

“Here there be dragons”

*Using systems thinking to explore
constitutional issues*

by

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For Paul,

*who asked the question that sent me on the search for
constitutional dragons*

Abstract

Too often the constitutional dimension of a policy problem is overlooked or under-valued in a process of developing governmental responses to difficult situations. Constitutional issues can be subtle and interlinked, creating a fine balance that can be altered by even minor shifts in policy. It can be difficult to predict the long-term effects of constitutional change, and concern about those effects is likely to be subsidiary to the pragmatic concern with solving the immediately presenting problem. The constitutional response to the Canterbury earthquakes, for instance, highlighted New Zealand's willingness to favour pragmatism and authoritarianism over some constitutional norms in the right circumstances. The Canterbury Earthquake Recovery Act 2011 did not sit as easily with New Zealand's constitutional norms as it could have. Although now repealed, the Act remains in public sector consciousness as a precedent for future large-scale disaster recoveries.

Through a case study based on the Canterbury earthquake recovery legislation, this thesis demonstrates that it is possible to think of a constitution as a conceptual system. This means soft systems thinking approaches can be used to understand and explore constitutional issues. Such approaches have long been applied to human and social processes to better understand their structure and operation. This thesis explores whether applying those approaches to constitutional issues will create fresh insights into those issues and their effects on the broader constitution. Reflecting that systems thinking approaches may be used in busy policy shops, the thesis considers whether these approaches are analytic, quick, and inclusive (Eden et al, 2009).

The strength or weakness of a systems-based intervention depends on its fit with the situation to be analysed and with the actors undertaking the intervention (Mingers, 2000). Systems approaches are based in paradigms, which suggests that viewing issues through a range of systems lenses should generate different insights. With that in mind, this thesis triangulates the selection of systems approaches based on their fit with the problem context, and with the available resources and skills. Using that triangulated approach, Soft Systems Methodology and Soft System Dynamics (reinforced by a systems-based policy framework developed by van der Lei et al (2011)) were selected to analyse three dimensions of the Canterbury earthquake recovery legislation:

- the extent to which the Canterbury Earthquake Recovery Act 2011 created a system to ensure legitimate decision-making;
- the need for coordination or centralised control of earthquake recovery activities;
- the need for expedited law-making under the 2011 Act, and the legitimacy of its Henry VIII clause.

The systems analysis incorporates both constitutional norms and values to show how the constitution “really works”, an approach which resonates with the theory of constitutional realism (M S R Palmer, 2006a, 2006b). A systems perspective gives a real-world perspective on constitutional legitimacy and can explain otherwise counterintuitive manifestations of constitutional behaviour. It provides a plausible explanation for the self-correcting faculty apparent in the Canterbury Earthquake Recovery Act’s real world operations. There is, thus, potential for constitutional systems analysis to strengthen advice to governments and enhance public understanding.

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They say it takes a village to raise a child. Looking back over the past six years, I think the same thing can be said for a thesis. While the inspiration for this thesis and the work that went into creating it are undoubtedly mine, it would not have come into being had I not had the modern equivalent of a village supporting me.

This thesis is the result of a conversation in our kitchen one sunny afternoon. As I was waxing lyrical about the potential for systems thinking to aid constitutional analysis, I commented that someone really ought to do a doctorate on it. “Why don’t you?” was Paul’s response. He proceeded to systematically demolish all my objections and has unwaveringly supported me through the last six years. He has entertained our children on the weekends to give me study time, and has endured snowdrifts of drafts and teetering piles of texts on our dining room table without complaint. Most importantly, he provided the safe haven I needed to form and test ideas, and celebrated my milestones with me.

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Sarah Kerkin

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Introduction

This thesis was born out of a sense that there must be a better way of doing constitutional policy, and bringing about (or responding to) constitutional change. As Chapter I describes, too often the constitutional dimension of a problem is overlooked or under-valued in a process of developing “ad hoc pragmatic responses to the reality of negotiating difficult situations” (M. S. R. Palmer, 2007).

Constitutional issues can be subtle and interlinked, and create a fine balance which can be altered by even minor shifts in policy. Constitutional principles are both nuanced and, at the margins, contested.¹ Individual changes can be made without sufficient appreciation that they carry sometimes significant constitutional implications (Constitutional Arrangements Committee, 2005, p. 13). When constitutional linkages are not well-understood, changes that affect the constitution are considered in isolation, and their consequences are under-emphasised and under-appreciated.

New Zealand’s unwritten constitution, coupled with a cultural emphasis on “number 8 wire” pragmatism² or – as Pouwels (2015) would have it – intellectual laziness, has traditionally allowed New Zealand to go “about the business of constitutional reform in an ad hoc fashion, very much dependent on the personalities and political winds of the day” (Malone, 2009). In practice it means that nobody notices the constitution until the wheels start falling off, by which time it may be too late to develop and implement a constitutionally desirable response, leaving a pragmatic short-term fix as the most viable

¹ See, for instance, the debate on the “thick” and “thin” conceptions of the rule of law (Bingham, 2010; Tamanaha, 2007; Waldron, 2008). See also the contested approaches to defining the scope of parliamentary sovereignty and the proper sphere of judicial review (Chapter II.4.4B).

² Number 8 wire is a 0.16” diameter gauge of wire on the British standard wire gauge. It was the preferred wire gauge for sheep fencing, so remote farms often had rolls of it on hand and it has often been used inventively to solve mechanical or structural problems (Orsman, 2011). Accordingly, the term “number 8 wire” has come to represent ingenuity and resourcefulness, and the phrase “a number 8 wire mentality” has come to denote the ability to create or repair machinery using whatever scrap materials are available to hand (Bardsley, 2008; Bridges & Downs, 2000).

response. Compounding this, it can be difficult to predict the long-term effects of constitutional change. Even where some effects can be predicted, concern about possible effects on apparently ephemeral or abstract constitutional principles is likely to be subsidiary to the pragmatic concern of solving the immediately-presenting problem.

There are many possible “better ways” to make constitutional policy. New Zealand has previously heard calls for an entrenched superior law bill of rights, which would enable an unelected judiciary to limit parliament’s law-making power (Geddis & Fenton, 2008; G. Palmer & Butler, 2016; G. Palmer, 1985). There have been calls for an independent institute to foster a better public understanding of, and informed debate on, New Zealand’s constitutional arrangements (Constitutional Arrangements Committee, 2005, rec 3), and an institutionalised “ongoing conversation” about the constitution (Constitutional Advisory Panel, 2013; Constitutional Arrangements Committee, 2005, rec 1). A constant refrain over recent years has been the need to strengthen civics and citizenship education in schools to ensure the next generations of voters and decision-makers understand the advantages of living in a stable democracy and the obligations that go with it (Constitutional Advisory Panel, 2013; Constitutional Arrangements Committee, 2005; Justice and Electoral Committee, 2013, 2016).

As a policy advisor with responsibilities for advising on a range of constitutional issues, I am less concerned with whether more information about the constitution is needed than I am with whether people (including policy makers, parliament, constitutional officeholders and the public) have the right information and analytical tools to help them understand the implications of constitutional change. My “better way” involves new analytical tools to identify and help us understand the effects of particular changes on constitutional values and norms. By showing the effects of particular changes in a system-wide context, I hope to make the consequences of constitutional change more apparent and relevant to decision-makers and the public. A stronger focus on constitutional norms and values, and their interrelationships would help policy

makers to better identify unintended consequences and to tell a compelling story about those consequences and any important trade-offs. That would promote better, more accountable decision-making. At the same time, new analytical tools need to be capable of providing answers expeditiously: constitutional issues can emerge quickly and with little warning, although on closer examination their causes may lie many years in the past.

My sense of needing a “better way” to do constitutional policy was sharpened by the government’s and parliament’s response to the Canterbury earthquake sequence that began in the dark hours before dawn on 4 September 2010. In the months that followed, particularly after the 22 February 2011 earthquake in which 185 lives were lost (New Zealand Police, 2012), many of Christchurch’s iconic buildings were badly damaged, thousands of people were displaced or faced months of living without functioning water and sewerage systems, and many were to wait months or years for insurance claims to be resolved and rebuilds or repairs to be completed (some are still waiting). While the people of Canterbury prepared to endure years of aftershocks, parliament set in train a series of constitutional seismic shifts whose after-effects look set to continue well into Christchurch’s regeneration.³ What shook my confidence in New Zealand’s constitutional arrangements was the widespread assumption of many parliamentarians that we could either have constitutional protections against arbitrary and unfair state action, or we could have a timely recovery from the earthquakes, but we could not have both. This struck at the heart of my belief that a constitution and its people are closely connected and that it can (and should) protect our most vulnerable citizens against arbitrary or unfair state action in their hour of greatest need. A constitution that cannot do so risks losing its legitimacy in the eyes of the very people it is supposed to protect.

The constitutional response to the Canterbury earthquakes was a stark example of New Zealand’s tendency to favour pragmatism – and authoritarianism – over principle. Parliament swiftly passed laws that centralised power in the executive

³ Orpin and Pannett (2010) describe the Canterbury Earthquake Response and Recovery Act 2010 as a “constitutional aftershock”, and Gall (2012) as a “seismic shift”.

while short-circuiting “bureaucratic” legal constraints and requirements.⁴ Their subtext: flexibility, speed and a controlled spend for the recovery trumped all other considerations, and people would need to trust the government not to abuse its powers. While people can — and still do — argue about different aspects of the recovery and the government’s approach to date, there have been very few instances of executive decision-making that ran foul of constitutional norms. Despite that, the constitutional response leaves open the question: was there a better way? The Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011 simultaneously resonated and conflicted with New Zealand’s constitutional values. The Acts did not sit as easily with New Zealand’s constitutional norms as they might have. Although now repealed, the Acts remain in public sector consciousness as a precedent for future large-scale disaster recoveries.

In fact, between submitting this thesis for examination and the examination itself, a sequence of earthquakes near Kaikōura led to enactment of the Hurunui/ Kaikōura Earthquakes Recovery Act 2016, which was closely modeled on the 2011 Act, but with some important differences that addressed some of the key criticisms set out in Chapters V-VII. Those differences include a narrower scope for the Henry VIII clause, statutory requirements for key decision-makers to give reasons, and a requirement to consider public participation options. I had discussed the ideas in this thesis with officials from the Ministry of Civil Defence Emergency Management before the Kaikōura earthquakes. I also discussed the ideas with officials developing the Kaikōura legislation in my capacity as a member of the Legislation Design Advisory Committee. I believe those conversations influenced officials’ approach to developing the new legislation.

This thesis explores whether soft systems thinking can provide the analytical tools I seek. Management scientists have developed systems thinking to aid

⁴ The 2010 Act was enacted in a single day. The Canterbury Earthquake Recovery Act 2011 repealed and replaced the 2010 Act after the 22 February earthquake, and took just three days to enact.

their understanding of organisations and human activity systems. As I explain in Chapters I and II, the system paradigm may be a useful metaphor for the purposes of constitutional analysis, particularly if a realist view of the constitution is taken.⁵

I have not identified any previous attempts, whether in New Zealand or elsewhere, to analyse constitutional issues systematically using soft systems methodologies.⁶ While terms like a “constitutional system” or a “system of government” are sometimes used, I have not unearthed any literature showing constitutional analysis undertaken using specific systems methodologies. This thesis, then, appears to be the first of its kind. I have, thus, set out to explore the territory between two disciplines. Like the explorers of old, I am armed with a map that shows the limits of current knowledge. The area beyond is marked with the unsettling warning “here there be dragons”.

Using the Canterbury earthquake legislation as a case study, this thesis explores whether using systems methodologies creates new or different insights into constitutional issues. It also tests whether different methodologies are likely to lead to different insights, which has implications for methodology selection: how can policy advisers select the systems methodology that is best for analysing a particular constitutional issue?

Chapter I explores the problem this thesis seeks to solve and poses the questions it aims to answer. Chapter II outlines the theoretical framework for the thesis. Given the focus on exploring whether systems thinking can help to explore constitutional issues, Chapter II focuses on the literature that describes systems thinking and that identifies and classifies systems. It also considers the strand of constitutional literature that helps to assess whether the system metaphor can meaningfully be applied to the constitution for analytical

⁵ A realist understanding of the constitution identifies the substantive elements of the constitution and also those who interpret and apply those elements, and the incentives to which those people are subject (M. S. R. Palmer, 2006b).

⁶ Adrian Vermeule’s book *The system of the constitution* (2011), takes a structural approach to constitutional analysis but does not conduct that analysis using soft systems methodologies.

purposes. Given the scale of constitutional literature, Chapter II does not try to cover the field, but focuses on the constitutional issues most pertinent to the systems analysis. It is augmented by additional material in Chapters V, VI, and VII canvassing specific constitutional concepts relevant to those chapters.

Chapter III explains the methodology used in this thesis. Because the systems thinking field is also vast, many system methodologies, methods, and tools could have been used in the case study, and Chapter III develops a method for methodology selection. I believe this method could be used in a policy shop, so I have reported on how I developed and used it, and the insights I gained from doing so. Chapter III deploys that method to select two system methodologies to be used in the case study that is central to this thesis.

Chapters IV to VII contain the substantive analysis conducted for the case study. Much of the substantive analysis is contained in the Tables and Figures. They are not merely adjuncts to the text, but need to be read with it. Chapter IV sets out the “cultural” analysis required to ground and contextualise the systems analysis. Chapter V explores the Canterbury earthquake legislation’s effect on legitimacy. Chapter VI examines the government’s approach to coordinating recovery activities, and Chapter VII explores possible approaches to expedited law-making.

Chapter VIII discusses the insights gained from the case study and considers the potential utility of systems thinking in public sector constitutional policy development. Because the case study has broken new ground, Chapter VIII also considers the experience gained in deploying systems methodologies, and what could be done differently. It identifies where further research could test the conclusions reached here and expand the research to include other policy areas.

Chapter I: The research objective

This chapter explains the what, why and how of this thesis: what the problem is that this thesis seeks to address, why that particular problem needs to be addressed, and how it will be addressed.

I.1 What: the research questions

This thesis tests whether applying the discipline of systems thinking to constitutional theory and practice can generate fresh insights into its operation, thereby ensuring that policy advice on constitutional change is more fully informed and soundly based. It asks two relatively simple questions:

- Could systems thinking create new or different insights into constitutional policy issues and their effects on the broader constitution?
- Are different systems methodologies likely to create different insights when applied to constitutional policy issues and, if so, how can we identify the methodologies that are likely to be most appropriate for analysing constitutional policy issues?

Underpinning these questions is my assumption that a system metaphor can meaningfully be applied to the constitution such that its inner workings can be modelled in order to:

- understand how and why they operate in a particular way; and
- predict how their workings might be affected by changes to their component parts or the wider environment.

The idea of using models to understand constitutional operations is not new. Gee and Webber (2010) observe that real world constitutions tend to be complex and contingent, and our grasp of their intricacies is fragile.

To deal with that we can, to quote Gee and Webber (2010, p. 291, citing Loughlin, 2000, p. 52):

employ models, more or less explicitly, to help us “describe events, ascribe causality between events, impute motive or intention, discern meaning, and apply norms as standards of evaluation”. That is to say we employ models to help make sense of real world constitutions.

What is new is the idea of using soft systems methodologies to explore constitutional issues. My reading of systems thinking literature suggests it is not a great leap. The purposes of modelling in systems thinking and in constitutional theory seem to be aligned. In essence, the major aim of systems modelling is insight into what is happening in the real world around us (Davies & Mabin, 2001). “We all interpret the world through models”, which may be explicit or tacit (Hoverstadt & Bowling, 2002). The process of framing and re-framing problems and contexts can also generate new insights (Davies & Mabin, 2001).

Using models explicitly allows us to compensate for the limitations of particular modelling processes, for models are a double-edged sword. While they create rigour and boost creativity by imposing structures on users’ thinking and forcing them to address issues that might not otherwise have occurred to them, models can limit creativity through the mental framework imposed by the modelling method itself: some questions just will not be raised (Bennett et al, 1997). That means a choice needs to be made about the models that are likely to be most relevant or insightful in exploring any given situation (Checkland, 2000, p. S15).

The research questions are not answered as abstract theoretical questions. They are explored through a case study centred on the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act) and the Canterbury Earthquake Recovery Act 2011 (the 2011 Act). Those Acts shifted the balance in New Zealand’s constitutional arrangements and may yet become precedents for future large-scale disaster recovery legislation. This thesis therefore explores the questions by analysing specific aspects of those Acts to see whether

systems modelling could have raised new or different insights and generated different options for the government to consider.

I.1.1 Testing assumptions

Despite the alignment I see between constitutional theory and the system paradigm, the research questions cannot be answered until I have tested two critical and closely related assumptions. They are, first, that systems methodologies developed in other contexts are appropriate for constitutional issues and, secondly, that system modelling is a fruitful approach to constitutional analysis.

Testing the first assumption requires consideration of the contexts in which systems thinking is normally used. Applied systems thinking emerged from the “interdisciplinary ferment created during the Second World War when scientists from different disciplines found themselves working together on vital military problems” (Jackson, 2009a, p. S24). Systems analysis has been applied to global issues such as energy and food supply (Jackson, 2003, p. 49). Systems engineering has been used in industrial and military systems, and in aerospace and energy programmes (Jackson, 2003, p. 49). Systems thinking is also used in logistical contexts, such as managing stock flows (see, for example, Maani & Cavana, 2007, pp. 199–224). More recently, systems thinking has been applied in organisational management, particularly to strategic planning, managing complexity, and solving ‘messy’ problems (Ackermann, 2012; Checkland, 1981, pp. 154–155; Mitroff & Mason, 1980). Systems methodologies do not generally confuse the conceptual framework for thinking about a real world problem with the real world itself. As a discipline, then, systems thinking has been adapted to different contexts and problems, including to abstract human activity systems.

The first assumption requires consideration of whether a system metaphor is meaningful in the context of a constitution. To test this assumption I need to consider:

- the defining characteristics of a system;

- whether those characteristics resonate with constitutional concepts New Zealand's constitution appears to possess those characteristics; and
- whether New Zealand's constitution possesses other characteristics which would suggest it cannot plausibly be viewed as a system.

This requires consideration of New Zealand's constitution and, particularly, its boundaries (i.e. what is constitutional, and how does one decide that?). The core of New Zealand's constitution is relatively well-settled, although there still appears to be room for argument at the margins. For the purposes of systems analysis, a boundary (albeit a permeable one) will need to be drawn around the constitutional system. This will require a definition of what is constitutional and what is not, with criteria for making decisions at the margins.

There is no standard and complete definition of New Zealand's constitution. Matthew Palmer (2006b, p. 133) notes that there has been little academic interest in exploring the definition of New Zealand's constitutional content, perhaps because of the "vague and ever-changing nature of the constitution" and the "unnervingly broad" scope of the task. Chapter II draws from a considerable body of research to inform a workable definition for the purposes of this thesis.

In testing the second assumption (that modelling is a fruitful approach for constitutional analysis), I have been guided by Checkland's approach in developing the soft systems methodology (SSM).

To quote Checkland (1981, p. 150):

I was interested to see to what extent 'hard' systems thinking could be applied both to the kind of fuzzy problems which managers face and to social problems which are even less well defined. I did not imagine that methods suitable for tackling 'hard' engineering problems would survive unscathed their transfer to 'soft' problem situations; on the other hand there seemed no justification for postulating at the start some novel methodology hopefully suitable for ill-defined problems in social systems. If the work started from the well-established methods of goal-directed systems analysis and consisted of trying to use them in ill-defined problems, then it would be possible both to cling on to the known as far as possible and to mark out the areas in which the known failed.

Testing the second assumption also requires consideration of: the challenges that may arise in applying systems thinking to a constitution; the modifications that might be necessary; and the limits to systems thinking. I have tested this assumption through the practical application of systems thinking in the case study analysis in Chapters V-VII. Chapter VIII contains my conclusions on the challenges of applying systems thinking to a constitutional issue, and the limits to systems thinking that I observed.

I.2 Why answering the research questions is important

Answering the research questions will advance the search for policy tools to ensure constitutional change is recognised for what it is, and to identify and avoid unintended consequences of constitutional change. Constitutional issues can present analytical challenges, particularly when they present as part of a large, complex problem that requires rapid intervention. Effective methods for dealing with complex public problems need to be inclusive, analytic, and quick, and it can be hard to deal with all three challenges simultaneously (Eden et al, 2009). These challenges are sharpened by the nature of New Zealand's constitution and its operating context.

The uncodified nature of the constitution means it can be quite abstract and impenetrable. Indeed, to many New Zealanders, the constitution is largely invisible and taken for granted, if it is considered at all. The many sources of New Zealand's constitution can make it difficult to identify and understand. When the workings of the constitution are, to all intents and purposes, invisible because they cannot be identified or understood except by scholars and experts, it can be easy to lose sight of the reasons for the limits imposed on public power. Then, the responsibility for protecting and upholding the constitutional limits is left with an informed few who may or may not be accountable for their actions.

Compounding this, in New Zealand, popular concern for pragmatic solutions to problems can overwhelm and largely ignore constitutional principle. An uncodified constitution can evolve to meet new situations as they arise, but this kind of flexibility is both a strength and a weakness. Flexibility enables incremental changes to be made in a relatively low-key way as the need arises. New Zealand has a strong tradition of dealing with constitutional matters one issue at a time through a process of “pragmatic evolution”. This brand of pragmatism has a strand of anti-intellectualism (Moloney, 2010), which may inform the counter-charge that pragmatic evolution is a euphemism for laziness (Pouwels, 2015). Constitutional decision-makers, particularly the executive and parliament, have strong incentives to be, and to be seen as, responsive to emerging, pressured situations. Tensions between constitutional principle and pragmatic responses have been seen in recent years in examples as diverse as employment law,⁷ police covert surveillance,⁸ and the Canterbury earthquakes.⁹

In short, problems can emerge when changes are made to aspects of our constitutional arrangements without a full appreciation of their consequences on the wider constitutional “system”. Sometimes the consequences are not

⁷ The Employment Relations (Film Production Work) Amendment Act 2010 was rushed through parliament in short order. Popularly known as “The Hobbit legislation”, Wilson (2011) views it as an example of government fiat and the unions as an industrial dispute (Kelly, 2011), whereas the Prime Minister viewed it as simply settling the law “to give film producers like Warner Brothers the confidence they need to produce their films in this country” (Radio New Zealand, 2010).

⁸ The Video Camera Surveillance (Temporary Measures) Act 2011 retrospectively validated covert camera surveillance operations affected by the Supreme Court’s ruling in *Hamed v R* [2011] NZSC 101. The government announced that it would introduce validating legislation and sought to pass it under urgency. Public outrage caused the government to rethink both the parliamentary process and the content of the law (Geddis, 2011a, 2015; D. R. Knight, 2011; Levy, 2011; Trevett, 2011; Vance, 2011).

⁹ For criticism of the 2010 Act and its parliamentary process, see A. Bennett, 2010; Gall, 2012; Geddis, 2010a, 2010b; Knight, 2010; Orpin & Pannett, 2010; Robertson, 2010; Temm, 2010. In parliamentary debates (Hansard, 2010) there were contributions highlighting concern with the process and content from Dr Kennedy Graham (first reading), Hon John Boscawen (first reading), Hon Ruth Dyson (first reading), Dr Russel Norman (second reading). Gall (2012) gives a good overview of the parliamentary process. Kenneth Palmer (2011) has a more optimistic perspective on the delegated law-making power in the 2010 Act.

For criticism of the 2011 Act and process, see parliamentary debates on the 2011 Bill, particularly the increasingly sharp interactions between Hon Clayton Cosgrove and the Minister, Hon Gerry Brownlee (Hansard, 2011a, 2011b, 2011c). See also the process concerns expressed by Hon Ruth Dyson in her third reading speech and during select committee hearing of submissions (Hansard, 2011b; Local Government and Environment Committee, 2011).

foreseeable. Sometimes they are foreseen, but not fully appreciated.

Sometimes there appears to be no appreciation of the fact that a change is even constitutional. And sometimes the need to respond to external pressures can lead to a conscious — or unconscious — decision to override constitutional principle. Understanding when something is constitutional and understanding the consequences of constitutional change will lead to better-informed, if not better-quality, decisions. The remainder of this section gives some examples of problems that have arisen in the recent, and not so recent, past.

1.2.1 Understanding when it is a constitutional issue

One of the difficulties with discussing constitutional issues is definitional.

Particularly at the margins, people may not agree that an issue has constitutional implications. And even if they do agree on that, people may not agree on the nature of those implications.¹⁰ As the Constitutional Arrangements Committee (2005, p. 9) observed:

New Zealand may be better served if it developed its capacity for paying systematic attention to constitutional issues as they arise. There is a risk at present that individual changes are sometimes made without sufficient appreciation, by Parliament and the public, that they have constitutional ramifications.

¹⁰ For instance, there is well-documented disagreement on whether Cabinet collective responsibility is a convention of the constitution or merely a political principle that can be ignored at will (Boston & Bullock, 2009; P. Joseph, 2009). The issue arose after the 2005 general election, when the leaders of two minor parties were deemed to be part of executive government by virtue of their ministerial positions but not part of the Labour-led coalition government, nor members of Cabinet. The two leaders were given latitude to disagree publicly with the coalition government outside their portfolio areas (Boston, 2007).

For Joseph (2009), this confirmed that the collectivity principle was “a rule of pragmatic politics, not a constitutional convention”. Boston and Bullock (2009) have methodically worked through a range of issues to demonstrate that the unanimity principle is part of Cabinet collective responsibility and it is, indeed, a constitutional convention because it meets a clear constitutional imperative by providing the constitutional basis for parliament and the people to hold the government to account. That does not mean the convention could not be modified, but it casts the modification in a different constitutional light. The modification has been described as “selective collective responsibility” (Rt Hon Sir Geoffrey Palmer, 2006, p. 34).

This problem was particularly apparent in the debate over the Regulatory Standards Bill in 2010 and 2011. That Bill started out as the Regulatory Responsibility Bill, a private member's bill in the name of Hon Rodney Hide, then leader of the ACT party. Parliament's Commerce Committee (2008) recommended that the Regulatory Responsibility Bill not be passed, but that "the Government establish a high-level expert taskforce to consider options for improving regulatory review and decision-making processes, including legislative and Standing Orders options".

The government-initiated Regulatory Responsibility Taskforce developed an alternative draft bill, which was introduced to parliament as the Regulatory Standards Bill (the Bill), against strong advice from government departments (Cabinet Economic Growth and Infrastructure Committee, 2011; Minister for Regulatory Reform, 2011). The Bill met with widespread opposition, including from the New Zealand Law Society, the Law Commission, and almost all government departments (Beever & Cain, 2010; Ekins, 2010a, 2010b, 2010c; Huang, 2010; Kelsey, 2010; G. Palmer, 2010; Rishworth, 2010; Tanner, 2010).

Debate on the Bill showed a clear disconnect between its proponents and its critics that muddled the constitutional issues and undermined the quality of the debate. The Bill's proponents viewed it as a "more muscular solution which tests the [legislative] process against principles of good legislation" (Scott, 2010, p. 60). The Bill's principles for good legislation were seen as being simple statements of "well-established" principle that already form part of our law (Scott, 2010; T. Smith, 2010).

Kelsey considered the Bill's proponents sidestepped the constitutional implications by focusing their arguments around the twin pillars of better regulation and less regulation and observed that: "At the most superficial level, slogans like 'better regulation' and 'regulatory responsibility' have positive connotations that marginalise critics: who wants to defend worse regulation or regulatory irresponsibility?" (Kelsey, 2010, p. 39). The Bill's critics focused on its

constitutional aspects, including (Beever & Cain, 2010; Ekins, 2010a, 2010b, 2010c; Huang, 2010; G. Palmer, 2010; Tanner, 2010; The Treasury, 2011):

- The content of the principles for good legislation, many of which overstated or wrongly stated the law, lost nuance through oversimplification, were too-strict distillations of more flexible guidelines, and did not recognise the benefits of aligning with international norms and coordinating with trading partners.
- The effect of the Bill's certification regime on relationships between ministers and chief executives of the public service. Certification would have included consideration of essentially political matters, and it was foreseeable that the public service might not always agree that a government's favoured regulation complied with the Bill's principles. In this way, the Bill risked undermining effective working relationships between Ministers and the public service: refusal to certify the government's favoured regulatory approach might be viewed as obstructive rather than constitutionally principled.

The Bill would undoubtedly have had a constitutional effect if passed in its then current form. It would have changed the relationship between the state and the people, and would have redistributed power and responsibility between the branches of state. It created a tension between the executive's right to govern and parliament's power to legislate on the one hand, and judicial scrutiny on the other.

The Bill would have resulted in judges adjudicating on matters of legislative quality that, in reality, would have been essentially political matters of competing priorities for public expenditure or the allocation of regulatory costs and benefits. The adversarial process is not well-equipped to surface and test such issues. Parliament, on the other hand, is well-placed to consider these matters, given its representative nature and its accountability to the people, and the scope for a contest of ideas within its legislative processes.

New Zealanders generally value a form of government that is free to act and responsive to majoritarian concerns (Geddis, 2016, p. 100). People also expect the government (and parliament) to act swiftly and surely when the situation

warrants it. Generally, New Zealand constitutional culture seems to suggest that people would prefer the law to be made by a democratically elected and accountable parliament and government than by unelected and (to the people) unaccountable judges.

In the end, the Bill languished in parliament until the Commerce Committee (2015) recommended it not be passed.

It is not only ideologically-driven legislation that can rearrange constitutional arrangements. Sometimes important changes can be made through innocuous-looking amendments that attract little attention. For instance, in 2005, the Constitution Act 1986 was amended by way of a Statutes Amendment Bill (SAB).¹¹ The changes were described as technical amendments to update the law so that it reflected current practice. They were sensible, but significant, and the procedure for their enactment fell considerably short of best practice.

The amendments were intended to give effect to the recommendations of parliament's Standing Orders Committee to:

- Ensure that a newly elected parliament (rather than the outgoing parliament) has the power to decide which business of the previous parliament would be carried over or reinstated in the new parliamentary session.
- Remove the Crown's financial initiative, a requirement that any bill for the appropriation of public money must be recommended by the Crown. The Crown's financial initiative "reflects a long-standing understanding forged in Westminster in struggles between the King and Parliament" (M. S. R. Palmer, 2007, p. 596; Standing Orders Committee, 2003).

Because the amendments were not introduced until the SAB was at select committee, the public did not have an opportunity to make submissions on them. The provisions were amended at the committee of the whole House

¹¹ Statutes amendment bills are used for non-controversial miscellaneous legislative changes which "should be unrelated to the implementation of a particular policy objective" (Standing Order 261(1)(e)).

stage through a government supplementary order paper, and were subsequently enacted (Parliamentary Library, 2005).

While the amendments made by the SAB were sensible, they were substantive and significant to the exercise of power (M. S. R. Palmer, 2007, p. 596). They were not only “formal” or merely “technical”. The rapid passage of these constitutional changes, after the government had changed its position several time, and with no opportunity for public comment, was arguably “constitutionally outrageous”, while being entirely consistent with the pragmatic nature of New Zealand constitutional culture and the unwritten, evolutionary nature of our constitution (M. S. R. Palmer, 2007, p. 596).

I.2.2 Anticipating unintended consequences

The multiple sources of New Zealand’s constitution, combined with its flexibility, create the risk that constitutional change will result in unintended consequences. New Zealand has a tradition of fixing problems as and when they arise, which creates the risk of inadvertent alterations to the big picture. “Minor repairs here and there may alter the overall balance between the branches of government in a way that is not necessarily foreseen or intended.” (Constitutional Arrangements Committee, 2005, p. 12).

Unintended consequences are more likely to arise when interconnections are not well-understood and the full effects of a change to one part of the constitution are not identified. Failure to identify the effects in advance means mitigating steps cannot be taken. While it will not always be possible to identify consequences in advance, a more systematic appreciation of the constitution’s inner workings could lessen the risk of unintended consequences. Unintended consequences can create the need for further change to address the problem, thus tying up time and resources. That further change can, in turn, precipitate further unintended consequences, which may themselves need to be resolved. This kind of spiral risks undermining the enduring nature of constitutional arrangements.

One of the most striking examples of an unintended consequence was the last-minute inclusion in the Civil List Act 1950. The consequence was not felt until some 34 years later in the constitutional crisis following the 1984 general election (McGee, 2006). The Civil List Act enacted the constitutional convention that members of the executive council must be members of parliament making it, for the first time, a legal requirement rather than an always-observed practice. In 1984 there was a stalemate following the general election. The outgoing prime minister, Sir Robert Muldoon, refused to accede to the incoming Labour government's request to devalue the dollar. The new Labour government could not force the devaluation, but it could not be sworn in to devalue the dollar itself: there were, legally, no MPs because the results had not been finalised and the writ had not been returned.

The immediate crisis was resolved through an extension to the caretaker convention. The outgoing deputy Prime Minister explained that the caretaker convention included the taking of actions required by the incoming government which could not be postponed because of their great "constitutional, economic or other significance" (McGee, 2006). A longer-term solution was created through the tortuously drafted section 6 in the Constitution Act 1986.

Unintended consequences can also result from the accretion of regulatory amendments. Over a long period of time, ad hoc amendments can produce a haphazard construction in which the organising rationale is well and truly buried (Hewison, 2000; McKinlay, 1998, p. 30). For instance, amendments to the Local Government Act 1974 throughout the 1990s and the Resource Management Act 1993 introduced special consultation measures into a raft of local authority planning and resource consent procedures as a means of increasing local authorities' accountability to the public. The measures responded to a concern that too much local government decision-making had taken place with insufficient consultation (McKinlay, 1998, p. 28).

By 1998 it was apparent that the special consultative procedures were having an adverse effect on public confidence in local government, possibly due to

differing expectations which local authorities and their publics had of the consultative process. People appeared to have viewed the submission process as participating in a genuine debate over the issue, and thought their views would influence the outcome in a manner akin to a referendum or survey. The local authorities treated the consultative process as an input into the decision-making process, without that input necessarily influencing their final decision (McKinlay, 1998, p. 27).

McKinlay notes that the special consultative procedure (1998, p. 28):

provides an opportunity for determined opponents, or well organised special interest groups, to play a dominant role at least in terms of timing as opponents prove able to drag out the decision making process. In effect, it can be seen as a manifestation of the problem of the vocal minority versus the silent majority.

Concern with the time taken to resolve legal challenges over local authority planning or consent activities appears to have underpinned the limitation of appeal rights in relation to the Canterbury fresh water management plan¹² and in the National War Memorial Park (Pukeahu) Empowering Act 2012¹³, and in proposed new procedures for local authority reorganisation.¹⁴

1.2.3 The need to respond to external pressures

Lastly, external events can create a strong pressure to respond. Where there is not a deep understanding of, or interest in, constitutional principles and interrelationships, short-term pragmatic solutions may be implemented without thought for the longer-term constitutional implications. The starkest example of such an external pressure is the Canterbury earthquakes, which is

¹² Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010. Sections 52 to 55 exclude the Environment Court and limit appeals to both the High Court and the Court of Appeal to questions of law. See Chapter IV.1.3.4 for context about this Act.

¹³ Section 17(4) of the Act excludes section 111(2) to (5) of the Public Works Act 1981, which provides for notice to be given to people whose properties are to be entered on to for the purposes of a public work, and for that notice to be challenged in the District Court. Section 18(5) of the Act excludes sections 23-26(1) of the Public Works Act 1981, which provide for challenge in the Environment Court of a notice of intention to take land.

¹⁴ The Local Government Act 2002 Amendment Bill (No. 2), Government Bill 144-1, was introduced on 9 June 2016.

why the 2010 and 2011 Acts provide the case study for this thesis. Aspects of the two Acts will be discussed in more detail in the chapters to come. A brief overview is given here to illustrate the problem.

On 4 September 2010, New Zealand awoke to find that Christchurch and its surrounds had been devastated by a massive earthquake. Although there were few injuries and no deaths, it was clear that the recovery would be long and expensive. The response from the government and parliament was swift and decisive. In a single day, parliament passed with unanimous support the 2010 Act, which gave the executive the power to modify almost all primary legislation by order in council (a Henry VIII clause) for a broadly stated set of purposes related to response and recovery.

On 22 February 2011, another major earthquake ripped through Christchurch, resulting in 185 deaths (New Zealand Police, 2012) and massive damage, particularly in the central business district and Christchurch's eastern suburbs. The ongoing significant and frequent aftershocks, the devastation in Christchurch's eastern suburbs, and the huge damage to essential infrastructure made it clear that the recovery would take many years. In response, parliament passed the 2011 Act. The entire parliamentary process took only three days, suffering something of a democratic deficit (G. Palmer, 2011).

The 2011 Act continued the Henry VIII clause and provided that modified laws could be in place for up to five years. It also established the Canterbury Earthquake Recovery Review Panel, an independent panel of people with "suitable expertise", chaired by a retired or former High Court judge or by a lawyer, to review draft orders in council before they were made by the Governor-General. The 2011 Act enabled orders in council to have retrospective effect, dating back to the initial earthquake on 4 September 2010. It also retrospectively validated any actions undertaken pursuant to the Civil Defence Emergency Management Act 2002 (section 84).

The two Acts are a stark demonstration of the constitution's vulnerability. The constitution's use of unwritten, uncodified norms means it relies on constitutional actors and decision-makers to uphold it. Here, two key constitutional institutions – the executive and the legislature – were so focused on responding to a crisis that they appeared to have been largely blinded to the constitutional implications. As one member of parliament put it: "We do not have to potentially suspend virtually the entire New Zealand statute book to rebuild Christchurch" (Hansard, 2010a, first reading per Kennedy Graham). They required us to put an unprecedented level of trust in politicians (Forbes, 2011), despite politicians generally not ranking highly in public opinion polls (G. Palmer, 2011; Research New Zealand, 2015).

During parliamentary debates on the 2011 Act, the cracks in parliament's formerly unified response to the earthquakes were showing. The opposition's concerns about short-cuts in parliamentary procedures and the 2011 Act's centralisation of power in the executive without adequate scrutiny and accountability were often met with accusations of "politics" and being more focused in scoring points on the government than in aiding the people of earthquake-torn Canterbury (Hansard, 2011a, 2011c).¹⁵

The yet-to-manifest, but undesirable, consequence of the 2010 and 2011 Acts is that they could become a precedent for future disaster recovery legislation.¹⁶ The speed of their passage and the comparative lack of constitutional focus in parliament gave a clear message about the extent of that institution's commitment to constitutional protections. It is conceivable that, given another significant event causing widespread devastation, a similar approach could be taken. The rule of law is most likely to come under threat in times of war and emergency. That is when the executive is most likely to seek, and people are most likely to grant willingly, exceptional powers (Forbes, 2011).

¹⁵ See particularly contributions by Hon Clayton Cosgrove, Hon Lianne Dalziel, and Hon Ruth Dyson stating the problem from the opposition's perspective, and responses from Hon Gerry Brownlee, Amy Adams MP, and Louise Upston MP.

¹⁶ This statement has been overtaken by events, as noted in the Introduction.

The Canterbury earthquakes highlight the fact that constitutional principles and conventions are only as strong as our belief in them: generally constitutional principles and conventions are binding on us because we accept them as such. An overt failure of constitutional principle, or a decision to override it (whether deliberate or inadvertent) shows that, to some extent, its strength is illusory. Principles and conventions may be overridden as the need arises with few direct legal consequences. If, as here, criticism of a decision to override constitutional principles is confined to legal and academic circles, with little interest from the population at large, there will be few consequences for the decision-makers.

1.2.4 Why systems thinking might be able to provide answers to constitutional issues

The problems contained in the issues outlined above resonate with the systems paradigm. Human-based systems such as companies, non-government organisations, communities, and nation states are bound by “invisible fabrics of interrelated actions, which often take years to fully play out their effects on each other” (Senge, 2006, pp. 6–7). Because people are part of the system, it can be hard for them to see the whole pattern of change. Instead, people tend to focus on snapshots of isolated parts of the system and wonder why the deepest problems never seem to be solved.

A system is, essentially, a collection of parts that interact with one another to function as a whole (Maani & Cavana, 2007, p. 7). The system is the product of the interactions between its parts. Broadly speaking, systems thinking seeks to unpack and demonstrate the relationships between different parts of a system in order to gain a better understanding of the system’s operation and the consequences of change within it or to its environment. Systems thinking may help in considering system improvements and redesign. Viewing the system as a whole and considering changes within the context of the whole will help to establish cause and effect relationships and penetrate beyond the immediately apparent relationships between system parts (Walsh, 2010, pp. 1047–1048).

Placing each element of the constitution in its proper place, and clarifying the relationships between those elements may help to reinforce the importance and relevance of some of the more abstract constitutional principles and their practical effect.

As discussed in Chapter II, New Zealand's constitution has a number of features that mean a system metaphor can meaningfully be applied to it. The constitution comprises a number of institutions and actors, and the relationships between those elements are as important to its workings as are the elements themselves. As shown in the preceding discussion, cause and effect in the constitution is not necessarily linear, and is not necessarily closely related in temporal terms.

I.3 How the research has been carried out

It is impossible to fully answer the questions asked in Chapter I.1 above within the constraints of a doctoral thesis, but I have reached provisional answers to the research questions. The breadth of the constitution, the range of systems thinking methods, and the size limits for a thesis mean I have had to be selective about which aspects of the constitution I could focus on, and how many systems methodologies I could test.

I.3.1 Using a case study to ground the analysis

Systems analysis appears to be used most commonly in response to problems, because however sophisticated the model, it cannot replicate the complexity and nuance of the real world. Therefore, I have selected constitutional "problems" for analysis, akin to "messy, ill-structured, real-world problems" (Checkland, 1985, p. 763). For the reasons given earlier, the legislative response to the Canterbury earthquakes is an interesting, important, and topical case study.

Even within that topic, I have had to scale back the number of issues analysed to keep within the word limits for this thesis. I have selected three issues that seem most pertinent to the relationship between the 2011 Act and the constitution, and its possible status as a good precedent for future emergencies.

Those issues are:

- the extent to which the 2011 Act created a system to ensure legitimate decision-making;
- the need for coordination or centralised control of earthquake recovery activities; and
- the need for expedited law-making under the 2011 Act.

Had space permitted, I would also have considered the extent to which the 2011 Act enabled Christchurch's communities to participate effectively in their own recovery.

I.3.2 Using two systems methodologies in the analysis

To test whether different insights into constitutional policy issues are likely from using different systems methodologies, I have analysed each issue using two methodologies.

The choice of systems methodology is important. As discussed in Chapter III, a large school of thought considers that the paradigms underpinning different systems methodologies are like lenses, and colour (or distort) analysis done using the methodology. Because paradigms vary from methodology to methodology, using different methodologies (or combining techniques from different methodologies) is likely to generate different insights into a problem. Because no one systems methodology can fully capture the richness and complexity of the real world, it makes sense to bring together techniques from different methodologies or to combine whole methodologies. This school of

thought also cautions that combining methodologies should be done with an awareness of the underpinning paradigms so the resulting analytical frameworks are coherent (see Chapter III).

There have also been calls for more self-awareness and reflexivity in systems modelling so that the activity of modelling is reported on as well as the modelling results (Brocklesby, 2016). In essence, the challenge is for researchers and authors to produce research that lets the audience see the puppet strings as they watch the puppet show (ibid). Because this thesis breaks new ground, and because the systems paradigm may be a new concept to constitutional policy advisers, I have explained how I have selected and deployed systems methodologies so that others may learn from my work and take it further. Chapter III outlines how I approached the methodology selection, why I selected the methodologies I did, and how I deployed them. Chapter VIII sets out my reflections on using the methodologies and my conclusions on their efficacy for constitutional policy analysis.

I.3.3 A deliberately subjective approach

In my early reading on soft systems methodologies, I was struck by the subjective nature of the approach. Part of the challenge with messy, ill-structured real-world problems is in defining objectives or deciding on which objectives are the most important. In essence, soft systems methodologies recognise that, to some degree, people's understanding of a system is influenced by their own mental models and preconceptions (Brocklesby, 2016; Checkland, 1981, p. 155). It requires system observers to define a system and its boundaries and to use systems thinking tools to develop plausible, rigorously argued, and negotiated ways of understanding what might be causing a problem situation, the options that may be available to address it, and the possible consequences of those options. In being explicit about how they view a system, system observers enable others to test and challenge their thinking.

This subjective approach resonates with Matthew Palmer's theory of constitutional realism (2006b), which acknowledges that constitutional decision-makers bring their own perspectives to their roles; and those perspectives are influenced by decision-makers' experiences and backgrounds. Because these perspectives influence how and why decision-makers act, Palmer includes key constitutional decision-makers within the boundaries of the constitution as he defines it. A person's background, experiences, and perspectives shape their mental models: i.e. deeply-held, sub-conscious beliefs that influence our decisions and actions. Joseph (2007), by contrast, would draw the boundaries of the constitution differently. His influential text book on New Zealand's constitutional and administrative law focuses on the rules, conventions, and principles that form the basis of the constitution. While he notes the decisions for which different constitutional offices are responsible, Joseph otherwise appears to view office-holders as homogenous, assuming that the people filling those roles will apply the rules, conventions, and principles predictably, objectively, dispassionately, and without being influenced by their own values or mental models.

In an effort to stay true to the soft systems paradigm, and to allow others to critique the path I have chosen, I have taken an openly subjectivist approach to the analysis in this thesis. I have drawn the boundaries around what I see as New Zealand's constitution explicitly, so that others may choose to agree or disagree. In Chapter III, I have systematically analysed the fit between my skills and interests and the systems analysis undertaken, in order to clarify the perceptions and preferences that influenced my methodology selection.

1.3.4 Research, not action research

To keep the scale of the research manageable, I confined my research to analysis of written sources, rather than deploying systems methodologies with

groups of test subjects.¹⁷ In order to work within that constraint, I have had to modify how I have deployed the methodologies, as discussed in Chapter III.

I.4 What success looks like for this thesis

In the first instance, success will be a positive answer to the first research question: systems thinking can create fresh insights into constitutional issues and their effects on the broader constitution. My objective in undertaking this thesis has always been to identify analytical tools that could strengthen the quality and rigour of constitutional policy analysis by the public sector, and particularly to find ways of doing that more quickly than is currently possible. Additional success factors will be if I can identify features of systems analysis that make it easier or faster to surface misunderstandings and identify commonly understood positions on constitutional issues.

I am alert to the possibility that systems thinking approaches might not help to fully explain the constitution or to illuminate the implications of specific constitutional changes. Another potential limitation is that particular systems methods may require significant adaptation. Further, I am aware of the need not to lose sight of the overall objective (i.e. gaining more insight into constitutional processes and relationships) in the process of developing and using systems methods.

In the longer term, success or failure will rest on whether systems analysis is used by the public service and the wider policy community to solve constitutional problems or to understand potential implications and risks of constitutional issues. Here, only time will tell. So, in one sense this thesis's success will not be known for some time. To quote Checkland (1981, pp. 192–193):

¹⁷ Murthy (2000) defines action research as a field of research to see on the ground the effects of intervention of managerial solutions for the societal problems, which they face.

...we cannot obtain or expect precisely repeatable results in purposeful systems, and the idea of making progress by refutation is equally inapplicable. In 'testing' methodology the best we can do is to ask a question which is always difficult to answer, and especially so when applied to social situations, the question being 'as the problem solved?' ... If, over a period of time and a number of experiences, problems are solved, in the sense that things 'improve' as measured by some agreed criteria, or that concerned people in the situation themselves feel that insight has been gained or useful changes made, then confidence in the methodology may grow, and we may gradually come to feel that it has been tested and found useful.

Drawing from Checkland's approach, I will view it as a success if people in the public sector and wider policy community are willing to implement the methods I have tested here, and if researchers are willing to test the application of other systems methodologies to constitutional problems, and to wider policy issues.

No doubt the systems thinking approach taken in this thesis will appeal more to people with particularly visual learning preferences: what works for me as a strongly visual learner with a preference for an overview of issues will not work as well for a person who prefers working with words and detailed and nuanced descriptions of issues.

Chapter II: Literature review

II.1 Introduction

This chapter provides an overview of literature drawn from two vast fields of academic study — systems thinking and constitutional theory — that helps to answer the research questions posed in Chapter I.

Chapter II.2 explores whether anyone has tried to apply the systems paradigm to constitutional issues and describes some examples of systems methodologies applied to public policy and to public sector organisations. Chapter II.3 considers definitions of systems thinking and identifies a range of different soft systems methodologies that could be drawn on for this thesis. Chapter II.4 gives a brief overview of the nature of constitutions and explores the extent to which a constitution is just a set of rules and norms and how much weight should be given to constitutional culture.

This sets the scene for Chapter II.5, which assesses whether the system metaphor can meaningfully be applied to New Zealand's constitution. This thesis does not set out to prove that the constitution is a social system, but asks whether the constitution has enough characteristics of a system to warrant using systems analysis to explore constitutional issues. Chapter II.5 settles on the means I have used to draw boundaries around the constitution for the purposes of this study. It also outlines my interpretation of legitimacy, which I have treated as the constitution's emergent property for the purposes of this study.

II.2 Applying systems thinking to constitutional issues — has it been done before?

Applying the systems paradigm to public sector policy problems is not new. Both soft systems thinking and operational research have long been applied to

human activity systems, albeit in an organisational context (Checkland, 2012; Jackson, 2003, Chapter 2). These applications are analogous to, but not the same as, applying soft systems methodologies to constitutional problems.

Vermeule has taken a literal approach to describing the American constitution as a system, to facilitate a structural inquiry into “analytically inescapable” constitutional system effects (2011, p. 36). While there is much to recommend it, Vermeule’s approach is open to the definitional difficulties that can arise when asserting that a constitution is, literally, a system (see, for instance, Checkland & Scholes, 1990; Checkland, 1981, 1985, 2000; Mingers, 2002). To avoid these difficulties, this thesis takes a different approach. Rather than asserting that a constitution is a system, it asks whether the system metaphor can fruitfully be applied to constitutional questions and tests whether specific soft systems methodologies, developed in other contexts, can be useful analytical tools in the constitutional context. That does not appear to have been done before.

II.2.1 Systems thinking applied to public policy problems

System dynamics models have been developed for a number of public management areas (Ghaffarzadegan, Lyneis, & Richardson, 2011). I have concentrated on New Zealand examples of systems methodologies applied to public policy problems because they are likely to have been (implicitly) informed by New Zealand constitutional norms and values. Generally, the examples are analogous with regulatory or organisational issues. They do not assess the constitutionality of proposed action or the implications of change on the wider constitution.

The examples include telecommunications regulation (Davies, Howell, & Mabin, 2008), evaluating the effects of the public health reforms in the early 1990s and lowering the drinking age (Cavana & Maani, 2000), border controls for anthrax

(Cavana & Mares, 2004) and excise tax policy on tobacco (Cavana & Clifford, 2006).

In relation to state sector organisational management, systems methodologies have been applied to retention and recruitment issues in the New Zealand army (Cavana, Boyd, & Taylor, 2007), the drivers of quality in health services (Cavana, Davies, Robson, & Wilson, 1999), developing strategy for a telecommunications business unit (Cavana & Hughes, 1995; Cavana & Maani, 2000), and in a baseline review of the New Zealand Customs Service (Cavana & Clifford, 1999). These appear to be orthodox uses of systems methodologies in a management-related context.

Van der Lei et al (2011) have developed a policy framework incorporating system dynamics analysis, which forms part of an undergraduate curriculum in systems engineering at Delft University of Technology. As explained in Chapter III, I used this framework to put some policy structure around my soft system dynamics analysis.

II.3 What is systems thinking?

“Systems thinking is the art and science of making reliable inferences about behaviour by developing an increasingly deep understanding of underlying structure” (Richmond, 1994, p. 139). It has been described as a meta-discipline that can be applied within virtually any other discipline (Checkland, 1981, p. 5).

Understanding a system, particularly its feedback loops, builds an understanding of system behaviour which can aid the diagnosis of problems. Accordingly, systems thinking looks for the underlying causes of problems so that solutions can be developed to address the cause, not just the symptoms, of the problem (Maani & Cavana, 2007, p. 10). This is so, even with complex systems: systems-based problem structuring methods aim to manage complexity rather than simplistically reducing it (Eden et al., 2009, p. 6).

Systems thinking is widely used in the engineering and biological sciences (Jackson, 2003, Chapter 1; Maani & Cavana, 2007, p. 6). There is also an extensive body of research concerned with applying the systems paradigm in the management sciences (Ackoff, Addison, & Carey, 2010; Checkland & Scholes, 1990; Checkland, 1981, 1985, 2000, 2012; Robert L Flood & Romm, 1996; Jackson, 2003; Midgley, 1997; Mingers, 2000, 2002, 2003, 2004, 1997b, 1999; Senge, Kleiner, Roberts, Ross, & Smith, 1994; Senge, 2006; Ulrich, 1996). Systems thinking is used in information science (Jackson, 2003, pp. 59, 107) and has been used in the design of large-scale services such as health systems (Checkland, 2000).

II.3.1 Ontology: what the systems paradigm assumes to exist

Essentially, a system is a collection of parts that interact together to function as a whole (Maani & Cavana, 2007, p. 7). It is the product of the interactions of its parts. Those interactions create new system properties (emergent properties) that do not exist at the level of its components.

The simplest way to think of a system is in terms of something tangible like a car (Maani & Cavana, 2007, p. 7). A car is a system of interrelated subsystems (e.g. suspension, steering, power), which work together to enable the car to move and transport people and goods. None of the component parts have this property; neither the engine, nor the wheels, nor the electrics can achieve the transportation function on their own. Remove any of these components from the system and the car, too, will lose that property. Only when all the elements of the system are operating in harmony can the system achieve its goal.

Brocklesby (2016, p. 800) considers that systems thinking has plenty to say about human and social processes. Most business, economic, natural and social systems are complex: business and other human endeavours are systems bound by “invisible fabrics of interrelated actions, which often take years to fully play out their effects on each other” (Senge, 2006, pp. 6–7). Checkland

(1981, p. 121) notes that any social system will be a mixture of a rational assembly of linked activities (a human activity system) and a set of relationships such as occur in a community, which Checkland views as a natural system.

II.3.1.1 Systems have boundaries, which may be drawn subjectively

Putting boundaries around the system under observation enables its components to be distinguished from its environment. Closed systems do not interact with their environment (Jackson, 2003, pp. 6–7, citing von Bertalanffy), although few systems are truly closed in the sense of there being no possibility of energy flows between the system and its environment. Autopoietic systems are organisationally closed but structurally open to their environments (Mingers, 2004).

In living or social systems, the boundaries can be hard to define. It is important to recognise that boundaries are defined for a purpose: the system observer seeks to isolate some part of the real world for the purpose of analysis (Checkland, 2012). In this sense, the boundaries are conceptual and, to some extent, subjective. Different observers with different specifications or informed by different values or motivations might draw boundaries differently.

How the boundaries are defined can have a significant effect on the analysis and its results. For instance, some constitutional theorists might choose to define the constitution as the set of written rules and unwritten conventions that allocate and guide the use of public power (see, for example, Joseph's view of the constitution discussed in Chapter II.5.1.1A). By contrast, Matthew Palmer (2006b) considers the meaning of the constitution exists in the understandings and actions of the constitutional actors who apply or interpret it. This perspective requires consideration of the mental models and values that influence the decisions of those constitutional actors, because they affect the

constitution's real world operation.¹⁸ Some systems methodologies explicitly recognise the system observer's perspective to expose the effect of their mental models (discussed further in Chapter III and illustrated in Chapter IV).

Having identified the boundaries of a system, Checkland (1981, pp. 75–78, 2012) considers that, at a minimum, four inter-related concepts are needed to express its nature. They are hierarchy and emergence, and communication and control.

II.3.1.2 Hierarchy and emergence

A system may contain functional subsystems, and may, as a whole, be a functional part of a wider system. In this sense, a system will, in principle, be part of a “layered structure” making a hierarchy of systems (Checkland, 2012). Hierarchy imposes order based around the span of care of different sub-systems and supra-systems. In part, hierarchy is a response to the need for stability, to allow systems to operate effectively in their environments (Checkland, 2000).

The order imposed by hierarchy binds the component parts into a system and produces the “emergent properties” that characterise that particular system (Checkland 2012). Emergent properties are created when the component parts operate together as a system and cease to be when the components are removed from the system or are altered (Checkland, 1981, p. 52).

II.3.1.3 Communication and control

Maintenance of hierarchy in a system entails a set of processes in which information is communicated for the purposes of regulation or control.

¹⁸ Mental models are the implicit causal map of a system that we hold in our heads - our beliefs about the network of causes and effects that describe how a system operates, the boundary of the model (the exogenous variables) and the time horizon we consider relevant to a problem (Stermann, 1994). Mental models reflect the beliefs, values and assumptions held by individuals that underlie their reasons for doing things in a certain way (Hoverstadt & Bowling, 2002, p. 2; Maani & Cavana, 2007, p. 15). Mental models are unavoidable and unconscious (Stermann, 1994).

Communication processes involving both the system and its environment are critical to enable the system to adapt to change. Communication processes enable performance monitoring, which in turn allows the system to adapt or be adapted. Communications can be intricate, requiring consideration of both content and channels; how communication occurs is as important as what is communicated. Effective communications require a feedback or acknowledgement mechanism, to ensure that the communication channel is working (Checkland, 2012).

Control processes drive responses to internal failure and shocks from the environment, and rely on the system's communication processes. Control processes can have a balancing effect — they maintain equilibrium within the system — or can reinforce the effects of change, which can create vicious or virtuous spirals (Meadows, 2009, pp. 25–34; Senge et al., 1994, Chapter 17).

When communication and control processes work together, they create feedback loops. Feedback helps build understanding of the system. Feedback loops allow for predictive control of systems, even where a priori knowledge of the system is difficult or impossible to achieve (Boardman & Sauser, 2008, pp. 22–37; Checkland, 1981, pp. 87–88; Leonard & Beer, 1994, p. 10; Walsh, 2010).

II.3.2 Epistemology: the forms of knowledge used in the systems paradigm

Systems thinking is both a paradigm and a learning method (Richmond, 1994). The paradigm, or vantage point, is bi-focal: to understand a system, one needs to see the macrocosm (the forest) and the microcosm (the trees) simultaneously (Maani & Cavana, 2007, p. 9; Richmond, 1994). The bi-focal perspective helps us to see and understand the whole pattern of change (Davies, Mabin, & Cox, 2004; Maani & Cavana, 2007, p. 10; Senge, 2006, pp. 6–7).

The learning method includes “system-as-cause” thinking, which recognises that the system may cause problem behaviours: problems can be created

internally because of the unintended consequences of people's decisions and actions (Maani & Cavana, 2007, p. 9; Richmond, 1994).

In the systems paradigm, real world problems are examined and explored through modelling. Models are analytical frameworks that can be used to structure an inquiry into the real world in a way that provides insights and promotes creative decision-making and problem solving. (Checkland, 2012; R L Flood & Jackson, 1991, p. 4). System models explicitly emphasise only certain important characteristics or issues in problem institutions, and do not seek to replicate the real world in which the intervention is taking place.

There is a distinction between hard and soft systems modelling. Table 2.1 highlights that the approaches have different purposes and perspectives. Those differences flow through to how models are constructed and used, and from there to the insights gained.

Hard and soft approaches to systems modelling roughly correspond to a system's openness to its environment, which influences its complexity. Closed systems will generally lend themselves to operational research and systems engineering (Jackson & Keys, 1984). Living and social systems are generally more affected by, and have more of an effect on, their environments. They are more complex, probabilistic systems whose behaviour can be difficult to predict (Jackson & Keys, 1984).

Table 2.1: Comparison of hard and soft approaches to systems modelling

	Hard approaches	Soft approaches
Model definition	A representation of the real world	A way of generating debate and insight about the real world
Problem definition	Clear and single dimensional (single objective)	Ambiguous and multi-dimensional (multiple objectives)
Philosophical paradigm	Positivist	Interpretivist
Systemicity perspective	Lies in the world	Lies in the process of enquiry into the world
People and organisation	Are not normally taken into account	Are integral parts of the model/system
Data	Quantitative	Qualitative
Validity	Repeatable, comparable with the real world in some sense	Defensibly coherent, logically consistent, plausible
Goal	Solution and optimisation	Insight and learning
Outcome	Product or recommendation	Progress through group learning

(Maani & Cavana, 2007, p. 23)

II.3.3 Axiology: what systems modelling can tell us

The literature on systems thinking is vast. It covers a large number of approaches, ranging from specific diagramming techniques through to full methodologies with specific philosophical underpinnings.¹⁹

Over time, a variety of practices and approaches framed around different systems paradigms have emerged and coalesced into different strands (discussed below). Many different methodologies exist for creating systems models, all with specific philosophical underpinnings that influence how the methodologies are applied.

¹⁹ Because of the range of techniques, methods and methodologies, I use “approaches” as a shorthand descriptor.

These approaches seem to share a desire to understand how “things really work” (Maani & Cavana, 2007, p. 8), which requires drilling down into the system to understand the interrelationships between component parts. Another common thread is exploring problems in the context of the totality of the components and their interrelationships, rather than taking the more traditional scientific analytical approach of breaking things down to their smallest components (Checkland, 2012).

II.3.3.1 Overview of different systems-based approaches

Jackson’s (2009) taxonomy of systems-based approaches is a useful way of organising and making sense of the literature.

A. Functionalist approaches

Functionalist approaches are used to ascertain that everything in the system is functioning well to promote either efficiency or survival. The functionalist approach contends that managers have more control through better knowledge about the nature of the parts of the system, the interrelationships between the parts and the relationship between the system and its environment (Jackson, 2009).

Functionalist approaches typically assume that the problem task is to find an efficient means of achieving a known and pre-defined goal. Analytical modes capture the most important variables and interactions in the system of concern, and are used to determine the most efficient way of achieving that goal.

The dependence on predefined goals and models that represent systems as logical machines limits the functionalist domain of applicability. Typically these approaches do not cope well with the complexity involved with social systems (Jackson, 2009). Hard systems approaches tend to be functionalist in nature and are not likely to be particularly useful for constitutional policy analysis. I have not used functionalist approaches in this thesis.

B. Structuralist approaches

Structuralist approaches (Jackson's second strand (2009)) seek out laws governing general phenomena of system behaviour, whatever the level of complexity that is being addressed. In this sense, structuralist approaches follow von Bertalanffy's general systems thinking approach (Jackson, 2009). Structuralist approaches look for those key mechanisms or structures that are fundamental to system behaviour whatever the system type, in order to discover the most important structural aspects that lie behind system viability and performance. That allows key design features to be manipulated so the system can survive and be effective over time.

Miller's living systems theory (1978, see also Jackson, 2009), based in biology, takes a general structuralist approach, as does the theory of autopoiesis (Mingers, 2002, 2004). Other structuralist approaches include system dynamics, organisational cybernetics and complexity theory. System dynamics explores feedback loops to understand system behaviour (Jackson, 2003, p. 67). Organisational cybernetics is based on the premise that cybernetic laws and principles at work at deep structural levels generate the phenomena we can observe (ibid., p. 87).

Jackson considers that structuralist approaches share much in common with functionalist approaches, including the need for a unitary client to give direction to an intervention and ensure implementation. He considers there is an open question about whether the systems models produced by structuralist approaches are really applicable to highly complex systems such as social systems (Jackson, 2009).

Social systems are shaped by people's intentions, motivations and actions, and to quote Jackson (2009, p. 80):

If we want to learn about social systems we have, therefore, to grasp the subjective interpretations of the world that individual social actors employ. Structuralist explanations can, indeed, often seem 'reductionist' - pitched at the wrong level.

C. Interpretive approaches

The third strand works with different interpretations of the world rather than trying to build models that replicate the real world. It recognises the different values, beliefs, philosophies and interests that may be involved in particular problem situations, and provides ways of accommodating those factors in building consensus for change (Jackson, 2009). Interpretive approaches might give a better understanding of social systems because they are consciously based within those systems and reflect (and work with) the richness of human interactions.

Interpretive approaches in common use are Checkland's soft systems methodology, Ackoff's interactive planning, and strategic assumption surfacing and testing (Jackson, 2009). Soft variants of system dynamics and organisational cybernetics have also emerged in response to the difficulties in applying their harder forms to social systems (ibid).

Interpretive approaches focus on a process of enquiry that seeks to understand the different interpretations and perspectives at play in ill-structured or "messy" problems. That process of inquiry brings a risk of misuse in situations with power imbalances (ibid.). In coercive contexts, stakeholders may have little in common, compromise may be difficult to achieve, and those with power may seek to ensure the decisions made are in their own interests. In response to this risk, critical systems thinking approaches have emerged, including critical systems heuristics (Jackson, 2003, Chapter 11), team synteegrity (ibid., chapter 12), and approaches to methodological pluralism (R L Flood & Jackson, 1991; Mingers, 1997a).

Table 2.2 sets out a number of systems approaches. It groups them according to Jackson's taxonomy and describes their ontology and epistemology. These approaches are largely in the interpretivist strand, and all are considered to be soft approaches to systems thinking. A longer version of Table 2.2 was the starting point for selecting methodologies for the case study in this thesis.

II.4 About constitutions

A constitution “is the system or body of fundamental principles under which a nation is constituted or governed; it sets up the framework for government itself.” (G. Palmer & Palmer, 2004, p. 4). Constitutions are concerned with public power; they seek to limit and regulate the power exercised by the state over its people (M. S. R. Palmer, 2006b; Rt Hon Sir Kenneth Keith, 2008, p. 1). Roa (2010, p. 166) states:

[Constitutions] can be described as the fundamental principles of a social group that guarantee certain rights to those who belong to that group; that determine the powers and duties of the executive empowered to govern and/or manage the group; and that state how the executive is appointed, and what its structure is to be.

There is a close relationship between a constituted society and its constitution. A community must have a permanent and definite organisation, with a determinate and systematic form, structure, and operation before it takes on the nature of a body politic or state (Salmond, 1924, p. 152). When communities coordinate pursuant to some value or open-ended commitment, the participants are likely to look about for practices, usages, conventions or norms for solving their coordination problems and/or someone with authority to select among available solutions. These norms will be viewed as norms of, and for, the group. Leaders will be thought of as having authority in and over the group. The existence of a group, the existence of social rules, and the existence of authority tend to go together (Finnis, 1980, p. 153).

A constitution gives effect to the constituted society’s decisions about authority and norms. It is a set of “meta-rules” or rules for making rules (Hart, 2012, Chapter 6) that: dictate who may exercise public power over others; define the nature and extent of that power; and set the conditions for its exercise (Laws, 1996). In this sense, it is possible to think of a constitution as infrastructure that underpins and supports other law and practices that allow a political society to attain its ends, and for the state and its citizens to meet their reciprocal

obligations (Salmond, 1924, p. 150). What makes something part of the constitution is the extent to which it takes on a legal, political or moral persuasive force that: influences or constrains the way in which power is used; constrains the way in which power is granted; or creates expectations about the processes to be followed.

The meta-rule nature of constitutions means they tend to be framed at a level of principle and do not cover every eventuality. Constitutions are, therefore, wrapped around by a web of decisions interpreting their words, and shored up by practices and principles that guide decision-makers (Griffith, 2001; M. S. R. Palmer, 2011). Over time, frequently used and broadly accepted practices or principles may crystallise into conventions which are invariably followed (P. A. Joseph, 2007, Chapter 8). In this way, constitutional traditions are a system of institutions, established processes, fundamental documents, written laws, recorded judgments, values, customs, and beliefs that regulate the government of a society (Hackett Fischer, 2013).

II.4.1 What do constitutions do?

Constitutions provide the “means to distinguish between the legitimate (constitutional) use and the (unconstitutional) abuse of public power” (Willis, 2014, p. 266). Constitutional legitimacy thus provides a way of understanding why public power ought to be exercised in a particular way and why particular constitutional arrangements are, therefore, worthy of respect (Willis, 2014). More broadly, constitutions help to ensure that people’s engagement with the law is not haphazard or idiosyncratic, but is “predictable according to a public scheme of general standards” (Eleftheriadis, 2008, p. 29). In this way constitutional rules stabilise society’s basic structure by making it both transparent and effective (Eleftheriadis, 2008).

If constitutions are concerned with the legitimate use of public power what, then, is legitimacy? I define legitimacy as a reservoir of goodwill that allows people to maintain confidence in institutions’ long-term decision-making

(Easton, 1965, cited in Gibson, Caldeira, & Spence, 2005). Legitimacy gives institutions the resilience to weather short-term shocks and crises without significant loss of public confidence. This kind of diffuse support helps people to accept or tolerate decisions to which they are opposed or the effects of which they see as damaging to their wants (Gibson et al., 2005).

There are different views about the origins and nature of the normative aspects of legitimacy. This thesis does not need to reach a conclusion on the origins of legitimacy's normative aspects. It is enough to note that, in some fashion, legitimacy requires consideration of the relationship between citizens and the state, and the ties that bind people into a society. Salmond, for instance, viewed the relationship between the state and its members as one of reciprocal obligation. He observed that the state owes protection to its members, while they owe obedience and fidelity to it in turn (Salmond, 1924, pp. 150-151). On this view, the state is a repository of obligations which citizens have a right to expect it to discharge, including assuring citizens, as far as possible, "a life free from fear, and a safe environment" (Sedley, 2001, p. 69). Similarly, the "law of the modern state, not least its constitutional law has to nourish and promote its citizens' essential characteristics or it will falter and fail" (Laws, 1996, p. 623).

Normative views of legitimacy may be based on ideas of equal standing, mutual respect, fairness, and reasonable self-restraint (Bromell, 2009; Eleftheriadis, 2010). This view of legitimacy requires simultaneously meeting "popular expectations on the political, social and economic levels." (Buchanan, 2009, p. 4). According to Buchanan (2009), popular support may ebb and wane on any one dimension, at particular times; what is important is the aggregate support across all three dimensions. Put another way, consent is given freely, actively, and contingently: consent is contingent on popular expectations being met over time (Geddis, 2007, pp. 10–11).

The common good has also been suggested as a basis for legitimate, representative government. Ekins suggests (2011, p. 31) that this basis for legitimacy does not require popular consent or that it be responsive to, or act in

accord with, popular preferences. This basis avoids the difficulties associated with theories of legitimacy that rest on consent of the governed and justifies representative, rather than direct, democracy (Ekins, 2011). It does not, however, clarify how the common good is identified or how representatives will decide between competing goals. The societal bond here is underpinned by constitutional norms of the rule of law (Eleftheriadis, 2010) and representative democracy (Buchanan, 2009). Willis (2014, p. 268) considers that there should be a normative justification for any exercise of public power and that the constitution itself has an important role in supplying this normative justification.

The approaches to legitimacy described here indicate that constitutions serve a normative function, as well as providing procedural restraints. Chapter V takes the normative and procedural aspects of legitimacy and develops a working theory of the levers that can help to promote legitimacy in the constitution's day-to-day operation. That theory is applied in the systems analysis in Chapters V and VII.

II.4.2 The descriptive and normative nature of constitutions

Unwritten constitutions, such as the British and New Zealand constitutions, present a particular challenge for considering the constitution's role and function. In an unwritten constitution, the role of concepts such as legitimacy may be less obvious and the normative justification for the exercise of public power can be obscured or uncertain (Willis, 2014). It has been observed that British constitutional law (Sedley, 1994, p. 270):

...historically, at least, is merely descriptive: it offers an account of how the country has come to be governed, and in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence.

Griffith (2001) observes that this is largely true of constitutional law the world over, including in those countries with written constitutions. Constitutions take their shape from political upheavals, reflecting and seeking to resolve deep conflicts in society (Griffith, 2000).

Griffith (2000) discusses some of the risks of normative constitutions, highlighting the difficulties they can create for setting an appropriate balance between elected representatives who make law and govern, and unelected judges who may be required to adjudicate on the application of constitutional norms to essentially political matters of social policy. Ekins (2003) notes that norms like human rights can be difficult to adjudicate in practice (see also Tamanaha, 2007). The nature of rights adjudication according to Ekins (2003, pp. 139–140):

...is not a straightforward exercise in which judges uphold a determinate set of individual rights that are self-evidently morally true. On the contrary, rights adjudication involves the making of a myriad of political choices in a political context that is pervaded by moral disagreement.

Despite these difficulties, a large school of thought considers constitutions can (and should) exercise a powerful normative force on the future exercise of public power (Willis, 2014). The views of a government can exert a powerful pull (or push) on the values and beliefs of the society it represents (M. S. R. Palmer, 2006b, 2007; Rt Hon Beverley McLachlin, 2006). Finnis' (1980, p. 155) conception of common good implies a normative role for the rules governing a political community.²⁰

II.4.3 Where are the people in constitutional legitimacy?

The beginning of this section describes the relationship between a constituted society and its constitution. Because the legal constitution reflects the state

²⁰ The common good is a set of conditions that enables members of the community to attain for themselves reasonable objectives, or to realise for themselves the values that they can achieve through collaboration within the community (Finnis 155).

which exists and is constituted (Salmond, 1924, p. 154), it suggests that constitutions should remain relevant to the constituted states that they protect (Gewirtzman, 2009; Mazzone, 2005).

Constitutional legitimacy seems to owe something to subjective cultural expectations. A nation's history ties it to a cultural narrative that informs the values and beliefs of its people: "how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history." (Pitkin, 1987, p. 169, cited in Willis, 2014, p. 273). These factors include norms that are essential to a nation's identity, values, and legal system (M. S. R. Palmer, 2007). In essence: "every institution must be in harmony with the nature of those who belong to it" (Laws, 1996, p. 623). Without a culture to reinforce it, the principles and institutions of constitutional government would largely be reduced to words on paper (Mazzone, 2005, p. 672).

At the same time, the relationship is two-way: while there must be a constituted state before there can be a constitution, the constitution itself can encourage and reinforce the culture of the constituted state. "Constitutional culture derives from the complex mixture of factors which reflect and affect national culture as it manifests in attitudes to the exercise of public power." (M. S. R. Palmer, 2007, p. 567). There thus appears to be a self-reinforcing relationship between the constituted state and its constitution.

This relationship suggests that, in seeking to create and assess legitimacy, New Zealand's constitutional culture, and the expectations of the state created by that culture, must be considered.

II.4.4 Describing New Zealand's constitution

New Zealand's constitution presents something of a challenge to those wishing to describe it. As an unwritten constitution, it is not to be found in a single document but is a collection of formal legal documents, court decisions, practices and convention that describe the major institutions of government,

state their principal powers, and regulate the exercise of those powers in a broad way (Rt Hon Sir Kenneth Keith, 2008).

In practice, the governing arrangements prescribed by the sources of New Zealand's constitution combine a highly centralised system of government with formally unlimited legislative authority, and strong executive dominance of parliament (Geddis, 2016).

II.4.4.1 Some key constitutional norms

Some of the key norms that comprise New Zealand's constitution are representative democracy, the rule of law, the separation of powers, and the notion of rights and freedoms. Most constitutional commentators emphasise these norms as being of fundamental importance, although they do not necessarily agree on the norms' relative importance or their content (Dicey, 1915; Geddis, 2007; P. A. Joseph, 2007; G. Palmer & Palmer, 2004; Webb, Sanders, & Scott, 2010). As a Westminster-type system, the concepts of responsible government and constitutional monarchy are also core to New Zealand's constitution. Finally, the Treaty of Waitangi is a founding document of New Zealand, and represents an explicit commitment to ongoing relationships in New Zealand society (M. S. R. Palmer, 2008, p. 297), which suggests the Crown-Māori relationship is an important norm in New Zealand's constitution.

Space does not permit a complete description of all of these constitutional norms. Only those norms that are directly relevant to the analysis in Chapters V-VII are described here. Each of those chapters gives more detail about particular norms as required for the systems analysis.

A. Representative democracy

A representative legislature is a prerequisite of a modern liberal democracy (P. A. Joseph, 2007, p. 12). New Zealand has a representative parliament that legislates on behalf of the people. The election of members of parliament legitimates the power they exercise (G. Palmer & Palmer, 2004, p. 138). New

Zealand's electoral law requires regular, free and fair elections, with almost universal suffrage (P. A. Joseph, 2007, p. 12).²¹

The role of an elected representative is not necessarily to act in accordance with popular preferences. Rather, law-makers should “act for the common good by making specific the abstract requirements of morality” (Ekins, 2011, p. 32).

B. Parliamentary sovereignty and responsible government

Parliament's authority to make the law comes from its sovereignty and from its constituent members, who are the people's elected representatives.

Parliament's legislative sovereignty “is at one and the same time a political fact, a product of the political history of the United Kingdom and this country [New Zealand], a convention of the constitution and a fundamental principle of the common law” (E. W. Thomas, 2000, p. 14). In essence, the doctrine of continuing parliamentary sovereignty is a rule that parliament can enact any law except one to limit its powers (Bogdanor, 2011; Wilson, 2010, p. 150). At its simplest and least philosophical, parliamentary sovereignty means that parliament is the highest source of law in the land. No other official or institution has legal authority to invalidate or override statutes (Goldsworthy, 2005, p. 31).²²

While the concept of parliamentary sovereignty has a “long and rich historical pedigree”, parliament's role as a forum of democratic participation and debate gives it the strongest contemporary justification for asserting sovereign law-making status. Geddis and Fenton observe that (2008, pp. 737–738):

²¹ The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 removed franchise from all prison inmates. Previously, only those sentenced to more than three years' imprisonment were excluded from voting. (Electoral Act 1993, s 80(1)(d)). Section 80(1)(d) has been declared to be inconsistent with the right to vote affirmed and guaranteed in the New Zealand Bill of Rights Act 1990: *Taylor v Attorney-General* [2015] NZHC 1706.

²² This is why the Henry VIII clause in the 2010 and 2011 Acts caused so much concern (see Chapter VII).

Laws created through the process of parliamentary enactment ostensibly possess a superior claim to basic legitimacy: they are more directly connected to (and respectful of) the various views of the citizenry, are subject to a broader and more informed policy analysis, and are better able to be revisited and revised in light of changing social beliefs.

Although parliamentary sovereignty is the heart of the Westminster system, the doctrine is not without controversy. In a systems-based analysis, different perspectives on the doctrine could result in significantly different approaches to drawing boundaries around the system and to deciding how norms and values affect the system's operation.

Parliamentary sovereignty has traditionally been considered to mean there are no legal constraints on parliament (Dicey, 1915, p. xviii; P. A. Joseph, 2007, p. 16; G. Palmer & Palmer, 2004, p. 10). It is now a contested matter in Britain and (to a lesser extent) in New Zealand.

The debate is essentially concerned with who we trust to protect us against arbitrary rule and unwarranted inroads into people's rights. One school of thought is more inclined to trust an independent and impartial judiciary to counter the tyranny of the majority, and discounts the effectiveness and reliability of moral restraints (Elias, 2003; P. Joseph, 2004). Another is more inclined to trust a democratically-elected parliament or the people and views moral restraints on parliament as both real and effective (Cullen, 2004, 2005; Goldsworthy, 1999, 2005).²³

²³ The debate tends to be framed as a contest between a political and a legal constitution. Gee and Webber (2010) provide a lucid summary of the major arguments for a political constitution, including a summary of Tomkins' and Bellamy's theories of the political constitution. See Tomkins (2002) for a further reframing as liberal constitutionalism and republican constitutionalism. Craig (2011) outlines the legal constitutional approach (see also Lakin, 2008). Other participants include Goldsworthy (2010), a staunch advocate for parliamentary sovereignty and Allan (1997, 2003), a proponent of the theory of bi-polar sovereignty. Allan considers that parliamentary sovereignty emanates from common law and concludes that it is therefore subject to judicial oversight. Joseph (2004) asserts that parliament has never been sovereign; rather the courts and parliament have always exercised "coordinate constitutive authority — Parliament through legislation and the courts through statutory construction and principles of common law". For discussion of the theory of bi-polar sovereignty (dual sovereignty of parliament and the courts) see Sedley (2011, Chapter 35) and C J S Knight (2009).

Belief in representative democracy runs deep in New Zealand's constitutional history and underlies the legitimacy of both the Sovereign's sovereignty and parliamentary sovereignty. Matthew Palmer (2011, pp. 63–65) considers it a key cultural norm of our constitution and it is reinforced by our constitutional value of egalitarianism.

There seems little public support in New Zealand for constraints on parliament's law-making powers. Although the Constitutional Advisory Panel's engagement process found broad consensus that the exercise of public power should be subject to effective limits and accountability, people did not agree on what those limits should be or how they should be enforced (Constitutional Advisory Panel, 2013). The Constitutional Advisory Panel's findings are consistent with the earlier public response to the White Paper proposing a superior law entrenched bill of rights (Geddis & Fenton, 2008).

