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**PERCEPTIONS AND REALITY - SCRUTINY OF  
SUBORDINATE INSTRUMENTS UNDER THE  
CADASTRAL SURVEY ACT 2002**

**RESEARCH PAPER**

**LAWS 542: LEGISLATIVE DESIGN, DRAFTING AND  
LAWMAKING**



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### ***Abstract***

Aspects of design and process used to develop, test and publish subordinate instruments have been criticised through inquiries of the Regulations Review Committee and by academics and commentators. In particular, there is a perception that the level of parliamentary scrutiny of subordinate legislation is insufficient, ineffective and inefficient. This paper considers if these criticisms are valid for aspects of a discrete regulatory regime such as the land surveying (cadastral survey) regime – a regime that underpins the land registration system in New Zealand.

Considering the roles of the Executive, Parliament and the Judiciary, the paper proposes the ‘ideal’ decision-making and review process for cadastral survey rules. It shows that improvements in scoping, developing, testing, consulting and information-sharing could restore confidence that:

- There are adequate checks and balances in the regulatory regime for land surveying.
- There is adequate scrutiny of legislative proposals given effect through subordinate instruments with considerable technical content.

This paper reflects the author’s opinions and suggestions and does not represent Government policy or the views of Land Information New Zealand, other government agencies or organisations.<sup>1</sup>

### ***Word length***

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,115 words.*

### ***Subjects and Topics***

Cadastral Survey Act 2002, Disallowable instruments, Land transfer, Legislative instruments, Post legislative scrutiny, Subordinate instruments.

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<sup>1</sup> All citations and references to electronic sources were accurate at the time of writing.

## *I. Introduction*

Subordinate instruments are “instruments made under an empowering law that create, alter, or remove rights and obligations and determine or alter the content of the law applying to all or a class of the public”.<sup>2</sup> The term is a category of legislation that includes what is commonly referred to as delegated legislation or law made by:<sup>3</sup>

- Parliament’s delegate (for example, the Governor-General in (the Executive) Council) or a statutory officer such as the Surveyor-General;<sup>4</sup> or
- Parliament’s delegate’s delegate (for example, the Deputy Surveyor-General).<sup>5</sup>

This paper aims to test the perception that the level of parliamentary scrutiny over proposals creating subordinate legislation is insufficient, ineffective<sup>6</sup> and inefficient.<sup>7 8</sup> Taking the example of highly technical subordinate instruments used to manage land surveying of property boundaries in New Zealand (the cadastral survey regime under s49 of the Cadastral Survey Act 2002 (CSA)), the issues for law-makers are canvassed in terms of the roles and processes used by the Executive and Parliament. The paper proposes an ‘ideal’ decision-making and review process for cadastral survey rules that points to ways to improve the overall quality of similar, highly technical, regulatory tools.

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<sup>2</sup> Ross Carter, *Disallowable Instruments*, [2014] NZLJ 235 at 235.

<sup>3</sup> Based on explanations in Ross Carter, Jason McHerron and Ryan Malone, *Subordinate Legislation in New Zealand* (LexisNexis, 2013) at [1.1.3].

<sup>4</sup> The Surveyor-General is empowered to make rules specifying standards for the conduct of cadastral surveys under s49 of the CSA.

<sup>5</sup> The Surveyor-General can delegate the power to make rules (any of his functions, duties and powers) to any employee of the chief executive of Land Information New Zealand or to any other suitable person under s8 of the CSA.

<sup>6</sup> For example, see Report of the Regulations Review Committee *Inquiry into instruments deemed to be regulations – an examination of delegated legislation* [1999] AJHR I.16R at 6 and 35.

<sup>7</sup> For example, see Daniel Greenberg, *Dangerous trends in modern legislation and how to reverse them* (Pointmaker, Centre for Policy Studies, April 2016) at 2; the quality of legislation and the need for “a systematic reconfiguration of the legislative process” Geoffrey Palmer *Lawmaking in New Zealand: Is there a better way?* (2014) 22 Waikato L Rev at [VII, A].

<sup>8</sup> Report of the Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments* [2014] AJHR I.16H at 8 and 20.

## *II. What is cadastral surveying and why it is important*

Understanding the ‘lie of the land’ or ‘mapping the land’ (exploring, recording information, creating representations of that information and sharing that information) have been critical to support human settlement for hundreds, if not thousands of years.

Land surveying and the role of surveyors have played a leading role in developing legislative controls over property rights in New Zealand, particularly since the Treaty of Waitangi was signed in February 1840<sup>9</sup> and sovereignty subsequently declared for the British Crown over New Zealand.<sup>10 11</sup>

Survey records provide the basis for describing the physical extent of property to support the State’s guarantee of title that we have today through the land transfer system.<sup>12</sup> As the Hon. Doug Kidd observed at the introduction of the Land Transfer and Cadastral Survey Legislation Bill in 2002:<sup>13</sup>

The survey system, like the land title system that flows from that work, is at the very foundation of life, society, the economy and the culture of all peoples in this country.

## *III. Exploring perceptions of subordinate instruments*

The history of surveying and surveyors is intrinsically linked to the development of New Zealand as a nation. Cadastral survey records underpin the property rights system. The consequences of a failure in the system are economically significant – particularly from the risk of having unworkable, impractical and unclear regulation (poor quality) and poor

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<sup>9</sup> Formally recognising Māori as owners of all land except that which had been ‘validly’ purchased.

<sup>10</sup> By Lieutenant-Governor William Hobson representing the British Crown, 21 May 1840. See Brian Marshall, *From Sextants to Satellites: a Cartographic Time Line for New Zealand* (New Zealand Map Society Journal No 18, 2005) at 12.

<sup>11</sup> Instructions for “a survey to be made” to record all surveyed lands on charts for public inspection were included in Queen Victoria’s Royal Charter to Governor Hobson dated December 1840. See Marshall, above n 10 at 12.

<sup>12</sup> Implemented through the Land Transfer Act 1952 and associated regulations; administered by the Ministry of Justice, Land Information New Zealand and a statutorily appointed Registrar-General of Land.

<sup>13</sup> Hon Doug Kidd (2 May 2002) 600 NZPD 16001.

processes that bring it into force (including policy development, legislative design, scrutiny and implementation).

With much of the survey control system governed by subordinate instruments, the key question in legislative design terms is whether the checks and balances in the processes of the Executive and Parliament are sufficient to safeguard against the risks of ill-thought-through, unreasonable and unworkable regulation.

This section explores some of the issues and criticisms of subordinate instruments that are considered factors that could influence future reviews of the cadastral survey regime.

### *A Confusion over what is and what is not regulation*

Subordinate legislation covers a wide range of tools made under the authority of empowering law (primary legislation). It is used to “create, alter or remove rights and obligations and determine or alter the content of the law applying to all or a class of the public”.<sup>14</sup>

Subordinate legislation is used extensively in New Zealand to implement law – particularly to provide detailed technical requirements and procedures for regulatory schemes such as those that underpin property rights. For example, the land transfer system, the land survey regime, rating valuation regimes are created in primary legislation, and implemented through regulations made by the Governor General in Council and through rules and standards made by statutory officers/bodies and non-statutory instruments such as administrative operating protocols and voluntary standards. These tools have been variously categorised as delegated legislation, secondary or tertiary instruments, traditional regulations, deemed regulations<sup>15</sup> or just regulation. There is obvious confusion over its many forms, inconsistency in how it is developed, who makes it and how it is applied as illustrated by the reports of the Regulations Review Committee since 1999.<sup>16 17</sup>

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<sup>14</sup> See Carter above n 2 at 235; and Carter, McHerron and Malone above n 3 at [1.1.3].

<sup>15</sup> Described as “delegated legislation that is— made by a person or body other than the Governor-General in Council (or a local authority); and deemed to be a regulation or required to be treated as a regulation for the purposes of the Regulations (Disallowance) Act 1989 (and accordingly subject to the scrutiny of the Regulations Review Committee” in *Further Government Response to the Report of the Regulations Review Committee on its “Inquiry into instruments deemed to be regulations – an examination of delegated legislation”* [1999-2000] Parliamentary Papers Vol 1 A5 at [4].

<sup>16</sup> See commentary in Dean R Knight and Edward Clark, *Regulations Review Committee Digest* (6th ed, New Zealand Centre for Public Law, Wellington, 2016) at 98-104.

The Legislation Act 2012 consolidated and modernised provisions for drafting, publication and printing legislation. It also clarified (and yet broadened) what should be published as “legislative instruments”<sup>18</sup>, recasting the definition of regulations by amending s29 of the Interpretation Act 1999:<sup>19</sup>

regulations means—

- (a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) an Order in Council that brings into force, repeals, or suspends an enactment:
- (d) regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
- (e) an instrument that is a legislative instrument or a disallowable instrument for the purposes of the Legislation Act 2012:
- (f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e)

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<sup>17</sup> Report of the Regulations Review Committee *Inquiry into instruments deemed to be regulations – an examination of delegated legislation*, above n 6; Report of the Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments*, above n 8; *Inquiry into the principles determining whether delegated legislation is given the status of regulations* [2004] AJHR I.16E; *Investigation into deemed regulations that are not presented to the House of Representatives* [2006] AJHR I.16E; *Inquiry into oversight of disallowable instruments that are not legislative instruments* [2014] AJHR I.16H.

<sup>18</sup> Legislation Act 2012, s4; the PCO webpages note legislative instrument includes “Orders in Council, regulations, rules, notices, determinations, proclamations or warrants. They are laws made by the Governor-General, Minister of the Crown and other bodies under powers conferred by an Act of Parliament.” This type of legislation was previously known as ‘regulations’ or ‘statutory regulations’ and included in the ‘SR’ series. From 1 January 2014, a legislative instrument must be drafted by the Parliamentary Counsel Office and published in the Legislative Instruments ‘LI’ series on the [www.legislation.govt.nz](http://www.legislation.govt.nz) website.” <<http://www.legislation.govt.nz/glossary.aspx#o>>.

<sup>19</sup> Paragraph (e) of the definition of “regulations” in s29 of the Interpretation Act 1999 was replaced by s77(4) of the Legislation Act 2012.

