. However, they also deliver fewer benefits (as they operate similarly to a well-written overview or outline provision). If you wish to include a purely descriptive purpose clause, it is often better to include a clear overview or outline provision.

**Examples of clauses that describe the legal means or effect of legislation**

**Electronic Courts and Tribunals Act 2016, [section 3](#)**

The purpose of this Act is to—

- (a) facilitate the use of permitted documents in, or with respect to, the proceedings of courts and tribunals; and
- (b) allow references to documents in existing enactments relating to the processes of courts and tribunals to be interpreted as including permitted documents; and
- (c) permit the filing of permitted documents at any specified place.

*Note that paragraph (a) goes further than being purely descriptive by making it clear that Parliament is expressing a goal of facilitating something.*

**District Court Act 2016, [section 3](#)**

The purposes of this Act are—

- (a) to reconstitute District Courts as a single court with divisions for a Family Court, a Youth Court, and a Disputes Tribunal; and
- (b) to provide for—
  - (i) the constitution and jurisdiction of the court; and
  - (ii) the practice and procedure of the court; and
  - (iii) the selection, appointment, removal, and conditions of the judicial and other officers of the court; and
- (c) to make provision for any other related matters; and
- (d) to improve the transparency of court arrangements in a manner consistent with judicial independence.

*Note that paragraph (d) goes further than a purely descriptive purpose clause.*

**Haka Ka Mate Attribution Act 2014, [section 3](#)**

The purpose of this Act is to give effect to certain provisions of the deed of settlement that settles the historical claims of Ngati Toa Rangatira. The provisions relate to the haka Ka Mate.

### *Policy purpose clauses*

At the other end of the spectrum is the policy purpose clause. When they are done well, these clauses can clearly identify the aims of the law in legal statements. By expressing the intent of Parliament in concrete terms, they can bridge the gap between policy and law. They may describe:

- the policy choices made in the legislation – ie, having balanced competing considerations, Parliament sets a policy direction for the legislation (for example, [section 3](#) of the Financial Markets Conduct Act 2013 reflects a shift from investor protection to confident and informed investor participation in financial markets), or
- key policy considerations that need to be balanced in applying the legislation – expressing the main competing policies and leaving the balancing to be done by regulators or the courts within the framework of the legislation (for example, the list of different “additional purposes” in [section 4](#) of the Financial Markets Conduct Act 2013), or
- the ultimate outcome to be achieved by the legislation – expressing the end purpose (for example, “to increase progressively the availability of official information to the people of New Zealand” in [section 4\(a\)](#) of the Official Information Act 1982).

As a result, policy purpose clauses may perform a signaling function, a concrete administrative, or legal function, an interpretative function, or all of these. They are particularly useful to set (or change) the policy direction of a regime and to be tied into decision-making criteria under the legislation.

However, these purpose clauses also present more risks. They have a more substantive impact on the legal effect of legislation than purely descriptive purpose clauses, so you need to design them with particular care:

- to ensure they are consistent with, and do not go further than, the substantive provisions (including any objectives of regulators or other entities with functions under the legislation, and other tests or criteria that apply to decisions made under the legislation), and
- to not make broad, unsubstantiated statements, which may expose decision-makers to unjustified judicial review risk in the exercise of discretion, create a risk of liability for negligence, or set standards unexpectedly high for administering agencies, and
- to ensure that they are unambiguous and do not add uncertainty or otherwise have unintended legal effects on the interpretation of the legislation, and
- to ensure that they do not result in overly complex, unrealistic, or unworkable tests for decision-making under the legislation, and
- to ensure that officials and law-makers do not expect the purpose clause to achieve more by itself than it can (and so under-estimate what is required in terms of substantive provisions).

#### **Examples of policy purpose clauses**

##### **Official Information Act 1982, [section 4](#)**

The purposes of this Act are, consistently with the principle of the Executive Government’s responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and

- polices; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—
- and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
  - (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

**Intelligence and Security Act 2017, [section 3](#)**

The purpose of this Act is to protect New Zealand as a free, open, and democratic society by—

- (a) establishing intelligence and security agencies that will effectively contribute to—
  - (i) the protection of New Zealand’s national security; and
  - (ii) the international relations and well-being of New Zealand; and
  - (iii) the economic well-being of New Zealand; and
- (b) giving the intelligence and security agencies adequate and appropriate functions, powers, and duties; and
- (c) ensuring that the functions of the intelligence and security agencies are performed—
  - (i) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and
  - (ii) with integrity and professionalism; and
  - (iii) in a manner that facilitates effective democratic oversight; and
- (d) ensuring that the powers of the intelligence and security agencies are subject to institutional oversight and appropriate safeguards.

**Financial Markets Conduct Act 2013**

**3 Main purposes**

The main purposes of this Act are to—

- (a) promote the confident and informed participation of businesses, investors, and consumers in the financial markets; and
- (b) promote and facilitate the development of fair, efficient, and transparent financial markets.