Responsible government is a defining feature of Westminster constitutionalism and exists today as a combination of law, convention, and political practice (P. A. Joseph, 2007, p. 11). Under responsible government, the government is recruited from and located in the House of Representatives (Constitution Act 1986, s 6; P. A. Joseph, 2007, p. 11). The government must retain the confidence of the House of Representatives to stay in government (Constitution Act 1986, s 6), and must resign if defeated in the House on a vote of no confidence (P. A. Joseph, 2007, p. 12). Responsible government facilitates democratic decision-making in a constitutional monarchy: the Crown always acts on and in accordance with ministerial advice, and there must always be a government that can advise the Crown and accept responsibility for the advice tendered (ibid., p. 11).

C. The separation of powers

The separation of powers requires separate articulation of the different stages of legislating, administering, adjudicating and enforcing (Waldron, 2012). The doctrine assumes that the most effective way to protect people against

tyrannical or arbitrary governance is to divide power between different institutions and office-holders (G. Palmer & Palmer, 2004, p. 8). It can be seen as a prescriptive theory: it is a “conscious determined attempt to control government by dividing it” and may mean at least three different things (P. A. Joseph, 2007, p. 187):

- the same people should not form part of more than one of the three organs of government (e.g. cabinet secretaries in the United States do not sit in Congress);
- one organ of government should not control or interfere with the work of another (e.g. the judiciary should be independent of the executive);
- one organ of government should not exercise the functions of another (e.g. the executive should not exercise legislative powers).

Practically, complete separation or complete fusion of powers is not possible: complete separation would preclude necessary coordination of policies and administration of government; complete fusion would risk tyranny by making control of the government by the people impossible (G. Palmer & Palmer, 2004, p. 8). However, when functions are not separated by institution, office, and personnel, separation of powers is forced to rely on decision-makers’ abstract identification and awareness of differentiated functions (Waldron, 2012).

While the separation of powers has long been thought of as a protection against tyranny, the rule of law may “offer a clearer and refreshing account of why the separation of powers is important” (Waldron, 2012). Oppressive laws are less likely if the law-makers are ordinary citizens and have to bear the burden of the laws they make themselves. But if law-makers can control the application of the law, they can direct the burden of those laws away from themselves (Waldron, 2012). There needs to be “an articulated process...so that the various aspects of law-making and legally-authorised action are not just run together into a single gestalt”(Waldron, 2013, p. 457).

In a sense, New Zealand’s version of separation of powers is based on the separation of functions, not institutions (P. A. Joseph, 2007, p. 187). As

described in Chapter VII, parliament does occasionally delegate responsibility for making primary legislation to the executive. However, the division of labour within the Westminster system as it is practised in New Zealand itself creates some checking and balancing (Stewart, 2004, p. 195). In practice, the major separation in New Zealand is between the political legislative and executive branches on the one hand, and the judicial branch on the other (P. A. Joseph, 2007, p. 187).

D. The rule of law

The Rule of Law is seen as a fragile but crucial ideal, and one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in a country's laws or constitution (Waldron, 2008, p. 4).

The rule of law is a multi-faceted ideal, but at its core is the idea that law has a distinctly separate or objective meaning that exists independently of the people who make, apply, and live subject to it. The meaning of the law is independent of the time at which it is applied. In short, law itself rules, and should rule (M. S. R. Palmer, 2007, p. 587).²⁴

Most conceptions of the rule of law emphasise the requirement that people in positions of power should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right or wrong (Waldron, 2012). Many conceptions of the rule of law emphasise legal certainty, predictability, and settlement, on the determinacy of norms and on the reliable character of their administration by the state (Tamanaha, 2007; Waldron, 2008, 2012). Rule of law principles protect the individual against arbitrary action by public authorities (Webb et al., 2010, p. 17).

²⁴ As discussed in Chapter V, the rule of law is a significant contributor to legitimacy and was a significant prompt for the Henry VIII clause in the 2010 and 2011 Acts. It also forms a significant part of the system dynamics analysis in Chapter V.

There is a strong procedural dimension to the rule of law (Waldron, 2008). There is a school of thought that the rule of law also has a substantive dimension (Bingham, 2010; Craig, 2003; S. A. de Smith & Brazier, 1998; Elias, 2003; P. A. Joseph, 2007, p. 151). The substantive dimension responds to the fact that the rule of law's procedural aspect does not necessarily require democracy, respect for human rights, or any particular content in the law. Procedurally, the rule of law does not ensure that the law is good, or that it deserves obedience. However, substantive limits can be hard to define and apply in practice, and can raise issues of social policy. Adjudicating on such issues can bring the judiciary into conflict with the executive and its right to govern (Tamanaha, 2007).

How we think about the rule of law is bound up by how much we tend to trust powerful public and private institutions. Wendel (2012) argues that New Zealanders are prepared to entrust significant decisions concerning their welfare to powerful state decision-makers. That may be true, but Matthew Palmer (2007) has also discerned an ambivalence to public power in New Zealand that comes from tensions between the value of egalitarianism (our decision-makers are "no better than we are") and fairness (the desire for everyone to have a "fair go"), compounded by authoritarianism and pragmatism, which create an expectation that those in power will take charge and resolve the country's problems.

II.4.4.2 New Zealand's constitutional culture

As discussed in Chapter II.4.3, constitutional rules and norms are not the totality of the constitution. A complete understanding of constitutional issues requires an understanding of both the constitutional provisions and the constitutional culture that influences not only what goes in to a constitution, but also how it is interpreted, applied, and used (M. S. R. Palmer, 2006a). Accordingly, this thesis assumes that New Zealand's constitutional and political culture affects, and is affected by, our constitutional institutions and processes.

Matthew Palmer has described New Zealand's constitutional culture, which he sees as more broadly-based than political culture. Palmer defines political culture as New Zealanders' attitudes about political relationships and how they should manifest themselves (compare with Barker, 2010 who also describes New Zealand's political culture). Palmer (2007, p. 569) defines constitutional culture as encompassing other branches of government and attitudes to the relationship between public power and individuals or groups of New Zealanders that could be conceived of as popularly-held philosophical tenets.

While Palmer differentiates between the two conceptions of culture, they share enough common ground that it is relevant to consider both in this context. At their core, both conceptions of culture recognise values that tend to be long-held and cumulative rather than fluctuations in public opinion responding to current political events. Both are influenced by "the more general framework in which the country's political history has been placed" (Moloney, 2010, p. 77).

This thesis accepts the broad thrust of other research into New Zealand's political and constitutional culture. That culture appears to have a number of elements, discussed below.

A. Authoritarianism

Generally, New Zealanders respect strong individuals with initiative and expect public figures to take charge and fix problems without getting caught up in constitutional niceties (Barker, 2010; M. S. R. Palmer, 2007). It is a rather moderate form of authoritarianism, which does not include support for dictatorial rule of a totalitarian, fascist or unduly autocratic nature. Such rule would likely offend New Zealanders' egalitarian sensibilities.

B. Liberalism

Successive parliaments have passed experimental social legislation, sometimes ahead of public opinion, aimed at precipitating social change or tolerance. These laws include the Homosexual Law Reform Act 1986, the Civil Union Act

2004, the Marriage (Definition of Marriage) Amendment Act 2013 (permitting same-sex marriage), and the Prostitution Reform Act 2003. There are many strands to liberalism but a common theme is freedom and autonomy. This strand of liberalism believes that generally people are the best judges of their own interests and thus should be left to make their own choices (Berger, 2007; Moloney, 2010). Liberalism does not sit wholly comfortably with the realities of how our society operates, particularly with whether, how and to what extent liberal societies should recognise groups as well as individuals (Bromell, 2009). Note too, that sometimes that broader social interests mean individuals may need to compromise and to accept second-best choices for themselves: the whole-hearted pursuit of liberal ideals can undermine popular expectations about social and economic equity, which can undermine the legitimacy of a democratic regime (Buchanan, 2009).

The liberal focus on the individual could be at odds with the communitarian recognition of cultural factors that may justify distinctive political institutions and practices (Bell, 2012). Māori and Pasifika communities, in particular, have cultures and traditions organised around communities (families, tribal groupings etc.) rather than individuals. New Zealand's constitution gives only patchy recognition to these traditions and their underlying values, which is a potential source of political tension.

C. Fairness / egalitarianism

Fairness is both a substantive and procedural idea, and is a model for relations between people who are in conflict or competition (Hackett Fischer, 2013). Hackett Fischer's (2013) study of fairness as a constitutional value suggests that the term is elastic and can accommodate notions of equality on the one hand and liberty and individual rights on the other. The term is sufficiently flexible to include fairness to individuals, groups, and classes, often simultaneously.

Barker (2010) has described fairness as the expectation of a fair state and a "fair go", often expressed in policy terms as support for collective solutions to

inequalities, but balanced by an expectation that people take some responsibility for their lives. To the extent that a fair go connotes equal opportunities for all members of society, it begs the question of what particular things ought to be equalised. New Zealanders can be intolerant of differences manifested in law and continues to struggle with reflecting in legislation the nature of the Treaty protections afforded to Māori. For instance, the state has never recognised tikanga Māori by putting it on a legal footing, either by incorporating it into state structures and processes, or by recognising it as sitting alongside the state (Law Commission, 2001, Chapter 3). The nature of customary title to the foreshore and seabed had a sharply divisive legislative history (Te Aho, 2010, p. 121). However, at the same time, the general public tolerance for settlements of historic breaches and backlash to extinguishing customary title in the foreshore and seabed can be seen as manifestations of the value of fairness. Fairness also seems to have driven some limitations on parliamentary sovereignty, such as the caretaker convention, the practice of opening the books before elections, and the period of restraint by the government before an election (Hunter, 2009).

Egalitarianism manifests itself in an expectation that government, and those who operate it, do not see themselves as “superior” to the governed (M. S. R. Palmer, 2007, p. 576). Liberalism and egalitarianism do not always sit well together, and the tension manifests as some ambivalence in our society. New Zealand is a society that advocates individual responsibility, yet also believes government has a significant role to play in economic and social spheres (Barker, 2010, p. 20).

D. Pragmatism

New Zealand’s constitutional history can be seen as a series of ad hoc pragmatic responses to the reality of negotiating difficult situations (Barker, 2010; Constitutional Arrangements Committee, 2005; Moloney, 2010; M. S. R. Palmer, 2007). Pouwels (2015) disputes that the typical New Zealand approach to constitutional reform is pragmatic; he also considers that a pragmatic approach

to constitutional reform is not desirable. Thus, even if New Zealand did take a pragmatic approach to constitutional reform, Pouwels considers it is not necessarily a virtue we should extol.

A desire for simplicity appears to drive the pragmatic approach. Successive reforms to New Zealand's constitutional arrangements have removed complexity from the system. Centralising government away from the provinces in 1875, and abolishing the Legislative Council in 1950 are two significant examples (Hackett Fischer, 2013). Hackett Fischer (ibid., p. 23) describes this as "the constitutional equivalent of Ockham's Razor, or Albert Einstein's axiom that 'everything should be as simple as possible, but not simpler'." Matthew Palmer (2011, p. 64) sees it as "tinkering in the constitutional shed, incrementally solving concrete problems with number 8 wire as they arise". Pouwels (2015), by contrast, sees New Zealand constitutional practice as evincing an uneasy tension between apathy and principle, rather than demonstrating any genuinely distinctive pragmatism.

Arguably, the replacement of FPP with MMP in 1996 complicated the electoral system, but can be seen as an example of ambivalence to the use of public power trumping a desire for simplicity. It was also, arguably, a deeply pragmatic way of constraining an effectively unaccountable executive without fundamentally altering the system of governance, particularly parliamentary sovereignty (Geddis, 2016, p. 110).

E. Ambivalence to the use of public power

While New Zealanders expect governments to act decisively, particularly in times of crisis, there is a strong, and often visceral, distrust of those whom we elect to power (Barker, 2010; M. S. R. Palmer, 2007). This ambivalence has manifested itself in:

- Widespread (at least at the beginning) support for sweeping powers for CERA and the Minister responsible for Canterbury earthquake recovery,

followed by increasing opposition to perceived high-handedness by those in positions of authority.²⁵

- Significant groundswell support for the introduction of the mixed member proportional representation voting system (MMP) as a way of curbing the power of the executive and better representing the views of the electorate through more direct representation in Parliament. Paradoxically, however, there is still a distrust of list members of Parliament and a perception that they have no mandate independent of their party (Electoral Commission, 2012, para. 2.22).
- The Citizens Initiated Referenda Act 1993, which was intended by its supporters to ensure the will of the people could prevail over that of their elected representatives (Oosterhoff, 2015, p. 6), and resentment when governments have declined to act on a citizens initiated referendum (Trevett, 2014).

F. Constitutional culture - a cultural package

The elements that make up New Zealand's constitutional culture are linked, sometimes in conflicting ways.

The elements can work against each other, leading to apparently paradoxical results. For instance, New Zealanders exhibit a high degree of tolerance and social liberalism, including high acceptance of full political participation by new citizens and representation of minorities in parliament and government (Barker, 2010, p. 21). Those attitudes can be contrasted with the intolerance of differences manifested in law noted above, although reserved seats in parliament have been in place for Māori since 1867, initiated through concern at Māori disenfranchisement resulting from property qualifications for franchise.²⁶

²⁵ For example, since 2013 there has been growing resentment at central government "interference" in the central city redesign (see for instance Barnaby Bennett, 2015; Conway, 2014; Dalziel, 2014; Gates, 2015, 2016; Hutching, 2015b; Stylianou, 2014a, 2014b). There has also been litigation over decisions about rezoning and the quantum of payment to particular classes of property owners (the "Quake Outcasts") discussed in Chapter V.2.5.3B

²⁶ Geddis (2007) outlines a history of the Maori seats; contrast with Joseph (2010).

The nature of the attitudes towards public power in New Zealand's constitutional culture means some constitutional norms run more deeply than others and change more slowly (M. S. R. Palmer, 2007, p. 567). Similarly, the resilience of political culture means that the influence of institutions on it will not necessarily be felt immediately (Barker, 2010, p. 18).

Matthew Palmer (2007, p. 589) believes the rule of law, a central component in most constitutions, is not reinforced by a cultural value, which leaves it vulnerable to being overridden by other norms that are so reinforced. The strength of the rule of law relies on the strength of people's belief in, and commitment to, it. In this sense, the rule of law is "a shared political ideal that amounts to a cultural belief" (Tamanaha, 2007, p. 13). When the cultural belief is pervasive, the rule of law can be resilient, but where it is not, the rule of law will be weak or non-existent (ibid.).

Hunter (2009) views a proliferation of complaints agencies as "New Zealand's attempt at institutionalising the pursuit of fairness".²⁷ New Zealand seems to prefer enabling people to take disputes to these less formal, investigative bodies, rather than relying solely on the courts. It signals the importance of fairness to New Zealanders, and enabling people to challenge the state's decisions. Fairness implies the mutual acceptance of rules that are thought to be impartial and honest, and I view impartiality and honesty as necessary components of the core of the rule of law.

II.5 Is the constitution amenable to a systems perspective?

A central premise of this thesis is that a systems-oriented perspective can create a richer understanding of how the constitution operates in the real world than can be gleaned from inquiring solely into the principles and words of the

²⁷ These agencies include the Office of the Ombudsmen, the Waitangi Tribunal (a permanent commission of inquiry), the Human Rights Commission, the Office of the Privacy Commissioner, and the Health and Disability Commissioner.

constitution. For instance, on paper the United States president is a constitutionally weak office in terms of its formal powers relative to the legislature. Yet in practice, the United States president is a “strong” president because the president is the uniquely nationally elected official and thus has control of the “bully pulpit” and is the head of a national political party (Ordeshook, 2009).

To pursue a legislative agenda, United States presidents must secure support from Congress, which means they must influence legislators. That creates incentives to lead via an appeal to the electorate and through cultivating leadership rather than relying on constitutional authority (Ordeshook, 2009).²⁸ This is, essentially a systems perspective on a constitution, which accepts that the consequences of constitutional provisions cannot be determined without viewing constitutional documents “as organic wholes wherein seemingly unrelated parts can interact to yield potentially unanticipated outcomes” (Ordeshook, 2009). Put another way: “To understand a constitution we need to understand the pathways of power that are more than merely documentary – what factors affect the exercise of power and how?” (M. S. R. Palmer, 2006b, p. 134).

As already discussed, New Zealand’s constitution comprises institutions, rules, conventions, processes and people. The question is whether those parts interrelate in such a way that a system metaphor can meaningfully be applied to them. Mingers (2002) warns that at the extremes, trying to characterise a social system as a particular type of logical system leaves it an impoverished and abstract representation of the richness of the real world. Accordingly, this thesis only uses system as a metaphor to structure an inquiry into the constitution’s operation in some particular contexts. Checkland says (1985, p.

²⁸ The executive orders issued by President Donald J Trump in the early days of his presidency are testing the limits of presidential powers and the president’s dependency on the legislature according to the more orthodox theory explained by Ordeshook. At the time of revising this thesis, President Trump’s executive order suspending entry from seven majority-Muslim countries (Trump, 2017) has been suspended by Federal Courts, and the suspension has been continued by a three-judge panel of the US Court of Appeals for the Ninth Circuit (*State of Washington, State Of Minnesota v DONALD J. TRUMP and ors*, 2017)

764): “models of human activity systems in SSM do not pretend to be models of the world, only models which embody a particular stated way of looking at the world.”

Having said that, it is desirable to define the scope and characteristics of the constitution, to ascertain whether it is likely to be amenable to a systems perspective. Here, I wish to highlight two main aspects of the constitution. The first is its boundaries: what makes a norm part of the constitution rather than being made by the constitution? The second point relates to emergence: just what happens when all the elements of the constitution work harmoniously and effectively?

II.5.1 Drawing boundaries around the constitution

As discussed in Chapter II.3.2.1, all systems have boundaries, which are drawn to define the area under observation (Checkland, 2012). Bounding the system under observation enables its components to be distinguished from the environment within which it operates. This section articulates the criteria I have used to define the constitution’s boundaries for the purposes of this analysis, so the constitutional theoretical underpinnings of the analysis in Chapters V to VII can be tested and challenged.

II.5.1.1 Drawing boundaries around the constitution

It seems possible to distinguish between constitutional provisions and ordinary law if they are thought of as being either the provisions, rules and norms that describe and limit the powers and functions of the state or provisions that apply and regulate state power in particular contexts (Dicey, 1915, p. 23; M. S. R. Palmer, 2006b). For the purposes of systems analysis, that suggests a boundary can be drawn. It may be permeable but that does not make it any less meaningful for the purposes of systems analysis.

In order to define the boundaries of the constitution, it is necessary to identify criteria against which to assess constitutional elements. I have identified four criteria that relate to the extent to which the rule, law, principle or convention:

1. articulates the philosophical foundations of, or limitations on, state power; or
2. defines the relationship between citizens and the state; or
3. establishes or modifies the structure and functions of the state; or
4. shapes how state functions or powers are to be exercised.

I identified these criteria using a process of inductive reasoning, starting with defining what it means to be constitutional and comparing that against provisions that are generally accepted as being constitutional (M. S. R. Palmer, 2006a, 2006b). The criteria help to assess the constitutional significance of a rule, law, principle or convention by distinguishing between rules (including practices, conventions, and principles) that are “constitutional”, which are rules for setting the rules, and rules that are “creatures” of the constitution, which are rules that are made in accordance with constitutional rules.

According to the four criteria, concepts like the rule of law, the period of restraint before a general election, and the Search and Surveillance Act 2012 are constitutional because:

- The rule of law shapes how state functions or powers are established and exercised through its focus on legal and (in some conceptions of the rule of law) ethical or moral restraints on officials and governments (Chapter II.4.4.1E above).
- During the period of restraint (the three months preceding a general election), incumbent governments do not tend to make significant appointments or run government advertising campaigns (Cabinet Office, 2014). The period of restraint enables incumbent governments to govern up to the election while not inappropriately restricting the choices of an incoming government.

- The Search and Surveillance Act 2012 creates the legal settings within which specific instances of search powers are to be exercised. In this way, the Search and Surveillance Act 2012 is part of the constitution rather than being a creature of it.

There are two main, and related, points to note about the criteria used here. First, the criteria emphasise function over form. Secondly, they are dynamic: the criteria do not set up hard and fast distinctions. This dynamism reinforces the need to consider constitutional elements, including constitutional decision-makers in the wider context of the constituted state and its society. To the extent that institutions such as the executive, the legislature and the judiciary meet the criteria by, for instance, articulating the foundations of (or limitations on) state power, or modifying the structure or functions of the state, those institutions should be seen as constitutional. Similarly, where a decision-maker such as the Governor-General modifies the relationship between citizens and the state, say by signing into law legislative restrictions on suffrage, that person is performing a constitutional function. By contrast, when a police officer seeks a search warrant from a judge, both actors are acting as creatures of the constitution by applying constitutional rules to a particular set of circumstances.

The emphasis on function over form may mean that some office-holders have a mix of constitutional and non-constitutional functions. For instance, the Privacy Act 1993 has a constitutional function: it enhances the accountability of central government by giving people an enforceable right to access their personal information. The Act also shapes how state functions and powers can be exercised by regulating the way in which personal information is collected, held, used and disclosed. At the same time, the Privacy Act is a creature of the constitution. It sets out the Privacy Commissioner's powers according to constitutional principle, and it regulates the handling of personal information in the private sector. According to my criteria, only part of the Privacy Act is constitutional, and only some of the Privacy Commissioner's functions are constitutional. For the rest, the Commissioner and the Act can be considered to be creatures of the constitution. By way of contrast, the provisions in statute

and common law that constitute the independent judiciary, provide for its accountability, and set out its powers, are constitutional.

As I have noted, the criteria do not create a hard and fast boundary. The boundary may shift with time and usage of constitutional provisions. For instance, where new powers have been created that do not accord with settled constitutional principles start to reshape thinking about how public power should be allocated and exercised, they become precedents for change. That precedent value may move those specific powers towards being constitutional. On the other hand, if those powers simply remain as anomalies and do not modify constitutional principles and norms, they should be considered as (anomalous) creatures of the constitution.

My approach is broadly consistent with Dicey's (1915, p. 23) definition of constitutional law as including all rules which directly or indirectly affect the distribution or exercise of the state's sovereign power. It is also broadly consistent with Matthew Palmer's (2006b, p. 137) approach that a rule is constitutional "if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, principles, rules, conventions or even culture". That description leaves it open to the judgment of the observer as to how significantly a rule influences the exercise of public power. The criteria identified for this thesis make that judgment explicit and testable. The criteria are also consistent with Palmer's focus on the generic exercise of public power, rather than specific instances of power. The criteria allow a distinction to be drawn between, say, the Search and Surveillance Act 2012 and any specific search powers made in accordance with that Act.

Joseph (2007, p 1) views constitutional law as being "concerned with the history, structure, and functioning of central government carried on in accordance with law, constitutional convention and the expectations of liberal democratic government". This view implies something of a sharper line than I have drawn. Even so, the criteria bear some similarity to Joseph's view of what is constitutional.

II.5.2. Legitimacy – the constitution’s “emergent property”

In the systems paradigm, an emergent property is some new property that is created when all of a system’s elements are interacting effectively. Although this thesis uses system as a metaphor, even that usage begs the question: what is the emergent property created when the constitution’s norms and institutions (including decision-makers) are working as they should?

No one part of the constitution would be able to implement all of the constitutional rules and norms, or carry out all constitutional functions. That would contravene the separation of powers and threaten the rule of law (Chapter II.4.4.1). When the parts of the constitution are working together effectively, the constitution can most effectively legitimise the legal, political, and administrative action undertaken in the name of the state and protect against arbitrary, unfair use of power. That suggests, for the purposes of a systems analysis, the constitution’s emergent property can be viewed as a protection against autocracy. However, I view this protection as a constitutional bottom line. It is not particularly aspirational. Legitimacy – the reservoir of goodwill – seems a more aspirational and richer emergent property, as I explain below. Protection against autocracy seems to be a relatively objective standard that is reasonably easily defined and measured. It is consistent with an approach to the constitution that sees it as “a set of authoritative norms which structure and determine many areas of social interaction” (Yablon, 1991, p. 1606).²⁹ Viewing the constitution as a set of authoritative norms gives a comforting picture of enduring rules that hold us collectively – and the state in particular – to standards of behaviour that we might not otherwise reach. Joseph (2007) appears to view the constitution in this way. His text is organised according to the key constitutional structures, institutions, rules and

²⁹ Note that Yablon posed this definition in the context of the law more generally rather than the constitution more specifically, but I think the approach works equally well here.

conventions, with an underlying subtext that these elements are norms whose existence can be determined objectively and authoritatively.

As an emergent property, protection against autocracy is both less ambitious and more objective than legitimacy. It is possible to envisage a parliament that was elected through almost universal franchise, but where the legitimacy of the government or the law made by that parliament was open to question in the minds of the public. Voting systems contribute to legitimacy, but people need to feel they have been listened to in the period between elections. This kind of concern led to a groundswell of dissatisfaction that resulted in change to the electoral system in 1993. Successive parliaments had been seen as unresponsive to popular concerns (G. Palmer & Palmer, 2004, p. 13). Changing the means by which representatives were elected was a straightforward solution to a crisis in the public's test in government. It was consistent with New Zealanders' preference for a political constitution in which government capability is leavened by popular accountability (Geddis, 2016).

For these reasons, while it is possible to view protection against autocracy as an emergent property of a constitutional system, legitimacy is a parallel and equally important emergent property. Protection against autocracy seems to be a necessary, but not sufficient, part of legitimacy. "Legitimacy is rightly prized as the philosopher's stone which transmutes power into authority" (Sedley, 2011, Chapter 29).

In Chapter II.4.1 I define legitimacy as a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making.

Constitutional legitimacy establishes both the authority of a government to exercise public power and the limits of that government's constitutional authority (Willis, 2014). Perceptions of legitimacy depend on diffuse public confidence in the constitutional system and the decisions it produces. Lack of such confidence could lead to distrust and avoidance of the system, which could undermine the peaceful resolution of disagreements, and disengagement and non-participation in important constitutional processes such as elections

and the court system. That would create a vicious cycle of ever-decreasing trust and disengagement.

It is possible to challenge this definition of legitimacy on the basis that it does not explain why people accept constitutionally-made laws as binding, even when they disagree with the law. Ayres and Braithwaite (cited in New Zealand Productivity Commission, 2014, p. 56) note that a complex set of economic, psychological and sociological factors underpin regulatory compliance decisions. People have different motivations based on values, social responsibility, economic rationality and the desire or need to follow the law (New Zealand Productivity Commission, 2014, p. 56). Compliance does not come solely from enforcement of the law: many more people comply with the law than have it enforced against them. Most people will want to comply with the law because they perceive it is legitimate and binding upon them, not least because of the way it has been made. Some people will need to be helped to comply, and a few will need to be held to account for their actions (ibid). When citizens who disagree with a given decision are called upon to comply with it nonetheless, their willingness to do so is based, in no small part, on habits of compliance with the rule of law that legitimate the decision (Gewirtzman, 2009). Effective commitments often embed themselves in habitual behaviour. Constitutional systems work in the same way, albeit on a larger scale. Gewirtzman (ibid., p. 649) states:

If one goal of a constitutional system is to maintain consistency over time, habitual behaviour and customary practices are the best available mechanism to sustain constitutional institutions.

Consistency with historical precedent is a source of constitutional legitimacy in almost all liberal democracies. “The antiquity of particular constitutional principles or arrangements is considered good reason to accept or even to venerate the constitution in both written and unwritten contexts” (Willis, 2014, p. 273), although habitual obedience does not fully account for the continuity observed in every normal legal system when one legislator succeeds another (Hart, 2012, p. 55).

Whatever the cause of legitimacy, in a liberal democracy it is likely to manifest in the form of general public acceptance of decisions. Universal consensus is unlikely, but in a democracy with a high degree of legitimacy, disagreement can be expected to manifest in ways that conform with social norms, comply with the rule of law, and seek to effect change within existing constitutional mechanisms (e.g. including peaceful protest, petitions, citizens' initiated referendums, complaints to complaints bodies, legal action, and voter turnout). This kind of influence could be seen in relation to the Video Camera Surveillance (Temporary Measures) Act 2011, in which public outcry at the legislative shortcuts proposed to be taken by the Government led to a different procedure being adopted (Trevett 2011; Vance 2011; Geddis 2011).

While it is possible to develop objective measures of legitimacy, it needs to be remembered that these "objective standards" have been developed by people drawn from particular kinds of societies, largely liberal democracies, who have been culturally embedded in certain constitutional norms.³⁰ The standards might, therefore, be less objective than they appear at first glance. In any case, while there is a place for objective theoretical approaches to legitimacy, it also seems important to take seriously citizens' broader perceptions of legitimacy. Arguably, completely objective theoretical approaches to legitimacy may be destabilising, if they are too far removed from the values and culture of the people the constitution is intended to protect.

My approach to legitimacy assumes that constitutional culture influences decision-makers. As discussed in Chapter V.1.2, this assumption is consistent both with systems thinking and with Matthew Palmer's constitutional realism theory (2006a, 2006b). While legitimacy is imperfectly theorised in this thesis, it does seem to show some promise as a notional emergent property of the constitution.

³⁰ See, for example, the World Justice Project's *Rule of Law Index* (2015): http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf

II.6 Conclusion

This chapter has traversed a range of literature from systems theory and constitutional theory to set the context for the analysis in the coming chapters. While systems methodologies have been applied to public policy issues, they do not seem to have been applied to constitutional policy issues.

Constitutions are primarily concerned with public power and distinguish between the legitimate use, and illegitimate abuse, of public power. There is an ongoing debate as to whether constitutions are primarily descriptive or have some normative force. I do not seek to resolve that debate, and the analysis in Chapters V through VII tends to focus on procedural protections, assuming that they will strengthen legitimacy.

Chapter II.4 concludes that constitutional rules and norms are not the totality of New Zealand's constitution. There is good evidence that New Zealand's constitutional culture affects, and is affected by, our constitutional institutions and processes. New Zealand constitutional culture is characterised by various ideas and traditions, most notably authoritarianism, liberalism, fairness/egalitarianism, and pragmatism, which combine to create both support for, and an ambivalence to, the exercise of public power.

Considering a constitution against systems criteria, I have concluded that the system metaphor can meaningfully be used for constitutional policy analysis. I have identified four criteria for drawing boundaries around the constitution and have identified that legitimacy can be treated as a notional emergent property for the purposes of analysis.

Chapter III: Methodology

This chapter outlines how I have selected and used systems methodologies to answer the research question. Because this thesis is breaking new ground, the way in which the analysis is done is as important as the conclusions reached. Therefore, this chapter documents the approach to, and experience of, selecting and deploying systems methodologies. It complements Chapter VIII, which assesses use of the methodologies in constitutional policy analysis.

This chapter explains why system methodology selection matters. It discusses three meta-methodologies that assist with methodology selection: System of Systems Methodologies (SoSM), Total Systems Intervention (TSI), and the Mingers-Brocklesby multi-methodological framework. I have used all three approaches to triangulate methodology selection for this thesis. This chapter documents my methodology selection and outlines how I deployed those methodologies so that others may critique and build on my approach.

III.1 Designing a systems intervention

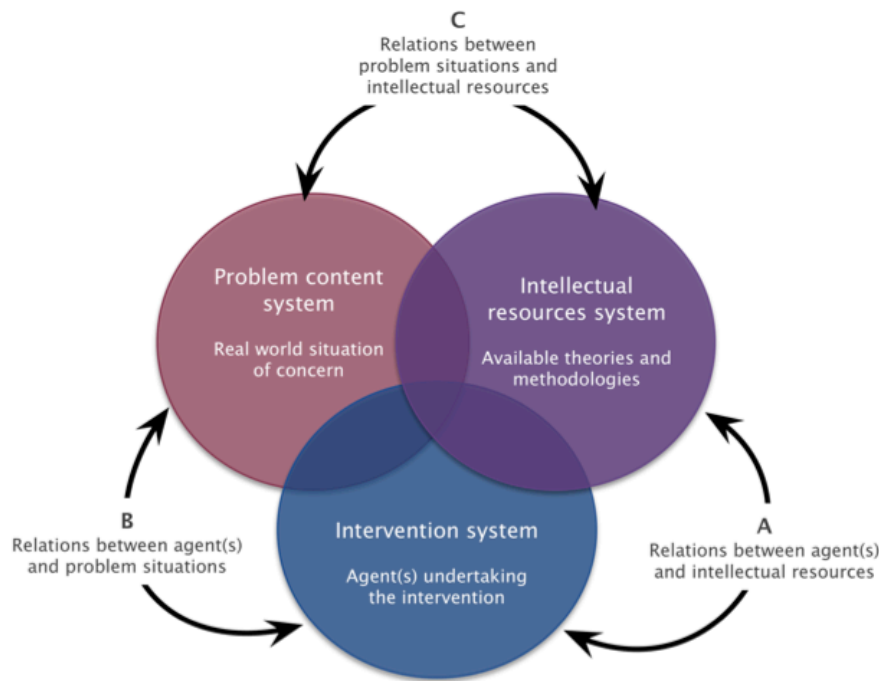
To intervene in a system, it is necessary to understand not just the problem context being addressed, but also the resources that can be brought to bear and the theoretical frameworks (methodologies) that can be used to understand and conduct the intervention. These three related matters influence intervention design. Addressing them explicitly means their limitations can be understood and factored into the design. This section considers how to identify the parameters of a systems intervention.

III.1.1 Understanding the parameters of systems interventions

The strength or weakness of a systems-based intervention depends on the methodology's fit with the situation to be analysed, and with the actors undertaking the intervention. In essence, the parameters of a systems

intervention can be summed up in the question: how can *these* people use *these* methods in *this* situation (Mingers, 2000)? Figure 3.1 shows how the three dimensions can be represented as three overlapping notional systems (ibid.).

Fig 3.1: Mingers' systems intervention design



(Mingers, 2000)

The intervention system is the person or people and the resources available to tackle the situation. It requires consideration of the skills, knowledge, experience, commitments and values of the people involved in the intervention (Mingers, 1997a, 2000). This notional system is explored in the cultural analysis in Chapter IV, and is not discussed further here.

The problem context system is the real-world site of concern. It may be "technical or strategic, well-defined or fuzzy, uncontentious or highly political" (Mingers, 2000, p. 680). The problem context system is formed from the perceptions and interactions of participants, as actors within the system and observers outside it. Oliga (1988, p. 107) observes:

Problem contexts are not objective features of the real world. As such, an over-reliance on the analyst's own definition and construction of a model of the problem situation may be questionable.

The problem content system for this thesis is explored in Chapter I.

The intellectual resources system consists of the theories, methods, and techniques that may be called on.³¹ It requires consideration of a system methodology's fit with the problem situation, and is influenced by the paradigm within which the methodology operates.³² The paradigm may inject biases and assumptions that influence how the methodology operates and the choice of information needed for its modelling tools (Leonard & Beer, 1994, p. 13).

Flood and Jackson (1991, p. 7) observe that systems methodologies offer only partial visions of what organisations are like, because organisations are too complex to be understood by using just one model. They suggest it is important to understand the lens through which problems are viewed, to understand the limitations of perspective. While those observations were made in a management context, they seem to apply to the constitutional context; it, too, is a complex and deeply human blend of structure and process.

III.1.2 The parameters of this systems exploration

Mingers (2000) uses structured questions to explore the overlapping dimensions of system intervention design. Those questions, and my responses, are set out in Table 3.1.

Viewing the responses in the round, the intervention design for this thesis is strongly influenced by three factors. The first is the purpose of the thesis, which is to explore whether systems thinking can help in analysing constitutional issues. It is, essentially, an individual inquiry into constitutional policy questions and is primarily concerned with the appreciation and analysis phases of a

³¹ This system is discussed below, in relation to methodology selection.

³² A paradigm is a construct that specifies a general set of philosophical assumptions covering ontology (what is assumed to exist), epistemology (the nature of valid knowledge), and methodology (Mingers, 2003).

system intervention (Figure 3.2). In these ways, this thesis departs from more orthodox use of systems methodologies, which are typically oriented towards taking action to improve a problem situation.

The second is pragmatic considerations of resource constraints and scale. To keep the scale of the project manageable the research is paper-based. Soft systems methodologies in the interpretivist mode are primarily oriented towards building a shared understanding of a problem situation and commitment to an intervention. Here, the research design necessitated replacing group work approaches to problem and options identification with seeking out different perspectives drawn out from relevant literature. While that approach enabled me to build an understanding of the problem based on multiple perspectives, it would not be sufficient to build consensus on any solutions developed in this way in a live policy exercise.

Finally, the ground-breaking nature of this thesis means there is no previous relevant research on which to base the choice and use of systems methodologies in the context of constitutional analysis. That makes it desirable to take as simple and orthodox an approach as possible, to ensure this thesis is on solid theoretical ground.

I have generally avoided multi-methodological approaches, although I found it convenient to re-use the rich picture developed for the soft systems methodology (SSM) analysis to inform the soft system dynamics (SSD) based analysis in Chapters V to VII. That was partly because there was no specific method for articulating the problem situation prescribed for the particular approach used.³³ I also found it necessary to complete the SSD analysis within a policy framework.

³³ As discussed in Chapter III.2.1, many systems theorists caution against mixing methodologies without considering the compatibility of their underlying paradigms. In deciding to use the SSM rich picture to inform SSD-based analysis, I considered the taxonomy of each methodology (Table 2.2) and concluded that, while SSD and SSM tackle problems in different ways and from different assumptions, their desire to understand the structures and processes related to problem contexts is relatively consistent. That meant using a problem structuring tool from SSM to inform problem structuring in SSD was unlikely to be problematic.

III.2 Systems methodology selection

III.2.1 Methodology selection matters because...

Some practitioners select particular analytical or diagramming tools from different approaches according to what feels right in the particular context. Many systems theorists consider this to be undesirable, and believe an understanding of methodologies' philosophical underpinnings is necessary to ensure the systems tools chosen for an intervention are appropriate to the problem context at hand, and work can harmoniously together (R L Flood & Jackson, 1991, pp. 47–48; Jackson, 1997, p. 350; Mingers, 2000, pp. 8–11). A systematic approach to methodology selection is needed to ensure selection is rational and defensible, and not solely dictated by personal preference.

III.2.1.1 ... some methodologies are better suited to particular phases of intervention...

Systems-based interventions have four phases (Figure 3.2). They are not steps to be followed in a linear way, but are “aspects of the intervention that need to be considered throughout, although their relative importance will differ as the project progresses” (Mingers & Brocklesby, 1997, p. 494). Mingers observes (2000, p. 683): “It is clear that the wide variety of [systems methodologies and techniques] available do not all perform equally well at all these activities”.

Techniques from different methodologies, such as rich pictures, questionnaires and surveys, and cognitive maps contribute to the appreciation phase.

Techniques such as building simulation models, and constructing root definitions and conceptual models build understanding of why the situation is as it is (analysis) and assist evaluation of other possibilities (assessment) (Mingers, 2000).

III.2.1.2 ... and paradigms colour perceptions of the world

The choice of system methodology also matters because system paradigms view the world in a particular way. Methodologies incorporating different approaches to modelling all make implicit or explicit philosophical assumptions about ontology, epistemology, and axiology (Mingers, 2003, p. 559).

These different assumptions create a unique world outlook and distinctive approaches to shared universal concepts (Bowers, 2011). Mingers and Brocklesby describe it in this way (1997, p. 492):

Adopting a particular paradigm is like viewing the world through a particular instrument such as a telescope, an X-ray machine or an electron microscope. Each reveals certain aspects but is completely blind to others. Although they may be pointing at the same place, each instrument produces a totally different, and seemingly incompatible, representation.

It is likely, therefore, that viewing a constitutional problem through a particular systems lens will result in a particular view of the problem and its impact on the real world. Considering the same problem through a different lens may result in a different view.

III.2.2 Three meta-methodologies

There are three meta-methodologies which put some structure and rigour around methodology selection.

First, the System of Systems Methodologies (SoSM) classifies problem contexts according to the nature of participants and the nature of the system under examination. It assumes that (Mingers & Brocklesby, 1997, p. 492):

methodologies from different paradigms make particular assumptions about the contexts within which they will be used, so that a methodology is most appropriate for a context matching its assumptions.

SoSM aims to reveal the particular strengths and weaknesses of available systems approaches. Understanding and appreciating the theoretical assumptions underpinning different systems methodologies should enable potential users to assess the strengths and weaknesses of different

methodologies for their purpose (Jackson, 1990). System methodologies are placed in an ideal-type grid according to how explicitly the tools within those methodologies address the different dimensions (Jackson & Keys, 1984; Jackson, 1990; see Figure 3.3).

SoSM is not intended to pigeon-hole real-world problem contexts, but informs an exercise of judgment (R L Flood & Jackson, 1991; Jackson, 1990).³⁴

Second, Flood and Jackson's (1991) Total Systems Intervention (TSI) is based on the idea that aspects of real-world situations will resonate more with some systems methodologies than others, and selects methodologies based on that resonance.

TSI's primary utility for this thesis is in the additional richness created by the use of metaphor in describing problem contexts. As with SoSM, the metaphors are intended to be an aid to judgment, rather than for mechanical application.

Finally, the Mingers-Brocklesby grid facilitates multi-methodological approaches by classifying methodologies according to their philosophical underpinnings and assessing the relative strengths and weaknesses of methodologies against the phases of intervention. The grid is organised around the three domains of: the material world;³⁵ the social world;³⁶ and the personal world (see Figure 3.3).³⁷ It is based on ideas from Habermas (1984; cited in Mingers & Brocklesby, 1997)

³⁴ A more functional, literal approach to applying the SoSM grid has largely been discredited (Banathy, 1988; Robert L Flood & Keys, 1989; Jackson, 1990; Keys, 1988; Oliga, 1988).

³⁵ The material world is independent of, and exists outside of, humans. We can shape the material world through our actions, but are subject to its constraints. Our epistemological relationship to this world is one of observation. These observations are theory- and subject-dependent. "We can characterise this world as objective in the sense that it is independent of the observer, although clearly our *observations* and *descriptions* of it are not" (Mingers & Brocklesby, 1997, p. 493).

³⁶ The social world is shared by people as members of particular social systems. It is a human construction, while going beyond and pre-existing any particular individual. The social world: "consists of a complex multi-layering of language, meaning, social practices, rules and resources that both enables and constraints our actions and is reproduced through them. One of its primary dimensions is that of power." (Mingers & Brocklesby, 1997, p. 494).

³⁷ The personal world is subjective. It is the world of people's own individual thoughts, emotions, experiences and beliefs. It is experienced rather than observed. This world is subjective in that it is generated by, and only accessible to, the individual subject (Mingers & Brocklesby, 1997).

and Searle (1986; cited in Mingers & Brocklesby, 1997) about the real world and people's relationship with it.

The grid assumes that, to best address the richness of the real world, it is desirable to go beyond a single methodology and to combine several methodologies (in whole or in part), possibly from different paradigms. When methodologies are mapped onto the grid, it shows where there are activities within the methodology that can help users in particular areas. Mingers and Brocklesby observe (*ibid.*, p. 501):

The point is not to pigeon-hole a methodology into a particular box, but to look across all the boxes and note all those that a particular methodology may help with.

Mingers (2003) has enriched the grid through a general, comparative classification of the gamut of systems thinking methods and methodologies that assists with mapping of methods and methodologies onto the grid.³⁸

Each of the approaches to methodology selection seems to offer different advantages. Combined, they give an increasingly rich assessment of the appropriateness of different methodologies for particular problem contexts. Accordingly, I have used the three approaches to triangulate the identification of potentially useful methodologies for this thesis.

III.2.3 System of Systems Methodologies

This section applies SoSM to the problem context, which is concerned with the effect of the 2010 and 2011 Acts on the constitutional system.

III.2.3.1 Dimension 1: simple-complex systems

The two dimensions of SoSM are: the nature of the system in which the problem is located; and the nature of the problem context, focusing on participants, including decision-makers (Jackson & Keys, 1984; Jackson, 1990).

³⁸ See Table 2.2 for my version of Mingers' framework populated with the classification of some systems methodologies and tools identified as particularly useful in the course of my research.

These dimensions have a particularly important effect on the nature of the problems found within them (Jackson & Keys, 1984).³⁹

SoSM accepts that the classification of the system and participants depends on the system observer's perspective and purpose for considering the system. The same system may be seen as simple or complex, depending upon the particular problem (Jackson & Keys, 1984).⁴⁰

In SoSM, the nature of the system turns on whether it is simple or complex. This distinction starts from the general proposition that problems can be regarded as easy if the system or systems in which they are found are relatively easy to understand. Systems are likely to be more difficult to understand where (ibid.):

- *Not all of the attributes are directly observable.* In such a system, the causes of problems may be hidden, which impedes the identification of useful solutions. It will be difficult to establish the effects of any solutions to the problem without actually implementing them.
- *The nature of the system is not amenable to modelling.* In some complex systems, even if laws can be established relating the actions of different parts of the system, they will be probabilistic in nature. That means modelling system behaviour will only give information about likely effects, not actual effects.
- *The system is adaptive.* For systems to be open to their environment and adaptive, parts of the system must have a certain level of autonomy, and must be purposeful. That autonomy makes the response to interventions

³⁹ Their theory is based on Ackoff's definition of the minimal necessary and sufficient conditions for the existence of a problem, which are: a decision-maker; an objective; at least two unequally efficient courses of action which have some change of yielding the desired objective; a state of doubt in the decision-maker as to which choice is "best"; and an environment or context of the problem (R L Ackoff, 1962, cited in Jackson & Keys, 1984, p. 474).

Ackoff's original concept of decision-makers has now been replaced by the concept of "participants" to ensure that the views of those not involved in making a decision still count in deciding whether a context is unitary, pluralist or coercive. Jackson (1990) notes that a problem-context is defined as pluralist even if the decision-makers are unitary, as long as those affected by a decision (even if not involved in making it) support different objectives.

⁴⁰ For example, in macro-economic issues such as inflation, interest rate fluctuations and the levels of export trade, the labour market can be seen as a highly aggregated, simple supply-demand system. Conversely, when considering issues such as the effect of early retirement or redundancy on individuals, the labour market can be seen as a highly complex system of businesses and people.

unpredictable. Social systems exist in increasingly turbulent environments, which makes it difficult for the problem solver to predict system-environment interactions.

- *The system involves more “behavioural” problems.* Decisions made in such a system will be affected by political, cultural, ethical, and similar factors, which make it hard to fully understand the rationale behind decisions made by system actors. Changing values are an important internal source of change in this kind of system.

Figure 3.4 outlines the characteristics identified by Flood and Jackson as indicating whether a system can be described as either simple or complex. Flood and Jackson (1991, p. 34) caution against superficial simplicity or superficial complexity. For instance, while an aeroplane has many parts and interrelationships and appears complex, those relationships are operated according to well-defined laws of behaviour and are not evolutionary. In this sense, an aeroplane is a relatively simple system. Features such as openness to the environment and goal-seeking behaviour that enable a system to adapt and evolve are more important to assessing complexity than the numbers of parts and interrelationships in a system.

Table 3.2 explores each of these characteristics in turn and concludes that a complex system is the best analogy for the constitution, although it has some elements in common with simple systems. Figure 3.5(a) represents that conclusion visually.

Two features are worthy of note. In some respects, the attributes of constitutional elements are predetermined because constitutional roles and functions are defined by law or bound by convention, although both are capable of evolution in the right circumstances. Similarly, the interactions between the branches of state and between components of those branches tend to be relatively organised, because of reasonably clearly defined constitutional roles and norms. Highly organised interactions tend to be more characteristic of simple systems. However, because parts of the constitution exhibit goal-seeking behaviour (e.g. the executive’s intent to govern) and

because the constitution is open to its environment, I have concluded that its nature is complex rather than simple.

III.2.3.2 Dimension 2: the nature of the problem context

The second SoSM dimension focuses on the nature of the problem context (the context in which decisions are made and implemented within the system). The problem context focuses on participants. For Jackson and Keys (1984, p. 474):

complications arise when a group of decision makers, rather than one, makes the decision; when some decision maker(s) make the decision, but others carry it out; when some decision makers not a party to a particular decision react against it; or when the decision makers' objectives are not consistent or change with time.

The unitary-pluralist-coercive problem contexts are shown in Figure 3.3(b).

Flood & Jackson's spectrum describes pluralist relationships as follows (1991, p. 34):

- having a basic compatibility of interest;
- some divergence in values and beliefs;
- while not necessarily agreeing upon ends and means, compromise is possible;
- full participation in decision making;
- acting in accordance with agreed objectives.

In the constitution, there is a basic underlying compatibility of interest, which revolves around maintaining public trust and confidence in legitimate governance. Although some constitutional elements (e.g. executive government, law-making by the legislature, adjudication by the judiciary) are purposeful and goal-seeking, and their goals do not always align directly, they tend to operate according to fundamental constitutional norms. Where there is divergence in values and beliefs, or disagreement upon ends and means, a solution is generally found within constitutional tolerances (e.g. at the executive's request, parliament enacted the Parliamentary Privilege Act 2014 to

resolve a disagreement between parliament and the courts over the nature and extent of parliamentary privilege).

For these reasons, it is justifiable to think of the constitution as pluralist in nature. Figure 3.5(b) shows this assessment of the constitution mapped onto Flood and Jackson's unitary-pluralist-coercive spectrum.

In such a devolved system, an event like the Canterbury earthquakes will inevitably cause some challenges to coordinating and effecting a recovery. The 2010 and 2011 Acts addressed those challenges by centralising power in the executive, albeit to different degrees.

The 2010 Act took a generally pluralist approach by leaving recovery functions in situ and establishing the Canterbury Earthquake Recovery Commission (CERC) to help coordinate local and central government on funding matters (State Services Commission, 2011, para. 81). In practice, CERC's establishment created confusion over who the leaders of the recovery functions were reporting to, as well as who was in charge of the overall recovery (Brookie, 2012, p. 22).

The 2011 Act responded to these differences by centralising power in the executive and moving earthquake recovery towards the more coercive end of the spectrum. Chapter IV.2.4 discusses CERC and the problems that led to a significant change in approach in the 2011 Act. The analysis of legitimacy in the recovery process (Chapter V.3.4) has highlighted that some actions can enhance legitimacy in the short-term but risk undermining it in the long-term.

The 2011 Act, and its implementation, had some features that place it towards the coercive end of the spectrum. Some of these features are explored in the chapters following so a brief overview only is given here.

First, there was a conflict in values and beliefs underpinning the 2011 Act and those extant in Christchurch's communities. The 2011 Act was based on an assumption that public participation is inherently time-consuming and could

impede a timely recovery (see, for instance, section 3). Dalziel (2011) observed: “The Minister is convinced that consultation and community engagement hold up the decision-making process”. Consistent with most communities affected by disasters, people wanted to participate in their own recovery. That desire was reflected in concerns about how the 2010 and 2011 Acts were enacted, and key decisions made, and by the grassroots networks and initiatives that emerged in the years following the earthquakes (Dalziel, 2011; Gall, 2012; Gates, 2015; Harvie, 2014; B. Hayward, 2013; Moore, 2014; Pine, Tarrant, Lyons, & Leathem, 2015; Swaffield, 2013; Toomey, 2012; Wesener, 2015). The 2011 Act also assumed that participation was at the consultation end of the spectrum, rather than deeper, more empowering community engagement.⁴¹

The 2011 Act did not promote compromise as an approach to resolving disagreements over ends and means. Instead, it gave the executive power to trump local decision-making. For example, the executive controlled the recovery strategy, the instrument that continues to dictate the long-term face and future of Christchurch (2011 Act, sections 11-15). The Minister also had (and exercised) the power to redraft the central business district recovery plan before approving it (2011 Act, section 21; see also Cabinet, 2012).

Figure 3.5(b) maps this assessment of the 2011 Act onto Flood and Jackson’s unitary-pluralist-coercive spectrum, and contrasts it with the assessment of the constitutional system.

III.2.3.3 Putting the two dimensions together: the ideal type grid

The simple-complex dimension and the unitary-pluralist-coercive dimension combine to create six ideal-type categories of problem context (Figure 3.4(b)).

⁴¹ For instance, section 17(5) provided that the process for developing the recovery plan for the CBD must include one or more public hearings at which members of the public could appear and be heard. Section 20 required that draft recovery plans be publicly notified and members of the public be invited to make written comments on them. There was criticism that the Government did not consult the public as frequently as it might have (Harvie, 2014).

The problem context is concerned with the effect of a complex-coercive “system” (the 2011 Act) on a complex-pluralist “system” (the constitution). Methodologies aimed at complex-pluralist problems seem most appropriate to explore that issue. Figure 3.4(c) shows that systems methodologies in the complex-pluralist space include interactive planning, SSM, and PANDA. PANDA is a post-modern approach that depends on group work, consensus-building, pluralism, and self-critique. That dependence makes it impossible to apply PANDA within this thesis’s research design, so it has not been considered further in the methodology selection process.

Before moving on from SoSM, I considered Jackson’s grouping of systems approaches according to their underlying purpose (Table 3.3 overleaf).

Interactive planning and soft systems methodology (SSM) are both type B methodologies. They aim to improve performance by evaluating different aims and objectives, promoting mutual understanding, and gaining commitment to purposes. Exploring purpose is consistent with the focus of this thesis, although building consensus is not.

Table 3.3: Jackson's typology of systems methodologies according to purpose

Methodology type	Examples
Type A: improving goal-seeking and viability	Hard systems thinking Soft system dynamics Organisational cybernetics – viable systems method Complexity theory
Type B: exploring purpose and building consensus	Strategic assumption surfacing and testing Interactive planning Soft systems methodology
Type C: ensuring fairness	Critical systems heuristics Team synteegrity
Type D: promoting diversity	Post-modern systems thinking <i>e.g.</i> PANDA

(Jackson, 2003, pp. 25–27)

Type A methodologies aim to improve goal seeking and viability through improving how well the system performs its role and responds to changes in its environment. I thought it interesting to introduce a type A methodology, to see whether a focus on goal-seeking and viability would produce any different insights from the type B methodologies already identified as potentially useful. Soft system dynamics (SSD) has been used in the context of New Zealand's public sector (see Chapter II.2.1). There is much readily available literature on causal loop diagramming, one of the primary tools in soft system dynamics. Therefore, it will be considered for use in this thesis, despite Flood and Jackson's assessment of it as being most useful in the complex-unitary space.

Type C and D methodologies are outside the research design of this thesis, given their reliance on full and open participation by a range of people.

To sum up, I have identified three possible methodologies using the SoSM approach: SSM, interactive planning, and SSD.

III.2.4 Total systems intervention

This section applies TSI to the problem context and identifies possible methodologies for use in this thesis.

TSI assumes that organisations' complexity means their issues should be investigated using a range of system lenses because no one systems paradigm is sufficiently all-encompassing to explain the complexity of the real world (R L Flood & Jackson, 1991, p. 3). TSI has two components – the SoSM assessment of problem context discussed above, augmented by a metaphor-based assessment of the problem context. Flood and Jackson (1991, pp. 7, 14) contend that the vision offered by each paradigm can best be revealed by understanding the particular metaphors upon which different methodologies are based. They have identified a range of metaphors (see Table 3.4). If any of the metaphors bring difficult issues into focus particularly clearly, then it is sensible to tackle the problem using a systems methodology which is consistent with the metaphor employed.

There are three phases to TSI, although they are not intended to be followed in a strictly linear fashion. TSI is a systemic cycle of enquiry, with iteration back and forth between the three phases (R L Flood & Jackson, 1991, p. 50). Only the first two of those phases are followed in this thesis. The third, implementation (or coordinated change) is outside the scope of this thesis.

III.2.4.1 Phase 1: creativity

The task in this phase is to use systems metaphors as organising structures to help think creatively about the situation. The tools to assist this process are the system metaphors (Table 3.4). The outcome is a “dominant” metaphor that highlights the main interests and concerns, and can become the basis for a

choice of an appropriate intervention methodology. Supporting metaphors can also be identified to aid the choice process.

In this phase, I revisited the problem context described in Chapter III.2.3.2. The constitution is an organising structure enabling the pursuit of many goals with procedural limits on how those goals may be pursued and (fewer) limits on whether goals may be pursued. By contrast, the 2011 Act had a clear single goal. To achieve that goal, it avoided ordinary procedural limits by: centralising power in the executive; short circuiting normal checks and balances; and seeking to limit accountability.

After comparing the constitution against the TSI system metaphors⁴², I concluded that the culture metaphor is the best fit with the constitution and is therefore the dominant metaphor. The political “coalition” metaphor also fits and is a supporting metaphor, although the “prison” metaphor may be more apt for thinking about the 2011 Act. The neurocybernetic metaphor can be seen as another, weaker, supporting metaphor.

III.2.4.2 Phase 2: choice

The task during this phase is to choose an appropriate systems-based intervention methodology (or set of methodologies) for the problem context. The tools to assist this process are SoSM and, derived from that, knowledge of the underlying metaphors employed by systems methodologies. Flood and Jackson (1991, p. 52) state that the link between system metaphors and methodologies is best made through SoSM, because it “neatly unearths the assumptions that each methodology makes about the system with which it deals and about the relationship between the actors concerned with that system”.

Flood and Jackson combine the underlying metaphors with SoSM’s two dimensions with the underlying metaphors. Once there is agreement about

⁴² The system metaphors are outlined in Table 3.4. My assessment of the constitution against these metaphors is set out in Table 3.5.

which metaphors “most thoroughly expose an organisation’s concerns, an appropriate systems-based intervention methodology (or set of methodologies) can be employed.” (R L Flood & Jackson, 1991, p. 45). Table 3.6 identifies the assumptions of problem contexts made by, and the underlying metaphors of, a range of system methodologies. I have made these assessments based on Flood and Jackson’s approach.

Figure 3.6 sets out my SoSM and TSI assessments of the problem context and identifies strong and weak connections between system methodologies and the problem context. The analysis suggests that interactive planning is the strongest connection. SSM is also a reasonably good fit, although it does identify with the organic metaphor, which is not a particularly good fit with the constitution (see Table 3.5). SSD is a weak fit, given its identification with the machine and organic metaphors.

The choice phase identified two possibilities which were not adopted. The first was strategic assumption surfacing and testing (SAST). However, SAST relies on identifying and debating the assumptions of stakeholder groups (Jackson, 2003, p. 144), which cannot be achieved within the research design. It would be worth considering SAST in future research. The second was the viable system method. Although a weak fit, it could be useful for exploring how internally-generated drivers for constitutional change work. Space constraints precluded testing this method. Further research would be needed to assess how problematic its underlying assumption of a single controlling brain in the system would be for constitutional analysis.

III.2.5 The Mingers-Brocklesby framework

The Mingers-Brocklesby grid (1997) assumes that a fully comprehensive intervention would consider the three different worlds of the problem domain and the four phases of intervention (Figure 3.4). Each box in the Mingers-Brocklesby grid generates questions about particular aspects of the situation or intervention that need to be addressed (Mingers & Brocklesby, 1997). It is then

possible to take different methodologies, consider the extent to which they address the questions, and appraise their relative strength in each box of the grid.

Mingers (2003, p. 566) suggests mapping according to orthodox, intended uses of the methodologies, rather than possible uses, and mapping onto a particular cell only where the methodology “explicitly deals with it, either by having a specific activity concerned with it, or by explicitly addressing it in its underlying assumptions, or occasionally where the method has commonly come to be used for that purpose in practice”.

I developed Mingers-Brocklesby grids using Mingers’ taxonomy (Table 2.2) for the three methodologies which appeared most suited to the problem context based on the preceding analysis (i.e. interactive planning, SSM, and SSD).

This thesis is focused on the appreciation and analysis phases of systems interventions, with some exploration of the assessment phase if the circumstances of the problem context warrant it. Thus, in using Mingers-Brocklesby grids, I focused on identifying those methodologies with tools designed for those phases.

The 2011 Act affected each of the social, personal and material dimensions, with its holistic approach to recovery.⁴³ The constitution’s emphasis is on the social dimension – it sets out the rules that govern how we live together as a constituted state. The personal dimension cannot easily be explored within the research design. The methodologies which have tools designed for exploring the social and material dimensions are therefore likely to be most valuable.

I mapped three methodologies using the Mingers-Brocklesby framework; my conclusions are outlined below and in Figure 3.7.

III.2.5.1 Soft system dynamics

⁴³ Section 3(g) of the 2011 Act referred to restoration of the social, economic, cultural, and environmental wellbeing of greater Christchurch communities.

System dynamics assumes that the multitude of variables existing in complex systems become causally related in feedback loops that themselves interact. The systemic interrelationships between feedback loops constitute the structure of the system and are the primary determinants of system behaviour.

System dynamics has both a qualitative phase and a quantitative phase. The qualitative phase – SSD – focuses on problem structuring and identifying the relevant variables and feedback loops, and models. The quantitative phase (not used in this thesis) is computer simulation of system models.⁴⁴

SSD appears to have reasonably strong tools for the appreciation and analysis phase in relation to the material dimension and, to a lesser extent, the social dimension (Figure 3.7(a)). This is consistent with Jackson's typology (Table 3.5 above), which suggests it is worthwhile including soft system dynamics in the analysis of the 2011 Act.

III.2.5.2 Soft systems methodology

SSM contains tools to surface different perspectives and use them to build models that are used in an exploration of the problem situation, with a view to taking steps to improve it (Figure 3.7(b)). SSM uses rich pictures to highlight the essence of the problem context and inform the development of root definitions and conceptual models that are used to identify opportunities for real world improvements.

SSM assumes group work will be used to build rich pictures and root definitions, and to assess models against the real world. For the purposes of this thesis, I have assumed that stakeholder perspectives could be extrapolated from written sources. While that can facilitate an individual inquiry, the research design does not permit consensus-building and shared commitment to interventions, which is a key purpose of the group work in SSM.

⁴⁴ Systems characterised by probabilistic behaviour may not be amenable to quantitative modelling (Chapter III.2.3.1).

III.2.5.3 Interactive planning

Interactive planning assumes that involving stakeholders in planning and design can achieve widespread buy-in to the plan (Jackson, 2003, p. 161).

Figure 3.7(c) shows that interactive planning is strongly centred around the action end of the spectrum. There is an open question whether an approach so overtly designed for organisational planning is likely to be useful for constitutional policy, although it would force a future-oriented perspective on constitutional policy analysis.⁴⁵

Of the five phases of interactive planning, only the initial phase ('formulating the mess') is likely to be relevant to this thesis. That phase envisions the future of an organisation if it continues its current plans, policies, and practices, and if its environment changes only in the ways it expects. It requires three types of study which, together, produce a reference scenario. One study is a systems analysis which gives a detailed picture of the organisation, what it does, its stakeholders, and relationships with the environment.⁴⁶ There are no specific tools to assist with the systems analysis; for this analysis interactive planning borrows from other methodologies.⁴⁷ This means interactive planning would not give me an additional set of systems tools to test, so I have decided against including it in the systems studies for this thesis.

III.2.5.4 Conclusions from the Mingers-Brocklesby framework

Based on the Mingers-Brocklesby grids (Figure 3.8), SSM and SSD look to have the right kinds of tools for the problem context at hand. Interactive planning does not, and will not be considered further.

⁴⁵ A risk with applying interactive planning to constitutional policy issues is that there may be more variables in the constitutional system than can meaningfully be accommodated within the planning tool. The analysis may be too complex if all variables are accounted for, and too insensitive if they are not.

⁴⁶ The other two studies are not relevant for this thesis.

⁴⁷ For instance, a large interactive planning exercise done by DuPont in relation to health, safety, and environment matters used some of Senge's fifth discipline tools in the "formulating the mess" phase (Jackson, 2003, p. 170).

III.2.6 Conclusions on methodology selection

To a greater or lesser extent, all three meta-methodologies identify SSM, reinforcing its appropriateness for the problem context. The Mingers-Brocklesby grid suggests that SSD may be useful for forming a picture of underlying causal structures. Jackson's classification of it as a Type A goal-seeking methodology makes it worth considering because it may provide a nice point of contrast with SSM (a Type B (exploring purpose) methodology). For these reasons, I have decided to pursue SSD despite TSI's suggestion that it is not quite apposite, given its identification with unitary systems and its dominant machine metaphor. Research done for the Mingers-Brocklesby grid revealed that interactive planning was not useful for this thesis, despite its apparent suitability to the problem context.

III.3 Methodology deployment

I intended to use the tools and techniques within SSM and SSD that assisted with the appreciation and analysis phases, and a lesser focus on the assessment phase. The goal of this research was to facilitate an individual inquiry, to see whether the systems lens could create new or different insights into constitutional policy issues. Compatibility at the analytical level would make it worthwhile considering full deployment of the methodologies, to build shared insights and consensus on solutions. Ideally, full deployment would enhance the legitimacy of constitutional interventions. In that sense, this thesis can be seen as the first stage of a larger inquiry.

As I deployed the methodologies, I also conducted further research into relevant aspects of the constitutional issues to produce the information required for the systems analysis.

This section records how I deployed SSM and SSD so that others may critique, follow, or build on the approach.

III.3.1 Soft systems methodology

III.3.1.1 Rich pictures

The starting point in any SSM analysis is developing a rich picture of the problem context. According to Checkland, making drawings to indicate the many elements in any human situation has always characterised SSM (2000, p. S22):

Its rationale lies in the fact that the complexity of human affairs is always a complexity of multiple interacting relationships; and pictures are a better medium than linear prose for expressing relationships. Pictures can be taken in as a whole and help to encourage holistic rather than reductionist thinking about a situation.

Rich pictures are pictorial representations of the problem situation that highlight significant and contentious aspects in a way that is likely to help creative thinking in the next stages of the analysis (Jackson, 2003, p. 186). Their aim is to gain and disseminate a creative understanding of the problem situation. Creating rich pictures ideally involves gathering multiple perspectives on the problem from the people with roles in the problem situation. The richer the picture of the situation, the more options there are for selecting a viewpoint from which to study the problem situation (Checkland, 1981, p. 165). Rich pictures are essentially used as a metaphor to begin the analysis (Murthy, 2000). The information required concerns the structures and processes at work and the relationship between the two (Jackson, 2003, p. 186), and includes insights from the parallel cultural analysis (ibid., p. 191).

There are no rules for drawing rich pictures, and much depends on the skill and purposes of the person doing the drawing (Jackson, 2003, p. 191):

...Rich pictures are selective and it is an art to know which issues, conflicts and other problematic and interesting aspects to accentuate. If done well, rich pictures can assist creativity, express the interrelationships in a problem situation better than linear prose, allow the easy sharing of ideas between those involved in an intervention, catalyse discussion and act as an excellent memory aid.

To start developing the rich pictures in Chapters V-VII, I read around the specific constitutional topics to get a sense of the structures, processes and climate. Sources included government reports, parliamentary debates, academic contributions, news media, and blogs. News stories were a particularly valuable source of information in the early days of the earthquake recovery, highlighting areas for further exploration. Based on this early reading, I was able to sketch out some issues which tended to highlight further avenues for exploration. As events continued to unfold, I found new ideas or, more often, new twists on old ideas that added further richness to the pictures. I revisited the rich pictures a number of times through the course of the systems analysis and during the write-up.

Checkland (2000, p. S19) emphasises the hand-drawn sketchy nature of rich pictures. They can be produced quickly, if the right people are available to contribute perspectives. That is an attractive proposition for a busy policy shop. I produced my rich pictures using a computer drawing programme, partly for legibility and partly to save time in revising them.⁴⁸

The research design did not permit the gathering of multiple perspectives from people involved in the problem situation. To mitigate that, I used quotes and comments from different sources to ensure I illustrated different perspectives. I used small three-dimensional people and first person speech bubbles to reinforce these perspectives and to keep the analysis grounded in the fact that the problems being described were real problems being faced by real people. I wanted to test the idea that, while constitutional norms are important in an abstract sense, they were relevant and effective for people whose normality had been literally pulled out from under them and who had to rebuild their lives out of the rubble.

⁴⁸ The pictures were made on a Macbook Air OSX 10.11.6, using Omnigraffle 6.6.1 by the Omni Group.

The rich picture process is highly creative. It required significant thought and focus, and I knew I was making progress only when the story started to emerge and resonate for the people with whom I shared my analysis.

III.3.1.2 Formulating a root definition

The process of model building in SSM starts with creating a root definition using the tools of CATWOE and PQR described below. The root definition is constructed around an expression of purposeful activity as a transformation process (Checkland, 2000, p. S27). The root definition ensures model builders clearly understand the purposeful activity relevant to the problem situation being addressed (ibid., p. S28).

CATWOE - a mnemonic

The mnemonic CATWOE identifies the elements that are essential to building a root definition. These elements help to ensure that all relevant perspectives are considered, and that the root definition is both internally consistent and consistent with the wider system perspective. The CATWOE elements are (Checkland & Scholes, 1990, p. 35; Jackson, 2003, p. 193):

C – customers: those who stand to benefit from the transformation or, conversely, those who can be victimised by it.

A – actors: those who would do T.

T - transformation process: through a transformation process, an input is transformed into a different state or form, which becomes the output.

W - weltanschauung, or world-view: this element requires clarity about the system's animating purpose. The weltanschauung is subjective, and different people are likely to have different views of a system's purpose. Clarifying weltanschauung enables conscious debate on different world views.

O – owners: the owners of the system are those who have the power to stop the transformation process (T).

E - environmental constraints: elements outside the system which it takes as given.

Checkland notes that the core of CATWOE is the pairing of T and W, the worldview that makes the transformation meaningful. For any relevant purposeful activity there will always be a number of different transformations by means of which it can be expressed, and they derive from different interpretations of the activity's purpose (Checkland & Scholes, 1990, p. 35).

The elements in CATWOE inform the root definition and give it enough richness to be modellable (ibid., p. 36). Different definitions of the CATWOE elements, particularly T and W, will alter the root definition and the model constructed from it (compare the SSM models in Figures 6.3 and 6.4). Setting these matters out as Checkland suggests ensures that others can see and test the approach that has been taken. It also means that different transformations, or the same transformation informed by a different worldview, can be created to further test thinking about the problem situation.

I found that Analysis 2 from the cultural analysis (Chapter III.3.1.5) particularly informed my thinking about customers, actors and owners for the CATWOE. Developing CATWOE was relatively straightforward, and the results are recorded in Tables 5.1, 6.1, and 7.2.

PQR - a formula for the root definition

At its simplest, a root definition is a formula:

A system to do P (what) by Q (how) to achieve R (why), where P is a transformation (T).

The choice of T is critical. In most systems, a number of transformations could be possible, and they may operate at different levels. R (why) helps to clarify the level at which the system is viewed. Checkland says there are always a

number of levels at which a system can be viewed, and the choice of level is always observer-dependent (2000, p. S29). In this sense, “system” is a relative term because SSM views systems in a conceptual way, to structure debate on action to improve real world problems (Figure 3.9).

The root definition is simply an expression of PQR, usually in a long compound sentence. The process of constructing a root definition from CATWOE and PQR was relatively straightforward. Articulating R helped me to clarify the level at which I was viewing the system under analysis.

I drafted the root definition by first defining the three elements (PQR) and then connecting them into a grammatical (if long) sentence. Once I had drafted a root definition, I then compared it against the CATWOE and rich picture to ensure they were aligned. The root definitions evolved over time as I built models and revisited rich pictures, consistent with Checkland’s observation that the modelling process is not linear.

III.3.1.3 Performance measures - the 5Es

Performance measures enable the operational system (to do P by Q to achieve R) to be monitored, and control action taken when necessary. Control action consists of any adjustments needed to achieve and maintain optimal performance in the face of changing circumstances.

Checkland describes SSM’s models as “logical machines for carrying out a purposeful transformation process expressed in a root definition” (2000, p. S30). That being the case, measuring the performance of a logical machine can be expressed through an instrumental logic which focuses on five issues (Checkland & Scholes, 1990; Checkland, 2000, p. S30):

- Is the desired output produced through the transformation? This is the efficacy measure.
- Are minimum resources used to achieve the transformation? This is the efficiency measure.

- Is this transformation worth doing because it contributes to a higher level or longer-term aim? This requires the transformation to be viewed in the context of the wider system and from the perspective of the system owner, and is the effectiveness measure.
- Ethicality - is the transformation morally correct?
- Elegance - is the transformation aesthetically pleasing?

The ethicality and elegance measures appear to be particularly relevant to constitutional issues, because they allow for explicit consideration of an intervention's consistency with constitutional norms such as the rule of law, public participation, and human rights. Ethicality, in particular, enables explicit consideration of the fairness, liberal, and egalitarian dimensions of New Zealand constitutional culture.

I have used elegance as a means of considering simplicity of design and consistency with constitutional norms. Simple systems are generally easier to understand and operate than complex ones. I assume that a simply designed transformation is more likely to resonate with the pragmatic dimension of New Zealand constitutional culture. For these reasons, a simply designed transformation is more likely to deliver an outcome in a way that New Zealanders understand and can accept, which would promote constitutional legitimacy more effectively than a more complex design. That said, a certain amount of complexity is likely in a system that interfaces with the constitution, given the complexity of the society protected by the constitution and the number of constitutional principles and practices that have evolved over centuries. Therefore, and with apologies to William of Ockham, I have defined this dimension of elegance as "the system is as simple as it can be, and no more complex than it needs to be".

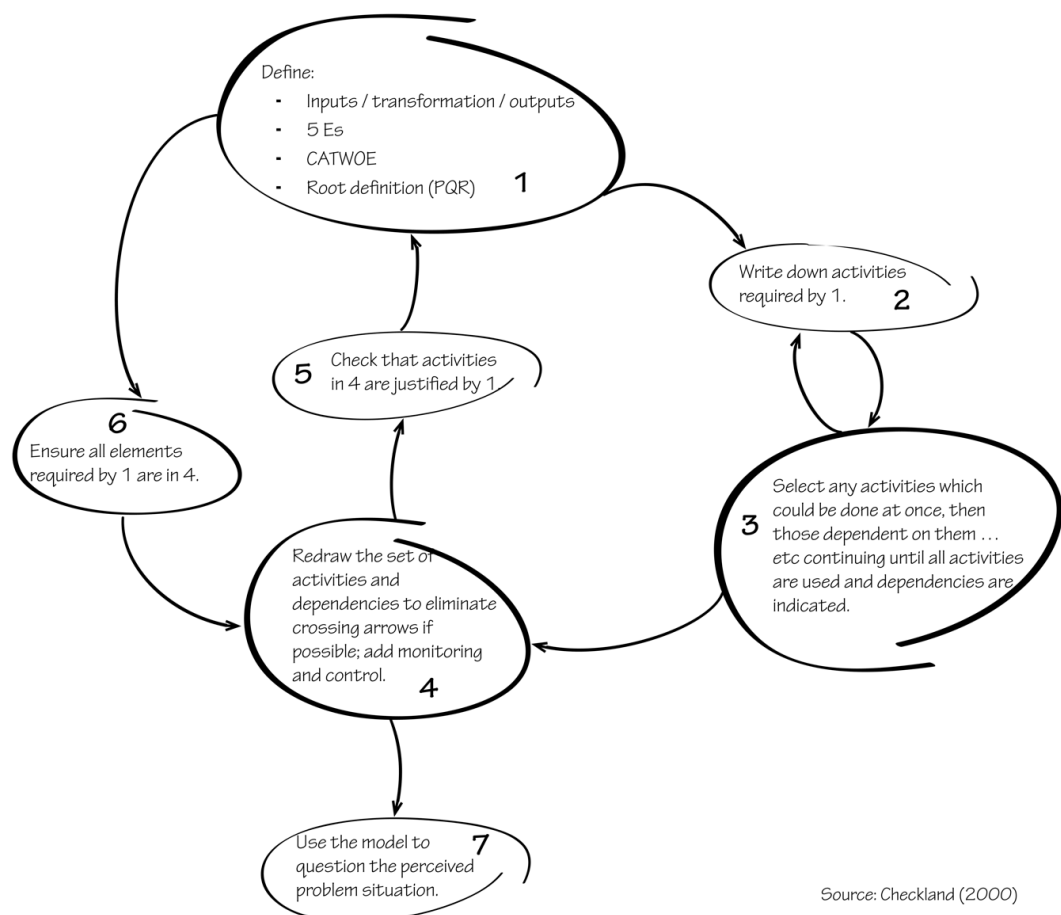
III.3.1.4 Building a system model

The system model is informed by the problem situation described in the rich picture, the root definition, CATWOE, PQR, and the 5Es performance measures.

Constructing a model of the system involves identifying the least number of steps needed to bring about T. This task should not be elaborate. Ideally, the overall activity of the model should be 7 ± 2 individual activities, any of which can be made the source of a more detailed model (Checkland, 2000, p. S30).

The core skills in model building are “logical thought and an ability to see the wood and the trees” (Checkland, 2000, p. S27). Checkland says it should be possible to build a model in about 20 minutes (ibid.). That was my experience, once I had got used to the process. The first model took significantly longer as I felt my way through the process, but subsequent models were quicker to build. Figure 3.9 illustrates Checkland’s process for building SSM models.

Figure 3.9: Checkland’s process for building SSM models



Checkland (2000, p. S30) admits it is not usually possible to construct a model exclusively on the basis of a root definition, CATWOE, PQR, and the

performance measures because real world knowledge tends to creep in. However, while real world knowledge informs model building, it must not dominate. That is because the model under construction is an ideal-type conceptual model intended to be tested against the real world to see where real-world changes would be needed to bring about the desired transformation.

When models are built, the performance measures assess the operation of the whole system, so steps can be taken to improve it. In this way, feedback is considered at a system level. However, I noted that individual elements within the model could (and probably would) provide feedback to other elements, thus creating learning within the system independent of performance measure feedback. I have shown these intra-system feedback loops as dotted lines (e.g. Figure 5.7).

Checkland and Scholes (1990, p. 40) observe that the performance measures operate at different levels. For instance, efficacy and efficiency focus at the Q (how) level - whether the particular means adopted will bring about T, and how much resource is needed to create T. Effectiveness, however, is concerned with whether T is meeting the longer-term aim (R). I have used ethicality to consider the appropriateness of R, as well as the means by which it is being achieved (T), and elegance to consider the whole system of PQR. I have displayed these different levels as a series of nested systems (e.g. Figure 5.7).

III.3.1.5 Cultural analysis

The stream of cultural analysis emerged some years after SSM's development, initially as an informal response to the need to understand the culture of problem situations. It was later formalised as a separate stream of analysis to enable "judgments to be made about the accommodations between conflicting interests which might be reachable by the people concerned and which would enable action to be taken" (Checkland, 2000, p. S21). With the stream of cultural analysis (ibid.):

... SSM ... recognises the crucially important role of history in human affairs. It is their history which determines, for a given group of people, both what will be noticed as significant and how what is noticed will be judged. It reminds us that in working in real situations we are dealing with something which is both perceived differently by different people and is continually changing.

There are three parts to the cultural analysis:

- An analysis of the intervention, which helps to identify the subjective preferences of problem owners and solvers so their influence on the analysis can be recognised.
- An analysis of the roles, norms, and values at play in the situation, which explores structural roles and likely influences on the behaviour of people in those roles.
- A political, or power-based analysis.

Analysis 1 - analysis of the intervention

Analysis 1 considers the intervention from the perspectives of the client, the world-be problem solver, and the problem owner (Checkland & Scholes, 1990, pp. 47–48). These perspectives inform the conceptual models, particularly the application of performance measures: one person's sense of effectiveness may impinge on another person's sense of ethicality. The perspectives may overlap, particularly where the client and the problem owner are the same person. Analysis 1 does not require any great research or effort; it is simply a matter of identifying and articulating the different perspectives.

Checkland does not give any particular guidance on how to do this analysis. The first two parts - perspectives as client and problem-solver - required me to consider my interests and perspectives in each of these roles (Chapter IV.1.1). For the third part – problem owners – I simply identified all classes of people who were affected by the earthquakes or had a role to play in the recovery. Confining problem-owners to decision-makers would have excluded the important perspectives of the people and communities affected by the recovery. To understand their different interests and perspectives, I imagined

myself in their positions and posed questions that encapsulated their interests. From these, I made first person statements that illustrated the perspectives they might bring to the problem situation (Table 4.1).

Analysis 2 - roles, norms and values

Analysis 2 examines the social (cultural) characteristics of the problem via interacting roles (social positions), norms (expected behaviour in roles), and the values by which role holders are judged. It is a deliberately simple model (Checkland & Scholes, 1990, p. 49), and I based my analysis on a broad understanding of the context.