### ***B Implications of the Legislation Act 2012***

Since 2002, Land Information New Zealand (LINZ), the Surveyor-General and the Parliamentary Counsel Office (PCO) have assumed that standards and rules under s49 of the CSA are ‘deemed regulations’ or ‘other instruments’ (that is, disallowable instruments, drafted by the Surveyor-General that do not need to be published in the Legislative Instruments (LI) series (formerly Statutory Regulations (SR) series)).<sup>20</sup>

Consequential amendments to s49(4) of the CSA<sup>21</sup> resulting from the Legislation Act 2012 have clarified that rules and standards made by the Surveyor-General must be drafted by the PCO and published in the LI series.

This has given rise to discussion around:

- The need for change in practice for the Surveyor-General and LINZ.
- Whether an amendment to the CSA is promoted to remove the reference to legislative instrument in s49(4), to reflect practice between 2002 and 2016 (and perhaps the original intent) and align status of cadastral rules with similar provisions of proposed amendments to the Land Transfer Act 1952.<sup>22</sup>
- Whether cadastral rules should be regulations promulgated through Order in Council rather than by the Surveyor-General.
- Whether cadastral rules should be included in primary legislation.

### ***C There is too much delegated legislation***

All branches of government (the Executive, Parliament and the Judiciary) contribute to designing, creating, endorsing, implementing and review of subordinate legislation.

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<sup>20</sup> Therefore treated as ‘Other Instruments’ for the purposes of publication and published directly on the LINZ website, with a link provided on the [www.legislation.govt.nz](http://www.legislation.govt.nz) website.

<sup>21</sup> Cadastral Survey Act 2002, s49(4):

Rules made under this section—

(a) apply subject to regulations made under this Part; and

(b) are a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

<sup>22</sup> Note that the Land Transfer Bill is in its final committee stages of Parliament and will provide formal powers of the Registrar-General of Land to make standards and issue directives that will be disallowable instruments, but not legislative instruments; Land Transfer Bill 2016 (118-2), cl 234.



The perceptions of proliferation and inefficiency noted above<sup>23</sup> are not unique to New Zealand commentators, but are also echoed in commentary from the United Kingdom, the United States of America and Australia. For example, Stephen Argument's examination of Australia's use of legislative rules expresses similar concerns - that pushing more and more material into "legislative rules" that was previously in regulations is affecting the overall quality of delegated legislation.<sup>24</sup>

This has led to several inquiries by the Regulations Review Committee,<sup>25</sup> an investigation by the Productivity Commission<sup>26</sup> and a fair amount of public debate (including complaints) that have generated a range of Government responses.<sup>27</sup> Indeed the Productivity Commission noted:<sup>28</sup>

The volume and complexity of the regulatory stock in New Zealand poses challenges to people wanting to understand their regulatory obligations and for the centre of government (ministers and central agencies) to manage the system.

#### ***D Delegated legislation is less democratic and lacks scrutiny***

Despite significant efforts to raise and resolve issues since the 1999 Regulations Review Committee's *Inquiry into Instruments deemed to be regulations – an examination of delegated legislation*,<sup>29</sup> there remains perceptions that there is a 'quality gap' between regulatory proposals that are and are not scrutinised by Cabinet. This is shown in the New Zealand Law Society's submission to the Committee's 2004 inquiry advocating

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<sup>23</sup> Geoffrey Palmer, above n 7; Report of the Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments*, above n 8.

<sup>24</sup> Stephen Argument *The use of "Legislative Rules" in preference to regulations: a "novel" approach?* (2015) 26 PLR 4 at 17-18.

<sup>25</sup> Regulations Review Committee reports noted above n 17.

<sup>26</sup> *Regulatory Institutions and Practices - Final Report* (Productivity Commission, 2014) <<http://www.productivity.govt.nz/inquiry-content/1788?stage=4>>; note the Commission also produced an Issues Paper in August 2013 and a draft report in March 2014.

<sup>27</sup> See Government response above n 15; *Government Response to the New Zealand Productivity Commission Report on Regulatory Institutions and Practices* (New Zealand Government, July 2015); *Memorandum for Cabinet: Government Response to the New Zealand Productivity Commission Report on Regulatory Institutions and Practices* (Office of the Minister for Regulatory Reform, July 2015); note all papers relating to the New Zealand Government's response to the Productivity Commission's work, including strengthening regulatory stewardship of agencies can be found at <<http://www.treasury.govt.nz/regulation/nzpcresponse>>.

<sup>28</sup> Productivity Commission, above n 26 at 13.

<sup>29</sup> [1999] AJHR I.16R.

further checks and balances including that “tertiary legislation should be directly authorised by Parliament”.<sup>30</sup> The Committee pointedly remarks that it cannot “scrutinise the exercise of the delegation of lawmaking powers ....if instruments of a lawmaking character escape Parliament’s scrutiny and control”.<sup>31</sup>

Concerns over delegated legislation were characterised in the Government’s response to the Regulations Review Committee’s *Inquiry into Instruments Deemed to be Regulations – an Examination of Delegated Legislation* as:<sup>32</sup>

Democratic	that deemed regulations are “less democratic”,
Quality	“not subject to executive scrutiny through the Cabinet process”
Access	“generally not published in the official series of Statutory Regulations”

Successive administrations since 1999 have endorsed this approach, rejecting broadening the categories subordinate instruments considered by Cabinet. Reasons for this include:<sup>33</sup>

- the work load/volume for Cabinet and the PCO;
- drafting standard will not be affected “if quality assurance systems can be developed and applied without taking deemed regulations to Cabinet”; and
- Ministers are unlikely to have the expertise or interest to scrutinise the technical material.

There are active initiatives that the Executive is using to address access concerns including the PCO’s Access to Subordinate Instruments Project (ASIP), and the consolidation of law regarding publication implemented through the Legislation Act

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<sup>30</sup> Report of the Regulations Review Committee *Inquiry into the Principles determining whether delegated legislation is given the status of regulations*, above n 17 at 12.

<sup>31</sup> At 17.

<sup>32</sup> *Further Government Response to the Report of the Regulations Review Committee on its “Inquiry into instruments deemed to be regulations – an examination of delegated legislation”* [1999-2000] Parliamentary Papers Vol 1 A5 at [6].

<sup>33</sup> At [22] - [24].

2012.<sup>34</sup> However, it could be said that there is a ‘stalemate’ regarding scrutiny and quality concerns, particularly relating to parliamentary oversight —the problems, as identified by successive Regulations Review Committee inquiries, make “the parliamentary scrutiny process inefficient”.<sup>35</sup>

#### *IV. The cadastral survey regime in New Zealand*

##### *A The principles of land surveying*

Land surveying is the science and art of describing where one point on earth is in relation to another point (the distances and angles between them) and converting the information into a useable form such as a map or plan.<sup>36</sup> The principles of land surveying are based on three-dimensional trigonometry.

Despite dramatic change in technology, the basic principles of surveying have not altered for over 230 years - since the late 1780s when Jesse Ramsden’s theodolite allowed the relative positions of the Royal Observatories of Greenwich and Paris to be measured, and solved a scientific dispute that ultimately led to founding the British national mapping agency, the Ordnance Survey in 1791.<sup>37</sup>

##### *B Creating survey controls in New Zealand*

The New Zealand Constitution Act 1846<sup>38</sup> established two provinces (New Ulster and New Munster).<sup>39</sup> This Act and associated Royal Charters established a system to register

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<sup>34</sup> Noting that the Treasury and Ministry of Business Innovation and Employment are leading initiatives to enhance ‘regulatory stewardship’ in terms of stocktake, reporting, transparency and planning regulatory review programmes.

<sup>35</sup> Report of the Regulations Review Committee *Inquiry into the oversight of disallowable instruments that are not legislative instruments*, above n 8 at 8.

<sup>36</sup> Explanatory material of the National Society of Professional Surveyors <<http://www.nsps.us.com>> and the International Federation of Surveyors (FIG) <<https://www.fig.net>>.

<sup>37</sup> History of the Ordnance Survey <<https://www.ordnancesurvey.co.uk/about/overview/history.html>>.

<sup>38</sup> This Act was only partially implemented and repealed by the New Zealand Constitution Act 1852. See sources such as *New Zealand History Online* for further information about the colonisation of New Zealand <<http://www.nzhistory.net.nz/letters-patent-issued-making-new-zealand-a-colony-separate-from-new-south-wales>>.

<sup>39</sup> Marshall, above n 10 at 17.

land titles, a land court to investigate titles and requirements to regulate land surveys that still form the basis for regulatory controls over survey data today.<sup>40</sup>

A Surveyor-General in Auckland was appointed to regulate surveys of New Ulster (the North Island north of the mouth of the Pātea River) and the Chief Surveyor of the New Zealand Company appointed to regulate surveys of New Munster (the rest of the North Island, the South Island and Steward Island). By 1850, the Colonial Government had taken control of the New Zealand Company's surveying operations.<sup>41</sup>

Prior to 1870, a deeds system was used to record property ownership in New Zealand. Under this system a land grant was the only document of land ownership, held by the owner. Title was transferred by deed, but the title was not noted on the deed. Every deed since the original land grant had to be produced to prove ownership.<sup>42</sup>

Following its successful introduction in Australia in 1858, the Torrens System<sup>43</sup> was introduced in New Zealand by the Land Transfer Act 1870. Compared with the deeds system, it was a simpler process of recording interests in land and changes to those interests by creating certificates of title held in a public register, guaranteed by the Crown. Landowners only receive a copy of what is held in the register. It wasn't until 1924 that it became compulsory for all land to be brought under the land transfer system.<sup>44</sup>

In the foreword to the Law Commission's report *A New Land Transfer Act*, the Rt. Hon. Sir Geoffrey Palmer referred to the Torrens System of land transfer as "one of the great legal reforms of the 19th century. It gave people security in their dealings with land".<sup>45</sup>

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<sup>40</sup> See the summary of the history of surveying in Trent F D Gulliver, *Developing a 3D Digital Cadastral Survey System for New Zealand* (Master of Geographic Information Science, University of Canterbury, 2015) <<http://ir.canterbury.ac.nz/bitstream/handle/10092/11730/Masters%20Thesis%20-%20Trent%20Gulliver.pdf?sequence=5&isAllowed=y>>.