**4 Additional purposes**

This Act has the following additional purposes:

- (a) to provide for timely, accurate, and understandable information to be provided to persons to assist those persons to make decisions relating to financial products or the provision of financial services:
- (b) to ensure that appropriate governance arrangements apply to financial products and certain financial services that allow for effective monitoring and reduce governance risks:
- (c) to avoid unnecessary compliance costs:
- (d) to promote innovation and flexibility in the financial markets.

To see an example of how a purpose clause of this kind can be knitted into decision-making and discretions under an Act, see [section 557](#) of the Financial Markets Conduct Act 2013.

*Mixed purpose clauses*

Many purpose clauses sit somewhere on the spectrum between descriptive purpose clauses and policy purpose clauses, or use elements of both.

The following examples provide some description of the policy rationale, in the context of describing the legal context of, or mechanisms used by, the Act. It can be very useful to set out this policy rationale to assist readers to understand the context and thinking behind the legislation even when

the purpose clause is not designed to significantly affect decision-making under the Act<sup>1</sup>.

<b>Examples of mixed clauses</b>
<p><b>Radiation Safety Act 2016, <a href="#">section 3</a></b></p> <p>The purposes of this Act are to—</p> <ul style="list-style-type: none"><li>(a) establish a framework to protect the health and safety of people and protect the environment from the harmful effects of ionising radiation while allowing for the safe and beneficial use of ionising radiation; and</li><li>(b) enable New Zealand to meet its international obligations relating to radiation protection, radiation safety and security, and nuclear non-proliferation, including (but not limited to) its obligations under—<ul style="list-style-type: none"><li>(i) the Convention on the Physical Protection of Nuclear Material done at New York and Vienna on 3 March 1980; and</li><li>(ii) the International Convention for the Suppression of Acts of Nuclear Terrorism done at New York on 14 September 2005; and</li><li>(iii) the Agreement between New Zealand and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons done at Vienna on 29 February 1972; and</li><li>(iv) the Protocols to the agreement described in subparagraph (iii).</li></ul></li></ul>
<p><b>New Zealand Business Number Act 2016, <a href="#">section 3</a></b></p> <p>The main purposes of this Act are to—</p> <ul style="list-style-type: none"><li>(a) enable eligible entities in New Zealand to interact more easily with government; and</li><li>(b) enable eligible entities in New Zealand to interact more easily with one another; and</li><li>(c) reduce transaction costs in New Zealand; and</li><li>(d) establish and maintain the New Zealand Business Number Register that will—<ul style="list-style-type: none"><li>(i) enable an NZBN identifier to be allocated to eligible entities; and</li><li>(ii) enable individuals dealing with NZBN entities to use the NZBN; and</li><li>(iii) enable certain information to be collected and shared between authorised government agencies; and</li><li>(iv) make certain information publicly available; and</li></ul></li><li>(e) protect the security and confidentiality of information provided under this Act and the privacy of individuals in business (within the meaning set out in section 9(2)).</li></ul>
<p><b>Victims’ Orders Against Violent Offenders Act 2014, <a href="#">section 3</a></b></p> <p>This Act—</p> <ul style="list-style-type: none"><li>(a) acknowledges the ongoing effects of serious violent offending for victims; and</li><li>(b) with a view to lessening those effects, empowers the court, on the application of a victim, to make a non-contact order prohibiting the offender from having any form of contact with the victim.</li></ul>

### *Cautions with all types of purpose clauses*

The following cautions apply to all types of purpose clauses:

- purpose clauses that are intended to relate to the Act need to cover the ambit of the whole Act (at least at a high level)
- at times it is useful to have more specific purpose clauses for particular Parts or even provisions

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<sup>1</sup> Regulatory impact assessments and other explanatory material are also valuable for this purpose, and continue to be available via the link in the introduction version of a Bill.

of legislation. You need to consider carefully the relationship between these and the main purpose of the Act so that you don't end up with over-complicated legislation, too many purpose clauses, or inconsistency between purpose clauses. This can cause difficulties in operationalising the legislation into realistic decision-making processes and tests that regulators or others can apply

- avoid using multiple similar versions of purpose clauses – it is better to use one purpose clause that is well-developed and refer back to it, than have slightly different versions throughout the legislation
- avoid a long list of potentially conflicting ideas – the task of properly taking into account a purpose statement is more complex (and risky) when it contains a miscellany of ideas and where the “weight” to be attributed to each idea is unclear
- it may be important to assess how the proposed purpose clause reflects or contrasts with purpose clauses of other relevant legislation (for example, if a regulator is established under one Act but many of its substantive functions are set out in other legislation)
- be particularly careful if you are retrofitting a purpose clause to legislation – it is very difficult to ensure that you have fully captured the purpose of the substantive provisions
- if you are amending legislation, be careful to re-check whether the purpose clause is still fit for purpose. The danger of a purpose clause becoming out-of-date can arise whether you are making a significant amendment or whether there are multiple amendments that re-shape the legislation over time.