I presented this information in two ways: a table and a diagram (Table 4.2, Figure 4.2). I extrapolated norms from the constitutional norms applying to decision-makers' roles, and applied the constitutional values identified in Chapter II. The diagram helped me to see the relationships between different actors and provided a useful comparison for Analysis 3.

The analysis was relatively helpful in starting to think about the problem situation for the rich pictures and it was completed fairly quickly. It was, however, relatively unstructured and resulted in a fairly simple and unsophisticated analysis. I found the more structured and detailed actor analysis in the Delft approach (see Chapter III.3.2.3) resulted in a more nuanced analysis, although it took significantly more time to complete. That analysis proved very helpful in identifying interventions and external factors that would influence the systems under consideration (both Analysis 2 and the actor analysis are discussed in Chapter IV).

Analysis 3 - power

Analysis 3 is concerned with how power is expressed in the situation under examination. It requires tact and is often not published openly (Checkland & Scholes, 1990, p. 51). An analysis of how power is expressed, though, is essential for the problem solver to understand the situation and the feasibility

of particular options. Analysis 3 should ideally encompass both formal and informal power structures.

The research design means it has not been possible to gain a nuanced understanding of the informal power structures that very probably existed in the Canterbury earthquake recovery. The tentative conclusions I reached are shown in a diagram format (Figure 4.3).

III.3.2 Soft system dynamics and the Delft approach

There are five phases to system dynamics (Cavana & Maani, 2000), only the first two of which are used in this thesis: problem structuring and causal loop modelling.⁴⁹ The thesis puts the causal loop diagram (CLD) into an intervention map devised at the Delft University of Technology (van der Lei et al., 2011).

SSD is typically deployed in areas with known problems that have a history of failed solutions (this is implicit in Senge et al., 1994, Chapters 14–18). SSD “is an extremely powerful and useful framework that can help the government ‘break through long-standing and complex policy problems’” (Cavana & Clifford, 1999, p. 14). That conclusion was made in the context of an extant policy problem. Following another systems exercise facilitated by Cavana, public sector policy analysts felt system dynamics would be best used in well-defined and well-controlled contexts on big issues (Cavana & Clifford, 2006).

I anticipated that using SSD to imagine future scenarios or build new policy to avert potential problems would be difficult, and that did prove to be the case for the problem context under consideration. I have not identified examples of SSD being used to predict the impact of initiatives that are being contemplated, although some critical reasoning approaches have been posited that might help in formulating CLDs in such cases (Cavana & Mares, 2004). The challenges I

⁴⁹ The remaining three phases are dynamic modelling, scenario planning and modelling, and implementation and organisational learning. Cavana describes uses of dynamic modelling and scenario planning in public policy scenarios (Cavana & Clifford, 1999, 2006).

faced in problem structuring led to me adopting an analytical framework that incorporates system dynamics concepts into a policy framework (van der Lei et al., 2011), which I describe as the Delft approach.

The Delft approach uses analytical concepts rooted in the hard systems traditions to develop a problem structuring method that focuses on analytical rigour, consistency and conceptual clarity (van der Lei et al., 2011, p. 1392). Unlike the soft systems approaches that emphasise the development of shared understandings of problems, the Delft approach assumes that preliminary policy analysis is done by an individual analyst or small team and is not typically the outcome of a participatory process (ibid.). Having said that, the rigorous logic applied to problem structuring is common to both hard and soft system dynamics.

III.3.2.1 Problem structuring

In the New Zealand public service examples led by Cavana, problem structuring appears to have been done in facilitated group workshops (Cavana & Clifford, 2006). That was not consistent with the research design, so I turned to other approaches. For an explanation and assessment of the problem situation, I used the rich picture developed for SSM. That gave both sets of analysis a common contextual basis, which I assumed would facilitate comparison of the two analyses.

That assessment alone was not sufficient. I needed more information to help me identify the structure of the system at issue and describe what the situation would like like if the problem were resolved. For extant problems, data and/or other qualitative evidence would normally be available. That information would help to define the boundaries of the system under examination and what success looks like. The Delft approach provided a policy framework for structuring the problem, which clarified the system that needed to be described

using a causal loop diagram (CLD).⁵⁰ There are four steps in the Delft approach, two of which are used in the problem structuring phase: objective mapping, and ways and means mapping. The remaining steps are described in III.3.2.2 and III.3.2.3 below.

A. Objective mapping

The Delft approach starts with developing objectives for an intervention, which can be logically worked through to identify the steering factors (interventions) needed to achieve the objectives. The objective mapping involves a conditional “if... then” logic, which lends rigour to the approach (Figure 3.11).

I had two difficulties with applying the Delft approach to mapping objectives. First, and most importantly, I found that the objective mapping focused on “if...then” encouraged a linear view of the situation, which drove the analysis towards a single answer to the problem. Constitutional issues are rarely this simple, because there are usually several norms and values involved, opening up a number of possible, sometimes complementary, solutions.

Secondly, I found the upward movement of the objective map counter-intuitive. The gravity of the eye tends to go from top left to bottom right, at least amongst readers of languages that read from left to right (Bradley, 2013, p. 10).

I found systemigrams to be a more useful way of mapping objectives. Systemigrams show the process to get from problem situation to desired outcome in such a way that multiple objectives can be shown, and are not seen in isolation (Boardman & Sauser, 2008, p. 101). Systemigrams read from top left

⁵⁰ There are parallels between the Delft approach (van der Lei, Enserink, Thissen, & Bekebrede, 2011) and Eden’s (2009) approach to policy analysis and strategic management. Eden highlights four dominant process modules, three of which have direct analogues within the Delft approach, and one of which resonates with my modification to one of the steps in the Delft approach. Eden and the Delft approach both recommend: a form of stakeholder mapping (actor analysis); strategy mapping (rich picture and the objectives map); and using system dynamics modelling to test draft policies and strategies over time (the CLD and intervention map). Eden also recommends developing a business model that explores the ability to deliver goals and resolve priority issues. While the Delft model does not have a direct analogue, some of that information is exposed through the actor analysis and the ways and means mapping.

to bottom right and label the arrows that connect the various notes, so the syntax of the diagram is absolutely clear (ibid.). I therefore followed the objective mapping stage, but used systemigrams to display my conclusions.

B. Ways and means mapping

The second stage of problem structuring is to identify the interventions needed to achieve the objectives.

I have departed from the Delft approach to display the ways and means mapping, again because I found it did not suit the constitutional problem context. The recommended approach goes across the page from left to right, from interventions (described as steering factors in the Delft approach), to objectives, to outcomes (Figure 3.11). It is highly logical, and would work well where interventions, objectives and outcomes were reasonably linear. However, when I came to apply it to constitutional issues, the issues were sufficiently inter-related that the diagramming became complicated and difficult to read. I concluded that another diagramming method was needed to display the inter-relationships.

Intervention logic is a diagramming method based on conditional “if...then” logic (Baehler, 2001). I selected this method in part because I am familiar with it, and in part because it was consistent with the conceptual approach underpinning the Delft approach. Intervention logic diagrams are read from the bottom up. The outcomes – the most important part of the diagram – are at the top and so catch the eye. The counter-intuitive need to read from bottom to top is mitigated somewhat by the arrows which clearly show the direction of travel.

III.3.2.2 Causal loop modelling

The next step was to develop a CLD. In essence, the CLD is a simplified model of a real world system. It is a word-and-arrow diagram that takes conceptual relationships and refines their description until the causal links are exposed.

Those causal links can then be modelled, giving a sense of how changes to (or within) the system will affect system behaviour. Qualitative diagrams convey richness; quantitative diagrams create rigour (Eden et al., 2009, p. 6). The diagrams in Chapters V to VII are qualitative (Figures 5.10, 6.7, 7.6a, and 7.6b). While they mostly contain causal links, some of the concepts resisted my attempts to transform them into variables, so some of the links remain conceptual in nature. I am, thus, left with an open question about the extent to which some constitutional norms can meaningfully be framed as variables, which also leaves open the possibility that constitutional issues may not be wholly amenable to dynamic modelling. That said, the qualitative diagrams in Figures 5.10, 6.7, 7.6a, and 7.6b do convey a rich, but economically described, picture of the interrelationships within the constitution described there.⁵¹

The Fifth Discipline Fieldbook (Senge et al., 1994, p. 105) describes the model building phase as telling a story. The idea is to develop a hypothesis that makes sense, is logically consistent, and could explain why the system is generating the problems that have been observed. The hypothesis is then tested. If it does not explain the observations, it will need to be refined or revised. Practitioners of CLD have identified a few underlying stories, or archetypes, that characterise many systems. Kim and Anderson (2007, pp. 1–4) advise to look for the archetypes to help understand why a system operates as it does.

When building a CLD, Cavana and Mares (2004) advise starting with concepts to form a conceptual map. The map should bring out every assumption behind a policy decision (ibid.). Then, the concepts are converted to variables which can be measured. The links between variables can be established through using counterfactual conditionals to test links (ibid.). I found the approach of starting with concepts to be an easy way to start building a CLD. I found the counterfactual approach slightly difficult because so many of the variables in my CLDs focus on people's behaviour. Testing the counterfactual therefore

⁵¹ In the process of working up the Technical Appendices describing the variables, links and loops, I found that a complete description of a single CLD required some 9,000 words, which shows just how economical the (admittedly complex) CLDs are.

assumes a level of rationality or a singleness of purpose that may not exist in the real world.

The next step was to turn the concepts into variables that could be modelled, which requires them to be expressed in a way that indicates there can be more or less of the variable. I found it hard to turn some of the concepts into variables, because they were inherently conceptual. Some elements, such as constitutional norms and values, are still shown as concepts⁵², which means these diagrams are not truly CLDs. I have described these diagrams as “system maps” rather than CLDs (Figures 5.10 and 7.6).

The links between variables have a polarity (ibid), which I have conveyed as “s” (the same) and “o” (opposite). The polarity indicates whether the variables move in the same or opposite direction (more of one means more of the other, or more of one means less of the other).⁵³ It is not easy to indicate a concept’s polarity relative to other variables, because the polarity may depend on the nature of the change. I have shown such changes as “s or o” meaning the polarity may go either way. If the system maps were to form the base of dynamic modelling, this approach would have been problematic, and I should have had to find another way of representing change to norms and values. However, because I only used the system maps to identify some probabilistic effects of change, it did not require the precision needed for dynamic modelling. Accordingly, I have retained concepts in the system maps and accommodated the uncertainty.

While developing the CLD (Figure 6.7), I tested the links between variables by first defining what the link meant, and checking the logic to confirm causality. Due to space constraints, that logic checking has not been reported in any detail in the analysis, but is available in Technical Appendix 2 (on the appended CD-

⁵² Concepts are distinguishable from variables by the language with which they are described. Variables are measurable, and are described as “level of”, “extent of” etc. The variables and concepts are defined in Technical Appendix 1 (appended CD-ROM).

⁵³ Some systems thinkers use “+” and “-” to indicate polarity. I found that confusing because I kept assuming that “+” was desirable and “-” was undesirable, although that is not necessarily the case. That assumption coloured my analysis until I switched to “s” and “o”.

ROM). Each of the links must be able to stand independently of the wider feedback loops, meaning that a change in variable A must cause a corresponding (or opposing) change in variable B, regardless of what happens in the wider feedback loop.

Technical Appendix 3 (also on the CD-ROM) describes the feedback loops in the CLD and system maps in Chapters V to VII.

III.3.2.3 Actor analysis

The Delft approach includes an actor analysis to identify relevant social, institutional and political attributes of the problems situation (van der Lei et al., 2011). The actor analysis is designed (ibid., p. 1395):

to identify relevant social, institutional, and political attributes of the problem situation. The actor network analysis does not so much focus on the system of interest to the stakeholder, but rather on the wider policy arena, in which the problem owner has to solve his problem. The relevant social, institutional, and political attributes found will however often lead to the identification of additional tactics, external factors, or criteria and this may lead to extension or modification of all other elements in the system diagram.

Relevant actors are those who have a stake in the solution, those who are affected by the solution, and those who have a legitimate interest in it. These are people whose cooperation will be needed and whose opposition should be avoided. The purpose of the actor analysis is to identify who else is involved with a problem situation, and their means to affect the interests of the problem owner (ibid.):

...in modern networked societies most problem owners can only achieve their objectives in cooperation with others and by preventing strong opposition. Therefore the analyst should gain insight into what other parties will or should be engaged, what their interests are, what relevant means they possess, how they see the situation, and what their intentions are.

The actor analysis considers the wider policy arena, within which the problem owner has to solve the problem (ibid.). As with Checkland's cultural analysis, the actor analysis is intended to inform the systems analysis. The relevant social, institutional and political attributes uncovered by the analysis will often

lead to the identification of additional tactics, external factors or success criteria, which may help to extend or modify the system diagram.

The actor analysis is normally conducted by talking with relevant people, complemented by an analysis of relevant legislation, procedures, and policy pieces (ibid.). I have compiled the actor analysis from relevant sources including legislation, parliamentary debates, news reports, monitoring reports, and journal articles. It maps actors' interest, desired objectives, the present or expected situation (gaps), causes of the gaps as perceived by the actor, and means or possibility to influence the course of events. The analysis categorises actors according to three factors (ibid., p. 1397):

- the similarity or difference of actors' perceptions, interests, and objectives;
- critical or non-critical - this refers to whether actors possess resources that are essential for solving the problem; and
- dedicated or non-dedicated - this refers to actors' determination or willingness to use their resources in solving the problem.

Combined, these factors allow the identification of potential allies, actors that do not need to be involved in the first instance, and critics and blockers who are described somewhat colourfully as sleeping dogs, barking dogs, and biting dogs (Table 3.7).

The interdependencies between listed actors should be explored, based on their resources. Those resources might be money, the power to implement or block decisions, expertise, or gateway to the media (ibid., p. 1397).

Table 3.7 Actor analysis matrix

	Dedicated actors		Non-dedicated actors	
	Critical actors	Non-critical actors	Critical actors	Non-critical actors
Similar perceptions, interests, and objectives	Will probably participate and are potential allies		Indispensible allies but hard to motivate	Don't have to be involved initially
Different perceptions, interests, and objectives	Potential blockers of (certain) changes – biting dogs	Potential critics of (certain) changes – barking dogs	Potential blockers that won't act immediately – sleeping dogs	No attention needed initially

(van der Lei et al., 2011)

III.3.2.4 Intervention mapping

Having created an objective map, a ways and means map, and a CLD, the next step was to put them together into a map of the intervention. The intervention map traces the interventions identified in the ways and means map through the CLD and out to the success criteria (Figure 3.11). Tracing the effects of interventions across the system makes it possible to identify potential ripple effects or unintended consequences. Those predictions can then be used to tailor the intervention or to start afresh. By tracing interventions through to the success criteria, it is possible to predict the likely success of an intervention and to assess and compare the relative benefits of different interventions. The Delft approach assumes the intervention map could be dynamically modelled. However, the number of behavioural-focused variables and the concepts which resisted being characterised as variables make it unlikely that my analyses could be dynamically modelled with any degree of confidence.

III.3.3 Conclusion on methodology deployment

The primary insight I have gained is that an iterative approach is required in using SSM and SSD. Moving between the methodologies' steps in a linear fashion will not result in optimal analysis. I found that analysis from a later step in the process frequently required earlier work to be rethought because of new insights or negated assumptions. That rethinking opened the door to new possibilities.

The nature of the constitutional issues under examination necessitated some modifications to the methodologies, the Delft approach in particular. It was not easy to examine a complex, pluralist system using SSD tools largely developed for a simple-unitary system. The challenges I experienced confirm to some extent the poor fit identified by SoSM, although in-process modifications meant the analysis was ultimately useful.

Chapter IV: Cultural and actor analyses to inform systems analysis

In both soft systems methodology (SSM) and the Delft approach discussed in Chapter III, the systems analysis is informed by an assessment of the various social and stakeholder interests and perspectives that influence a system's real world operation. The Delft approach is unequivocal: this analysis identifies potential supporters and blockers of an intervention, described as sleeping dogs (potential blockers), barking dogs (critics), and biting dogs (actual blockers) (van der Lei et al., 2011, p. 1397). SSM explicitly, if circumspectly, considers the distribution of power that might affect an intervention's success.

This chapter discusses the cultural analysis conducted to inform and support the systems analysis in Chapters V to VII. Normally the cultural analysis, particularly analysis of stakeholders, would be informed by conversations with the relevant people. My research design means I have based the analysis on reports, media sources, journal articles, and material published by stakeholders themselves.

IV.1 SSM cultural analysis

The cultural analysis puts the system under examination into its cultural context by identifying the people, roles, values, norms, and power relationships at play. This analysis helps in assessing intervention options for feasibility.

IV.1.1 Analysis 1 - analysis of the intervention

Analysis one views an intervention as entailing three roles (Checkland & Scholes, 1990, pp. 47–48):

- The client who caused the study to take place. The client's reasons for causing the study or intervention to take place inform choices made throughout the intervention.

- The would-be problem solver (who may also be the client), who wishes to do something about the system in question. The problem-solver's perceptions, knowledge, and readiness to make resources available significantly influence intervention design.
- The problem owner. Nobody is intrinsically a problem owner. Instead, the problem solver decides who to take as possible problem owners, although the list should always include the client and the problem solver. The list of problem owners is the best source of choices of systems to be analysed.

For the purposes of this analysis, I am both the client and the would-be problem solver.

As the client, my primary interest is in understanding the effects of the 2011 Act on a pluralist constitutional system. Understanding those effects is important, because the 2011 Act may become a precedent for large-scale disaster recovery in the future. This perspective has influenced my choice of aspects of the 2011 Act to analyse: I have focused on the Henry VIII clause and centralised coordination as the primary mechanisms assisting recovery, and on legitimacy to gain an overall sense of the constitutional implications of the approach.

As the would-be problem solver, my perspective, skills, and resources have influenced both the approaches taken (and not taken) and my analysis. Being conscious of these matters makes it easier to identify their influence on the analysis.

Chapter II outlines my perspective on constitutional matters. Two points are particularly pertinent to this study. First, I subscribe to the view that there is a close relationship between a constituted state and its constitution, which brings a subjective dimension to constitutional norms. I find the theory of constitutional realism compelling, as it recognises the subjective influences on constitutional decision-makers.

Secondly, I consider that one of the constitution's basic tasks is to legitimise (and to limit) state authority. Legitimacy in this context is a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-

making (Chapter II.4.1). I assume that legitimacy enables peaceful, orderly transitions of power. It underpins a largely peaceful society in which people generally observe and respect each others' rights and interests, and use lawful means to resolve disputes. People are more likely to challenge laws, decisions, and transitions of power if they consider the law, its implementation, or its enforcement is not legitimate. In constitutional terms, I view legitimacy as a function of propriety, procedural fairness and legality (see Chapter VI.1).

Table 3.1 describes the parameters of the systems exploration in this thesis. Those parameters influence my perspective as would-be problem solver.

IV.1.1.1 Who are the problem owners?

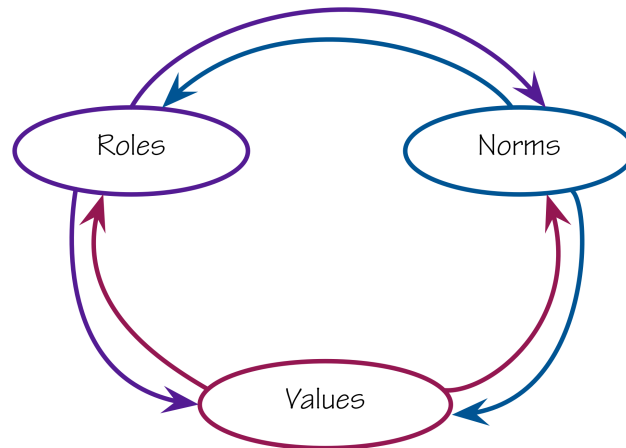
Consistent with Checkland's holistic approach, I have identified a broad range of potential problem owners (Table 4.1). I created this table by imagining what the situation looked like to the problem owners, informed by my research. Table 4.1 includes: people who are experiencing the problems created by the earthquakes; those with the power and resources to do something about solving those problems; and those responsible for scrutinising and controlling the exercise of public power.

I used the perspectives outlined in Table 4.1 to inform the systems analysis, particularly in developing the CATWOE for SSM root definitions (see Chapter III.4.1.2). I also used the perspectives in testing models and assessing actions proposed for improving the real world situation.

IV.1.2 Analysis 2 - social system analysis

Analysis 2 is deliberately simple so it can be used "on the hoof" throughout a study. It assumes that a social system is a continually changing interaction between three elements; roles, norms, and values. "Each continually defines, redefines and is itself defined by the other two" (Checkland & Scholes, 1990, p. 49).

Figure 4.1: The three components of social system analysis



(Checkland & Scholes, 1990, p. 49)

A role is a social position recognised as significant by the people in the problem situation. It could be defined institutionally or behaviourally. Roles are characterised by expected behaviours, or norms. Actual performance in a role will be judged according to local standards, or values, which are beliefs about what is humanly “good” or “bad” performance by role-holders.

IV.1.2.1 Roles

Table 4.2 identifies the people and organisations with a formal role in Canterbury earthquake recovery.⁵⁴ Table 4.2 also details my assessment of relevant norms and values, together with a description of their combined effect. Figure 4.2 maps the roles identified in Table 4.2 and shows the roles revolving around the two primary decision-makers – the Minister for Canterbury Earthquake Recovery (the Minister) and the Canterbury Earthquake Recovery Authority (the Authority). Local government is to one side of the locus of control, contrary to its peacetime functions under the Local Government Act 2002, the Resource Management Act 1991 and the Building Act 2004. Figure 4.2 shows, for completeness, the problem owners without a formal role (residents,

⁵⁴ Not all of the problem owners in Table 4.1 have a formal role (e.g. residents, businesses and communities). Problem owners without a formal role are not included in Table 4.2.

businesses and communities). I found that excluding these problem owners from the map skewed the analysis towards a bureaucratic perspective; including them injects a tangible reminder about the human dimension of recovery.

IV.1.2.2 Norms

The norms in Table 4.2 are the formal and informal rules governing the use of public power. Table 4.2a in the Technical Appendices gives a brief explanation of the norms, which are described in plain language to enhance accessibility to a non-constitutionally expert audience.

The norm of parliamentary supremacy is strikingly absent from Table 4.2, despite it having been identified as one of parliament's interests (Table 4.1). I included parliamentary supremacy in Table 4.1 because it is a foundational principle in a Westminster system. I excluded it from Table 4.2 because parliament effectively ceded its control over law-making to the executive and imposed few constraints on the executive's use of the Henry VIII clause.

Transparency is a strong theme in Table 4.2. Transparency is an essential ingredient of accountability and is a prerequisite to both formal and informal accountability measures:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.⁵⁵

While accountability also appears in a number of the roles, it was weaker in practice than Table 4.2 might suggest (see Chapter V.2.5.2).

Similarly, although a number of the roles include the norm of public participation, Kennedy Graham (a Green party member of parliament), observed: "there is an appearance of community engagement, but the reality of ministerial control" (Hansard, 2011a, vol. 671). The gap can be explained by an

⁵⁵ Louis D Brandeis, quoted in Palmer & Palmer, 2004, p. 229.

underlying assumption that that community participation would slow things down and could appropriately be traded off to speed up the recovery process. For instance, the 2011 Act explicitly limited community participation in recovery planning with the qualifier: “without impeding a focused, timely, and expedited recovery” (2011 Act, section 3(b)).

The processes used under the 2011 Act to involve the community were consultation, rather than deeper engagement. The most consultative approach was Christchurch City Council’s large-scale participatory exercise – Share an idea — to inform the Christchurch central business district recovery plan. That plan was subsequently revised at the Minister’s instruction and issued without further consultation (Toomey, 2012, p. 155). See the discussion of the UDS case in Chapter V.2.5.3C for a contrasting approach to participation.

As a result, by 2013, there was a “rising curve” of public expectations about engagement in recovery decisions (Murdoch, 2013, para. 60). The potential influence of the community forum was not well understood or recognised beyond the Minister and the Authority (Murdoch, 2013, para. 58–59), and its processes did not engage the community as they might have.⁵⁶ For these reasons, I do not consider public participation to have been a strongly operative norm under the 2011 Act.

IV.1.2.3 Values

The values in Table 4.2 are short contextualised extrapolations of those discussed in Chapter II.

The authoritarianism and pragmatism that typify New Zealand’s constitutional culture were apparent early on in the recovery in the form of the 2010 Act and its sweeping Henry VIII clause. The public and political reaction to the Henry VIII

⁵⁶ For instance, the forum’s meeting notes of 2 October 2014 noted members’ concern about not being able to share much of the information they received with their communities. They saw that some of their value was in representing their communities to ask the hard questions (Community Forum, 2014a). It suggests that, in 2014, the community forum was still trying to chart a course between being fully government-facing and being as community-facing as grassroots organisations.

clause — and the reaction to that reaction — epitomise New Zealanders’ pragmatism and egalitarianism.

A group of academics circulated an open letter expressing dismay at the “extraordinarily broad transfer of lawmaking power away from Parliament and to the executive branch, with minimal constraints on how that power may be used” (Geddis, 2010a). These concerns were not simply “academic” or “theoretical” in nature (ibid.):

...over and over again history demonstrates that unconstrained power is subject to misuse, and that even well-intentioned measures can result in unintended consequences if there are not clear, formal measures of oversight applied to them.

The academics’ concern was met with some scepticism. Geddis described the public response to the letter as “is this really a problem?” (2011b). One of the more colourfully worded responses came from a Labour member of parliament, Hon Clayton Cosgrove (A. Bennett, 2010; Geddis, 2011b):

There’s been a lot of latte-drinking people who have the luxury to contemplate the constitutional niceties. That’s wonderful if you’re not digging sewage out of your own home.

The 2010 and 2011 Acts continued a long tradition of pragmatically fixing the problems of the day. Arguably, so too did some of the more controversial ways in which decisions such as the red zone decisions were made. However, public responses to the red zone decisions and associated buyout offers (Chapter V.2.5.3B), contested amendments to the district plan (see Chapter V.2.5.3C), and the processes for making decisions about Christchurch Cathedral and the proposed convention centre (Barnaby Bennett, 2015; Cohen, 2014; Dann, 2014b; Day, 2012; De Boni, 2013; Finance and Expenditure Committee, 2014a; Hutching, 2015b; Meier, 2015c, 2015d; Stylianou, 2014b, 2014a) suggest some chafing under a perception that the government was not giving Cantabrians sufficient opportunity to participate in significant decisions relating to their city.

The value of fairness can be seen in the Quake Outcasts litigation over the treatment of uninsured red zone property owners. The litigation tested two

competing views of fairness. The Quake Outcasts considered that focusing on their insurance status rather than their recovery needs was unfair because they alone of red zoned owners could not “move on with their lives”. The government also characterised the issue as one of fairness – paying full value to the uninsured Quake Outcasts would have been unfair to insured property owners (see Chapter V.2.5.3B).

IV.1.3 Analysis 3 — power

Analysis 3 accepts that any human situation will have a political dimension, which needs to be explored. Here “politics” means a process by which differing interests of members of a group (e.g. a club, a company, a community, a nation state) reach accommodation (Checkland & Scholes, 1990, p. 50). The accommodations which are generated, modified or dissolved by politics will ultimately rest on dispositions of power. Politics is taken to be a power-related activity concerned with managing relations between different interests and pursuing contested goals (*ibid.*).

Analysis 3 asks how power is expressed in the situation under study, and then considers the embodiments of power (described as commodities). Commodities can range from formal role-based authority, intellectual authority, gatekeeping (allowing or restricting access to people, processes, or information), through to reputation. Analysis 3 observes how these commodities are obtained, used, preserved, passed on, and relinquished. “Delicate judgments” are usually required about the public visibility of Analysis 3, because bluntly making it public can make the results themselves a potent commodity of power in the real politics of the situation (*ibid.*, p. 51).

This section outlines how formal power was expressed in the 2011 Act and shows how the 2011 Act shifted power from its peacetime locations (see also Figure 4.2).

IV.1.3.1 Parliament

Parliament ceded power to the executive and shifted power from local government to central government by empowering the executive to:

- amend primary legislation through the Henry VIII clause (2010 and 2011 Acts); and
- override Resource Management Act planning documents, which are set by local authorities and provide the framework for their day-to-day decision-making (2011 Act).

In the parliamentary debates on both Acts, members were strongly sympathetic with the plight of Cantabrians and wanted to help (Hansard, 2010a, vol. 666, 2011a, vol. 671). Parliament would not have wished to seem unsympathetic to Christchurch or to be slowing recovery efforts, but some advantage of that seems to have been taken by the government. Labour party members noted that any disagreement with, or challenge to, the earthquake recovery legislation was criticised as being “political” or impeding progress (Hansard, 2011a, 2011b, 2011c, per Hon Clayton Cosgrove, Hon Lianne Dalziel).

Having ceded its legislative function, parliament’s remaining power over the executive was limited to two broad types of scrutiny: scrutiny of appropriations and expenditure, and scrutiny of delegated legislation. The two select committees tasked with that scrutiny were diligent in carrying out their responsibilities. The Finance and Expenditure Committee’s scrutiny of the Minister and the Authority was both probing and wide-ranging (Finance and Expenditure Committee, 2011, 2012, 2013a, 2013b, 2014a, 2014b). The Regulations Review Committee (the Committee) also inquired extensively into use of the Henry VIII clause during 2010 and 2011. Since then, except for complaints referred to it, the Committee has not conducted any further inquiries.⁵⁷ The Committee’s power to examine legislative instruments includes

⁵⁷ The Committee considered two complaints regarding the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311) and recommended, as a matter of urgency, the Government issue explicit guidelines for the relevant local authorities concerning the removal of extended

considering whether an instrument makes an “unusual or unexpected” use of the instrument-making power (Standing Order 319).⁵⁸ That ground for review was significantly narrowed by the 2011 Act’s wide purpose clause (section 3), which made it unlikely that legislative instruments could stray beyond the Act’s purposes. For instance, the then Minister for the Environment considered the Act would enable legislation to eliminate chimneys (and fires) to improve air quality in the region (see Chapter V.2.5.2B). The question of scope did not arise in the instruments considered by the Committee in 2010 and 2011, which may have been partly due to the wide scope of section 3 and partly due to careful use of the Henry VIII clause by the executive (see Chapter VII).

IV.1.3.2 Central government

The 2011 Act centralised power in the executive. The government’s approach was characterised by control: it provided a significant proportion of the funding for recovery and had an obligation to both parliament and the taxpayers to ensure that funding was spent appropriately. The government had, therefore, a strong interest in controlling decisions that affected how funding could be used. The mechanisms for exercising control included the:

- executive-controlled recovery strategy, which overrode local government planning documents (sections 11 and 15);
- requirement that recovery plans be consistent with the recovery strategy (section 18);
- Minister’s ability to redraft the Christchurch central business district recovery plan developed by Christchurch City Council (section 21(1)); and

section 124 notices (known colloquially as “red cards”) issued under the Order (Regulations Review Committee, 2014).

In this context, it is relevant to note that the Committee’s composition has changed over time. In the 49th Parliament (2008-2011), there were nine members, with four from the Labour party, four from the governing National party, and one from the Maori party. In the 50th Parliament (2011-2014), membership reduced to 5, with three from the governing National party and two from the Labour party. That composition has been retained for the 51st Parliament (2014-2017). At five members, the Committee is very small for its span of care.

⁵⁸ Standing Orders are the House of Representatives’ rules of procedure: www.parliament.nz/en/pb/parliamentary-rules/ (accessed 1 September 2016).

- Henry VIII clause (section 71).

The 2011 Act simultaneously created a liability shield for actions taken under it (section 83). That, combined with the wide scope of section 3, limited the potential for successfully challenging decisions or legislative instruments as being ultra vires.⁵⁹ By shielding the government from accountability, the Act risked blunting its incentives to exercise powers with restraint.

IV.1.3.4 Local government

The position of local government in New Zealand is discussed in Chapter VI.1. The 2011 Act was enacted against a backdrop of an ongoing rebalancing of power between central and local government. Key points in that rebalancing were the definition (and redefinition) of local government's purpose, a narrowing of that purpose, and the replacement of Environment Canterbury's elected regional councillors with ministerially-appointed commissioners.

The Local Government Act 2002 sets out the purposes of local government. Initially, those purposes were focused on democratic local decision-making and action, and promoting the social, economic, environmental, and cultural well-being of communities, in the present and for the future (Local Government Act 2002, section 10). By 2012, this latter purpose had been reframed as meeting “the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses”.⁶⁰ “Good-quality” in this context means infrastructure, services and performance that are efficient, effective, and appropriate to present and anticipated future circumstances. Further amendments in 2010 were designed to “encourage” councils to focus on core services.⁶¹

⁵⁹ See the UDS case (Chapter V.2.5.3C).

⁶⁰ Section 10(2), inserted by the Local Government Act 2002 Amendment Act 2012.

⁶¹ Local Government Act 2002, section 11A. Although the new provision was described by the then Minister of Local Government, Hon Rodney Hide, as amending section 12 (the power of general competence), it was eventually enacted as a standalone provision, sitting alongside the

Before the earthquakes, the Government had dismissed the democratically elected members of Environment Canterbury (the regional council) and replaced them with Commissioners to “rapidly address long standing, systemic, institutional and governance issues” and to facilitate “the timely development of a robust, clear, and effective framework for the management of natural resources — particularly fresh water — in Canterbury” (Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill, Government Bill 130-1, see the explanatory note). The legislation for the temporary Commissioners was first extended to 2013 and now includes a transitional body combining elected and appointed members for the 2016-2019 local authority election-cycle period.⁶² The transition is intended to ensure that the Commissioners’ governance improvements and familiarity with the freshwater strategy remain available to the elected members.

As noted above, under the 2011 Act the recovery strategy trumped all other planning documents issued by Canterbury’s local authorities, meaning that regional and district plans had to be consistent with the strategy (2011 Act, section 15). The Minister used his power to amend the central business district recovery plan, taking control of the Christchurch City Council-developed plan, and establishing the Central City Development Unit (CCDU) to complete and implement it (Toomey, 2012).

In 2013, Christchurch City Council lost its accreditation for its resource consent process (Cairns & Young, 2013). That resulted in the appointment of a crown manager to oversee the consents process and to regain accreditation.

IV.1.3.5 The courts

The courts’ power was effectively limited by the 2011 Act’s wide purpose clause, as well as by the privative clauses that purported to oust judicial review. Although courts are traditionally suspicious of privative clauses, in this context

power of general competence (Cabinet, 2009; Minister of Local Government, 2009a, 2009b, 2009c).

⁶² Environment Canterbury (Transitional Governance Arrangements) Act 2016.

the courts have been careful to uphold the principle of comity and respect parliament's clear statement about the scope of the executive's mandate.⁶³

IV.1.3.6 Communities, businesses and residents

Particularly in the early days of the recovery, communities, businesses, and residents had little power in decisions affecting their future. For decisions on the red zone, property owners had to wait for first technical assessments and then political and policy decisions. Faced with the loss of their (usually) biggest asset, many residents had little real choice but to move away from the red zone.

Truncated or non-existent Resource Management Act processes meant people had few, if any, opportunities to participate in decision-making processes than would normally be the case.

IV.2: Delft approach — actor analysis

The actor analysis explores actors' perceptions, interests, and objectives. It is a more detailed inquiry than the SSM cultural analysis of perspectives and interests.

IV.2.1 Actors in Canterbury earthquake recovery

To identify actors for this analysis, I started with the list of problem owners in Table 4.1. I also identified that taxpayers and the Reserve Bank were actors, given their respective interests in prudent public expenditure and macro-economic settings. Their perspectives form important parts of the "wider policy arena" (van der Lei et al., 2011), given the influence their perspectives may have on central government. I had not identified these actors in the course of the SSM cultural analysis, but the more structured approach to the actor analysis made the gap clear. Table 4.3 provides a summary assessment of: the

⁶³ See discussions of the Quake Outcasts and UDS cases in Chapter V.2.5.3.

actors; their roles; perceptions, interests and objectives; their nature; status; and an overall assessment.⁶⁴

The various actors have a mixture of roles. Some, like residents and businesses have no formal role in the recovery. They are what Checkland would describe as customers - the victims or beneficiaries of recovery activities (see Chapter III.4.1.2). Some, like the community forum and the cross-party parliamentary forum, have advisory roles.

The Delft approach structures the problem from the problem owner's perspective, although it seems to assume that there is only one problem owner (analogous to the client in SSM Analysis 1). In the earthquake recovery context, I found it inappropriately constraining to limit the perspective to one problem owner. Therefore, I have characterised problem owners as those who were either statutorily, financially, or contractually responsible for core recovery activities. Here there were four: the executive generally; the Minister for Canterbury Earthquake Recovery and the Authority specifically; local government; and infrastructure providers.

The actors' roles, noted in Table 4.3, inform the analysis of their nature and status, which informs the overall assessment of actors as allies, critics or blockers. The Delft approach suggests that the actor analysis includes actors who do not have a formal role to play, which I found augmented SSM Analysis 2 because I had confined that analysis to those actors with a formal role. That excluded businesses and residents, but the analyses here show that both could have become critics or blockers of recovery activities (discussed below).

⁶⁴ The detailed assessments, from which the summary was drawn, are on the appended CD-ROM. The abstracted summary is sufficient for the present discussion.

IV.2.2 Actors' perceptions, interests and objectives

The detailed actor analyses that informed Table 4.3 are on the appended CD-ROM. They were based on the SSM cultural analysis in Table 4.1, augmented by identifying for each actor:

- their interests;
- the situation and objectives desired by that actor;
- the existing or expected situation and gap, from the actor's perspective;
- causes of that situation and gap, as perceived by the actor; and
- the solutions available to the actor, and their possible influence over those solutions.

To answer these questions, I researched and synthesised information from different sources. In a live policy intervention, these analyses could be done based on discussions with actors. I recorded only those objectives most pertinent to earthquake recovery.

Common themes run through the actor analyses. Maintenance of basic services, timely repairs, certainty, and financial security were likely to be issues for residents, businesses, communities and problem owners alike. However, their interests in relation to these themes were likely to vary with context, which means the interests of different actors may have aligned or conflicted according to the context. For instance, a community's interest in the re-opening of local schools would likely align with central government where that community's schools were unaffected by closures and mergers. Communities whose schools were to be closed or merged may have felt a sharp divergence from the government's interests.

The four formal problem owners had additional interests, particularly over funding for the recovery and ongoing financial viability. The cost of repairs was likely to exceed what local government could afford, particularly given that its

rating base had been potentially profoundly affected (Hansard, 2011a, vol. 671, per Hon Gerry Brownlee). That meant central government would need to contribute to the recovery, but its tax base had been similarly affected by the disruption: lost productivity, reduced retail spending and potentially reduced business presence in Christchurch combined to mean lower tax revenues coming out of Christchurch in the short-term (Stevenson et al., 2011).

Complicating these funding issues was the extent to which the rebuild would be just a rebuild rather than an investment in the future. As one manager with Waimakariri District Council put it (Vallance, 2013, p. 69):

I remember [we] were sitting on top of a culvert trying to work out what the hell had gone on with the culvert because the land had changed and water was different. And we were sitting on this culvert and it looked like it would be really stuffed. When we saw it we knew we'd end up replacing it. Anyway, I said, this is an opportunity to rebuild this town in a great way...We've got a significant percentage completely trashed and we're going to have to fix it up. It lacked some amenity before then, so this is an opportunity not only to make the infrastructure more resilient but, more importantly, to make the new streetscape and the landscape more attractive.

IV.2.3 Searching for allies and dogs of various descriptions

Identifying how actors' interests align enables problem owners to seek out allies and anticipate critics (sleeping and barking dogs) and blockers (biting dogs) before they can cause problems for an intervention. Having a single problem owner greatly simplifies this analysis, because there is a single focal point. Here, there were four problem owners, whose interests did not fully align as noted above. As discussed in Analysis 3, local government and central government did not share the same interests when it came to decision-making power.

For these reasons, while Table 4.3 notes the alignment of actors' interests, it does so with some uncertainty. For ease of analysis, I have assessed the alignment of actors' interests with central government's interests, because the

2011 Act put the Minister and the Authority at the centre of the earthquake recovery process (see Figure 4.3).

Context affects the categorisation of similar and opposing interests, which affects the overall assessment of actors in relation to each other. It means, for instance, that residents or communities might simultaneously be allies with central and local government on infrastructure repairs, but critics (barking dogs) in relation to school closures. Residents whose green zone homes were being repaired or rebuilt, and red zone residents who had to move away were likely to have both different and congruent interests in, and perspectives on, the recovery.

From the government's perspective, the actor analysis highlights what the government needed to consider to reduce the risk that residents, businesses and communities would turn from potential allies into potential critics (barking dogs) or blockers (biting dogs). In a recovery effort of this scale, it is inevitable that some people would disagree with decisions made. It is inevitable, too, that people would agree with some decisions but not others, depending on their perspectives and the way those decisions were made.

From a constitutional perspective, whether or not actors turn from potential allies into barking or biting dogs largely depends on the extent to which they perceive recovery decisions that conflict with their interests as legitimate. The litmus test for legitimacy is whether people consider they are bound by a decision or law that they disagree with or that goes against their interests.

If I am correct in thinking that a focus on legitimacy helps to keep potential allies from turning into barking or biting dogs, then it is worthwhile reviewing the more controversial decisions from the recovery to consider whether the results were inevitable, or whether different approaches might have led to different results. The focus of this inquiry is on the compliance with norms and the use (or disuse) of the three legitimacy levers. Legitimacy is concerned with

gaining people's acceptance of decisions as binding on them, which is not the same as convincing them that the decisions are correct.

The red zone decisions are discussed in more depth in Chapter V.2.5.3B, so are alluded to only briefly here. They resulted in the clearance of some of Christchurch's worst-affected suburbs. Although the decisions were controversial, most people seem to have accepted the decisions' binding nature regardless of whether they actually agreed with the decisions. To that extent, the decisions have some legitimacy, although the the decision-making process has not wholly withstood judicial scrutiny, with hard questions being asked about why the government did not use the 2011 Act's powers and mechanisms that would have afforded opportunities for public participation.

The Cathedral became a lightning rod for dissatisfaction about the recovery ("Christ Church Cathedral: why all the fuss?," 2015; Cohen, 2014; Day, 2012; De Boni, 2013; Graham, 2016). There were – and likely still are – strongly held views about how it should be rebuilt or replaced. The legitimacy of this decision is important, because its consequences will be felt for decades to come. Under normal circumstances, a resource consent would be needed to rebuild the Cathedral. That requirement was modified using the Henry VIII clause, meaning there is no requirement to notify publicly the decision to rebuild or replace, and there is no way for people to challenge the decision to grant a consent. The government has recently announced a working party on the cathedral (Gates, 2016).

IV.3 Comparing the cultural and actor analyses: what do they tell us?

The analyses underscore the importance of understanding the social system within which earthquake recovery had to take place. They reinforce that a wide range of people and organisations had stakes in the recovery, even if they appeared at first glance to be far removed from the devastated areas. How

these actors are considered can affect the priority given to engaging with them, which can in turn affect their perceptions of the recovery's legitimacy.

The analysis shows how the use of public power can become controversial and fraught when there is insufficient understanding of the social system at work. Recovery issues are rarely purely technical. Even apparently technical issues such as the distribution of portaloos⁶⁵, the affixing of building safety placards, and the designation of land as requiring particular earthworks to rebuild, bring with them social and/or economic dimensions (Brookie, 2012; Middleton & Westlake, 2011; Vallance, 2011). These “technical” issues become political because of their resonance with the constitutional values of egalitarianism and fairness, and the social norms of democracy and public participation.

The SSM analysis also noted a disconnect between the norms that could be expected to apply in normal circumstances, and how those norms operated in practice. This disconnect may have been caused by a sudden shift in the balance between constitutional values triggered by a crisis situation, leading to an emphasis on pragmatism and authoritarianism to “get the job done”. The reviews of the 2011 Act make it clear that by 2013 there was growing pushback from the public, with a rebalancing towards egalitarianism manifesting as a greater need for public participation in recovery decisions, and increasing interest in holding the executive to account.

The analysis also highlights the contextual nature of shared and competing interests, which suggests a nuanced approach should be taken to building alliances in developing and implementing interventions (Community Forum, 2014b).

⁶⁵ It is unlikely that residents would have viewed the distribution of portaloos as merely technical. This was a matter of access to an essential item – and the closer to home, the better.

Chapter V: Legitimate decision-making in Canterbury earthquake recovery: two system analyses

The underlying premise of this thesis is that the constitution can be treated as a system and that its emergent property is legitimacy. This chapter explores the legitimacy of decision-making in Canterbury earthquake recovery, with particular regard to the extent to which it was embedded in the design of the Canterbury earthquake legislation, and how the design choices there influenced the legitimacy of decision-making under those Acts. It considers what would have constituted an ideal level of legitimacy for Canterbury earthquake recovery, and designs system interventions to reach that ideal. Those interventions are compared to the Canterbury Earthquake Recovery Act 2011 (the 2011 Act) to identify similarities and differences, and to consider how they influenced the recovery's legitimacy.

First, however, the chapter discusses a working theory of legitimacy that has informed the systems analysis.

V.1 A working theory of legitimacy

I define legitimacy as a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making (Chapter II.4.1).

V.1.1 The constitutional norms at the heart of legitimacy

I view legitimacy as a function of constitutional propriety, procedural fairness, and legality. The levers that give effect to these norms are transparency, accountability, and participation. These norms and levers, and how they interact, are shown in Figure 5.1.

Figure 5.2 drills into more detail about the content of the three norms, showing the elements of those norms that decision-makers have to take into account in carrying out their day-to-day functions. The three norms are derived from, and expand on, the constitutional norms described in Chapter II.

A. Constitutional propriety

Propriety asks should we make the decision in question. Constitutional propriety requires consistency with a range of human rights and common law norms, the Crown's obligations under the Treaty of Waitangi, and consistency with New Zealand's constitutional values. Combined, these norms are a recipe for acting reasonably and proportionately, with due respect for the inherent dignity of those affected by decisions. The norms are a blend of substance and procedure. Some, such as the Crown's requirement to consult with Māori, are clearly procedural. They place limits on how the state may exercise its powers. Others, such as the freedom of expression and the protection of property interests, are clearly substantive. They place limits on what the state may do.

I have included consistency with constitutional values here because constitutional values affect the reality of how power is exercised and how it will be viewed by society (see Chapter V.3.4 below). The values are discussed in Chapter II.4.4.2.

B. Legality

Legality asks can we make the decision in question. The legality norms highlighted in Figure 5.2 are the essence of the rule of law (introduced briefly in Chapter II.4.4.1D). Legality and propriety overlap to some extent. For instance, common law protection of property interests is effected through the rule of law principle that the law should generally be prospective to avoid interference with accrued rights and interests (Legislation Advisory Committee, 2014, Chapter 11).

C. Procedural fairness

Procedural fairness asks how must we make the decision in question.

One of the constitution's primary assumptions is that centralised power risks autocracy. Constitutional arrangements are, therefore, designed to distribute power through a separation of roles and functions (e.g. law-making versus law enforcement) and a system of checks and balances that effectively distribute power between the branches of state and limit how it can be exercised.

The constitution also protects against arbitrariness and unfairness in decision-making by requiring natural justice, decisions to be based on probative evidence, and fair and consistent decision-making. These requirements protect against bias and predetermination in decision-making (P. A. Joseph, 2007, pp. 999–1001), and against unreasonable decisions. Decision-makers must be disinterested in the sense of being unbiased and impartial, and not influenced by considerations of personal gain in their decision-making. The most formal mechanism to ensure disinterestedness in New Zealand is the legislative protection of judicial tenure and salary (Constitution Act 1986, section 24). By shielding the judiciary from threats to their livelihood, these legislative protections ensure the judiciary can judge cases involving the Crown fairly and without fear or favour.

Decisions that fail to meet standards of natural justice, or are unreasonable or inconsistent or unfair, are unlikely to be accepted as legitimate. Procedural defects will likely chafe, inflaming a sense of grievance at the perceived unfairness of the substantive decision.

V.1.2 Three levers that shore up constitutional norms

If the norms described above form the heart of legitimacy, the question is how they are reflected and implemented in day-to-day decision-making by constitutional actors. Public law is a vast field, and is highly nuanced, which can

make it difficult to design a decision-making framework that reflects constitutional norms in a way that ensures legitimacy. I found a pattern emerging in my research into legitimacy and how it manifests. Just as constitutional norms tend to coalesce into the three groupings noted above, three levers tend to be used to give effect to those norms: transparency, accountability, and participation mechanisms. While there are bound to be exceptions, and the levers are unlikely to have equal weight in all contexts, I have concluded that these three levers incentivise voluntary compliance with constitutional norms. Figure 5.1 demonstrates the logical reasoning for this conclusion.

My conclusion is based on the assumption that constitutional values influence decision-makers. The soft systems paradigm acknowledges that people's actions and decisions are influenced by deeply held, subconscious beliefs or mental models (Maani & Cavana, 2007, p. 15). Matthew Palmer's constitutional realism theory (2006b) resonates with this acknowledgement. Palmer states that constitutional actors (decision-makers) influence how constitutional principles and rules are interpreted and applied (*ibid.*, p. 134). That makes it necessary to consider what factors may influence decision-makers' mental models. New Zealand's constitutional culture is likely to influence those decision-makers who have been present in New Zealand long enough to have absorbed and identify with it. The public is likely to reinforce that influence, albeit unconsciously, by supporting decisions and processes that are broadly consistent with New Zealand constitutional culture and challenging decisions and processes that are not (Gewirtzman, 2009, pp. 652–657). The incentives are soft, and largely unspoken, but present nonetheless.

If constitutional culture influences public expectations of constitutional actors, and constitutional actors are responsive to public expectations, then transparency and participation are levers that should incentivise compliance with constitutional norms, assuming that people are more likely to comply with norms if they believe others are watching. Transparency mechanisms such as the Official Information Act 1982 and open decision-making processes (e.g.

published decisions, open court and parliamentary procedures) mean decision-makers know their decisions and decision-making procedures will be open to scrutiny by the public.

Participation in decision-making processes (e.g. through the right to be heard, or through public consultation or deliberation processes) brings constitutional actors into close proximity with those interested in, or affected by, their decisions. That proximity is likely to strengthen decision-makers' incentives to follow correct procedures and to comply with substantive norms.

Accountability incentivises compliance with constitutional norms by providing an enforcement-based lever for those decision-makers who are not minded to comply with norms.

In these ways, the levers of transparency, participation, and accountability mechanisms promote decision-makers' compliance with constitutional norms and values. That should promote public trust and confidence in decision-makers and acceptance of their actions and decisions. That acceptance and trust and confidence combine to create legitimacy.

V.1.2 Legitimacy in Canterbury earthquake recovery

Identifying an ideal level of legitimacy for Canterbury earthquake recovery provides a benchmark against which to assess the 2010 and 2011 Acts. This thesis accepts that legitimacy is a somewhat subjective concept and does not attempt to quantify it.

As discussed in Chapter II.5.2, in a liberal democracy, legitimacy is likely to manifest as general public acceptance of decisions. Universal consensus is unlikely, but disagreement should manifest in ways that: conform with social norms; comply with the rule of law; and seek to effect change within existing constitutional mechanisms. Peaceful movements might also be established to lobby for change, or draw attention to unsatisfactory aspects of the recovery,

or to inject a citizen perspective.⁶⁶ The news media may be a barometer for public opinion on recovery decisions. Indicators of legitimacy may be found in levels of voter turnout at local and general elections.

The reservoir metaphor for legitimacy accepts that goodwill may wax and wane. Regular “topping-up” of the reservoir is needed to maintain a reasonable level of legitimacy, which suggests decision-makers should generally try to act consistently with the levers of transparency, participation, and accountability. That alone will not guarantee consistency with constitutional norms but, as discussed above, can incentivise compliance. In this way, the levers can promote public trust and confidence in the constitutional settings and in decision-makers, which are two precursors to legitimacy. Accordingly, I assume that the presence of decision-making powers that generally reflect transparency, participation, and accountability and do not depart radically from constitutional norms should result in an ideal level of legitimacy. Significantly weakening any one of these levers will weaken the legitimacy system, as demonstrated by Figures 5.3, 5.4, and 5.5, which systematically remove one of the three levers to show how the system would be affected.

The remainder of this chapter discusses the legitimacy of aspects of the 2010 and 2011 Acts through the system lenses of SSM and SSD.

V.2 Soft systems methodology

This section sets out the analysis done using SSM. As discussed in Chapter III, the SSM artefacts are:

- a rich picture describing the problem situation, with a focus on its root causes;
- the root definition of the system, derived from the tools of CATWOE and PQR;

⁶⁶ In Canterbury, CanCERN established itself as a network of community organisations (Vallance, 2011). Greening the Rubble has focused on re-vegetating barren sites (Swaffield, 2013, p. 8).

- performance measures for the system (the 5Es); and
- a system model, which is a conceptual model used to focus on assessment of the real world. That assessment aims to identify the areas where change is needed to bring about the transformation at the heart of the system model.

This section (and the accompanying Tables and Figures) describe and analyse each of the artefacts, and records the insights for legitimacy that have been gained through the analysis.

V.2.1 Building a rich picture of the problem context

The rich picture in Figure 5.6 starts by contextualising the nature of decisions that were forced by the earthquakes. The context against which the 2010 and 2011 Acts were enacted was a network of statutory frameworks and decision-makers responsible for different kinds of decisions. The frameworks included the compulsory acquisition of land for public works (Public Works Act 1981), resource and building consents for a range of land uses (Resource Management Act 1991), and matters of building safety (Building Act 2004). The earthquakes created a situation where those decisions became highly interconnected, creating the risk of incompatible or, worse, conflicting decisions. That was a recipe for confusion and cumbersome decision-making.

The network of statutory frameworks governing recovery actions therefore posed a risk of eroding legitimacy in two ways. First, tying up recovery decisions in endless process risked the public losing confidence in those frameworks because they impeded “sensible” decision-making. This set up an inevitable clash between the constitutional value of pragmatism and the norm of procedural propriety, given that in New Zealand’s constitutional arrangements, the procedure is, in many cases, the check and balance on the use of public power. However, the prevailing view at the time seemed to be that procedure was “process for the sake of process” (Hansard, 2010a, per Amy Adams MP) and something to be cut through.

Second, frustration with the process could incentivise decision-makers to circumvent it, particularly if they thought the public shared their frustration. In the short-term that would give the (hopefully right) result in the form of the necessary decision but would expose decision-makers to the risk of judicial review for having followed the wrong procedure, which could act as a disincentive for some-decision-makers. It would also bring the judiciary into the centre of a procedural debate in which they had no choice but to apply the law, even though the law was (at least in the government's view) demonstrably deficient for a recovery process of the scale and complexity needed in Canterbury. Combined, these factors could sharpen the underlying tension between constitutional propriety and pragmatism, and see an erosion of public trust in constitutional arrangements over time.

The problem was sharpened by the 22 February 2011 earthquake. Until then, it had been assumed by central and local government that local government would lead the recovery process (Chapter IV.2.4). The 22 February earthquake meant that the recovery needed "to be much bigger - involving more difficult decisions, many more parties and a lot more resource" (State Services Commission, 2011, para. 10).

The State Services Commission concluded that the scale of the recovery effort was beyond the capability of current institutions, and that new institutional arrangements were required, together with specific powers and access to streamlined regulatory processes (ibid., para. 14). With such an imperative driving decisions it was clear that, whatever the form of the institutional arrangements, Cabinet's decisions would profoundly affect people's lives for years to come. The decisions would have long-term effects on the the design and rebuilding of the central business district and the long-term viability of entire suburbs.

Within that context, the rich picture is predicated on two strong assumptions. I have assumed that the executive would want recovery decisions to be accepted as legitimate. Second, I have assumed that local communities are usually best

placed to make local decisions and that, despite the national interest in recovery, it is local communities that would primarily be affected by recovery decisions.⁶⁷ This is an example of how my perspectives as would-be problem solver drive my perception of the problem. Another person might view the problem context differently. SSM seeks to surface these differing perspectives so they can be tested and mediated into an agreed problem definition.

The rich picture highlights that the usual means of giving effect to the underlying assumptions would slow down recovery progress in a way that could have been unacceptable to people living and working in greater Christchurch. Working through constitutional processes to ensure decisions are legitimate may seem irrelevant when compared to the realities of living in an earthquake-damaged house without functioning plumbing, navigating earthquake-damaged roads, supporting children through school closures, and worrying about job security in a disrupted economy (Hansard, 2010a, per Hon Clayton Cosgrove MP).

The rich picture emphasises that these were real problems experienced by real people. At the same time, though, the problem definition makes it clear that legitimacy is part of the solution. While the circumstances may indicate normal procedures would be too slow, a faster process should not inappropriately trade-off legitimacy. Public confidence in the legitimacy of decisions is essential for the recovery to be enduring. Trading-off constitutional norms in the name of short-term expediency risks jeopardising longer-term legitimacy.

⁶⁷ By “local decisions” I mean decisions that are primarily felt by people in close vicinity to the area directly affected by the decision. For instance, decisions about the red zone were primarily felt by the people whose properties were located in the red zone, who faced the prospect of having to move away, place their children in different schools, and find new routes to work or new employment closer to their new homes.

Given the scale of the damage in Canterbury, decisions such as the central government’s contribution to the rebuild and new approaches to planning in the central business district would have effects beyond local residents. These decisions would affect all taxpayers and, potentially, the national economy. Even so, it seems reasonable to say that they were issues of primary importance to residents, businesses, and organisations located in greater Christchurch, whose daily lives and operations were affected.

The rich picture challenges policy makers to find a way of doing things more quickly with the elements needed to maintain people's confidence in the legitimacy of law and decision-making. It assumes that one need not be wholly sacrificed for the other. The rich picture tells a relatively simple and compelling story. By stripping out the detail of constitutional norms, the rich picture exposes the interconnections and gets to the core of what decision-making processes should encompass.

V.2.2 Formulating a root definition

The rich picture poses the challenge that decision-making processes need to be faster and transparent, accountable, and with appropriate levels of participation. This section discusses the development of a root definition for a system to do that.

V.2.2.1 CATWOE

Table 5.1 outlines the CATWOE developed for this analysis.

V.2.2.2 PQR

Table 5.2 contains the PQR developed for this analysis.

V.2.2.3 CATWOE and PQR create a root definition

Based on the CATWOE and PQR elements, I have formulated a root definition for the system:

A system to promote public trust and confidence in the decision-making process for recovery decisions and the legitimacy of recovery decisions by ensuring the decision-making process is transparent, decision-makers are accountable, and proportionate opportunities for public participation are available; that will ensure decisions are consistent with New Zealand constitutional norms and values so that the exercise of public power over people is proportionate, reasonable, and fair.

This root definition contains a number of subsystems, which could themselves be the subject of a root definition and system model (e.g. participation).

V.2.3 Defining performance measures - the 5 Es

The approach to the five Es is described in Chapter III. Table 5.3 sets out the five Es for this system definition, including the rationale for each performance measure.

The nature of this system means some time may elapse before its effects can be assessed against the first four performance measures (see Figure 5.7). Not all of the effects will be immediately apparent, and some may need to be assessed over a period of time to identify the direction of travel.

V.2.4 A conceptual model for legitimate decision-making

Figure 5.7 unpacks and displays the root definition as a conceptual model. The model is drawn at a reasonably high level of abstraction. It is a framework to guide the development of decision-making procedures. At this level, it is more important to emphasise the function of norms, rather than their form. The model does not, therefore, specify how decision-making procedures could comply with particular norms.

The first four steps in the model ensure it is firmly grounded in its real-world context so that the decision-making procedures developed using it are proportionate and appropriate to the circumstances. The first four steps produce a sense of the constitutional norms that need to apply to particular recovery decisions in order to maintain legitimacy. In this way, constitutional norms are firmly embedded in the system with a clear objective of maintaining legitimacy.

The model outlines an implementation process, which involves publishing and applying business rules for decision-making. It makes the decision-making process transparent, which tends to promote legitimacy as described in Figure 5.12 and Chapter V.3.5.2.

The model includes feedback links between individual elements (dotted lines on Figure 5.7). Checkland's approach (2000, pp. S30–S32) does not identify feedback links between system elements, instead viewing feedback at a system-wide level through monitoring and control action. System-wide feedback emphasises the holistic and interconnected nature of the conceptual model. However, the feedback links in this model could enable decision-makers to learn in real time. For instance, publishing business rules may occasion comment from interested parties that enable refinements. Similarly, operating the rules may highlight gaps or inefficiencies, enabling further refinements. Displaying feedback links on the system model shows where the system's learning capability lies, which enables deliberate learning.

The model builds in systematic evaluation of the system against the performance measures to enable control action to be taken where necessary. Control action enhances system performance through tweaks (e.g. new or altered steps, new business processes, or strengthening feedback loops). Evaluation is part of the model, and is shown as a series of nested systems. The system's effectiveness comes from a combination of its efficacy, efficiency, and ethicality. The system's overall elegance is the product of its design, efficacy, efficiency, ethicality, and effectiveness.

V.2.5 Comparing the model to the real world

In practice, SSM models are developed for comparison against the real world to identify how the real world needs to be altered to create the desired transformation. Checkland (2000) has noted that a matrix assessment systematically comparing the real world experience against each step in the model can be done, as can scenario building.

In this context, Checkland's matrix assessment was difficult to do and did not produce useful insights, primarily because the differences between the model and the real world approach of the 2011 Act were so profound that it was almost impossible to systematically compare the two. In light of that, this

section considers how the executive made some key recovery decisions, assesses the legitimacy of those decisions, and considers their impact on the overall legitimacy of recovery-related decision-making.

V.2.5.1 Appreciating what decisions had to be made to effect recovery

The 2011 Act did evidence a considered approach to the decisions needed to effect recovery. Where possible, it identified and empowered the types of decisions that would need to be made. It also established mechanisms for making decisions that could not be foreseen in the still unfolding context. While the executive could not be quite sure precisely what was needed, it did consider that a new public service department was needed. The responsible Ministers (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a, para. 19) advised Cabinet:

... to coordinate the recovery efforts of the Christchurch City Council, Selwyn District Council, Waimakariri District Council, Environment Canterbury, central government departments and crown entities, infrastructure providers, business construction firms, and the local community. No single central or local government agency has the powers available to manage, oversee and, if necessary, direct the recovery effort. The need for a greater Christchurch-based organisation and the necessary focus on the recovery effort militate against an existing agency being used. A new entity is necessary.

On 28 March 2011, Cabinet agreed that a number of powers would be conferred on the Minister for Canterbury Earthquake Recovery (the Minister) and/or the Canterbury Earthquake Recovery Authority (the Authority) (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b). Clearly, then, the executive anticipated many of the kinds of decisions that might be made during the recovery process. The list of powers and responsibilities was lengthy and included:⁶⁸

- entry onto land to carry out a range of activities (sections 33, 34);

⁶⁸ Section references are to the 2011 Act. Although now repealed, the Act remains available through an advanced search on www.legislation.govt.nz.

- authorising the erection of temporary structures or buildings on public and private land (section 38);
- demolition powers (section 39);
- closing roads and diverting traffic (section 46);
- restricting access to specified areas and buildings (section 45);
- calling in and exercising the functions, rights or responsibilities and associated powers of local authorities and council organisations (section 50);
- directing property owners to act for the benefit of adjacent property owners where there were interlinked interests (section 52);
- compulsorily acquiring land and interests in land (sections 53-59).

Cabinet managed the uncertainty of the unfolding context through the mechanism of a recovery strategy for reconstruction and rebuilding of greater Christchurch, to be issued by the Minister and supported by a series of recovery plans. It also carried over the Henry VIII clause from the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act).

A regulatory impact statement was prepared for the Canterbury Earthquake Recovery Bill (the Bill).⁶⁹ The Treasury noted that the regulatory impact statement had been drafted under significant time pressures with very limited access to the information that would be needed for a comprehensive regulatory impact analysis. Gaps in the impact analysis made it “difficult to judge whether the proposed option is proportionate to the problem” (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b, para. 108).

Dean Knight observed that in the Bill:

All the important powers and responsibilities are located at Ministerial level. The Minister has the ultimate responsibility for setting the vision for recovery and rebuilding, and has numerous coercive powers which may be used to trump decisions and actions of local authorities and other agencies. While there is some reference to “collaboration”, “coordination”, and “cooperation”

⁶⁹ The Canterbury Earthquake Recovery Bill was enacted as the 2011 Act.

etc., the legislative scheme is drawn in command and control terms. The legislative scheme does not build in the usual elements of local democracy and community participation that is traditionally seen and expected in legislation dealing with town planning and management of local resources.

While the location of powers at a Ministerial level does not offend constitutional principle, it does raise questions about the legitimacy of the recovery and rebuilding plans and actions (Local Government and Environment Committee, 2011, pp. 77–78).

Despite these concerns, generally decisions made clearly within the ambit of the 2011 Act seem to have enjoyed a reasonable level of acceptance and, by implication, legitimacy. The problems have arisen where decisions pushed at the limits of the 2011 Act's powers, particularly where those decisions were contrary to the interests of some people. Where those decisions have been litigated, the courts have not unequivocally found in the executive's favour. Those decisions are discussed in Chapter V.2.5.3 below.

V.2.5.2 Appreciation of the role of constitutional norms

Given the speed with which the Bill was developed it is unsurprising that there was little overt consideration of the role of constitutional norms in decision-making. The State Services Commission's regulatory impact statement (2011, para. 42) noted that the exercise of powers:

... may impact on individuals and businesses including access to property and ability to trade. These interferences with people's lives and business activities would only be exercised where necessary for the recovery of the greater Canterbury area: in effect it would usually be where there is a greater public benefit than the private interference.

A. The executive sought to limit accountability through immunities and privative clauses

The executive was sufficiently aware of the constitutional norms related to appeal and review that it took active steps to neutralise their likely effect. For instance, the Cabinet minute (2011b) approving the powers for the Minister and the Authority contains a list of immunities, including:

- an immunity from liability when powers are exercised or carried out in good faith (recommendation 38.2);
- an exclusion of liability for damage and nuisance, except through negligence (recommendation 12);
- the protections of the Building Act 2004 in relation to liability issues or demolition costs relating to the demolition of buildings (recommendation 13); and
- the Civil Defence Emergency Management Act 2002 protections in relation to liability or costs arising out of or related to demolition (recommendation 14).

The 2011 Act also carried over the 2010 Act's privative clauses that purported to limit the courts' ability to judicially review use of the Henry VIII clause. The first privative clause (section 74(2)) provided that the Minister's recommendation for an order in council was not reviewable. That meant while the Minister had to take into account the 2011 Act's purposes and the Canterbury Earthquake Recovery Review Panel's recommendations, the Minister could have ignored those statutory requirements (Local Government and Environment Committee, 2011, p. 45, per Legislation Advisory Committee).

The second privative clause (section 75(5)), provided that orders in council had the force of law. As the Legislation Advisory Committee (LAC) explained to the select committee (*ibid.*, p. 33), this was a weak-form privative clause relying on the constitutional protection of legislation made by parliament. Parliamentary-made law is not reviewable by the courts due to parliamentary sovereignty. Courts can review legislative instruments made using a delegated law-making power to ensure they are made within the scope of parliament's delegation.

The statement that a legislative instrument "has the force of law as if it were enacted as a provision of" an Act suggested that orders in council were intended not to be reviewable. George Tanner QC, representing the LAC, advised the select committee that he hoped this was not intended "because it would be a very strange situation if it were" (*ibid.*, p. 33). Tanner explained that legislative instruments ought to be challengeable in the courts, and this clause

muddied the water. He could not recall ever having seen this kind of language before (ibid.).⁷⁰

Philip Joseph told the select committee that neither clause would be effective, but that both should be deleted (ibid., p. 104). He considered the privative clauses highly inflammatory and likely to engender “the same adverse academic and public reaction that the earlier earthquake legislation [the 2010 Act] invited” (ibid.).

Despite the very strong objections from submitters, the privative clauses were enacted without change.

B. The purpose clause also limited executive accountability

Legislative purpose clauses can give strong clues about an Act’s scope. They set parameters on the exercise of executive and coercive powers, so can be instrumental factors in: a court considering whether an executive action is ultra vires (beyond the power of) the Act (Local Government and Environment Committee, 2011, pp. 78–79, per Dean Knight); and parliament considering whether a legislative instrument promulgated by the executive makes an unusual or unexpected use of the delegated legislation power (Standing Order 319(2)(c)).

The executive understood the importance of purpose clauses and wanted to frame the clauses in the 2010 and 2011 Acts widely enough to cover the gamut of recovery activities. At the same time, the executive responded to criticism of the breadth of the purpose clause by asserting that it was not too wide. During debate on the earlier 2010 Act, which also had a broadly stated purpose of facilitating the response to the earthquake, the Minister said (2010b, per Hon Gerry Brownlee):

⁷⁰ In this context, it is relevant to note that George Tanner QC had been Chief Parliamentary Counsel and a Law Commissioner. His experience with legislative drafting was extensive and well-respected.

I think the comfort members should take in this bill is that it does have a very strong purpose clause. The purpose is well defined, and no Minister will be in any way looking at this bill and thinking of it as an opportunity to abuse some of the powers in it. There will be lots of constraints around that particular activity, not the least of which is our commitment to keep all parties in this House informed about how things are going...

On this point, he echoed a point made earlier by Amy Adams MP, who acknowledged “this is a significant set of powers, but equally I draw attention to clause 3, “Purpose”, which provides a very clear statement of the scope and the ambit within which these powers are to be used” (Hansard, 2010a, second reading).

The then Minister for the Environment, Hon Nick Smith, observed that the Henry VIII clause would permit legislative amendments “only if they directly relate to the recovery from, and the response to the Canterbury earthquake” (Hansard, 2010b, third reading). Yet two paragraphs on, Dr Smith explained how the 2011 Act would enable legislation to improve air quality in the region, something only tangentially connected with recovery (ibid.):

One issue I am considering as Minister for the Environment is that it might be sensible given the number of fatalities that have occurred historically around earthquakes and chimneys, and given that I think the House shares a desire to improve the air quality of Canterbury, for us to pass some extra Orders in Council to ensure that wherever possible we eliminate the chimneys and move Christchurch, Ashburton and other communities to having a cleaner air quality.⁷¹

The 2011 Act’s purpose clause (section 3) used phrases such as “respond to and recover from”, “facilitate...rebuilding and recovery of affected communities”. It provided that the focus of recovery included restoring “social, economic, cultural and environmental wellbeing”, a holistic view of recovery. While appropriate for the concept of recovery, it was not effective to confine the scope of executive and coercive powers.

⁷¹ Of the 185 people killed in the earthquakes, only 12 died in suburban locations (New Zealand Police, 2012). Some of those deaths might have been attributable to chimneys, but I have not been able to source any data to verify that.

As Dean Knight told the select committee (Local Government and Environment Committee, 2011, p. 78):

It is a blank cheque for any types of action the government decides is desirable. This is an anathema to rule of law. Almost all governmental action could be justified in the name of restoring community wellbeing. (emphasis added)

Knight suggested that coercive powers such as demolition and construction of works, and “call-in” powers should be exercised only where mandated by the recovery strategy, to give effect to it. The recovery strategy’s development would involve some community participation, so that would give some community-based mandate for the operation of these powers, particularly where they involved the suspension of vested rights (ibid., p. 79-80). Officials’ advice on the bill rejected the suggestion that there be preconditions on the exercise of executive and coercive powers: “we do not think it is necessary to outline criteria for when and why CERA / Minister can exercise the powers” (Department of the Prime Minister and Cabinet, n.d., p. 7).

In all, the executive seemed to have little positive appreciation of the constitutional norms that generally apply to decision-making. Kennedy Graham MP observed (Hansard, 2011b, third reading):

This bill is a commentary on who we are. New Zealanders are, by and large, by nature not a theoretically minded people. We like to see ourselves as pragmatic and casual, decent and fair-minded. No. 8 wire takes precedent over encyclopaedic script. We tenaciously refuse to write a formal constitution, proud of our British heritage. We disbanded the Upper Chamber on the grounds it might get in the way. We are slow to write into the books our natural obligations pertaining to human rights and freedom of information. We glue our society together on personalised trust rather than idealised obligation. These ingredients make for a fragile society, more fragile than we realise.

V.2.5.3 How were constitutional norms applied in decision-making?

With one exception, the executive did not seem to give any systematic consideration to how it would observe the constitutional norms that generally apply to decision-making. That exception was the Authority’s proactive approach to releasing information under the Official Information Act 1982. Its

website was a rich source of information about government decision-making on recovery matters.⁷²

This section explores three issues that highlight tensions between constitutional norms and the 2011 Act's approach. It considers the constitutional norms that should, ideally, have applied to those decisions and the extent to which those norms were in evidence in the executive's approach. The three issues are: delegated law-making; the decisions relating to the residential red zone and uninsured property owners; and the Minister's planning and zoning decisions in relation to the Christchurch airport.

A. Delegated power to amend primary legislation

The Henry VIII clause was a central feature of the 2010 Act and was carried over into the 2011 Act without amendment. It received considerable attention from submitters to Parliament's Local Government and Environment select committee while the 2011 Bill was being considered by Parliament. Submitters' concerns focused on:

- the scope of the power, which applied to all but five core constitutional statutes, and the broadly stated purposes for which it could be exercised
- the privative clauses intended to oust the courts' jurisdiction to scrutinise the delegated legislation made with these powers (see Chapter V.2.5.1 above).

The Henry VIII clause is explored in a standalone system analysis (Chapter VII). Suffice to say here that, although the 2011 Act did not create any explicit mechanisms to make the decision-making process for orders in council transparent, the approach adopted was highly transparent. Departments' advice on draft recommendations was routinely published on the Authority's website. The advice generally set out the problem, options, and preferred

⁷² The website is no longer available. On 18 April 2016, the Authority was disestablished as part of the transition from central government-led recovery to locally-led recovery and regeneration arrangements. The Department of the Prime Minister and Cabinet now houses the Greater Christchurch Group, which maintains an archive of the Authority's information and publications. The archive page is at: <http://ceraarchive.dpmc.govt.nz>

approach (Department of Building and Housing, 2011; Department of Internal Affairs, 2011, 2013; Ministry for the Environment & Department of Conservation, 2011).

The Canterbury Earthquake Recovery Review Panel's (the Panel) recommendations were also published on the Authority's website. The Panel did not tend to give reasons for its decisions. Its advice was often confined to a short recommendation to the Minister (Canterbury Earthquake Recovery Review Panel, 2011a, 2011c, 2012). While it is reasonable to assume that the Panel agreed with the justifications offered by departments, the Panel could have provided more explanation about its reasons, which would have created a body of decision-making jurisprudence. Such jurisprudence would have helped departments learn from the experiences of others and informed the public about the acceptable tolerances within which the law-making power could be used.

The 2011 Act did not create any participatory mechanisms for other branches of the state or the public around the delegated law-making powers, consistent with the Act's assumption that participation could unjustifiably delay the recovery. As discussed in Chapter VII.2.5.3, other procedures for affirming delegated legislation would have enabled more participation by parliament.

Despite the limitations on accountability imposed by the privative clause and broad purpose clause, the Henry VIII clause seems to have been exercised proportionately, reasonably, and with care. The Regulations Review Committee's inquiries into its use did not identify anything to cause the committee particular concern. My own survey of the Orders made between 2011 and 2014 concluded that they had been carefully crafted, and were proportionate and defensible. That such an open-ended power was not abused suggests the constitution can self-correct; when an external stimulus pushes it in a direction that may be inconsistent with constitutional norms, it somehow responds by pulling back to a point of relative consistency with norms. Using

soft system dynamics (SSD), I have identified a plausible explanation for that self-correcting faculty (discussed in Chapter V.3.5.4B).

B. Residential red zone and uninsured landowners

The government's decisions relating to the residential red zone and the buyout offers to uninsured landowners diverged sharply from constitutional norms and exposed competing constitutional values.

The central business district and the eastern suburbs were particularly hard hit by the earthquakes. After a third significant earthquake on 13 June 2011, Cabinet authorised a committee of Ministers to make decisions on land damage and remediation issues. The committee took a number of decisions at a meeting on 22 June 2011, which were recorded in a memorandum for Cabinet signed by the Minister and dated 24 June 2011 (*Quake Outcasts and Fowler Developments Ltd v Minister for Canterbury Earthquake Recovery and Anor* [2015] NZSC 27, para. 2 (the Supreme Court decision)).⁷³ The decisions categorised greater Christchurch into four zones according to the extent of land damage and the prospects of remediation.⁷⁴ Of interest here is the red zone. As described by the Court of Appeal (*Minister for Canterbury Earthquake Recovery and Anor v Fowler Developments Ltd and Quake Outcasts* [2013] NZCA 588, para. 27 (the Court of Appeal decision)), it covered areas where:

rebuilding may not occur in the short-to-medium term because the land is damaged beyond practical and timely repair, most buildings are generally rebuilds, these areas are at a high risk of further damage to land and buildings

⁷³ A record of the meeting was not adduced in evidence before the Court of Appeal (*Minister for Canterbury Earthquake Recovery and Anor v Fowler Developments Ltd and Quake Outcasts* [2013] NZCA 588, para. 25). A paper presented to the meeting was later discovered in the office of the Minister and provided to the Court of Appeal. The Court noted some material differences between that paper and the memorandum of 24 June 2011, and observed that the "discovery of the 21 June 2011 paper does not dispel our concern about the unsatisfactory nature of the records of decisions made by the Cabinet committee (exercising delegated powers to make Cabinet decisions" (ibid., para. 26).

⁷⁴ The green zones covered areas where there were no significant issues to prevent rebuilding, based on then current knowledge of seismic activity. Orange zones required further work to determine whether land repair would be practical and the areas suitable for rebuilding on in the short-to-medium term. White zones included the Port Hills, which needed further mapping and assessment following the earthquakes on 13 June 2011.

from low-levels of shaking (e.g. aftershocks), flooding or spring tides; and infrastructure needs to be rebuilt.

The Cabinet committee also decided to offer to purchase insured residential properties in the red zones (the Supreme Court decision, para. 3). Owners of insured properties were given two options:

- Sell the entire property at 100% of the most recent (2007) rating valuation for the property (land and improvements) and assign all insurance claims (including the claim to the Earthquake Commission (EQC)) to the Crown.
- Sell the land at 100% of the 2007 rating valuation (land only component) and assign claims against EQC for land damage to the Crown. Owners would retain insurance claims relating to improvements. (ibid., para. 3-4)

The offers excluded uninsured residential properties and vacant lots.⁷⁵ The decision to omit uninsured property owners appeared to have been made at the last minute. A draft of the Cabinet committee paper proposed making offers to the owners of uninsured improved land and vacant lots at 100% of the 2007 rating valuation. The final version of that paper omitted that proposal and excluded these owners, noting:

For residential owners, the risks of not having insurance were risks that ought to have been considered when making the decision to invest in the property. Residential owners should have been aware of the risks when choosing not to purchase insurance (Court of Appeal decision, para. 28).

Information provided to Cabinet after the Cabinet committee meeting noted that the Crown envisaged recouping between 60 and 70 per cent of the cost of buying the insured properties from EQC and insurers. The Court of Appeal observed that: “this level of detail was not before the Cabinet committee on 22 June 2011 so does not seem to have loomed large in its decision making” (Court of Appeal decision, para. 30).

Offers in accordance with the Cabinet committee’s decision were made by the chief executive of the Authority under section 53 of the 2011 Act. The offers

⁷⁵ Vacant lots are not eligible for EQC or private insurance cover (*Fowler Developments v CERA; Quake Outcasts v Minister for Canterbury Earthquake Recovery and CERA* [2013] NZHC 2173, para. 89).

were accompanied by a fact sheet that made it clear staying in the red zone was not a viable long-term option (ibid., para. 31).

In June 2012, offers were extended to a range of property owners for whom, for a variety of reasons, EQC insurance was not available (e.g. residential properties under construction, commercial properties). The Crown's recovery objectives were a motivating factor, acknowledging that without the offers these property owners could have difficulty re-establishing themselves and moving on with their lives with certainty and confidence (Court of Appeal decision, para. 37). Offers were duly made by the Authority's chief executive.