<sup>41</sup> Marshall, above n 10 at 19.

<sup>42</sup> *The Torrens System* Land Information New Zealand <<http://inlinz/torrens-system>>.

<sup>43</sup> Named after Sir Robert Richard Torrens.

<sup>44</sup> Land Information New Zealand, above n 42; Land Transfer (Compulsory Registration of Titles) Act 1924.

<sup>45</sup> *A New Land Transfer Act* (Law Commission NZLC R116, 2010) at iv. This report also includes a discussion of the principles of the Torrens System of land transfer.

The Torrens System is also lauded as a “great improvement in facilitating the effective transfer of land compared with the old deeds system”.<sup>46</sup>

### *C Developing the New Zealand cadastral survey system*

Despite the success of the Torrens System, concerns grew about the condition and accuracy of surveys used for registering titles. In 1871, the new Registrar-General of Lands recommended legislation to create “a system of survey which will operate over the whole colony”;<sup>47</sup> which the chief surveyors supported and presented to the House of Representatives in 1873.<sup>48</sup> However, it was not until after Henry Spencer Palmer of the Ordnance Survey of Great Britain reported on the poor quality of surveys to the House of Representatives in 1875<sup>49</sup> that steps were taken to address the issues. In 1876, the first Surveyor-General’s Department was established and statutory chief surveyors were appointed for each of the land districts prescribed under the Land Transfer Act 1870. The mechanisms were in place to achieve “uniform rules and regulations”<sup>50</sup> for all surveys.

### *D The basis for recording property rights in New Zealand*

The term ‘cadastral survey’ is associated with surveys and records relating to the location of boundaries of rights and interests in land under various tenure systems including freehold, leasehold, Māori and Crown land.<sup>51</sup>

The term ‘cadastral’ has only appeared in primary legislation in New Zealand since 1986.<sup>52</sup> However, it has been used by surveyors and cartographers since the late 1870s to

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<sup>46</sup> At iv.

<sup>47</sup> Marshall, above n 10 at 34.

<sup>48</sup> Marshall, above n 10 at 35, referencing the request of the Colonial Secretary to report to Parliament and advocacy of surveyors for uniform rules and regulations to be made applicable to all surveys; aligning survey records; and not bringing land under the Land Transfer Act until its delineated records of maps; and to set up of a board to oversee professional qualifications; *Report of the conference held at Wellington, April 12, 1873, Conference of Chief Surveyors* [1873] 2 AJHR H-1 at 1.

<sup>49</sup> *Correspondence relative to, and report by Major Palmer on the state of the surveys in New Zealand* [1875] 2 AJHR H-1 at 1.

<sup>50</sup> Marshall, above n 10 at 35.

<sup>51</sup> Land Information New Zealand, *The survey system* <<http://www.linz.govt.nz/land/surveying/survey-system>>.

<sup>52</sup> Survey Act 1986, s4.

distinguish maps, plans<sup>53</sup> and records that describe property boundaries from those used for other purposes such as to create topographic maps that show physical features.<sup>54</sup>

In New Zealand, there are three authoritative, regulated data sources that support property rights: the geodetic system, the cadastral survey system and tenure systems illustrated in Figure 1.<sup>55</sup> Collectively the data held to support the tenure systems in New Zealand is referred to as ‘the cadastre’<sup>56</sup> and is defined in s4 of the CSA:<sup>57</sup>

*cadastre* means all the cadastral survey data held by or for the Crown and Crown agencies

*cadastral survey* means the determination and description of the spatial extent (including boundaries) of interests under a tenure system

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<sup>53</sup> Survey Act 1986, s2, definition of “map”, a representation of the features in graphical, photographic or digital form or a combination); and definition of “plan”, a graphical representation of any survey or surveys.

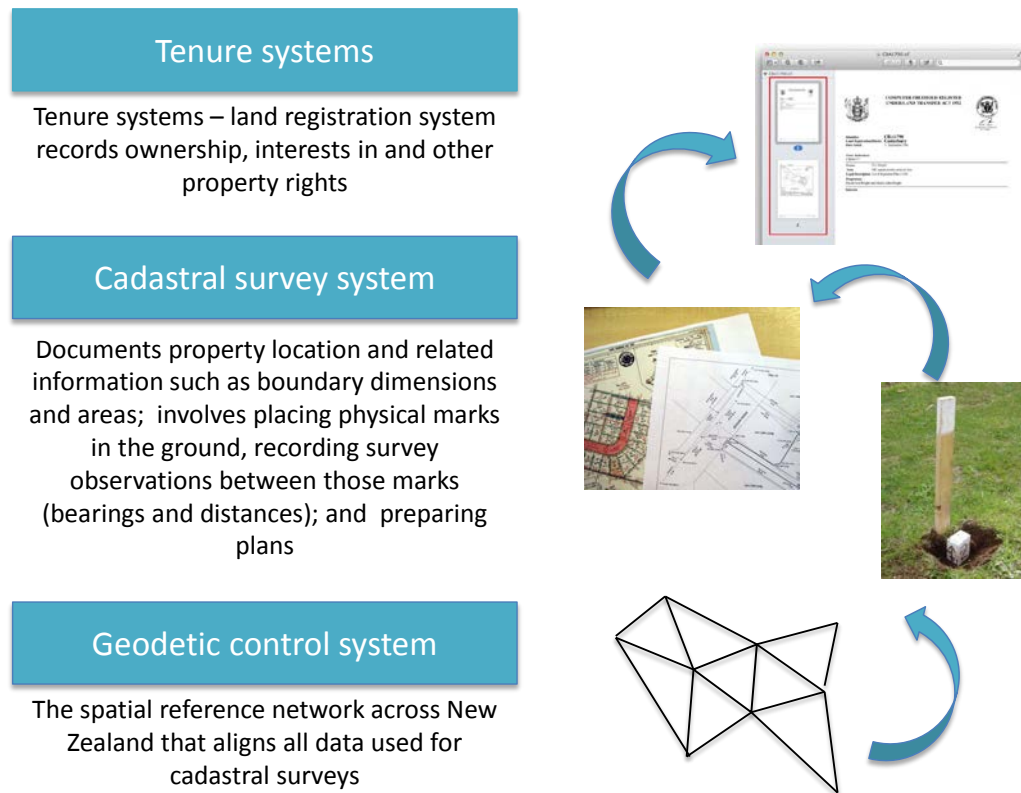
<sup>54</sup> The map series NZMS13, started in 1877, distinguished cadastral maps from cartographic maps.

<sup>55</sup> Land Information New Zealand, above n 51; tenure systems include rights and interests in land in place for freehold, leasehold, Maori and Crown land.

<sup>56</sup> The Merriam-Webster online dictionary entry notes cadastre as “an official register of the quantity, value and ownership of real estate used in apportioning taxes”; and suggests the term was used from 1804 and its origin is French, from the Italian ‘catastro’ or Greek ‘kastastichon’ for notebook, < <http://www.merriam-webster.com/dictionary/cadastre> >.

<sup>57</sup> Cadastral Survey Act 2002, s4.

Figure 1 The systems that underpin property rights in New Zealand



Source: Adapted from information and images from LINZ [www.linz.govt.nz](http://www.linz.govt.nz).<sup>58</sup>

LINZ strategy, *Cadastrre 2034*<sup>59</sup> provides a useful summary of the core factors that underpin New Zealand's property rights system and shape the legislative tools used to administer and operate it – who, what, when and where:<sup>60</sup>

- What** property rights exist
- knowing what rights, restrictions and responsibilities exist in law (tenure).
- Who** owns those rights
- knowing who (or which organisation) holds these rights, restrictions and responsibilities or who are subject to them.

<sup>58</sup> Land Information New Zealand, above n 51.

<sup>59</sup> *Cadastrre 2034: A 10-20 year Strategy for developing the cadastral system* (Land Information New Zealand, 2014) at [3.1.2].

<sup>60</sup> Adapted from *Cadastrre 2034*, above n 59; and information in draft papers prepared for *Proposed cadastral rules for greater Christchurch: consultation document* (Land Information New Zealand, August 2016) <<http://www.linz.govt.nz/land/surveying/canterbury-earthquakes/information-for-canterbury-surveyors/consultation-proposed-rules>>.

- When** rights come into effect - knowing when rights, restrictions and responsibilities come into effect and when they cease to apply.
- Where** those property rights are located - knowing where property rights are located and their spatial extent (boundaries).

### *E The cadastre and its relationship with land registration*

The development of the Canterbury Property Boundaries and Other Related Matters Act 2016 during 2015 and 2016 caused considerable discussion between technical professionals (lawyers and surveyors, particularly within LINZ) about the accuracy and reliability of cadastral information and how it is used for land tenure purposes<sup>61</sup>. For example, the debate has tried to address two questions about cadastral information held by LINZ (on behalf of the Crown):

1. What cadastral survey information can the Registrar-General of Land rely on (and in what forms) for the Crown's 'guarantee' of interests held in a computer register?<sup>62</sup>
2. What cadastral survey information is 'guaranteed' by the Crown?

An explanation, in part response, is provided in the consultation document released by the Surveyor-General in August 2016 for proposed cadastral survey rules to support the Canterbury Property Boundaries and Other Related Matters Act 2016:<sup>63</sup>

Under the LTA [Land Transfer Act 1952] a title describes the land in a way that directly or indirectly refers to a Deposited Plan (DP) CSD [cadastral survey dataset].

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<sup>61</sup> The Law Commission has investigated reform of the land transfer system including the doctrines of tenure and estates embodied in NZ law and the history of and principles of the Torrens system of land transfer: *Tenures and Estates in Land* (NZLC PP20, 1992) at [75]; *Law Commission A New Land Transfer Act* (NZLC R116, 2010) at [1.10]; *Law Commission Review of the Land Transfer Act 1952* (NZLC IP10, 2008) at [1.1 – 1.31].