## Statements of principle<sup>2</sup>

*Principles should be used with care and not as enforceable substantive rights or duties*

You can use statements of principle in a similar way to policy purpose clauses, ie, to set out, in legal terms, high-level statements of core policy aims or general underlying values that affect how the legislation should be interpreted and applied.

Create them to support and enable decision-making in line with the policy of the legislation. Do not use them to create stand-alone enforceable substantive rights or duties as they are usually too broad and unqualified to work well in this way.

As with a purpose clause, any statement of principles in the legislation must be clear about how it relates to the rest of the legislation. Who must act in accordance with, or be guided by, the principles? To which powers, duties, or functions are the principles relevant? What needs to be balanced in considering the principles?

In most cases, statements of principle will guide and limit the exercise of powers and duties under the legislation. The examples below demonstrate various forms of words to do this — “guide the operation”; “must take into account”; “be guided by”; “intended to guide”; “must take account of”;

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<sup>2</sup> This material is not intended to discuss “principles-based” legislation, which is a different concept focussed on whether legislation sets general, open-textured requirements (for example, [section 9](#) of the Fair Trading Act 1986) or detailed or prescriptive requirements (for example, labelling requirements in consumer information standards under that Act). Rather, the focus in this material is on lists of principles that are used to state policy aims of the legislation.

“must have regard to”, and “must do so in accordance with”.

Treat very broad statements of principle with caution if they could impose unquantifiable statutory obligations, expose the Crown or other people to unjustified judicial review risk in respect of the exercise of discretion, or create a risk of liability for negligence. They can also over-promise compared to the substantive provisions or the realities of usual constraints such as funding. One method of limiting such risk is to ensure decisions are conferred in subjective terms and to include qualifiers within the statement of principles. Some qualifiers in the examples below include:

- “where appropriate and to the extent practicable within the resources available”
- “where appropriate and so far as is reasonable and practicable in the circumstances”
- “if satisfied that the necessary resources are available”
- “unless it is not reasonably practicable or in the best interests of the patient to do so”.

### *Cautions with principles*

As well as ensuring that statements of principle are not overstated, it is important that principles enhance decision-making processes and do not create complexity and risks for decision-making under legislation. Some key guidance on this point is:

- ensure that there are not too many principles to be taken into account, as it will result in unworkable and complex decision-making (“less may be more”)
- the order in which principles are stated usually does not signal any hierarchy or weighting (sometimes this is made explicit, but it is not generally necessary to do so)
- consider consistency with purpose clauses and with other statements of principle carefully
- consider whether decision-makers will balance principles or will be permitted to give them no weight.

The other cautions around ensuring purpose clauses do not create complexity or risks in the legislation (see above) is usually equally relevant to statements of principles.

#### **Examples of statements of principles that expressly guide or limit powers and duties (underlining added)**

##### **Substance Addiction (Compulsory Assessment and Treatment) Act 2017, [section 12](#)**

Every person and every court that exercises, or proposes to exercise, a power conferred by or under this Act in respect of a patient must be guided by the following principles:

- (a) where compulsion is necessary, the level of coercion used on patients should always be the least restrictive possible to enable effective treatment; and
- (b) the views of the patient and the views of the patient’s principal caregiver, welfare guardian (if the court has appointed one), and nominated person (if the patient has nominated one) should be ascertained and taken into account before the power is exercised, unless it is not reasonably practicable or in the best interests of the patient to do so; and
- (c) interferences with the rights of patients should be kept to a minimum; and
- (d) the interests of patients should remain at the centre of any decision making; and
- (e) the power should be exercised with—
  - (i) proper recognition of the importance and significance to the patient of the patient’s ties with his or her family, whānau, hapū, iwi, and family group; and
  - (ii) proper recognition of the contribution those ties make to the patient’s well-being; and
  - (iii) proper respect for the patient’s cultural and ethnic identity, language, and religious or ethical beliefs.

**Standards and Accreditation Act 2015, [section 28](#)**

In setting the amount of fees or charges under sections 26 and 27, the NZ Standards Executive must have regard to the following principles: [...]

**Veterans' Support Act 2014, [section 10](#)**

Every person who performs any function or exercises any power under this Act must do so—

- (a) in acknowledgement, on behalf of the community, of the responsibility for the injury, illness, or death of veterans as a result of them being placed in harm's way in the service of New Zealand; and
- (b) in accordance with the following principles:
  - (i) the principle of providing veterans, their spouses and partners, their children, and their dependents with fair entitlements:
  - (ii) the principle of promoting equal treatment of equal claims:
  - (iii) the principle of taking a benevolent approach to claims:
  - (iv) the principle of determining claims—
    - (A) in accordance with substantial justice and the merits of the claim; and
    - (B) not in accordance with any technicalities, legal forms, or legal rules of evidence.