Against this backdrop, Cabinet made decisions in September 2012, 15 months after the first offers, in relation to the group of owners in the red zone who had not yet received offers. The majority of these people owned either vacant land or uninsured improved properties. The offers were on significantly less generous terms than the earlier ones, offering half, or less than half that offered to insured homeowners. The decisions were challenged by Fowler Developments, a property investor who owned vacant land, and the Quake Outcasts. The underlying concerns were that the applicants had been treated unfairly, the government had acted arbitrarily, and the offers were not sufficient to enable the applicants to re-establish themselves and move on with their lives. The grounds for the challenge were that the decisions were not made in accordance with the procedures envisaged in the 2011 Act and were not consistent with the 2011 Act's recovery purposes.

The central issue was whether the executive had to use procedures from the 2011 Act to declare the red zone and to decide on purchase offers to owners in the red zone. The Crown is not restricted to using statutory powers. A line of precedent articulates the Crown's residual freedom, which allows the Crown to do things without a specific statutory authorisation, but:

- It cannot authorise government officials to act in conflict with citizens' legal rights and liberties (Court of Appeal decision, para. 78)

- It cannot authorise executive action where “the field is covered by statute” (Court of Appeal decision, para. 79, *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508)
- It is reviewable by the courts. That review will focus on whether any legal rule prohibits the action or requires it to be taken under a statutory power. Review may also focus on reasonableness and rationality grounds (Court of Appeal decision, para. 81).

These constraints protect people from state action that treats them arbitrarily or unfairly. Because the red zone decisions were not made using powers in the 2011 Act, the nature and effect of the decisions became critical.

The courts took quite different approaches to the issue. In the High Court, Panckhurst J concluded that the combination of the red zone decisions, the offers, the fact sheet, and the clearance strategy (which only emerged over time) was “essentially destructive” of the residential zoning designations of the affected land (*Fowler Developments v CERA; Quake Outcasts v Minister for Canterbury Earthquake Recovery and CERA* [2013] NZHC 2173, para. 62 (High Court decision)):

In reality the decisions meant that over time the red zone would cease to be residential, and would become open space. In the meantime, the residential zones under the district plan subsisted, but in reality were no longer operative.

From this real world perspective, the creation of the red zone interfered with inhabitants’ fundamental right of use and enjoyment of their homes, which influenced their legal status. Panckhurst J declared the red zone decision to be unlawful in relation to the applicants and directed the Minister and the Authority’s chief executive to make new offers consistent with the 2011 Act (High Court decision, para. 102(b)).

The executive appealed to the Court of Appeal, which took a more legalistic approach, noting that despite the practical effect of the red zone decisions there had been no legal step to change relevant planning documents. Viewed through that lens, all the red zone did was to create an area in which the Authority would make purchase offers, which meant that the decisions had not

actually interfered with legal rights and liberties (Court of Appeal decision, para. 105-108). That meant the red zone decisions were lawfully made. The offers made to the applicants were unlawful because they did not accord with the 2011 Act's recovery purposes (ibid., para. 136), although the court accepted that there was a rational basis for distinguishing between property owners on the basis of their insurance cover.

In the Supreme Court, the majority (McGrath, Glazebrook, and Arnold JJ) considered that the 2011 Act should have been used to make decisions about the red zone and the scope of purchase offers (Supreme Court decision, para. 38). The judges seem to have thought it desirable as a matter of policy to use the mechanisms within the Act that required both participation and accountability. These safeguards were "particularly important because many of the powers in the Act are highly coercive. It cannot have been intended that the safeguards in the Act could be circumvented by acting outside of the Act" (ibid., para. 117).

To the majority, the significance of the red zone decisions meant a recovery strategy or recovery plan mechanism should have been used to enable a level of public participation in the decision (ibid., para. 118). The Authority had considered the options of using a Recovery Plan or rezoning, but noted the disadvantages of "longer timeframes to complete process", given the need for consultation. A further disadvantage was the "community expectation that their views may change decisions" (ibid., para. 43-44). The majority was unsympathetic to this perceived disadvantage (ibid., para 131):

That the mechanisms under the Act may not be entirely suitable, convenient or perfectly "aligned" to what the Executive desires to achieve is not a reason for statutory procedures to be bypassed. It is for Parliament to amend the legislation if it is not fit for purpose."

The majority concluded that the offers to the applicants were not lawful because they had not been made in the context of a recovery plan.

Compounding the wrong process and failure to consider the 2011 Act's recovery purpose, the executive had over-emphasised in its decision-making:

- Unfairness to insured people, because the offers to some insured people had been more than the insured value of their property, and because it made “an unjustified assumption of public lack of generosity for those in need that stands in marked contrast to the public’s actual response to the earthquakes” (ibid., para. 161).
- Moral hazard, which would not be relevant to vacant land (which is uninsurable) and, in any case, should not be exaggerated.

The Minister and the chief executive were directed to reconsider their decisions in light of the judgment. The Minister subsequently announced that a recovery plan would be prepared concerning offers to owners of vacant, commercial/industrial and uninsured properties in the residential red zone, saying that the process would allow people “to give their views based on what it means for the property owners, as well as the taxpayer and how people insure their properties” (Minister for Canterbury Earthquake Recovery, 2015).

The National Business Review described the approach as throwing the Outcasts to the court of public opinion (Hutching, 2015a). However, the Quake Outcasts and other red zone property owners in their position were ultimately made offers much closer to the June 2011 offers to insured residential owners (Canterbury Earthquake Recovery Authority, 2015b).

By the end of the Quake Outcasts litigation, the legitimacy of the executive’s decisions had been called into question by three layers of the judicial system. While each court decided the matter on different grounds, there was a generalised discomfort about the decision-making process used, and about the markedly different treatment of the Quake Outcasts from other residential red zone owners. The courts appeared to be particularly concerned by the executive’s failure to acknowledge that its treatment of the Quake Outcasts would prejudice their ability to recover from the earthquakes. In this respect, the courts seem to have been influenced by the constitutional value of fairness in a substantive, not merely procedural, way. There were competing views of fairness in this case, but the view which ultimately prevailed was focused on the

Outcasts and their ability to move on with their lives, consistent with the focus of the 2011 Act.

The litigation explored principles that are fundamental to the nature of public power and its exercise. The Supreme Court, in particular, held the government to account for acting in accordance with the primary recovery mechanisms – the recovery strategy and recovery plans – which were envisaged for significant decisions such as the red zone, precisely because they enabled public participation in those decisions. Failure to use those mechanisms had denied people the chance to participate in decisions affecting their futures – and to inform executive decision-making.

Of note is the executive's response to the court decisions. After the Cabinet decision was overturned in the High Court, the Minister appealed, rather than re-making the decision using a procedure based on the 2011 Act. The Quake Outcasts appealed an aspect of the Court of Appeal's decision. The Minister could have reconsidered the September 2012 offers and potentially forestalled the appeal, but explained to parliament's Finance and Expenditure Committee that a settlement offer could not be made while an appeal was pending (Finance and Expenditure Committee, 2014b, pp. 9–10), which contrasts with the Minister's decision to bring extant legal proceedings to an end by revoking Proposed Change 1 to the Canterbury regional policy statement (see below).

C. Amendments to the regional policy statement - urban limits and the airport

The final set of decisions, relating to the Minister's use of section 27 of the 2011 Act to amend the Canterbury regional policy statement, highlight the executive's willingness to take procedural shortcuts and sidestep participation mechanisms where it was expedient to do so.⁷⁶ The decisions related to a new

⁷⁶ *Independent Fisheries Ltd & ors v Minister for Canterbury Earthquake Recovery & Canterbury Regional Council, Christchurch City Council, Waimakariri District Council, Selwyn District Council & NZ Transport Agency* [2012] NZHC 1810; *Canterbury Regional Council v Independent Fisheries Ltd & ors*; *Christchurch City Council, Waimakariri District Council & New Zealand Transport Agency v Independent Fisheries & ors*; *Minister for Canterbury Earthquake Recovery v*

airport noise contour around Christchurch International Airport and setting an urban limit for greater Christchurch that provided for urban development of designated greenfield areas over the next 35-40 years, including space for 47,225 residential properties. (UDS case, Court of Appeal, para. 3). This change required revocation of Proposed Change 1 (PC 1), which pre-dated the earthquakes and was the subject of ongoing litigation (UDS case, High Court, para. 4).

A number of land owners brought judicial review proceedings and claimed successfully in the High Court that the Minister's decisions were unlawful. They questioned whether the Minister's decisions were necessary for earthquake recovery purposes or whether the Minister was using his powers to intervene in an unrelated matter. The litigants also considered the exercise of the power was fundamentally flawed because it had the effect of denying them access to the courts, particularly the Environment Court (UDS case, Court of Appeal, para. 5). The High Court invalidated the Minister's decisions and reinstated PC1 and the Environment Court proceedings (*ibid.*, para. 6).

The Minister argued that he was "faced with a pressing need for land to be freed up for urban residential subdivision" (*ibid.*, para. 5). The contested changes to the regional policy statement were causing uncertainty for developers and councils, and impeding the development of land for residential purposes. The Minister considered "there was no prospect of the Environment Court resolving the PC1 appeals quickly and that council officers involved in those appeals were required for earthquake recovery planning" (*ibid.*).

Taking a broad view of earthquake recovery, the Minister's concern seemed reasonable. The earthquakes had destroyed considerable infrastructure and rendered it impractical to rebuild in some areas. Dealing with recovery in the context of an urban development strategy was not unreasonable. The problem

Independent Fisheries Ltd & ors [2012] NZCA 601. For ease of reference, I call this case "the UDS case" (UDS stands for the Urban Development Strategy developed and championed by the territorial authorities and the New Zealand Transport Agency).

was that the Minister knew his preferred course of action would bring extant proceedings to an end.

The Minister was advised to suspend (not revoke) PC1 and “see how the Court proceedings play out” (UDS case, High Court, para. 33). The Minister did not agree with this advice (*ibid.*, para. 44):

I was very keen that there be no doubt that the appeal process, and the time commitment by Council staff and others [to that process], had been brought to an end.

The High Court took a narrow interpretation of the 2011 Act, viewing section 10(1) as indicating that “Parliament did not intend the Minister to pursue any purposes beyond those specified in the Act” (*ibid.*, para. 91). Chisholm J considered that only some of the purposes behind the decision were related to recovery. Resolving longstanding issues by setting long-term planning strategies did not accord with the purposes of the 2011 Act, as required by section 10(1) (*ibid.*, para 92-93). While accepting that the Minister had acted in good faith, the Court concluded that “acting for an improper purpose in an administrative law sense can arise as the result of an unintentional misapplication of statutory power” (*ibid.*, para 104).

The Minister appealed, claiming that the decisions were within the purposes of the Act and it was necessary to act as the Minister had acted. The Court of Appeal dismissed the appeals, but for different reasons from the High Court. The Court of Appeal took a large and liberal approach to interpreting the 2011 Act’s purpose (para 38):

The fact that the powers are significant and must be exercised for the purposes of the Act does not mean that the purposes should be interpreted restrictively when Parliament has made it clear that they should be interpreted broadly. The Act is designed to confer adequate powers on the Executive to achieve the full social, economic, cultural and environmental recovery of greater Christchurch in the widest sense.

The Court observed that the fact that issues pre-date the earthquake did not, of itself, take the decisions outside the 2011 Act’s purposes. That said, the Court disagreed with the Minister’s use of section 27 to amend the regional policy

statement because the Minister needed to consider other options for achieving the desired result before he could be satisfied that it was necessary to use section 27. There was no evidence that he had done so (ibid., para 132, 134):

The Minister does not appear to have recognised that the primary focus of the Act was on the mandatory long-term recovery strategy and that it would address the identification of areas for rebuilding and redevelopment, their sequencing and the location of existing and future infrastructure. The Minister needed to consider why it was necessary to exercise the discretionary ancillary power under s 27 in October 2011 while the Recovery Strategy was still being developed. Instead the Minister appears to have considered, incorrectly, that the s 27 power was simply an independent, standalone power.

...

It is not at all clear from the evidence why a short-term “neat solution”, which precluded public participation, was necessary, rather than merely expedient or desirable for a long-term problem which would be addressed in the Recovery Strategy, the draft of which had already been publicly notified.

Eventually the same outcome was achieved using the correct legal procedures. The Recovery Strategy amended the regional policy statement, as did the Land Use Recovery Plan issued by the Minister under the strategy. Ultimately, on 9 December 2013, the Minister issued a public notice revoking PC1 under section 27, ancillary to gazetting the Land Use Recovery Plan (Minister for Canterbury Earthquake Recovery, 2013).

This litigation shows how legitimacy can be undermined when a process is already underway and the decision-maker changes the direction of travel without warning. The litigation focused on procedure, reinforcing the constitutional position that often the procedure is the protection. The case became a contest between the Minister’s pragmatism on the one hand and the norms of restraint and participation on the other. The detrimental effect of removing opportunities for participation seemed particularly instrumental in the court’s decision.

V.2.6 Assessing the 2011 Act's legitimacy

Figure 5.7 and Table 5.3 outline performance measures for the system model. The performance measures help to assess how well the real world is moving towards the desired transformation, and to assess whether the transformation is, indeed, the right one. This section considers each of the performance measures in turn against the real world context. The Henry VIII clause's performance is assessed in Chapter VII.2.6.

V.2.6.1 Efficacy

As discussed in the preceding section, there were some instances where executive decision-making clashed with procedural fairness requirements and other constitutional norms. That said, those decisions were clearly transparent and reviewable, which enabled the defects to be mitigated.

The preceding section highlights only two decisions out of many hundreds that were likely made while the Act was in force. That so many decisions went unchallenged may indicate acceptance. More research would be needed to assess the consistency of recovery decisions with norms.

V.2.6.2 Efficiency

The two decisions discussed in the preceding section suggest that, in those instances, the decision-making procedure did not strike the right balance between speed and procedural propriety. The courts concluded that the Quake Outcasts had been treated unfairly as a result. Here, I think the short-term goals of making decisions quickly overrode longer-term considerations of legitimacy. The result was costly, time-consuming litigation that, in both cases, resulted in the decisions being re-made. By no account can that be an efficient use of time or resource.

I suspect that the model in Figure 5.7 would have made the trade-offs between speed and propriety more overt, which might have led to more future-proofed

decision-making. That said, these were only two decisions out of hundreds. Further research would be required to assess the overall efficiency of decision-making under the 2011 Act.

V.2.6.3 Ethicality

As noted earlier, there were relatively high levels of transparency, in that the Authority and Minister were subject to the OIA, and the Authority generally operated a policy of proactive release. There was little transparency around the red zone decisions: they were subject to Cabinet secrecy until announcements were made.

I consider that the very existence of the privative clauses and immunities undermined the 2010 and 2011 Acts' performance against the ethicality measure.

V.2.6.4 Effectiveness

This measure focuses on the use of, and response to, judicial review, which is a key indicator of whether decisions are proportionate, reasonable, and fair. Judicial review is a feedback mechanism which triggers evolution in decision-making procedures.

Although the vast majority of recovery decisions have not been challenged through judicial review, the executive's response to those that were challenged appears to have been patchy. The outcome of the regional policy statement amendments shows the evolution this measure looks for: the result was eventually reached through the right procedure that enabled affected people to participate in the process. The Quake Outcasts litigation showed some resistance to such evolution on the executive's part.

V.2.6.5 Elegance

The approach of using a statutorily-mandated strategy and plans to govern recovery was a simple way of aligning the plethora of planning and zoning

documents, and regulatory requirements that might otherwise have applied to recovery activities. The process for developing the recovery strategy enabled some public participation, although the level of participation in developing plans was controlled by the Minister (2011 Act, section 19(1)). The problems discussed in this chapter seem to have arisen when the executive sought to act outside the framework, or to push against its limits.

V.3 A soft system dynamics-based policy approach

This section (and the accompanying Tables and Figures) sets out the analysis done using the Delft approach to system dynamics-based policy analysis discussed in Chapter III. The artefacts of this analysis are:

- a problem definition;
- an objectives map;
- a ways and means map identifying interventions;
- a system map of the system under exploration; and
- an intervention map, which maps the interventions onto the system map.

This section describes each of the artefacts and records the insights gained through the analysis.

V.3.1 Legitimate decision-making in Canterbury earthquake recovery: what was the problem?

The analysis rests on the rich picture in Figure 5.6. The insights from the rich picture are discussed in Chapter V.2.1.

When the 2010 and 2011 Acts were developed, the problem outlined in the rich picture was a foreseeable risk rather than an actual problem. That characterisation complicated the SSD analysis, as explained in Chapter III.4.2.

V.3.2 Objectives for legitimate decision-making

Figure 5.8 sets out the objectives map. Combining the theory of legitimacy (Chapter V.1) with the insights from Figure 5.6, I identified three primary objectives for legitimate decision-making in the context of Canterbury earthquake recovery:

- to maintain public trust and confidence in government;
- to maintain public trust and confidence in the constitution's ability to protect its people; and
- to maintain public trust in the legitimacy of the law.

I also identified two secondary objectives that would help to meet these primary objectives:

- Faster decision-making procedures that protect against arbitrary and unfair decisions. Pace would be a necessary part of the solution to get people into warm, weathertight homes, to repair core infrastructure, and to shore up the Canterbury economy. A lack of pace would undermine public trust and confidence in the recovery. Pace would need to be balanced with constitutional propriety, because a recovery characterised by arbitrary or unfair decisions would undermine public trust and confidence in both the recovery itself and the constitution's ability to protect its people.
- Transparent and accountable decision-making procedures that included appropriate levels of participation.

The assumptions underpinning the objective map are depicted as thought bubbles on Figure 5.8. These assumptions surfaced as I tested the logic of the links between the objectives.

The objective map's syntax means it can be read as a story. The story starts with the earthquakes that created a need for decisions to facilitate the recovery process. Rapid and timely decision-making was needed to give Cantabrians certainty about the future of their city and their property and to promote their trust and confidence in decision-makers and decision-making. That meant the ordinary checks and balances would need to be modified. At this point the story splits along a range of arcs, which are different but sometimes interrelated ways of promoting legitimacy. The objectives map assumes that fast decision-making should not always trump participation: some decisions may be sufficiently important and have sufficiently long-term effects that they require public engagement despite any resulting loss in speed.

Legitimacy tends to be self-reinforcing. A situation characterised by high legitimacy tends to reinforce trust and confidence in decision-makers and constitutional settings, making the system more resilient: where people have a high level of trust in institutions, their trust is more likely to withstand one-off shocks and crises.

V.3.3 Ways and means mapping for legitimacy

Figure 5.9 sets out the ways and means map for legitimate decision-making in Canterbury earthquake recovery. It outlines the practical real-world steps needed to bring about each of the objectives.

The map highlights the objectives' interconnectedness, which suggests that removing one intermediate objective would weaken a number of higher level objectives. For instance, the "accountable decision-makers" objective is an input into the "trust and confidence in decision-makers" objective, which is itself an input to the top-level legitimacy objective. These interconnections

suggest that weakening accountability would have flow-on effects that could strike at the heart of legitimacy.

Figure 5.9 shows that if decision-makers have the necessary authorisations to make decisions and if modified checks and balances are identified, then there can be rapid and timely decision-making. That would give Cantabrians the desired certainty. Because there is a wide range of possibilities for modification of checks and balances, the map focuses on interventions based on transparency, accountability, and participation, which are most likely to reinforce legitimacy. It also considers interventions aimed at ensuring decision-makers generally meet public expectations of fairness, given the importance of that value in New Zealand's constitutional culture.

All of the interventions on the map can be seen as limitations on the extent to which checks and balances can be modified. For instance, modifications abrogating all requirements for decision-makers to observe natural justice and removing all appeal and review pathways would significantly weaken decision-makers' accountability. That accountability protects against arbitrary and unfair decisions, and thus supports trust and confidence in constitutional settings.

V.3.4 The causal loops affecting legitimacy

Figure 5.10 is a system map with a blend of causal and conceptual links that combine to create feedback loops. Ideally, this map would be a causal loop diagram (CLD) but, as explained in Chapter III.3.2.2, some constitutional concepts resisted being described as variables, and they remain as concepts on Figure 5.10. In this map, "decision-maker" is used to describe any person or institution exercising public power. The map is not specific to any particular decision-maker, but can be applied to the different branches of state and decision-makers within those branches.

The map's geography is illuminating. It centres around decision-makers' compliance with constitutional norms. That variable drives a number of feedback loops that reinforce or balance each other. The geography shows that

decision-makers' behaviour can be influenced by a range of factors; one change to one factor may result in changes across the system. Decision-makers are as important as the constitutional norms in this map's explanation of legitimacy. In this way, the map resonates with Matthew Palmer's constitutional realism theory (2006).

The map's central premise is that compliance with constitutional norms resonates with constitutional values, and builds public trust and confidence in decision-makers and decision-making processes. That trust and confidence creates legitimacy. Legitimacy is assumed to be self-reinforcing. That reinforcing tendency will help to strengthen and stabilise the underpinning norms and values, thereby shoring up the system. The system is capable of evolving to meet emerging circumstances, and can do so in a way that can see evolution of constitutional procedures and – if necessary – norms, without destabilising the system in the long-term.

Feedback loops R1, R2, and R3 are at the centre of the map. They show the complex and often implicit relationship between constitutional values and norms that manifest as public expectations, which influence decision-makers' behaviour. Constitutional values have a tacit but strong influence on behaviour. Acknowledging that influence better equips us to predict its results, which might otherwise remain unanticipated and unexplained.

Loop R1 shows how compliance with constitutional norms and values creates certainty and predictability that enables people to order and live their lives without being worried about (or even necessarily aware of) the constitutional system and the state. It strengthens public trust and confidence in the constitutional system, although that trust and confidence is likely to be implicit, possibly even unconscious.

Even implicit trust and confidence in system settings can reinforce legitimacy of the decisions generated using the system. That legitimacy tends to become self-reinforcing: a system delivering decisions that are accepted as legitimate tends

to incentivise decision-makers to continue making decisions in the same way. However, trust and confidence alone may not be a sufficient incentive. As illustrated by Figure 5.4, legitimacy is particularly weakened without accountability for decision-makers. The legitimacy system represented by the map is dependent on the presence and effective operation of accountability mechanisms.⁷⁷

The relationship between decision-makers, procedure, trust and legitimacy is such that trust and confidence in decision-makers is logically prior to trust and confidence in procedures (loop R2) because of the value placed on pragmatism in New Zealand's constitutional culture. Slavishly following the rules regardless of context is likely to undermine public trust and confidence, so the rules tend to include some leeway to deal with unforeseen circumstances. Thus, New Zealand's constitutional arrangements tend to rely on decision-makers who can be trusted to follow the norms and procedures wherever possible, and to always act consistently with constitutional values.

Fairness has an important role in the legitimacy system. Many constitutional norms contribute to fairness, including legality (prospective and accessible laws, with legal avenues for redress), restraint, and impartiality. The expectation that decision-makers will be disinterested, reasonable, consistent, and observe natural justice squarely plays to the constitutional value of fairness, as does as acting consistently with the Treaty of Waitangi and upholding commitments made in Treaty settlements.⁷⁸

⁷⁷ Figure 5.10 does not specify accountability mechanisms, because they vary greatly according to the branch of state under examination. The importance of accountability is acknowledged through explicit reference in the list of relevant norms.

For instance, judicial accountability is through the operation of open justice and scrutiny of judgments, and through the appeals and judicial review systems. There is a mechanism to hold judicial conduct to account (Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004). Executive accountability is to parliament through standing orders, appropriations scrutiny, and question time. The executive and parliament are both accountable to the public through elections.

⁷⁸ The extent to which Māori values are shared by non-Māori is still subject to some debate, which is why the values and the Treaty norms are in separate but linked boxes on Figure 5.10 (see for instance: Constitutional Advisory Panel, 2013; M. S. R. Palmer, 2007).

Ordinary legitimacy procedures can be disrupted by extraordinary events that create pressure to make decisions differently. Loops B4 and B5 show how extraordinary circumstances can affect the legitimacy system, and how it can respond. The pressure to make decisions differently in extraordinary circumstances is driven by pragmatism. It creates an expectation that procedures will be short-circuited or side-stepped if they really do not make sense in a particular set of circumstances.

Revising how constitutional norms are observed in extraordinary circumstances need not jeopardise legitimacy; indeed revising norms can actually strengthen their relevance. However, care needs to be taken to give system changes time to embed before making further (possibly unnecessary) changes. Care also needs to be taken to ensure that the problem being fixed is the right one, and is not merely a symptom of a bigger problem. Finally, care needs to be taken not to compromise norms in a way that weakens them disproportionately over the long term.

In extraordinary circumstances, decision-makers may respond to public expectations of expediency (loop B5). If extraordinary circumstances strengthen public expectations of expedient decision-making, decision-makers may respond by finding short-cuts or sidestepping the procedures that do not make sense. Alternatively, they might persist with the procedure, and blame the underlying norm for the adverse result. This kind of action can result in procedures being perceived as “process for the sake of process”.

Cutting procedural corners will be publicly tolerated in the right circumstances. For instance, after the February 2011 earthquake, it was apparent that the damage to horizontal infrastructure was such that a high degree of coordination would be required. Centralising those decisions might have been necessary to displace the incentives of individual infrastructure service providers. However, in the months and years following, there has been increasing public resistance to centralised decision-making procedures in relation to strategic decisions about the long-term shape of the central business district, the clearance

strategy for residential red zone areas, and choices for rebuilding iconic buildings such as the Christchurch Cathedral (Chapter IV.1.2.3).

Loop R6 shows the implicit relationship between compliance with norms and their stability and strength. If the norms are used without apparent difficulty there is no reason to question their relevance, but if non-compliance is generally accepted by the public the norms are clearly not that relevant in that particular context. As norms' content and importance weakens, decision-makers can be expected to find reasons not to follow them.

Strong and stable norms will support the core loops (R1, R2 and R3) and shore up constitutional values. The stronger the norms, the more they can be expected to reinforce the related values.

Loop B7 shows the influence of values on constitutional norms. Norms and values need to maintain some alignment. A lack of alignment may create tensions that could, if sufficiently sharp, manifest in a loss of confidence in constitutional arrangements, which could in turn lead to constitutional change.⁷⁹ The relationship between norms and values described by loop B7 should be a warning against complacency. Constitutional values influence decision-makers' compliance with norms, which suggests that if those values weaken so, too, will their influence.

Loop R8 shows the reinforcing effect of constitutional values on decision-makers. The influence of values on decision-makers is likely to be implicit, even sub-conscious. The more strongly decision-makers are driven by constitutional values, the more incentives they have to comply with constitutional norms.

⁷⁹ Arguably, such a lack of alignment of values and norms underpinned the Labour government's response to the Court of Appeal's decision in *Ngati Apa v Attorney-General* [2003] NZCA 117 concerning Māori claims to the foreshore and seabed, "a judgment that surprised and upset many Pakeha members of the public and politicians" (M. S. R. Palmer, 2008, p. 271). The Labour government's response, the Foreshore and Seabed Act 2004, met with a strong public response (J. Hayward, 2010, p. 111). It was ultimately repealed and replaced by the Marine and Coastal Area (Takutai Moana) Act 2011, which has the purposes of establishing "a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand", recognising "the mana tuku iho [inherited right or authority derived in accordance with tikanga] in the marine and coastal area by iwi, hapu and whanau as tangata whenua", and providing for the exercise of customary interests in the common marine and coastal area (section 4).

Constitutional values tend to evolve very slowly. The effects of changing values may manifest, and will likely be felt, over a much longer timescale than the more short-lived effects of extraordinary circumstances. Any effects of the Canterbury earthquakes on constitutional values may not manifest for some time to come.

Constitutional values will be influenced by external factors like global events, migration, and international media. Migration can be expected to have an ongoing influence on New Zealand society and values in the foreseeable future.⁸⁰ Māori kaupapa (principles) also inform New Zealand constitutional values. The strength and nature of that kaupapa, and the extent to which it influences New Zealand constitutional norms and values is the subject of a thesis in itself and is not explored here.

V.3.5 Mapping interventions for ensuring legitimate decision-making

This section isolates and discusses the effects of implementing a range of interventions drawn from Figure 5.9.

V.3.5.1 Ensuring decisions and actions are authorised by law

Figure 5.11 maps the effect of requiring decisions and actions to be authorised by law. It responds to pressure for normal decision-making procedures to evolve to meet the extraordinary circumstances created by the earthquakes (loop B5).

The discussion here does not consider the particular legislative vehicle that might be used to achieve it. That is a second order question. In a live policy exercise, I would start with the analysis at the level discussed here and, if it looked sufficiently promising, I would develop design options for different legislative vehicles. That said, I assume that any legality intervention would

⁸⁰ New Zealand has been described as a “superdiverse” country: at the 2013 Census there were 213 ethnicities in New Zealand, and 160 languages are spoken here (Chen, 2015, p. 53).

enable or require accountability for decision-making and actions, so Figure 5.11 shows a causal link between the legality intervention and the three accountability interventions.

Authorising recovery decisions will promote their legitimacy, although the strength of the advantage depends on the decisions' consistency with constitutional norms and values, particularly with the value of fairness. It also depends on the extent of decision-makers' accountability for their decisions and actions. Figure 5.11 demonstrates this conclusion through highlighting a range of links that tell a story:

- By enabling decision-makers to act lawfully, it can give them confidence to act, which removes a potential source of delay.
- Authorising decisions increases the likelihood they will be made in a particular way, or according to particular criteria, thus increasing predictability and certainty.
- Predictable decisions are more likely to be accepted by the people affected.
- Acceptance strengthens legitimacy, and legitimacy is an incentive for decision-makers to comply with norms, because it manifests as compliance and an absence of dissent. The reinforcing effect depends on the authorised decisions being consistent with the constitutional value of fairness.⁸¹
- Legitimate decisions can withstand public and/or judicial scrutiny of procedure and substance.
- Where decisions can withstand scrutiny, they are more likely to be accepted by the public, and the public is more likely to have confidence in decision-makers.
- That is likely to strengthen ongoing public confidence in the underlying constitutional settings, which should:

⁸¹ If the authorisation was framed so as to enable arbitrary or unfair action against residents and businesses, that could have a very different effect. It would create a clash of constitutional values and cause loop R3 to operate in a negative way, reducing trust and confidence in decision-making procedures and weakening legitimacy. It would potentially undermine the stability and strength of constitutional norms, through weakening the effect of loop R2, and call into question the relative strength and priorities of constitutional values through loop B7.

- reinforce trust and confidence in decision-makers: people are more likely to trust decision-makers whose decisions can withstand scrutiny than those whose decisions cannot;
- help to stabilise and strengthen constitutional norms.

The 2010 and 2011 Acts clearly authorised a wide range of recovery decisions to be made and actions taken. They seem to have been sufficient to enable most, if not all, of the recovery decisions that have been made to date. The one outlier in this context is the residential red zone decisions made by Cabinet, and the majority of the Supreme Court thought the Minister should have used the recovery vehicles available under the 2011 Act.

V.3.5.2 Transparency in decision-making

Figure 5.12 maps three related transparency interventions requiring decisions and their reasons to be published. Giving reasons can be essential for enabling people to understand a decision's rationale if that is not clear from its face. The Official Information Act 1982 (OIA) is the primary mechanism for requiring transparency of the executive. It offers a ready-made framework for releasing official information, including giving reasons for decisions to the people affected by them (OIA, section 23), and a review mechanism. Therefore, the most straightforward intervention would be to make public and state sector decision-makers subject to the OIA.

As discussed earlier, transparency is a powerful incentive for decision-makers to comply with constitutional norms. Thus, transparency reinforces norms in much the same way as the legality intervention discussed above. Publishing decisions and reasons would create transparency and influence decision-makers' compliance with norms. In this way, transparency can strengthen the reinforcing relationship between compliance with norms, trust, and fairness described by loops R1, R2, and R3.

Further consideration needs to be given to the availability of reasons. Section 23 of the OIA gives people (including bodies corporate) a right to reasons for

decisions affecting them in their personal capacity, but not reasons for decisions or actions affecting more general matters. Section 88 of the 2011 Act required the Minister to report quarterly to parliament on his use of powers under the Act. The reports had to include a description of powers exercised by or on behalf of the Minister or the chief executive under this Act during the period reported on.

When section 88 was being debated in parliament, some members suggested it require some details to be specified (e.g. whether notification was given or consultation carried out). The Minister told members that it was “implicit in this bill” that such detail would be given (Hansard, 2011b, per Hon Gerry Brownlee). As enacted, section 88 did not require reasons to be given or details to be specified, and the Minister’s section 88 reports did not give any procedural information or the reasons for exercising the powers (Minister for Canterbury Earthquake Recovery, 2011).

In light of that experience, it might be desirable to require decision-makers to provide reasons for decisions, particularly those involving the use of coercive powers, because it can promote legitimate decision-making. Any such requirement would have to be balanced against the privacy interests of the subjects of the decisions, so their private interests and concerns were not subjected to idle curiosity.

V.3.5.3 The role of accountability in legitimate decision-making

A. Review and appeal pathways

Figure 5.13 maps the effect of review and appeal pathways on legitimacy. The judicial review pathway depends on the existence of grounds of judicial review, which are shown on the map as causal links.

The use of appeal and review pathways only occurs when people reject or challenge a decision. The stronger the decision’s legitimacy, the less likely it is that people will reject or challenge it. Also militating against use of appeals or

review are perceptions of the utility of legal action. People are less likely to bring legal action if they do not believe the legal action will bring about any meaningful change. This is particularly so for judicial review, where the court does not tend to substitute its own decision for that of the decision-maker, but may remit the matter back to the decision-maker for a fresh decision. That may be an unpalatable remedy where a decision-maker is not trusted.

Appeals and reviews are likely to create an effect that I have defined as sitting outside this legitimacy system, which is demand for court services and legal aid.⁸² That demand could create problems if the availability of legal aid and low-cost dispute resolution mechanisms do not increase correspondingly. Cost and delays can weaken appeals and reviews as a lever to drive accountability.

Accessible appeal and review pathways will help to stabilise and strengthen constitutional norms and values by signalling that, despite the extraordinary circumstances, recovery-related decisions must observe constitutional norms and be consistent with our underlying constitutional values. That signal should help to reinforce decision-makers' incentives to comply with norms (loop R1) and reinforce (and meet) expectations of fairness (displayed in loops R2 and R3). Meeting expectations of fairness is likely to increase acceptance of decisions.

Appeal and review pathways can support the evolution of normal decision-making procedures. Judicial supervision over the modifications should protect against arbitrary or unfair results, which reduces the risk of evolution, at least from the public's perspective. Decision-makers might find the prospect of judicial supervision somewhat uncomfortable. However, the most significant advantage is a longer-term one of helping to maintain the relevance of, and compliance with, constitutional norms whilst the norms are evolving. That can

⁸² Arguably, legal action could be seen as part of the system for legitimacy: it incentivises compliance with constitutional norms and rebalances trust and confidence when decision-makers have made poor decisions, or when another decision could equally have been made. However, a boundary needs to be drawn around the system to place some constraints on the analysis, to make it feasible. I have oriented this system description to the factors that create legitimacy in the first place. Legal action tends to remediate errors or poor choices after the event.

help to build public confidence that the recovery decision framework is proportionate and restrained, and is used fairly and appropriately.

In short, appeal and review mechanisms should be included in a decision-making framework, particularly where that framework modifies constitutional norms in response to extraordinary circumstances. By contrast, the 2011 Act explicitly limited judicial review and appeals, through a range of immunities and privative clauses, as discussed in Chapter V.2.5.1A. The 2011 Act also limited appeals by specifying only a few sections in the Act in respect of which appeals were permitted (sections 68, 69, 70) and restricted access to appeals under the Resource Management Act 1991 (section 86).

B. Natural justice

Figure 5.14 maps the effect of requiring decision-making processes to observe natural justice. Natural justice is a protective process that aims to ensure that decision-makers act fairly and impartially, and are fully informed about relevant facts. It improves decision quality and promotes fair procedures, which promotes legitimacy. “The requirements of natural justice are essentially unwritten rules of the common law” (Wade & Bradley, 1985, p. 642). The two main rules of natural justice are the rule against bias (no person can be a judge in his or her own cause) and the right to a fair hearing (ibid., pp. 642-643). The duty of natural justice arises (ibid., p. 644):

...Whenever it is particularly important to an individual directly affected by the decision that a fair procedure should be observed. Therefore, if the exercise of power directly affects a man’s rights, or his property, or his character, it is more likely to be subject to natural justice; so is a decision which follows a procedure involving the confrontation of two opposing views, in a manner comparable to that of litigation.

I have assumed that the legitimacy system should require natural justice, and the question is whether any steps need to be taken to specifically require decision-makers to observe natural justice, or whether it is sufficient to assume that they will do so, given its role as a constitutional norm protected by the courts at common law.

Natural justice's primary effect is on decision-makers' incentives, but that effect depends on the cost and perceived utility of the available review pathways. A statutory obligation to observe natural justice would be highly visible and immediately apparent, and non-legally trained decision-makers may find a statutory obligation easier to identify and understand than an obligation established at common law and in other legislation.

Not specifying the need to observe natural justice would rely more heavily on the common law, which may be less accessible to non-legally trained decision-makers. Inaccessibility may lead to less, or less full, compliance with the obligation.

The Minister and the Authority were automatically subject to the New Zealand Bill of Rights Act 1990, which means they were bound to observe the right to justice protected by section 27. Section 27(1) requires public authorities with the power of determination to observe natural justice. That formulation essentially limits the protection in section 27 to adjudicative decisions (Ministry of Justice, n.d., p. 436), which means it would not have been much help to people seeking a right to be heard in relation to administrative decisions.

The 2011 Act's approach to natural justice was context-specific. In relation to compensation for the compulsory acquisition of land, section 64(4) required the Minister (who was responsible for determining compensation) to give claimants a reasonable opportunity to appear to make representations as to the nature of the claim and the amount of compensation payable.

In other areas, the 2011 Act seemed to limit the operation of natural justice in respect of matters that could have materially affected people's property interests. For instance, section 27(2) of the 2011 Act allowed the Minister to suspend or cancel a resource consent, a permitted use under the Resource Management Act, or a certificate of compliance under the Resource Management Act. The Minister's only obligation to a person directly affected by such an action was to notify them, if practicable (section 27(3)).

These constraints on natural justice, combined with the 2011 Act's limitations on appeal and review pathways potentially weakened the overall legitimacy of the earthquake recovery measures, and potentially left the good transparency practices as a relatively empty shell: one of the purposes of transparency is to equip people with the information they need to hold decision-makers to account.

C. Statutorily expressed relevant considerations

One head of judicial review aims to protect against arbitrariness, unfairness, and irrationality in decision-making by ensuring that like matters are treated alike. Essentially, it asks whether a decision-maker has considered matters that should have been ignored (irrelevant considerations) or, conversely, ignored matters that should have been considered (relevant considerations).

Figure 5.15 maps the effect of specifying relevant considerations for decisions in the statute on legitimacy. Specifying relevant considerations would make the law more accessible to decision-makers and affected parties alike. At the same time, it would risk inflexibility - it is difficult to predict in advance all of the factors that might be relevant. This intervention would strengthen the virtuous cycle of loops R1, R2 and R3 through increased compliance with norms, stronger trust and confidence in decision-makers and meeting expectations of fairness.

The intervention creates two new feedback loops. Loop B9 assumes that specifying relevant considerations for decision-makers can promote acceptance of decisions and, through so doing, reduce recourse to judicial review, which alleviates potential pressure on the court system.

Loop B10 shows how the positive effect of express relevant considerations on predictability enhances trust in decision-making procedures and enhances legitimacy. The public trust created as a result of decisions effectively withstanding scrutiny is likely to strengthen confidence in underpinning constitutional settings, which should (implicitly) strengthen and stabilise norms.

The 2011 Act specified relevant considerations for some decisions. Section 64 of the 2011 Act set out relevant considerations for the Minister's determination of compensation for compulsorily acquired property. Section 10(1) of the Act also required the Minister and chief executive to ensure that their use of powers accorded with the Act.

V.3.5.4 How constitutional propriety promotes legitimacy

A. Observing separation of powers

The separation of powers seeks to limit state power by dividing it between different institutions and office-holders (P. A. Joseph, 2007, p. 187). The intervention shown in Figure 5.16 had a working assumption that maintaining constitutional propriety through observing separation of powers would strengthen legitimacy and help to meet the success criteria. The analysis suggests the assumption was not operative in this context.

I started by highlighting the perceived need for speed in responding decisively and authoritatively to the situation created by the earthquakes, which was reinforced by the values of pragmatism and authoritarianism. However, dispersed power is the very antithesis of a centralised, authoritative decision-making process. In this way the separation of powers pulls against the constitutional values of pragmatism and authoritarianism. That pull is compounded by the fact that under ordinary law and in ordinary times, local government bears much of the responsibility for implementing the frameworks governing land and resource use, and buildings' compliance with mandatory standards.

The tension between constitutional norms and values affects the operation of loop B7. Conflict between values and norms may play out as changing relative priorities between norms and changing approaches to interpreting and applying norms. That kind of destabilising effect can create challenges for decision-makers, who may have limited awareness of the changes, and may over- or under-respond.

To avoid the tension, it might be necessary to collapse the separation of powers somewhat by centralising control over law-making and decision-making for recovery in the executive. A further step could be to limit appeal and review pathways (see Figure 5.17, which traces the effect of that intervention in red). The 2011 Act did both. Some short-term improvements are likely from such an approach. For instance, centralising power would meet public expectations of expedient decision-making, which is likely to build trust and confidence in decision-making procedures, which would strengthen legitimacy and build public confidence in the underlying constitutional settings through the operation of loop B4. Public acceptance of pragmatically-made decisions could weaken decision-makers' incentives to comply with constitutional norms if they experienced greater rewards from taking charge and "getting stuff done".

Such an evolution of normal decision-making procedures weakens three constitutional norms: representative democracy, parliamentary supremacy, and the rule of law. Weakening those norms risks undermining the relevance of related constitutional norms, which could further weaken decision-makers' compliance with those norms. If decisions did not meet public expectations of fairness, it could undermine confidence in decision-makers and decision-making through the operation of loops R2 and R3. The interrelationships between these factors are such that a negative spiral could emerge over the long-term.

Limiting appeal and review pathways as part of this intervention would contradict the accountability interventions. Given the important role accountability plays in promoting legitimacy, the trade-offs would need careful consideration.

Over the long term, undermining the norms of representative democracy and parliamentary supremacy in the name of recovery risks eventually eroding confidence in the constitutional settings enabling that recovery. That effect appears to be emerging in relation to the Crown-appointed commissioners in the Environment Canterbury (the Canterbury regional council), whose appointment in 2010 displaced the democratically elected representatives.

Initial support for the appointment of commissioners appears to have been eroding since their appointment, particularly since it has become clear that even after the 2016 local body elections Environment Canterbury will still not be a fully elected body (Brookie, 2012; B. Hayward, 2013; Toomey, 2012; Trotter, 2012, see also Environment Canterbury (Transitional Governance Arrangements) Act 2016).

B. The constitution's self-correcting faculty

It appears that a sudden significant shift in one set of constitutional norms - here, parliamentary supremacy and the separation of powers - can incentivise compliance with other, unaltered norms, causing the constitution to self-correct. In developing Figure 5.17, I identified the interrelationship between constitutional norms and constitutional values that may cause this incentive effect (traced in green on Figure 5.17).

The self-correcting faculty was at work in officials' use of the Henry VIII clause. There was a tension between the values of authoritarianism and pragmatism on the one hand, and the norm of restraint on the other. I had initially expected this tension to play out over a few years: decisions characterised by a high level of pragmatism would be made and accepted early on when the triggering event is still uppermost in people's minds, but would become harder to justify as more time elapsed. I expected that, as individual decisions started to weaken overall legitimacy, it might lead to a rebalancing between the values of pragmatism and authoritarianism, and the norm of restraint, which would cause some correction back to the earlier status quo.

However, restraint was apparent even in orders made relatively early in the recovery. The research design precluded interviewing the officials concerned to understand their reasons, but that would be an interesting study. In the absence of first-hand accounts, I wondered whether the conflict of norms and values (restraint versus pragmatism and authoritarianism) creates opposing

influences on decision-makers, which manifest in how they comply with constitutional norms or, indeed, which norms they comply with.

This explanation resonates with New Zealanders' ambivalence to public power (M. S. R. Palmer, 2007). How decision-makers respond to that conflict will be influenced by the relative weight they give to constitutional values, their own ambivalence to public power and how it is wielded, and the ways in which they are held accountable. Decision-makers whose accountability occurs three-yearly at the ballot box have strong incentives to act consistently with public expectations on matters whose consequences will be felt within that three-year window. Their incentives to care about longer-term consequences may not be as strong. The public service, by contrast, should have incentives to take a longer view because departments tend to endure beyond a three-year parliamentary term, and may have to address the consequences of today's decisions whether they manifest tomorrow or in ten years' time. As noted above, centralising power in the executive may strengthen legitimacy over the short term, but weaken it over the longer term.

One possible explanation for the early restraint shown in orders in council is that the departments concerned were viewing the issue through a lens of long-term legitimacy: what might have been accepted as legitimate in the short-term might not have been accepted in the long-term. Another possible explanation is that the constitutional norms of restraint, legality, parliamentary supremacy, and representative democracy were strongly embedded in the public service and so counterbalanced against the then-prevailing values of pragmatism and authoritarianism. The two explanations are mutually compatible

In any event, the extent to which new powers are exercised with restraint will increase decision predictability, which will strengthen perceptions of legitimacy through the operation of loop R1. Reinforcing legitimacy should reinforce decision-makers' incentives to comply with the new norms, which would start the process of re-stabilising norms. For the reasons given earlier, enhanced compliance with norms can be expected to strengthen trust and confidence in

decision-makers (loop R2) and meet expectations of fairness (loop R3), which will tend to stabilise and strengthen norms and values. Over time, as decisions withstand scrutiny, we could expect to see building public confidence in the constitutional settings governing the recovery framework.

The self-correcting faculty is a valuable feature of New Zealand's constitution but its operation is dependent on decision-makers who are driven by New Zealand's constitutional values and are aware of the constitutional norms. It is not, therefore, something we can take for granted. Constitutional values and norms need to be nurtured and articulated so they are understood and shared by New Zealand's different communities, from which decision-makers are drawn.

C. Maintaining consistency with a range of constitutional norms

Figure 5.18 describes the effect of maintaining consistency with a range of constitutional norms. I have described this intervention at a reasonably high level of abstraction. In a live policy problem, I would do the preliminary analysis at this level and then drill down into further detail to assess which aspects of the rule of law, which human rights norms, and which common law principles would have the greatest effect with the fewest disadvantages. Space has not permitted that level of analysis, but the point can be seen at the current level of abstraction.

The intervention traced in red assumes that legitimacy requires protection from arbitrary or unfair uses of power, and that consistency with norms is the best way of doing that. Ordinarily, consistency with norms like the rule of law and human rights is supported by New Zealand's constitutional values of egalitarianism and fairness. Therefore, maintaining consistency with norms tends to reinforce the stability and strength of New Zealand's constitutional values. That influences decision-makers who are inculcated in those values.

In extraordinary circumstances, the values of egalitarianism and fairness may conflict somewhat with the values of pragmatism and authoritarianism that

create pressure to act decisively to get the job done (traced in yellow on Figure 5.18). That conflict is likely to result in decision-makers making decisions driven more by one value than by others, depending on the context. Overall, it may create an impression of inconsistent compliance with constitutional norms. Figure 5.18 suggests that has two potential effects.

First, less predictable decision-making may weaken public confidence in decision-makers. Less predictable decisions are also less able to withstand public and/or judicial scrutiny, which will weaken public confidence in the framework. Second, inconsistent compliance with norms may undermine the norms' stability and strength. If the underlying values are in conflict, decision-makers may feel pressure to prioritise one norm over others. For instance, public consultation might be viewed as "process for the sake of process" that gets in the way of sensible decision-making to rebuild the city. That could create incentives to sidestep or change the norm. Not consulting on the demolition of a building that is in imminent danger of collapse is likely to be accepted as a clearly justifiable pragmatic decision. But prioritising speed over participation in decisions on the much-loved cathedral would risk weakening trust and confidence in the decision-making procedure, weakening legitimacy of the final decision.

Given the generally undesirable consequences of the scenario just described, Figure 5.19 traces a modified approach to maintaining consistency with norms in recovery-related decision-making. It shows a new intervention (shown in a yellow cloud shape) enabling limited departures from norms, confined to earthquake recovery, with judicial supervision in the form of appeal and/or review pathways. This intervention is supported by the constitutional value of pragmatism.

The effect of judicial supervision is shown in red on Figure 5.19. This aspect of the intervention is not consistent with the limiting of judicial supervision proposed on the intervention map in Figure 5.17, which means the relative trade-offs would need to be considered.

The intervention in Figure 5.19 enables the controlled evolution of normal decision-making procedures to meet the exigencies of changed circumstances. Loop B5 suggests that should meet public expectations of expedient decision-making. That helps to maintain the relevance of constitutional norms, which has two consequences. First, it strengthens decision-makers' incentives to comply with norms - both changed and unchanged - which strengthens the whole legitimacy system. This strengthening is supported by judicial supervision as a key check on executive action: the existence of review and appeal pathways should push decision-makers to comply with norms, both changed and unchanged.

The intervention would, however, likely have other effects. It will potentially destabilise and/or weaken some constitutional norms. That could weaken the operation of loop B7 and loop R6, by weakening decision-makers' awareness of norms and their incentives to comply with norms. Over time, that could weaken public confidence in the constitutional settings enabling recovery decisions.

This intervention is described at a reasonably high level of abstraction, and given the generally more positive results, it merits a more detailed analysis of the effect of departing from specific norms in specific contexts. Time and space have not permitted that more detailed analysis here, but it would be an approach worth considering in a live policy intervention.

V.3.5.5 Mapping interventions - participation

Figure 5.20 sets out the participation intervention map. It, too, has been developed at a high level of abstraction. Rather than trying to develop specific participation mechanisms for different kinds of recovery decisions, the intervention simply requires that decision-making processes contain proportionate engagement mechanisms. This level of abstraction is necessary in the first instance, because the range of recovery decisions is so wide, and the numbers and types of affected people and groups so varying that a one-size-fits-all participation approach is unlikely to be feasible.

The intervention is supported by three constitutional values:

- Liberalism suggests that individuals and (depending on context) communities are best served by being free to make their own choices. This suggests that local communities should be involved in decisions about their own recovery (B. Hayward, 2013; Nigg, 1995; Vallance, 2011).
- Fairness - it seems only fair that communities should be able to have some input into decisions that affect them.
- Pragmatism - engagement processes that work well in peacetime may be too lengthy or cumbersome for some of the decisions that have to be made for the recovery; pragmatism suggests that participation might be de-emphasised where it is expedient to do so.

The intervention reinforces, to some extent, the constitutional norm of public participation, which strengthens decision-makers' incentives to comply with it. It is consistent with the broad consensus about the benefits of community involvement in recovery activities (Brookie, 2012, p. 12; Vallance, 2011). Effective community engagement, which enables communities to own their recovery, is a crucial element of disaster recovery (Brookie, 2012, p. 13; Natural Hazards Research and Applications Information Centre, 2001). That should promote trust and confidence in decision-making procedures and decision-makers, and reinforce public confidence in the constitutional settings enabling recovery decisions. Over the long-term that confidence could feed back into the system, reinforcing decision-makers' incentives to include participation in their decision-making.

The intervention assumes that not all recovery decisions carry equal urgency, so different approaches to participation can be determined according to the nature of the decision and the length of time over which its effects will be felt. There is no publicly available evidence that the executive systematically assessed the kinds of participation approaches that might be needed for various recovery activities. The 2011 Act contemplated some participation, but in a way that indicated the need for speed would trump participation (section 3). The

Government was warned in 2014, in the Act's annual review, that (Murdoch, 2014, para. 51):

A qualitative lift in public facing activities and joint engagement through communications by CERA and the CCC [Christchurch City Council] is all seen as necessary.

V.4 Systems-generated insights into legitimacy in Canterbury earthquake recovery

This section considers the insights into the legitimacy of decision-making in Canterbury earthquake recovery generated by the systems analysis in this chapter.

The question posed at the beginning of this chapter was what would have constituted an ideal level of legitimacy for Canterbury earthquake recovery, and what interventions would be necessary to reach that ideal. The ideal described in Chapter V.1.2 was that decision-making powers generally reflected transparency, participation and accountability, and did not depart radically from constitutional norms. Legitimacy would have manifested as general public acceptance of decisions, given that universal consensus would be unattainable in a liberal democracy.

V.4.1 Understand the system at hand

The systems analysis has reinforced that when intervening in the system, it is important to first understand the system. The systems methodologies took different approaches, but both allowed ideal-type constructs to be developed to address a problem and, in the SSD policy intervention, to achieve a range of objectives. That ideal-type construct could be tested against real-world events and a representational map of the legitimacy system. Using the methodologies has highlighted the absolute importance of understanding what legitimacy is, how it seems to work in the New Zealand context, and how that manifests on a

day-to-day basis. With SSM, that insight came about through the model-building process: it was not possible to identify an approach that would promote legitimacy without understanding the nature of the decisions to be made and the constitutional norms those decisions may have engaged.

With SSD the methodology was more explicit and methodical: the process required a mapped representation of the legitimacy system overlaid with selected interventions, in order to assess how they might interact with the system. The SSD analysis highlighted the importance of accountability measures and demonstrated visually how appeal and review pathways could stabilise and strengthen constitutional norms by sending a signal that, despite the extraordinary circumstances, recovery-related decisions were expected to observe constitutional norms and be consistent with constitutional values.

Understanding the system would help policy advisors considering the trade-offs between the accountability intervention discussed in Chapter V.3.5.3 and collapsing the separation of powers discussed in Chapter V.3.5.4A. That second intervention has short- and long-term implications that conflict. The process of mapping these effects helped to crystallise the conflict. In a live policy intervention, that would allow the trade-offs to be articulated and assessed so decision-makers could decide whether to favour pragmatically-focused short-term immunity from legal challenges, or accept the risk of some appeals and reviews because of the advantages for long-term legitimacy.

In assessing the overall approach to legitimacy underpinning the 2011 Act, I first asked how the Act compared against this insight of understanding the system before intervening in it. My research has not unearthed any apparent signs that the executive systematically considered the 2011 Act's implications for legitimacy. The executive did appear to be concerned with ensuring recovery decisions and actions would be lawful, at least when the 2010 and 2011 Acts were being developed, which rather begs the question why it did not use the 2011 Act to make the red zone decisions.

That said, the executive declined to modify the Canterbury Earthquake Recovery Bill (enacted as the 2011 Act) in response to legitimacy-based concerns expressed by submitters, and it does not seem to have taken a wider or longer-term view of the legitimacy system. The steps taken in the 2010 and 2011 Acts to shield recovery decisions from accountability mechanisms, particularly judicial review and appeals, seem to have been predominantly driven by a concern that litigation would slow things down and distract efforts from the recovery. That was a short-term view that failed to acknowledge the longer-term implications for legitimacy identified in Chapter V.3.5.3.

V.4.2 The constitution's self-correcting faculty may come into play

One of the most significant insights relates to the constitution's self-correcting faculty. That self-correcting faculty meant the 2011 Act did not fulfil the fears of academics and submitters who expressed strong concerns about the breadth of the Henry VIII clause (see Chapter VII). While Henry VIII clauses are undoubtedly constitutionally problematic, the operation of this one reinforced its legitimacy and may yet cement the place of Henry VIII clauses in future recovery legislation.

I had observed the self-correcting faculty after studying the orders in council made under the 2010 and 2011 Acts (having had the benefit of the Regulation Review Committee's scrutiny), but was unable to explain how it worked until I mapped the separation of powers intervention onto the legitimacy CLD (Chapter V.3.5.4). The mapping highlighted that a sudden significant shift in one set of norms can incentivise compliance with other norms. With the Henry VIII clause, the key tension was between the norm of restraint on one hand, backed by concerns for representative democracy and parliamentary supremacy, and the values of pragmatism and authoritarianism on the other. I have not been able to fully explore this tension. There is more to do, to gather and assess first-hand accounts to understand the factors driving officials' and decision-makers' behaviour. It would be desirable to identify and examine other instances of

constitutional self-correction to understand what norms and values were in play there, to see whether there are common underlying values and norms at work. That would be a useful step in identifying the norms and values that need reinforcing to ensure that the constitution's self-correcting faculty does not diminish over time. It would also, perhaps, help to identify the conditions under which self-correction might not occur.

V.4.3 Values and norms are inter-related, and both matter

Articulating the relationship between values and norms in the legitimacy system map demonstrates how the theory of constitutional realism operates in practice. It also reinforced, quite starkly, just how vulnerable New Zealand's constitution is, with integral, but unarticulated, constitutional values.

Viewing recovery-related litigation through this systems lens also highlighted a matter that I might previously have skipped over without fully appreciating its significance: competing views of fairness, which was at the heart of the Quake Outcasts litigation. One view was concerned with fairness to the group of Outcasts who, alone of the red zone occupants, could not move on with their lives. The executive implicitly accepted the fairness framing, but viewed it through another lens: fairness to those people who had been insured. Why should uninsured people get the same benefit as those who have paid for insurance?

The courts were not immune to the pull of fairness. Although the arguments before the courts were, at times, dense and arcane, and the courts' reasoning dealt with the legal points, all three courts referred at some point to the situation the Outcasts found themselves in, their level of culpability for that, the purposes of the 2011 Act, and the extent to which insurance status could justify differential treatment.

The interrelationship between norms and values is such that misalignment between them can be disruptive for the legitimacy system. I noted that, if

sufficiently sharp, a misalignment might manifest in a loss of confidence in constitutional arrangements that could, in turn, create pressure for constitutional changes. That suggests we need to be aware of the relative strength and stability of constitutional norms and values and be alert for misalignment or dissonance between them.

V.4.4 Legitimacy will be weakened by resisting the levers of transparency, accountability, and participation

The Quake Outcasts litigation shows how legitimacy can be weakened by resisting the three levers of transparency, accountability, and participation. In this case, the decision-making process was not transparent, and Cabinet actively avoided using the transparent and participatory recovery plan process. The executive's approach to the Outcasts' legal challenge was to resist accountability – it declined to reconsider the decision, appealed, and then finally did use the statutory recovery plan process, arguably three years too late. The consequence of the initial approach was to undermine the decision's legitimacy. Interestingly, it led straight to a questioning of the constitutional norms at the centre of the legitimacy triangle, particularly those concerned with limits on executive power (Figures 5.1 and 5.2). Possibly that was because the decision-making method chosen by Cabinet could operate without transparency and participation, and with only limited direct accountability.

The UDS litigation also seems to have been a contest between the Minister's pragmatism on the one hand and the norms of restraint and participation on the other. The norm of participation appears to have been particularly instrumental in the court's decision.

V.4.5 Final thoughts on the legitimacy of Canterbury earthquake recovery

The systems analysis has changed how I view the 2011 Act, at least in one respect. Like many of the constitutional academics and practitioners who

submitted on the Canterbury Earthquake Recovery Bill, I was concerned about the centralising of power in the executive, and particularly with the scope of the Henry VIII clause. I started my SSD analysis, therefore, with an assumption that it was better to retain clear separation of powers. The process of tracing that interrelationship onto the system map, however, highlighted the adverse consequences that might have resulted, which led me to consider a modified approach that collapsed separation of powers somewhat through a Henry VIII clause and centralising local government functions in central government. I have concluded that some centralisation was probably necessary, and its risks could be mitigated through judicial supervision (judicial review pathways), provided the public perceived judicial review as an option worth pursuing.

I have also observed that the constitution's self-correcting faculty did shore up the 2011 Act's legitimacy, although it would not do to become complacent. It would be desirable to better understand how the self-correcting faculty really works before relying on it to any great extent in policy interventions.

Generally, the recovery has operated at a high level of transparency, although there is room for improvement at the margins, and future recovery-focused legislation should consider a requirement for decision-makers to give reasons for decisions in relation to their more coercive powers.⁸³

The recovery would have benefited from a more systematic and nuanced approach to participation, and I suspect that dissatisfaction with that lack will be one of the recovery's enduring legacies.

The recovery's legitimacy has, I think, been harmed by the approach to accountability. Philip Joseph was probably right in labelling the 2011 Act's privative clauses "highly inflammatory". The clauses were not ultimately tested

⁸³ In fact, the Hurunui/Kaikōura Earthquakes Recovery Act 2016 has such a provision. That Act was developed after my discussion with officials with the Ministry of Civil Defence Emergency Management about the analysis in this chapter and Chapter VII. When recommending an order in council to be made under the Henry VIII clause, the relevant Minister must give reasons (section 10). The Hurunui/Kaikōura Earthquakes Recovery Panel's recommendations on draft orders must include reasons (section 14(6)).

in the courts, but the signal they sent created suspicion - quite unnecessarily as it turned out. The executive's approach to litigation and responding to court orders has not strengthened the Act's legitimacy.

Chapter VI: A coordinated approach to earthquake recovery: two system analyses

The primary question addressed in this chapter is the extent to which the approach to coordination taken by the 2010 and 2011 Acts was consistent with, or conflicted with, constitutional norms and values. The secondary question is what options were available to mitigate the effects of any conflicts and whether any of those options were reflected in the 2010 and 2011 Acts.

The backdrop for this analysis is the relationship between central and local government arising out of their different roles and functions, and the role and importance of local democracy in allowing communities to shape themselves and orient local governance to meet their needs.

VI.1 The relationship between central and local government, and the people

The earthquakes crossed local government boundaries, affecting three districts. They created damage on a scale that was going to be impossible for local government to repair without financial assistance from central government (Hansard, 2010b, per Hon Gerry Brownlee). Horizontal infrastructure⁸⁴ not only crossed district boundaries, but some of it fell within the responsibilities of central government and the private sector. Demand for insurance assessment, consent processing, and building inspections was likely to greatly exceed the “peacetime” capacity of insurance companies and local authorities. These factors indicated that coordination would be needed to manage the recovery.

That coordination need arose against the functional divide between local and central government. Section 12(2) of the Local Government Act 2002 gives local

⁸⁴ Horizontal infrastructure runs horizontally along the ground. It includes: roads; freshwater, storm water, and wastewater systems; retaining walls; stop banks; bridges, and footbridges (www.strongerchristchurch.govt.nz accessed 20 May 2016).

government “full capacity” to undertake activities in the same manner as individuals or corporations, which reverses an earlier presumption that local authorities were authorised to undertake only those specific functions delegated to them (D. R. Knight & Charters, 2011, p. 293). Section 12 has been described as a power of general competence (Asquith, 2012; D. R. Knight & Charters, 2011; McKinlay, 2010), although some think that is not beyond doubt (Cheyne, 2008; Hewison, 2000; see also Palmer & Palmer, 2004). Many in the local government sector described a now-repealed power to promote wellbeing as a power of general competence.⁸⁵ Yet, generally the position of local government in New Zealand is rather ambiguous and its history depends primarily on the policies and expectations of central government (K. A. Palmer, 1993, p. 23, cited in G. Palmer & Palmer, 2004, p. 248).

Local government is, at least in aspirational terms, all about “the peoples” (D. R. Knight & Charters, 2011, p. 284). The Local Government Act 2002 explicitly places the notion of citizen participation at its heart by enabling “democratic local decision-making and action by, and on behalf of, communities” (section 10(a)). “This lodestar is buttressed by a number of more specific principles and processes that aim to facilitate interaction between the citizen and the local state” (D. R. Knight & Charters, 2011, p. 285).

“Local government is primarily about providing citizens with the opportunities to make meaningful decisions about the way in which they order their own affairs at the local level” (Stigley, 2000, p. 318). As governments centralise, their span of control becomes larger and “the opportunity for individuals to participate in decision-making reduces and is replaced by organised interest groups competing for influence over political representatives” (Stigley, 2000, p. 319).

⁸⁵ Section 10(b) of the Local Government Act 2002 provided that one of the purposes of local government was to “promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future”. This purpose was repealed and replaced with a more focused provision by the Local Government Act 2002 Amendment Act 2012 (2012 No. 93). For the rationale and effect of that amendment see Department of Internal Affairs, 2012, n.d.; Minister of Local Government, 2012.

Despite the functional divide, central government is “a particularly significant stakeholder [in local government community planning processes] in that its policies and resources have major impact on community wellbeing” (Cheyne, 2008). The Royal Commission on Auckland Governance observed that local government has considerable capacity to partner with central government to improve social well-being (2009, para. 9.27):

Central government can be limited in its ability to target initiatives at the neighbourhood level where clusters of deprivation are located. Local government, with neighbourhood-level knowledge, relationships, and established initiatives ... can work with national agencies to increase the effectiveness of policy, funding, services, and monitoring in order to improve social well-being for high-need communities.

New Zealand’s governmental structure tends to be centralist⁸⁶, and tensions between local and central government have been particularly associated with: financing arrangements for local government given its broad power to promote wellbeing and its sustainable development role; lack of alignment between central and local government planning processes as a result of different political priorities; and the bounded power of general competence (Cheyne, 2008).

Thomas and Memon (2007, p. 181) observe:

In many ways, the long-standing struggle between provincial and centrist tendencies in New Zealand continues to persist. ...The local government sector has been empowered by introducing a participatory model of democracy but the constitutional position of local government has not been addressed and the legislative framework is nonetheless still prescriptive.

Developments since 2010 have had an increasingly centralist orientation, as discussed in Chapter IV.1.3.4. By 2012, the level of government concern over local government functions, performance and expenditure was such that a bill

⁸⁶ (Hewison, 2000). This view is reinforced by a wide range of ministerial powers of consent or intervention, the number of mandatory functions, a tendency for decentralisation of central government functions rather than devolution, and a discordance of administrative boundaries between central government agencies and local authorities. Note, Stigley (2000) has a different view, and sees governmental structure on a spectrum from sub-national to supra-national.

was introduced constraining and refocusing the purpose of local government and introducing a:⁸⁷

...simpler, graduated mechanism for Crown assistance and intervention in the affairs of individual councils, enabling central government to provide assistance to struggling councils before situations become critical (Department of Internal Affairs, n.d.).

That mechanism allowed intervention in the form of a Crown manager to be provided to Christchurch City Council after it lost IANZ accreditation for resource consenting functions (Cabinet, 2013; Minister for Canterbury Earthquake Recovery & Minister of Local Government, 2013). The relationship between central government, local government, and the people provided important context for the coordination of earthquake recovery functions.

VI.2 SSM analysis of a system to co-ordinate recovery-related activity

This section (and the accompanying Tables and Figures) discusses the results of the SSM analysis of co-ordination of recovery related activities.

VI.2.1 Building a rich picture of the problem situation

The rich picture is in two parts. Figure 6.1 considers the responsibilities, questions and concerns of each of the problem owners identified in the cultural analysis (Chapter IV). The questions and concerns were extrapolated from my research and supplemented by an assessment of the questions and concerns I would have had in the position of those problem owners. The perspectives of infrastructure providers, central and local government, parliament, and the constitution included a blend of questions or concerns and responsibilities deriving from their roles. From each of these sets of questions, concerns, and

⁸⁷ This Bill was enacted (Local Government Act 2002 Amendment Act 2012), and further local government reforms are underway: <https://www.dia.govt.nz/Better-Local-Services> (accessed 31 May 2016).

responsibilities, it was possible to distil a summary statement of needs and interests.

That distillation made it possible to map the interconnections, to gain a sense of where the coordination needs might lie (Figure 6.2). For instance, a householder's concern about job security links to a business's concern about whether it will still be trading in a year's time. That concern is affected by infrastructure questions (without functioning roads, employees and clients may not be able to reach the business), and the functioning of the broader economy.

Figure 6.2 makes it strikingly clear that local government is something of a hub: it holds much of the information needed by infrastructure providers, businesses, and householders; it is an infrastructure provider, and needs to coordinate with other infrastructure providers; and it controls permits and consents. Before the 2011 Act, local government also controlled local and regional planning.⁸⁸ It is logical to conclude that displacing local government from its role as a hub is likely to have ripple effects, not least because as a holder of vital information, its cooperation will be necessary for whoever takes over the hub role.

The rich picture also highlights the possibility for tension between local and central government because central government is likely to be the focus of public expectations fuelled by the constitutional value of authoritarianism. In the context of centralised government and diminishing central government confidence in local government, such tensions were more likely.

Another key message from the rich picture is that parliament could not be relied on to be the guardian of the constitution in the circumstances, because the constitutional perspective and the parliamentary perspective diverged in these circumstances. There was no institution advocating the longer-term

⁸⁸ The 2011 Act moved this role in relation to greater Christchurch to central government by making the recovery strategy (issued by the Minister for Canterbury Earthquake Recovery) the primary planning document for the earthquake-affected districts (sections 11, 15).

constitutional perspective to ensure the 2011 Act's effects on constitutional norms were appreciated.

Figure 6.2 portrays the parliamentary and constitutional perspectives as sitting to one side, and feeding into the overall situation, which seems an accurate portrayal of what occurred. While parliament's imprimatur was needed to empower central government to take over, the constitutional perspective in particular does not seem to have had much influence in decisions on the 2011 Act.

VI.2.2 Formulating a root definition

Figures 6.1 and 6.2 make it clear that recovery from the earthquakes was going to be a complex matter requiring coordination. A system to coordinate recovery-related activity would need to make roles and authorities clear. As the Minister for Canterbury Earthquake Recovery (the Minister) noted at the time, some power of direction would be required to enforce coordination if necessary (Hansard, 2011a, per Hon Gerry Brownlee). This section discusses two alternative root definitions, based on the same transformation, both of which have been modelled for comparison with the approach taken by the 2010 and 2011 Acts.

VI.2.2.1 CATWOE

Table 6.1 outlines the CATWOE developed for this analysis. It includes an alternative W, which informs the alternative PQR in Table 6.2.

VI.2.2.2 PQR

Table 6.2 contains the PQR developed for this analysis. It sets up an alternative PQR which reflects the Cabinet policy decisions approving the 2011 Act. The T in the alternative PQR is unchanged, but the Q (how) and R (why) are different. The difference in Q is explained by the different underpinning assumptions shown in Table 6.2.

VI.2.2.3 CATWOE and PQR create a root definition

Based on the CATWOE and PQR elements, I have developed two root definitions. The first is:

A system to speed up and coordinate earthquake recovery activities through: centralised decision-making and property acquisition; expedited law-making; and coordinated demolition, repair, and rebuilding in order to enable the people affected by the earthquakes to get back to their normal lives and activities as quickly as possible while not being subjected to arbitrary or unfair decision-making.

This first root definition includes a number of subsystems, which could themselves be the subject of a root definition. Two of those sub-systems are explored as standalone systems in this thesis: protection against arbitrary and unfair decision-making is a dimension of legitimate decision-making, explored in Chapter V; and expedited law-making is explored in Chapter VII.

The alternative PQR in Table 6.2, combined with the alternative W set out in Table 6.1, combine to create a different root definition:

A system to speed up and coordinate earthquake recovery activities through: central government-controlled strategy, planning and implementation; powers to require people, local authorities and council organisations to do things necessary or desirable for the recovery, including powers to direct and call-up functions and powers; and through limitations on appeals, reviews and liability to ensure that recovery from the earthquakes and the restoration of the social, environmental, economic, and cultural wellbeing of greater Christchurch communities, is focused, timely, and expedited.

While the two root definitions have elements in common, they are based on quite different worldviews which means Q (how) and R (why) are also different. Importantly, the alternative root definition does not include an explicit aim of protecting against arbitrary or unfair decision-making. As discussed in Chapter VI.2.4, the different root definitions result in starkly contrasting models.

VI.2.3 Defining performance measures – the five Es

The five Es are based on the approach described in Chapter III. Table 6.3 sets out the five Es, including the rationale for each performance measure. With one exception, the performance measures are the same for both root definitions. That exception is noted with a separate measure in Table 6.3.

VI.2.4 Two alternative conceptual models for coordinated earthquake recovery

This section describes and contrasts the two models built using the two root definitions and discusses their implications as a basis for comparing real world operations. Figure 6.3 contains the model built from the first root definition. Its first steps involve appreciating a number of dimensions of the relevant context including: the decisions that need to be made; who had the authority to make those decisions; and the requisite skills needed for those decisions. This appreciation grounds all decisions within the context, which should help to ensure that any coordination decisions are well-informed and focused correctly.

This model is a recipe for making informed and proportionate decisions about the level of coordination required to respond effectively to the earthquakes. It keeps a range of design options open. For instance, it does not assume that coordination requires all functions to be vested in a single agency. It allows for the possibility of clarifying and delineating authority for the actions needed to effect recovery, and leaving those functions within different agencies. A similar approach was tried under the 2010 Act, with the Canterbury Earthquake Recovery Commission (CERC) established as an advisory group. CERC was to be a coordinating body, comprised of the mayors of the three affected districts, an appointee from the regional council, Environment Canterbury, and three other appointees (2010 Act, section 9). The approach was consistent with the Ministry of Civil Defence and Emergency Management's generic recovery framework,

which is based on the idea that recovery is best achieved when the affected community exercises a high degree of self-determination (Brookie, 2012, p. 15).

Brookie (2012, p. 22) observes that CERC's establishment created confusion over reporting lines for the leaders of recovery functions. It also created confusion over who was in charge of the overall recovery. Perhaps as a result of that, but certainly compounding the problem, by February 2011 Christchurch City Council had not, as required by the Civil Defence Emergency Management (CDEM) recovery plan, appointed a recovery manager to focus on coordination and communication (Brookie, 2012, p. 22; Dalziel, 2011). Dalziel (2011) considered that the Council had relied on CERC and the Earthquake Commission to take charge. As a result, by February, recovery had effectively stalled (Brookie, 2012). CERC took no part in the response to the 22 February earthquake, and disappeared afterwards (McLean, Oughton, Ellis, Wakelin, & Rubin, 2012, p. 30). That context strongly suggested that clearer governance was needed to create and maintain momentum.

Model 1 in Figure 6.3 does not assume that the agency responsible for coordinating activities should also carry out those activities. It could, instead, direct or oversee activities. This option does not seem to have been considered in the process used to establish the Authority.⁸⁹

Model 1 does not assume that its implementation would require regulation. Rather, the model allows the transformation to be seen in its wider context which means that regulatory or non-regulatory vehicles could be selected to achieve parts or all of the transformation. The approach allows a combination of, for instance, regulation and market incentives, and the systems perspective ensures those choices are seen in their wider context.

Model 2 in Figure 6.4 is a simpler and more streamlined model with fewer steps and interdependencies, despite the additional Q (how) factors set out in

⁸⁹ The Cabinet papers from March 2011 make no mention of the Canterbury Earthquake Recovery Commission, except to note that it will be disestablished (Cabinet, 2011a; Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a).

the root definition. The simplicity comes from the alternative worldview's emphasis on "recovery at all costs", which lends itself to a centralised, command-and-control approach. Because Model 2 limits reviews and appeals, it does not put as much effort in ensuring the use of power is proportionate – power can be wielded with a greater degree of impunity under the alternative model than is possible under the first model. However, that creates challenges for legitimacy. To the extent that the executive and parliament would wish the recovery to be seen as legitimate, Model 1 offers at least the opportunity of power sharing and cooperation – it is a pluralist rather than a coercive model. Arguably, Model 2 is more coercive and would result in a centralisation of functions similar to that enabled by the 2011 Act.

VI.2.5 Comparing the models to the real world

This section uses the models to consider the real world experience as evidenced by written sources. Both models assume that cooperation would be needed to effect recovery from the earthquakes, although they take different approaches to that cooperation.

VI.2.5.1 The 2010 and 2011 Acts were grounded in an approach to recovery that began during the response phase

Both models begin by appreciating what has already been done to effect recovery. So, too, did the response to the earthquakes. Recovery begins during the response phase and although they are distinct activities, there is no bright line between them (Brookie, 2012, pp. 8–9; Nigg, 1995, p. 4; Rotimi, Wilkinson, Zuo, & Myburgh, 2009). Indeed, the response to the February 2011 earthquake morphed into recovery so seamlessly it is hard to separate one from the other (McLean et al., 2012, p. 18). The executive started setting up recovery structures whilst the response was still underway. The Minister noted in Parliament that response efforts to date had given a clear indication of some of the recovery activities that would be required, including: consents for overweight loads and landfills; streamlined processes for dealing with

dangerous buildings, repair and replacement; and financial support for people (Hansard, 2010a, per Hon Gerry Brownlee). After the 22 February 2011 earthquake, the CDEM National Controller (who had relocated to Christchurch) oversaw the transition from response to recovery. While that transition resulted in a change to organisational structure on 20 March 2011, the transition had effectively commenced nearly a month earlier (McLean et al, 2012, p. 48).

VI.2.5.2 Both Acts were informed by the different roles in effecting recovery

After the 4 September 2010 earthquake, recovery was mostly considered to be the preserve of local government. The Minister said (Hansard, 2010a, per Hon Gerry Brownlee):

It is very important not to undermine the capacity that exists within the local authorities to get this job done... We are reliant on the councils. We have to empower them, and we have to trust them to do the job.

The rich picture in Figure 6.2 makes that point clear. By virtue of their “peacetime” functions,⁹⁰ local authorities hold much of the information needed by infrastructure providers, businesses and householders. Under the Resource Management Act 1991, the Building Act 2004, and the Local Government Act 2002 local authorities are responsible for consenting many of the activities that needed to occur once the state of emergency was lifted.

The private sector also saw that it had a role. For instance, immediately after the 4 September 2010 earthquake, the Canterbury Employers’ Chamber of Commerce started gathering information through a call centre, visual inspections, and liaison with businesses. That work allowed the Chamber to give sufficient information to the Minister of Finance two days later to enable

⁹⁰ In this context, “peacetime” refers to the normal situation in which emergency or extraordinary powers are not required. Recovery aims to transition a post-emergency situation back to normal and is usually characterized by a progressive winding back of emergency or extraordinary powers.

decisions about the extent of urgent government aid needed to assist businesses to survive (Middleton & Westlake, 2011, p. 18).

Central government saw that it had a role, although it was more confined than that of local government. The Minister (Hansard, 2010a, per Hon Gerry Brownlee) described it this way:

...the people of Canterbury and their elected representatives will be leading the recovery, with the Government standing firmly behind them to give assistance where it is needed.

In essence, central government's role was to contribute funding and help the councils look across the whole area affected by the earthquakes to ensure a perspective encompassing the greater good was taken. The Minister (Hansard, 2010b, Hon Gerry Brownlee) again:

...Reconstruction work is something that those districts will have to engage with the government on. Frankly, we know that the districts do not have the money to do the work. We know that they do not have a rating base that can even spread that work over a period of time.

VI.2.5.3 A cooperative approach akin to Model 1 was unsuccessful...

The 2010 Act addressed the issue of coordination of recovery activities by establishing CERC. CERC was described as linking the work of central, regional and local government (Hansard, 2010a, per Hon Dr Nick Smith): "It makes sure we work in harmony through this recovery and reconstruction phase". The Minister described CERC in these terms (Hansard, 2010b, per Hon Gerry Brownlee):

There has to be a conduit for the councils, which will each make the decisions that come through to Government. Across a district, there needs to be some equity and there has to be some understanding that if we do not repair one part of the district, the whole district will suffer.

...

We are trying to create something that ... recognises the knowledge that exists in the districts, expresses confidence in their ability to plan and achieve what we want in terms of recovery, and makes a commitment to work with them.

CERC comprised seven commissioners, three of whom were mayors of the affected areas: Christchurch City Council, Selwyn District Council, and Waimakariri District Council. One Commissioner was drawn from Environment Canterbury (the regional council).⁹¹ The remaining three were appointed by the three responsible Ministers (2010 Act, section 11).⁹² The chair, a ministerial-appointed member, was Murray Sherwin. The deputy chair was Dame Margaret Bazley, the Environment Canterbury chair (Minister for Canterbury Earthquake Recovery, 2010a, 2010b).

CERC's functions were to (2010 Act, section 10):

- advise ministers proposing to amend primary legislation by order in council in relation to those orders;
- advise the responsible ministers on prioritisation of resources and funding allocated for earthquake response;
- provide a central contact point between central and local government in managing the response to the Canterbury earthquake.

CERC's terms of reference, set on 9 December 2010, specified that it should (Government of New Zealand, 2011, p. 303):

- provide strategic oversight of the recovery effort, particularly in relation to those areas that lie across the roles and jurisdictions of local authorities and government agencies;
- facilitate a process to set priorities and act as a clearinghouse to ensure good information flows between local authorities, government agencies and key stakeholders, and ensure they were all aware of the full scope of activities supporting the recovery effort;
- advise on what support (including technical support) was necessary to ensure effective and coordinated decision-making at national, regional, and local levels;

⁹¹ On 22 April 2010 the elected representatives on Environment Canterbury were replaced with commissioners (Minister for the Environment & Minister of Local Government, 2010).