<sup>62</sup> The Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 introduced the concept of "computer register", providing for electronic registers of interests in land to replace paper-based certificates of title.

<sup>63</sup> *Proposed cadastral survey rules for greater Christchurch: consultation document* (Land Information New Zealand, August 2016) at [2.4.1] <<http://www.linz.govt.nz/land/surveying/canterbury-earthquakes/information-for-canterbury-surveyors/consultation-proposed-rules>>.



The DP shows information enabling the owner (or a surveyor on behalf of the owner) to locate the land on the ground, including:

- the land parcel in a scale diagram with an area,
- where the boundary markers have been placed (commonly wooden pegs),
- the distances and directions between those markers.

When a land transfer (LT) CSD is ‘approved’ as to survey, the RGL [Registrar-General of Land] is assured that the CSD correctly shows the extent of the land in relation to previous definitions of the land, and adjacent land. Based on this assurance, the RGL creates a new title and registers dealings with the land without fear that any of the owner’s land has been omitted or the title inappropriately overlaps with property rights in another person’s land. Under the Land Transfer Act the Crown guarantees ownership of the land as marked out on the ground as recorded by this DP. There is no guarantee associated with a boundary defined in a survey office (SO) CSD unless the definition of the boundary from the SO is recorded in the land transfer register

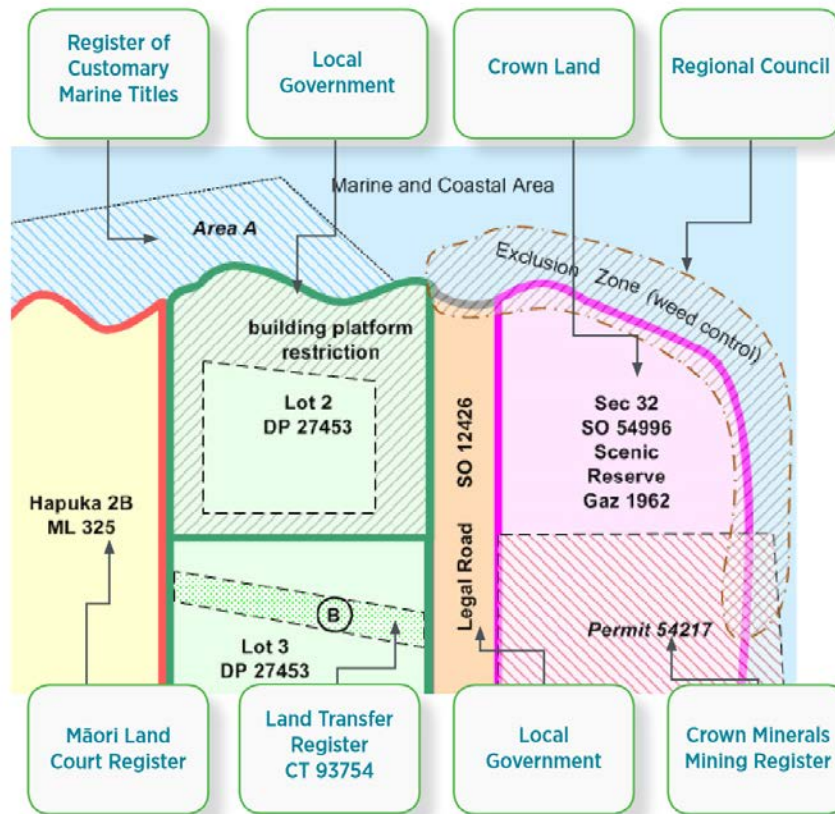
A discussion of the question of Crown guarantee of survey information could form several research papers. The particular relevance for this paper is the interaction between the land transfer and cadastral systems: ensuring the land marked out on the ground is recorded and the data transferred to the cadastre and then represented in a plan (including a ‘Deposited Plan’ used for land transfer purposes). Delegated legislation is used to govern (through standards and rules) how and when information in the cadastre is ‘certified’ by licensed cadastral surveyor and ‘approved’ by LINZ as complying with survey standards. To that extent, the information in the cadastre can be relied on as accurate.

Figure 2 reproduces a diagram from ‘*Cadastre 2034*’<sup>64</sup> that illustrates the relationships between cadastral information and other datasets held for public purposes (for example, land and resource management).

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<sup>64</sup> Cadastre 2034, above n 59 at 9.

Figure 2 Cadastral information and related data sets



Source: *Cadastre 2034: A 10-20 year Strategy for developing the cadastral system*, Land Information New Zealand [2014].

## V. The regulatory toolbox for the cadastral survey regime

The accuracy of New Zealand's cadastre depends on tight management by the Surveyor-General of survey standards and processes to give an authoritative database of spatial information:<sup>65</sup>

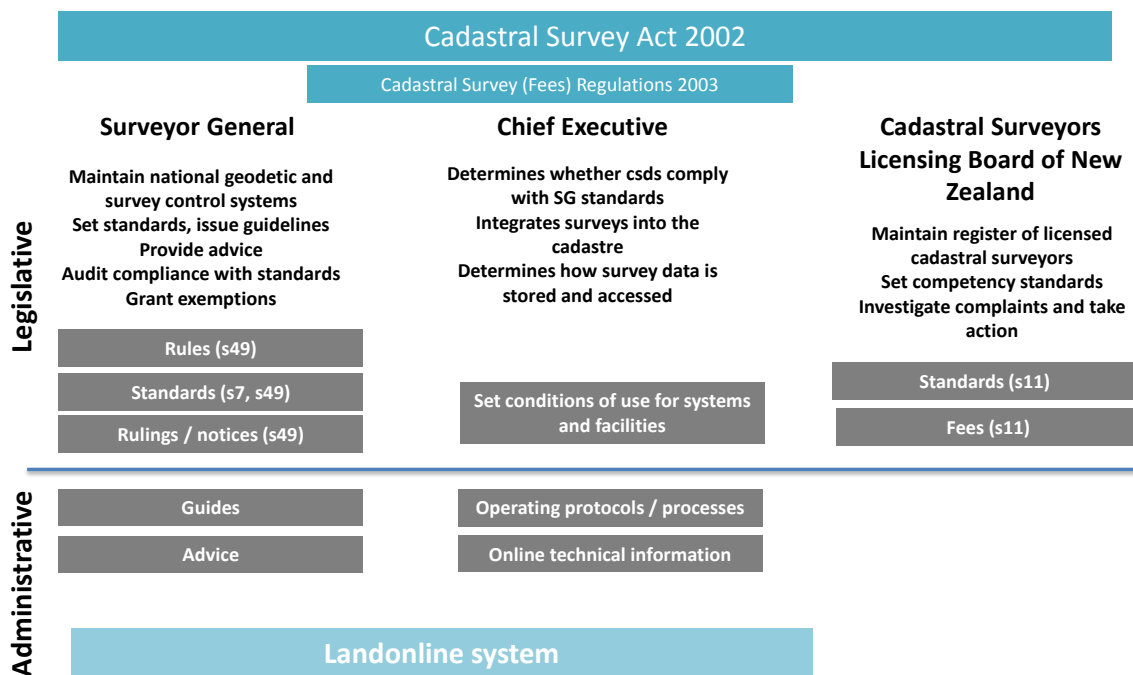
[It] gives certainty for individuals about exactly where their boundaries are when they buy, sell and make use of land. It provides a robust foundation for government and private individuals to grow New Zealand's economy

<sup>65</sup> Cadastre 2034, above n 59 at 1. This strategy sets a vision to develop the cadastre to keep pace with technological change and demands for use and access to data if it is to continue to be a reliable system of recording rights in land and support crucial economic, cultural and social objectives.

Administrative responsibility for the CSA lies with LINZ, with portfolio oversight by the Minister of Lands. LINZ is a regulator and operations/service provider in relation to the cadastral survey regime. The chief executive has stewardship for the assets and legislation administered by the department.<sup>66</sup> The Surveyor-General is one of four statutory officers appointed as regulators with specific roles and functions for legislation administered by LINZ. The decisions of the Surveyor-General are independent of LINZ.

An overview of the types of functions and instruments under the CSA is included in Figure 3. The CSA includes provisions to make regulatory instruments such as regulations (through Order in Council)<sup>67</sup> for the Surveyor-General to make rules and standards<sup>68</sup> and guidelines,<sup>69</sup> and for the chief executive to set conditions for the use of facilities for storing, receiving and integrating cadastral data.

Figure 3 The regulatory toolbox for the cadastral survey regime



<sup>66</sup> State Sector Act 1988, s32.

<sup>67</sup> Cadastral Survey Act 2002, s48.

<sup>68</sup> Cadastral Survey Act 2002, ss 7 and 49.

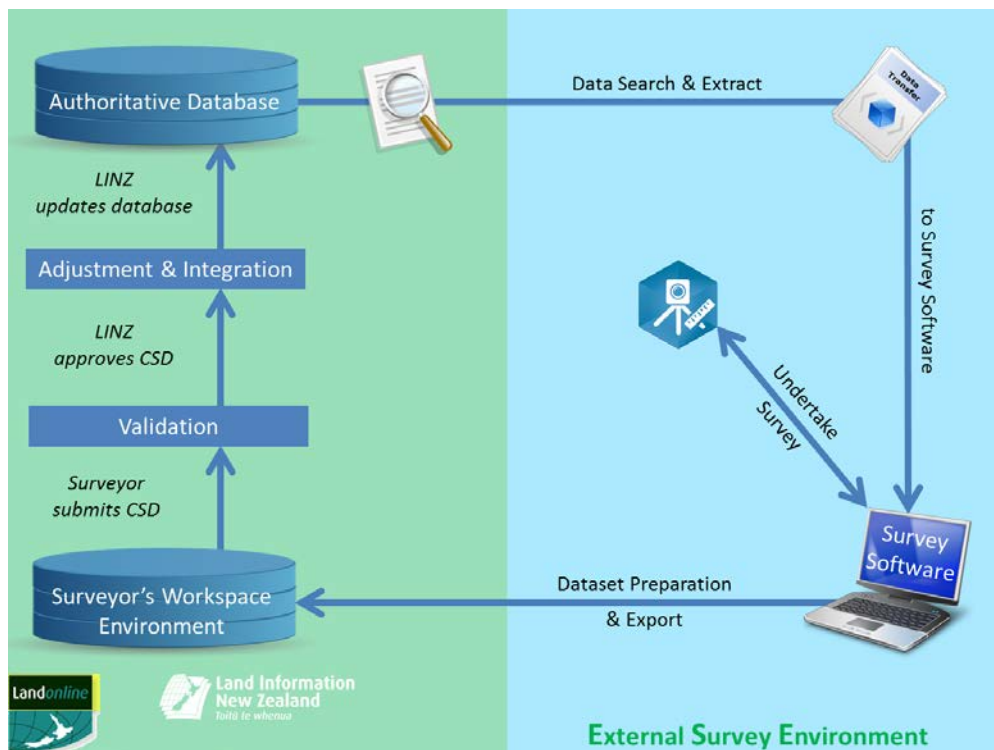
<sup>69</sup> Cadastral Survey Act 2002, s7.