⁹² The ministers were: the Minister for the Environment; the Minister of Finance; and the Minister for Canterbury Earthquake Recovery.

- identify impediments to the recovery process and advise on how they might be overcome;
- keep Ministers and local authorities informed of the overall progress on the recovery effort and escalate issues that could not be resolved at a local level.

These combined functions resonate with Model 1, as did CERC's membership. High-level representation from the local authorities and regional council, mediated by externally appointed commissioners was, theoretically, a reasonable way of coordinating a region-wide approach. It should have enabled effective information sharing and prioritisation of the many activities needed to help Canterbury's recovery. It should have provided a good information link between local and central government, and enabled problems to be escalated to Ministers as needed. In theory, the approach should have worked. In practice, it did not.

As discussed in Chapter VI.2.4, CERC did not have the desired impact. It was disestablished after the 22 February (McLean et al., 2012, p. 30). Direct feedback from CERC's members, its secretariat, and informed observers would be necessary to determine why the approach failed. It seems possible that CERC was undermined by a failure to appreciate the importance of the role it could have played. In SSM terms, the Commissioners might not have shared the same set of goals or had the same worldview, or might have sought different transformations. CERC might have been affected by wider dysfunction in local governance in the Canterbury region at the time. McLean (2012, p. 30) notes that CERC's chair was part-time and that, after initially participating, the Mayor of Christchurch had delegated his role. The organisational structures established to support CERC did not appear to include any civil defence emergency management expertise.

The report into the management of the February earthquake notes local political antagonisms amongst the territorial authorities in Canterbury (McLean et al., 2012, p. 30; see also Middleton & Westlake, 2011, pp. 20–22). There were poor relationships between the Christchurch City Council emergency team

and the CDEM group, which operates at a regional level under the Civil Defence and Emergency Management Act 2002 (McLean et al., 2012, p. 45). Situational and local political factors at the time of the February earthquake hampered the CDEM group in implementing its powers in a cohesive manner (Minister of Civil Defence, 2012). That context contributed to an inefficient emergency response structure after the national emergency was declared, and resulted in the National Controller relocating to Christchurch to take control of the response (McLean et al., 2012, pp. 45–51).

The problems in Canterbury were so marked that the McLean report (2012) recommended removing emergency management responsibilities from territorial authorities and vesting sole responsibility in regional CDEM groups. The Government did not accept that recommendation on the basis that (Ministry of Civil Defence and Emergency Management, 2012):

The ongoing commitment of councils is crucial to the success of CDEM responses. Most emergencies are short, localised events that are best dealt with at the local level without needing the CDEM group to formally lead the response.

CERC had limited transparency and accountability levers. This had been raised as a problem while the 2010 Bill was being debated in parliament. Hon Ruth Dyson (Hansard, 2010a) argued that while the Commission was an “opportunity for a collaborative approach and clear leadership”, there was no public accountability or transparency. CERC was not to be subject to the Official Information Act 1982: “There is no input from the public into their process of consideration or even as spectators at their meetings”. These concerns were not addressed by the 2010 Act as enacted.

The model in Figure 6.3 suggests that, had all the relevant players agreed on a transformation process and shared the same worldview, CERC might have successfully carried out the functions set out above. In terms of the performance measures, such an approach could have been efficacious. As it played out, CERC was an experiment in cooperation that failed.

VI.2.5.4 ...and was not tried again

After the 22 February 2011 earthquake the government proposed a new approach to recovery, given the significantly increased challenges posed by the substantial additional damage.

The new approach would include (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a; State Services Commission, 2011):

- stronger governance and leadership;
- significantly increased central government investment of funds;
- increased coordination across multiple agencies and sectors;
- coordinated business and community engagement and more effective information management, to build and maintain confidence in the recovery process.

These elements of the new approach responded to both the magnitude of the investment needed to recover from the February earthquake, plus the shortcomings of the Commission as an approach to co-ordinating recovery activity. Model 2 (Figure 6.4) is consistent with this approach.

The 2011 Act gave the Minister and the Authority's chief executive a range of powers to direct activities and carry out functions themselves, as well as a significant level of control over what would amount to long-term planning for the region. In practice, coordination over infrastructure repair and the Christchurch central business district rebuild was managed by establishing the Stronger Christchurch Infrastructure Rebuild Team (SCIRT)⁹³ and the Christchurch Central Development Unit (CCDU).⁹⁴ These approaches to co-

⁹³ The Stronger Christchurch Infrastructure Rebuild Team is an alliance between three owners (CERA, the Christchurch City Council, and the New Zealand Transport Authority) and five non-owner participants, including four private contractors and one Council-owned company. The alliance is responsible for rebuilding horizontal infrastructure. The alliance approach is designed to align participants to common goals and objectives, which is similar to the SSM process of building shared worldviews and agreed transformations (www.strongerchristchurch.govt.nz).

⁹⁴ The Christchurch Central Development Unit was established within the Authority to oversee CBD recovery, to "kick start the market" by providing the right conditions for reinvestment

ordination created coordinating groups with a clear, single focus.⁹⁵ In SSM terms, these initiatives had a common goal. Their relatively confined focus was likely to mitigate any differences in worldview. The Minister's powers under the 2011 Act further mitigated the effects of any ongoing differences in worldviews.

VI.2.5.5 Were there any other means of coordinating earthquake recovery that could have been tried?

One option that does not appear to have been considered is a coordinating group which either had powers of direction in its own right, or had powers delegated to it. The existence of statutory powers was a key objection to replacing responsibility for refinement and implementation of the CBD recovery plan with local authorities or a Crown-owned company (Cabinet, 2012; Minister for Canterbury Earthquake Recovery, 2012). In effect, the “intrusive powers that are considered necessary for an effective recovery” precipitated the 2011 Act and establishment of the Canterbury Earthquake Recovery Authority (the Authority) (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b, para. 10).

It never seems to have been contemplated that powers would be devolved from central government, because the analysis assumed the Minister would be at the apex of the decision-making framework. The Regulatory Impact Statement (RIS) for the 2011 Act notes the preferred option for new legislation to establish an agency, and assumes that it would be part of the central government (State Services Commission, 2011). An early option that was discarded was to replace local authorities with a commissioner reporting directly to the Minister. This option was viewed as a significant alteration to local government that was unlikely to maintain the confidence of people and organisations in Canterbury (ibid., para. 32). The RIS did not consider any

(Minister for Canterbury Earthquake Recovery, 2012). The CCDU developed the Blueprint for the CBD, based on the Council-drafted CBD recovery plan, and oversaw land acquisitions and planning for the various precincts.

⁹⁵ These approaches have now been overtaken by the move from recovery into regeneration. The 2011 Act has expired, and the Authority disestablished. They have been replaced with the Greater Christchurch Regeneration Act 2016 and a new set of entities.

options that would have involved power-sharing between central and local government.

The 2010 and 2011 Acts took an all-or-nothing approach: the 2010 Act gave co-ordination responsibilities without the power to direct; the 2011 Act prioritised the power to direct over everything else. It centralised power by giving central government much greater control over matters that, in peacetime, would be controlled by local government. The first model (Figure 6.3) suggests that other, more nuanced approaches might have been feasible.

VI.2.6 Assessing the system's performance

Table 6.3 shows the performance measures against which the system is assessed. The performance measures help to assess the performance of the real world situation, particularly at its points of departure from the system model. The discussion in this section considers each of the performance measures in turn against the real world context.

VI.2.6.1 Efficacy

CERC was not an efficacious approach. However, its failure was not necessarily due to a design flaw; it may have been a failure of implementation. Co-ordination without statutory authority will be difficult unless everyone involved shares the same worldview and agrees a set of priorities. SCIRT's success appears to be due to such a shared worldview and set of priorities.⁹⁶

The 22 February 2011 earthquake removed any opportunity to consider the causes of CERC's ineffectiveness. In the context of the new and exacerbated problems created by the earthquake, Cabinet was advised that "the advisory capacity of the Canterbury Earthquake Recovery Commission is not considered sufficient to deliver the leadership and governance now needed" (Minister for

⁹⁶ As at 25 May 2016, SCIRT was 89% of the way through reconstruction and on target to meet its December 2016 (see www.strongerchristchurch.govt.nz; also The Treasury, 2016).

Canterbury Earthquake Recovery & Minister of State Services, 2011a; State Services Commission, 2011).

The 2011 Act established a centralised model with a central government agency empowered to effect co-ordination. That approach seems to have been efficacious, in that recovery decisions were made throughout the period of the Authority's existence. Some people consider the recovery has been slower than desirable and there are, as could be expected, views that disagree with the approach taken.⁹⁷ That said, the approach adopted in the 2011 Act was not the only choice open to the government at the time, as discussed in VI.2.5.5.

Another dimension of efficacy is whether decisions made within the system are enduring, given the long-term nature of the recovery. It is too early to be able to assess the long-term durability of decisions. It is, however, possible to assess whether decisions are able to withstand scrutiny by the courts. Here, the performance has been mixed.

As discussed in Chapter V, two key sets of decisions have been the subject of litigation. Generally, the courts have been careful to give effect to parliament's clear intention in the 2011 Act. In that sense the approach worked. The balance of power between the three branches of state (courts, legislature and executive) fluctuates over time. The courts can be expected to scrutinise the use of power and to use the tools of statutory interpretation and common law principle to rein in executive power if it is being used excessively or arbitrarily.

The Court of Appeal has taken the executive to task on procedural matters, and has found some uses of power invalid (discussed further under ethicality below). In the UDS case (see Chapter V.2.5.3C) the Court made it clear that the executive had to follow proper process and give effect to all of the Act's purposes. The facts of the UDS case indicate some Ministerial impatience with procedure and, perhaps, an unwillingness to engage in public participation in

⁹⁷ See, for instance, "Christ Church Cathedral: why all the fuss?," 2015; Dann, 2014a, 2014b, 2014c; Espiner & Brownlee, 2016; Gates, 2015; Graham, 2016; Hutching, 2015; Macfie, 2016; McCrone, 2015; Meier, 2015a, 2015b; Price, 2016.

favour of getting things done. When such impatience results in litigation and appeals it begs the question whether short-circuiting procedure is efficacious, or whether it just risks creating bigger distractions. That said, the Minister was operating under new legislation with new powers in an unprecedented set of circumstances. Some testing of the limits of powers was to be expected. What matters for efficacy is that the testing resulted in learning.

The courts also expressed a range of concerns with the process used to divide Christchurch into zones, particularly given the implications for land in the red zone, which is effectively to be “retired” from residential use for the foreseeable future (see Chapter V.2.5.3B). While the courts have been careful not to undermine the legality of all red zone decisions, reflecting that those decisions benefited the vast majority of homeowners, they have consistently demonstrated concern that, in relation to the Quake Outcasts, the executive appeared to have motivations other than earthquake recovery. Within the confines of the 2011 Act, such extraneous concerns were not relevant, and the Supreme Court required the executive to reconsider its decisions regarding the litigants. In this sense, the decisions were not enduring and also detracted from the overall legitimacy of the recovery.

VI.2.6.2 Efficiency

In practice, CERC was undoubtedly less efficient than the Authority established by the 2011 Act. As noted above, the CERC model depended on shared world views and agreed priorities. It can take time to reach these agreements and make the necessary accommodations, although the outcomes are more likely to be enduring if the process creates greater buy-in. Theoretically, CERC might have been a better approach in the long-run. But in the short-term, when faced with an overwhelmingly large task, there was force in the argument that the inefficiencies of the CERC model could have unduly compromised the early stages of recovery during which the restoration of basic services was still urgent. The CERC model did not seem to be strongly supported by local authorities: the mayors of Christchurch and Waimakariri did not think it should

continue (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a, para. 30).

The Minister and the Authority were statutorily responsible for ensuring a focused, timely, and expedited recovery, as emphasised by the worldview animating the 2011 Act:

3. The purposes of this Act are -

(b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:

(c) to provide for the Minister and CERA to ensure that recovery:

That focus on speed reinforced an underlying assumption that the same pace was needed for all aspects of the recovery, which was not necessarily correct. Certainly, demolition of unsafe buildings and repair of core infrastructure needed to happen quickly. And providing businesses with premises to prevent flight was also a priority. But the development of some, arguably less essential, amenities such as the convention centre could have proceeded on a slower track and with less command and control.⁹⁸ And with an alternative place for worship in place, earlier attention to public engagement on the future of the Cathedral should have been possible.

As time passed, the Authority implemented a more co-operative approach by establishing SCIRT and the CCDU, although those bodies still operated in an environment of command and control.

VI.2.6.3 Effectiveness

There are two different performance measures for effectiveness. Model 1 contemplates a nuanced approach to coordination and a focus on legitimacy as a tangible sign of effectiveness. Model 2 focuses on the speed with which

⁹⁸ The convention centre has been controversial, partly because space was earmarked for it and funding budgeted before a business case was developed (Finance and Expenditure Committee, 2013b). Since then, ongoing concerns have been expressed about cost, size, and location (Barnaby Bennett, 2015; Dann, 2014b; Hutching, 2015b; Meier, 2015c; Stylianou, 2014a).

decisions are made and their tangible effect on the four wellbeings — social, economic, cultural, and environmental.

A. Legitimacy

Looking at the first measure, Chapter V contains a detailed analysis of legitimacy in earthquake recovery, which is not repeated here. That analysis is based on the theory of legitimacy in Chapter V.1. CERC and SCIRT are both examples of coordination as contemplated by Model 1. The approaches to transparency were profoundly different: CERC was not subject to freedom of information legislation and little publicly available information emanated from it. SCIRT, by contrast, has adopted a highly transparent approach to its work⁹⁹. The 2010 Act shielded CERC from review in relation to its scrutiny of delegated legislation, consistent with the 2011 Act's shielding of the Authority and the Minister from review. Neither CERC nor SCIRT seem to have adopted much of a public participatory approach. SCIRT consciously treats its infrastructure rebuild as a technical, rather than a social matter.¹⁰⁰

As noted in Chapter V, the Authority adopted a highly transparent approach. But its overall legitimacy was limited by the 2011 Act's shielding of the Minister and the Authority from review. It was further limited by the Minister's approach to transparency about his exercise of powers: the Minister's section 88 reports to the House of Representatives did not include reasons for the exercise of powers, which limited their utility as an accountability mechanism (Minister for Canterbury Earthquake Recovery, 2011; see also Chapter V.3.5.2). In this sense, the legitimacy of the recovery has been less than it might have been.

⁹⁹ <http://strongerchristchurch.govt.nz>

¹⁰⁰ <http://strongerchristchurch.govt.nz/about/methods>.

B. Speed of the recovery

Looking at the second measure, the 2011 Act's annual reviews provided a reasonably neutral assessment of progress, based on a range of interviews with key stakeholders. The 2013 review noted that the relief elements of the recovery (restoring basic services and properly completing the planning elements of the first recovery phase) took more time and effort than had been foreseen (Murdoch, 2013). One year on, Murdoch noted "a higher operational tempo across all master programmes and in aggregate a recovery which is significantly engaged in its second phase outcomes through the subsidiary programmes" (2014, para. 17). By 2014, repairs and rebuilds for flatland green zone dwellings had accelerated, but recovery partners were encountering "the problems of the tail" — the resolution of community situations, group vulnerabilities, and individual cases that were either inherently complex or had extrinsic factors making them particularly complex (Murdoch, 2014, para. 21). To people in "the tail", recovery progress probably looked slow and unsatisfactory.

The Treasury's assessment of Canterbury earthquake recovery projects in its Major Projects Performance Review noted that SCIRT was on track to meet its December 2016 completion date for horizontal infrastructure. The Treasury also noted concern about delivery of the Christchurch central programme because of "significant issues relating to governance and transition" (The Treasury, 2016). The Minister, Hon Gerry Brownlee, did not accept the Treasury's assessment, dismissing it as "utter tripe" and a "disrespectful" report from "book keepers" (Price, 2016).

A plethora of news articles consider aspects of the rebuild and its pace. Many of the articles focus on specific matters of dissatisfaction. It has not been possible to track down every criticism and assess it for veracity.¹⁰¹ The last word will be given to the Minister, who addressed the pace of the review with Parliament's

¹⁰¹ Accordingly, a selection of relevant articles is cited here but not explored further (Bill Bennett, 2013; Cairns, 2014a, 2014b, 2016; Conway & Cairns, 2014; Dann, 2014a; Key, 2013; Law, 2014; Perpich, 2013; Price, 2016; Young, 2013).

Finance and Expenditure Committee (Finance and Expenditure Committee, 2014b):

Central city progress has been one that there's been a lot of criticism about. People can lose sight of the fact that there was a very big job cleaning that up, getting it ready to replace it, and the man hours that were worked in that area with only one injury, I think, is a significant result.

C. Effect on wellbeing

The Authority produced an index of wellbeing indicators. It is used here, as a comprehensive and centralised source of information. The indicators reported against included: education and employment; household income; housing affordability; health and mental wellbeing; safety; and social connectedness. It reported these indicators in the context that individual recovery can take between five and ten years after a major disaster. The 2015 index (Canterbury Earthquake Recovery Authority, 2015a) reported many signs of progress, including:

- improvements in education participation and achievement by young people, at rates higher than the national average;
- reduced unemployment, generating a 24% increase in median weekly household income (compared to a 14% national average increase);
- high and improving overall quality of life over time, albeit at levels that are still lower than before the earthquakes.

The index also reported a clear need for ongoing support for some of the population:

- Housing pressures were a key stressor for households: in damaged or temporary accommodation; experiencing difficulty in finding affordable rentals; or continuing to negotiate settlement of insurance claims.
- Housing affordability fell sharply after the earthquakes. Mean house prices increased by 34% (compared with 25% national average increase). Mean weekly rent increased by 44% (compared with 20% national average increase). Low income households experienced a 69% reduction in available affordable rental accommodation.

- Relationships have become strained. Dwelling assaults in Canterbury are up 20%, compared with 4% national average increase.
- Social agencies reported that the complexity of their clients' circumstances had increased immensely, making it more challenging to resolve their needs.
- Higher levels of stress are being experienced by people with pre-existing vulnerabilities (e.g. people with a health condition or disability, from a low-income household, and renters) but new groups are also reporting high levels of stress: those with unresolved insurance claims, those in temporary accommodation, and those aged 25-34 years old. The distribution of emotional wellbeing varies with geography: it is worse for those in the worst affected areas.
- Secondary stressors affecting wellbeing include: being in a damaged environment and/or surrounded by construction work; loss of recreational, cultural, and leisure-time facilities; transport-related pressures; dealing with EQC/insurance issues in relation to personal property and health.

VI.2.6.4 Ethicality

Ethicality requires that decision-makers respect constitutional norms in their decision-making processes, and that their decisions be accepted as legitimate (as defined in Chapter V). As discussed in Chapter V, the 2011 Act limits accountability for a range of decisions, including decisions to amend primary legislation by order in council.

It is hard to assess the fairness or arbitrariness of the exercise of some powers because of limited transparency, e.g. the Minister's section 88 reports to the House of Representatives on his use of powers, discussed above.

As discussed in Chapter V, there has been some litigation on decisions that people have considered to be unfair or unreasonable uses of the Minister's powers. While acknowledging the wide scope of the 2011 Act and the Minister's powers, the courts have emphasised the importance of operating within the confines of those powers. In particular, the courts have emphasised the importance of using the proper procedure, particularly when that procedure has inbuilt safeguards such as public participation, rather than

heading straight for the “short-term neat solution” (UDS case, Court of Appeal, para. 134; see Chapter V.2.6.2).

The Quake Outcasts litigation, discussed in Chapter V.2.5.3B, was about competing ideas of fairness but the nature of judicial review meant the case was brought in terms of the legality of the red zone declaration and offers to purchase. The stakes were high for the executive: if the red zone decision was illegal, it would undermine the purchase strategy and the legality of all of the transactions entered into under it, creating new uncertainty for red zone property owners. The courts were not prepared to do this, and confined their decisions to the litigants (see Chapter V.2.5.3B).

As I noted in Chapter V.2.5.3B, the legitimacy of the executive’s decisions relating to the red zone and the Quake Outcasts has been called into question by three layers of the judicial system. There was a generalised discomfort about the decision-making processes used and about the markedly different treatment of the Quake Outcasts from other residential red zone owners.

VI.2.6.5 Elegance

As discussed in Chapter III.3.1.2, the 2011 Act established a centralised coercive structure that has been overlaid on a pluralist constitutional system. The structure straddles central and local government, and has shifted power to the central government from local government and Parliament, while limiting the judiciary’s scope for scrutiny and oversight. The courts have given due deference to Parliament’s very clear intention and would not intervene in a way that created more uncertainty for those affected by the earthquakes.

The 2011 Act contained a range of command and control-type powers analogous to other powers to compulsorily acquire land (Public Works Act 1981) and extraordinary powers (Civil Defence Emergency Management Act 2002). The 2011 Act differed, however, in its attempts to oust scrutiny (e.g. the privative clauses discussed in Chapter V.2.5.2A). In this way the 2011 Act was not as consistent as it could have been with the constitutional system.

VI.3 A soft system dynamics-based policy approach

This section (and the accompanying Tables and Figures) sets out the analysis done using the Delft approach to system dynamics-based policy analysis (see Chapter III).

VI.3.1 Coordination in Canterbury earthquake recovery: what was the problem?

As with the preceding chapter, the analysis in this section is based on the rich picture described in Chapter VI.2.1. There were, essentially, two problems. First, responsibilities for repairing the damage caused by the earthquakes were spread over a range of private sector, local government and central government organisations. Local government had a central role by virtue of its control over planning and consenting, its responsibilities for building inspections, and its role as a provider of horizontal infrastructure.

That comes to the second problem from the government's perspective, which is its role in the recovery. Given the emphasis on central government in New Zealand, people (and the government) might have expected government to take control. In reality, though, it did not have the right levers to do so beyond the immediate emergency response, which was overseen by the National Controller until the state of emergency was lifted. Local government, not central government, sits at the hub of the rich picture in Figure 6.2.

Compounding this problem of roles was an apparent loss of confidence in local government by elements of central government (see Chapter IV).

VI.3.2 Objectives for coordination in earthquake recovery

This section discusses the objectives that were identified based on the rich picture. Figure 6.5 considers coordination-related objectives in the context of a wider primary objective, which is that Christchurch remains a viable city in the long-term. That primary objective will be achieved through the combined effect of three secondary objectives:

- focused, timely and expedited recovery
- Christchurch's communities remaining viable in the short term
- people feeling safe living and working in Christchurch.

Those secondary objectives are, in turn, predicated on a range of interconnected lower-level objectives. Not all of these objectives require coordination, but many of them do. Figure 6.5 shows that by drawing a dotted line around those objectives that require coordination.

The objectives map distinguishes between privately-owned property and publicly-owned property, but assumes some coordination might be required for repairs to private and commercial buildings. The Waimakariri District Council planned for an integrated approach to recovery in its district, which included “crossing the boundary” — coordinating the repair of infrastructure on public land (e.g. freshwater, wastewater, and stormwater systems) — with repairs to infrastructure on private property. This represented a significant shift in mindset (Vallance, 2013):

Traditionally TLAs [territorial local authorities] do not step across the home-owner's boundary and any infrastructure issues between the house and the front boundary is the home-owner's problem. But post-earthquake it would have been impossible to just call a plumber to get the issue fixed. So we [Waimakariri District Council] made a decision fairly early on to liaise with EQC and coordinate repairs across the boundary because there's no point us finishing our side of the sewer and people still not being able to use [the toilet] because the pipe between the house and the boundary is broken.

While coordination meant some households would have to wait for longer than others for repairs to their horizontal infrastructure, it also gave them certainty and enabled them to plan (Vallance, 2013, pp. 59–60).

The objective map assumes that demand for insurance claim and consent processes, and building resources, will exceed supply, at least in the short-term. That may make it necessary to prioritise access to those processes and resources. The objective map assumes the fairest way to allocate scarce resources in relation to infrastructure and public buildings is to prioritise according to efficiency and the public good so as to reduce the pain most quickly for the greatest number of people or the most vulnerable people. It also creates the very real prospect that some businesses, schools, and residents will be displaced for longer than others, because they cannot function effectively without horizontal infrastructure. That makes it necessary to provide alternative accommodation for those disadvantaged by the need for prioritisation of repairs, such as the Re:START mall in Christchurch.¹⁰²

Alternative accommodation for businesses, schools and residents is assumed to be vital to Christchurch's communities remaining viable in the short-term. It is included within the boundary of the coordination system, because it is essential to coordination succeeding — the need for alternative accommodation will either create flight from affected areas, thereby risking ongoing viability of communities, or it will create incentives to sidestep the prioritisation system.

The objectives map has a number of interdependencies. Removing one objective could weaken the likelihood of achieving other objectives. To some extent, that is likely to create a situation where interventions have to be implemented as a package; the objectives should not be viewed as a “pick and mix” basket of options.

¹⁰² A temporary mall built from shopping containers in Cashel Street. The mall was driven by a trust aimed at getting retail back into the central city (Restart the Heart Trust), which received an interest-free loan of \$3.36 million from the Christchurch Earthquake Appeal Trust. The mall opened on 29 October 2011, and one developer has expressed interest in relocating it so it can operate for another ten years (Christchurch Earthquake Appeal, 2011; Meier, 2015b; The Press, 2011).

The objectives map does not assume that central government will intervene. It leaves open the possibility that the objectives could be achieved by shoring up local government, akin to the 2010 Act's approach. While consistent with New Zealand's constitutional arrangements, this approach might not have been seen as optimal by the government of the day because it would not have met the pragmatic imperative.

VI.3.3 Ways and means mapping for coordination in earthquake recovery

Figure 6.6 sets out the ways and means map for coordination in Canterbury earthquake recovery. It sets out the objectives from Figure 6.5 with the real-world steps needed to achieve the objectives. Success factors were extrapolated from the objectives by considering how each of them would alter the real world and how we would know whether the objectives had, in fact been achieved. Figure 6.6 reinforces that the interlinkages between objectives are such that removing one of the intermediate objectives would weaken a number of higher level objectives.

VI.3.3.1 Start with information and intelligence-gathering

Figure 6.6 starts with the steps needed to ensure that decision-makers have the information and intelligence they need about land, buildings, and infrastructure, which provides a basis for informed decision-making. Some information, such as underlying land stability and propensity for liquefaction may require entry onto private land and soil testing. Similarly, assessing damage to buildings may require entry and, possibly, invasive testing. Therefore, powers may be needed to enter private property to assess land and buildings.

Identifying the repairs needed informs decisions about the materials, equipment and skills needed to effect repairs to public buildings and infrastructure. That identification also informs prioritisation and sequencing of repairs for maximum efficiency and public good. Prioritisation and sequencing

will work only if property owners affected by decisions and suppliers agree to work with the priorities, which means they need the right incentives.

Figure 6.6 indicates that incentives may include alternative accommodation and financial relief, particularly for those whose properties or businesses are in lower priority areas. Market incentives may be needed to influence suppliers. If additional incentives could push the existing market to work towards the desired transformation, additional regulation would not be necessary. The map notes there would be no relaxation of requirements for resource or building consents because these processes help to ensure land use is appropriate for the area and structures are safe and fit-for-purpose. These factors are core contributors to the objectives of fit-for-purpose repairs and creating a climate where people feel safe living and working in Christchurch.

In effect, the consents process is the point of entry to the rebuild system, so prioritised access to the consents process may help to ensure the right prioritisation and sequencing of repair works. If prioritised access were supported by streamlined consents processes and increased capacity (i.e. greater workforce), it could result in speedy approvals for the highest priority repairs. If coupled with mechanisms to ensure that repair work with consents could get access to equipment, materials and workforce, that would promote timely rebuilding and repair work.

Although Figure 6.6 assumes that prioritisation is confined to horizontal infrastructure and public buildings, private property owners are affected in two ways. First, their access to the consents process would have a lower priority than horizontal infrastructure and public buildings. Second, they would be affected by sequencing decisions — there would be little point in seeking building consents to rebuild in an area whose infrastructure will not be repaired for another five years.

With this caveat, Figure 6.5 and 6.6 leave control over the timing of the rebuild of private property in the hands of property owners. It would, theoretically, be

possible to include private property directly in the sequencing and prioritisation process. That has not been attempted here because of the huge complexity it would add, and because the extent of incursion into private property rights is likely disproportionate to the circumstances and therefore constitutionally unsound.

VI.3.3.2 Give property owners certainty over their future

Property owners need to know what and how much insurance will pay in relation to the damage to their properties. Without that, most property owners will not be able to make decisions about rebuilding, repairing, or moving away — even if the sequencing of horizontal infrastructure repairs mean they cannot rebuild or repair immediately. The interventions likely to be needed here include workforce capacity - insurance assessors and claims assessors will be needed in significantly greater numbers than in peacetime. Land assessment will be needed to decide whether land can be rebuilt, or whether additional strengthening will be needed, or whether the propensity for future damage is such that rebuilding is not cost-effective. That assessment requires a workforce with requisite skills in adequate numbers to ensure this process does not unnecessarily hold up claims determinations. Another intervention that might be needed (it was an issue in the Canterbury earthquake recovery) is an assessment of the ongoing viability of insurance companies with large numbers of claimants.

Combined, these interventions will streamline, or otherwise take care of, land assessment and insurance processes, giving property owners certainty, which then allows them to be part of the timely rebuild process.

VI.3.3.3 Selecting interventions from the range of possible ways and means

Figure 6.6 highlights three factors that helped to focus the choice of interventions for the intervention map. First, it is critical to maintain building and safety standards — the need to make progress quickly should not justify

dropping standards. Dropping standards risks creating downstream quality problems, and it would be irresponsible to allow buildings and repairs that did not come close to earthquake safety standards given what we now understand about Christchurch's seismic status.

Secondly, there are likely to be efficiency gains from sequencing work, as was considered to be the case by the Waimakariri District Council (Vallance, 2013). Sequencing could help to manage workforce capacity limits, and it could target resources and equipment for most efficient deployment. However, sequencing would also disadvantage those forced to wait, which means that some kind of assistance would be needed by those further down in the queue. Failing to provide that assistance could result in flight from Christchurch, thus jeopardising its viability in both the short and long-term.

Finally, workforce capability and capacity is likely to be a problem that could manifest early in the recovery. It might be necessary to intervene in the market to prompt the scaling up of capability and capacity ahead of the demand curve. Capability needs to be sufficient to ensure building quality standards can be met.

Based on these insights, I decided to map the following interventions:

- maintain extant quality and safety standards for repairs and rebuilds;
- require repair work to be approved;
- boost capacity of consenting, inspection, and insurance processes;
- prioritise and sequence access to consents processes, and resources;
- provide financial and practical assistance to displaced people and businesses.

Together these interventions should ensure a timely rebuild and repair process that results in durable, fit-for-purpose buildings and infrastructure. These interventions would need to be reinforced by other external factors, such as planning processes making land available for new developments, and building

standards that give clear guidance on factors affecting the safety and durability of buildings. The interventions would necessitate the exercise of power by the state to intervene in what would otherwise be a private market situation, and affect matters that are within local authorities' remit. To be legitimate, the interventions would need to be consistent with constitutional norms and values, and would need to include elements of transparency, accountability and allow for some measure of public participation. The primary value at play in this context is fairness. Legitimacy would be determined by the process used to make prioritisation and sequencing decisions, including decisions about whether land is fit for rebuilding.

VI.3.4 The causal loops affecting the timeliness and durability of rebuilds and repairs

The causal loop diagram (CLD) in Figure 6.7 is a series of “limits to growth” archetypes relating to consents processes, the quality and durability of repairs and rebuilds, resources (including workforce, materials, and equipment), and insurance and land assessment. I identified these factors as those most likely to get in the way of a timely recovery. As the CLD notes, the factors are interrelated, such that coordination (or lack thereof) may affect the timeliness and durability of rebuilds and repairs.

“Limits to growth” is one of a number of archetypes that occur in all aspects of organisational life (Kim & Anderson, 2007, p. vii). In a limits to growth archetype, a reinforcing process is set in motion to produce a desired result. It creates a spiral of success but also creates secondary effects that manifest in a balancing process, which eventually slow down the success (Senge, 2006, Chapter 6). Understanding the archetype means it can be anticipated and managed, particularly by assuming that various limits will be hit and clarifying which ones they might be (Kim & Anderson, 2007, p. 51). Figure 6.8 sets out the limits to growth archetype and compares it to one of the causal loops in Figure 6.7.

Figure 6.7 maps the decision-making processes affecting the durability of repairs and rebuilds, including consents (loops R1 and B2), inspections (loops R12 and B13), land assessments (loops R9 and B10), insurance assessments (loops R6 and B7), as well as the availability of resources, including workforce, materials and equipment (loops R3 and B4). These loops are in pairs, with one balancing and one reinforcing loop. In each pair, capacity is the limiting factor. Loop B5 acknowledges that, as far as resources are concerned, the limiting factor is price – additional capacity can be created by bringing additional resources (e.g. workforce) into the region, but market forces may push up the price, rendering it uneconomic. Not shown on the CLD, an unintended consequence of increasing the local workforce would be to put additional pressure on already-stretched housing availability and affordability.

Two individual loops should be noted. Loop B8 considers the financial viability of insurance companies, which is affected by their level of exposure to earthquake related claims and their reinsurance cover. That will affect their determination of, and payout on, claims, which will affect the capital investment people can inject into their rebuilds, which will affect confidence in the recovery. In fact, in April 2011, the executive underwrote an insurance company, AMI, which was at risk of going under and not being able to pay out on insurance claims (Southern Response, n.d.).

Loop R11 considers the long-term effects of the consenting and inspection system. In essence, it shows that where quality and safety standards are mandated by law, consents will be sought and granted. Where that happens, plans for repairs and rebuilds should be compliant with standards because the consents process (including inspections) is effectively a quality assurance process. Loop R11 assumes that compliance with standards means repairs and rebuilds will be durable and fit-for-purpose. However, given the delay inherent between signing off a consent and a completed build, that relationship may take some time to manifest. Where it does, that will tend to reinforce the quality and safety standards. As with all reinforcing loops, R11 can operate as either a virtuous or vicious cycle. It will either, therefore, reinforce and

normalise compliance with quality and safety standards, or reinforce and normalise non-compliance, thus undermining quality and safety standards.

The inter-relationships between the various causal loops suggest that uneven capacity could create clogs in parts of the system. For instance, if insurance claims or land assessment processes were well-resourced and run quickly, that would likely lead to an increase in demand for resource and building consents — people would have their money, and know whether they could rebuild on their land. If the consent process was not similarly well-resourced and streamlined, people would be stuck in a queue waiting for building consent applications to be processed. That could incentivise bypassing the consent process despite its importance to compliant plans, and to durable, fit-for-purpose repairs and rebuilds. Over time, durability and quality will be significant factors creating long-term confidence in the recovery.

The other striking feature of Figure 6.7 is that it does not obviously have a role for central government. The insurance assessment processes are in the hands of private sector insurance companies. Land assessment could be done by insurance companies, or by local government using either in-house or contracted expertise. Consents and inspection processes are within the purview of local government. And resources do not have to be procured centrally - the system operates with resources being procured by the market as and when needed.

VI.3.5 Mapping interventions for ensuring effective coordination in earthquake recovery

This section takes the interventions identified in VI.3.3.3 and explores how they would operate and their potential impact on the CLD. The discussion below clumps related interventions into three broad themes: durable rebuilds; capacity; and sequenced access to the system.

VI.3.5.1 Ensuring rebuilds and repairs are durable and fit-for-purpose

Figure 6.9 maps two related interventions onto the CLD to identify how they would affect the system and to assess their likely success.

The intervention assumes that repairs and rebuilds will be durable and fit-for-purpose if they are subject to extant quality standards and to consenting and inspection processes used to ensure compliance with those standards. That may not, in fact, require any law change.

It may, however, create additional pressure on consent and inspection services through significantly increased demand. That can be expected to strengthen the operation of the balancing feedback loops B2 and B12, so capacity limits will be felt more quickly than under normal circumstances. Combined, these loops limit the number of consents, inspections, and approvals that can be granted or completed, which will likely cause delays in the consenting and inspection/approval processes. That risks creating user dissatisfaction, and reducing confidence in the recovery.

An unintended, and undesirable, consequence of those delays might be the creation of incentives to bypass the consenting and inspection/approval processes (loop R11). That would risk disrupting any sequencing and prioritising interventions (discussed below in Chapter VI.3.5.3) and could result in diminishing quality of repairs and rebuilds. Over time that, too, would reduce confidence in the recovery, although it is possible that the consequences of diminishing quality might not be felt for some time. When the consequences are eventually felt, the effects could be particularly significant for affected householders and could lead to people revising their views of the recovery's success.¹⁰³ Accordingly, these interventions will need to be supported by other

¹⁰³ Mumford (2011, p. 82) notes something similar with respect to the leaky homes problem. He concludes that the regulatory regime failed because “there was neither early detection that there might be a problem, nor a timely and appropriate response to relevant information that did become available, which led to a large number of buildings failing with significant consequences”.

interventions to incentivise compliance with the processes and to weaken the incentives to avoid those processes. These interventions are discussed below. Although described separately, they operate as a package, and one without the other is unlikely to succeed.

VI.3.5.2 Boosting capacity across the system

Figure 6.10 identifies where capacity would need to be boosted, how that would affect the system's operation, and what its likely success would be. Additional capacity would be needed in the consenting, inspection, and land and insurance assessment processes, and packaged induction schemes would help incoming workforce to adapt to local procedures at speed (Rotimi et al., 2009). The capacity needed would be people, equipment, and materials. Figure 6.9 shows that boosting capacity in the land and insurance assessment areas could increase demand for consents; what will hold many people back from seeking a consent to build is knowing whether they will be able to build on their land (or whether the land will require additional stabilisation), and knowing how much insurance money they will have. That means capacity needs are unlikely to be evenly distributed in time – demand for insurance and land assessment may peak earlier than for consent and inspection (shown on Figure 6.8 as parallel lines crossing the relevant arrows to loops B2 and B13).

Figure 6.10 suggests that boosting capacity across the system is likely to mitigate the negative impacts of the intervention in Figure 6.9.

VI.3.5.3 Prioritising and sequencing access to the system, and mitigating disadvantages to those affected

Figure 6.11 identifies interventions that would inject new elements into the CLD, and create new relationships between different parts of the CLD in order to ensure that: repairs are prioritised to maximise the public good: repair work with consents can access resources without delay; and the viability of businesses, infrastructure providers, and public bodies is not threatened by having to queue for repair. These three outcomes must be sought

simultaneously to reduce the effect of incentives not to coordinate and cooperate. Figure 6.11 shows that, combined, these interventions could build confidence in the recovery, and enhance its legitimacy. These interventions would support the maintenance of quality and safety standards. They may also require intervention by central government, because the system is unlikely to achieve such coordination on its own.

The first intervention starts with the identification of earthquake damage, and uses that to assist in prioritising infrastructure repairs according to public good considerations. That prioritising means some consent applications are processed more quickly, which results in their being granted more quickly. Because resources are prioritised towards those higher priority repairs, the works with consent can access resources without delay. And they can get the requisite inspections done, also without delay, which results in durable, fit for purpose repair and rebuilds in a timely way. That builds confidence in recovery, and strengthens the legitimacy of the recovery programme.

Financial incentives not to coordinate and cooperate may undermine the intervention's success. For instance, infrastructure providers will have strong incentives to respond to the needs of their customers, who will not want to be inconvenienced for longer than necessary. That provides an incentive for infrastructure providers to take necessary steps to secure resources or consents to prioritise their repairs. Even infrastructure providers who are effectively a monopoly, like the electricity network supplier and the local authority (which maintains the freshwater, stormwater, and wastewater systems), will have incentives to seek priority for their services to be reconnected. They could face contractual penalties for failure to supply or consider themselves under a moral obligation to provide customers relief if they cannot supply essential services. They could also be subjected to pressure from groups representing the interests of different communities or organisations, who will all have reasons for thinking their reconnection is higher priority than that of others.

To mitigate these pressures, it may be necessary to provide financial and practical assistance to displaced people and businesses. That will help to maintain the viability of businesses, infrastructure providers, and public bodies whose areas are not at the top of the priority list. It will mitigate the short term impact of prioritising repair work, and should encourage compliance with the prioritisation process. This intervention resonates with the constitutional value of fairness discussed in chapter V, and will be a significant contributor to legitimacy.

VI.4 Systems-generated insights into coordination in Canterbury earthquake recovery

This section returns to the questions posed at the beginning of the chapter: to what extent was the approach to coordination taken by the 2010 and 2011 Acts consistent with, or conflicting with, constitutional norms and values? What options were available to mitigate the effects of any conflicts? Were any of those options reflected in the 2010 and 2011 Acts? At one level, both the 2010 and 2011 Acts were concerned about constitutional proprieties: the driving concern underpinning the Henry VIII clause allowing delegated legislation to amend Acts of Parliament was to ensure recovery action was authorised by law. The Acts could be seen as an attempt to legitimise a speedy earthquake recovery. On that basis, it is reasonable to assume that the executive would not have intended its response to the earthquakes to create unnecessary constitutional tensions. Answering these questions draws on the system analyses' different points of focus and different conclusions. The differences between the two systems methodologies, and their relative advantages, are discussed further in Chapter VIII.

The short answer is that the 2010 Act was broadly consistent with constitutional norms in terms of the cooperative structure, CERC. However, CERC's failure to keep the recovery moving conflicted with the constitutional

values of authoritarianism and pragmatism (discussed in Chapter II). The tension at the heart of the 2011 Act is that its command-and-control focus does not sit comfortably with constitutional norms, yet it resonates strongly with the constitutional values of authoritarianism and pragmatism. In this sense, the answer is that it is a matter of perspective and depends on which particular values are prioritised.

VI.4.1 Perspective matters

The two SSM models (Figures 6.3 and 6.4) show just how influential perspective can be. Both models share the same transformation but have different worldviews that led to starkly different approaches to how the transformation would be achieved and how success was viewed. Those differences suggested significant differences in real-world implementation. Model 2 (Figure 6.4) suggested a command-and-control approach that, without intending to, would take the executive on a path to constitutional tensions created by overlaying a coercive model onto a pluralist constitutional system. Model 1 suggested a more pluralist, cooperative approach.

The differences illustrate the point that, in developing policy options, perspective matters. Worldviews colour people's perspectives on: the viability of options; acceptable ways of implementing options; and how success is measured. SSM's CATWOE forces these perspectives to be articulated, thus helping to surface differences for examination, negotiation, and consensus-building.

VI.4.2 Command-and-control was not inevitable

The SSM models, combined with CERC's performance, help to explain why the executive preferred a command-and-control model for the 2011 Act. It did not have to be that way, however. Model 1 shows that further options might have been identifiable at the time.

In Chapter VI.2.5.3, I noted that, while CERC's functions resonated with the first model, it did not keep recovery moving, although it should have been able to do so, and I noted a number of reasons why it might have failed. A proper diagnosis of CERC's shortcomings should have enabled the development of options for shoring it up so it could drive collaboration and coordination effectively. Those options could have been assessed alongside the executive's proposals to create the Authority.

The SSM CATWOE and five Es also highlighted the importance of compatibility between the cooperation model and New Zealand's pluralist constitution. The SSM model-building process could have highlighted the tensions created by overlaying a coercive command-and-control model onto a pluralist constitutional system. It might have encouraged exploration of the regulatory and institutional options that lie between powerless, authority-light coordination and centralised command-and-control. Surfacing the different perspectives would, I suggest, make it easier to explore other institutional options to drive collaboration and coordination, backed up by powers to direct action to be taken if need be.

Chapter VII: Expedited law-making for earthquake recovery: two system analyses

A wide range of activities were necessary for the immediate clean-up after the earthquakes, and for the longer-term recovery.¹⁰⁴ The law prevented or restricted some of those activities, particularly once the state of emergency was lifted.¹⁰⁵ It might have been silent in relation to other activities, but the executive appeared to want to put the legal authority for recovery activities beyond doubt.¹⁰⁶ There were both pragmatic and principled reasons for doing so. Recovery would be slowed if people hesitated to act for fear of breaching the law or delayed acting until they had obtained legal advice or an indemnity. The principled reasons related to questions of fairness and legitimacy. It would have been unfair to hold people liable for contravening laws made in peacetime that could not be complied with or no longer quite made sense in the post-earthquake context (Hansard, 2010a, per Hon Nick Smith). Rather than encouraging non-compliance with those laws, it was better to amend them so they did make sense and could be complied with. Ideally, the method of changing the law would uphold the law's legitimacy.

The primary question for the analysis in this chapter is the extent to which the approach to expedited law-making taken by the 2010 and 2011 Acts was consistent with, or conflicted with, the constitutional norms and values governing law-making. The secondary question is whether any options were

¹⁰⁴ Modified legislation was needed for transporting over-weight loads of rubble to landfills, flexible welfare support payments, and expedited presses for dealing with dangerous buildings (Hansard, 2010a, per Hon Gerry Brownlee).

¹⁰⁵ The declaration of a state of emergency under the Civil Defence and Emergency Management Act 2002 empowers a range of activities to be undertaken that might ordinarily require a specific statutory authorisation. In Canterbury, the need for some activities continued after the state of emergency was lifted. The 2010 Act was intended to ensure those activities could be undertaken lawfully (Hansard, 2010a per Hon Gerry Brownlee).

¹⁰⁶ This is implicit in the general policy statement on the Canterbury Earthquake Response and Recovery Bill 2010:
<http://www.legislation.govt.nz/bill/government/2010/0215/latest/DLM3233004.html>. (See also Hansard, 2010, 2011 per Hon Gerry Brownlee and Hon Nick Smith).

available to mitigate the effects of any conflicts. The next section puts law-making into its constitutional context as a backdrop for the analysis.

VII.1 What are the constitutional norms and values governing law-making?

The primary constitutional objective of law-making is for the resulting law to be considered legitimate, so people consider it binding on them and act accordingly, regardless of their views about the law's merits. I treat legitimacy as a notional emergent property of an effectively operating constitution. As discussed in Chapter V, I see legitimacy as a function of constitutional norms and values, with the three primary levers being transparency, accountability, and participation. This section discusses the norms and values governing who should make the law, how limitations are imposed on what the law may do, and how the law should be made. Together, these norms and values comprise the core of legitimate law-making. The discussion is necessarily a very brief overview, building on the foundations in Chapter II.

VII.1.1 Generally, Parliament should make the law

As discussed in Chapter II, parliament's authority to make the law comes from its sovereignty and from its constituent members, who are the people's elected representatives. Parliament's role as a forum of democratic participation and debate give it the strongest contemporary justification for asserting sovereign law-making status (Geddis & Fenton, 2008).

Belief in representative democracy runs deep in New Zealand's constitutional history and underlies the legitimacy of both the Sovereign's sovereignty and parliamentary sovereignty. It is a key cultural norm of our constitution (M. S. R. Palmer, 2011, pp. 63–65), reinforced by the constitutional value of egalitarianism (Ekins, 2011, p. 44).

In New Zealand, Justice Thomas (2000, p. 23) has contrived to bring the two perspectives together by concluding that any particular majority that contrives to enact oppressive legislation “simultaneously strikes at the legitimate basis of its own exercise of power”, and the protection of basic democratic properties requires the ultimate safeguard of independent adjudication by the judiciary. Yet such a safeguard is not necessarily a straightforward choice between judicial and parliamentary sovereignty. Justice Baragwanath (2008, p. 13) has observed:

...judges must speak and act with caution. The development of democracy since 1215 gives our elected representatives a legitimacy which judges cannot claim, derived from the choice of the community. At least so long as there is no departure from Magna Carta’s basic principle that no-one must suffer gross injustice, Judges must to defer to that choice.

Uncertainty over the limits of parliamentary sovereignty is not necessarily problematic (E. W. Thomas, 2000). Even when a principle lacks specific legal status, it may still be an indispensable part of our constitutionalism: “an indispensable touchstone for evaluating the operation of and any change in our constitutional arrangements” (Waldron, 2012). At a pragmatic level, uncertainty (E. W. Thomas, 2000, p. 8):

...furthers forbearance among those to whom political power is distributed. Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament’s conception of its omnipotence, and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power.

While the subject taxes the judiciary and academia, there seems little public support in New Zealand for constraints on parliament’s law-making powers. Although the Constitutional Advisory Panel’s (2013) engagement process found broad consensus that the exercise of public power should be subject to effective limits and accountability, people did not agree on what those limits should be or how they should be enforced. The Constitutional Advisory Panel’s findings are consistent with the earlier public response to the White Paper proposing a superior law entrenched bill of rights (Geddis & Fenton, 2008).

Parliament's role as law-maker draws from the separation of powers. As noted in Chapter II, New Zealand's observance of the separate of powers divides functions between different branches of state — each is separately constituted and acts as a counterbalance upon the others (P. Joseph, 2000, p. 168). There is, however, some overlap in their membership, with the executive being elected representatives in the legislature.

Most importantly for this chapter, parliament has the power to delegate its law-making function to the executive. It maintains control through scrutiny and oversight. That control includes parliament's power to disallow executive-made law if it contains matters that would be more appropriate for parliamentary enactment (Standing Order 319).

V.II.1.2 There are few normative constraints on parliamentary law-making

Before MMP, New Zealand was seen as something of an executive paradise (G. Palmer & Palmer, 2004, p. 12; Rt Hon Sir Geoffrey Palmer, 2006, p. 5). With a unicameral parliament and no superior law bill of rights or constitution, there are few normative constraints on parliament's law-making power (G. Palmer & Palmer, 2004, p. 319). The situation was starker under the first past the post electoral system (FPP), which tended to deliver single-party majority government, which meant a single party could control both the House and the executive (Boston & Bullock, 2009).¹⁰⁷ Mixed member proportional representation (MMP) imposes political restraints on executive power by requiring (often minority) governments to build legislative majorities in the House (Malone, 2009; M. S. R. Palmer, 2011, p. 65). The executive's control has diminished over the speed, quantity, and content of government bills passed by

¹⁰⁷ See Boston & Bullock, 2009; Boston, 1996; and Malone, 2009 for perspectives on the events and attitudes leading to the introduction of MMP. Malone (2009, p. 2) considers the history of MMP to be doubly interesting because it "reaffirms the notion that New Zealand goes about the business of constitutional reform in an ad hoc fashion, very much dependent on the personalities and political winds of the day".

parliament. It has also seen parliamentary parties “increasingly influencing non-statutory government decisions” (Malone, 2009, p. 7).

However, while the House is now more representative, making tyranny of the majority somewhat less likely, there are still few legal constraints on parliament’s law-making. The New Zealand Bill of Rights Act 1990 (BORA) is not superior law. Judges have latitude to interpret statutes in a way that is consistent with BORA (section 6), but cannot hold invalid or decline to apply statutory provisions that are inconsistent with BORA (section 4).¹⁰⁸

That said, parliaments need to be somewhat responsive to the views and perspectives of their electors. Matthew Palmer (2011, p. 63) has observed that politicians, judges and lawyers frequently emphasise the importance of the rule of law, although he notes that:

Its meaning is not well understood either in theory or in practice. And I doubt it is well entrenched in our national psyche or by any cultural attitude. ... There are too many examples of aspects of the rule of law being overridden by constitutional norms that run more deeply in New Zealand.

As noted in Chapter II, the rule of law is a multi-faceted ideal, but at its core is the idea that law has a distinctly separate or objective meaning that exists independently of the people who make, apply, and live subject to it (M. S. R. Palmer, 2007, p. 587).

Most conceptions of the rule of law emphasise the requirement that people in positions of power should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right or wrong (Waldron, 2012). Beyond this, many conceptions of the rule of law emphasise legal certainty, predictability, and settlement, on the determinacy of norms and on the reliable

¹⁰⁸ A declaration of inconsistency is sometimes sought as a remedy in itself. The first such declaration was given in *Taylor v Attorney-General* [2015] NZHC 1706. Justice Heath declared section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) to be inconsistent with the right to vote affirmed and guaranteed in s 12(a) BORA and that it could not be justified under s 5 BORA (Russell McVeagh, n.d.).

character of their administration by the state (Tamanaha, 2007; Waldron, 2008, 2012). Rule of law principles protect the individual against arbitrary action by public authorities (Webb et al., 2010, p. 17).

VII.1.3 How the law should be made

In constitutional terms, procedure is important. While the constitutional concern about procedure can sometimes be viewed as “process for the sake of process” (Hansard, 2010a, per Amy Adams MP), in New Zealand’s unwritten constitution the procedure often is the protection: “without good process, good law is much more difficult to achieve” (McLeay, Geiringer, & Higbee, 2012, p. 14). When procedure enhances transparency, accountability and participation, it is assumed to be sufficient in many cases to bring political and moral norms to bear, in lieu of legal constraints.

McLeay et al (2012) have identified ten criteria that distinguish good law-making. Table 7.1 outlines the criteria and links them to my theory of legitimacy (Chapter V.1). Six of the criteria are related to the transparency, accountability and participation levers. One focuses on substantive constitutional norms. Together, the criteria reinforce that legitimate law requires consistency with constitutional norms and needs to be made by transparent, accountable and participatory processes.

Parliamentary law-making is highly transparent and generally offers participation opportunities for elected representatives, experts, stakeholders, and the public. Parliament’s accountability is at the ballot box; the doctrine of parliamentary sovereignty means that matters related to the passage of primary legislation are not justiciable. The principle of comity requires parliament and the courts to respect each others’ respective functions and spheres of control (Privileges Committee, 2013).

When the normal procedure will not suffice, or where matters are not sufficiently important to warrant parliament’s direct attention, parliament may delegate its power to the executive. It may empower the executive to prescribe

regulations specifying details within an overarching legislative framework. More controversially, parliament may empower the executive to modify primary legislation through delegated legislation (also known as a Henry VIII clause). Such a clause was enacted in the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act) and the Canterbury Earthquake Recovery Act 2011 (the 2011 Act). Henry VIII clauses impinge on the separation of powers and parliamentary sovereignty, although that can be mitigated to some extent by parliamentary and judicial supervision and control over the executive's use of that power.

As the systems analysis in this chapter shows, it was necessary to delegate law-making power to the executive for earthquake recovery purposes. However, there were too few constraints on the use of that power, and parliamentary and judicial supervision and control were narrowed inappropriately. That limited the executive's accountability for its exercise of power. On paper, law-making, implementation, and coercive action were run into Waldron's single gestalt centred on the Minister and the Authority's chief executive. In practice, though, the constitution's self-correcting faculty came into play and executive power was exercised reasonably and proportionately.

VII.2 SSM analysis of a system for expedited law-making

This section (and the accompanying Tables and Figures) discusses the results of the SSM analysis of expedited law-making.

VII.2.1 Building a rich picture of the problem context

The rich picture is in two parts. Figure 7.1 is an overview of the problem context and builds the case for expedited law-making in a way that would be as consistent as possible with constitutional norms. Figure 7.2 is a detailed picture of the earthquake recovery activities that were considered to need

authorisation. It was built from a survey of the orders in council issued under the 2010 and 2011 Acts. That survey showed the scope and scale of the activities considered to need legislative authority at the time.

I developed Figures 7.1 and 7.2 in parallel because the detailed analysis took longer than the overview, given the volume of material that had to be synthesised. It might have better replicated the situation policy makers were in at the time to have developed the overview in an information vacuum. However, that would have been an artificial approach. My analysis did have the benefit of the policy makers' real world experience, which allowed me to reflect on the breadth of law changes in framing the overview (Figure 7.1). It also meant my detailed analysis could provide a reality check for the constitutional checks and balances proposed in the overview.

Figure 7.1 sets up a clear problem and goal. It highlights that, as well as ensuring the recovery did not get tied up in red tape, it was necessary to authorise recovery activities in a way that would maintain public confidence in the law's legitimacy. Figure 7.1 proposes checks and balances that limit the scope of the expedited law-making power, because an open-ended power would undermine parliament and be inconsistent with constitutional norms.

Figure 7.1 assumes that constitutional propriety should be part of the solution. While policy makers might depart from established procedures, that does not have to undermine constitutional propriety. Nor should it. Constitutional checks and balances maintain public trust and confidence in the legitimacy of state decisions and actions. Side-stepping checks and balances in the name of short-term expediency jeopardises longer-term legitimacy. Figure 7.1 challenges policy makers to find a way of doing things more quickly with the checks and balances needed to maintain people's confidence in law's legitimacy. To avoid an open-ended law-making power that would undermine parliament, Figure 7.1 asks whether the kinds of activities that need to be authorised can be predicted. At this point, the detailed activity map in Figure 7.2 becomes relevant.

Figure 7.2 is a mind map of the real world post-earthquake needs that were met by law changes.¹⁰⁹ It poses questions like those policy-makers could be expected to ask, which would enable them to identify the need for particular law changes. While it is somewhat reverse-engineered in this context, this mode of questioning might be worth trying in other contexts.

Combined, the rich pictures suggest it is desirable to develop a sense of the activities that need to be authorised so as to narrow the scope of the Henry VIII clause. Because it is not possible to predict every eventuality, some flexibility should be retained to address unforeseen issues.

The need for flexibility was a concern for the executive when the 2010 Act was being developed (Gall, 2012). At the time, it would have been difficult for policy-makers to identify the full range of statutes needing modification to expedite recovery activities. Even so, the Minister was able to include an indicative list of necessary activities in his contributions to the parliamentary debate on the Canterbury Earthquake Response and Recovery Bill 2010 (Hansard, 2010a, per Hon Gerry Brownlee; see Chapter VII.2.5.1). However, to preserve maximum flexibility and to avoid having to go back to the House for further authorisations, the Henry VIII clause was drafted very broadly and excluded only five “core constitutional” statutes from its ambit.¹¹⁰

When the 2011 Act was passed, experience with the clean-up after the earlier earthquakes should have given an indication of the activities likely to need a statutory authorisation, despite the greater scale of the damage then facing the authorities. Despite that, the Henry VIII clause was carried over into the 2011 Act unchanged.

¹⁰⁹ I developed Figure 7.2 in two stages. First, I mapped all the orders made under the Henry VIII clause, including notes about what those orders did. Then I extrapolated a series of questions which were answered by the orders. Those questions are reflected in Figure 7.2.

¹¹⁰ The Bill of Rights 1688, Constitution Act 1986, Electoral Act 1993, Judicature Amendment Act 1972, and the New Zealand Bill of Rights Act 1990.

VII.2.2 Formulating a root definition

Figures 7.1 and 7.2 make it clear that, absent an expedited mechanism to amend the law, some existing laws might have held up recovery, or prevented practical steps being taken to alleviate compliance burdens. Avoiding or not complying with those laws could have exposed people to a risk of legal liability. Any of these consequences could have undermined confidence in the law's legitimacy. Therefore, a system was needed to expedite law making to authorise recovery activities, with the checks and balances needed to maintain confidence in the law's legitimacy. This section discusses the development of a root definition of a system to enable expedited law-making.

VII.2.2.1 CATWOE

Table 7.2 outlines the CATWOE developed for this analysis.

VII.2.2.2 PQR

Table 7.3 contains the PQR developed for this analysis. The Q (how) is one of four options developed in the course of this analysis (see Table 7.4 and Chapter VII.2.5.3).

VII.2.2.3 CATWOE and PQR create a root definition

Based on the CATWOE and PQR elements, I have formulated the following root definition:

A system to authorise recovery-related activities by an alternative law-making procedure that emphasises speed and flexibility together with transparency and accountability, in order to mitigate the harms caused by the earthquakes by enabling the people affected to recover as quickly as possible while being protected from arbitrary and/or unfair laws, and to protect those working on earthquake recovery against liability for not following business-as-usual rules and procedures.

It contains a number of sub-systems, which themselves could be the subject of a root definition.

VII.2.3 Defining performance measures – the five Es

Table 7.4 sets out performance measures and indicators for assessing the system for expedited law-making.

VII.2.4 A conceptual model for expedited law-making

Figure 7.3 contains a conceptual model for an expedited law-making process. The first step in the model is to appreciate the normal law-making process, including the constitutional norms and values protected by it. That ensures the expedited process has constitutional norms firmly embedded in its design, which establishes a good basis for identifying and comparing different law-making approaches.

The model requires consideration of a range of questions. The first order question is:

1. What needs to be done to effect a timely and efficient recovery?

This question aims to establish the business needs – the real world imperatives that agencies with recovery roles could see before them. That understanding of business needs informs the second order questions:

2. Are there any legal constraints or requirements applying to those activities?
3. Will any of those constraints or requirements unnecessarily slow those activities?

Together, these questions operate as a triage, isolating the most problematic legal provisions for attention. They also force consideration of trade-offs. Some constraints or requirements might be necessary, even though they might slow down activities. For instance, Chapter VI shows just how central the consenting process was in maintaining quality and safety standards for buildings. Schedule 2 of the Building Act 2004 exempts certain repair work from consent and

inspection requirements, including structural repairs. After stories emerged about faulty earthquake repairs, the Ministry of Business Innovation and Employment (MBIE) reviewed a sample of earthquake repairs. It found a number of problems related to quality processes for non-inspected work and recommended the appropriateness of the exemptions for foundation-related building work be reviewed (Ministry of Business, Innovation and Employment, 2015).

Through these questions, the model confines the scope of the Henry VIII clause, which limits its encroachment on parliamentary sovereignty. It also requires decision-makers to be explicit about the trade-offs between speed and constitutional legitimacy.

The model includes feedback links between individual elements, which are shown as dotted lines on Figure 7.3.¹¹¹ Feedback will enable the truncated law-making process to learn from experience with the laws made using it.

VII.2.5 Comparing the model to the real world

As discussed in Chapter III, the purpose of comparing the model to the real world is to identify opportunities to improve real world operations so they move towards the desired transformation. Accordingly, the comparison in this section focuses on points of difference between the model and the real world.

VII.2.5.1 Appreciating the normal law making procedure

There is no publicly available evidence that the executive consciously appreciated how and why the normal law-making process creates legitimate law. Cabinet's decisions approving development of the 2010 Act did not consider those values when describing the truncated law-making process, which involved a Henry VIII clause (Minister for the Environment, 2010). The 2010 Act passed through all its parliamentary stages in a single day and without any select committee consideration (McSoriley, 2010).

¹¹¹ Chapter V.2.4 outlines the rationale for this approach.

Section 6 of the 2010 Act provided:

The Governor-General may from time to time, by Order in Council made on the recommendation of the relevant Minister, make any provision reasonably necessary or expedient for the purpose of this Act. [emphasis added]

The term “expedient” is not often used in delegating parliament’s power to legislate, and no justification was offered for it in this case. The Minister’s examples to the House of where the law-making power was needed appeared to be at the “necessary” end of the spectrum (Hansard, 2010a, per Hon Gerry Brownlee):

Legislation needs to be adapted to respond to the special circumstances that now exist in Canterbury and, in particular, that will apply when the state of emergency is lifted. So far, we have identified several needs: modifying legislative requirements under the Resource Management Act, such as in respect of heavier than allowable loads being able to be taken to landfills; streamlining Building Act processes to deal with dangerous buildings without delay, and the repair and perhaps replacement of buildings; and flexible welfare support and payments for people in need.

To facilitate the Canterbury recovery, we need a mechanism that allows specific amendments to a range of legislation. This bill will be the House’s expression of a strong desire to remove bureaucracy that could slow down the very necessary work we now have to do. [Emphasis added]

Similarly, the analysis of submissions on the 2011 Bill stated that “Orders in Council may only be used where necessary and fit within the purpose of the Bill” (Department of the Prime Minister and Cabinet, n.d., emphasis added).

The Henry VIII clause was carried over into the 2011 Act without substantive revision. The parliamentary process included a very short submission process. Submitters had 24 hours to view the Bill and make submissions to the Local Government and Environment Committee (the Committee). Unusually, the Committee did not have the power to recommend changes to the Bill (Local Government and Environment Committee, 2011). Nor did it have departmental

advisers to assist with its consideration of submissions received (Hansard, 2011c, per Hon Ruth Dyson).¹¹²

Despite the short notice and limited hearing, the Henry VIII clause (cl 70 in the 2011 Bill, enacted as s 71) attracted considerable attention from submitters.

The New Zealand Law Society's submission (Local Government and Environment Committee, 2011, p. 98) suggested that it be done away with altogether:

In general "Henry VIII" clauses, such as clause 70, giving very wide powers for Orders-in-Council to override enactments are contrary to the rule of law and good legislation principles and are therefore undesirable. Subpart 7 may be seen as a pragmatic solution but it is questionable whether it can be justified ... Where there is a need for legislative amendments or suspensions in order to facilitate the recovery programme, a better alternative would be for Parliament to dedicate House time for those matters to be dealt with by legislation, as they arise.

The Legislation Advisory Committee had concerns with the "expedient" test.

During the oral submissions, Warren Young for the Legislation Advisory Committee said of clause 70 (*ibid.*, p. 31):

... the words 'or expedient' just shouldn't be there. It [clause 70] should be limited to things that are extraordinary and need to be done because they're absolutely necessary to give effect to the purpose of the Act, not things that are simply expedient to do.

Charles Chauvel MP, then chair of parliament's Regulations Review Committee (RRC), made the same point in the House (Hansard, 2011c):

... under this clause the orders can be expedient. Parliament is saying to the executive: "We are going to do away with our right to make laws. We are going to delegate that to you if you think it is a nice idea." That is what - in layman's terms - 'expedient' means.

I would urge the Minister, even though that is the test in the existing legislation, and even though he has not abused it - and I have put that on record - to tell us why we have the 'expedient' test there. Why do we not only do away with parliament's right to legislate exclusively, and confer it on him,

¹¹² In the normal course of parliamentary law-making, bills are referred to select committees for scrutiny. That process nearly always involves consideration of submissions from the public. Advisers from the department responsible for the bill are usually appointed to assist the committee. Their role is to explain the policy of the bill and analyse the submissions for the committee (State Services Commissioner, 2007).

but then say that he can use it whenever he thinks it is ‘expedient’? That is unwise; it is too broad. We will regret this precedent in the future.

In the debate on the 2010 Bill, Kennedy Graham MP had observed (Hansard, 2010a):

The government is essentially saying we must trust it not to do anything silly. But trust is not the normal ingredient of the political process. The reason for political principles, legislative acts, and judicial review is so that societal trust can be applied to executive action. This is no disrespect to the government. Our Cabinet Ministers may be as pure as the driven snow; it would still be irrelevant. Personal trust and societal trust are different creatures. We can all personally trust Cabinet Ministers yet require that they remain within the law and not suspend it.

These concerns met with resistance. The executive wanted the Henry VIII clause to be consistent with the 2010 Act, although it did not explain why.¹¹³ In the end, the clause was re-enacted without change.

VII.2.5.2 Appreciating the activities that are needed to effect recovery

The 2010 Act was developed very quickly, passed 10 days after the initial earthquake, while a state of emergency was still in place. It was asserted, when the 2010 Act was passed, that officials could not confidently predict what kinds of activities would need authorisation, which was why such a broad enabling provision was needed (Hansard, 2010a, per Hon Gerry Brownlee). However, when the 2011 Bill was being developed, agencies should have had some idea of what activities would be needed, and the kinds of legal constraints in play.

In developing the 2010 Bill, officials asked Canterbury local authorities to compile a “wish list” of the legislative changes that they may require to promote a more efficient recovery” (Gall, 2012, p. 234). The conceptual model outlined in Chapter VII.2.4 focuses on business needs before legal barriers. Legal barriers become relevant only once the business need has been identified.

¹¹³ In the analysis of submissions, suggestions for changes to the Henry VIII clause or the privative clauses were met with “No change proposed. This provision was included in the Canterbury Earthquake Response and Recovery Act 2010” (Department of the Prime Minister and Cabinet, n.d.).

Putting the legal barriers question first would have encouraged a focus on matters of bureaucratic inconvenience and was likely to result in an unfocused and abstract response. Unsurprisingly, the feedback from the councils was mixed. Gall (ibid.) notes that:

- Christchurch City Council supported special legislation (i.e. the Canterbury Earthquake Response and Recovery Bill);
- Environment Canterbury considered the emergency provisions in the Resource Management Act 1991 to be sufficient for their purposes;
- councils asked for exemptions from: the Resource Management Act 1991, the Building Act 2004, the Local Government Act 2002, and the Land Transport Act 1998;
- some councils asked for an exemption from the Resource Management Act's emergency provisions.

This response is unlikely to have instilled confidence that the councils had identified most of the legal barriers they might face in their recovery efforts. Indeed, the executive considered that the only practical way forward was to enact a generic empowering clause (Gall, 2012). In the end, the 2010 Act did list the statutes most likely to require amendment as examples (section 6(4)) but applied the Henry VIII clause more widely. As Dean Knight observed, the 2010 Act left it open to modify the Local Electoral Act 2001, which governs local body elections (Gall, 2012; Orpin & Pannett, 2010).

Submitters on the 2011 Bill suggested changes to the scope of the Henry VIII clause. David Bullock and Daniel Jackson submitted that removing other core constitutional statutes from the ambit of the power would add important constitutional protections, and would require only a minor change to the Bill (Local Government and Environment Committee, 2011, pp. 73–74). They recommended excluding the following statutes from its ambit:

- Abolition of the Death Penalty Act 1989
- Habeas Corpus Act 2001

- Human Rights Act 1993
- Judicature Act 1908
- Legislature Act 1908
- Official Information Act 1982
- Ombudsmen Act 1975
- Supreme Court Act 2003
- Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004
- The constitutional statutes listed in schedule 1 of the Imperial Laws Application Act 1988, which include the statutes relating to royal succession, and the Magna Carta.

Orion Energy Ltd (the electricity supplier to much of Christchurch) suggested including another four statutes in the list of those statutes expressly subject to the Henry VIII clause.¹¹⁴ Orion considered this would have improved transparency and certainty, and would not have left the matter to ministerial discretion (Local Government and Environment Committee, 2011, pp. 101–102).

If the executive had taken the opportunity to reconsider the Henry VIII clause in the light of experience gained under the 2010 Act and as suggested by submitters, it might have reached different conclusions about its scope and the driving imperative of flexibility. The subtext of the Minister's messages appears to have been speed at all costs; the explicit text of submitters' messages was that recovery was important, but not at any cost. Parliamentary debates on the 2011 Bill did not reconcile those different perspectives.

In future, would it be possible to do away with Henry VIII clauses altogether in post-disaster recovery? I suspect not. Where legislative change is needed urgently, parliamentary processes can be too slow: the House is not always

¹¹⁴ The statutes were: Companies Act 1955; Electricity Act 1992; Energy Companies Act 1955; and the Financial Reporting Act 2004 (which appears to have been misnamed in the submission; it was possibly the Financial Reporting Act 1993).

sitting and cannot easily be recalled in a recess.¹¹⁵ Governments would have to negotiate for the numbers to effect changes to the order paper, or to pass motions for urgency or extended sitting hours, as well as for the substantive legislative change itself. They might judge that the political capital spent in getting an urgent measure through the House would be better spent elsewhere. There is also the opportunity cost, both in terms of the time needed for a bill's passage and for the other legislation it displaces on the order paper. These factors highlight that, although they present some constitutional challenges, Henry VIII clauses are a pragmatic approach to making precise amendments to statutes in post-disaster recovery contexts. I am inclined to think that as long as Henry VIII clauses have a clearly defined and proportionate scope and are temporally limited, and their use is controlled and supervised by parliament and the judiciary, their encroachment on parliamentary sovereignty and the separation of powers can be mitigated.

That said, experience with the Canterbury earthquake recovery should help to identify appropriate exclusions from any future Henry VIII clause for post-disaster recovery, which should number considerably more than five statutes. It should also be possible to create a more definite list of the kinds of activities and empowering legislation that might need to be relaxed or modified to facilitate future disaster recovery, and a truncated law-making process should be designed for them, consistent with the model (Figure 7.3).

What about the truly unforeseen legislative barrier? A key driver in the 2010 and 2011 Acts appears to have been the desire to not have to seek further legislative authorisation. Flexibility trumped certainty of scope. Informed by the model (Figure 7.3), I think it should be possible to develop a backstop provision to allow unforeseen legislative barriers to be modified as the need arises, but with additional layers of parliamentary scrutiny to mitigate the uncertainty of an open-ended delegation of parliament's law making function. In effect, this would create a two-tiered approach. For foreseeable recovery activities

¹¹⁵ Doing so requires the Prime Minister to consult with leaders of all parliamentary parties and to inform the speaker. The Speaker determines when the House sits (Standing Order 55).

identified in the statute, a Henry VIII clause might be adopted with a truncated disallowance timeframe (Standing Order 324) to give maximum certainty about the effect of legal changes. The backstop provision, with additional safeguards such as normal disallowance or, possibly, an affirmative resolution process, would then be available for unanticipated amendments. The greater level of parliamentary scrutiny of that backstop would stack the incentives against unnecessary use, but it would still be a faster option than parliament-made law.¹¹⁶

VII.2.5.3 Developing a truncated law-making procedure

The model in Figure 7.3 acknowledges that there will be trade-offs between speed and flexibility on the one hand, and consistency with constitutional norms on the other. It challenges users of the model to develop a procedure that will be as consistent as possible with constitutional norms.

The model assumes that the truncated law-making procedure should deliver laws that are perceived as legitimate, which suggests that the procedure should be as consistent as possible with the constitution's substantive and procedural norms. Figures 5.1 and 5.2 describe the levers required to ensure legitimacy in decision-making, and provide a high-level description of the norms that I describe in the aggregate as propriety, legality, and procedural fairness. Figure 5.1 shows how the three levers – transparency, accountability, and participation – tend to incentivise compliance with the constitutional norms. Given those incentive effects, I have included the triangle in the model to highlight those levers and require decision-makers to ensure trade-offs are considered explicitly.

¹¹⁶ The Hurunui/Kaikōura Earthquakes Recovery Act 2016 specifies the legislation that may be amended by order in council (section 7, Schedule 2). Section 18 of that Act permits legislation to be added to Schedule 2 by order in council if there is unanimous or near unanimous support amongst the leaders of all parliamentary parties. This approach seeks parliament's imprimatur in a less formal way than more traditional parliamentary procedures such as affirmative resolution, while achieving a substantially similar result.

The norms of propriety, procedural fairness, and legality are described in Chapter V. Given the extraordinary circumstances and the exigencies of recovery, decision-makers may consider it necessary to make laws that clash with constitutional norms. The model helps to make these tensions explicit, so the implications have to be considered.

In the context of truncated law-making, the participation lever is largely missing. It is reasonable to assume that the usual Cabinet-mandated procedure of consultation on policy proposals is unlikely to be followed. That appears to have been the case with much of the legislation modified under the 2011 Act. Figure 5.5 shows that removing participation:

- Removes one way of ensuring accurate and proportionate decisions. Just having to engage with the public to explain a decision incentivises most decision-makers to make more reasonable decisions. Hearing from the public is one way of ensuring decision-makers are aware of all relevant perspectives on a problem.
- Reduces opportunities for the public to engage with the decision-making process. That very engagement tends to increase acceptance of decisions – having participated in the process, people will have a better understanding of the competing interests and may feel they have more of a stake in the decision.
- Loses one way of meeting public expectations of procedural fairness, which will tend to mitigate any dislike of the substantive result.

Removing or weakening the role of participation weakens incentives to comply with constitutional norms and reduces opportunities to boost public trust and confidence in decisions, decision-makers, and the wider system settings. Ideally different perspectives should be obtained, and testing should be done, before the law is made. Ex post facto challenges to the law can, at best, expose extant flaws; they cannot prevent those flaws from being introduced in the first place.

Participation need not be removed altogether from a truncated law-making process. While the dictates of speed might obviate public participation, there might be options to utilise the people's representatives through a

parliamentary procedure such as: ex ante scrutiny of draft legislation, including fast-track consultation by select committees; an affirmative resolution process; or ex post scrutiny and disallowance. The latter would also act as an accountability mechanism.

Weakened emphasis on participation means the law-making procedure is likely to become more reliant on transparency, and the informal pressure it brings to bear on law-makers. A transparent law-making procedure means people can see and understand the rationale for the proposed law and form their own views on it. Transparency is a precursor to accountability: it is hard to hold an institution to account if its activities are not known. This element is consistent with the executive's obligation of transparency required by legislation such as the Official Information Act 1982 and the Public Finance Act 1993 and by parliamentary scrutiny of the executive (e.g. question time in the House, estimates examinations and financial reviews). The normal law-making procedure is highly transparent. Parliamentary debates are both broadcast and reported, and submissions on bills and select committee reports are published at the conclusion of the select committee process.

The law-making procedure may also become more reliant on accountability mechanisms. As discussed earlier, there are few legal constraints on parliamentary law-making. Political accountability measures are strongly relied upon in New Zealand's constitution. Challenge and response in the House, publicly reported on through the media, has a corrective role. A non-parliamentary analogue would need to be found for a truncated non-parliamentary law making process. One approach would be to consider the level at which decisions ought to be made: it is one thing for a minister to make a decision on his or her own. It is quite another for Cabinet to have to make a decision, as the minister will have to persuade his or her colleagues, who will be bound by collective responsibility once the decision has been made. Other, more formal, accountability measures include the Ombudsmen's jurisdiction over maladministration under the Ombudsmen Act 1975, and the Auditor-General's wide powers of inquiry.

Based on these considerations, I have identified four possible options for a truncated law-making procedure (see Table 7.5), including that used in the 2011 Act (option 3 in Table 7.5). The other three options do not seem to have been considered in the policy development process. For instance, the Cabinet paper seeking approval for the Canterbury Earthquake Response and Recovery Bill did not suggest any alternatives had been considered (Minister for the Environment, 2010). Nor were the other options considered by Cabinet when it approved the policy for the 2011 Act (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a, 2011b; State Services Commission, 2011). Option 1 was suggested by Dean Knight and option 4 by the New Zealand Law Society in their respective submissions on the 2011 Bill (Local Government and Environment Committee, 2011).

Table 7.5 is a multi-criteria analysis of four options. It compares them against the criteria of expedited, rapid law-making and certain predictable outcomes (these criteria were clear objectives for the 2010 and 2011 Acts) and against the levers of transparency, accountability, and participation. None of the options is perfect. Ideally, parliament would amend its own legislation in a timely way, so as not to unnecessarily impede the recovery. But when it cannot, compromises have to be made. Each of the options trades constitutional norms differently against speed and flexibility. As it stands, a procedure akin to that in the Epidemic Preparedness Act 2006 (option 2 in Table 7.5) seems to reach the best balance. Option 3 appears to be the weakest in terms of the constitutional levers, although it delivers certain, rapid law-making.

VII.2.5.4 Approval, commencement, and publication of the new law

The processes for approval, commencement, expiry and publication of orders in council made under the Henry VIII clause generally accorded with constitutional norms.

Parliament allowed modifications of the law to be retrospective back to the first earthquake in September 2010. Generally, retrospective laws are considered to be undesirable because of the uncertainty they can create and because of the unfairness if people act in reliance on the law, only to find the law has been changed in a way they could not possibly have anticipated at the time (Legislation Advisory Committee, 2014, Chapter 11). The 2011 Act allowed laws to be backdated to the 4 September 2010 earthquake: a point in time which was the obvious origin of the need for recovery activities. This approach avoided the need for potentially complex assessments of causation and distinguishing between different parts of a series of related events.

VII.2.6 Assessing the Henry VIII clause's performance

Figure 7.3 and Table 7.4 outline performance measures for the system model. The performance measures can help to assess how well the real world is moving towards the desired transformation, and to assess whether the transformation is, indeed, the right one. The discussion in this section considers each of the performance measures in turn against the real world context.

VII.2.6.1 Efficacy

Generally, the Henry VIII clause seemed to work. A large number of orders were made, enabling a wide variety of activities (see Figure 7.2). The RRC's two reports (2010, 2011) on its inquiry into the orders made under the 2010 and 2011 Acts did not identify any significant concerns. The RRC also upheld the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311), which had been the subject of a complaint (Regulations Review Committee, 2014).

I have been able to find only one instance in which the validity of an order made under the Henry VIII clause was successfully called into question. The RRC considered the validity of the Canterbury Earthquake District Plan Order 2014 was in doubt because of an irregularity in the Panel's make-up. That irregularity undermined the constitutional protection created by the Panel's review. The

RRC could not agree on whether the order was invalid, and its suggestion that validating legislation be included in the Greater Christchurch Regeneration Bill was taken up (Regulations Review Committee, 2015).

VII.2.6.2 Efficiency

The expedited law-making process can be assessed at two levels. At the microcosm, it can be assessed in terms of whether particular recovery activities were expedited by law changes and whether those activities would have proceeded at the same rate if the law changes had not been made.

Departments' justifications for amending laws by order in council tended to explain why the amendment was needed.¹¹⁷ In the absence of other information, it may be that the departments were right, but further testing would be required to determine that with any confidence.

At the macrocosm, the system can be assessed in terms of whether the Henry VIII clause is the most efficient way of amending law, or whether regular law-making processes would have been efficient enough. In essence, this measure invites a comparison between options 3 and 4 in Table 7.5. The trade-off in option 4 would be rapid certain law-making, which would probably have been unacceptable to the executive: it would have been dependent on support in parliament on both the procedure for, and substance of, law changes. Option 4 also carries opportunity costs of other legislation not progressed while parliament considered recovery-related legislation.

VII.2.6.3 Effectiveness

The Henry VIII clause seems to have been reasonably effective in achieving the wider goals. A large number of orders were made to enable recovery activities. The RRC's inquiries and my own assessment (discussed in VII.2.6.4 below) suggest the orders were moderate and proportionate, and did not expose people to arbitrary or unfair law. Space and time, and the methodology for this

¹¹⁷ See, for example Department of Building and Housing, 2011; Department of Internal Affairs, 2011, 2013; Ministry for the Environment & Department of Conservation, 2011.

thesis have not enabled an in-depth survey of litigation to assess how effective orders were at protecting recovery workers against liability, or a survey of recovery workers' levels of confidence about their legal authorisations. I do not, therefore, have enough information to assess that dimension of the Henry VIII clause's overall effectiveness. That would be a useful piece of research to inform future decisions about the utility of Henry VIII clauses in post-disaster recovery contexts.

VII.2.6.4 Ethicality

Table 7.5 indicates that the Henry VIII clause in the 2010 and 2011 Acts was the weakest of the four options in terms of constitutional checks and balances. Having said that, some real world operations of that process are worthy of specific comment.

First, despite the very wide scope of legislation within the ambit of the truncated law-making power, and despite a very broadly defined purpose clause (see Chapter V.2.5.2B), the power appears to have been used proportionately and with restraint. The RRC's then chair, Charles Chauvel MP, stated for the record that the orders in council made to date had been moderate and had not overreached the powers conferred by parliament (Hansard, 2011c, vol. 671). Subsequently, the RRC only reported on the two orders discussed in Chapter VII.2.6.1.

My own research included scrutinising the orders made under the 2010 and 2011 Acts, including the supporting material prepared by departments. I reached a similar conclusion to the RRC on a broader sample of orders. Generally, the orders seemed to have been demonstrably necessary, and proportionate in their approach. None seem to have been simply expedient, despite the concerns raised at that test. The advice from departments is nearly uniform in providing a clear rationale focusing on the necessary, rather than merely expedient, end of the spectrum.

Departments appear to have taken seriously their responsibility to advise the Canterbury Earthquake Recovery Review Panel (the Panel). Many of the letters explaining the need for and purpose of an order include material normally found in Cabinet papers and Regulatory Impact Statements. The letters contain generally clear problem definitions and policy objectives. Some of the best ones identify and assess options, and explain how the various options would – or would not – address the problem (see, for example Department of Internal Affairs, 2013). Cross-Party Parliamentary Forum members found that departmental advice “while clearly not as comprehensive as a full Cabinet paper [was] adequate in terms of their being enabled to grasp the essentials of the ‘case’ which was being made for recourse to extraordinary powers” (Murdoch, 2012).

Departments’ advice and the Panel’s responses were published on the Authority’s website, together with a link to the relevant order in council. Through a combination of proportionate action, clear advice and reasoning, and proactive transparency departments mitigated the shortcomings of the expedited law-making procedure and improved its consistency with constitutional norms (see discussion in Chapter V.4.2, where I saw this as an example of the constitution’s self-correcting faculty).

The Panel was heralded as a safeguard, with its role of providing independent scrutiny of proposed orders, although the 2011 Act required it to provide recommendations within only three working days (section 73(3)). The safeguard was particularly important because the executive’s exercise of its powers under the Henry VIII clause was not subject to any judicial oversight. The Panel’s public record of its advice is generally uninformative and does not give a clear sense of the thresholds for meeting the legal test.¹¹⁸

¹¹⁸ See, for example the Panel’s (2011a) report on the Canterbury Earthquake (Local Government Act 2002) Order 2011. The Panel provided a slightly more informative report (2011b) on the Canterbury Earthquake (Resource Management Act - Energy Network Recovery) Order 2011 and the Canterbury Earthquake (Reserves Act - Energy Network Recovery) Order 2011.

Section 73(3)(b) of the 2011 Act required the Panel to give a report “that includes the panel’s recommendations”. There was no statutory requirement for the Panel to give reasons, which was (with the benefit of hindsight) an unfortunate omission.¹¹⁹

VII.2.6.5 Elegance

Table 7.4 sets out some possible indicators to assess elegance. Overall, the fit of the Henry VIII clause with constitutional norms was not optimal. Having said that, generally laws made using the Henry VIII clause appear to have been accepted as legitimate by parliament, and seem to have gone largely unremarked by the public. Some specific points are worth noting:

- The limited facility for retrospective law (looking back to the 4 September 2010 earthquake) was rationally connected to the purpose for the clause and probably created little uncertainty.
- The wide purpose clause and privative clauses limited parliamentary and judicial supervision, without any compelling reason. However, the RRC did supervise use of the Henry VIII clause, and did not elicit any significant cause for concern.
- The level of transparency was very high, due in large part to the Authority’s proactive release of information, and by the detailed explanations given by departments to the Panel.

VII.3 A soft system dynamics-based policy approach

This section (and the accompanying Tables and Figures) sets out the analysis done using the Delft approach to system dynamics-based policy analysis (discussed in Chapter III).

VII.3.1 Expedited law-making: what was the problem?

¹¹⁹ This omission is rectified in the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (section 14(6)).

The SSD-based analysis rests on the rich pictures in Figures 7.1 and 7.2. The insights from the rich pictures are discussed in Chapter VII.2.1 and are not repeated here.

VII.3.2 Objectives for expedited law-making

The objectives map (Figure 7.4) has two high-level objectives: that Christchurch is a viable city into the future, and the creation of legitimate law. From a legislative perspective, the problems created by the earthquakes were twofold — some recovery activities to counteract the earthquakes' effects would need authorisation; and the earthquakes meant a range of legal obligations either could not be met, or did not make sense, in the post-earthquake context. Both problems required rapid and timely law changes, so that recovery work could be expedited and the law would be fit-for-purpose. Together, these changes would strengthen the law's legitimacy.

The objectives map charts a course to meet both objectives by enabling rapid and timely law changes through a process that pulls the legitimacy levers of transparency, accountability, and participation, and seeks to ensure that laws are neither arbitrary nor unfair.

VII.3.3 Ways and means mapping for expedited law-making

Figure 7.5 sets out the ways and means map. The map has been influenced by the approach of the Epidemic Preparedness Act 2006 (EPA), which allows emergency responses to mass outbreaks of infectious disease. The EPA's key differences from the 2011 Act are that ministers' recommendations for law changes are subject to judicial review, and the law changes themselves are subject to a truncated disallowance procedure. It is not clear why the executive did not base the 2011 Act on this approach.

Figure 7.5 is underpinned by three assumptions:

- parliamentary law-making will not be sufficiently responsive to the post-earthquake context, so modifications will be needed;
- it is better to leverage off familiar checks and balances than to compound uncertainty by creating new ones;
- for the law to be seen as legitimate, law changes need to be consistent with constitutional norms, and the process needs to be transparent, accountable, and to allow proportionate opportunities for participation.

The first intervention is a feedback mechanism for people to alert departments to legal requirements that cannot be complied with or that do not make sense in the post-earthquake context. That enables some participation, and ensures departments' decisions on necessary law changes are grounded in people's real world experiences. A feedback mechanism need not be formal consultation, but could take the form of an online suggestion box, linking with representative stakeholders, or additional instructions to call centres so relevant information filters from call centres to policy-makers.

The map proposes assessing activities and requirements for the urgency with which law change is needed. To maintain consistency with constitutional norms, non-urgent law changes should follow normal legislative procedures; the expedited process would be reserved for those law changes which are needed urgently.

The map proposes a threshold for the expedited law-making process and verification that the threshold has been met. The threshold is based on that used in the EPA (section 15), with an additional element to reflect post-earthquake recovery needs:

- compliance (or full compliance) with a legal requirement or restriction is impossible or impracticable in the post-earthquake context; or
- compliance would unreasonably divert resources away from recovery efforts.

Verification would be needed to satisfy Cabinet and the Governor-General that the threshold had been met and that the law change would go no further than

reasonably necessary in the circumstances. Figure 7.8 explores two possible ways of operationalising such a verification process.

The ways and means map identifies a range of checks and balances for the expedited process to ensure law-making is transparent and accountable, the laws made are fair and rational, and there are proportionate opportunities for participation in law-making. These factors should combine in a way that would meet people's expectations of fairness, build trust and confidence in decision-makers and acceptance of the law-changes, and ensure law changes were fit-for-purpose. Combined, these objectives should help to ensure the law is seen as legitimate. Combined with the relative speed offered by a Henry VIII clause, the interventions should help to expedite recovery, thus promoting the viability of greater Christchurch.

VII.3.3.1 Selecting interventions from the range of possible ways and means

Figure 7.5 sets out a number of interventions, and space does not permit exploration of all of them. I took as a given, based on the options analysis in Chapter VII.2.5.3, that a Henry VIII clause would be used. Starting from there, it seemed most important to assess entry to the expedited law-making process (threshold and verification) and the interventions required to ensure laws would be fair and rational, together with the three legitimacy levers. The interventions are shown on the left-hand side of the intervention map (Figure 7.7).

VII.3.4 The causal loops affecting expedited law-making

Like Figure 5.10, Figure 7.6 sets out a system map with a blend of causal, conceptual, and procedural links that combine to create feedback loops.

Loops B1, B2 and R3 describe the normal parliamentary law-making process that tests legislation's policy and design. The parliamentary process creates

legitimate law that is generally accepted as binding by the public. That acceptance is likely to reinforce the expectation that laws need to go through the process in order to be legitimate. Generally, that should strengthen parliament's incentives to comply with its procedural norms, although that is not always the case.

If the executive has decided on a policy, it might choose to ignore public submissions and suggestions made by parliamentary parties. It might seek leave to truncate or avoid the select committee process altogether.¹²⁰ Government members might block changes at select committee if they have the numbers or might unwind changes through a supplementary order paper (SOP) at the committee of the whole House stage (the committee stage). Law passed under urgency often bypasses the select committee process altogether (McLeay et al., 2012). For these reasons, the primary law-making loop (B1) is shown as a balancing loop. The primary balancing factors relate to the select committee stage (B2) and the committee of the whole House stage (R3).

The committee stage is the last chance to make amendments to tidy up drafting issues and neutralise any unintended consequences from the select committee's changes. Notwithstanding the importance of this stage, it seems to be viewed as a set-piece with little substantive value. The constitutional cultural value of pragmatism has a powerful balancing effect, which has manifested as procedural changes to reduce the time needed for this stage. For instance, Standing Order 303 allows bills to be debated part-by-part, rather than clause-by-clause, which has resulted in bills' provisions being clumped into as few parts as possible. That approach to drafting can weaken scrutiny at the committee stage, increasing the risk that unintended consequences will be overlooked. Other factors limiting the importance of this stage include routine

¹²⁰ For instance, the Video Camera Surveillance (Temporary Measures) Act 2011 had a truncated select committee process. The government of the day had initially wanted to pass the video surveillance legislation under urgency and without select committee scrutiny, but was unable to get the numbers to do so (Geddis, 2011a; D. R. Knight, 2011; Levy, 2011; Manhire, 2011; Trevett, 2011; Vance, 2011; Watkins, 2011). As discussed in Chapter VII.2.5.1, submissions on the Canterbury Earthquake recovery Bill were heard over two days and the select committee was not permitted to recommend changes to the Bill (Hansard, 2011c, per Hon Ruth Dyson).

use of proxy votes, which means there might be very few members in the House, particularly in an evening sitting, with speeches delivered to a mostly empty chamber. The rules for filming in the chamber tend to limit footage of the empty seats,¹²¹ which further weakens members' incentives to attend, reinforcing the view of the committee stage as a set piece. For these reasons, loop R3 has a relatively weak effect overall and its effect spills over to the B1 and B2 loops, with a potentially detrimental effect on legitimacy.

Loop B4 explores the relationship between democratic elections, law-making by elected representatives, and legitimacy. Law's legitimacy is largely driven by the fact that New Zealand's adult population, with very few exceptions, has the right to elect representatives to make law on our behalf, and that the population has the right to re-elect those members (or not) every three years.¹²² Loop B4 assumes a positive relationship between legitimacy and electoral participation (legitimacy drives electoral participation), but the converse may be true (a perceived lack of legitimacy may incentivise voters to participate to expel a government). Members of parliament are one of the least trusted professions in New Zealand (Research New Zealand, 2015).¹²³ If this distrust manifests as reduced electoral participation, it may eventually flow through to weakened perceptions of law's legitimacy — this is most obviously

¹²¹ The rules for filming in the debating chamber require cameras to cover a member who is speaking. Default shots are of the speaker. Wide angle shots of the chamber can be used only in certain circumstances (Standing Orders, Appendix D).

¹²² New Zealand extends the right to vote to both citizens and permanent residents who have, at some point, resided continuously in New Zealand for at least one year (Electoral Act 1993, s 74(1)). Limited disqualifications are set out in s 80. Controversially, a 2010 amendment disqualified all prisoners currently serving a sentence. Until then, disqualification had been limited to prisoners serving a sentence exceeding 3 years (akin to the disqualification of offshore citizens and people compulsorily detained under the Mental Health (Compulsory Assessment and Treatment Act) 1992 or Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003).

¹²³ A June 2015 survey found that only 25% of respondents trusted MPs, compared with 44% trusting public servants, and 75% trusting police officers and school teachers (Research New Zealand, 2015).

felt in laws that particularly benefit members of parliament, such as campaign finance, parliamentary expenditure, and members' remuneration.¹²⁴

Loops B5 and B6 are related, reflecting the interplay between constitutional norms and values, and their influence on law-makers. Essentially, the stronger and more stable norms and values are, the stronger the incentives are to comply with them. Because compliance with norms is more likely to result in acceptance of law's legitimacy, compliance with norms will both incentivise future compliance and reinforce the norms themselves. B5 is not a strong loop on its own because constitutional norms' partially written status means they are not necessarily understood and complied with consciously. Their translation into law-makers' consciousness may not be immediate, but may be felt over a number of years. Stable norms will tend to reinforce the constitutional values which underpin and inform them. Conversely, weakening norms will weaken their underlying values.

Loop B6 tends to augment the influences on law-makers of loop B5 by reinforcing constitutional values. It is reasonable to assume that, to a greater or lesser extent, elected representatives share those values because we are more likely to vote for representatives who we think can represent us. Assuming decision-makers are influenced by New Zealand's constitutional values, they will tend to comply with procedural norms because the norms will resonate for them (being aligned with New Zealand's constitutional values¹²⁵) and because they are incentivised to do so given that compliance results in law that is generally perceived to be legitimate.

¹²⁴ Controversy over setting members' remuneration led to responsibility for remuneration being moved to the Remuneration Authority, an independent statutory body (Members of Parliament (Remuneration and Services) Act 2013). Even so, the Remuneration Authority's salary determination of 26 February 2015, which awarded a 5.5% increase to members caused such outrage that amending legislation was enacted to limit the criteria that can be considered by the Authority. The amendment ensures members' remuneration increases in line with the average public sector salary (Remuneration Authority (Members of Parliament Remuneration) Amendment Bill 2015 (10-1, Explanatory Note) available on www.legislation.govt.nz).

¹²⁵ Refer to Chapter II. Gewirtzman has shown that constitutions work best when values and norms are closely in step; dissonance between values and norms tends to indicate the need for constitutional change.

Loop B7 describes the process of flexible evolution of law-making through supervised delegation of parliament's law-making power. It shows how that evolution can happen without undermining constitutional protections, assuming that the values underpinning those protections (fairness, egalitarianism, and liberalism) balance out the influence of pragmatism and (possibly) authoritarianism, which essentially drive loop B7. While loop B7 is the product of pragmatism, it assumes that other values will reassert themselves, driving a wish to supervise and control delegated law-making powers.

The paradox in loop B7 is that, in the right circumstances, the parliamentary procedures creating trust and confidence, and legitimacy can also undermine it. Delegating power away from parliament may strengthen trust and confidence in legitimacy and strengthen constitutional norms where the normal legislative procedure is cumbersome, too slow, or a disproportionate investment for a particular matter. In such cases, public expectations of pragmatic decision-making will not be met, diminishing trust and confidence in law-making procedures. Parliament can be expected to respond to that loss of trust and confidence by creating faster, more proportionate, law-making processes, including delegating law-making authority to the executive.

Delegating law-making powers weakens the operation of loop B4, which can be mitigated through parliamentary supervision and control over the executive's use of delegated law-making powers. Parliament has historically done so through scrutiny by the RRC and disallowance. Supervision and control restore the constitutional norms of parliamentary sovereignty, representative democracy, and the separation of powers. They also give effect to the rule of law by requiring the executive to stay within the limits of its delegation. They strengthen perceptions of legitimacy, reinforcing trust and confidence in the (revised) law-making procedures. In this way, loop B7 tends to reinforce loops B5 and B6.

VII.3.5 Mapping interventions to enable timely law-making for earthquake recovery

VII.3.5.1 A threshold for expedited law-making, and a triage process

Figure 7.7 maps the effects of imposing a threshold on the expedited law-making process. The threshold is important, because it limits the encroachment into parliament's legislative functions. The first part of the threshold seeks to balance rule of law concerns with pragmatism: when people cannot comply because of circumstances beyond their control or because legal requirements no longer make sense in the post-earthquake environment, insisting on compliance risks bringing the law into disrepute (see Figure 7.4). The constitutional values of authoritarianism and pragmatism will create public expectations that parliament and the executive will ensure laws are fit-for-purpose.

Setting the threshold too low favours pragmatism over the rule of law. Arguably the threshold used in the 2011 Act was too low. It enabled law changes that were "reasonably necessary or expedient" for the Act's purposes, which were themselves widely drafted (sections 3, 71(1)). An expedient action is one that is convenient and practical, but possibly for a purpose that is improper or immoral.¹²⁶ Even without the suggestion of improper purposes, it is not particularly desirable for convenience to outweigh rule of law concerns. Long-term, such an approach could weaken constitutional norms and alter the balance between parliament and the executive. The threshold in Figure 7.7 is based on that in the EPA, which is higher than the 2011 Act. That seems preferable, on balance.

The second part of the threshold considers the urgency with which amendments are needed. The expedited law-making process should be used only where urgency makes it undesirable to wait for a parliamentary process.

¹²⁶ www.oxforddictionaries.com/definition/english/expedient Accessed 13 June 2016.

The urgency component should prevent officials and ministers assuming that, just because a law change is necessary for earthquake recovery it must, therefore, be urgent.

Parliament has a variety of methods of passing law quickly: it can operate under urgency (Standing Orders 57, 58) or under extended sitting hours (Standing Order 56). It can truncate the time taken for select committee consideration (Standing Order 290). These methods require the government to seek agreement, either through the business committee or through a notice of motion in the House. In an MMP environment, such a proposition may appear formidable to a government, but it would be most surprising — and disappointing — if the House could not agree to adopt measures that would enable it to pass law quickly on earthquake relief and recovery measures.

Figure 7.7 shows that triaging legislation needs into urgent and non-urgent paths weakens the negative effects of devolving parliament's law-making powers on its legitimacy (loop B4). In other words, limiting delegation of parliament's law-making functions tends to protect parliament's legitimacy and, in so doing, is likely to stabilise constitutional norms. Figure 7.7 asserts a reinforcing link between strengthened constitutional norms and parliamentary law-making. It is likely that success would breed success: once parliament had shown it could pass law quickly, and would engage in a cooperative process to do so, the executive would have more confidence in using that process. That would leave the expedited procedure to those situations where there genuinely was urgency, which would discourage its overuse.

This approach can be contrasted with that of the 2010 and 2011 Acts, which placed no such limitation on the executive's ability to amend primary statutes. Instead, they effectively prioritised loop B7 (delegating parliament's law-making function) over loop B1 (parliament's law-making process), which increased the executive's power and visibility relative to parliament. This effect compounded the measures in the 2010 and 2011 Acts that weakened the availability and

effectiveness of parliamentary and judicial control over executive law-making (see VII.3.5.5 below).

Figure 7.7 shows that the threshold is likely to result in both parliamentary and executive-made law being viewed as legitimate and binding, and is likely to build confidence in law-makers. If expedited law-making is subject to parliamentary supervision and control, that is also likely to result in laws that can withstand scrutiny, which would strengthen public confidence that the law protected their interests and regulated society effectively (see Figure 7.13 and Chapter VII.3.5.5B).

VII.3.5.2 Two approaches to verifying that the threshold has been met

Figure 7.8 shows two approaches for verifying that the threshold has been met and that the changes go no further than is reasonably necessary. This verification aims to balance pragmatism with the rule of law to ensure executive-made law is proportionate. It is a hook to ensure constitutional norms are considered in the law-making process. Because delegated legislation is reviewable, ministers' and officials' advice could be reviewed, as discussed in Chapter VII.3.5.5A below.

The first approach, an independent panel, was used in the 2011 Act. The Panel was established to advise ministers on draft orders in council (section 73). This approach would give ministers the benefit of advice from an independent, neutral panel of experts to inform their advice to the Governor-General. The independent model does not weaken the constitutional norm of responsible government, but adds a layer of complexity by creating a new constitutional institution. However, its independence from the executive could help the panel to build public confidence that executive-made law is necessary and proportionate.

The second approach is verification by departmental chief executives and ministers, based on the EPA. It relies on extant constitutional roles and brings

together the policy and operationally-oriented departmental perspective and the politically-oriented ministerial perspective. This approach might surface tensions between those perspectives where chief executives and their ministers disagree.¹²⁷ It resonates with the Westminster system of cabinet government and responsible government supported by a politically-neutral public service. It may, however, be less effective at building and maintaining public trust than an independent panel.

VII.3.5.3 The importance of complying with status quo constitutional norms

The interventions highlighted in Figure 7.9 are explicit manifestations of the status quo — the norms that apply unless expressly displaced by statute.

Collectively, these norms reinforce the rule of law and an aspect of the separation of powers. Stating those norms reduces the risk they will be displaced inadvertently. Complying with norms will help laws to withstand public and judicial scrutiny, which can be expected to build public confidence that the law will protect people's interests and regulate society effectively. It should also help to strengthen ongoing public confidence in law-makers.

The effect of the Henry VIII clause on the separation of powers was a concern when the 2010 Act was enacted. The then deputy leader of the ACT party saw the Henry VIII clause as part of a trend of the National Government transferring decision-making powers from parliament to ministers (Hansard, 2010, per Hon John Boscawen MP):

Our constitutional system depends on a clear separation of powers between the executive, the legislature and the judiciary. Parliamentary scrutiny is an essential and vital element of our system of government and constitutional framework, both of which are threatened by this developing trend, which will only be reinforced every time the Government enacts legislation that overrides normal parliamentary or local government process.

¹²⁷ In recent years, surfacing those tensions has been used as a means of enhancing the quality of regulation. The Regulatory Impact Statement (RIS) is explicitly the department's document and is produced independently of ministers. RIS quality is independently assessed by the Treasury or by departmental panels, and their assessment of the quality of a RIS must be set out in the minister's advice to cabinet (Cabinet Office, 2008, para. 5.71; The Treasury, 2013, pt. 5).

The 2010 and 2011 Acts empowered a time-limited element of retrospectivity, allowing executive-made law to date back to the first earthquake because “they [were] needed in this case to protect those who have taken necessary action in this period and immediately following the earthquake” (Hansard, 2010a, per Hon Gerry Brownlee). As I observe in Chapter VII.2.6.5, while retrospective law is generally undesirable, in this case it was limited and rationally connected to the purpose of the Acts. Closing any inadvertent potential for liability could, therefore, enhance certainty and confidence in the law.

VII.3.5.4 Transparency in the expedited law-making process

Transparency interventions are reasonably easy to achieve and, depending on the institutional form of the law-making entity, may not require law changes. Transparency can be achieved operationally through a policy of proactive release of decision-making documents. Ministers and public sector departments are subject to the Official Information Act 1982 (OIA), which requires official information to be disclosed upon request, subject to withholding grounds. New entities (such as the Authority) need to be added to the schedule of agencies subject to the OIA.

The Authority was subject to the OIA. Its policy of proactive release made it easy to scrutinise the underlying rationale for uses of the Henry VIII clause. I believe the high level of transparency in this context helped to reinforce the need to use extraordinary powers carefully and proportionately, with the result that the executive-made law was able to withstand parliamentary scrutiny and did not contravene the rule of law.

Transparency measures can ensure the rationale for executive-made law is publicly available and understood. As noted on Figure 7.10, that understanding should increase trust in law-makers. Seeing and understanding decision-makers’ reasoning can reinforce confidence that decision-makers are not acting capriciously, but are following procedures properly. That helps to reinforce

trust in the process, which strengthens perceptions of the law's legitimacy and is likely to have two main effects:

- A virtuous cycle that reinforces incentives to comply — when people accept the law as binding that shows decision-makers that transparency (and compliance with constitutional norms) is its own reward, thus strengthening their incentives to comply.
- Strengthened and stabilised constitutional norms — transparency strengthens loop R5, which shows that the stronger and more stable norms are, the more influence they have on decision-makers. In effect, loop R5 can reinforce transparency, which reinforces norms, and can mitigate some of the effects of weakening the role of the parliamentary process in law-making.

VII. 3.5.5 Accountability for executive law-making

A. Judicial review

It is orthodox constitutional practice that executive action is subject to judicial review, including the executive's use of delegated law-making powers. While parliament may delegate its law-making powers as it sees fit, the judiciary may supervise to ensure the executive does not stray beyond its delegation.

Figure 7.11 shows the effect of this constitutionally-orthodox practice of allowing the default position, which assumes that executive-made law will be subject to judicial review and that the grounds of review apply without limitation.¹²⁸ The availability of judicial review increases the executive's incentives to comply with constitutional norms, which increases perceptions of legitimacy and strengthens the operation of loops B5 and B6. Strengthened

¹²⁸ Judicial supervision can be ousted expressly, by a privative clause that purports to oust judicial supervision (e.g. 2011 Act, section 74(2)). This is a strong form privative clause. A weak form privative clause could provide that delegated legislation had to be treated as if it were primary legislation, which by implication makes it non-justiciable (e.g. 2011 Act, section 75(5)). Judicial supervision can also be restricted by limiting the reach of the heads of review. Where a statute has a very broad purpose clause and enables executive-made law consistent with those purposes, it lessens the likelihood that executive-made law could stray beyond the scope of the empowering statute.

legitimacy supports the success factors, which are mutually reinforcing and in turn reinforce incentives to comply with norms through positive feedback.

Figure 7.11 contrasts with Figure 7.12, which illustrates the approach of the 2011 Act. The Act limited the potential for judicial review in three ways:

- section 74(2) provided that the Minister's recommendation for an order in council was not reviewable in the courts (a strong-form privative clause);
- section 75 protected executive-made law by providing that it was to be treated as primary legislation (a weak-form privative clause);
- the wide purpose clause (section 3) would have made it difficult to establish that any given Order in Council was *ultra vires* (beyond the scope) of the Henry VIII clause.

This approach was inconsistent with constitutional norms, and risked weakening them by creating a perception (at least in the short term) that non-compliance with constitutional norms was unproblematic. It risked weakening the executive's incentives to comply with norms.

Reduced compliance with norms will weaken perceptions of legitimacy. That may weaken the stability and strength of norms if people lose faith in norms' ability to protect them against executive action. Non-compliance may result in laws that cannot withstand scrutiny. Law that cannot withstand scrutiny is likely to reduce public confidence that the law will protect people's interests and regulate society effectively. These effects might build over a period of time, so will not necessarily create immediate feedback loops into the system.

B. Parliamentary disallowance

Figure 7.13 contrasts two approaches to disallowance. The darker blue line is the intervention that enables disallowance. The lighter blue line shows the effect of limiting disallowance through a broadly-worded purpose clause.

To enable Parliament to disallow executive-made law, two conditions must be met. First, the laws need to be subject to part 3 of the Legislation Act 2012.

Certain types of delegated legislation are automatically disallowable, but others need to be made subject to disallowance. Secondly, the empowering legislation cannot implicitly or explicitly constrain any of the grounds of disallowance. These conditions respond to the rule of law norm that the executive can only act within the scope of its powers in statute and at common law. They strengthen parliament's ability to supervise and control delegated law-making powers, which strengthens perceptions of legitimacy.

Parliamentary supervision and control is a precursor to executive accountability and is likely to result in law-making that can withstand scrutiny. Having law disallowed by parliamentary colleagues may have political consequences for ministers.

When law-making can withstand scrutiny, people can be confident that the law will protect their interests and be fair, proportionate, and effective. It can also give people confidence in law-makers, which feeds back into the law-making system to reinforce parliamentary supervision and control of delegated law-making. Strengthened legitimacy is likely to reinforce the stability and strength of constitutional norms, which will strengthen the operation of loops B5 and B6. That is likely to mitigate some of the weakening of loop B1, created by bypassing the parliamentary process in the first place.

The Henry VIII clause provided that executive-made law was disallowable. However, the 2011 Act's purpose clause (section 3) was so broadly worded, it would have been hard to apply the ground of disallowance that most clearly indicates the executive has overstepped the mark by making an "unusual or unexpected use" of the law-making power. In this way, the 2011 Act was somewhat inconsistent with the idea that parliament supervises and controls use of delegated law-making powers, and it weakened the assumption that supervision and control would counteract any potential adverse consequences of those powers. Despite that, as discussed in Chapter VII.3.5.4, transparency appears to have had a strongly self-corrective effect on executive-made law in this context.

VII.3.5.6 The effect of participation measures in expedited law-making

Consultation with all stakeholders is often crucial to obtain essential information...Key stakeholders will usually have more, or different, detailed information...than the government (Castalia Strategic Advisors, 2013, p. 24).

Not using normal parliamentary procedures means valuable opportunities for testing legislation for fitness for purpose and unintended consequences are lost, risking law that is less predictable and less accepted, with a consequent loss in legitimacy. Recognising this, the Cabinet manual (Cabinet Office, 2008, para. 7.86) notes that delegated legislation should be consulted with affected groups if required by law or otherwise appropriate (para. 7.81). That is not a legal requirement, and anecdotal evidence suggests that inadequate consultation is a very common reason for the failure of non-significant RISs to meet quality criteria.¹²⁹

From my own experience in working in a government policy shop, consultation will be sacrificed if it is likely to slow down the policy development process to a minister's dissatisfaction. In circumstances like the Canterbury earthquakes, it would be very tempting to bypass consultation altogether. However, that would lose the opportunity to improve regulation by identifying unintended consequences (reflected in loops B2 and R3) and to build public acceptance of legislation through participation (Figure 5.1).

Realistically, however, full consultation processes can significantly lengthen the time needed to develop legislation. While they might ensure legislation is fit-for-purpose and predictable, they might also compromise urgently-needed regulatory changes. Figure 7.14 shows how law changes could be triaged

¹²⁹ Personal communication from Jonathan Ayto, Principal Adviser at the Treasury (9 February 2016). The Treasury assesses the quality of RISs that meet its criteria for significance. Non-significant RISs are assessed by independent reviewers within the authoring departments. Consultation was considered in a 2013 external evaluation of departmental RISs. The reviewer considered consultation was "often done well" but when consultation was incomplete, it could "make the rest of the RIS, and in particular the options analysis, appear very weak" (Castalia Strategic Advisors, 2013, p. 24).

according to their urgency, which could inform decisions about the feasible extent of public participation.

Having a level of consultation can help build public understanding of the rationale for modifications to law. Input from experts and stakeholders can help to ensure law modifications meet their objectives and reduce the risk of unintended consequences. Both of these scenarios make it more likely that law making can withstand scrutiny, which is likely to enhance public confidence in the law and law-makers. That confidence will flow through to strengthen law-makers' incentives to comply with the new procedural norms, reinforcing loops B5 and B6.

The intervention supports the use of feedback mechanisms for people to alert departments to regulatory requirements that cannot be complied with or that do not make sense in the new environment. Departments' responses to this feedback can support public expectations of pragmatic decision-making, which would support trust and confidence in law-making processes, with flow-on support for perceptions of legitimacy. That is likely to increase public acceptance of executive-made law as binding, and strengthen confidence in law-makers. That is likely to flow back into the system as strengthened incentives for decision-makers to use the triage and consultation mechanism.

A. Comparison with the 2011 Act: the Canterbury Earthquake Recovery Review Panel and the Cross-Party Parliamentary Forum

The 2010 Act established the Canterbury Earthquake Recovery Commission (CERC). One of its roles was to scrutinise draft orders in council. When the Commission was disestablished, this function was allocated to the Panel (2011 Act, section 73(2)). The Panel was to be a layer of ex ante scrutiny, presumably in lieu of ex post judicial review. Its influence was soft, and the Panel's generally brief recommendations make it hard to assess how much guidance it gave on acceptable uses of the Henry VIII clause.

The Cross-Party Parliamentary Forum (the Forum) was formally established by the 2011 Act, although it had been convened during the emergency phase as “one of the several bridges between the tiers of governance and politics” (Murdoch, 2012). The Forum’s membership consisted of Canterbury-based members of parliament (section 7(2)). Although not required by law, draft orders in council were routinely made available to Forum members when provided to the Panel. The Forum’s comments were considered in finalising the orders (Murdoch, 2012, 2014).

Both initiatives provided some opportunity to inject different perspectives into the executive’s thinking, although neither could wholly compensate for a lack of public or stakeholder participation.

VII.4 Systems-generated insights into expedited law-making for Canterbury earthquake recovery

Returning to the primary question for this chapter, to what extent was the approach to expedited law-making for Canterbury earthquake recovery consistent with the constitutional norms and values governing law-making? To the extent that there were conflicts between the approach and norms, were there any ways of mitigating the effects of those conflicts?

The short answer to those questions is that the Henry VIII clause was not wholly consistent with constitutional norms, but it resonated with constitutional values. Failing to put in place something like the Henry VIII clause would have risked undermining public trust and confidence in parliamentary law-making. The Henry VIII clause as drafted was an unnecessarily blunt instrument, although it was exercised with care and restraint. The modelling in this chapter shows that options were available to mitigate the effects of tensions between the Henry VIII clause and constitutional norms. Those options would have focused the Henry VIII clause and enhanced supervision of its use, thus reducing reliance on the constitution’s self-correcting faculty (see Chapter V).

VII.4.1 The importance of asking the right question

The systems thinking approach is designed to help people see beyond the manifesting symptoms of a problem situation, so the root cause or causes can be identified. SSM does that through a combination of developing rich pictures of the problem situation and articulating desired transformations. Here, that discipline meant that when I came to build the SSM model, I grounded it by steps that expressly considered constitutional norms and recovery needs, and identified relevant legal constraints and restrictions. These steps laid out the first and second order questions, which focused on the real world business needs that were made more difficult by legislative requirements or constraints, which would have helped to focus officials on the legislative changes that were needed. Combined with the urgency threshold, the Henry VIII clause's focus could have enabled precise, surgical amendments where they were needed urgently.

That focus would have challenged what I think was the Government's starting assumption that any legislative requirement or constraint would have to be overridden for the good of the recovery, and that all legislative changes were equally urgent. It would have enabled the drafting of a narrower Henry VIII clause that, if unaccompanied by privative clauses, would probably have occasioned less adverse comment. It would probably have resulted in very little change in practice, given the restraint in the Henry VIII clause's use, but would have sent very different signals about constitutional norms and thresholds for change.

The questions in this case made it clear that the situation did not necessarily call for a one-size-fits-all Henry VIII clause. Different legislative pathways, including different approaches to parliamentary oversight, could have been used according to the scope, scale, urgency, and foreseeability of the issues requiring expedited law changes. Again, that could have resulted in a different, more overtly moderate approach than the 2010 and 2011 Acts.

VII.4.2 The importance of solid constitutional foundations

While at one level it is clear that constitutional norms are important, sometimes the rationale can be abstract and theoretical, and it can be hard to make a compelling case for an abstract norm when faced with other harsh realities, as the academics who signed an open letter about the 2010 Act found (see Chapter IV).

I found that mapping the application of norms onto the intervention map (Figure 7.9) made an abstract concept feel significantly more solid and real-world. The mapping clarified that consistency with constitutional norms would reinforce key inputs to legitimacy, which would reverberate across the system represented in the system map (Figure 7.6).

At the same time, the analysis showed that insisting on parliamentary processes rather than delegating law-making powers would not be viable and would risk diminishing public trust in parliament (Figure 7.6, loop B7). Despite the opprobrium in which Henry VIII clauses are held, my analysis suggests that given New Zealand's constitutional culture, in the right context and with the right checks and balances, a Henry VIII clause might be a more acceptable solution than a parliamentary process. The checks and balances require that the Henry VIII would generally need to be a short-term solution to deal with a specific problem, that its use be supervised by parliament and the judiciary, and that it be exercised with a high degree of transparency.

VII.4.3 The constitution is more than a collection of rules and principles

In Chapter II I discussed the role of people and constitutional values in the constitution's operation. The system map (Figure 7.6) clearly draws out the interrelationships between the law-making process, parliament's legitimacy, and the influences of constitutional norms and values on that process and the

institution of parliament. It shows the driving force that the values of pragmatism and egalitarianism can have on the operation of the parliamentary law-making process, and on parliament's legitimacy. In these ways, the system map reinforces the premise of constitutional realism, that a constitution is more than formal rules; it is heavily influenced by its decision-makers and their experiences and attitudes, which will be informed by their underlying constitutional values.

The role of values in the constitution's operation helps to explain the paradox at the core of loop B7 in the system map: the parliamentary processes that create legitimacy of the law and confidence in parliament can, in the right circumstances, undermine it. It is why I have concluded that, in the right context, Henry VIII clauses, for all their encroachment on the separation of powers and parliamentary sovereignty, can boost public confidence in parliament and public perceptions of law's legitimacy.

VII.4.4 Forcing a long-term perspective to be taken

The systems paradigm understands that cause and effect are not necessarily linear and may be separated by time and space. Delays between cause and effect can make it difficult to diagnose the root cause of problems, and can make it hard to trust a solution whose effects may not be felt in the short-term. In a situation such as the Canterbury earthquakes, the pressure to respond to the immediate problem is likely to overwhelm any sense of long-term consequences. And where the consequences are described in abstract theoretical terms such as "the rule of law", it can be tempting to downplay those consequences as less significant than the immediate real-world hardship be endured by people (Geddis, 2011b).

I found that both the SSM and SSD analyses made it easier to reflect on the longer-term consequences while considering interventions to address the short-term problem. The SSM performance measures require consideration of

efficacy (is the transformation being achieved?), which may take some time to manifest. For instance, the effectiveness of the Henry VIII clause could not be known until a number of orders had been made, the RRC had had an opportunity to consider them, and people had had a reasonable opportunity to complain. Similarly, the consideration of effectiveness (is the transformation achieving the desired outcomes?) would only emerge over a period of time. Setting this longer view at the start keeps the likelihood of longer-term consequences at the fore, which may help to prevent the transformation being thought of solely in the short-term.

Causal loop diagrams represent delayed effects through parallel lines across arrows. I used those lines in my system map and found they acted as a visual reminder that I needed to think of consequences in both short and long timescales. For instance, the triage approach (Figure 7.7) would have some immediately-felt effects in the form of some law changes being made under the expedited process, and others being made through parliament. The intervention's effects on public confidence and on the stability of norms and values would be likely to be felt over a longer time-scale, and as a gradual change in opinion, rather than a sharp rising or falling of confidence.

VII.4.5 The self-corrective power of transparency

In Chapter V, I discussed the self-correcting faculty that seems to manifest in the constitution's operation. I attributed that self-correction to the operation of constitutional norms and values, responding to a sharp change in constitutional settings. In this Chapter's SSD analysis, I identified that transparency seems to have a role to play.

The Authority's proactive release policy may have meant that the senior officials signing advice had a good idea that it would be published. Even without the proactive release policy, the advice was subject to the OIA, and would probably have been released on request had it not been published. That probably created incentives on departments to ensure that their advice was as

robust and defensible as possible. It seems reasonable to conclude that the disinfectant value of sunlight carries some normative weight.

Chapter VIII: Discussion

Chapter I posed two relatively simple questions:

- Could soft systems thinking techniques create new or different insights into constitutional policy issues and their effects on the broader constitution?
- Are different systems methodologies likely to create different insights and, if so, how can we identify the methodologies that are likely to be most appropriate for constitutional policy issues?

This chapter answers those questions based on the experience of applying systems thinking in the case studies in Chapters V to VII.

It considers the utility of constitutional systems thinking for public sector policy shops. In that context, and because this thesis breaks new ground, this chapter documents the difficulties experienced while doing the systems analysis, so that others may learn from my experience. Because my success measures include public sector uptake of constitutional systems thinking, this chapter also identifies some barriers to that happening.

Finally, this chapter highlights the questions left unanswered and identifies a number of avenues for future research to build on the foundations laid by this thesis.

VIII.1 Insights from soft systems thinking

Through the systems analysis in Chapters V to VII, I gained a number of insights into New Zealand's constitution and its interrelationship with the Canterbury Earthquake Recovery Act 2011 (the 2011 Act).

VIII.1.1 A deep-lying incompatibility between the constitution and the 2011 Act

The systems analysis highlights the incompatibility between the constitution and the 2011 Act. That incompatibility complicated the methodology choice process (discussed in Chapter III). The incompatibility is illustrated by the alternative soft systems methodology (SSM) models in Chapter VI (Figures 6.3 and 6.4), which have strikingly different underpinning assumptions about power and control. It is also demonstrated by Figures 7.11 and 7.12, which contrast a constitutionally orthodox approach to accountability with the 2011 Act's approach.

The incompatibility derives from differences in temporal focus (the 2011 Act's focus was comparatively short-term compared to the much longer-term focus of the constitution) exacerbating the effect of the 2011 Act's underlying preferences relating to power and control. The 2011 Act's incompatibility directly challenged some fundamental constitutional norms in a way that might yet jeopardise their long-term viability if it becomes a model for future large-scale disaster recovery.

Table 8.1 summarises a comparison of the constitution and the 2011 Act. The comparison is discussed in further detail below.

VIII.1.1.1 The contextual basis for the operation of constitutional norms

Constitutional norms do not operate in a vacuum. They operate against a background of assumptions about power, compliance, and enforcement, and are influenced by constitutional goals, and the goals sought by legislative regimes. These goals, in turn, operate in the context of a temporal line of sight.

Table 8.1: Summary comparison of assumptions and norms - constitution and 2011 Act

Assumptions and norms	Constitution	2011 Act
Contextual basis for operation of constitutional norms		
Temporal line of sight	Long-term.	Short- to medium-term.
Goals	Pluralist – general framework accommodates a range of purposes.	Singular – recovery from earthquakes.
Assumptions about power	Dispersed power reduces risk of autocratic and arbitrary uses of power.	Centralised power gives control over recovery and ensures success.
Assumptions about compliance and enforcement	Assumes voluntary compliance. Transparency and accountability mechanisms incentivise compliance.	Assumes compliance may not be voluntary. Creates powers to compel action and revisit decisions.
Constitutional assumptions and norms		
Transparency	Promoted through a range of mechanisms.	Act subject to normal transparency mechanisms. Some additional ex post facto reporting requirements.
Accountability	Promoted through a range of mechanisms.	Accountability shields contained in the Act for government and people carrying out activities authorised by the Act.
Participation	Promotes participation as the precursor to legitimacy.	Enables focused and targeted participation, but assumes that participation creates delay and that progress should not be traded off.
Certain, predictable law that applies generally (rule of law)	Valued as the default position, from which parliament can depart using explicit language.	Act assumes recovery should be lawful but creates perverse incentives for accountability and restraint.
Restraint	Constitution values and upholds restraint as a protection against autocracy.	Act silent on restraint. Implementation of Henry VIII clause characterised by restraint. Some ministerial decision-making has been criticised by courts in a way that suggests that in isolated instances, less restraint than desirable has been used.

As Table 8.1 shows, the constitution and the 2011 Act had markedly different lines of sight, goals, and assumptions. In essence, the 2011 Act was a coercive regime overlaid onto a pluralist constitutional system, which created tensions in the approach to, and application of, constitutional norms.

A. Temporal line of sight

While the 2011 Act has now expired, its effects will be felt over the long term. While decisions made under the 2011 Act will shape the design and infrastructure of Christchurch for decades to come, its focus was on the short- to medium-term objective of getting momentum behind the recovery. By contrast, the constitution is concerned with long-term legitimacy and government stability, although its norms guide decision-making in the here-and-now. Tensions can arise where legislation makes assumptions, imposes obligations, or requires actions which are inconsistent with longer-term constitutional norms.

B. Conflicting assumptions

The constitution assumes that power will be abused if it can, so it divides power between branches of state and imposes checks and balances on its use. It also divides power between central and local government, on the assumption that local communities are best placed to make decisions about local matters (Chapter VI.1). The 2011 Act centralised power, apparently on the assumption that centralised power was necessary to ensure a timely and successful recovery (discussed in Chapters IV, V, and VI).

New Zealand's constitution generally assumes people will voluntarily comply with constitutional norms and laws and incentivises voluntary compliance through accountability measures such as:

- Transparency requirements for open decision-making
- A free press to enable public scrutiny of decisions

- Parliamentary oversight of executive expenditure and actions
- Appointment and election processes
- The backstop threat of disciplinary measures or judicial review in appropriate contexts.

By contrast, the 2011 Act's underlying assumption seems to have been that voluntary compliance would not get the job done. This perception was likely strengthened by lack of progress in the period between the two earthquakes. As discussed in Chapter VI, governance of the recovery was confused by the addition of the Canterbury Earthquake Recovery Commission (CERC).

This context suggested that clearer governance was needed to achieve and maintain momentum. The method chosen, the 2011 Act, stood in stark contrast to some aspects of the constitution.¹³⁰ Compounding this, the 2011 Act effectively shielded the Minister and the Authority from liability by limiting it to bad faith and gross negligence (section 83). The very broad purpose clause (section 3) effectively limited any judicial review on the basis that an action was ultra vires (beyond the power of) the Act. Similarly, although orders in council were subject to disallowance under the Legislation Act 2012, the practical likelihood of disallowance was reduced by the very broad purpose clause (section 3).¹³¹

VIII.1.1.2 Constitutional assumptions and norms

The constitutional norm of transparency operated fairly harmoniously under the 2011 Act, and did not seem to cause any particular or long-lasting

¹³⁰ For instance, the 2011 Act gave the Minister extensive powers to compel compliance, including the ability to: rewrite recovery plans (section 21(1)(a)); require councils to perform functions (section 49(1)); and call in functions where councils had not performed them (section 50). The 2011 Act also gave the Authority's chief executive the power to direct property owners to act for the benefit of adjoining or adjacent owners (section 52).

¹³¹ As discussed in Chapter VII, parliament may disallow delegated legislation if it makes an "unexpected or unusual" use of the delegated legislation making power. The broader the wording of the delegated law making power (and here that power was tied to the purposes of the 2011 Act), the less scope there is for parliament to conclude that a piece of delegated legislation is unexpected or unusual.

concerns. As discussed in Chapters V and VII, both the Minister and the Authority took a generally proactive approach to disclosure of pertinent official information, particularly relating to the Henry VIII clause. There was a lower level of transparency regarding the Minister's reports to the House of Representatives on his use of coercive powers (2011 Act, section 88). While this reporting requirement assumed parliamentary scrutiny would incentivise the Minister to exercise coercive powers with restraint, the uninformative reports would have limited their utility as an accountability measure.

The 2011 Act created some tensions in the interrelationships between legality, accountability and restraint which could not be mitigated by the normal operation of the constitution, given specific settings in the 2011 Act. The 2011 Act assumed that the recovery should be done by lawful means, although I have been unable to confirm whether it was considered desirable as a matter of principle, or because of a pragmatic consideration that people will act more quickly and confidently if they know they are acting lawfully (or possibly a combination of both). The Henry VIII clause was the primary legality mechanism, augmented by retrospective validation of actions (section 84), and the liability shield (section 83).

Arguably, sections 83 and 84, and the purpose clause (section 3) created perverse incentives in relation to accountability and restraint. Restraint is generally encouraged through concepts like *ultra vires* and accountability mechanisms like judicial review, but as discussed above, those concepts were effectively neutralised by the 2011 Act. The 2011 Act did not send any particular signals about restraint, but the constitution's self-correcting faculty came into play and the Henry VIII clause was exercised with restraint (Chapters V.3.5.4B; VII.3.5.4; VII.4.5).

I believe the lack of clear signals ultimately resulted in an increased litigation risk for the most contested (and ultimately litigated) decisions: notably regarding amendments to the district plan (the UDS litigation

discussed in Chapter V.2.5.3C); and the terms of the purchase offers to the red zoned Quake Outcasts. Arguably, if the normal constitutional settings had applied, more careful consideration might have been given to the decision-making process, which imposes constitutional restraint.

VIII.1.2 Constitutional systems analysis provides a different perspective

The analysis in Chapters V to VII created some new insights and helped me to think about some old issues in new ways. In particular, I gained a new understanding of the interrelationship between constitutional values and norms, and developed a plausible explanation for the constitution's self-correcting faculty. I also found that the soft system dynamics analysis challenged some of the received wisdom about Henry VIII clauses.

VIII.1.2.1 A holistic view of constitutions and their operation

Traditionally, constitutional analysis is primarily legal analysis. The many articles and texts that I read focused on legal rules and principles. To the extent that constitutional actors were considered at all, the emphasis was on the functions of particular constitutional roles. Little thought was given to the person occupying that role. This kind of analysis gives a very clear, principled sense of how constitutions ought to operate, but does not help to explain why constitutions do not always operate consistently with that expectation. Matthew Palmer's (2006a, 2006b) constitutional realism theory is a significant step forward in this regard.

Systems thinking requires a holistic view to be taken. As the analysis in Chapters V to VII shows, a systems approach illuminates interrelationships and feedback loops that might not be revealed via a purely legal analysis. Given that a constitution's legitimacy is so closely related to its relevance to, and resonance with, the society it protects it makes sense for constitutional analysis to consider all of the factors that influence its operation. Having

said that, any systems analysis will be incomplete if it lacks a solid basis in the constitution's legal underpinnings.

VIII.1.2.2 The interrelationships between values and norms

The system maps developed for the Delft / soft system dynamics (SSD) analysis highlight the multiple relationships between constitutional values and constitutional norms, and show how values and norms can influence each other and act on decision-makers' incentives (Figures 5.13, 5.16, 5.18, 6.19, 7.7, 7.9).

The assertion that constitutional values are relevant to a constitution's operation is not new. However, my perusal of constitutional literature found comparatively few works seriously considering the effect of constitutional values on constitutional operations. By far the majority of the literature focuses on norms, and assumes those norms can be objectively and rationally defined. The logical extreme of such thinking is the idea of an "IKEA" constitution, which is a reservoir of standardised constitutional items that can be transferred to any society (Frankenberg, 2010). This idea does not seem to give sufficient recognition to the relationship between constitutional values and norms. While Frankenberg distinguishes between constitutional items that can be "idealised" (e.g. basic architecture of legislated constitutions) and those that cannot because of their context-specificity or -dependence (e.g. the right to bear arms in the US constitution), I question just how "idealised" these constitutional items can be. New Zealand has, for instance, not taken the opportunity to adopt an "idealised" supreme law constitution, because it appears to conflict at a fundamental level with New Zealanders' constitutional preferences (see for instance Geddis, 2016, p. 100).

The systems analysis has forced me to confront the dichotomy between objective and subjective approaches to the constitution. Until I embarked on this research, I had assumed that constitutional norms, such as the rule

of law and the separation of powers, were objectively defined and understood concepts. I have come to realise that, even where there are objective definitions of concepts, our understanding of them is somewhat subjective. The Quake Outcasts litigation illustrated tensions between competing notions of justice. The parties had different material principles of fairness, which reflected different intuitions about what was right (Chapter V.2.5.3B).

VIII.1.2.3 An explanation for the constitution's self-correcting faculty

Throughout the research for this thesis, I have been struck by the apparent self-correcting faculty in New Zealand's constitution. This faculty appears to be a function of legitimacy and constitutional values and norms, reinforced by transparency (Chapters V.3.5.4, VII.3.5.4, VII.4.5). Events such as the Canterbury earthquakes can alter the balance between our constitutional values, so that one is prioritised over others, which influences decision-making for a time. Over time, as the crisis abates, the values rebalance and settle. Decision-makers inculcated in New Zealand constitutional values are likely to react to the change and to the post-crisis settling. As I noted in Chapter VII, transparency has an important role in this rebalancing process because it ensures that decision-makers' behaviour is drawn to the public's attention, which allows the public to signal their acceptance of (or concern with) that behaviour.

Such a strong dependence on unspoken constitutional values leaves us exposed to the prospect of change as our society evolves. Constitutional values reflect the population, so it makes sense that, as our population changes, so will our values. That alteration is likely to be slow and the feedback may be subtle. In Chapter VIII.5.1 below I recommend further work to investigate the constitution's self-correcting faculty and to explore ways of articulating and shoring up constitutional values to enable more conscious evolution.

VIII.1.2.4 A different perspective on Henry VIII clauses

Henry VIII clauses are generally viewed with suspicion by constitutional lawyers. The Legislation Advisory Committee Guidelines (2014, para. 13.5) state that delegated legislation should “rarely, if ever, override, suspend or amend primary legislation”. Chapter VII discusses the reactions of submitters to parliament on the 2011 Act. Objections to the Henry VIII clause were predictable in their constitutional orthodoxy; the strongest, from the New Zealand Law Society, suggested that even the Canterbury earthquakes were not an adequate justification for use of a Henry VIII clause.

The combined Delft / SSD (soft system dynamics) analysis of the Henry VIII clause (Figures 5.16 & 5.17) has changed how I view them. The analysis suggests that, in the right context and if exercised with restraint, a Henry VIII clause will resonate with constitutional values and maintain confidence in the law’s legitimacy. As Figure 5.16 shows, in such a context insisting on normal legislative procedures could actually undermine legitimacy. While Henry VIII clauses are something to be used with considerable care, and with adequate safeguards (which were not as strong in the 2011 Act as they might have been), there may be a legitimate place for Henry VIII clauses within New Zealand’s constitutional arrangements.

VIII.2 Methodology matters

VIII.2.1 Different methodologies seem to create different insights in the constitutional context

It is orthodox within soft systems thinking to accept that systems analysis does not replicate the richness of the real world, but offers a lens through which we can gain insights on real world problems. Any lens provides an incomplete view, so understanding the lens — the paradigm within which a particular methodology is based — is critical. Different paradigms will

emphasise some particular aspects of a situation over others, or encourage particular interpretations to be made. Therefore, understanding the paradigm allows the conclusions drawn within it to be interpreted in their proper context.

I found this orthodox position holds true when different systems lenses are applied to the constitutional context. The two sets of analysis on each issue were based on the same constitutional assumptions and on the same problem definition. Yet the tools focused on different matters, requiring me to think about different aspects of the issue, which ultimately led to different perspectives on the issues under analysis.

VIII.2.1.1 The strengths and weaknesses of the different systems methodologies

I have found soft system methodology's (SSM) CATWOE to be a particularly powerful tool for opening the mind to different perspectives and possibilities. I have also found it to be a useful tool for identifying the common ground between apparently disparate perspectives. In that sense, I can see the value of using Type B methodologies in policy contexts which are characterised by widely divergent views.

True to its Type A nature, I found the SSD analysis was helpful in diagnosing structural problems. The Delft approach made it easier to use SSD in the context of an emerging issue by wrapping a policy framework around the causal loop analysis.

SSM provided a framework for thinking creatively about the problem at hand. To the extent that SSM looks backwards, it does so in order to understand the root causes of the problem in the extant situation. The emphasis in SSM modelling is on the transformation that is needed to bring about the desired change. The model, therefore, looks forwards. Focusing on the desired transformation requires some projection into the future, enabling different futures to be envisaged. In a policy context, that would

enable policy debates about alternative futures. SSM's explicit focus on worldview also enables an explicit discussion about underlying worldviews and associated mental models, which enables competing worldviews to be surfaced and tested. As I showed in Chapter VI the same transformation informed by a different worldview can lead to a markedly different model being built (Figures 6.3 and 6.4).

From a constitutional policy perspective, SSM's creative framework and explicit worldview are useful because they give a clear sense of objectives but do not close off options too early in the analytical process. It means a number of transformations can be explored from a variety of perspectives. Although the models in Chapters V, VI and VII were built at a high level of abstraction, it would be possible to drill down to create lower-level models of other parts of the system to construct a series of nested systems and subsystems that give a more detailed picture about the range of actions needed to bring about a transformation.

SSM and the combined Delft/SSD approach complemented each other. While encouraging creative problem-solving, the SSM models do not give a clear sense of system structure. The Delft/SSD models give that sense of structure by showing: how the different processes and activities fit together into a whole; how they interact; and how they could influence each other. The models give a clear (if complicated) picture of interventions in their context, together with a sense of the wider external factors that could affect, or be affected by, the interventions. The process of developing objectives, and ways and means, took me into the nature of the decisions that needed to be made in relation to each of the issues under investigation. That required thought about how different decisions, and their decision-making frameworks, could work together, and how they could influence (and be influenced by) constitutional norms and values.

From a policy perspective, SSD feels like it looks backwards, because of its emphasis on modelling the extant situation to understand the cause of the

problem. I did not find the process of developing causal loop diagrams (CLD) and mapping interventions helpful for imagining different futures, or identifying transformations that could bring about desired changes. Using SSD to imagine different futures leaves the intervention largely within the confines of a policy adviser's (or team's) imagination. SSM, by contrast, provides a series of tools that channel the imagination and put logic, rigour, and transparency around the articulation and modelling of the desired transformation.

Both approaches share a strength in their reliance on diagramming. Diagramming interrelationships can convey interdependencies in ways that cannot be done simply in prose. I found that particularly so in SSM's elegantly simple models, which stripped away unnecessary detail. In the model in Chapter 6, for instance, it quickly became clear that steps could be interdependent and would not necessarily be linear (Figure 6.3). Presenting the steps diagrammatically, with arrows showing dependencies, made the relationships clear. Presenting those same steps as a bullet point list would have imposed a linear view that could have resulted in interdependencies being overlooked. This example reinforces that framing information in multiple ways is important because frames "wittingly or otherwise, provide a cognitive structure that can be used to build understanding... They can be considered as mental windows through which we perceive and structure our understanding..." (Davies & Mabin, 2001, p. 73).

VIII.2.1.2 Some difficulties with applying SSD in this thesis

SSD seems to assume that through a process of story-telling, we will eventually reach a point where the system archetype becomes clear and the problem can be modelled and options identified (Senge et al., 1994). The story-telling process here was complicated by the uncertain and changing nature of the situation being analysed. That is, however, not an unusual scenario for policy development: in an unfolding situation solutions may

have to be developed in an information vacuum. In such a context, the more structured approach of SSM's transformations might be easier to use.

Another issue I found with SSD was that constitutional norms and values resisted being characterised as variables in CLDs. When it came to assign a polarity to some links, I found it hard to say whether a link would move two variables in the same direction or in opposite directions. The answer was, in some cases "it depends" or "it will change a variable, but I do not yet know how". In particular, I found balancing feedback loops particularly hard to identify. I found it easier to start by drawing reinforcing loops before drawing the balancing loops. I tended to think of the reinforcing loops as aspirational, describing how the constitution ought to work. The balancing loops in my models tend to describe how the system responds to pressures.

These difficulties make me inclined to agree with Jackson's (2009a, p. S28) doubt about applying structuralist systems thinking methods to complex social systems. Critics of structuralist methods have argued that humans, through their intentions, motivations, and actions, shape social systems, which means we need to grasp subjective interpretations of the world employed by social actors (Jackson, 2009a). This criticism resonates with the difficulty I had in turning conceptual maps into causal loops. Because humans do not always act according to the "plan", they will not always behave as the conceptual model would suggest, which makes it difficult to say that one constitutional variable causes another. It can cause another variable, but only if a human decision-maker chooses to act in a particular way.

VIII.2.2 Methodology selection is important

As discussed in Chapter III, it is accepted in the systems paradigm that the strength or weakness of the systems approach, and of any particular systems methodology, depends on the fit between the methodology and the situation to be analysed. The fit is influenced by a methodology's

philosophical underpinnings — the paradigm within which it operates (Leonard & Beer, 1994, p. 13). In short, methodology selection matters. The experience of selecting and using systems methodologies for constitutional analysis suggests that methodology selection is important here, too.

Each of the approaches to systems methodology choice set out in Chapter III seems to have something to offer when selecting methodologies for constitutional systems analysis. None of them can replace judgment, but each provides some richness of insight that helps in exercising that judgment. I found the three-stage selection process useful because each stage encouraged different ways of thinking about the problem situation and the systems methodologies under review. Much of the material generated in the first stage (system of systems methodologies - SoSM) can be re-used in the second stage.

Working through the three-stage process forced me to further clarify the problem definition in order to characterise the problem precisely enough to be mapped onto the SoSM grid. This process initiated further thinking about where the greatest value was in terms of the research product. I also found that the process challenged some of my assumptions, including my acceptance of the prevailing views of a constitution as either something mechanical or as something organic. I concluded that neither of those metaphors really work well for the view of the constitution adopted in this thesis, which is primarily a cultural and political construct. Stage 3 (the Mingers-Brocklesby grids) showed me that the methodologies indicated by the earlier stages would not give me a structural analysis of the constitution, which was something I wanted out of this research. It alone suggested that SSD would give this kind of analysis.

Overall, it seems that triangulating methodology selection gives a more complete picture than any single approach will. Accordingly, I recommend that other scholars and policy practitioners use the approach set out in Chapter III to select methodologies for constitutional systems analysis.

VIII.2.3 Further developing methodology deployment in constitutional systems analysis

This thesis has not deployed systems methodologies in their conventional, accepted ways, or for their conventional purposes. Rather than using methodologies to develop and implement an intervention designed to remedy a problem situation, this thesis used SSM and SSD to facilitate an inquiry into a constitutional problem situation. The goal was to see whether doing so could bring new insights, which are canvassed earlier in this chapter.

The method of deployment departed somewhat from the orthodox by replacing group-based analysis in SSM and stakeholder interviews in the Delft approach with paper-based research. While that adequately supplied the perspectives needed for the analysis here, it would not be sufficient in a live intervention to build shared understandings of the problem or consensus on solutions, and commitment to interventions. It thus would not achieve the objectives of SSM in particular.

In this sense, this thesis can be seen as the first stage of a broader research agenda. Having established that soft systems methodologies can add insight and value to constitutional analysis, the next step is to discover whether full and orthodox deployment can build consensus for, and the legitimacy of, systems-based interventions.

VIII.3 Implications for constitutional policy practitioners

To deal effectively with complex problems, problem structuring methods need to be (Eden et al., 2009):

- analytic, so the right problem is solved and solutions do not exacerbate the problem or cause new problems;
- quick, so they can be used by busy managers and ensure problems do not fester while solutions are being developed; and
- inclusive in terms of content knowledge, stakeholder interest, and skill areas applied to the problem

It can be extremely difficult to cope effectively with all three challenges simultaneously (ibid.). As explained below, my research suggests that soft systems thinking approaches might help constitutional policy practitioners to meet these challenges.

VIII.3.1 Analytical rigour

“Powerful small models”¹³² can be used to communicate the most crucial insights of a modelling effort to the public. For many public policy problems, a small model is sufficient to explain problem behaviour and build intuition about appropriate policy responses (Ghaffarzadegan et al., 2011).

In building the models for this thesis, I identified five ways in which the methods could strengthen analytical rigour in constitutional policy analysis:

- A clear emphasis on problem definitions that go beyond the surface of the presenting problem. The emphasis on problem definition runs throughout the analytical process, with model-building being an iterative approach that forces constant testing of problem definition and

¹³² These are models with a few significant stocks and at most seven or eight major feedback loops (Ghaffarzadegan, Lyneis, & Richardson, 2011).

objectives against the model under construction. The iterative approach creates strong logical links between problem and solution.

- SSM provides a logical structure within which to think creatively about possible transformations, while also providing the back-end logic and rigour to ensure that the imagined transformation can be implemented and its performance measured.
- The Delft approach provides a structured way of projecting options for change onto a notional system in order to identify likely consequences. As I found, it can highlight counterintuitive consequences that might otherwise be overlooked.
- Conceptual and causal loop diagrams can illustrate system structure in a way that enables “system as cause” and “forest and trees” thinking (Maani & Cavana, 2007, p. 9). Seeing systems structure can expose counterintuitive connections that might otherwise be overlooked.
- The systems paradigm accepts that the system may be a cause of the presenting problem. That forces an endogenous perspective, which may alert policy advisors to causes that might otherwise have been overlooked.

I also identified a flexibility in the SSM modelling process: each model can be viewed through a multiplicity of perspectives because the underlying CATWOE analysis includes customers, actors, and owners (Chapter III). It is, therefore, possible to test models by altering the perspective, and to show how models might vary if different worldviews are taken.

VIII.3.1.1 But...

It is necessary to avoid overconfidence. Ghaffarzadegan et al (2011) note that in complex systems with long delays and a large degree of uncertainty, overconfidence is likely, particularly given the difficulty that policymakers have learning about their own performance and capabilities.

“Overconfidence has an especially important influence on the ability of policymakers to question their assumptions, models of thinking, and strategies” (ibid., p. 26). Because the constitution is complex, carries a large degree of uncertainty, and because there can be long delays between cause

and effect, its operation is hard to predict and may not respond the way modelling might lead us to expect. Over-reliance on models could risk constraining our thinking and blind us to unexpected consequences.

While the intervention maps developed using the Delft/SSD approach are good working documents, they are unlikely to be successful presentation devices. The intervention maps are too complicated and daunting to an unfamiliar audience, and a simpler presentation device needs to be found.

Soft systems analysis can give a better understanding of how different interventions might affect the operation of a part of a constitutional system. In this way it can augment other analyses, such as cost-benefit analysis, but it will not obviate the need for those analyses.

VIII.3.2 Speed

I found the discipline of thinking of the system as being “to do P by Q to achieve R” and thinking in terms of transformations makes the process of pulling together the root definition and model surprisingly easy. There seems to be some force to Checkland’s statement that, with time and experience the modelling process can become intuitive. Model building requires “logical thought and an ability to see the wood and the trees”, and models should be built within about 20 minutes (Checkland, 2000, p. S27). Especially if done in a group environment, articulating the initial problem situation, building the models, and doing the real world comparison could be a very streamlined exercise. That could make SSM a useful and efficient analytical framework for constitutional analysis in a busy policy shop, provided practitioners were familiar with the approach and comfortable using its tools.

Consistently using systems methods over a period of time is likely to build up a body of knowledge that will speed the process. For instance, stakeholder analysis can be reused and updated over time because in the constitutional context, key stakeholders tend to remain reasonably static.

VIII.3.2.1 But...

The speed asserted by Checkland depends on familiarity with the methodology. I found working alone through my first set of models took a long time, although I got faster as I became more confident with the modelling tools. Policy practitioners would need to put time and effort into learning how to build models, and learning through doing is likely to be the most effective approach.

In my experience in a busy policy shop, inclusiveness is most likely to be traded off in the interests of speed. Although SSM and SSD information gathering and modelling can be done as group exercises to gather multiple perspectives efficiently, that will not necessarily be sufficient to overcome the need for speed.

VIII.3.3 Inclusiveness

In a constitutional sense it is important to understand the multiple perspectives on constitutional issues as well as the underlying norms. Figure 5.5 emphasises the importance of allowing for public and/or stakeholder participation in constitutional matters.

SSM builds stakeholder participation explicitly into its processes and, although it is somewhat subjective, Jackson (1990) considers it remains regulative and does not ensure the conditions for “genuine” debate are provided. He notes (*ibid.*, p. 663):

The kind of open, participative debate which is essential for the success of the soft systems approach, and is the only justification for the results obtained, is impossible to obtain in problem situations in which there is conflict between interest groups, each of which is able to mobilize differential power resources. Soft systems thinking either has to walk away from these problem situations, or it has to fly in the face of its own philosophical principles and acquiesce in proposed changes emerging from limited debates characterized by ‘distorted communication’.

All debates are limited in some sense, whether by time, resources, competing priorities, or strongly entrenched worldviews. These limits can affect policy shops, whose communication with their ministers is likely to be limited by ministers' availability, Cabinet and parliamentary schedules and, sometimes, strongly divergent perspectives. The open participative debate sought by Jackson may be a utopia that will never be reached in the policy context, but I remain hopeful that the tools tested here are an advance on the status quo.

Other soft systems approaches explicitly build in participation, including Interactive Planning and Strategic Assumption Surfacing and Testing. A stream of critical systems thinking aims to ensure the conditions for genuine debate are provided (see Jackson, 2003 for an overview of these approaches). These approaches were not tested because they were not suited to the research design, and are potentially fruitful areas for future research.

VIII.3.4 The value of cultural analysis

For a constitutional realist proposing reform, it is essential to understand the landscape through which your proposed road travels. Formalist 'paper' roads can often give a misleading impression of likely progress in the reality of the youthful jagged New Zealand landscape of the constitution (M. S. R. Palmer, 2007).

Understanding the various perspectives that might be brought to constitutional policy issues is essential. The cultural analysis tools in SSM and the Delft approach's actor analysis provide a structured approach to identifying and understanding different perspectives. They prevent too narrow a focus being taken. When working at a speed that does not allow a participatory process, they could help to identify other perspectives although, from a legitimacy perspective, these analyses cannot replace participation.

SSM's three streams of cultural analysis pull together some themes which can ground the systems analysis in its broader context. Analysis 1 was

particularly helpful for developing rich pictures for coordinated recovery activities (Figures 6.1 and 6.2). Identifying the problem owners gave me a good start for extrapolating the different perspectives in play, which helped me to populate the rich pictures.

The Delft actor analysis is more detailed than the SSM cultural analysis. It is harder to do because it requires a deeper dive into actors' stories. However, it does help in starting to assess what different actors will support and why. That is the beginning of a basis for testing solutions, which is useful where there may be a range of objectives and a range of possible paths to reach them.

Analysis 2 in the SSM cultural analysis made me think hard about the norms and values that would drive behaviour. That particular aspect was absent from the actor analysis, which tended to lead me towards an assumption that all actors will seek to maximise their welfare. To fill the gap, I injected constitutional culture and norms into the system maps (Chapters V and VII in particular) to reflect their influence on constitutional actors' behaviour.

On balance, the SSM analysis is quicker, because it is less detailed. It was enough to get me started thinking about a problem from different perspectives, and would probably suffice for policy work being done in response to a crisis. The more detailed actor analysis, with additional columns to explore relevant norms and values, would give more rigour for policy projects with a slightly less hurried development track.

VIII.3.4.1 But...

The SSM analysis was difficult to get started. In the absence of clear instructions about how to go about doing the analysis, I struggled to marshal the material I had gathered into some semblance of order. In the end, I took a very literal approach to each of the analyses. For Analysis 2 I decided to tackle the norms from a layperson's perspective rather than using an academic law lens. My rationale was that the norms are social

norms, not necessarily constitutional norms. While people might not think consciously about the rule of law, they would be likely to expect governments to behave legally; hence I described the norm as legality, but in conceptualising it I was influenced by rule of law principles.

It was also hard to know where the boundaries should be drawn for the cultural analysis. It would have been possible to go into much more detail, and to have covered significantly more territory. In the end, I drew a line based on the territory that was to be subject to the systems analysis. I also found that there was something of an iterative process as I did the systems analysis. Insights gleaned through the systems analysis informed the cultural analysis, which allowed me to develop it further.

If I were to do the cultural analysis again, I would roughly sketch out Analysis 1 before starting the systems analysis, but would then work up Analyses 2 and 3 concurrently with the systems analysis. Asking the questions needed for Analyses 2 and 3 can help to make sense of elements needed to create root definitions of systems. The answers to the questions can come through the systems analysis. In this way the system and cultural analysis are mutually informing.

VIII.4 The challenges to uptake of constitutional systems analysis

While constitutional systems analysis offers analytical rigour and, possibly, speed, together with a pathway that enables participation, I can see challenges to its uptake.

VIII.4.1 The subjectivist perspective

Soft systems thinking is a rigorous, logic-based discipline. It accepts and works with subjectivity, recognising that we are, inescapably, part of the human activity systems we wish to analyse. Accepting that our perspectives

influence how we perceive those systems enables us to articulate and test those perspectives and so learn other ways of seeing the system under analysis.

Constitutional policy advisors may find this subjectivity confronting. Policy advisors are used to producing analysis that is rational and objective. Subjectivity can be seen as a euphemism for opinion, which may be neither rational nor rigorous. Seen through a soft systems lens, I suspect that policy advice on the constitution and other human activity systems may be less objective than advisors would like to think. By articulating and testing worldviews, constitutional systems thinking may actually enhance the rigour and rationality of policy advice. It will open the door to alternative proposals based on different worldviews, as I showed with alternative SSM models (Figures 6.3 and 6.4).

The subjectivist perspective might make it more difficult to bring a normative approach to constitutional issues. There is a risk that subjective perspectives will not always be consistent with objectively desirable norms. I suggest, however, that the process of exposing and testing worldviews creates opportunities to inject objectively desirable norms into the policy debate. Normative values like respect for the innate dignity and integrity of human beings, or the moral and philosophical foundations of legitimacy could be considered explicitly as *weltanschauungen* (worldviews) in SSM modelling.

VIII.4.2 Constitutional systems analysis is not a silver bullet

Systems analysis of the constitution may make its workings more readily apparent, but I am not convinced it will make the constitution more accessible. The analytical framework does not obviate the need for a sound knowledge of the rules, principles and conventions that are key components of the constitution. And while my intervention maps do show the predicted

effects of an intervention onto a wider system, they are highly complex diagrams that would not help discussions in Cabinet.

In this respect, constitutional systems analysis is not a silver bullet. It cannot – and should not – replace legal training in constitutional issues, although it can augment legal analysis. Nor can it displace the need for a public that understands and cares about New Zealand’s constitutional arrangements. If anything, the systems analysis in this thesis highlights the importance of a constitutionally-aware public that is willing to hold decision-makers to account for acting consistently with constitutional norms and values.

Within the public policy field, constitutional systems analysis could be a significant advance: it could create a better understanding of how the constitution operates, which would provide a better basis for predicting how it might respond to change. However, even here, it is not a complete answer. Human activity systems are, by their nature, somewhat unpredictable. The constitution is both complex and abstract; it is underpinned by unwritten norms and values whose meaning is likely to be viewed differently by different people. Modelling constitutional issues is therefore unlikely to identify every possible permutation or combination of change. Such a caveat may put constitutional policy advisors off trying constitutional systems thinking: if it cannot highlight all possible consequences of change, why bother?

Modelling is desirable, despite that caveat, because it is:

- a tool to aid critical thinking and it can strengthen analysis;
- a structured approach to help us understand how things work in the real world, which is a bridge between the real world and constitutional theory.

I also anticipate some resistance to the system-as-cause thinking that characterises the systems paradigm (Maani & Cavana, 2007, p. 9). That thinking enables us to identify and address (or work with) the tensions

within a system. It can, however, lead to answers that make sense in systems terms but may be counterintuitive in constitutional terms. For instance, in the context of the Canterbury earthquakes, a Henry VIII clause was likely to be viewed by decision-makers and the public as more legitimate than maintaining normal legislative processes. In system terms, that clearly makes sense, but it contravenes the doctrines of the separation of powers and parliamentary sovereignty. Some constitutional theorists would find that hard to accept and might challenge the validity of an analytical process that could lead to such a conclusion.

VIII.4.3 Mastery will require time and effort

I am no systems thinking practitioner. What I have learned about putting systems thinking into practice has come from doing the analysis in Chapters V to VII. While the thinking and modelling tools appear to be straightforward in theory, in practice they can be difficult to apply.

For example, although I built the first draft of the SSM model in Chapter V very quickly, my subsequent analysis revealed that I had defined the problem at the wrong level, and accordingly the model was too narrow. I subsequently embarked on an iterative rebuilding of both the rich picture and the model. This is consistent with Checkland's view (2000, p. S19) that the methodology should not be followed in a linear fashion, but in an iterative way that reveals new insights and allows those insights to influence earlier stages of the analysis, thus potentially revealing further insights.¹³³

¹³³ My early effort at building the rich picture characterised the problem in a negative way, as protecting people against arbitrary and unfair decision-making, which is essentially a de minimis way of viewing constitutional processes. That approach led to a strong focus on transparency and accountability, which are key constitutional levers, but did not give a strong push towards the broader constitutional system objective of legitimacy. I subsequently recast the problem as a need to ensure recovery decisions are seen as legitimate, which pushed a wider view of the levers needed to achieve legitimacy. Rather than just focusing on transparency and accountability, the rebuilt model includes procedural fairness and consistency with human rights and constitutional norms. The rebuilt model also goes into more detail about implementation and use of norms in business procedures.

I also struggled with building CLDs for the SSD analysis. I found that the rich picture problem definitions did not provide enough information to clearly define the system at issue. As noted in Chapter III, part of the difficulty was that the rich pictures were describing a then still-unfolding situation, so the boundaries of the system were not clear. Wrapping the Delft policy framework around the CLD gave me enough of a sense of system structure that I could start developing a conceptual map of the system. I found, however, that some constitutional norms and values resisted being turned into variables for a causal loop. My Delft/SSD models are therefore a blend of conceptual and causal loops. I do not think this approach is unduly problematic, as the maps are for qualitative use only, and will not be developed into mathematical models. Notwithstanding that, these difficulties may lead constitutional policy advisors to query whether the effort is justified. I think it is, particularly where constitutional norms may be jeopardised by short-term responses to unfolding situations.

I take heart from Checkland's statement that rich pictures and SSM models can be developed quickly (Checkland, 2000, p. S27). Practice makes perfect, and I found the pace of model-building increased as I became more familiar with the techniques. There is, however, a lead time for learning, and that would need to be factored in, otherwise constitutional systems analysis will be unlikely to be deployed successfully.

VIII.5 The avenues for future research

I have identified a range of issues that would benefit from further research, some of which raise questions of constitutional policy; others relate to furthering constitutional systems thinking.

VIII.5.1 Constitutional policy questions

A. Testing my theory of legitimacy

As discussed in Chapter V, my theory of legitimacy is a system-based assessment of how legitimacy “really works”. It thus gives a real world perspective on the levers that can support and strengthen legitimacy. While my theory can offer some rules of thumb for policy advisors, it has not been sufficiently developed to find the right balance between normative and subjective components of legitimacy. I believe we need to know more about how legitimacy works in New Zealand, and to build a bridge between Willis’ (2014) normative analysis and my more subjective approach. While legitimacy is much debated in academic and judicial circles, it is probably not debated much amongst the general population. Yet it is public perspectives on legitimacy that will influence whether a government - and a system of government - will stand or fall.

B. Testing my explanation for the constitution’s self-correction

As discussed in VIII.1.3 above, I have developed an apparently plausible explanation for the constitution’s self-correcting faculty. It would be interesting to see if it stands up to testing and to think about the limits to the constitution’s capacity self-correct, and the conditions necessary for self-correction. Testing could be done in two ways:

1. Some further investigation of the events following the Canterbury earthquakes. For instance, the officials and decision-makers involved in developing and approving orders in council under the 2010 and 2011 Acts could be interviewed to better understand their thought processes and incentives to see if the self-correction was actually driven by rebalancing of constitutional values, shored up by transparency.
2. Considering other moments of abrupt constitutional shifts and rebalancing to see if the explanation can plausibly be applied to those situations. Such moments might include the 1984

constitutional crisis, the Watersiders' strike in 1951, the move to the mixed member proportional representation voting system, and the abolition of the Legislative Council in 1950.

If my explanation does plausibly apply in other contexts, it creates a challenge for government, parliament, academics, schools and civil society to work out how we shore up constitutional values and monitor for changes, discussed further below.