Before 2000, administering and operating the land titles and survey systems was largely paper based. From 1996 with the amalgamation of survey and title functions into a new entity (LINZ) work began to modernise and automate processing of property transactions.

‘Landonline’ was developed and implemented between 1997 and 2002. It forms the authoritative database and primary information technology system that manages data and runs the cadastral and title registration systems. It automates many title registration functions (the ‘e-dealing system’) and survey functions (the ‘e-survey system’).<sup>70</sup> By 2003 the system was fully operational, and in 2007 all cadastral survey data was required to be lodged through Landonline.<sup>71</sup>

The regulatory regime requires licensed cadastral surveyors to use Landonline to prepare and lodge survey data. Figure 4 illustrates how the system works.

Figure 4 The basis of Landonline in the cadastral survey system in New Zealand [Source: LINZ August 2016]



<sup>70</sup> See LINZ webpages for history and development of Landonline < <https://forms.landonline.govt.nz/about-landonline/introduction.asp> >.

<sup>71</sup> Cadastral Survey (Compulsory Lodgement of Digital Cadastral Survey Datasets) Order 2007.

### ***A How regulatory tools are developed by LINZ***

Legislative and operational tools (other than those required to go through Cabinet such as regulations under s48 of the CSA) are developed in line with a model that has been in place at LINZ since around 2004 – the ‘optimal regulation’ model.

The 4-year plan developed by LINZ in 2016 summarises the approach which aims to “balance the level of intervention (the tools chosen) against the risk of not achieving outcomes.”<sup>72</sup> A stocktake was carried out in 2010 that significantly reduced the volume of regulatory documents needed to support regulatory activities. LINZ is working to review and refresh the model and align it more closely with the model of ‘review, legislate, administrate’ advocated by the Organisation for Economic Co-operation and Development (OECD) shown in Figure 5.<sup>73</sup>

The process methodology typically used by LINZ to develop regulatory tools under the CSA is shown in Figure 6. The process can be scaled to suit a particular initiative (for example, a formal review of all cadastral rules; or a discrete aspect of an operating standard). A specialist regulatory team works with the Surveyor-General’s team to scope and assess the need for change/need to create a particular tool. Statutory requirements and LINZ operating requirements in terms of drafting, public consultation, expert advice, approval process and publication are considered so a tailored programme and engagement plan for the work is developed.

The process follows a ‘scope, develop, test/consult, approve, publish, implement’ approach.

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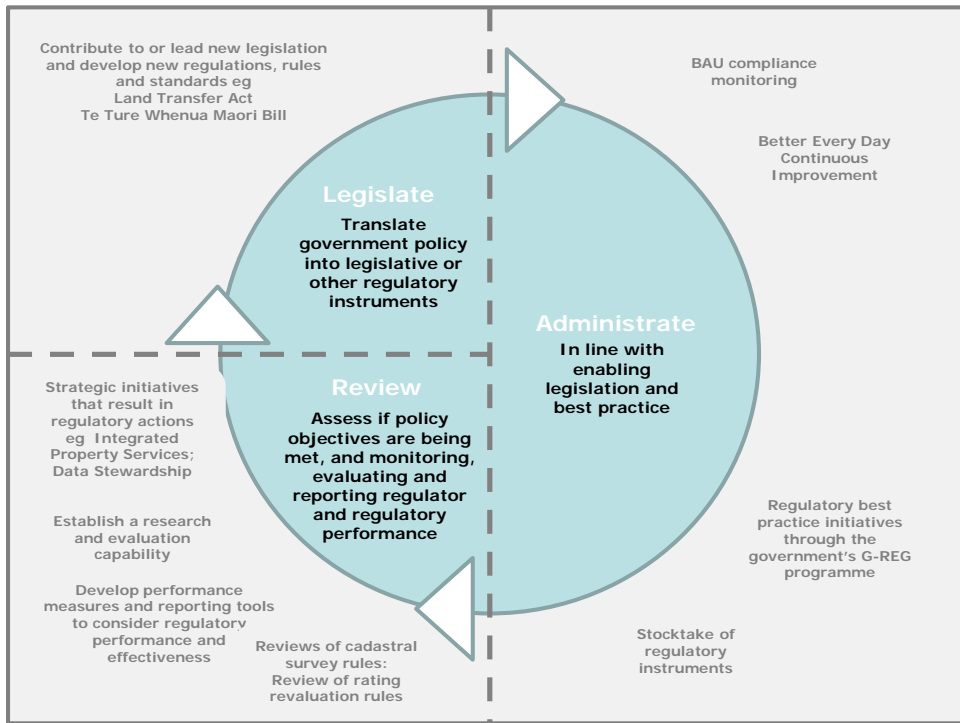
<sup>72</sup> *Four Year Plan 2016-2020* (Land Information New Zealand, May 2016) at 28

<<http://www.linz.govt.nz/about-linz/publications/four-year-plan-2016-2020>>.

<sup>73</sup> The Australian Audit Office produced a schematic of the OECD model in its *Better Practice Guide, Administering Regulation Achieving The Right Balance* (Australian National Audit Office, 2014)

<[https://www.anao.gov.au/sites/g/files/net1661/f/2014\\_ANAO%20-%20BPG%20Administering%20Regulation.pdf](https://www.anao.gov.au/sites/g/files/net1661/f/2014_ANAO%20-%20BPG%20Administering%20Regulation.pdf)>.

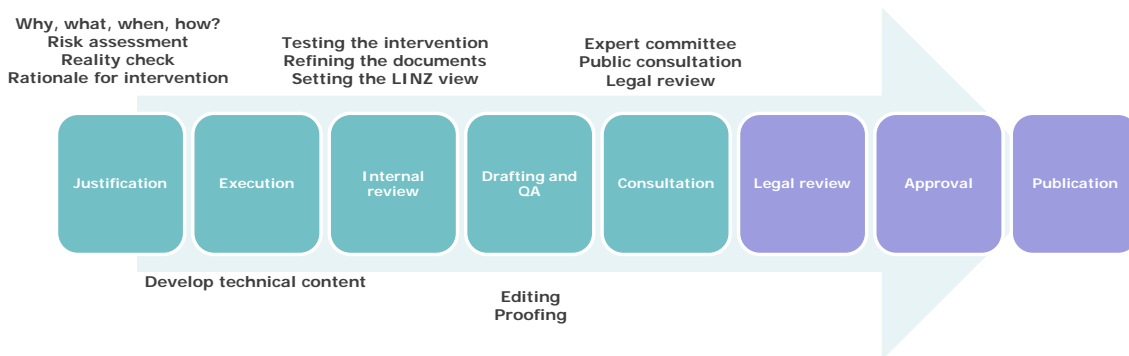
Figure 5 LINZ's regulatory process and LINZ initiatives



**The regulatory process and 2016 LINZ work programmes**

Based on regulatory process concept diagram in 'Better Practice Guide', Australian National Audit Office 2014

Figure 6 The process methodology used by LINZ [Source: Regulatory Frameworks, LINZ, July 2016]



The Rules for Cadastral Survey 2010<sup>74</sup> were developed over a period of four years and were developed from ‘scratch’, as part of a major review programme to update and modernise the rules following the introduction of the CSA in 2002. Eleven meetings of expert committees/groups were held alongside public consultation for a period of 6 months. An expert committee considered every submission and gave advice to the Surveyor-General, who then authorised the final version.<sup>75</sup>

The optimal regulation model also set a fixed suite of tools that could be developed for ‘regulatory interventions’<sup>76</sup> based heavily on the approach of Standards New Zealand as shown in Table 1. A terminology has been developed irrespective of whether the tool has legislative effect or was purely operational and therefore ‘administrative’. Needless to say, this has led to some confusion and difficulty of regulated parties to distinguish between what is and is not the ‘law’.

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<sup>74</sup> *Rules for Cadastral Survey 2010 LINZS65003, Land Information New Zealand, 2 November 2012*) <[www.linz.govt.nz/regulatory/65003](http://www.linz.govt.nz/regulatory/65003)>.

<sup>75</sup> This information was given by LINZ to the Regulations Review Committee and documented in Report of the Regulations Review Committee *Complaint Regarding Rules for Cadastral Survey 2010*, [2010] AJHR I.16G at 24-26.

<sup>76</sup> LINZ uses ‘intervention’ to describe any action a Regulator takes to modify the behaviour of LINZ’s staff and/or stakeholders. This includes education programmes, fact sheets and regulatory standards, rules, and guidelines.