C. Shoring up constitutional values

The role of values in the constitution's operation suggests that our unwritten constitution is particularly vulnerable to weakening or changing values. Because so much of the constitution's operation depends on decision-makers acting consistently with unwritten principles, it relies heavily on decision-makers' incentives. Decision-makers inculcated in New Zealand constitutional values can be expected to act consistently with constitutional norms, all things being equal. Because constitutional values tend to be unspoken they are vulnerable, particularly as the patterns of our society change through global influences and migration.¹³⁴

Thought needs to be given to how our constitutional values are articulated and recorded, and how they are expressed in constitutional decision-making, so that current and future decision-makers take them into account. There have been many calls for civil and citizenship education that have resulted in little apparent change (Constitutional Advisory Panel, 2013; Constitutional Arrangements Committee, 2005; Justice and Electoral Committee, 2013, 2016). I suggest change is needed to ensure that evolution of our values is somewhat more conscious.

¹³⁴ According to the *Superdiversity Stocktake* (Chen, 2015, p. 32), New Zealand is superdiverse now. Superdiverse countries have migrants comprising more than 25% of the resident population or have more than 100 nationalities represented. Projections to 2038 suggest that Māori, Asian, and Pacific peoples will increase to 51% of the population. "The higher birth rate of the Māori, Pacific and Asian populations ... together with a high rate of intermarriage between different ethnicities, means faster cultural evolution will occur in New Zealand than in most other countries" (ibid.).

VIII.5.2 Constitutional systems analysis

A. More case studies to further test the approach

When I first began scoping this thesis, I identified a range of constitutional issues that looked to be interesting candidates for systems analysis. It would be useful to undertake more case studies of constitutional policy-making to test the approach further. Some possibilities include:

- Issues relating to the respective roles of central and sub-national government.
- Design options for emergency powers, with particular reference to the Canterbury Earthquake Recovery Act 2011 and the Epidemic Preparedness Act 2006.
- The role of public participation in building constitutional legitimacy.
- Legislating for regulatory quality and how that could realign power between the executive, legislature and the judiciary, with particular reference to the Regulatory Standards Bill and disclosure requirements in the Legislation Amendment Bill (bill 213-1, introduced to the House on 20 May 2014).
- Crown-Māori relationships and the Treaty of Waitangi beyond the historic claims process, with particular reference to the growth in influence of iwi governance structures.
- Public disengagement with political and democratic processes, including its effect on the legitimacy of decisions made by constitutional actors.

B. Testing full deployment of soft systems methodologies

As noted in VIII.2.3 above, it would be worthwhile testing whether full and orthodox deployment of soft systems methodologies, SSM in particular, would be likely to build consensus for, and the legitimacy of, system-based interventions for constitutional problems.

C. Identifying other system methodologies that might be useful in a constitutional policy context

In Chapter III, I identified a range of other system methodologies that might be appropriate for constitutional systems analysis. It would be useful to test those methodologies. My experience with SSD also suggests that it might be worth testing methodologies that are not immediately obvious. Further thought might need to be given to refining the methodology selection approach to ensure methodologies are not discounted inappropriately.

D. Exploring multi-methodology interventions for constitutional issues

Full deployment of system methodologies would also open up the possibility of developing multi-methodology interventions for constitutional issues. That is a potentially fruitful area for future research. Any future research would need to consider the issue of paradigm incommensurability, and whether it does - or should - stand in the way of multi-methodology in systems thinking.¹³⁵

E. Exploring critical systems methodologies for use in the constitutional policy context

Critical systems methodologies aim to neutralise the influence of power. In a policy setting, the person or institution with control over the problem structuring method can control how the problem is characterised, which has a material influence on the the range of possible solutions. That means we may need to view problem definitions as the key to power (Liebl, 2002). Accordingly, it is desirable to have an adequate theory of how problems are defined in terms of content and process, particularly concerning who is involved in the process of developing problem definitions. This might be a fruitful area of research for the constitutional policy context.

¹³⁵ The paradigm incommensurability question has been extensively considered (Robert L Flood & Romm, 1997; Jackson, 1990, 2003, p. 282, 2009b; Mingers, 1997a).

F. Developing and trialling an evaluation framework for constitutional systems thinking

To build public sector support for constitutional systems thinking, it may be helpful to develop a systematic way of evaluating constitutional systems thinking approaches. Midgley et al (2013) have developed a framework that looks to be a good place to start.

Conclusion

This thesis was born out of a sense that there must be a better way of doing constitutional policy and bringing about (or responding to) constitutional change. Having navigated two oceans of literature, thought deeply about the constitutional aspects of the Canterbury earthquake recovery legislation, and applied (haltingly at first, but with growing confidence) systems methodologies to it, I believe that systems thinking should be added to the constitutional policy toolkit. It provides another way of thinking about constitutional issues. It can bring the analytical rigour and, potentially, the speed needed for constitutional analysis in the public sector, with the added advantage of built-in participatory approaches. In short, I have found that the two disciplines of constitutional law and systems thinking share more territory than might have been imagined. That territory now lies before us, waiting to be mapped more comprehensively. The dragons have fled.

I have found through this research that systems thinking can be applied to the constitution without asserting, let alone proving, that the constitution is literally a system. Thinking about the constitution as a conceptual system has allowed me to formulate models to test against my perceptions of the real world constitution to see what I could learn about its operation. By requiring me to view the constitution holistically, the approach has expanded my definition of the constitution to include decision-makers and the things that influence their decisions, the constitutional values that shape our thinking about public power and how it should be exercised, and the informal ways our society holds decision-makers to account.

This thesis makes a compelling case for incorporating both constitutional norms and values in constitutional analysis, and has shown how doing that can explain otherwise counterintuitive manifestations of constitutional behaviour. In this way, I have had a glimpse of how the constitution “really works”. I see potential for such a perspective to greatly strengthen advice to governments on the constitutional consequences of policy changes. It may also help in framing

advice to governments on options for deliberate constitutional evolution. Systems analysis can help in predicting the likely effects of constitutional change, and likely public responses to that any change.

There are caveats to this conclusion. Constitutional systems thinking cannot deliver absolute certainty; it can provide a logical explanation for how a constitution might operate, but it is unlikely that the most sophisticated system model could account for all of the variables that might affect a constitution's real world operation. That is because the constitution operates in the real world, and because there are tradeoffs between the complexity and understandability of models.

The systems analysis in this thesis has a strongly subjective dimension. That cannot — and should not — be avoided. People are, inescapably, part of the constitutional system under analysis. Soft systems thinking is a rigorous, logic-based approach that accepts and works with subjectivity. That is why it can give us a better understanding about how a constitution works in the real world. In the end, I believe the honesty required by soft systems thinking will strengthen the credibility of constitutional policy analysis and the sophistication of constitutional policy debates.

Returning to the success criteria I set in Chapter I.4, this thesis shows that soft systems thinking can create insights into constitutional issues and their effects on the broader constitution. It lends support to the theory of constitutional realism by offering a system-based explanation for the behaviour recognised by that theory, which is influenced by mental models and feedback loops. Chapter VIII observes that, depending on the methodology used, systems analysis may well make it faster and easier to identify risks, surface misunderstandings, and identify commonly understood positions on constitutional issues. Systems analysis offers an insight into the constitution's self-correcting faculty, which provides an opportunity to both use and reinforce it.

Chapter I.4 sets out a longer-term success criterion, based on the public sector's use of constitutional systems thinking. Success or failure according to this criterion will not be known for some years. Chapter VIII identifies a number of challenges to uptake by the public sector as well as a number of matters that need further research in order to answer the questions unearthed during this research. I am optimistic that the answers to some of these questions will reduce the barriers to constitutional systems thinking in the years to come.

References

- Ackermann, F. (2012). Problem structuring methods “in the dock”: arguing the case for soft OR. *European Journal of Operational Research*, 219, 652–658.
- Ackoff, R., Addison, H. J., & Carey, A. (2010). *Systems thinking for curious managers*. Axminster: Triarchy Press.
- Allan, T. R. S. (1997). Parliamentary sovereignty: law, politics and revolution. *Law Quarterly Review*, 113, 443–452.
- Allan, T. R. S. (2003). Constitutional dialogue and the justification of judicial review. *Oxford Journal of Legal Studies*, 23(4), 563.
- Asquith, A. (2012). The role, scope and scale of local government in New Zealand: its prospective future. *Australian Journal of Public Administration*, 71(1), 76–84. <https://doi.org/10.1111/j.1467-8500.2012.00751.x>
- Baehler, K. (2001, December). *Intervention logic: a presentation to the Pathfinder Project*. Wellington, New Zealand. Retrieved from <http://fin.ssc.govt.nz/pathfinder/secure/default.asp.html>
- Banathy, B. H. (1988). Matching Design Methods to System Type. *Systems Research*, 5(1), 27–34.
- Baragwanath, D. (2008, June). *Magna Carta and the New Zealand constitution*. Address presented at the English Speaking Union. Retrieved from <https://www.courtsofnz.govt.nz/speechpapers/29-06-08.pdf>
- Bardsley, D. (2008, November 20). Rural language: No. 8 wire. In *Te Ara - the Encyclopedia of New Zealand*. Ministry for Culture and Heritage. Retrieved from <http://www.teara.govt.nz/en/photograph/18585/no-8-wire-sculpture>
- Barker, F. (2010). Political culture: patterns and issues. In *New Zealand Government and Politics* (Fifth, pp. 13–28). Melbourne: Oxford University Press.
- Beever, G., & Cain, G. (2010). Legislating for the legislature. *New Zealand Law Journal*, 45.
- Bell, D. (2012). Communitarianism. Stanford Encyclopedia of Philosophy. Retrieved June 14, 2012, from plato.stanford.edu/entries/communitarianism/
- Bennett, A. (2010, November 11). Emergency legislation bulldozes laws - Christchurch earthquake. *New Zealand Herald*. Auckland. Retrieved from http://www.nzherald.co.nz/christchurch-earthquake/news/article.cfm?c_id=1502981&objectid=10686810
- Bennett, Barnaby. (2015, April 19). Christchurch Convention Centre: The closer I look the less it makes sense – Making Christchurch. Retrieved from

<https://makingchristchurch.com/christchurch-convention-centre-the-closer-i-look-the-less-it-makes-sense-da0fc9d1cd4f#.sb8vqs1qk>

- Bennett, Bill. (2013, July 25). Christchurch rebuild not on track - Business - NZ Herald News. Retrieved November 26, 2014, from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10902426
- Bennett, P., Ackermann, F., Eden, C., & Williams, F. (1997). Analysing litigation and negotiation: using a combined methodology. In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 3). Chichester: John Wiley & Sons.
- Berger, B. L. (2007). Law's religion: rendering culture. *Osgoode Hall Law Journal*, 45(2), 277–314.
- Bingham, T. (2010). *The rule of law*. London: Penguin Books.
- Boardman, J., & Sauser, B. (2008). *Systems Thinking: coping with 21st century problems*. Boca Raton: CRC Press.
- Bogdanor, V. (2011). Imprisoned by a doctrine: the modern defence of parliamentary sovereignty. *Oxford Journal of Legal Studies*, 1–17. <https://doi.org/10.1093/ojls/gqr027>
- Boston, J. (2007). An unusual government: coalition politics and inter-party arrangements following the 2005 general election. In S. Levine & N. S. Roberts (Eds.), *The baubles of office: the New Zealand general election of 2005* (pp. 389–418). Wellington: Victoria University Press.
- Boston, J., & Bullock, D. (2009). Experiments in Executive Governments under MMP in New Zealand: Contrasting Approaches to Multi-Party Governance. *New Zealand Journal of Public and International Law*, 7, 39–75.
- Bowers, T. D. (2011). Towards a framework for multiparadigm multimethodologies. *Systems Research and Behavioral Science*, 28, 537–552. <https://doi.org/10.1002/sres.1120>
- Bradley, S. (2013). *Design fundamentals: elements, attributes, and principles*. Boulder, Colorado: Vanseo Design.
- Bridges, J., & Downs, D. (2000). *No. 8 Wire: The Best of Kiwi Ingenuity*. Auckland: Hodder Moa Beckett.
- Brocklesby, J. (2016). The what, the why and the how of behavioural operational research - an invitation to potential sceptics. *European Journal of Operational Research*, 249, 796–805.
- Bromell, D. (2009). Diversity and democracy. *Policy Quarterly*, 5(4), 29–35.
- Brookie, R. (2012). *Governing the Recovery from the Canterbury Earthquakes 2010-11: the Debate over Institutional Design* (Institute for Governance and Policy Studies Working Paper No. 12/01) (p. 46). Wellington: School

- of Government, Victoria University of Wellington. Retrieved from <http://igps.victoria.ac.nz/publications/publications/show/337>
- Buchanan, P. (2009, August 11). Are We There Yet? A conceptual framework for evaluating democracy in Aotearoa. Retrieved June 26, 2016, from <http://www.scoop.co.nz/stories/print.html?path=HL0908/S00080.htm>
- Cabinet. (2009). *Local government transparency, accountability and fiscal management: improving transparency and accountability (paper 1)* (No. CAB Min (09) 38/16). Wellington, New Zealand: New Zealand Government. Retrieved from [https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaper1MinuteOct09/\\$file/TAFMCabinetPaper1MinuteOct09.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaper1MinuteOct09/$file/TAFMCabinetPaper1MinuteOct09.pdf)
- Cabinet. (2011a). *Canterbury earthquake recovery: proposed governance arrangements (paper 1)* (Cabinet minute No. CAB Min (11) 13/9). Wellington, New Zealand: New Zealand Government.
- Cabinet. (2011b). *Canterbury earthquake recovery: proposed powers (paper 2)* (Cabinet minute No. CAB Min (11) 13/10). Wellington, New Zealand: New Zealand Government.
- Cabinet. (2012). *Christchurch CBD recovery* (Cabinet minute No. Amended minute CAB Min (12) 11/20). Wellington, New Zealand: New Zealand Government.
- Cabinet. (2013). *Next steps for responding to Christchurch City Council consenting issues* (Cabinet minute No. CAB Min (13) 23/9). Wellington, New Zealand: New Zealand Government. Retrieved from [http://www.dia.govt.nz/diawebsite.nsf/Files/CAB-Min-\(13\)-23/\\$file/CAB-Min-\(13\)-23.9.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/CAB-Min-(13)-23/$file/CAB-Min-(13)-23.9.pdf)
- Cabinet Economic Growth and Infrastructure Committee. (2011). *Adoption of the Regulatory Responsibility Bill Drafted by the Regulatory Responsibility Taskforce* (No. EGI Min (11) 1/100). Wellington, New Zealand: New Zealand Government. Retrieved from <http://www.treasury.govt.nz/regulation/informationreleases/pdfs/egimin-11-1-10.pdf>
- Cabinet Office. (2008). Cabinet Manual. Cabinet Office, Department of the Prime Minister and Cabinet. Retrieved from <http://www.cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf>
- Cabinet Office. (2014). *Government Decisions and Actions in the Pre-election Period* (Cabinet office circular No. CO (14) 2). Wellington: Cabinet Office.
- Cairns, L. (2014a, July 23). Council struggling to supply trained inspectors for rebuild. *Stuff.co.nz*. New Zealand. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/10297930/Council-struggling-to-supply-trained-inspectors-for-rebuild>
- Cairns, L. (2014b, November 26). Christchurch council struggling with rebuild. Retrieved April 4, 2016, from <http://www.stuff.co.nz/the->

press/business/the-rebuild/63537374/christchurch-council-struggling-with-rebuild

- Cairns, L. (2016, January 14). Developers get help to cut through Christchurch's red tape. Retrieved April 4, 2016, from <http://www.stuff.co.nz/the-press/business/the-rebuild/75801585/Developers-get-help-to-cut-through-Christchurchs-red-tape>
- Cairns, L., & Young, R. (2013, July 1). Council set to lose consenting power. *The Press*. Christchurch, New Zealand. Retrieved from <http://www.stuff.co.nz/the-press/news/8862238/Council-set-to-lose-consenting-power>
- Canterbury Earthquake Recovery Authority. (2015a). *Canterbury wellbeing index: June 2015*. Christchurch: Canterbury Earthquake Recovery Authority.
- Canterbury Earthquake Recovery Authority. (2015b). *Purchase offer supporting information for vacant land, insured commercial properties and uninsured improved properties in the residential red zone*. Christchurch, New Zealand: Canterbury Earthquake Recovery Authority.
- Canterbury Earthquake Recovery Review Panel. (2011a). *Report and recommendation of the Review Panel: Canterbury Earthquake (Local Government Act 2002) Order 2011*. Christchurch, New Zealand: Canterbury Earthquake Recovery Review Panel. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Canterbury Earthquake Recovery Review Panel. (2011b). *Report and recommendation of the Review Panel: Canterbury Earthquake (Resource Management Act - Electricity Network Recovery) Order 2011 and Canterbury Earthquake (Reserves Act - Electricity Network Recovery) Order 2011*. Christchurch, New Zealand: Canterbury Earthquake Recovery Review Panel. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Canterbury Earthquake Recovery Review Panel. (2011c). *Report and recommendation of the Review Panel: Canterbury Earthquake (Tax Administration Act) Order (No 2) 2011*. Christchurch: Canterbury Earthquake Recovery Review Panel.
- Canterbury Earthquake Recovery Review Panel. (2012). *Report and recommendation of the Review Panel: Canterbury Earthquake (Social Security Act) Order (No 2) 2010 Amendment Order 2012*. Christchurch: Canterbury Earthquake Recovery Review Panel.
- Castalia Strategic Advisors. (2013). *Regulatory Impact Analysis Evaluation 2013*. Castalia. Retrieved from <http://www.treasury.govt.nz/regulation/informationreleases/pdfs/ria-review-jun13.pdf>
- Cavana, R. Y., Boyd, D. M., & Taylor, R. J. (2007). A systems thinking study of retention and recruitment issues for the New Zealand army electronic

- technician trade group. *Systems Research and Behavioral Science*, 24, 201–216. <https://doi.org/10.1002/sres.820>
- Cavana, R. Y., & Clifford, L. V. (1999). *The matrix, the spiderweb and the influence diagram: developments in systems thinking at the New Zealand Customs Service* (Working Paper No. 3/99). Wellington, New Zealand: Graduate School of Business and Government Management, Victoria University of Wellington.
- Cavana, R. Y., & Clifford, L. V. (2006). Demonstrating the utility of system dynamics for public policy analysis in New Zealand: the case of excise tax policy on tobacco. *System Dynamics Review*, 22(4), 324–348. <https://doi.org/10-1002/sdr.347>
- Cavana, R. Y., Davies, P. K., Robson, R. M., & Wilson, K. J. (1999). Different world perspectives of clinicians and policy managers highlighted through a qualitative system dynamics analysis of quality in health services. *System Dynamics Review*, 15(3), 331–340.
- Cavana, R. Y., & Hughes, R. D. (1995). Strategic modelling for competitive advantage. In *Proceedings of the 1995 International System Dynamics Conference* (Vol. II, pp. 408–417). Gakushin University, Tokyo, Japan.
- Cavana, R. Y., & Maani, K. E. (2000). A methodological framework for integrating systems thinking and system dynamics. In *Sustainability in the third millennium*. Bergen, Norway: System Dynamics society. Retrieved from www.systemdynamics.org/conferences/2000/PDFs/cavana41.pdf
- Cavana, R. Y., & Mares, E. D. (2004). Integrating critical thinking and systems thinking: from premises to causal loops. *System Dynamics Review*, 20(3), 223–235.
- Checkland, P. (1981). *Systems thinking, systems practice*. Chichester: John Wiley & Sons.
- Checkland, P. (1985). From optimising to learning: a development of systems thinking for the 1990s. *Journal of the Operational Research Society*, 36(9), 757–767.
- Checkland, P. (2000). Soft Systems Methodology: a thirty year retrospective. *Systems Research and Behavioral Science*, 17, S11–S58.
- Checkland, P. (2012). Four conditions for serious systems thinking and action. *Systems Research and Behavioral Science*, 29, 465–469. <https://doi.org/10.1002/sres.2158>
- Checkland, P., & Scholes, J. (1990). *Soft Systems Methodology in action*. Chichester: John Wiley & Sons.
- Chen, M. (2015). *Superdiversity stocktake: implications for business, government and New Zealand*. New Zealand: Superdiversity Centre for Law, Policy and Business. Retrieved from www.superdiversity.org

- Cheyne, C. (2008). Empowerment of local government in New Zealand: a new model for contemporary local-central relations? *Commonwealth Journal of Local Governance*, (1), 30–48.
- Christ Church Cathedral: why all the fuss? (2015, December 23). *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/75412698/Christ-Church-Cathedral-why-all-the-fuss>
- Christchurch Earthquake Appeal. (2011, August 12). Trust funds project to kick start retail - christchurchappealtrust.org.nz. Retrieved September 17, 2016, from <http://christchurchappealtrust.org.nz/Trust-funds-project-to-kick-start-retail>
- Cohen, D. (2014, January 19). Christ Church Cathedral a flashpoint for quake-hit New Zealand town. *Christian Science Monitor*. Retrieved from [CSMonitor.com](http://www.csmonitor.com)
- Commerce Committee. (2008). *Regulatory Responsibility Bill (71-1): report of the Commerce Committee*. Wellington, New Zealand: New Zealand Parliament.
- Commerce Committee. (2015). *Regulatory Standards Bill: report of the Commerce Committee*. Wellington, New Zealand: New Zealand Parliament. Retrieved from https://www.parliament.nz/en/pb/sc/reports/document/51DBSCH_SCR62893_1/regulatory-standards-bill-277-1
- Community Forum. (2014a). *Meeting notes for the meeting of the CERA Community Forum 2 October 2014*. Christchurch, New Zealand. Retrieved from <http://cera.govt.nz/community-forum/notices>
- Community Forum. (2014b). *Meeting notes for the meeting of the CERA Community Forum 21 August 2014*. Christchurch, New Zealand: CERA Community Forum. Retrieved from <http://cera.govt.nz/community-forum/notices>
- Constitutional Advisory Panel. (2013). *New Zealand's constitution: a report on a conversation*. Wellington, New Zealand: Constitutional Advisory Panel.
- Constitutional Arrangements Committee. (2005). *Inquiry to review New Zealand's existing constitutional arrangements*. Wellington, New Zealand: New Zealand Parliament.
- Conway, G. (2014, February 18). Dalziel's speech raises hackles. *The Press*. Christchurch. Retrieved from www.stuff.co.nz/the-press/9732653/Dalziels-speech-raises-hackles
- Conway, G., & Cairns, L. (2014, April 16). How is the new council getting on? | [Stuff.co.nz](http://www.stuff.co.nz). Retrieved April 4, 2016, from <http://www.stuff.co.nz/the-press/news/9946342/How-is-the-new-council-getting-on>
- Craig, P. (2003). Constitutional foundations, the rule of law and supremacy. *Public Law*, (Spring), 92–111.

- Craig, P. (2011). Political constitutionalism and the judicial role: a response. *International Journal of Constitutional Law*, 9(1), 112–131.
- Cullen, M. (2004). Parliamentary sovereignty and the courts. *New Zealand Law Journal*, 243.
- Cullen, M. (2005). Parliament: supremacy over fundamental norms? *New Zealand Journal of Public and International Law*, 3, 1.
- Dalziel, L. (2011). Dalziel: Turning Disaster into Opportunity | Scoop News. Presented at the Australian and New Zealand Institute of Insurance and Finance Conference, Auckland. Retrieved from <http://www.scoop.co.nz/stories/PA1111/S00521/dalziel-turningdisaster-into-opportunity.htm>
- Dalziel, L. (2014, February). *The state of the city - Mayor Lianne Dalziel addresses the city of Christchurch*. Christchurch. Retrieved from www.lianne.co.nz/speeches/the-state-of-the-city-mayor-lianne-dalziel-addresses-the-city-of-christchurch
- Dann, J. (2014a, July 22). Those Left Standing: The Town Hall. Retrieved from <http://rebuildingchristchurch.wordpress.com/2014/07/22/those-left-standing-the-town-hall/>
- Dann, J. (2014b, August 12). Anything but conventional | Rebuilding Christchurch [Blog]. Retrieved November 26, 2014, from <http://rebuildingchristchurch.wordpress.com/2014/08/12/anything-but-conventional/>
- Dann, J. (2014c, September 2). An admission of failure; too little, too late | Rebuilding Christchurch. Retrieved November 26, 2014, from <http://rebuildingchristchurch.wordpress.com/2014/09/02/an-admission-of-failure-too-little-too-late/>
- Davies, J., Howell, B., & Mabin, V. (2008). Telecommunications regulation, regulatory behavior and its impact - a systems view. *Communications & Strategies*, 70(2nd quarter), 145–167.
- Davies, J., & Mabin, V. (2001). Framing: a meta-framework for the use of mixed-mode modelling. In M. G. Nicholls, S. Clarke, & B. Lehaney (Eds.), *Mixed-mode modelling: mixing methodologies for organisational intervention* (p. chapter 3). Dordrecht: Kluwer Academic Publishers.
- Davies, J., Mabin, V. J., & Cox, J. F. (2004). The theory of constraints and systems dynamics: a suitable case for multi-methodology (p. 26). Presented at the System Dynamics Society, Keble College, Oxford, England: System Dynamics society. Retrieved from http://systemdynamics.org/conferences/2004/SDS_2004/PAPERS/229DAVIE.pdf
- Day, J.-L. (2012, November 12). Wynn Williams - Articles | Cathedral Decision 15 November 2012 - What it really means | Jeremy Bell-Connell | Wynn Williams. Retrieved November 26, 2014, from

<http://www.wynnwilliams.co.nz/Publications/Articles/Cathedral-Decision-15-November-2012-What-it-Really>

- De Boni, D. (2013, December 6). Empty space at a city's heart. *New Zealand Herald*. Auckland.
- De Smith, S. A., & Brazier, R. (1998). *Constitutional and Administrative Law*. London: Penguin Books.
- Department of Building and Housing. (2011, August 23). Canterbury Earthquake (Building Act) Order 2011. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Department of Internal Affairs. (2011, June 10). Canterbury Earthquake (Local Government Act 2002) Order 2011 and Canterbury Earthquake (Energy Companies Act) Order 2011. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Department of Internal Affairs. (2012). *Better local government* (Regulatory Impact Statement). Wellington, New Zealand: Department of Internal Affairs. Retrieved from [https://www.dia.govt.nz/pubforms.nsf/URL/RISBetterLocalGovernment-signed.pdf/\\$file/RISBetterLocalGovernment-signed.pdf](https://www.dia.govt.nz/pubforms.nsf/URL/RISBetterLocalGovernment-signed.pdf/$file/RISBetterLocalGovernment-signed.pdf)
- Department of Internal Affairs. (2013, February 28). Canterbury Earthquake (Local Government Act 2002 - Christchurch City three year plan) Order 2013. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Department of Internal Affairs. (n.d.). *Summary of the 2012 amendments to the legislation* (Web page). Wellington, New Zealand: Department of Internal Affairs.
- Department of the Prime Minister and Cabinet. (n.d.). *Untitled*. Wellington: New Zealand Government.
- Dicey, A. V. (1915). *Introduction to the study of the law of the constitution* (Eighth). London: MacMillan & Co, Ltd.
- Eden, C., Ackermann, F., Richardson, G. P., Andersen, D. F., & Finn, C. B. (2009). Integrating modes of policy analysis and strategic management practice: requisite elements and dilemmas. *Journal of the Operational Research Society*, 60(1), 2–13.
- Ekins, R. (2003). Judicial supremacy and the rule of law. *Law Quarterly Review*, 119, 127.
- Ekins, R. (2010a). Reckless lawmaking. *New Zealand Law Journal*, 127.
- Ekins, R. (2010b). Regulatory responsibility? *New Zealand Law Journal*, 25.
- Ekins, R. (2010c). The Regulatory Responsibility Bill and the constitution. *Policy Quarterly*, 6(2), 9–13.
- Ekins, R. (2011). The value of representative democracy. In *We, the People(s): Participation in Governance* (pp. 29–49). Wellington, New Zealand: Victoria University Press.

- Electoral Commission. (2012). *Report of the Electoral Commission on the review of the MMP voting system*. Wellington: Electoral Commission.
- Eleftheriadis, P. (2008). *The constitution as higher law* (Working Paper No. 04/2008). Oxford: University of Oxford. Retrieved from <http://ssrn.com/abstract=1090437>
- Eleftheriadis, P. (2010). Law and sovereignty. *Law & Philosophy*, 29(5), 535–569.
- Elias, S. (2003, March). *Another spin on the merry-go-round*. Presented at the A series on sovereignty in the 21st century, University of Melbourne. Retrieved from <https://www.courtsofnz.govt.nz/speechpapers/Speech19-03-2003.pdf>
- Espiner, G., & Brownlee, G. (2016, February 22). Five years on, how is Christchurch faring? | Morning Report, 7:10 am on 22 February 2016 | Radio New Zealand [Webcast]. Retrieved from <http://www.radionz.co.nz/national/programmes/morningreport/audio/201790223/five-years-on,-how-is-christchurch-faring>
- Finance and Expenditure Committee. (2011). *2011/12 Estimates for Vote Canterbury Earthquake Recovery*. Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_EST_10722_1/201112-estimates-vote-canterbury-earthquake-recovery
- Finance and Expenditure Committee. (2012). *2010/11 financial review of the Canterbury Earthquake Recovery Authority and the Earthquake Commission*. New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR5412_1/201011-financial-review-of-the-canterbury-earthquake-recovery
- Finance and Expenditure Committee. (2013a). *2012/13 Estimates for Vote Canterbury Earthquake Recovery: report of the Finance and Expenditure Committee*. Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_EST_11294_1/201213-estimates-for-vote-canterbury-earthquake-recovery
- Finance and Expenditure Committee. (2013b). *2013/14 Estimates for Vote Canterbury Earthquake Recovery: report of the Finance and Expenditure Committee*. Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_EST_12147_1/201314-estimates-for-vote-canterbury-earthquake-recovery
- Finance and Expenditure Committee. (2014a). *2012/13 financial review of the Canterbury Earthquake Recovery Authority, and of the non-departmental appropriations for Vote Canterbury Earthquake Recovery*. Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/documents/reports/50DBSCH_SCR5412_1/201011-financial-review-of-the-canterbury-earthquake-recovery

nz/pb/sc/documents/reports/50DBSCH_SCR6059_1/201213-financial-review-of-canterbury-earthquake-recovery

- Finance and Expenditure Committee. (2014b). *2014/15 estimates for Vote Canterbury Earthquake Recovery: report of the Finance and Expenditure Committee*. Wellington, New Zealand: New Zealand Parliament.
- Finnis, J. (1980). *Natural law and natural rights*.
- Flood, R L, & Jackson, M. C. (1991). *Creative problem solving: total systems intervention*. Chichester: John Wiley & Sons.
- Flood, Robert L, & Keys, P. (1989). Methodology choice, complexity texture, self-reflection. *Cybernetics and Systems: An International Journal*, 20(5), 401–415. Retrieved from <http://dx.doi.org/10.1080/01969728908902215>
- Flood, Robert L, & Romm, N. M. A. (1996). Diversity management: theory in action. In R L Flood & N. R. A. Romm (Eds.), *Critical Systems Thinking: current research and practice* (pp. 81–91). New York: Plenum Press.
- Flood, Robert L, & Romm, N. R. A. (1997). From metatheory to “multimethodology.” In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 11). Chichester: John Wiley & Sons.
- Forbes, A. (2011). The rule of law and New Zealand lawyers. *New Zealand Law Journal*, 42.
- Frankenberg, G. (2010). Constitutional transfer: The IKEA theory revisited. *International Journal of Constitutional Law*, 8(3), 563–579.
- Gall, M. (2012). A seismic shift: public participation in the legislative response to the Canterbury earthquakes. *Canterbury Law Review*, 18, 232. Retrieved from <http://www.nzlii.org/nz/journals/CanterLawRw/2012/12.pdf>
- Gates, C. (2015, August 30). Council designer regrets Share an Idea didn’t go further | Stuff.co.nz. *The Press*. Retrieved from <http://www.stuff.co.nz/the-press/71573351/Council-designer-regrets-Share-an-Idea-didn-t-go-further>
- Gates, C. (2016, July 7). Five years after quake damage, Govt announces “working party” for cathedral | Stuff.co.nz. Retrieved August 31, 2016, from <http://www.stuff.co.nz/the-press/business/the-rebuild/81844459/seismic-measuring-work-at-christchurch-cathedral-on-thursday>
- Geddis, A. (2007). *Electoral law in New Zealand: practice and policy*. Wellington: LexisNexis.
- Geddis, A. (2010a, September 28). An open letter to New Zealand’s people and their Parliament. Retrieved from www.pundit.co.nz
- Geddis, A. (2010b, December 1). Was I wrong about the CERRA?

- Geddis, A. (2011a, April 15). Some praise for Parliament, rare though that may be | Pundit. Retrieved from <http://www.pundit.co.nz/content/some-praise-for-parliament-rare-though-that-may-be>
- Geddis, A. (2011b, April 15). Someone give that man a latte.
- Geddis, A. (2015, February 19). Further on “the Geddis solution” ... | Pundit. Retrieved February 19, 2015, from <http://www.pundit.co.nz/content/further-on-the-geddis-solution>
- Geddis, A. (2016). Parliamentary government in New Zealand: Lines of continuity and moments of change. *International Journal of Constitutional Law*, 14(1), 99–118.
- Geddis, A., & Fenton, B. (2008). "Which is to be master? - rights-friendly statutory interpretation in New Zealand and the United Kingdom. *Arizona Journal of International & Comparative Law*, 25(3), 733–778.
- Gee, G., & Webber, G. (2010). What is a political constitution? *Oxford Journal of Legal Studies*, 30(2), 273–299.
- Gewirtzman, D. N. (2009). Our founding feelings: commitment, and imagination in constitutional culture. *University of Richmond Law Review*, 43, 623–683. Retrieved from <http://ssrn.com/abstract+1353337>
- Ghaffarzadegan, N., Lyneis, J., & Richardson, G. P. (2011). How small system dynamics models can help the public policy process. *System Dynamics Review*, 27(1), 22–44.
- Gibson, J. L., Caldeira, G. A., & Spence, L. K. (2005). Why do people accept public policies they oppose? Testing legitimacy theory with a survey-based experiment. *Political Research Quarterly*, 58(2), 187–201. Retrieved from www.jstor.org/stable/3595622
- Goldsworthy, J. (1999). *The sovereignty of Parliament, history and philosophy*. Oxford: Clarendon Press.
- Goldsworthy, J. (2005). Is parliament sovereign? Recent challenges to the doctrine of parliamentary sovereignty. *New Zealand Journal of Public and International Law*, 3, 7.
- Goldsworthy, J. (2010). *Parliamentary sovereignty: contemporary debates*. Cambridge: Cambridge University Press.
- Government of New Zealand. (2011). *New Zealand Gazette* (No. 14) (pp. 271–321). Wellington, New Zealand: Department of Internal Affairs.
- Graham, R. (2016, May 2). ChristChurch Cathedral’s future remains uncertain | Radio New Zealand News. Retrieved August 31, 2016, from <http://www.radionz.co.nz/news/regional/302797/christchurch-cathedral's-future-remains-uncertain>
- Griffith, J. A. G. (2000). The brave new world of Sir John Laws. *Modern Law Review*, 63, 159.

- Griffith, J. A. G. (2001). The common law and the political constitution. *Law Quarterly Review*, 117, 42.
- Hackett Fischer, D. (2013). Constitutional traditions and values in open societies: a comparative inquiry. Presented at the Unearthing New Zealand's constitutional traditions, Wellington: New Zealand Centre for Public Law.
- Hansard. (2010a). *Canterbury Earthquake Response and Recovery Bill - Procedure, First Reading, Second Reading* (New Zealand Parliamentary Debates No. vol 666) (p. 13899). New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL10334_1/canterbury-earthquake-response-and-recovery-bill
- Hansard. (2010b). *Canterbury Earthquake Response and Recovery Bill - Second Reading, In Committee, Third Reading* (New Zealand Parliamentary Debates No. vol 666) (p. 13934). New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL10334_1/canterbury-earthquake-response-and-recovery-bill
- Hansard. (2011a). *Canterbury Earthquake Recovery Bill - First Reading* (New Zealand Parliamentary Debates No. vol 671) (p. 17898). Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL10600_1/canterbury-earthquake-recovery-bill
- Hansard. (2011b). *Canterbury Earthquake Recovery Bill - In Committee, Third Reading* (New Zealand Parliamentary Debates No. Vol 671) (p. 18198). Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL10600_1/canterbury-earthquake-recovery-bill
- Hansard. (2011c). *Canterbury Earthquake Recovery Bill - Second Reading, In Committee* (New Zealand Parliamentary Debates No. vol 671) (p. 18129). Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL10600_1/canterbury-earthquake-recovery-bill
- Hart, H. L. A. (2012). *The concept of law* (Third). Oxford: Oxford University Press.
- Harvie, W. (2014, November 19). Cera rarely sought input on projects | Stuff.co.nz [newspaper]. Retrieved November 25, 2014, from <http://www.stuff.co.nz/the-press/business/the-rebuild/63326316/Cera-rarely-sought-input-on-projects>
- Hayward, B. (2013). Rethinking resilience: reflections on the earthquakes in Christchurch, New Zealand, 2010 and 2011. *Ecology and Society*, 18(4),

37. Retrieved from <http://www.ecologyandsociety.org/vol18/iss4/art37/>

Hayward, J. (2010). The Treaty and the Constitution. In R. Miller (Ed.), *New Zealand Government and Politics* (5th ed.). Melbourne: Oxford University Press.

Hewison, G. (2000). A power of general competence - should it be granted to local government in New Zealand? *Auckland University Law Review*, 9, 498–527.

Hon Peter Salmon (Chair), Dame Margaret Bazley, & David Shand. (2009). *Royal Commission on Auckland Governance volume 1* (Royal Commission of Inquiry). Auckland: Royal Commission on Auckland Governance. Retrieved from [http://ndhadeliver.natlib.govt.nz/ArcAggregator//arcView/resource/IE1055203//http://www.royalcommission.govt.nz/rccms.nsf/CONTENTPAGES/0C090EEC64441E90CC25758600069806/\\$FILE/AGV1.pdf?open](http://ndhadeliver.natlib.govt.nz/ArcAggregator//arcView/resource/IE1055203//http://www.royalcommission.govt.nz/rccms.nsf/CONTENTPAGES/0C090EEC64441E90CC25758600069806/$FILE/AGV1.pdf?open)

Hoverstadt, P., & Bowling, D. (2002). Modelling organisations using the viable system model (p. 14). Presented at the Systems Engineering Workshop, Royal Academy of Engineering. Retrieved from www.fractal-consulting.com

Huang, C.-C. (2010). Regulatory responsibility and the law. *New Zealand Law Journal*, 91.

Hunter, K. L. (2009). American constitutionalism an impediment to the pursuit of fairness? Lessons from New Zealand political culture. *Policy Quarterly*, 5(3), 44.

Hutching, C. (2015a, April 22). Brownlee throws Quake Outcasts order to court of public opinion). *National Business Review*. Auckland. Retrieved from www.nbr.co.nz

Hutching, C. (2015b, June 22). Brownlee admits convention centre doubts as CERA's relevance fades. *National Business Review*.

Jackson, M. C. (1990). Beyond a System of System Methodologies. *Journal of the Operational Research Society*, 41(8), 657–668. Retrieved from www.jstor.org

Jackson, M. C. (1997). Pluralism in systems thinking and practice. In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 13). Chichester: John Wiley & Sons.

Jackson, M. C. (2003). *Systems thinking: creative holism for managers*. Chichester: John Wiley & Sons.

Jackson, M. C. (2009a). Fifty years of systems thinking for management. *Journal of the Operational Research Society*, 60(S1), S24–S32. Retrieved from www.palgrave-journals.com/jors/

- Jackson, M. C. (2009b). Managing the tensions created by mixing methods: comments for Eden et al from a critical systems perspective. *Journal of the Operational Research Society*, 60(9), 1297–1299.
<https://doi.org/10/1057/jors>
- Jackson, M. C., & Keys, P. (1984). Towards a System of Systems Methodologies. *Journal of the Operational Research Society*, 35(6), 473–486.
- Joseph, P. (2000). The legal history and framework of the constitution. In C. James (Ed.), *Building the constitution*. Wellington, New Zealand: Institute of Policy Studies, Victoria University of Wellington.
- Joseph, P. (2004). Parliament, the Courts, and the Collaborative Exercise. *King's College Law Journal*, 15, 321.
- Joseph, P. (2009). MMP and the Constitution. *New Zealand Journal of Public and International Law*, 7, 111–134.
- Joseph, P. A. (2007). *Constitutional and administrative law in New Zealand* (3rd ed.). Wellington, New Zealand: Brookers.
- Joseph, P. A. (2010). The Future of Electoral Law. Presented at the Reconstituting the Constitution, Wellington.
- Justice and Electoral Committee. (2013). *Inquiry into the 2011 general election* (No. I.7A). Wellington, New Zealand: New Zealand Parliament. Retrieved from https://www.parliament.nz/en/pb/sc/reports/document/50DBSCH_SCR5837_1/inquiry-into-the-2011-general-election-i7a
- Justice and Electoral Committee. (2016). *Inquiry into the 2014 general election* (No. I.7A). Wellington, New Zealand: New Zealand Parliament. Retrieved from https://www.parliament.nz/en/pb/sc/reports/document/51DBSCH_SCR68922_1/inquiry-into-the-2014-general-election-i7a
- Kelly, H. (2011, April 12). Helen Kelly: The Hobbit Dispute | Scoop News. Retrieved July 6, 2016, from <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>
- Kelsey, J. (2010). “Regulatory Responsibility”: Embedded Neoliberalism and its Contradictions. *Policy Quarterly*, 6(2), 36–41.
- Key, J. (2013, September 10). Making Progress: The Christchurch Rebuild | Scoop News. Retrieved November 26, 2014, from <http://www.scoop.co.nz/stories/PA1309/S00180/making-progress-the-christchurch-rebuild.htm>
- Keys, P. (1988). A methodology for methodology choice. *Systems Research*, 5(1), 65–76.
- Kim, D. A., & Anderson, V. (2007). *System archetype basics: from story to structure*. Acton, MA, USA: Leverage Networks Inc.

- Knight, C. J. S. (2009). Bi-polar sovereignty restated. *Cambridge Law Journal*, 68(2), 361–387.
- Knight, D. R. (2010). Shaking our constitutional foundations. *Public Sector*, 24.
- Knight, D. R. (2011, September 20). “Elephants and the Law” by Dean Knight: Covert video surveillance and the (c)overt erosion of the Rule of Law. Retrieved February 19, 2015, from <http://www.laws179.co.nz/2011/09/covert-video-surveillance-and-covert.html>
- Knight, D. R., & Charters, C. (2011). Local democracy and consideration of community views. In *We, the People(s): Participation in Governance*. Wellington, New Zealand: Victoria University Press.
- Lakin, S. (2008). Debunking the idea of parliamentary sovereignty: the controlling factor of legality in the British constitution. *Oxford Journal of Legal Studies*, 28(4), 709–734.
- Law Commission. (2001). *Maori Custom and Values in New Zealand Law*. Wellington: Law Commission.
- Law, T. (2014, November 22). \$250m short of target. Retrieved May 25, 2016, from <http://www.stuff.co.nz/national/63437145/rebuild-spend-250m-short--of-target>
- Laws, J. (1996). The constitution, morals and rights. *Public Law*, (Win), 622–635.
- Legislation Advisory Committee. (2014). *Guidelines on the content and process of legislation*. Wellington: Legislation Advisory Committee. Retrieved from <http://www.ldac.org.nz/guidelines/lac-revised-guidelines/>
- Leonard, A., & Beer, S. (1994). *The systems perspective: methods and models for the future* (Futures Research Methodology). AC/UNU Millennium Project.
- Levy, D. (2011, September 22). Labour won't support surveillance “fixit” law. *Stuff.co.nz*. New Zealand. Retrieved from <http://www.stuff.co.nz/national/politics/5666270/Labour-won-t-support-surveillance-fixit-law>
- Liebl, F. (2002). The anatomy of complex societal problems and its implications for OR. *Journal of the Operational Research Society*, 53, 161–184.
- Local Government and Environment Committee. (2011). *Hearing of evidence on the Canterbury Earthquake recovery Bill: Report of the Local Government and Environment Committee*. Wellington, New Zealand: New Zealand Parliament. Retrieved from https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5107_1/hearing-of-evidence-on-the-canterbury-earthquake-recovery
- Loughlin, M. (2000). *Swords and Scales: an examination of the relationship of law and politics*. Oxford: Hart.
- Maani, K. E., & Cavana, R. Y. (2007). *Systems Thinking, System Dynamics: Managing Change*. Auckland: Pearson.

- Macfie, R. (2016, February 27). Shakedown of a shakeup - New Zealand Listener. *The Listener*. Retrieved from <http://www.listener.co.nz/current-affairs/social-issues-current-affairs/shakedown-of-a-shakeup/#print>
- Malone, R. (2009). "Who's the boss?": Executive-Legislature relations in New Zealand under MMP. *New Zealand Journal of Public and International Law*, 7, 1–20.
- Manhire, T. (2011, September 20). National's retro-law on surveillance lambasted by pundits - Commentary - The Internaut - The Listener. Retrieved February 19, 2015, from <http://www.listener.co.nz/commentary/urewera-law-video-evidence-surveillance-supreme-court/>
- Mazzone, J. (2005). The Creation of a Constitutional Culture. *Tulsa Law Review*, 40, 671.
- McCrone, J. (2015, July 11). How much is the Government really spending to fix Christchurch? | Stuff.co.nz. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/70084887/how-much-is-the-government-really-spending-to-fix-christchurch>
- McGee, D. (2006). Constitutional Conventions. Presented at the In the Public Interest Conference 2006: a tribute to Emeritus Professor Keith Jackson.
- McKinlay, P. (1998). *Local government reform: what was ordered and what has been delivered (part 2)* (Monograph No. 7). Wellington, New Zealand: Local Government New Zealand. Retrieved from www.lgnz.co.nz/library/files/store_015/local-government-reform.pdf
- McKinlay, P. (2010). New directions in New Zealand local government. *Commonwealth Journal of Local Governance*, (March). Retrieved from <http://epress.lib.uts.edu.au/ojs/index.php/cjlg>
- McLean, I., Oughton, D., Ellis, S., Wakelin, B., & Rubin, C. B. (2012). *Review of the Civil Defence Emergency Management Response to the 22 February Christchurch Earthquake*. Wellington, New Zealand. Retrieved from <http://www.civildefence.govt.nz/resources/review-of-the-civil-defence-emergency-management-response-to-the-22-february-christchurch-earthquake/>
- McLeay, E., Geiringer, C., & Higbee, P. (2012). "Urgent" legislation in the New Zealand House of Representatives and the bypassing of select committee scrutiny. *Policy Quarterly*, 8(2), 12–22.
- McSoriley, J. (2010). *Canterbury Earthquake Response and Recovery Bill 2010* (No. Digest No. 1805). Wellington: Parliamentary Library. Retrieved from <https://www.parliament.nz/resource/en-NZ/49PLLawBD18051/3d5ee225c1adf5aef79c2a7da23d2d331a1b3fa6>
- Meadows, D. H. (2009). *Thinking in systems: a primer*. London: Earthscan.
- Meier, C. (2015a, April 22). "Ludicrous" red tape delaying Christchurch rebuild | Stuff.co.nz. Retrieved April 4, 2016, from <http://www.stuff.co.nz/the->

press/business/the-rebuild/67961922/Ludicrous-red-tape-delaying-Christchurch-rebuild

- Meier, C. (2015b, April 23). Re:Start mall in Christchurch may stay another 10 years | Stuff.co.nz [News]. Retrieved September 17, 2016, from <http://www.stuff.co.nz/business/small-business/67962367/restart-mall-in-christchurch-may-stay-another-10-years>
- Meier, C. (2015c, July 3). Christchurch's convention centre could be scaled down | Stuff.co.nz. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/69914857/christchurchs-convention-centre-could-be-scaled-down>
- Meier, C. (2015d, July 10). Five reasons to have your say on Christchurch's future | Stuff.co.nz. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/opinion/70091949/five-reasons-to-have-your-say-on-christchurchs-future>
- Middleton, D., & Westlake, R. (2011). *Independent Review of the Response to the Canterbury Earthquake, 4 September 2010*. Wellington, New Zealand: Ministry of Civil Defence and Emergency Management. Retrieved from <http://canterbury.royalcommission.govt.nz/documents-by-key/20111003.55>
- Midgley, G. (1997). Mixing methods: developing systemic intervention. In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 10). Chichester: John Wiley & Sons.
- Midgley, G., Cavana, R. Y., Brocklesby, J., Foote, J. L., & Wood, D. R. R. (2013). Towards a new framework for evaluating systemic problem structuring methods. *European Journal of Operational Research*, 229, 143–154.
- Miller, J. G. (1978). *Living systems*. New York: McGraw-Hill.
- Mingers, J. (1997a). Multi-paradigm multimethodology. In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 1). Chichester: John Wiley & Sons.
- Mingers, J. (1997b). Systems typologies in the light of autopoiesis: a reconceptualisation of Boulding's hierarchy, and a typology of self-referential systems. *Systems Research and Behavioral Science*, 14, 303–313.
- Mingers, J. (1999). Towards critical pluralism. In J. Mingers & A. Gill (Eds.), *Multimethodology: the theory and practice of combining management science methodologies* (p. chapter 15). Chichester: John Wiley & Sons.
- Mingers, J. (2000). Variety is the spice of life: combining soft and hard OR/MS methods. *International Transactions in Operational Research*, 7, 673–691.

- Mingers, J. (2002). Can social systems be autopoietic? Assessing Luhmann's social theory. *The Sociological Review*, 278–299.
- Mingers, J. (2003). A classification of the philosophical assumptions of management science methods. *Journal of the Operational Research Society*, 54(6), 559–570. Retrieved from www.palgrave-journals.com/jors
- Mingers, J. (2004). Can social systems be autopoietic? Bhaskar's and Giddens' social theories. *Journal for the Theory of Social Behaviour*, 34(4), 403–427.
- Mingers, J., & Brocklesby, J. (1997). Multimethodology: towards a framework for mixing methodologies. *Omega International Journal of Management Science*, 25(5), 489–509.
- Minister for Canterbury Earthquake Recovery. (2010a, September 24). Earthquake Recovery Commissioners named. Retrieved July 1, 2016, from <http://www.beehive.govt.nz/release/earthquake-recovery-commissioners-named>
- Minister for Canterbury Earthquake Recovery. (2010b, October 1). Final Earthquake Commissioner named. Retrieved July 1, 2016, from <http://www.beehive.govt.nz/release/final-earthquake-commissioner-named>
- Minister for Canterbury Earthquake Recovery. (2011). *Canterbury Earthquake Recovery Act: quarterly s 88 reports (cumulative)* (Report to the House of Representatives). Wellington, New Zealand. Retrieved from <http://cera.govt.nz/sites/default/files/common/section-88-quarterly-report-powers-exercise-under-cer-act-2011.pdf>
- Minister for Canterbury Earthquake Recovery. (2012). *Christchurch CBD recovery* (Cabinet paper). Wellington, New Zealand: New Zealand Government.
- Minister for Canterbury Earthquake Recovery. (2013, December 9). Public Notice: Revocation of Proposed Change 1 to the Canterbury Regional Policy Statement. Minister for Canterbury Earthquake Recovery. Retrieved from www.beehive.govt.nz
- Minister for Canterbury Earthquake Recovery. (2015, April 21). New process for red zone Crown offers. Retrieved September 11, 2016, from <https://www.beehive.govt.nz/release/new-process-red-zone-crown-offers>
- Minister for Canterbury Earthquake Recovery, & Minister of Local Government. (2013, July 8). Crown Manager appointed for Christchurch. Retrieved December 19, 2014, from <http://www.beehive.govt.nz/release/crown-manager-appointed-christchurch>
- Minister for Canterbury Earthquake Recovery, & Minister of State Services. (2011a). *Paper 1: Canterbury Earthquake Recovery: Proposed*

- Governance Arrangements* (Cabinet paper). Wellington, New Zealand: New Zealand Government. Retrieved from www.cera.govt.nz
- Minister for Canterbury Earthquake Recovery, & Minister of State Services. (2011b). *Paper 2: Canterbury Earthquake Recovery: Proposed Powers* (Cabinet paper). Wellington, New Zealand: New Zealand Government. Retrieved from www.cera.govt.nz
- Minister for Regulatory Reform. (2011). *Adoption of the Regulatory Responsibility Bill drafted by the Regulatory Responsibility Taskforce* (Cabinet paper). Wellington, New Zealand: New Zealand Government. Retrieved from <http://www.treasury.govt.nz/regulation/informationreleases/pdfs/egimemo-11-7.pdf>
- Minister for the Environment. (2010). *Canterbury Earthquake Response and Recovery Bill* (Cabinet paper). Wellington, New Zealand: New Zealand Government.
- Minister for the Environment, & Minister of Local Government. (2010, April 22). Environment Canterbury Commissioners appointed. Retrieved July 1, 2016, from <http://www.beehive.govt.nz/release/environment-canterbury-commissioners-appointed>
- Minister of Civil Defence. (2012). *Review of civil defence emergency management response to the 22 February Christchurch earthquake* (Cabinet paper). Wellington, New Zealand: New Zealand Government. Retrieved from http://www.civildefence.govt.nz/memwebsite.nsf/wpg_URL/For-the-CDEM-Sector-Publications-Review-of-the-Civil-Defence-Emergency-Management-Response-to-the-22-February-Christchurch-Earthquake?OpenDocument
- Minister of Local Government. (2009a). *Improving local government accountability, transparency and fiscal management* (Cabinet paper No. EGI (09) 44). Wellington, New Zealand: New Zealand Government. Retrieved from [https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaperApril09/\\$file/TAFMCabinetPaperApril09.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaperApril09/$file/TAFMCabinetPaperApril09.pdf)
- Minister of Local Government. (2009b). *Local government transparency, accountability and fiscal management: improving transparency and accountability (paper 1)* (Cabinet paper No. EGI (09) 209). Wellington, New Zealand: New Zealand Government. Retrieved from [https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaper1Oct09/\\$file/TAFMCabinetPaper1Oct09.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/TAFMCabinetPaper1Oct09/$file/TAFMCabinetPaper1Oct09.pdf)
- Minister of Local Government. (2009c, October 28). Reforms to help keep rate rises under control. Retrieved June 30, 2016, from <https://www.beehive.govt.nz/release/reforms-help-keep-rate-rises-under-control>

- Minister of Local Government. (2012). *Better local government* (Cabinet paper). Wellington, New Zealand: New Zealand Government. Retrieved from [https://www.dia.govt.nz/Pubforms.nsf/URL/FINALBetterLocalGovernmentCabinetpaperfor19March.pdf/\\$file/FINALBetterLocalGovernmentCabinetpaperfor19March.pdf](https://www.dia.govt.nz/Pubforms.nsf/URL/FINALBetterLocalGovernmentCabinetpaperfor19March.pdf/$file/FINALBetterLocalGovernmentCabinetpaperfor19March.pdf)
- Ministry for the Environment, & Department of Conservation. (2011, August 15). Canterbury Earthquake (Resource Management Act - Electricity Network Recovery) Order 2011 and Canterbury Earthquake (Reserves Act - Electricity Network Recovery) Order 2011. Retrieved from <http://ceraarchive.dpmc.govt.nz>
- Ministry of Business, Innovation and Employment. (2015). *Earthquake repairs to Canterbury homes: home inspection survey report*. Wellington, New Zealand: Ministry of Business, Innovation and Employment. Retrieved from <http://www.mbie.govt.nz/about/whats-happening/news/document-image-library/home-inspection-survey-report.pdf>
- Ministry of Civil Defence and Emergency Management. (2012). *Background information to the Review of the Civil Defence Emergency Management Response to the 22 February Christchurch Earthquake* (p. 4). Wellington, New Zealand: Ministry of Civil Defence and Emergency Management. Retrieved from http://www.civildefence.govt.nz/memwebsite.nsf/wpg_URL/For-the-CDEM-Sector-Publications-Review-of-the-Civil-Defence-Emergency-Management-Response-to-the-22-February-Christchurch-Earthquake?OpenDocument
- Ministry of Justice. (n.d.). *Guidelines to the New Zealand Bill of Rights Act 1990*. Wellington: Ministry of Justice. Retrieved from <http://www.justice.govt.nz/assets/Documents/Publications/Guidelines-to-Bill-of-Rights-Act.pdf>
- Mitroff, I. I., & Mason, R. O. (1980). Structuring ill-structured policy issues: further explorations in a methodology for messy problems. *Strategic Management Journal*, 1(4), 331–342.
- Moloney, P. (2010). Part 2.6 Ideology: populism, pragmatism and liberalism. In R. Miller (Ed.), *New Zealand Government and Politics* (5th ed., pp. 77–90). Melbourne: Oxford University Press.
- Moore, C. (2014, July 18). The Christchurch Town Hall must be saved | Stuff.co.nz. *The Press*. Christchurch, New Zealand. Retrieved from <http://www.stuff.co.nz/the-press/news/christchurch-earthquake-2011/10280853/The-Christchurch-Town-Hall-must-be-saved>
- Mumford, P. J. (2011). *Enhancing performance-based regulation: lessons from New Zealand's building control system*. Wellington: Institute of Policy Studies, Victoria University of Wellington.

- Murdoch, S. (2012). *Annual review of the Canterbury Earthquake Recovery Act 2011* (Ministerial report) (p. 20). Wellington, New Zealand. Retrieved from <http://cera.govt.nz/sites/default/files/common/canterbury-earthquake-recovery-act-2011-annual-review-2012.pdf>
- Murdoch, S. (2013). *Annual review of the Canterbury Earthquake Recovery Act 2011* (Ministerial report) (p. 24). Retrieved from <http://cera.govt.nz/sites/default/files/common/canterbury-earthquake-recovery-act-2011-annual-review-2013.pdf>
- Murdoch, S. (2014). *Annual review of the Canterbury Earthquake Recovery Act 2011*. Retrieved from <http://cera.govt.nz/sites/default/files/common/canterbury-earthquake-recovery-act-2011-annual-review-2014.pdf>
- Murthy, P. N. (2000). Complex societal problem solving: a possible set of methodological criteria. *Systems Research and Behavioral Science*, 17, 73–101.
- Natural Hazards Research and Applications Information Centre. (2001). *Holistic Disaster Recovery: Ideas for building local sustainability after a natural disaster*. Colorado: Public Entity Risk Institute.
- New Zealand Police. (2012, February 9). List of deceased | New Zealand Police. Retrieved July 4, 2016, from <http://www.police.govt.nz/major-events/previous-major-events/christchurch-earthquake/list-deceased>
- New Zealand Productivity Commission. (2014). *Regulatory institutions and practices*. Wellington: New Zealand Productivity Commission.
- Nigg, J. M. (1995). *Disaster recovery as a social process* (Preliminary Paper No. 219) (p. 30). University of Delaware Disaster Research Center.
- Oliga, J. C. (1988). Methodological foundations of systems methodologies. *Systems Practice*, 1(1), 87–112.
- Oosterhoff, L. (2015). *Vote for Justice: Should New Zealand Consider Binding Citizen-Initiated Referenda on Law and Order Policy?* Victoria University of Wellington, Wellington.
- Ordeshook, P. C. (2009). Constitutions, elections, and election law. *Texas Law Review*, 87, 1595.
- Orpin, J., & Pannett, D. (2010). Constitutional aftershocks. *New Zealand Law Journal*, 10(November), 386.
- Orsman, H. W. (2011). *The Dictionary of New Zealand English*. Oxford University Press.
- Palmer, G. (1985). *A Bill of Rights for New Zealand: A White Paper* (AJHR No. 1) (p. A6). Wellington, New Zealand: New Zealand Parliament.
- Palmer, G. (2010). A View of the Legal Debate. *Policy Quarterly*, 6(2), 33–35.
- Palmer, G. (2011). What is parliament for? *New Zealand Law Journal*, 378.

- Palmer, G., & Butler, A. (2016). *A constitution for Aotearoa New Zealand*. Wellington: Victoria University Press.
- Palmer, G., & Palmer, M. (2004). *Bridled Power: New Zealand's constitution and government* (4th ed.). Melbourne: Oxford University Press.
- Palmer, K. (2011). Canterbury Earthquake Recovery Act 2011 - a legislative opportunity. *Resource Management Bulletin*, 9(5), 52.
- Palmer, K. A. (1993). *Local Government in New Zealand* (2nd ed.). Sydney: Law Book Co.
- Palmer, M. S. R. (2006a). Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution. *American Journal of Comparative Law*, 54, 587.
- Palmer, M. S. R. (2006b). What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders. *Public Law Review*, 17, 133–162.
- Palmer, M. S. R. (2007). New Zealand constitutional culture. *New Zealand Universities Law Review*, 22(December), 565–.
- Palmer, M. S. R. (2008). *The Treaty of Waitangi in New Zealand's law and constitution*. Wellington: Victoria University Press.
- Palmer, M. S. R. (2011). Open the doors and where are the people? Constitutional dialogue in the shadow of the people. In C. Charters & D. R. Knight (Eds.), *We, the People(s): Participation in Governance*. Wellington, New Zealand: Victoria University Press.
- Parliamentary Library. (2005). *Bills Digest No. 1237 (6 April 2005)*. Wellington: New Zealand Parliament. Retrieved from <https://www.parliament.nz/resource/mi-nz/47PLLawBD12371/ea9c041c479a60b90e8bd3779c3527f0f48673cd>
- Perpick, M. (2013, February 19). Wynn Williams - Articles | CERA Acquisitions for Anchor Projects | Amanda Douglas | Wynn Williams. Retrieved November 26, 2014, from <http://www.wynnwilliams.co.nz/Publications/Articles/CERA-Acquisitions-for-Anchor-Projects>
- Pine, N. S., Tarrant, R. A., Lyons, A. C., & Leathem, J. C. (2015). Rolling with the shakes: an insight into teenagers' perceptions of recovery after the Canterbury earthquakes. *Kotuitui: New Zealand Journal of Social Sciences Online*, 10(2), 116–125. <https://doi.org/10.1080/117083x.2015.1068183>
- Pouwels, C. (2015). Does New Zealand have a “pragmatic” constitution? *Auckland University Law Review*, 21, 41.
- Price, R. (2016, April 8). Christchurch rebuild projects gets worst performance rating in Treasury report. Retrieved May 26, 2016, from <http://www.stuff.co.nz/national/politics/78690984/christchurch-rebuild-projects-gets-worst-performance-rating-in-treasury-report>

- Privileges Committee. (2013). *Question of privilege concerning the defamation action Attorney- General and Gow v Leigh: report of the Privileges Committee* (No. I.17A). Wellington: New Zealand Parliament.
- Radio New Zealand. (2010, October 27). Hobbit films staying in NZ | Radio New Zealand News. Retrieved July 6, 2016, from <http://www.radionz.co.nz/news/national/60471/hobbit-films-staying-in-nz>
- Regulations Review Committee. (2010). *Orders in Council made under the Canterbury Earthquake Response and Recovery Act 2010*. Wellington, New Zealand: New Zealand Parliament.
- Regulations Review Committee. (2011). *Orders in Council made under the Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011: interim report* (No. I.16N). New Zealand Parliament.
- Regulations Review Committee. (2014). *Complaint regarding the Canterbury Earthquake (Building Act) Order 2011 (SR 2011/311): report of the Regulations Review Committee*. Wellington, New Zealand: New Zealand Parliament. Retrieved from http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_COMPL_12054_1/complaint-regarding-the-canterbury-earthquake-building
- Regulations Review Committee. (2015). *Investigation into the Canterbury Earthquake District Plan Order 2014: report of the Regulations Review Committee*. Wellington: New Zealand Parliament. Retrieved from https://www.parliament.nz/en/pb/sc/reports/document/51DBSCH_SCR_68141_1/investigation-into-the-canterbury-earthquake-district-plan
- Research New Zealand. (2015). *Trust and Confidence in Members of Parliament compared with local councillors, lawyers, journalists and others such as those working in the Ambulance Service, the Fire Service and the Police*. Wellington: Research New Zealand. Retrieved from <http://www.researchnz.com/pdf/Media%20Releases/Research%20New%20Zealand%20Media%20Release%20-%202004-06-15%20-%20Trust%20and%20Confidence.pdf>
- Richmond, B. (1994). Systems thinking/system dynamics: let's just get on with it. *System Dynamics Review*, 10(2-3), 135–157.
- Rishworth, P. (2010). A second Bill of Rights for New Zealand? *Policy Quarterly*, 6(2), 3–8.
- Roa, T. (2010). Kīngitanga. In M. Mulholland & V. Tawhai (Eds.), *Weeping Waters: the Treaty of Waitangi and constitutional change* (pp. 165–174). Wellington, New Zealand: Huia Publishers.
- Robertson, B. (2010). Ad hoc legislation (Editorial). *New Zealand Law Journal*, (December), 397.

- Rotimi, J. O., Wilkinson, S., Zuo, K., & Myburgh, D. (2009). Legislation for effective post-disaster reconstruction. *International Journal of Strategic Property Management*, 13(2), 143–152.
- Rt Hon Beverley McLachlin. (2006). Unwritten constitutional principles: what is going on? *New Zealand Journal of Public and International Law*, 4, 147.
- Rt Hon Sir Geoffrey Palmer. (2006). The Cabinet, the Prime Minister and the Constitution. *New Zealand Journal of Public and International Law*, 4, 1–36.
- Rt Hon Sir Kenneth Keith. (2008). On the constitution of New Zealand: an introduction to the foundations of the current form of government. In *Cabinet Manual 2008* (pp. 1–6). Wellington, New Zealand: Cabinet Office, Department of the Prime Minister and Cabinet.
- Russell McVeagh. (n.d.). Bill of Rights Remedies: Declarations of Inconsistency | Russell McVeagh. Retrieved June 24, 2016, from <http://www.russellmcveagh.com/Publications/ViewPublication/tabid/176/Title/bill-of-rights-remedies-declarations-of-inconsistency/pid/407/Default.aspx>
- Salmond, J. (1924). *Jurisprudence* (7th ed.). London: Sweet & Maxwell Ltd.
- Scott, G. (2010). The Regulatory Responsibility Bill: Some Issues in the Debate. *Policy Quarterly*, 6(2), 58–62.
- Sedley, S. (1994). The sound of silence: constitutional law without a constitution. *Law Quarterly Review*, 110, 270.
- Sedley, S. (2001). The common law and the political constitution: a reply. *Law Quarterly Review*, 117(Jan), 68–70.
- Sedley, S. (2011). *Ashes and sparks: essays on law and justice*. Cambridge: Cambridge University Press.
- Senge, P. (2006). *The Fifth Discipline: the Art and Practice of the Learning Organization* (First). London: Random House Business Books.
- Senge, P., Kleiner, A., Roberts, C., Ross, R. B., & Smith, B. J. (1994). *The fifth discipline fieldbook: strategies and tools for building a learning organization*. New York: Doubleday.
- Smith, T. (2010). The Regulatory Responsibility Taskforce: a view from inside the room. *Policy Quarterly*, 6(2), 14–20.
- Southern Response. (n.d.). Christchurch Rebuild | EQC Claims | Southern Response. Retrieved July 28, 2016, from <http://southernresponse.co.nz/>
- Standing Orders Committee. (2003). *Review of Standing Orders: Report of the Standing Orders Committee* (No. I.18B). Wellington: New Zealand Parliament. Retrieved from https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR2639_1/cc0af3fb47ba43aab6ba79ff6b3ddb5639b72b11

- State of Washington, State Of Minnesota v DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; REX W. TILLERSON, Secretary of State; JOHN F. KELLY, Secretary of the Department of Homeland Security; UNITED STATES OF AMERICA, No. D.C. No. 2:17-cv-00141 (United States Court of Appeals for the Ninth Circuit February 9, 2017). Retrieved from <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>
- State Services Commission. (2011). *Regulatory Impact Statement: Canterbury Earthquake Response and Recovery Bill* (Regulatory Impact Statement). Wellington, New Zealand: New Zealand Government. Retrieved from www.cera.govt.nz
- State Services Commissioner. (2007). *Standards of integrity and conduct*. Wellington, New Zealand: State Services Commission.
- Sterman, J. (1994). Learning in and about complex systems. *System Dynamics Review*, 10(2-3), 291–330.
- Stevenson, J. R., Kachali, H., Whitman, Z., Seville, E., Vargo, J., & Wilson, T. (2011). Preliminary observations of the impacts of the 22 February Christchurch earthquake on organisations and the economy: a report from the field (22 February-22 March 2011). *Bulletin of the New Zealand Society for Earthquake Engineering*.
- Stewart, I. (2004). Men of class: Aristotle, Montesquieu and Dicey on “separation of powers” and “the rule of law.” *Macquarie Law Journal*, 4, 187–223.
- Stigley, C. (2000). Local government’s growing importance in the constitution. In C. James (Ed.), *Building the constitution* (pp. 317–324). Wellington, New Zealand: Institute of Policy Studies, Victoria University of Wellington.
- Stylianou, G. (2014a, August 8). Convention centre will cost \$500 million | Stuff.co.nz. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/10361223/Convention-centre-will-cost-500-million>
- Stylianou, G. (2014b, November 16). Green MP: Locals need voice in rebuild | Stuff.co.nz. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/business/the-rebuild/63247430/Green-MP-Locals-need-voice-in-rebuild>
- Swaffield, S. (2013). Place, Culture and Landscape After the Christchurch Earthquake. In H. Sykes (Ed.), *Space Place and Culture*. Future Leaders. Retrieved from http://www.futureleaders.com.au/book_chapters/pdf/Space-Place-Culture/Simon-Swaffield.pdf

- Tamanaha, B. (2007). *A concise guide to the rule of law* (Legal Studies Research Paper Series No. Paper #07-0082). St John's University School of Law. Retrieved from [Http://ssrn.com/abstract=1012051](http://ssrn.com/abstract=1012051)
- Tanner, G. (2010). How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts. *Policy Quarterly*, 6(2), 21–32.
- Te Aho, L. (2010). Judicial Creativity. In M. Mulholland & V. Tawhai (Eds.), *Weeping Waters: the Treaty of Waitangi and constitutional change* (pp. 109–126). Wellington: Huia Publishers.
- Temm, J. (2010, September 30). Canterbury Earthquake Response and Recovery Act 2010. Retrieved from http://www.lawsociety.org.nz/__data/assets/pdf_file/0008/31040/canterbury-earthquake-response-recovery-act-2010.pdf
- The Press. (2011, April 7). Plan to reopen Christchurch CBD announced | Stuff.co.nz. Retrieved September 17, 2016, from <http://www.stuff.co.nz/national/christchurch-earthquake/4860552/Plan-to-reopen-Christchurch-CBD-announced>
- The Treasury. (2011). *Regulatory Impact Statement: Regulating for better legislation - what is the potential of a Regulatory Responsibility Act?* Wellington, New Zealand: The Treasury. Retrieved from www.treasury.govt.nz
- The Treasury. (2013). *Regulatory Impact Analysis Handbook*. Wellington: The Treasury. Retrieved from <http://www.treasury.govt.nz/regulation/regulatoryproposal/ria/handbook>
- The Treasury. (2016). *Major Projects Performance Report*. Wellington, New Zealand: The Treasury. Retrieved from <http://www.treasury.govt.nz/statesector/investmentmanagement/publications>
- Thomas, E. W. (2000). Centennial lecture - the relationship of parliament and the courts: a tentative thought or two for the new millennium. *Victoria University of Wellington Law Review*, 31, 5–36.
- Thomas, S., & Memon, P. A. (2007). New Zealand local government at the crossroads? Reflections on the recent local government reforms. *Urban Policy and Research*, 25(2), 171–185. <https://doi.org/10.1080/08111140701344825>
- Tomkins, A. (2002). In defence of the Political Constitution. *Oxford Journal of Legal Studies*, 22(1), 157–175.
- Toomey, E. (2012). Public participation in resource management: the New Zealand experience. *New Zealand Journal of Environmental Law*, 16, 117.
- Trevett, C. (2011, September 19). Urgent new law after Urewera case. *New Zealand Herald*. Retrieved from

http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10752855

- Trevett, C. (2014, August 27). Two thirds of voters believe citizens-initiated referenda should be binding - survey - National - NZ Herald News. Retrieved July 19, 2016, from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11315091
- Trotter, C. (2012, September 11). Canterbury democracy hammered. *The Press*. Christchurch. Retrieved from <http://www.stuff.co.nz/the-press/opinion/columnists/chris-trotter/7649879/Canterbury-democracy-hammered>
- Trump, D. J. (2017, January 27). EXECUTIVE ORDER: PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES. Retrieved February 19, 2017, from <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>
- Ulrich, W. (1996). Critical systems thinking for citizens. In R L Flood & N. R. A. Romm (Eds.), *Critical Systems Thinking: current research and practice* (pp. 165–178). New York: Plenum Press.
- Vallance, S. (2011). Community, resilience and recovery: building or burning bridges? *Lincoln Planning Review*, 3(1), 4–8.
- Vallance, S. (2013). *Waimakariri District Council's integrated, community-based recovery framework*. Christchurch, New Zealand: Lincoln University.
- Van der Lei, T. E., Enserink, B., Thissen, W. A. H., & Bekebrede, G. (2011). How to use a systems diagram to analyse and structure complex problems for policy issue papers. *Journal of the Operational Research Society*, 62(7), 1391–1402.
- Vance, A. (2011, October 4). Labour gains changes to surveillance bill. *Stuff.co.nz*. New Zealand. Retrieved from <http://www.stuff.co.nz/national/politics/5726524/Labour-gains-changes-to-surveillance-bill>
- Vermeule, A. (2011). *The system of the constitution*. New York: Oxford University Press.
- Wade, E. C. S., & Bradley, A. W. (1985). *Constitutional and Administrative Law* (10th ed.). London: Longman.
- Waldron, J. (2008). The concept and the rule of law. *Public Law and Legal Theory Research Paper Series*, (Working paper no. 08-50), 66. Retrieved from <http://ssrn.com/abstract=1273005>
- Waldron, J. (2012). Separation of powers or division of power? *Public Law and Legal Theory Research Paper Series*, (Working Paper No. 12-20), 33. Retrieved from <http://ssrn.com/abstract=2045638>

- Waldron, J. (2013). Separation of powers in thought and practice. *Boston College Law Review*, 54(2), 433.
- Walsh, D. P. (2010). Complex Environments. In J. A. Cox & J. G. Schleier (Eds.), *Theory of Constraints Handbook* (pp. 1045–1065). New York: McGraw-Hill.
- Watkins, T. (2011, September 19). Urewera ruling jeopardises police trials. *Stuff.co.nz*. New Zealand. Retrieved from <http://www.stuff.co.nz/national/politics/5650650/Urewera-ruling-jeopardises-police-trials>
- Webb, D., Sanders, K., & Scott, P. (2010). *The New Zealand legal system: structures and processes* (5th ed.). Wellington: LexisNexis.
- Wendel, W. B. (2012). Political Culture and the Rule of Law: Comparing the United States and New Zealand. *Otago Law Review*, 12(4), 663.
- Wesener, A. (2015). Temporary urbanism and urban sustainability after a natural disaster: transitional community initiated open spaces in Christchurch, New Zealand. *Journal of Urbanism: International Research on Placemaking and Urban Sustainability*, 8(4), 406–422.
- Willis, E. (2014). Constitutional authority: legitimising the exercise of public power in New Zealand. *New Zealand Law Review*, 265–301.
- Wilson, M. (2010). Reforming Parliament. In *New Zealand Government and Politics* (5th ed., pp. 145–155). Melbourne: Oxford University Press.
- Wilson, M. (2011). Constitutional implications of “The Hobbit” legislation. *New Zealand Journal of Employment Relations*, 36(3), 90–98.
- Yablon, C. (1991). Timeless rules: can normative closure and legal indeterminacy be reconciled? *Cardozo Law Review*, 13, 1605.
- Young, R. (2013, June 8). Council “totally incompetent” - news - the-press | *Stuff.co.nz*. Retrieved May 17, 2016, from <http://www.stuff.co.nz/the-press/news/8771184/Council-totally-incompetent>

“Here there be dragons”

Using systems thinking to explore constitutional issues

Appendices: Tables and Figures

Table 2.2: Systems thinking taxonomy

This Table describes a number of approaches to systems thinking grouped according to Jackson’s taxonomy. These approaches are largely in the interpretivist strand, and all are considered to be ‘soft’ approaches to systems thinking.

Jackson’s taxonomy	Methodology / Technique	What it does A system to...	Ontology What it assumes to exist	Epistemology Representation by modelling...	Axiology Necessary information	Axiology Source of information	Axiology Users	Axiology Purpose In order to...	Dominant metaphor ¹
Structuralist approaches	Viable System Method	... design organisations and diagnose problems using cybernetic principles	Complex systems containing purposeful organized parts; systems open to a changing environment; agreement about the goals or objectives to be pursued	Organisations in terms of VSM structure of five interrelated subsystems and their communications links	Purposes, structure, environment and communications of an organisation	Cybernetic principles and research into an organization; observation	Analyst	... diagnose and improve organisational structure and functioning	Organic Political (team) Neurocybernetic
	Qualitative system dynamics / causal loop diagrams and influence diagrams	... simulate the behaviour of physical and social stocks, flows and processes, and their causal relationships	Material and immaterial stocks and flows, and their causal feedback relations, information and decisions that link them	Influence diagrams, SD diagrams, software-generated icon diagrams	Structure of causal relations between flows	Observation and measurement of the real world, together with judgement and opinion	Analyst	... explore the operation of a complex real-world system to aid understanding and ‘control’	Machine Organic Neurocybernetic
Interpretivist approaches	Interactive planning	... prepare a vision of how an organisation should be and plan how to realise the design	Stakeholders with differing values that can be reconciled in designs for the future that are preferable for all	Constrained or unconstrained idealised designs that are technologically feasible, operationally viable, and improvable	Stakeholders’ views about desirable designs for their own spheres of influence and their interrelations	Involvement by all, the stakeholders in the design/planning process	Analyst, facilitator, stakeholders	... plan and design futures that are desirable for different stakeholder groups, and then jointly realise them	Neurocybernetic Political (coalition) Culture
	Soft Systems Methodology	... explore different world views relevant to a real-world situation and to contrast them in a process of debate	Real-world problem; conceptual human activity systems; world views	Systems concepts; rich pictures, analyses 1, 2 & 3; logical relations	Hard and soft information concerning structure, process, climate and relevant world views	Concepts, language, logic and participation by concerned actors	Analyst, researcher, facilitator, participant	... learn about and improve a problematic situation by gaining agreement on feasible and desirable changes	Organic Political (coalition) Culture
	Strategic assumption surfacing and testing (SAST)	... surface a variety of contrasting strategic options and achieve consensus through a debate	Groups with competing views and the assumptions underlying these from different stakeholder views	Diametrically opposed viewpoints, underlying assumptions, and relevant stakeholders	Options, individual characteristics and viewpoints, stakeholders and their interests	Formations of maximally different groups to present and debate different viewpoints	Facilitator participants, stakeholders	... synthesise competing viewpoints about complex interactive messes	Machine Political (coalition) Culture
	Participatory Appraisal of Needs and the Development of Action (PANDA)	... work holistically and pragmatically to address the diversity and uncertainty found in multi-agency settings	Different perspectives held by clients and stakeholders, power imbalances that may prevent all perspectives from surfacing, contingency – the only truths are those relevant to the local circumstances at the moment	Different viewpoints, underlying assumptions, options analysis Use methods from other methodologies as seem appropriate	Options, stakeholders and their interests	Observation, discussions, participation, concepts, language, logic	Facilitator, participants, stakeholders, analysts	... ensure interventions are pluralist and challenge or neutralise existing power imbalances	Neurocybernetic Political (coalition) Culture

(Derived from Davies & Mabin, 2001; Flood & Jackson, 1991; Mingers, 2000)

¹ Identifying the dominant metaphor is a technique used in Total Systems Intervention, discussed in Chapter III.