*Table 1 Examples of core tools/interventions under the CSA as prescribed in the LINZ optimal regulation model*

<b>Intervention</b>	<b>Purpose</b>	<b>Example</b>
Rule	A set of laws issued by a Statutory Body through sections in Legislation (enabling legislation).	Rules for Cadastral Survey 2010, LINZS65003
Standard	A document, established by consensus and approved by the Regulator, which provides for common and repeated use for their activities or their results, aimed at achieving Government or Regulatory mandatory requirements in a given area. The mandatory requirements are those for which compliance is expected and is not optional.	Standard for integration and provision of cadastral survey LINZS10003
Interim Standard	Published when there is likely to be modifications to the content in the immediate future. These modifications could be due to changing legislation, technology changes, or untested legislation.	Interim Standard for Mark Protection surveys (Canterbury Earthquake), LINZS10004
Ruling	A Ruling responds to requests for clarifications of existing documents or may be published as a 'quick fix' to a new situation.	Ruling on Official geodetic datum and projections, LINZR65300
Guideline	An informative document that may reflect best practice. It is a discretionary guidance document which usually expands on content in a standard and could include examples to assist with the implementation of the requirements in the standard.	Interpretation guide to the Rules for Cadastral Survey 2010, LINZG65700
Interim Guideline	A guideline, published when there is likely to be modifications to the content in the immediate future. These modifications could be due to changing legislation, technology changes, or untested legislation.	Interim guideline to sea boundaries and the Marine and Coastal Area (Takutai Moana) Act 2011, LINZG65705

*Source: Land Information New Zealand, 2015.*

*Note that operationally, LINZ also uses interventions such as factsheets, technical circulars, education programmes, web-based information, and accreditation systems for service suppliers.*



## *VI. Do the criticisms about subordinate instruments apply to rules and standards under the CSA?*

This section discusses whether the general criticisms of subordinate instruments noted above hold true for the cadastral survey regime in terms of:

- The processes involved in development – are there adequate checks and balances?
- Post-legislative scrutiny – has it been effective?
- The instruments that can be made under the CSA – is the mix of tools appropriate?
- Transparency and public input/access – is it adequate?

### *A Adequate checks and balances?*

In pre-legislative process, LINZ and the Surveyor-General seem to have adopted good government practices in developing subordinate instruments under the CSA in terms of technical development, consulting/engaging and implementing.

However, as noted earlier, the implications of the Legislation Act 2012 on the process to review CSA subordinate instruments were only recently discovered. It transpires that drafting and publication protocols had not been strictly observed to prepare a range of instruments under s49 of the CSA. This was despite:

- The Rules being presented to the House of Representatives in 2010<sup>77</sup> and to the Regulations Review Committee through a complaint.<sup>78</sup>
- An application to the High Court by the Institute of Cadastral Surveying for a declaratory judgment on the interpretation of cadastral survey dataset.<sup>79</sup>
- The Legislation Act 2012 amending s49(4) of the CSA to state that rules under are ‘legislative instruments’ and ‘disallowable instruments’.

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<sup>77</sup> Regulations (Disallowance) Act 1989, s4.

<sup>78</sup> Regulations Review Committee *Complaint Regarding Rules for Cadastral Survey 2010*, above n 75.

<sup>79</sup> *The Institute of Cadastral Surveying Inc v Land Information New Zealand* [2012] NZHC 1335.

- ‘Rulings’ and other standards being made by the Chief Executive of LINZ and the Surveyor-General based on the LINZ ‘optimal regulation’ model.
- Variations made to instruments to support the Canterbury earthquakes recovery.
- Policy and technical work to develop the Canterbury Property Boundaries Act 2016 (for which cadastral rules were anticipated).

These factors show that for over 12 years, the processes adopted have not been questioned or tested. The Rules for Cadastral Survey 2010 were developed as ‘deemed regulations’ on the basis that the Surveyor-General has the power to draft (this appears to be the original intent as shown in initial drafting instructions<sup>80</sup> and incorporated into the first reading of the Land Transfer and Cadastral Survey Legislation Bill (2002 169-1)).<sup>81</sup>

Carter, McHerron and Malone note that by the time s9 of the Legislation Act 2012 commenced (5 August 2013), “most of the legislation at the New Zealand Legislation website had been ‘officialised’ ”.<sup>82</sup>

It seems that the process the PCO went through in terms of ‘officialisation’ had not been undertaken in relation to the Rules for Cadastral Survey 2010. Perhaps this was because they were already drafted and published by LINZ, gazetted in 2010, updated in 2012-13 and published in the ‘other instruments’ series rather than as a ‘legislative instrument’?

Would the 2010 Rules be any different (in quality or legislative effect) if the PCO had drafted them, as was the practice pre 2002? In the author’s view, it is unlikely that the results would be any less technical or of a higher quality. However, there must always be benefits of having greater levels of independent scrutiny, particularly in drafting of highly technical legal provisions – as a test to ensure clarity and plain language.

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<sup>80</sup> Reference to LINZ ‘draft’ drafting instructions has been made in the course of research for this paper but it is unclear about the interpretation of requirements in the CSA in 2002 or discussions during policy development for the Legislation Act 2012.

<sup>81</sup> Explanatory note to the Land Transfer and Cadastral Survey Legislation Bill (2002-169-1) “Rules will be subject to the Regulations (Disallowance) Act 1998 but not the Acts and Regulation Publication Act 1989” at 18; see commentary on cl 116 in second reading of the Land Transfer and Cadastral Survey Legislation Bill (2002-169-2), Hansard (2 May 2002) 600 NZPD 16000.

<sup>82</sup> “‘officialisation’ involves both a check of accuracy and authoritativeness, and a check that ensures material is consistent with current legislative drafting practice” Carter, McHerron and Malone above n 3 at [3.4.2].

### ***B Keeping the Executive honest - the deterrent effect of Parliamentary and judicial scrutiny***

Knight and Clark reflect on the significant role of parliament in supervising the making of subordinate legislation. They note the Algie Committee's view that "the public will expect Parliament to exercise something more than a merely nominal supervision over the work of those to whom law-making powers have been delegated".<sup>83</sup> They further note:<sup>84</sup>

In practice, supervision of regulations by Parliament can take five forms:

- the presentation of all regulations to the House of Representatives;
- confirmation of regulations by an Act of Parliament;
- approval of regulations by resolution of the House;
- disallowance or amendment of regulations under the Legislation Act 2012 (before 2013, the Regulations (Disallowance) Act 1989); and
- scrutiny by the Regulations Review Committee.

In general, Parliament and the Executive have relied on the threat of post-legislative scrutiny to improve the quality of regulation. This could be through one of the five forms noted above or through judicial scrutiny (an action is taken to test whether the regulation is ultra vires the empowering enactment, or the decision-maker has acted within their authority, or that the process has been followed correctly).<sup>85</sup>

A complaint (successful or not) to the Regulations Review Committee or through proceedings for judicial review or declaratory judgement do not necessarily represent regulatory failure. The 'deterrent' effect as noted by Hon David Cunliffe<sup>86</sup> (or risk,

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<sup>83</sup> Knight and Clark, above n 16 at 14, quoting from the *Report of the Delegated Legislation Committee* [1962] AJHR I.18 [Algie Committee] at 6.

<sup>84</sup> Knight and Clark, above n 16 at 14.

<sup>85</sup> Knight and Clark, above n 16 at 14.

<sup>86</sup> Hon David Cunliffe, Chairperson, Regulations Review Committee, notes that "Disallowance acts more as a deterrence than a regular remedy. The disallowance provisions have been used sparingly since their original enactment in 1989. Regulations have been disallowed on one occasion using the provisions, and amended on one other." He further notes that eight motions for disallowance have been made since 1989 – only one has been successful, one resulted in amending the instrument, four were debated and voted down and two lapsed; *The evolution of the New Zealand Regulations Review Committee: Systems, Scrutiny and*

potential or likelihood of it occurring) is perhaps incentive enough for a government agency (including statutory officers) to properly consider the scope, effect, impact and cost of legislative proposals. Knight and Clark also note the “fact that the courts are able to invalidate a regulation acts as an important check on those exercising delegated regulation-making powers.”<sup>87</sup> This is particularly relevant for those legislative instruments such as standards and rules under s49 of the CSA that are not required, or do not meet thresholds for consideration by a Cabinet committee.

Parliament has chosen to use its powers of ‘disallowance’<sup>88</sup> of subordinate legislation on very few occasions. The Executive has also firmly rejected suggestions of creating more intensive pre-legislative scrutiny by Cabinet of technical subordinate instruments that have not traditionally been required to be considered by Cabinet.<sup>89</sup>

However, questions over the status of and processes used to create certain forms of ‘regulations’ persist.

### ***C Is the mix of primary and secondary tools appropriate?***

The current three-tier system was created by the CSA in 2002. Up to this time, a two-tier system had been in place - rules and standards were formal regulations and considered through Cabinet and promulgated through the Order in Council process. While the Surveyor-General retained similar functions under the 2002 enactment that had effectively been in place since the 1870s, the intent of the Executive was to consider that rules/standards were ‘tertiary’ instruments, to be treated as ‘deemed regulations’ that did not need to be drafted by the PCO or have Cabinet approval.

Therefore, what was clearly intended for the cadastral survey regime is not what has emerged in practice:

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*Complaint* (Australia-New Zealand Scrutiny of Legislation Conference, Perth Western Australia, 11-14 July 2016) at 6.

<sup>87</sup> Knight and Clark, above n 16 at 14, cites Geoffrey Palmer, *Deficiencies in New Zealand Legislation* (1999) 30 VUWLR 1 at 2.

<sup>88</sup> Refer to the House’s powers to disallow or amend regulations under ss5 and 9 of the Regulations (Disallowance) Act 1989 in Carter, McHerron and Malone, above n 3 at [11.0.8] and [11.0.8].

<sup>89</sup> *Further Government Response to the Report of the Regulations Review Committee on its Inquiry into Instruments Deemed to be Regulations – an examination of delegated legislation*, above n 32 at [17-23].

- The present interpretation of s49(4) of the CSA is that rules and standards are ‘legislative instruments’ and therefore must be drafted by the PCO and held and published in the LI series.
- There seems to be a ‘fourth-tier’ to the instruments that have legislative effect. It is unclear how the ‘rulings’ mechanism should work; are they for just notices of decisions made by the Surveyor-General or should they be treated formally as ‘brief’ standards / rules? Either way, their status and procedural requirements to approve them need to be addressed.

Over the past 14 years, there has been no indication of systemic or systematic failure in the cadastral survey regime. Certainly no complaints to the Regulations review Committee or actions of Parliament or the Judiciary that would lead to a conclusion that the underlying rationale for rules and standards under the CSA is broken. If it were, there would be merit in considering a change to the roles and responsibilities of the Surveyor-General<sup>90</sup> and moving the content of subordinate instruments into the primary legislation. Some would argue this is appropriate as a matter of principle. However, it is unlikely to improve the quality of the regulation.

#### ***D Are opportunities for public input and access adequate?***

Carter, McHerron and Malone note three fundamentals of transparency and access to the law:<sup>91</sup>

- The law should be accessible to the citizen.
- Ignorance of the law does not excuse a person from criminal liability for failing to comply with it.
- Reasonable steps must be taken to inform those whom will be affected by an instrument otherwise it’s validity and efficacy will be in doubt.

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<sup>90</sup> For example, as a technical specialist and adviser to the Executive and Parliament, with duties and functions that include overseeing the effectiveness and efficiency of the regime.

<sup>91</sup> Summarised from Carter, McHerron and Malone above n 3 at [3.4.1].

### 1 *Transparency in decision-making*

Sections 7(2) and 49(3) of the CSA<sup>92</sup> impose an obligation on the Surveyor-General to “have regard to” factors akin to what is required under Cabinet and Treasury guidelines for regulatory impact assessment when making decisions about subordinate instruments.

Ensuring there is transparency in how the Surveyor-General has considered these factors is important so that public and Parliamentary confidence in the regime is maintained. Aligning LINZ’s ‘optimal regulation’ processes more closely with Treasury guidelines on regulatory impact assessment<sup>93</sup> and the principles of good regulatory practice<sup>94</sup> (irrespective of whether they are formally required by Cabinet process), will provide greater transparency in developing and testing changes to regulation.

It is also intended to enhance parliamentary and public scrutiny through proposals currently before Parliament to amend the Legislation Act 2012.<sup>95</sup> If passed, chief executives of agencies will be required to prepare disclosure statements for all Government legislation, including disallowable instruments drafted by PCO, such as the 2010 Rules.<sup>96</sup> This embeds current Cabinet practice requirements in legislation and extends it to most disallowable instruments.<sup>97</sup>

Standards and rules under the CSA have been made available on line (creating links to the government legislation website) and professional bodies are highly engaged in using those resources. As noted above, across a range of tools, greater clarity is needed over what forms the body of law and what is purely administrative/operational.

In addition, there is not a well-developed performance measurement, review and reporting system in place to assess how the ‘law’ is working in practice for the cadastral

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<sup>92</sup> These sections cover matters such as assessing risk, efficiency and effectiveness and cost/benefit.

<sup>93</sup> *Regulatory Impact Analysis Handbook* (The Treasury, August 2013) <<http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook>>.

<sup>94</sup> A code of good regulatory practice was developed by The Treasury in 1997 covering the principles of efficiency, effectiveness, transparency, clarity and equity. These principles have been developed further to reflect economic objectives and the concepts of proportionality, flexibility, certainty, transparency and capability as outlined in *Best Practice Regulation: Principles and Assessments* (The Treasury, February 2015) <<http://www.treasury.govt.nz/regulation/bpr>>.

<sup>95</sup> Legislation Amendment Bill (213-1).

<sup>96</sup> *Disclosure Requirements for Government Legislation* (Cabinet Office Circular, CO (13) 3) at [5] <[http://www.dPMC.govt.nz/sites/all/files/circulars/coc\\_13\\_03.pdf](http://www.dPMC.govt.nz/sites/all/files/circulars/coc_13_03.pdf)>.

<sup>97</sup> Legislation Amendment Bill (213-1), c157K.

survey regime.<sup>98</sup> As such, the renewed interest and leadership in academic and government circles in terms of “regulatory excellence”<sup>99</sup> and “regulatory stewardship”<sup>100</sup> gives an opportunity to promote discussion about enhancing design of subordinate instruments under the CSA and to create more transparency in reporting and forward planning.

The 2003 Treasury Working Paper *Encouraging Quality Regulation: Theories and Tools*<sup>101</sup> identified “potentially significant gaps” in the Executive’s pre-legislative process. A lack of detail was noted about how regulatory proposals are intended to be implemented or monitored and that “transparency” is a strong incentive to promote regulatory quality:<sup>102</sup>

... [transparency] makes failures more open to scrutiny both by those responsible for assessing bureaucratic performance and by those affected by the regulation. The latter are therefore better placed to challenge low quality regulation.

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<sup>98</sup> The Government’s stewardship expectations define “regulatory regime” as all elements required to make regulation function, including statutory and non-statutory instruments, capability and functions and organisational culture; *Memorandum to the Cabinet Committee on State Sector Reform and Expenditure Control SEC (13) 8: Regulatory Systems (Paper Two): Improving New Zealand’s Regulatory Performance* (Office of the Minister for Regulatory Reform, March 2013) at [Annex 1] <<http://www.treasury.govt.nz/regulation/informationreleases/pdfs/reg-2597298.pdf>>.

<sup>99</sup> Demonstrated through initiatives including the Government Regulatory Practice Initiative “G-Reg”, a cross-agency series of working groups convened by MBIE since 2015. See also the suite of papers of the ‘Best-in-Class Regulator Initiative’ (Penn Program on Regulation at <<https://www.law.upenn.edu/institutes/ppr/bestinclassregulator/>>; and Cary Coglianese *Listening, Learning, and Leading: A Framework for Regulatory Excellence* ( Penn Program on Regulation, 2015) <<https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreportpdf>>.

<sup>100</sup> Initial regulatory stewardship expectations were set out in Cabinet decision March 2013 (CAB Min (13) 6/2B and published online as *The 2013 Expectations for Regulatory Stewardship* <<http://www.treasury.govt.nz/regulation/stewardship>>; and were followed by specific advice to departments from the Hon Steven Joyce, Minister of Regulatory Reform.

<sup>101</sup> *Encouraging Quality Regulation: Theories and Tools* (New Zealand Treasury Working Paper 03/24 September 2003) <<http://www.treasury.govt.nz/publications/research-policy/wp/2003/03-24/>> at [4.3.1]. This paper led to significant reform of the regulatory impact assessment tools and guidelines the Treasury developed from 2004.

<sup>102</sup> Treasury, above n 101 at [4.3.2].

## 2 *Regulatory stewardship*

The Government has focussed efforts since 2013 on developing the Executive's 'regulatory stewardship', which has included commissioning the Productivity Commission to investigate and report on how to improve the design and operation of regulatory regimes.<sup>103</sup> This has resulted in a renewed framework of expectations on departments relating to "best practice regulation". These initiatives are still being implemented (driven through both Ministerial direction,<sup>104</sup> and updated functions and duties of chief executives under s32 of the State Sector Act).<sup>105</sup>

An initial group of seven regulatory agencies has been required to prepare 'annual regulatory system reports' and is in the process of preparing regulatory management strategies.<sup>106</sup> It is expected that in the next year or so, more agencies with regulatory functions and responsibilities will produce such strategies and formalise review programmes.<sup>107</sup> This supports a general commitment of government to be more open, transparent and accountable when developing regulation.

The comprehensive nature of these measures including the use of regulatory performance assessment tools<sup>108</sup> will support greater transparency particularly at scoping and development stages to ensure:

- a sound rationale is developed for rules and standards under s49 of the CSA before the PCO is instructed; and

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<sup>103</sup> Productivity Commission, above n 26.

<sup>104</sup> *The 2013 Expectations for Regulatory Stewardship* above n 100.

<sup>105</sup> State Sector 1988, s32(1)(d)(iii); makes specific reference to stewardship of legislation. Agencies now include priorities for their regulatory review programmes in 4-year plans.

<sup>106</sup> See < <http://www.treasury.govt.nz/regulation/fitforpurpose/stewardship-strategies> > for information about the regulatory strategies prepared and links to *MBIE's Regulatory Management Strategy* (Ministry of Business Innovation and Employment, August 2016) <<http://www.mbie.govt.nz/publications-research/publications/regulatory-systems-programme/regulatory-management-strategy-15-august-2016.pdf>>; and the Department of Internal Affairs' *Regulatory Strategy 2016-17 Internal Affairs* (Department of Internal Affairs, September 2016) <[http://www.dia.govt.nz/diawebsite.nsf/Files/Regulatory-Strategy-2016-17/\\$file/Regulatory-Strategy-2016-17.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Regulatory-Strategy-2016-17/$file/Regulatory-Strategy-2016-17.pdf)>.

<sup>107</sup> While LINZ has a priority to review the cadastral survey rules, it has not formally progressed a 'regulatory system report' or regulatory management strategy that specifically addresses the cadastral survey regime.

<sup>108</sup> *Memorandum to the Cabinet Committee on State Sector Reform and Expenditure Control SEC (13) 8: Regulatory Systems (Paper Two): Improving New Zealand's Regulatory Performance* (March 2013) above n 98 at [18] and [Annex 1].



- the decisions made are well documented and explained for the public record.

## *VII. Conclusions - addressing perceptions, building good practice*

### ***A The cadastral survey regime is fundamentally sound***

Reliability, accuracy, clarity, transparency and accountability are at the heart of recent criticisms of the Rules for Cadastral Survey 2010, as noted through complaints to the Regulations Review Committee and an action to seek declaratory judgment by the Institute of Cadastral Surveying (ICS).<sup>109</sup>

The Institute of Cadastral Surveying Inc v Land Information New Zealand, LINZ was tested closely on the design, process and engagement used to develop the 2010 Rules. Chisholm J noted:<sup>110</sup>

"Taken as a whole, the statutory scheme indicates the S-G [Surveyor-General] has been entrusted with wide functions that directly impact upon cadastral surveyors. To the extent that it has deemed necessary, Parliament has included statutory safeguards in the legislation (ss7(2), 47(5) and 49(2) and (3)). All in all it is a comprehensive package".

As a whole the cadastral regime works well in terms of developing subordinate instruments.

### ***B Greater involvement of the PCO in drafting subordinate instruments will improve the quality of regulation***

Cadastral rules under s49 are no longer considered 'deemed' regulations, but "legislative instruments" (a return, in part, to pre-2002 regulations development process, though excluding Cabinet and the Order in Council process). It will provide a check / balance against the risk of bias towards a political or technical mindset.

The principle in Carter, McHerron and Malone appears sound:<sup>111</sup>

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<sup>109</sup> The ICS has challenged LINZ on the basis of certification of cadastral survey data and what constitutes a cadastral survey dataset.

<sup>110</sup> The Institute of Cadastral Surveying Inc v Land Information New Zealand [2012] NZHC 1335, Chisholm J at [36].

<sup>111</sup> Carter, McHerron and Malone above n 3 at [3.4.3].

if the instrument is a disallowable instrument under the Legislation Act 2012 it should be published in the LI series unless there is a good reason justifying separate publication

However, there are likely to be concerns that this approach is inconsistent with the approach taken for similar functions proposed for the Registrar-General of Land in the Land Transfer Bill 2016.

The role of the Surveyor-General, since the 1840s, has been that of a specialist technical advisor and decision-maker, rather than a specialist law drafter. A key question is, who (or what role) is best to advise on the quality of drafting as a check and balance and when?

As a matter of principle, if more scrutiny is desired, then it points to:

- making rules and standards under the CSA formal regulations and using Cabinet processes to approve them; or
- moving the rules into the primary legislation.

In contrast, if less scrutiny of quality is acceptable, then the potential direction is to promote an amendment to s49(4) of the CSA to remove reference to “legislative instrument”.

***C Greater Ministerial or Cabinet oversight of subordinate instruments made by statutory officers is unlikely***

The processes used by the Executive (collectively, the Surveyor-General and LINZ as a support function) to develop rules and standards under s49 of the CSA is designed to keep the Minister of Land Information informed, but it is more about oversight of stakeholder engagement and process rather than oversight of content or technical merit.

To achieve greater Ministerial or Cabinet oversight may make processes unduly onerous and inefficient. In the worst case, this may create more incentives to ‘tick the box’ on the legal and regulatory analysis needed to consider regulatory proposals properly.

Government responses to the concerns raised since 1999 firmly rejected calls for a wider range of delegated legislation to receive greater scrutiny by Cabinet. At the time, the Government noted that:<sup>112</sup>

- Cabinet's primary function is to take decisions, not to scrutinise or monitor.
- Cabinet is not generally concerned with minor or technical decisions.
- Ministers are more concerned with whether regulations effectively implement government policy than with technical issues such as drafting.
- Cabinet has streamlined its processes, reducing the number of technical issues that it considers.

In the short-term, it is unlikely that Cabinet will invite greater scrutiny over subordinate instruments (or promote amendment to the Cadastral Survey Act to require greater Cabinet oversight). The emphasis is on improving the 'pre-legislative' and pre-decision-making process that will improve quality of regulation through stronger regulatory stewardship. As departments enhance transparency of decision-making, engagement with affected parties and formalise strategies and review processes for regulatory regimes, there is little doubt that the quality of delegated legislation will improve. However, the opportunity for greater pre-legislative scrutiny will not be taken; it will be too costly, increase timeframes, and overload the system.<sup>113</sup>

#### ***D The ideal process to develop new cadastral survey rules***

The focus and impetus for action around regulatory stewardship initiatives points to refreshing and enhancing current practice, rather than developing new mechanisms or adding more process requirements.

If we consider that LINZ will be reviewing the legislative instruments under the CSA in coming months, what elements in the development and approval process would be considered 'best practice' that may enhance legislative quality? For example, through:

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<sup>112</sup> *Further Government Response to the Report of the Regulations Review Committee on its Inquiry into Instruments Deemed to be Regulations – an examination of delegated legislation*, above n 32 at [14] – [17].

<sup>113</sup> Note the comments about separation and independence of independent statutory powers (where Ministers do not have control) helps to ensure “a judicial independence of decision” and “credible processes of independent scrutiny, supervision and advice” in Rt Hon Sir Kenneth Keith *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government in the Cabinet Manual* (Cabinet Office, Department of Prime Minister and Cabinet, Wellington, 2008) at 5.

- pre-legislative scrutiny (content and Executive process); and
- accountability and transparency (to Parliament and the public).

Sir Geoffrey Palmer lauds the Law Commission process that uses systematic methods of approaching problems and solving them.<sup>114</sup> He notes 12 points for process that will deliver well-reasoned legislation that is more likely to work because it has been rigorously tested before enactment. The Law Commission process is very much an ‘ideal’. The challenge is to scale the approach to apply, not just for large-scale primary legislative proposals, but to smaller, more specific areas (or “problems” if you consider traditional ‘intervention logic’ and risk-based regulation).<sup>115</sup>

A series of options and incorporates the process steps recommended by Sir Geoffrey into current executive process is illustrated in Figure 7.<sup>116</sup>

Key points to note are:<sup>117</sup>

- Scoping – use remit/ask advice or test design (including changes to design) with the Legislation Design and Advisory Committee and the PCO.
- Assess operational impact, consider how to implement and over what time period.
- Consider the statutory consultation requirements a ‘minimum’; ensure process provides meaningful, open and transparent consultation with interested and affected parties (public, other departments, professional bodies, at scoping stage and Regulations Review Committee).
- Ensure a rigorous approach is taken to establish the rationale for intervention, the options and to develop a comprehensive implementation plan that addresses legislative and administrative activities.
- Ensure the PCO or specialist drafters are used to draft the instrument in line with the requirements of the Legislation Act 2012.

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<sup>114</sup> Geoffrey Palmer, *The Law Reform Enterprise: Evaluating the Past and Charting the Future* (2015) 131 LQR at 415.

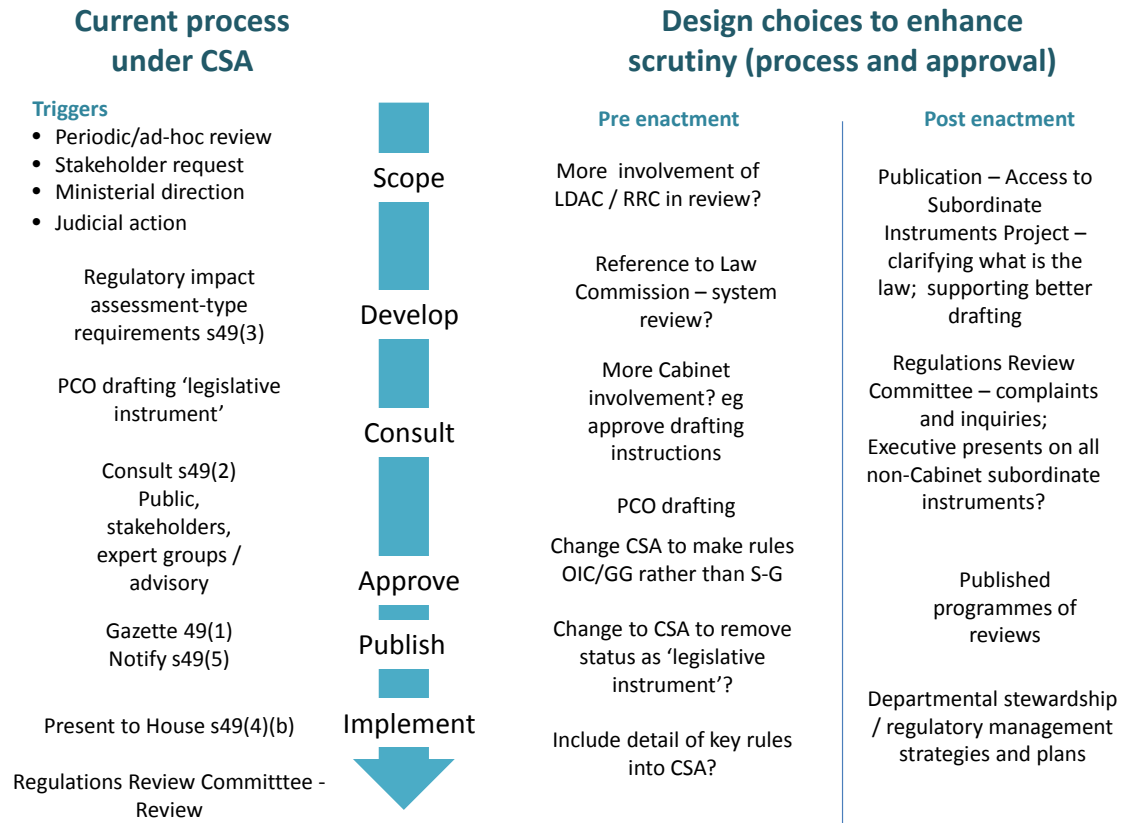
<sup>115</sup> Consider Professor Malcolm Sparrow’s approach to understanding, assessing and unpicking the “knots” of problems in *The Character of Harms* and *The Regulatory Craft*. This is very similar to a strongly analytical and systematic approach advocated by Sir Geoffrey and the current Law Commission process.

<sup>116</sup> Geoffrey Palmer, above n 114.

<sup>117</sup> Refer also to Geoffrey Palmer, *Lawmaking in New Zealand: Is there a better way?* (2014) 22 Waikato L Rev VII.

- Keep Ministers informed.
- Regularly review the suite of tools.

Figure 7 Improving process and regulatory design



Improvements in scoping, developing, testing, consulting and information-sharing need to restore confidence that:

- There are adequate checks and balances in the regulatory regime for land surveying.
- There is adequate scrutiny of legislative proposals given effect through subordinate instruments with considerable technical content.

As the Hon. Doug Kidd said in May 2002 during the committee stage of the Land Transfer and Cadastral Survey Legislation Bill:<sup>118</sup>

It is something that we do not address very often in this Parliament, so on the rare occasion, some decades apart, when we do, then we ought to take the trouble to take it seriously because what we do had better work as it is unlikely to get back on the legislation priority list any time soon.

Amendments to the CSA and proposals to create or amend subordinate instruments under this statute are infrequent and therefore need to be fully tested when the opportunity arises. However, allocating resources for thorough analytical work will always be subject to political priorities driven by the Government of the day.

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<sup>118</sup> Hon Doug Kidd (2 May 2002) 600 NZPD 16001.

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