Table 3.1: Mingers’ critical questions clarifying parameters of systems intervention

Questions about the system	Comment
System (A) Relations between intervention system and intellectual resources system	
As the agent undertaking the intervention: <ul style="list-style-type: none">What is my level of critical awareness / understanding of potential methods?What is my experience and skill in using them?What is my personality / cognitive style comfortable with?To what extent can I work in varied paradigms?	I have no practical experience at working with potential methodologies. My understanding is theoretical only. I am not comfortable working with numbers. I am likely to be most comfortable working with ‘soft’ methodologies and techniques. The issues to be explored centre on relationships between people, and constitutional norms and values. The purpose is to assess whether systems methodologies can help to generate debate and insight into ambiguous and multi-objective problem situations. That indicates soft methodologies and techniques might be more relevant than hard techniques.
Nature of relationship (B) – intervention system to problem content system (e.g. what might I be able to use in this situation)	
Nature of relationship (C) - problem content system to intellectual resources system (e.g. what methods might be relevant to this situation)	
System (B) Relations between practitioner(s) and problem situations	
What has initiated this engagement?	
As the agent undertaking the intervention: <ul style="list-style-type: none">What, if any, is my history of interactions in regard to this situation?What are my commitments to various actors in the situation?Who do I see as clients, victims, problem owners, etc.?What resources and powers do I have?	I have initiated the project, and am the primary actor in the situation. While I lack practical experience with systems methodologies, I have 12 years’ experience working with constitutional policy issues at the Ministry of Justice. I propose to develop an understanding of the real-world situation through my own research, rather than facilitating a sharing of understanding amongst others (‘action research’). This approach may limit the practicality of testing methodologies such as interactive planning, strategic assumption surfacing and testing (SAST), and PANDA, which tend to emphasise interactive learning and exploration.
Nature of relationship (A) – intervention system to intellectual resources system (e.g. what methods am I experienced in that may be useful? What might I have to learn?)	
Nature of relationship (C) – problem content system to intellectual resources system (e.g. what methodologies may or may not be seen as legitimate here? What methods have they experienced?)	In this project, my purpose is to test a hypothesis and to record my findings in a thesis.
System (C) Relations between problem situations and intellectual resources	
<ul style="list-style-type: none">What is the culture of the organisation / situation with respect to methodology use?What is the history of past methodology use?What methodologies are likely to be useful in this situation given the particular tasks or concerns initiating the intervention?To what extent are the values embedded in the methodologies appropriate to the situation?	I am breaking new ground: as far as I have been able to ascertain, nobody has tried applying management science-oriented systems methodologies to constitutional issues. Because there is no previous experience to guide methodology choice, I will be guided by the literature on methodology choice.
Nature of relationship (A) – will the agent’s experience allow the use of a particular methodology here?	I will target softer methodologies and techniques given their apparently greater resonance with the issues I propose to explore.
Nature of relationship (B) – does the agent’s history with this organisation suggest particular methodologies?	

Derived from Mingers, 2000

Table 3.2: SoSM dimension 1 applied to the constitution

Characteristic	Assessment	Reasons
Number of elements	Many	<p>These elements include:</p> <ul style="list-style-type: none">• Rules - generally set out in legislation, e.g. parliamentary term (Constitution Act 1986, s 17), no taxation without parliament's authority (Bill of Rights 1688)• Conventions – e.g. caretaker convention, Governor-General acts on advice (Joseph, 2007, p. 117)• Principles – e.g. comity²• Decision-makers – e.g. Governor-General, Speaker, Parliament / the House of Representatives, the Clerk of the House of Representatives, Cabinet, the Prime Minister, Ministers of the Crown, the Ombudsmen, the Chief Justice, judges, tribunal referees.• Institutions, including the three branches of state and their components (e.g. government departments, Office of the Auditor-General and the Ombudsmen, and individual courts and tribunals).
Number of interactions between elements	Many	<p>There are many and regular interactions between branches of state, such as:</p> <ul style="list-style-type: none">• The Governor-General (as head of state) signing bills into law that have been passed by the House of Representatives (the legislature). Those bills are usually introduced by the executive, but are sometimes introduced by members of the House of Representatives.• Parliamentary scrutiny of executive action, including through the Regulations Review Committee, Auditor-General, Ombudsmen, and select committee reviews of departmental expenditure. <p>There are also many interactions within branches of state, such as interactions between lower courts and appellate courts, and Treasury's scrutiny of Ministers' papers to Cabinet.</p>
Attributes of elements	Somewhat pre-determined	<p>The constitutional system has touchstones (principles, conventions, and rules) that guide elements' behaviour but their attributes are not wholly pre-determined. For instance:</p> <ul style="list-style-type: none">• The 2011 Act shows how elements of the constitution can evolve to meet changing circumstances. In the specific context of the Canterbury earthquakes, the executive asked parliament to centralize recovery functions in the executive (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a, 2011b). <p>Decision-makers are influenced by values, experience, and mental models (Maani & Cavana, 2007, p. 16; M. S. R. Palmer, 2006), rendering the behaviour of constitutional elements somewhat probabilistic, despite guiding principles.</p>
Nature of interaction between elements	Loosely organised	<p>Constitutional roles and responsibilities are generally clearly assigned, but many decisions require value judgments to be made; negotiation can be necessary. While constitutional conventions and principles guide procedures for interacting with other elements, they do not cover every eventuality and are somewhat open to interpretation.</p> <p>A constitutional dialogue is permanently taking place at the boundaries between the three branches of state (the three loci of power), which ebb and flow. For example:</p> <ul style="list-style-type: none">• The Parliamentary Privilege Act 2014 is Parliament's response to the Supreme Court's decision in <i>Attorney-General and Gow v Leigh</i>, which challenged Parliament's view of the scope of article 9 of the Bill of Rights 1688. The Act clarifies the scope of article 9 and overturns the <i>Leigh</i> case (section references to come).

² Comity refers to the relationship of mutual restraint and respect between the judiciary and the legislature (Privileges Committee, 2013, p. 10).

Characteristic	Assessment	Reasons
Behaviour	Somewhat probabilistic	<p>The nexus of context and people makes the behaviour of elements probabilistic, despite principles and conventions that guide behaviour. The probabilistic nature of elements' behaviour is best seen at the boundaries between branches, where the margins are tested:</p> <ul style="list-style-type: none"> In <i>Attorney-General and Gow v Leigh</i>, the views of both the Crown and Parliament on the one hand, and the Supreme Court on the other, were consistent with their perspectives about their respective roles. The Crown and Parliament were primarily concerned with the effective operation of Parliament and considered that constraints on privilege in the case's context would impede parliamentary proceedings.³ The Supreme Court was concerned to preserve citizens' common law rights, including the right to seek redress in the courts for infringements of their rights. The courts' role is to ensure that, where parliamentary privilege will deprive citizens of their common law rights, that privilege is absolutely necessary for the proper and effective functioning of Parliament. <p>These views are relatively orthodox for the respective branches of state. The strength of the views held by the various actors, and the speed with which Parliament responded to the court's decision was possibly due to the strength of beliefs held by key players, including the Chief Justice and the Attorney-General.⁴</p>
Evolution	Evolves	<p>The constitution as an unwritten evolving way of doing things is one of New Zealand's fundamental constitutional norms (Palmer, 2006). Some relatively recent examples of evolution are:</p> <ul style="list-style-type: none"> Parliamentary Privilege Act 2014. Frameworks for amending constitutional procedures in response to emergency situations - Epidemic Preparedness Act 2006, and the 2010 and 2011 Acts. Confidence and supply arrangements and their impact on collective responsibility – political parties are increasingly entering into confidence and supply arrangements that include ministerial posts outside Cabinet. Those arrangements have tended to include “agree to disagree” clauses, which mean that the minority party Minister is not bound by Cabinet collective responsibility in certain circumstances (Boston & Bullock, 2009; Boston, Levine, McLeay, & Roberts, 1998). Cross-parliamentary reference groups – a recent mechanism used to de-politicise and build consensus on important, wide-reaching issues (e.g. Consideration of Constitutional Issues and New Zealand flag referendums). They tend to be used as a means of conveying information and providing an opportunity for feedback in a semi-private setting. A reference group of Canterbury members was established following the Canterbury earthquakes.
Purposeful	Purposeful	<p>The constitution can be viewed as a system of purposeful systems. Each branch of state can be viewed as a system that pursues goals, which are not necessarily shared by the other branches. As part of the constitution's balancing of power, the other branches may impose checks on how those goals are pursued and, sometimes, whether those goals may be pursued.⁵</p> <p>Each branch of state can be viewed as a system of purposeful systems. For instance, within the executive, there are systems for: delivering social services (e.g. education, social welfare, and health); collecting revenue; administering social housing, justice services, and food safety; and regulating financial markets. Each of these sub-systems generate and pursue their own goals, within the overall context of the constitutional system.</p>
Behavioural influences	Strongly affected	<p>A realist understanding of the constitution identifies both its substantive elements and those who interpret and apply those elements. Viewed through that lens, the constitution is strongly affected by behavioural influences.⁶</p> <p>Constitutional change can be precipitated by the population responding to decision-makers' behaviour, particularly where that behaviour indicates an approach</p>

³ The case concerned whether an official's advice to a Minister, given to assist the Minister in preparing to answer an oral question in the House, was privileged by article 9 of the Bill of Rights 1688.

⁴ The Chief Justice is on record as having clear views about the role of the judiciary vis a vis parliament (Elias, 2003). The clear concern held by the Supreme Court about the effect of parliamentary privilege on citizens' common law rights resonates with those views. The Attorney-General took a direct and multi-faceted role in the Government's response to the Supreme Court's decision and in shepherding the Parliamentary Privilege Act through its parliamentary stages, including chairing the privileges committee that made the recommendations and scrutinised the bill, and sitting in the Minister's chair for the committee of the whole house stage (the bill was in the name of the Leader of the House).

⁵ Minority government has been a feature of the New Zealand political landscape since MMP. Confidence and supply agreements generally guarantee the government a majority on the matters that are critical to its ongoing right and ability to govern – votes of the House's confidence in the government, and appropriations (funding) necessary to fund government activities. Outside these matters, governments may have to rely on support from parliamentary parties on an issue-by-issue basis to get legislation enacted.

⁶ See Chapter V for discussion of the influences on decision-makers' incentives to comply with constitutional norms.

Characteristic	Assessment	Reasons
		to power that does not resonate well with prevailing constitutional values. See, for example, the contrasting approaches of the <i>Foreshore and Seabed Act 2004</i> , responding to the Court of Appeal's decision in <i>Ngati Apa v Attorney-General</i> , and the <i>Marine and Coastal Area (Takutai Moana) Act 2011</i> .
Closed / open	Open	<p>The constitutional system is influenced by major events, both domestic and international. For example:</p> <ul style="list-style-type: none"> The constitutional crisis of 1984, precipitated by the need for urgent action to devalue the dollar just after the 1984 general election. There was a stalemate when the caretaker prime minister, Sir Robert Muldoon, refused to accede to the incoming Labour government's request to devalue the dollar. The new Labour government could not force the devaluation, and could not be sworn in to devalue the dollar itself: there were, legally, no MPs because the writ had not been returned. The crisis was resolved through an extension to the caretaker convention. The deputy Prime Minister explained that the convention included the taking of actions required by the incoming government, which could not be postponed because of their great "constitutional, economic or other significance" (Joseph, 2007, p. 127; McGee, 2006). A longer-term solution was created through the <i>Constitution Act 1986</i>.⁷ New Zealand's approach to security, terrorism, and surveillance has been influenced by Al Qaeda's 2001 terror attacks in the United States and the subsequent military action in Afghanistan and Iraq. The <i>Terrorism Suppression Act 2002</i> addresses the financing of terrorism; as well as recruiting terrorists, participating in terrorist groups, and harbouring or concealing terrorists.⁸ <p>The constitutional system is also influenced from within. For example:</p> <ul style="list-style-type: none"> Pressure from the public and opposition members led the Government to reconsider the procedure it would use to enact the <i>Video Camera Surveillance (Temporary Measures) Act 2011</i>. The Act responds to the Supreme Court's decision in <i>R v Hamed</i> [2011] NZSC 101, which ruled that covert video surveillance in relation to the 2007 Urewera raids was unlawful. The decision put at risk another 40 prospective trial and 50 police operations put at risk by the decision (Watkins, 2011).⁹ <p>The Government announced that it intended to introduce and pass, under urgency, retrospective legislation to limit the effect of the decision to the parties. The outcry from opposition politicians and pundits led to the Government agreeing to refer the bill to a select committee so the human rights implications could be considered and members of the public could make submissions. On 27 September 2011, the bill was introduced, had its first reading and was referred to select committee. The committee reported back on 3 October, and the bill passed through its remaining stages under urgency on 6 October. In the few days the bill was before the committee, the committee received 438 submissions and heard from 20 submitters (Justice and Electoral Select Committee, 2011).</p>

⁷ Section 6(2) allows for time-limited tenure as a Minister or member of the Executive Council in certain circumstances. The origins of the crisis are found much earlier in New Zealand's constitutional history. A last-minute inclusion in the *Civil List Act 1950*, introduced at committee stage with no debate, enacted the constitutional convention that members of the Executive Council must be Members of Parliament. The provision was unremarked until the 1984 crisis (McGee, 2006).

⁸ Flaws with that Act emerged after the Urewera raids, when the Solicitor-General declared it to be "unnecessarily complex, almost incoherent and as a result almost impossible to apply in the domestic circumstances observed by police in this case". A subsequent investigation by the Independent Police Conduct Authority found some searches carried out during the raids to have been unlawful, and the police have now apologised in person to six families and entered into settlement agreements with Tuhoe, the iwi most affected by the Urewera raids ("Apology over Urewera raids," 2014).

⁹ That did not mean the surveillance material was automatically inadmissible; rather it fell to be considered under s 30 of the *Evidence Act 2006*, which requires judges to use a balancing process to decide whether improperly obtained evidence can be admitted. By a 3-2 majority, the court concluded that the evidence was still admissible against those defendants facing the more serious charges.

Table 3.4: TSI – systems methodologies showing assumptions about problem contexts and underlying metaphors

Systems methodology (examples)	Assumptions about problem contexts	Underlying metaphors
Critical Systems Heuristics	Simple – Coercive	Machine Organism Prison
Interactive planning	Complex – Pluralist	Brain Coalition Culture
PANDA (participatory appraisal of needs and the development of action)	Complex – Pluralist	Brain Coalition Culture
Qualitative system dynamics	Simple – Pluralist	Machine Organism
SAST (strategic assumption surfacing and testing)	Simple – Pluralist	Machine Coalition Culture
SODA and Cognitive mapping	Simple – Unitary	Culture Brain
SSM (soft systems methodology)	Complex – Pluralist	Organism Coalition Culture
System dynamics	Simple – Unitary	Machine Team
Theory of Constraints thinking process tools	Simple – Unitary	Machine Team
Viable system diagnosis	Complex - Unitary	Organism Brain Team

Table 3.5: TSI metaphors applied to the constitution

Metaphor	Comment	Conclusion
Machine (‘closed system’ view)	<p>Machines operate in a routine and repetitive fashion and perform predetermined sets of activities. The machine metaphor does not fit well where the mindful human parts cannot or will not maintain a mindless contribution to the system: “it will either dehumanise or will lead to conflicting aims between machine and minds.” (Flood & Jackson, 1991).</p> <p>People fit into the constitutional system, but not necessarily in a predictable way. Constitutional roles have some pre-set functions and are based on foundational principles, but the reality of how those functions are exercised and the weight given to different principles (especially when values or principles conflict) is likely to be influenced by the background and influence of the decision-maker (M. S. R. Palmer, 2011).</p>	Not a good fit
Organic (‘open system’ view - organism)	<p>Superficially attractive – the constitution is an open system that interacts with its environment, consistent with the metaphor.</p> <p>The organic metaphor views change as generated externally through systems’ adaptation to environmental changes. However, the constitution evolves as the branches of state balance and rebalance, and as our values and beliefs evolve. If people and their constitutional values are considered to be part of the system (refer to Chapter II), then this change is generated from within, as well as in response to environmental changes. Flood and Jackson consider the organic view does not fit well with this kind of proactive development.</p> <p>A deeper objection is the organic metaphor’s underlying assumption that the system has one brain that gives the system its overall direction and resolves disputes between its purposeful sub-systems. That assumption is made explicit in Miller’s living systems theory (Miller, 1978). The assumption does not sit easily with the constitutional system, which purposely avoids having a single brain to make all of the decisions affecting the constitution. The very rationale for the rule of law, and particularly the separation of powers and functions, is to ensure that the law has a meaning that is independent from the views of those who have the power to make, implement and enforce the law (M. S. R. Palmer, 2007).</p>	Superficially attractive, but not a good fit
Neurocybernetic (‘brain’)	<p>This metaphor resonates for the constitution. It focuses on understanding both internal and external interactions to enable the system to adapt to achieve its goals.</p> <p>This metaphor assumes that systems have a single purpose. It assumes a single overarching decision-making function, which comes from its organic origins (the viable system method was inspired by the brain [Beer]. It may struggle with the constitutional system, which has a number of independent, though interrelating, parts, which will pursue individual and independent purposes consistently with constitutional values, principles, and rules.</p>	A better fit than the organic metaphor, because it recognises that change can be generated from within the system
Culture	<p>This metaphor emphasises norms and values, which determine how organisations respond to change and which changes are seen to be feasible. It fits best with social organisations, and the constitutional system can be seen as a social organisation writ large given the constitutional realist view adopted in this thesis.</p>	The best fit
Political (team coalition prison)	<p>This metaphor views relationships between individuals and groups as competitive and involving the pursuit of power (Flood & Jackson, 1991). There are three subsets within the political metaphor: team (unitary political system); coalition (pluralist political system); and prison (coercive political system). Flood and Jackson observe that, while all organisations show examples of political activity, explicit recognition of the politics of a situation may lead to further politicisation and generate mistrust (TSI).</p> <p>This metaphor resonates for the constitution’s concern with the distribution and exercise of public power. Democracy is, itself, a competition concerned with who gets to exercise power. As a pluralist system, the coalition metaphor appears most appropriate for the constitutional system.</p> <p>The 2011 Act can be seen as creating a structural reason for the Government wanting more power because that power will help it to achieve a desired outcome. It seems to be the product of a desire to control the recovery to ensure that recovery happens as quickly as possible and the government’s substantial investment is spent appropriately. The 2011 Act’s coercive elements may make the prison metaphor appear relevant at times.</p>	<p>A good fit – the coalition metaphor is most apt for thinking about the constitution</p> <p>The prison metaphor may be more apt for thinking about the 2011 Act</p>

Table 3.6: TSI metaphors

Metaphor	Description	Fits best with...	Does not fit well with...
Machine (‘closed system’ view)	A machine operates in a routine and repetitive fashion. It performs predetermined sets of activities. Seeks the rational and efficient means of reaching pre-set goals and objectives.	Contexts with a clear, usually single, purpose. Contexts where human components fit into the system and are prepared to follow machine-like commands.	Volatile environments – machine-like organisations do not adapt easily or quickly to changing circumstances. Situations where the mindful, human, parts cannot or will not maintain a mindless contribution to the system: “it will either dehumanise or will lead to conflicting aims between machine and minds”.
Organic (‘open system’ view - organism)	Views organisations (and their constituent parts, including people) as open systems that interact with their environment. Draws from biology. Views systems at a number of levels, from their most basic components (e.g. individual constituent cell) through the organism/organisation as a whole, through to the organism as part of an ecosystem.	Complex and changing environments, where the system needs to be responsive to change.	A people-perspective - organic view does not recognise that organisations are socially constructed phenomena which need to be understood from the point of view of the people within them. Proactive development - the metaphor sees change as being generated externally - systems adapting to environmental changes. Systems with more than one ‘brain’ – the metaphor assumes systems have a single brain, which makes the decisions that affect the system and issues commands. This does not sit easily with the constitutional system, which purposely avoids having a single ‘brain’.
Neurocybernetic (‘brain’)	Emphasises active learning and control rather than passive adaptability (the organic/open system view). Focuses on understanding what the system produces, its interactions with the outside environment, and within the system itself, and filtering useful information from noise to enable the system to change itself to achieve its goals.	Learning organisations. The viable system view promotes creativity, and self-enquiry and self-criticism, which enables dynamic goal-seeking based on learning. This view is useful where there is a high degree of uncertainty. BUT it assumes that systems have a single purpose.	Conflicting purposes within the system. The neurocybernetic metaphor does not cope well with the possibility that parts of a system may have purposes that differ from the system’s overarching purpose. It does not recognise that organisations are socially constructed phenomena. The neurocybernetic metaphor may struggle to analyse a constitutional system with independent (though inter-relating) parts which will pursue individual and independent purposes in upholding their constitutional roles.
Culture	Emphasises norms and values. In the management sciences, culture of organisations is considered important, because it determines both how organisations react to change and what changes are seen to be feasible for a particular organisation.	Social organisations. The metaphor reminds us that the cohesion generated by shared social and organisational practices can both inhibit and encourage organisational development. In the context of organisational change, the culture metaphor emphasises that, as well as technological and structural change, we need to consider the perceptions and values of the people within the system.	Overuse or cynical use. A risk with the cultural view is that it may lead to explicit ideological control that will generate feelings of manipulation, resentment and mistrust.
Political (team coalition prison)	Views relationships between individuals and groups as competitive and involving the pursuit of power. It highlights all organisational activity as interest based, and emphasises the key role of power in determining political outcomes. It also encourages recognition of the organisational actor as political for both motivational and structural reasons. The metaphors may view the organisation as: <ul style="list-style-type: none">• A ‘team’ – unitary political system• A ‘coalition’ – pluralist political system• A ‘prison’ – coercive political system.	A strand of critical systems thinking is based around this political metaphor. The various methodologies focus on power distribution within problem situations and seek to neutralise the potential for coercion in the processes used to resolve those problem situations.	Situations with low trust between participants. While all organisations show examples of political activity, explicit recognition of the politics of a situation may lead to further politicisation and generate mistrust.

Derived from R L Flood & Jackson, 1991

Table 4.1: SSM analysis 1 – problem owners, interests, and perspectives

Problem owner	Interest in the issue	Perspective
Businesses in Christchurch	Is there more that could be done to speed recovery?	Central government, local government – it's all just bureaucracy. Businesses may or may not care about participating in local decision-making. We want to get businesses working efficiently again.
Cabinet	Was the 2011 Act the right approach for a disaster of this magnitude? It would be nice to endorse the government's approach as a decisive and proportionate way of getting on with the recovery.	The earthquakes happened on our watch. The people needed someone to take charge. People like the approach – they voted the government back in 2014. We respect parliament, but the normal law-making processes are too slow. The cost of the recovery means we need to invest and need close oversight of that investment.
Communities (including community groups and citizens)	Is there more that could be done to speed recovery? We've got great ideas about making our city / neighbourhood better.	We're worried about people drifting away and leaving our communities as an empty shell. We want life to get back to normal. We want a say in the new shape of our city.
Courts	Is power being used appropriately?	Our role is to ensure the executive operates within the limits of its powers and according to public law norms.
Householders	Is there more that could be done to speed recovery? I have ideas about what I want for my city / neighbourhood / my children's schools.	Living in a broken home, in a city with broken streets, takes all my time and effort. I want someone to take charge and fix it. I want a say in the new shape of my city and my children's schooling.
Infrastructure providers	Is there more that could be done to speed recovery?	Our customers are struggling – they need our services to function properly. We may face contractual penalties if we fail to supply our services.
Local government	The 2011 Act is another attack on local government. Could the approach be used again?	The earthquakes happened on our watch. We were taking charge, but first the 2010 Act, and then the 2011 Act 2011, downgraded our role and put central government in charge. Local communities are best placed to decide things that affect them directly.
Parliament	Was the 2011 Act the right approach for a disaster of this magnitude? Is it a good precedent for the future?	We are elected by the people, so we must respond to what they want and value. In this case, that's a strong but proportionate response to a major disaster. [We must preserve and protect parliamentary sovereignty.] ¹⁰
Public service	Was the 2011 Act the right approach for a disaster of this magnitude? As implemented, is the Act a proportionate and restrained way of getting on with the recovery?	We respect parliament's role in making law, but the processes are too slow. We don't know what laws we will need to modify for recovery purposes – we are operating with high uncertainty. Transparency promotes accountability, so we will publish our recommendations for legislative instruments. That, and the Canterbury Earthquake Recovery Review Panel incentivises us to ensure our proposals are defensible. The Treasury has an obligation to ensure government expenditure is prudent and good value.

¹⁰ Contrary to my expectation, this perspective was not strongly present. See Chapter IV.1.3.

Table 4.2: SSM analysis 2 – social analysis

Person/organisation	Role	Social norms ¹¹	Social / constitutional values - expectations that the person would:	Effect of combined norms and values
Cabinet	Advise and challenge the Minister. Support the Minister's decisions.	Restraint Transparency Accountability Legality Public participation	Be pragmatic – do what's necessary to get the job done. Take charge – be authoritative. Act fairly – nobody gets left behind; nobody gets favoured unfairly.	Get the job done lawfully. Nobody gets left behind. People have a fair chance to have their say on the recovery. Decisions are open to scrutiny.
Canterbury Earthquake Recovery Authority	Make decisions. Advise and support the Minister. Purchase property for recovery related purposes. Keep recovery moving – coordinate other agents in the recovery.	Restraint Transparency Accountability Public participation Legality Political neutrality Impartiality	Be pragmatic. Act fairly. Be authoritative, within the limits of powers.	Get the job done lawfully. Nobody gets left behind. Advice and decisions are open to scrutiny. Advice to government is free and frank, and reflects the views of the people affected.
Community forum	Advise the Minister and the Authority.	Public participation Democracy	Be pragmatic – do what's necessary to get the job done. Be fair and remain true to the community.	Local perspectives inform the recovery. Nobody gets left behind.
Courts	Adjudicate disputes. Act as a check on executive power.	Legality Judicial independence Impartiality Transparency Accountability Democracy	Be fair and impartial.	Nobody is treated in a way that is manifestly unfair. Scrutinise executive use of power, but respect parliament's clear wishes about the executive's power in the recovery. Parliament is directly accountable to the people.
Cross party parliamentary forum	Advise the Minister. Contribute to parliamentary consensus-building on earthquake recovery activities.	Public participation Transparency Accountability Legality Democracy Restraint	Be pragmatic – do what's necessary to get the job done. Act fairly – nobody gets left behind; nobody gets favoured unfairly.	Get the job done lawfully. Government's use of power is scrutinised to ensure pragmatism is tempered with restraint. Nobody gets left behind. Local perspectives inform government decisions.
Local government	Strategy and planning decisions for district and region. Approvals (resource consents, building consents).	Public participation Transparency Accountability Legality Democracy	Be pragmatic – do what's necessary to get the job done. Take charge – be authoritative. Act fairly – nobody gets left behind; nobody gets favoured unfairly.	Get the job done lawfully. Local perspectives inform the recovery. Nobody gets left behind.

¹¹ The terms in this column are explained in Table 4.2a.

Person/organisation	Role	Social norms ¹¹	Social / constitutional values - expectations that the person would:	Effect of combined norms and values
Minister for Canterbury Earthquake Recovery	Make decisions and grant approvals. Keep recovery moving – bang heads together if necessary to get other agents in the recovery to fulfil their roles.	Restraint Transparency Accountability Public participation Legality	Be pragmatic – do what’s necessary to get the job done. Take charge – be authoritative. Act fairly – nobody gets left behind; nobody gets favoured unfairly.	Get the job done lawfully. Nobody gets left behind. People have a fair chance to have their say on the recovery. Decisions are open to scrutiny.
Parliament	Authorise the executive to act. Scrutinise executive action. Fund the executive.	Transparency Accountability Public participation Democracy	Take charge – empower the government to do the recovery; and supervise it. Be pragmatic – give the government the powers and money it needs for the recovery.	Enable the job to be done lawfully Parliament is supreme and supervise the executive’s use of delegated powers

Table 4.3: Summary of actor analyses using the Delft approach

Actor	Role ¹²	Perceptions, interests and objectives	Nature: dedicated or non-dedicated ¹³	Status: critical or non-critical ¹⁴	Overall assessment ¹⁵
Businesses / business representative groups	No formal role. <u>Customers</u> – businesses are the beneficiaries or victims of earthquake recovery activities. <u>Problem owners</u> by virtue of their contribution to the local economy. Business representative groups are <u>advocates</u> for their members.	Interests broadly align with residents. Businesses employ people who live locally, and are also affected by issues such as weathertight, affordable accommodation, and infrastructure. Businesses' alignment with recovery efforts will be influenced by their ongoing financial viability. Representative groups' alignment will be influenced by their members' interests.	<u>Non-dedicated</u> - businesses have strong financial incentives to stay afloat. If remaining in Christchurch risks their ongoing viability, they may leave. Businesses likely to participate in recovery-oriented measures if it makes financial sense and is not difficult. Unlikely to contribute to measures that do not benefit them.	<u>Critical</u> . Businesses' continued presence in Christchurch supports the economy that supports the tax base and rating base needed to fund recovery activities. Representative groups are <u>non-critical</u> , but can help government to reach business. Could be useful persuaders.	Businesses are indispensable potential allies that may be hard to activate. Representative groups may be easier to reach and activate than businesses. May also be potential blockers who will not immediately jump to action (sleeping dogs).
Central government (cabinet and public sector departments)	<u>Problem owner</u> . Central government has more financial resources available to it than local government, and administers regulatory frameworks that can enable and expedite (or slow) the recovery.	A strong and swift response to alleviate suffering and minimise impact on Canterbury's (and the wider) economy. Rebuild is an opportunity to future-proof the city and attract investment. As elected representatives, Cabinet perspectives will be influenced by public expectations, and by the three-year parliamentary term. The public sector perspective may be more technical, and informed by longer-term objectives.	Dedicated. Central government has strong political, fiscal, legal and moral incentives to support the recovery.	Critical. Central government agencies have essential resources for the recovery, including funding and regulatory frameworks to expedite recovery activity.	Actor that will undoubtedly participate and is a potential ally. Has the levers to take control away from other actors (e.g. local government).
Communities / community groups	No formal role. <u>Customer</u> – communities are the beneficiaries or victims of earthquake recovery activities. Community groups advocate for communities and represent their interests. Grassroots networks such as CanCERN sprang up after the earthquakes.	Interests and objectives influenced by the community's ongoing viability. School closures, re-zoning and land retirement can put communities at odds with decision-makers. Community groups may coalesce around particular interests (e.g. the Great Christchurch Buildings Trust; CanCERN).	<u>Dedicated</u> in the short term. Long-term dedication, is vulnerable and depends on communities' viability. Communities rallied around their members in the immediate aftermath. Land retirement, school closures, and long-term unavailability of community facilities make it hard to maintain the community spirit, while residents have on their own recovery needs. Community groups may depend on volunteers and may evolve as needs or issues coalesce.	Critical. Communities can mobilise their members to support recovery activities.	Actors that will probably participate and are potential allies. May also be potential blockers of certain changes (biting dogs).

¹² Refers to formal tasks, authorities and relations (e.g. from legislation, procedures – van der Lei (p 1396)

¹³ Dedication refers to the determination or willingness to use these resources.

¹⁴ Criticality refers to whether or not actors possess resources that are essential for solving the problem (van der Lei p 1397)

¹⁵ Overall assessment comes from van der Lei, p. 1397.

Actor	Role ¹²	Perceptions, interests and objectives	Nature: dedicated or non-dedicated ¹³	Status: critical or non-critical ¹⁴	Overall assessment ¹⁵
Community Forum	<u>Adviser</u> to the Minister and the Authority.	Interested in injecting community perspectives into recovery decisions, to align decisions with those perspectives as much as possible.	Dedicated. Forum established under statute to advise the Minister. It could be expected to want to fulfil that role, and has dedicated more effort than might have been envisaged initially (Murdoch, 2013, 2014).	Non-critical. The forum has been established as a proxy for community input, but neither the Minister nor the Authority have to acquiesce with its views.	Actors that will participate and are potential allies.
Courts	<u>Decision-maker</u> in relation to legal disputes.	"Independent, fair and efficient courts are an important cornerstone in our democracy. Courts underpin social stability. They give confidence that our rights as citizens can be upheld; that our differences and conflicts can be resolved through law; that those who interfere with our rights can be held to account; that our society can be protected from law breakers; and that the State can be required always to act lawfully." ¹⁶	Non-dedicated. Courts' resources are required only when legal action is brought. Otherwise, they do not contribute to recovery action.	Critical. Courts' concerns and principles are relevant. The executive needs to consider how the courts will interpret and apply the law. Otherwise it risks finding itself on the wrong side of the law.	Potential blockers that will not immediately jump to action (sleeping dogs).
Cross-party parliamentary forum	<u>Adviser</u> . The forum established under the 2011 Act comprised members of parliament who usually live in greater Christchurch, and members who represent constituencies there. It informed and advised the Minister (2011 Act, s 7).	Recovery meets local needs and is consistent with local perspectives.	Non-dedicated. Members have strong incentives to participate in the forum, but lack resources to contribute directly to recovery activities.	Non-critical. Forum lacks power to enable or block action.	Don't have to be involved initially.
Infrastructure service providers (including SCIRT ¹⁷)	<u>Problem owner</u> . Infrastructure providers are responsible for maintaining operational horizontal infrastructure (roads, water, wastewater, storm water, electricity and telecommunications networks).	Interested in repairing horizontal infrastructure to enable life to get back to normal for people living and working in greater Christchurch. Some competition for resources (e.g. workforce and equipment). Coordination is needed to ensure they "dig once and dig right". ¹⁸	Dedicated. Infrastructure providers have strong incentives to facilitate recovery. Willingness and interest in participation will be influenced by providers' own interests in (1) meeting their customers' needs and (2) being seen as helpful, cooperative and effective.	Critical. Infrastructure providers are critical to ongoing viability of Christchurch as a city.	Actors that will probably participate and are potential allies. May need to be assisted into a cooperative framework.

¹⁶ www.courtsofnz.govt.nz/about/system/role/overview (accessed 1 September 2016).

¹⁷ Stronger Canterbury Infrastructure Rebuild Team, an alliance of owner participants (CERA, Christchurch City Council and the New Zealand Transport Agency) and non-owner participant organisations (City Care, Downer, Fletcher, Fulton Hogan, McConnell Dowell). The alliance is a contractual agreement between the parties to deliver the infrastructure rebuild. www.strongerchristchurch.govt.nz/about/structure (accessed 28 July 2016).

¹⁸ www.strongerchristchurch.govt.nz/about/methods (accessed 28 July 2016).

Actor	Role ¹²	Perceptions, interests and objectives	Nature: dedicated or non-dedicated ¹³	Status: critical or non-critical ¹⁴	Overall assessment ¹⁵
Local government	<u>Problem owner.</u> Local government owns and/or operates horizontal infrastructure (e.g. wastewater). It operates a range of community services and facilities (e.g. libraries, parks and playgrounds, recreational facilities) that are instrumental in community recovery. Local government is responsible for planning and zoning, administering resource and building consents, and building safety.	Local communities best understand their own needs, but cannot fully fund a recovery of this magnitude. Want central government assistance without losing too much control over the recovery process.	Dedicated. Local government has strong incentives to devote its resources to the recovery.	Critical. Local government has resources that are essential to the recovery, including regulatory and planning tools.	Actors that will undoubtedly participate and are potential allies. May block or slow certain changes (biting dogs).
Parliament	<u>Enabler.</u> Parliament is the highest source of law in the land. Parliament also appropriates funding to the executive from taxes. Both will be required for the recovery.	A strong and swift response to alleviate suffering and minimise impact on Canterbury's (and the wider) economy. Maintain public trust and confidence in the branches of state.	Dedicated. Parliament has strong incentives to enable the recovery through its levers (legislation, appropriations, and scrutiny of executive action). Incentives are strengthened by accountability through general elections and by the constitutional value of authoritarianism. In times of crisis, New Zealanders expect strong leadership (M. S. R. Palmer, 2007).	Critical. Parliament can enable or stymie recovery through whether and how it legislates, and through its appropriations.	Actor that will undoubtedly participate. Potential allies, while also being potential critics of certain changes (barking dogs). It would have been politically damaging to vote against the 2010 or 2011 Acts, given the public support for Canterbury immediately after the earthquake (Brookie, 2012).
Reserve bank	<u>Enabler.</u> The Reserve Bank oversees monetary policy and has levers that can cushion economic shock and inflationary pressures resulting from the earthquakes.	Softening short-term shock and managing medium term inflationary pressures. Economic and fiscal lessons from the earthquakes should not be lost.	Dedicated. The bank's main lever is the official cash rate, which it used to mitigate economic effects (Bollard, 2011; Reserve Bank of New Zealand, 2010a, 2010b).	Non critical. Other than the official cash rate, the bank lacks levers to directly assist the recovery.	Actors that will probably participate and are potential allies.
Residents / ratepayers	No formal role. <u>Customers</u> – residents are the likely victims or beneficiaries of earthquake recovery activities.	Rebuilding and repairing homes, infrastructure, community facilities, and schools. Returning to pre-earthquake normality as much as possible. Financial security and certainty.	<u>Dedicated</u> , at least in the short term. There is likely to be a critical mass of residents willing/able to remain in Christchurch and repair or rebuild their homes (unless they lose confidence in the recovery, in which point they may move if able to do so).	<u>Non-critical</u> – residents do not generally possess the resources needed for recovery. ¹⁹	Don't have to be involved initially.
Taxpayers	No formal role.	Interests align to some extent with residents due to sense of fairness (will tolerate and expect collective solutions to the problem). Will expect to see public funds used wisely.	Non-dedicated.	Non-critical, although most taxpayers are eligible to vote, and may enforce accountability at the ballot box.	Don't have to be involved initially. Central government may be alert to taxpayer sentiment.

¹⁹ There are two ways of looking at residents' status, depending on how "critical" is defined. The Delft approach defines critical as possessing the resources needed for the intervention (van der Lei). In that sense, residents are not critical: the recovery will need more funding than can be raised from residents' rates. However, residents can be seen as critical: the recovery will fail if residents lose confidence and move away.

Actor	Role ¹²	Perceptions, interests and objectives	Nature: dedicated or non-dedicated ¹³	Status: critical or non-critical ¹⁴	Overall assessment ¹⁵
The Minister / the Authority	<p><u>Problem owners.</u></p> <p>Central government agency and Minister with specific responsibility for overseeing the recovery process.</p>	<p>A strong and swift response to alleviate suffering and minimise impact on Canterbury's economy.</p> <p>The rebuild is an opportunity to future-proof the city and attract investment.</p> <p>As an elected representative, the Minister's perspectives will be influenced by public expectations, and by the three-year parliamentary term.</p> <p>As a public sector department, the Authority's perspective may be more technical. Arguably its limited lifespan might shorten the time horizon of its perspective.</p>	<p>Dedicated.</p> <p>Specifically tasked with directing and enabling the recovery, and so will direct resources to that end.</p>	<p>Critical.</p> <p>Specifically tasked with directing and enabling the recovery. Legislation puts them at the centre of decision-making processes.</p>	<p>Actors that will undoubtedly participate and have the levers to take control.</p>

Table 5.1: CATWOE for legitimacy in earthquake recovery decision-making


CATWOE element	Discussion	
Customers (can be thought of as beneficiaries or victims of the system)	<p><u>People affected by recovery decisions</u> will benefit from the protections afforded by the procedural and fairness requirements needed to create legitimacy. They may perceive themselves as victims if system requirements slow down recovery decisions that affect them.</p> <p><u>Judiciary</u> benefit by being part of the system that creates legitimacy by holding decision-makers to account.</p> <p><u>General public</u> benefits from the ongoing legitimacy of public decision-making that reinforces constitutional norms and values.</p> <p><u>Decision-makers</u> benefit from the public trust and confidence that goes with legitimacy. They will benefit from having clear procedural guides for decision-making, but may feel constrained if procedures are not well-suited to particular contexts.</p> <p><u>Central and local government</u> will benefit from their association with legitimate decision-making, and are more likely to maintain trust and confidence of the voting public.</p>	
Actors (those who will make the transformation)	<p>Cabinet and Ministers (particularly the Minister for Canterbury Earthquake Recovery).</p> <p>Government departments, particularly the Canterbury Earthquake Recovery Authority.</p> <p>Local government.</p> <p>Independent boards (e.g. Canterbury Earthquake Recovery Review Panel; SCIRT – Stronger Christchurch Infrastructure Recovery Team).</p>	
Transformation (the desired change in state)	<p>Moving <u>from</u> a situation where</p> <ul style="list-style-type: none">• Decision-making is opaque and does not clearly comply with constitutional norms• Reasons are unclear• Normal review mechanisms may not apply• Recovery decisions may not be perceived as legitimate by the public.	 <p><u>To</u> a situation where</p> <ul style="list-style-type: none">• Decision-making is transparent• Reasons are expressed• Normal review mechanisms either clearly apply and can be used based on available information or are replaced by appropriate bespoke review mechanisms• Decisions reflect core constitutional norms• The public trusts and has confidence in the decision-making process and the legitimacy of decisions made using it.
Weltanschauung, or world-view	<p>The recovery will be enduring if decisions are perceived as legitimate. Legitimacy is a reservoir of goodwill that enables the constitution and its institutions to weather short-term shocks and crises without significant loss of public confidence.</p>	
Owners (those who have the power to stop the transformation process)	<p>The primary owner is the executive, which could use informal means to give effect to (or stop) T or could propose law to give effect to (or change) T.</p> <p>Parliament is a secondary owner, because legislation to give effect to or change T can only be made by Parliament.</p> <p>On a longer timescale, voters could also have an indirect power to continue, stop, or change T, by voting for or against the incumbent government. This analysis concentrates on those with direct and immediate power.</p>	
Environmental constraints (elements outside the system which it takes as given)	<p>Tensions in New Zealand's constitutional culture mean people will expect a pragmatic solution that enables timely recovery decisions and will expect the government to take charge. At the same time, people will want to ensure decision-makers, particularly political decision-makers, can be held accountable.</p>	

Table 5.2: PQR for legitimacy in earthquake recovery decision-making


PQR element	Description	
A system to do P (what) (where P is a transformation (T))	Moving <u>from</u> a situation where <ul style="list-style-type: none">Decision-making is opaque and does not clearly comply with constitutional normsReasons are unclearNormal review mechanisms may not applyRecovery decisions may not be perceived as legitimate by the public.	 <u>To</u> a situation where <ul style="list-style-type: none">Decision-making is transparentReasons are expressedNormal review mechanisms either clearly apply and can be used based on available information or are replaced by appropriate bespoke review mechanismsDecisions reflect core constitutional normsThe public trusts and has confidence in the decision-making process and the legitimacy of decisions made using it.
By Q (how)	Decision-making process is transparent, and the reasons for decisions are publicly available. Decision-makers are accountable: review and appeal mechanisms are available and accessible. Proportionate opportunities for public participation in recovery decision-making.	
To achieve R (why)	To ensure decisions are consistent with constitutional norms and values, which is likely to result in their legitimacy. Legitimate decisions are likely to be more enduring, because they are less likely to be revisited. Legitimate recovery decision-making will reinforce public confidence and trust in the underlying constitutional settings, thus enabling the wider constitution to better withstand shocks and crises like extraordinary events that require short-term, expedient decision-making.	

Table 5.3 Five Es for legitimacy in earthquake recovery decision-making

Performance measure	Description	Rationale
Efficacy	Decisions comply with procedural fairness requirements and constitutional norms. Decisions are transparent and reviewable.	<p>This measure identifies what the real world would look like if the system were working. If the system were working, decision-makers would comply with procedural fairness requirements and core constitutional norms, including human rights. Decisions would be transparent and reviewable.</p> <p>Indicators could focus on the existence of decision-making processes and a qualitative assessment of their compliance with norms. Indicators could also measure rates of compliance with those processes, the numbers of decisions that were reviewed, and the outcomes of those reviews.</p>
Efficiency	The trade-offs between speed, transparency, and accountability are balanced appropriately.	<p>This measure requires that the trade-offs between speed and procedural propriety, including the factors identified in element 4 of the model (Figure 5.7), are balanced appropriately so that decision-making is not slowed down unnecessarily, and people are not exposed to an unacceptable risk of arbitrary or unfair decision-making.</p> <p>This measure needs to involve qualitative consideration of the factors influencing perceptions of legitimacy and trust over the medium-long term. A straightforward comparison of resources is likely to give a short-term perspective that may discount future risk to legitimacy.</p>
Effectiveness	Decisions are proportionate, reasonable, and fair. Decision-makers revisit their decisions in accordance with reviewers' recommendations or directions. Decision-making processes evolve in response to problems identified by reviewers. Decisions are accepted as legitimate and binding.	<p>This measure considers whether the system is delivering the right changes, when viewed from a wider system perspective. Success requires the exercise of power to be proportionate, reasonable and fair. That can be measured through scrutinising the use and results of judicial review. Cumulatively, legitimate decisions should contribute to strengthening the legitimacy of the wider recovery process, which would be expected to strengthen trust and confidence in central and local government institutions.</p> <p>Indicators could include the number of judicial review applications brought as a proportion of decisions made. Indicators could also focus on the outcome of judicial review applications. Review should act as a feedback loop so that decision-making processes evolve in response to problems or shortcomings identified by reviewers. Indicators could look for qualitative assessments of how decisions are revisited post-review and the nature and extent of changes to decision-making procedures.</p> <p>Surveys could measure levels of public trust in decision-making processes and acceptance of decisions as legitimate and binding.</p>
Ethicality	Procedures for transparency are consistent with Official Information Act norms. Decision-makers are subject to accountability mechanisms. Decisions comply with procedural fairness requirements and with core constitutional norms, including the rule of law.	<p>This measure is strongly informed by core constitutional norms. It looks for consistency of interventions with norms.</p> <p>Indicators could include: the existence of (and levels of compliance with) transparency requirements; availability and accessibility of review and appeal pathways; qualitative assessment of decisions' compliance with rule of law norms.</p>
Elegance	Procedures and mechanisms are as simple as they can be and no more complex than they need to be. Procedures are easy to follow and mechanisms are easy to use. Procedures and mechanisms add substantively to transparency and accountability, and are consistent with constitutional structures and norms.	<p>This measure involves a qualitative comparison of the model for legitimate decision-making with the constitution to assess its compatibility and the nature and extent of any incompatibility.</p>

Table 6.1: CATWOE for coordination of earthquake recovery activities


CATWOE element	Discussion
Customers (can be thought of as beneficiaries or victims of the system)	Customers are people who have been affected by the earthquakes, including householders, residents, schools, local businesses, insurance companies, infrastructure providers, local authorities, and communities.
Actors (those who will make the transformation)	The actors include: <ul style="list-style-type: none">Cabinet and Parliament as bodies with oversight and the power to direct government agencies (Cabinet) and change the law if need be (Parliament)Central government agencies, local authorities, infrastructure providers, and contractors, who can coordinate closer to the front line.
Transformation (the desired change in state)	Moving <u>from</u> a situation of uncoordinated activity, unclear authority, and slow decision-making  <u>To</u> a situation of timely, coordinated activities with clear authority
Weltanschauung, or worldview	<p>W has been defined as “it’s best for Canterbury (and New Zealand) if it recovers quickly from the earthquakes”.</p> <p>A supporting W is: “central and local government can work cooperatively to achieve the recovery if regulatory obstacles are removed”.</p> <p>This world-view reflects that New Zealand’s social, economic and commercial resilience benefit where economic growth and risk are spread across the country, and that, in normal times, Canterbury offers a number of economic drivers (Minister for Canterbury Earthquake Recovery, 2012). The worldview also assumes that coordination will enable greater efficiency in resource allocation and use. It also assumes that coordination will allow prioritization and sequencing of work to enable the fastest possible progress.</p> <p>An alternative W is: “it’s best for Canterbury (and New Zealand) if it recovers quickly from the earthquakes, so nothing can be allowed to impede a focused, timely, and expedited recovery”.</p> <p>This alternative worldview is based on the same view of resilience and the spread of economic growth and risk outlined above. It gives priority to that view, and concludes that nothing should be able to get in the way of an expedited recovery. It assumes that coordination will enable greater efficiency and faster progress, and that command and control will be the quickest way of achieving recovery.</p>
Owners (those who have the power to stop the transformation process)	<p>The primary owner is the Executive, which could use informal means to give effect to (or stop) T or could propose law to give effect to (or change) T.</p> <p>Parliament is a secondary owner, because legislation to give effect to or change T can only be made by Parliament.</p>
Environmental constraints (elements outside the system which it takes as given)	<p>Environmental constraints include:</p> <ul style="list-style-type: none">Limited workforce capacity – the earthquakes have created demand that takes organisations beyond their BAU resourcing levels. Expanding capacity may take time.Finite supplies of materials and equipment – while additional materials and equipment can be sourced, it may take time, particularly if it has to be sourced from overseas.The New Zealand constitutional values of authoritarianism and pragmatism, which are likely to create public expectations that someone (probably the government) will take charge.

Table 6.2: PQR for coordination of earthquake recovery activities


PQR element	Description		An alternative description
A system to do P (what) (where P is a transformation (T))	Moving <u>from</u> a situation of uncoordinated activity, unclear authority, and slow decision-making	 To a situation of timely, coordinated activities with clear authority	
By Q (how)	<ul style="list-style-type: none">Centralised decision-making for strategic direction and implementation of recovery activities, including property acquisitionExpedited law-makingCoordinated demolition, repair and rebuilding, supported by powers to erect temporary structures, and to enter to undertake work, and to close roads and restrict access to areas <p>(While decision-making is centralised and action is coordinated, this approach to Q assumes that decision-makers will work cooperatively to achieve the recovery and that coercive powers are not required to require local authorities to fulfil their roles relating to recovery activities.</p> <p>This approach to Q also assumes that, to maintain legitimacy, it is necessary for the recovery decision-makers to be accountable for their actions, so no limitations on accountability will be created unless absolutely necessary. If they are necessary, limitations will be drafted as narrowly as possible.)</p>		<ul style="list-style-type: none">Central government-issued recovery strategy to govern all recovery activity, and local government planningRecovery plans to give effect to recovery strategy (developed by central government, or by others at direction of central government)Powers to erect temporary buildings, acquire and develop landExpedited law-makingCoordinated demolition, repair and rebuilding, supported by powers of entry and undertaking workPowers to close roads and restrict accessCentral government powers to assume regulatory responsibilities and to assume management of council infrastructure servicesPower to direct people, local authorities and council organisations, and to call up functions and powers from local authorities and council organisationsLimitations on appeals and judicial review, and limitations on liability for performance of functions in relation to earthquake recovery. <p>(This approach to Q assumes that timeliness is of paramount importance and, while fairness is important, appeals, reviews and arguments over compensation cannot be allowed to hold up recovery.</p> <p>(Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b).</p>
To achieve R (why)	To enable people affected by the earthquakes to get back to their normal lives and activities as quickly as possible while not being subjected to arbitrary or unfair decision-making		<p>To ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes in a focused, timely, and expedited way.</p> <p>To restore the social, economic, cultural, and environmental wellbeing of greater Christchurch communities.</p> <p>(2011 Act, section 3)</p>

Table 6.3 Five Es for the coordination of earthquake recovery activities

Performance measure	Description	Rationale
Efficacy	All recovery-related matters clearly fall within the responsibilities of an identified decision-maker. Decision-makers know the scope of their decision-making responsibilities. Decisions are being made and implemented without delay.	<p>This measure focuses on whether the steps taken to implement T are achieving the <i>desired transformation</i>. The key question here is whether the steps taken to achieve coordination are actually resulting in coordination.</p> <p>The description assumes that clear decision-making responsibilities will give decision-makers confidence to make decisions on matters within their purview. The tangible outcome of that will be that decisions are being implemented.</p> <p>Indicators could, therefore, focus on numbers of decisions made and decisions implemented, and matters still awaiting decision. They could also focus on the number of matters for which there is no clear decision-making responsibility.</p>
Efficiency	Decisions are made without delay. Decision-makers have the right skills (or have access to the right skills) to make decisions.	<p>This measure focuses on whether the method of coordination is more efficient than the status quo, in terms of the time and resources needed to get decisions made and implemented.</p> <p>Indicators could focus on the time that elapses between an issue being identified and decisions made, and on time elapsed between decision-making and implementation. Indicators could also focus on the cost of decision-making, including the times that decision-makers have to take advice or call on specialist expertise to make decisions.</p>
Effectiveness	Decisions are accepted by the affected parties. Decisions do not have to be revisited. Where challenged, decisions are not overturned by reviewers (including the courts).	<p>This measure focuses on the extent to which the <i>desired transformation</i> is achieving the wider purpose: to what extent is coordination resulting in a timely recovery while not subjecting people to arbitrary or unfair decision-making.</p> <p>The description is based on the theory of legitimacy (V.1), and assumes that decisions that are accepted by affected parties and decisions that can withstand judicial and public scrutiny will be proportionate, reasonable and fair.</p> <p>Indicators could focus on the numbers of decisions challenged as a proportion of all decisions made, and on the results of judicial challenges. Qualitative indicators could be drawn from the extent of, and nature of, commentary on decisions (e.g. news media reporting and surveys of affected residents, businesses, and local government).</p>
	Decisions are made without delay and tangibly improve the social, environmental, economic, or cultural wellbeing of greater Christchurch communities.	<p>The alternative root definition requires a different measure, because it aims to achieve a different R (why). R is a focused, timely and expedited restoration of the social, environmental, economic, and cultural wellbeing of greater Christchurch communities.</p> <p>The description focuses on timeliness and tangible improvements. Indicators could focus on the time that elapses between issues being identified and decisions made, and on time elapsed between decision-making and implementation. Indicators could focus on public and provider perceptions of social, environmental, economic, and cultural wellbeing.</p>
Ethicality	Decision-making processes are transparent and include proportionate opportunities for participation. Decision-makers are accountable. Decisions are publicly perceived as legitimate.	<p>This measure links coordination with compliance with constitutional norms and looks for indications that coordination is creating decisions that are broadly accepted as legitimate as a proxy for ethicality.</p> <p>Indicators could focus on the extent to which decisions are released publicly, and reasons for decisions are given. Other indicators could include the extent to which decisions-makers are shielded from liability (e.g. through privative clauses). Numbers and types of decisions where participation is part of the process. Qualitative indicators (e.g. surveys) could focus on whether people consider participation opportunities were adequate and the level of confidence that participation made a difference..</p>
Elegance	Procedures and mechanisms are as simple as they can be and no more complex than they need to be. Framework for recovery decision-making should reflect and be consistent with New Zealand's pluralist constitutional system.	<p>This measure involves a qualitative comparison of the model for cooperation with the constitution to assess its compatibility and the nature and extent of any incompatibility.</p>

Table 7.1: Criteria for good law-making

No.	Criteria	Comment
1.	Legislatures should allow the time and opportunity for informed and open policy deliberation	Reflects the importance of <u>transparency</u> and <u>participation</u> in legitimate law-making. Transparency enables people to participate in an informed way to test policies, and to hold legislators to account for their decisions.
2.	The legislative process should allow enough time and opportunity for adequate scrutiny of bills	As above. <u>Transparency</u> and <u>participation</u> mean more eyes can peruse bills, increasing the chances that unintended consequences will be identified.
3.	Citizens should have the opportunity to participate in the legislative process	<u>Participation</u> is expected in a democracy (reference – Stanford?). It strengthens legitimacy (Figure 5.1).
4.	Parliament should operate in a transparent manner	<u>Transparency</u> is an enabler of participation and accountability (Figure 5.1).
5.	The House should strive to produce high-quality legislation	The quality of legislation – its fitness for purpose – is a desirable end in itself. It strengthens the rule of law by enhancing the law's accessibility and predictability. Good quality law enhances confidence in the legislature. Through that, it strengthens legitimacy of the law and the law-making system (Figure 5.1).
6.	Legislation should not jeopardise fundamental constitutional rights and principles	Reflects the importance of law's substance. This criterion focuses on protecting constitutional propriety, legality, and procedural fairness (Figures 5.1 and 5.2).
7.	Parliament should follow stable procedural rules	Stable procedural rules impose discipline on the House, which enhances its gravitas, thus making it more worthy of respect and confidence. That respect and confidence shore up the legitimacy of law made by parliament. The procedural rules mean the House can be held to <u>account</u> for departures from them.
8.	Parliament should foster, not erode, respect for itself as an institution	Respect for parliament is related to <u>participation</u> in democratic processes. Together, those factors influence confidence in the parliamentary process, which reinforces the legitimacy of law made by parliament (Figure 7.6).
9.	The government has a right to govern, as long as it commands a majority in the House	The doctrine of responsible government is a core tenet of the Westminster system. It resonates with the constitutional values of authoritarianism and egalitarianism, and with the principle of representative democracy.
10.	Parliament should be able to enact legislation quickly in (actual) emergency situations	This criterion resonates with the constitutional value of pragmatism, and is likely to strengthen public confidence in the institution of parliament. To be legitimate, law needs to law is fit for purpose for the prevailing circumstances, even when those circumstances are changing rapidly. Parliament-made law is consistent with parliamentary sovereignty.

(Derived from McLeay, Geiringer, & Higbee, 2012)

Table 7.2: CATWOE for expedited law-making


CATWOE element	Discussion
Customers <i>(can be thought of as beneficiaries or victims of the system)</i>	Customers are people who have been affected by the earthquakes, including householders, residents, schools, local businesses, insurance companies, infrastructure providers, and local authorities. Customers include people working on earthquake recovery, including central government agencies, local government, and private companies and individuals contracted to do recovery work.
Actors <i>(those who will make the transformation)</i>	The actors are: <ul style="list-style-type: none">• Cabinet – has the power to direct government agencies; advises the Governor-General to sign instruments into law• Parliament – New Zealand’s sovereign law-maker who can either make law or authorise the executive to do so.
Transformation <i>(the desired change in state)</i>	<div>Moving <u>from</u> a situation where recovery is slowed by business-as-usual constraints and requirements and recovery workers face legal liability if they do not comply</div> <div></div> <div><u>To</u> a situation where recovery is expedited by relaxed or modified processes and recovery workers who comply with those relaxed or modified processes are protected from liability.</div>
Weltanschauung, or worldview	“It’s best for Canterbury (and New Zealand) if it recovers quickly from the earthquakes” (Table 6.1 sets out the rationale for this W). A supporting W is “ongoing legitimacy of the law requires that the law to be fit-for-purpose and capable of fair and rational application, even in the post-earthquake context”. (This W responds to the constitutional values of fairness and pragmatism).
Owners <i>(those who have the power to stop the transformation process)</i>	Parliament is the primary owner, because legislation to enable expedited law-making (which enables T) can only be made by Parliament. Parliament can, therefore, stop T. The executive is a secondary owner, as it will have control over the day-to-day application of expedited law-making, which will give effect to, or change, or stop T.
Environmental constraints <i>(elements outside the system which it takes as given)</i>	Environmental constraints include: <ul style="list-style-type: none">• The constitutional values of authoritarianism and pragmatism, which means people will expect someone to take charge.• The rule of law expectation that law should be certain, predictable, accessible, and prospective.• An assumption, based on the rule of law, that earthquake recovery needs to be done within legal constraints.

Table 7.3: PQR for expedited law-making


PQR element	Description
A system to do P (what) (where P is a transformation (T))	<div><div>Moving <u>from</u> a situation where recovery is slowed by business-as-usual constraints and requirements and recovery workers face legal liability if they do not comply</div><div></div><div><u>To</u> a situation where recovery is expedited by relaxed or modified processes and recovery workers who comply with those relaxed or modified processes are protected from liability.</div></div>
By Q (how)	<p>Identifying as far as possible the range of activities that might need authorisation, or the relaxation or modification of requirements.</p> <p>Enacting a Henry VIII clause that empowers the executive to modify primary legislation where:</p> <ul style="list-style-type: none">• Compliance, or full compliance, with a legal requirement or restriction is impossible or impracticable in the post-earthquake context, OR• Compliance would unreasonably divert resources away from recovery efforts, AND• Legislative change is required urgently to address a problem that is current or imminent. <p>(Q assumes that requiring all necessary legislative changes to be made by Parliament would significantly disrupt the government's legislative programme. "All governments want to get their legislative programme through the House, and almost all governments face the problem of too many bills to introduce and pass in too little time" (McLeay et al). Progressing all recovery-related amendments in Parliament would incur a significant opportunity cost for the government.)</p> <p>Imposing the following checks and balances on use of the Henry VIII clause:</p> <ul style="list-style-type: none">• Parliamentary disallowance on a truncated timeframe (modelled on the Epidemic Preparedness Act 2006) to give legal provisions certainty as soon as possible, while not undermining Parliament's scrutiny and control• Judicial review of delegated legislation• Statutory requirement that the minister proposing delegated legislation is to decide a level of participation that is proportionate to the nature of the issue, its effect on the affected population, scale of the affected population, and the need for urgency. Ministers must certify these matters to Cabinet.• Limited retrospectivity – executive-made law can be retrospective to the date of the first earthquake (4 September 2010)• Decisions and advice are subject to the Official Information Act 1982 (no legislative change required). <p>(Q assumes these checks and balances will be sufficient to mitigate the Henry VIII clause's effect on the separation of powers and the rule of law.)</p>
To achieve R (why)	<p>To enable the people affected to recover from the effects of the earthquakes as quickly as possible while being protected from arbitrary and/or unfair laws.</p> <p>To protect those working on earthquake recovery against liability for not following business-as-usual rules and procedures.</p>

Table 7.4: Five Es for expedited law-making

Performance measure	Description	Rationale
Efficacy	Legal restrictions and requirements make sense in the post-earthquake environment and do not unreasonably divert resources away from recovery activities.	<p>This measure focuses on whether expedited law-making is having the desired effect. Qualitative indicators could be drawn from surveys of people, businesses, and regulators involved in recovery work. Surveys could measure perceptions of unnecessarily 'bureaucratic' requirements and identify problematic legal restrictions or requirements.</p>
Efficiency	The time and effort needed to get a law change is less than the time and effort needed to work with existing legal restrictions and requirements or to seek amendments through the parliamentary process.	<p>This measure focuses on the relative efficiencies of the expedited law-making process against:</p> <ul style="list-style-type: none">• Working with the status quo, and• Law change through the parliamentary process. <p>This measure helps to assess whether the expedited law-making process is more efficient than the alternatives. Indicators could focus on estimated costs and time needed to comply with the status quo and the opportunity cost of the status quo versus a modified legal process.</p> <p>Indicators for a comparison of the expedited process versus the parliamentary process could focus on projected time from policy approvals to enactment and likely time investment by officials and ministers. The comparison would need to control for modifications to the parliamentary process, including a truncated select committee consideration, and use of extended sitting hours or urgency. Indicators would also need to assess the opportunity cost of what Parliament could not enact while it was passing recovery-related legislation.</p>
Effectiveness	<p>Law changes are authorising and expediting recovery work so that tangible progress can be seen. Recovery workers are confident that their activities are lawful.</p> <p>The nature of this measure is such that time will need to be given to allow the expedited process to be used and for the resulting legislation to be implemented and used.</p>	<p>This measure focuses on the extent to which the desired transformation is achieving the wider purpose: to what extent is the expedited law-making process moving recovery along so as to mitigate the harm caused by the earthquakes? And how well is it protecting recovery workers against liability for not following business-as-usual processes?</p> <p>Indicators could include the numbers of legal challenges to recovery-related action and their results. Qualitative indicators could measure levels of confidence amongst recovery workers about their legal authorisations.</p> <p>It is hard to measure the effect of the expedited law-making process in one sense because it is hard to measure a negative (what would have been the effect of not legislating?), but a random sample could be modelled as a case-study to project the effects.</p>

Performance measure	Description	Rationale
Ethicality	<p>Law changes are transparent and are subject to control by the legislative and judicial branches of state. Law changes are notified and publicly accessible, and disturb the status quo to the minimum extent necessary. Law changes are neither arbitrary nor unfair.</p> <p>Time will need to be given to allow the expedited process to be used, so that the resulting legislation can be assessed against this measure</p>	<p>This measure links the expedited law-making process with constitutional norms and uses my theory of legitimacy (Chapter V) and elements of the rule of law as a proxy for ethicality. This measure is strongly informed by core constitutional norms and assumes that the levers of transparency, accountability and participation will incentivise compliance with the constitutional norms of propriety, legality and procedural fairness (detailed in Figure 5.2).</p> <p>Indicators could include the numbers of judicial reviews and other challenges to law changes made using the expedited process (e.g. Regulations Review Committee consideration), and the results of those challenges. Qualitative assessments would be needed to examine the extent of change and of arbitrariness / fairness. Those assessments could be informed by disallowance criteria in Standing Orders (SO 319).</p>
Elegance	<p>The law-making process is as simple as it can be, and no more complex than it needs to be. The process is broadly consistent with the rule of law and results in law that is generally accepted as legitimate by the public.</p>	<p>This measure looks for a qualitative assessment of the process against elements of the rule of law and the theory of legitimacy (Chapter V). Indicators could include:</p> <ul style="list-style-type: none"> • Instances of retrospectivity, and the strength of the justification for them • The presence of accountability measures that mean executive use of the mechanism is supervised and controlled by parliament and the judiciary • The actual level of transparency of the law-making process (e.g. instances of proactive release of information relating to law modifications) • The actual level of participation in the law-making process by the public, stakeholders, and experts.

Table 7.5: four options for an expedited law-making process

Criteria	Option 1	Option 2	Option 3	Option 4
Description	<p>Henry VIII clause enabling orders to be developed by the government, authorised by the Governor-General, and submitted to parliament for approval by affirmative resolution.</p> <p>Executive decisions judicially reviewable.</p> <p>This option ensures parliamentary consent to executive law-making.</p>	<p>Henry VIII clause enabling orders to be developed by the government and authorised by the Governor-General.</p> <p>Truncated disallowance modelled on Epidemic Preparedness Act 2006.</p> <p>Executive decisions judicially reviewable.</p>	<p>Henry VIII clause enabling orders to be developed by the government and authorised by the Governor-General.</p> <p>Draft orders scrutinised by an independent panel.</p> <p>Normal disallowance procedures.</p> <p>No judicial review of decision-making. (2010 and 2011 Acts)</p>	<p>Parliamentary law-making process using Standing Order provisions that enable:</p> <ul style="list-style-type: none">Parliament to sit on any day except a Sunday (SO 47)Extended sitting hours, which are usually used to progress legislation (SO 56)Urgency, which is also used to extend parliament's sitting hours, often to progress legislationOmnibus bills, which include a range of related amendments to different enactments (SO 263)Bypassing or truncating select committee consideration, or enabling select committees to meet outside of normal select committee meeting hours.
Expedited, rapid law-making	<ul style="list-style-type: none">Orders not in force until approved (SO 322). Likely to take at least a month.Notice of motion to approve delegated legislation leads to a referral to select committee, which must report within 28 days. If the select committee proposes amendments that are not incorporated, the motion may be referred back to select committee.Of options 1, 2 and 3, this is the slowest way of getting law into force.	<ul style="list-style-type: none">Orders come into force immediately.Orders must be presented to the House (EPA, s 16).Notice of motion to disallow must be lodged within six sitting days (EPA s 17) and is disallowed within another six sitting days if agreed by the House (EPA s 18). Notice of motion for disallowance can be lodged on any working day and is considered on the next sitting day (SO 324).Of options 1, 2 and 3, this is the fastest way of getting law into force.	<ul style="list-style-type: none">Orders come into force immediately, until such time as it is disallowed.Regulations Review Committee (RRC) can inquire into orders on its own motion or in response to complaints.Notice of motion for disallowance by an RRC member does not lapse, and remains on parliament's order paper until dealt with (SO 321).Not as fast as option 2 for getting law into force because of longer disallowance process.	<ul style="list-style-type: none">Parliament can agree to pass law very rapidly (the 2010 Act was passed in a single day), but the government needs to secure support for both the substance of the law and the procedure to be used to pass it.Process needs to be managed around parliament's sitting days.Depending on the procedure negotiated, this could be a quick option, or it might be slower than option 1.

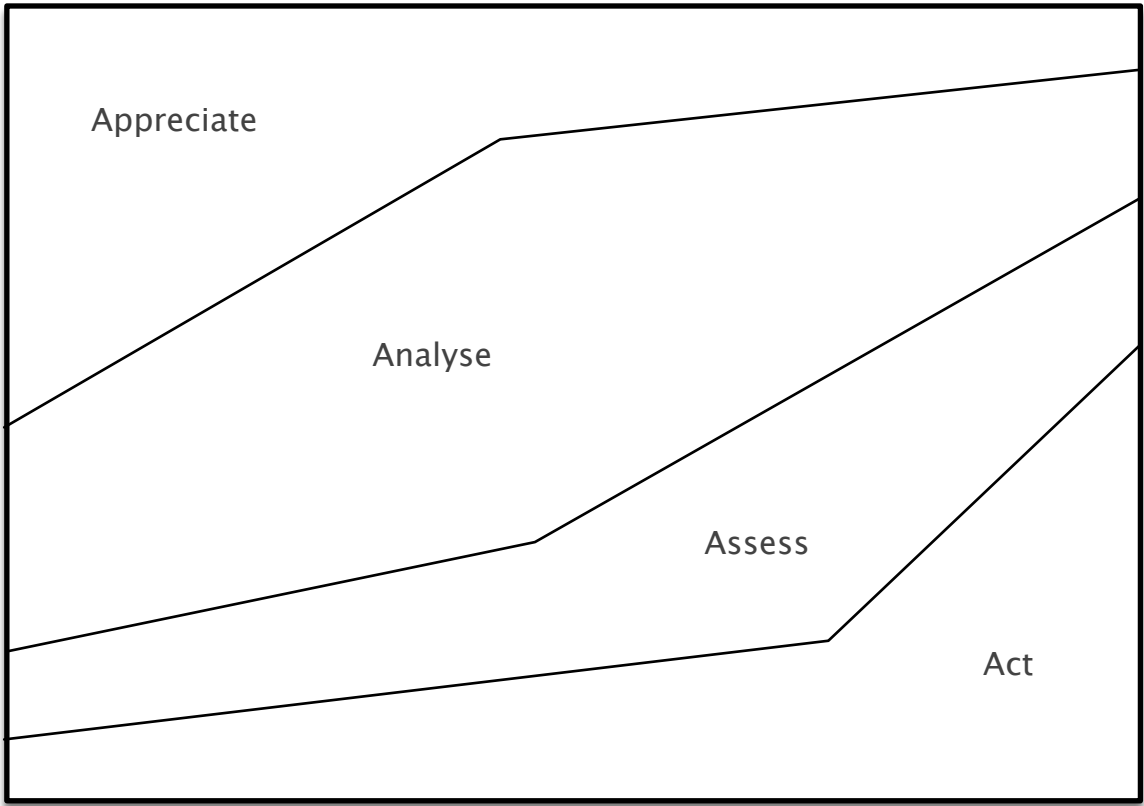
Criteria	Option 1	Option 2	Option 3	Option 4
Certain, predictable outcome	<ul style="list-style-type: none"> No guarantee Parliament will approve orders. Decision to make orders is reviewable, which creates some uncertainty over their future operation. One of the least certain options. 	<ul style="list-style-type: none"> Certainty about the status of orders is achieved after a short period (6 sitting days v 28 days in option 1). Decision to make the amendment is reviewable, which creates some uncertainty over the amendment's future operation. 	<ul style="list-style-type: none"> Certainty about the status of orders is longer because of the application of ordinary disallowance rules. Exclusion of judicial review removes uncertainty over orders' future enforceability. Gives the most certainty. 	<ul style="list-style-type: none"> Outcome is dependent on co-operation from other parties, on both the substance of the law and the procedure to be used to pass it. No prospect of judicial review of any amendments. One of the least certain options.
Transparency	<ul style="list-style-type: none"> Highly transparent because parliament <u>must</u> consider all orders made using the Henry VIII clause. Consideration includes active examination by a select committee. 	<ul style="list-style-type: none"> No mandated transparency – parliamentary consideration only triggered if a notice of motion to disallow is lodged. Government is subject to Official Information Act. 		<p>The most transparent of the four options: all legislative amendments are debated openly in the House of Representatives. May include select committee processes, with detailed scrutiny of the legislation and public submissions.</p>
Participation outside the executive	<ul style="list-style-type: none"> Yes. This option requires active parliamentary participation on all orders made using the power. Can include a short public submission phase. The greatest opportunity for participation outside the executive. 	<ul style="list-style-type: none"> More limited participation than option 1, because disallowance is triggered on an exceptions basis and does not involve a select committee process or any public participation. Active consideration of disallowance motions by parliament. 	<ul style="list-style-type: none"> More limited participation than option 1. Disallowance is triggered on an exceptions basis. The public may complain to the RRC. Disallowance motions made by members of that committee do not lapse. Consideration by the Canterbury Earthquake Recovery Review Panel is limited – the panel has three working days to consider draft legislation. It is a scrutiny mechanism, not participatory. 	<ul style="list-style-type: none"> Yes. The parliamentary process involves the House. Select committee processes can include public participation.
Executive accountability	<ul style="list-style-type: none"> Highly accountable. Parliament makes the law and is directly accountable to voters through elections. Cabinet is accountable to parliament through Cabinet collective responsibility. Judicial review means the courts can review executive decisions to promulgate an order. Options 1 and 4 have the accountability measures that most closely affect law-makers. 	<ul style="list-style-type: none"> Reasonably accountable. While the executive makes the law, it is subject to scrutiny by the House. The procedure ensures delegated legislation is brought to the House's attention, thus allowing the disallowance procedure to be initiated. RRC scrutiny depends on the interest and capacity of committee members. Judicial review means the courts can review executive decisions to promulgate an order. 	<ul style="list-style-type: none"> Some accountability. The executive makes the law, and it is subject to scrutiny by the House. No procedure explicitly requiring delegated legislation to be brought to the House's attention, so disallowance operates on an exceptions basis. RRC scrutiny depends on the interest and capacity of committee members. Purported exclusion of judicial review means ministers' decisions to promulgate delegated legislation cannot be reviewed. Weakest accountability measures. 	<ul style="list-style-type: none"> Highly accountable. Parliament makes the law, consistent with parliamentary sovereignty, and is directly accountable to voters through elections. Options 1 and 4 have the accountability measures that will most closely affect law-makers.

Criteria	Option 1	Option 2	Option 3	Option 4
Overall assessment	<ul style="list-style-type: none">This option pulls the three levers (transparency, participation, and accountability).Unlikely to meet the government's desire for speed and certainty. The House is not always sitting, so there could be delays before orders could be brought into force.	<ul style="list-style-type: none">This option pulls the transparency lever and, to a lesser extent, the accountability lever. Its participation lever is not strong. There is an element of all three branches influencing the decision-making process.This option achieves certainty after a relatively short period of uncertainty.	<ul style="list-style-type: none">This option does not pull any of the three levers strongly. It provides the most certainty because of limited parliamentary involvement and a low risk of judicial review.Highly dependent on complaints and/or motivation of the RRC for any accountability, but does not facilitate those processes through mandated transparency.	<ul style="list-style-type: none">This option pulls all three levers, but at the possible expense of rapid, certain law-making. The executive would be dependent on the House for both procedure and substance of law changes.Has potentially significant opportunity costs for the executive, as recovery legislation would displace other items on the legislative programme.

Appendices: Figures

Figure 3.2 Phases of systems interventions

Overview



Explanation

Phase	What it is	Why it is important
Appreciation	Appreciating the problem situation as experienced by the agents involved and expressed by actors in the situation	<p>A rich appreciation of the problem situation ensures the right problem, in all its dimensions, is identified. That provides a focal point for subsequent analysis and assessment.</p> <p>Appreciation is conditioned by the researchers' previous experiences and their access to the situation (Mingers 2000).</p>
Analysis	Analysing the underlying structure and constraints generating the situation as experienced, including the history that has created it, and the particular structure of relations and constraints that maintain it.	Understanding the full situation, including the constraints and underlying structures helps to ensure options fix the underlying problem and not just the symptoms.
Assessment	Envisaging the ways in the situation could be other than it is; assessing the extent to which the constraints could be altered	This phase moves away from focusing on how things are and assessing the extent to which structures and constraints can be changed within the intervention's limitations.
Action	Bringing about the desired changes	Without action, nothing will change.

(Mingers & Brocklesby, 1997)

Figure 3.3 Mingers-Brocklesby grid - the problem domain and the phases of intervention

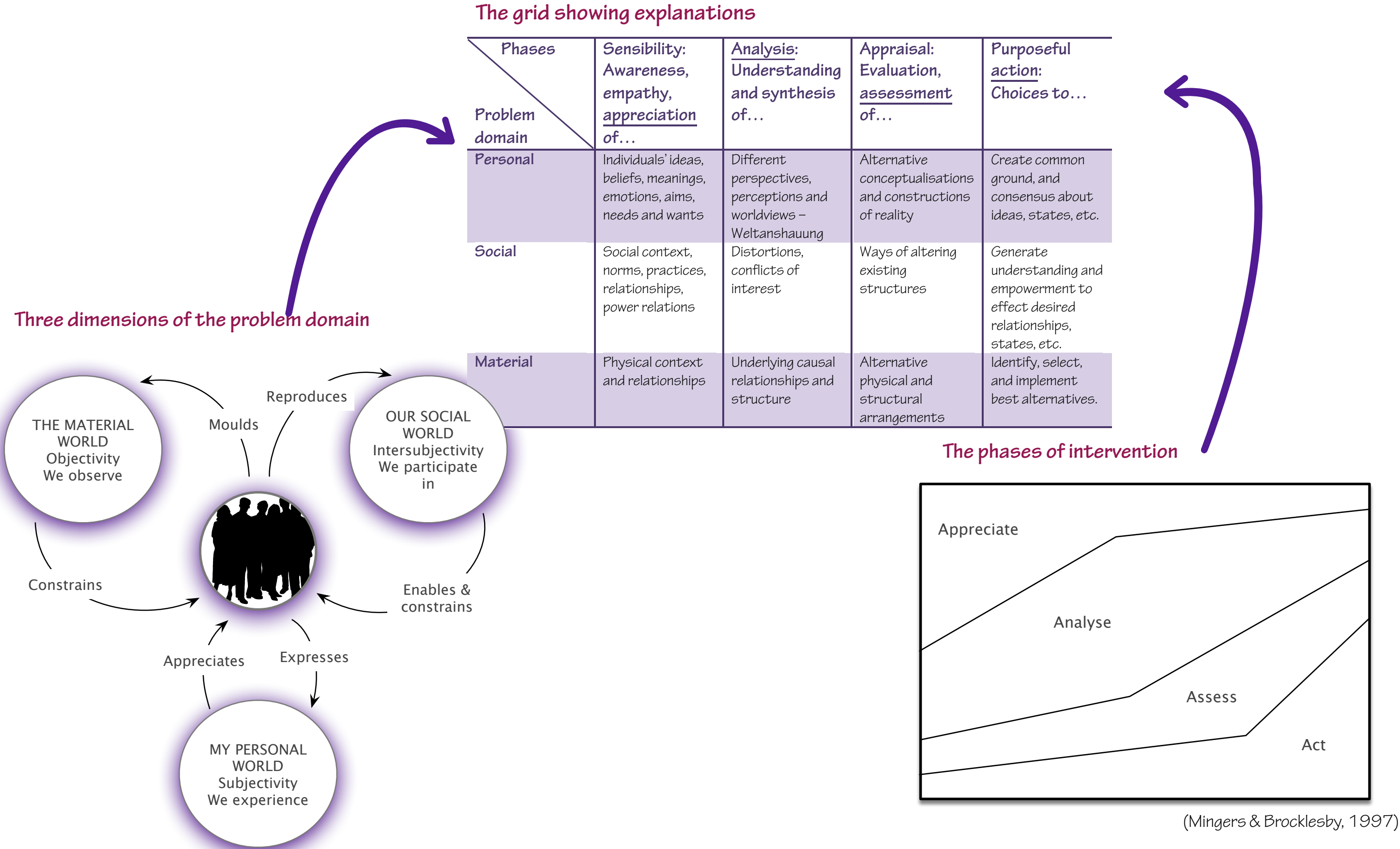


Figure 3.4 System of Systems Methodologies

(a) Flood & Jackson’s simple-complex dichotomy

Characteristics	Simple systems	Complex systems
Elements	Few	Many
Number of interactions between elements	Few	Many
Attributes of elements	Predetermined	Not predetermined
Nature of interaction between elements	Highly organized	Loosely organised
Behaviour	Governed by well-defined laws	Probabilistic
Evolution	The ‘system’ does not evolve over time	‘System’ evolves over time
Purposeful	‘sub-systems’ do not pursue their own goals	‘Sub-systems’ are purposeful and generate their own goals
Behavioural influences	The ‘system’ is unaffected by behavioural influences	The ‘system’ is subject to behavioural influences
Closed/open	The ‘system’ is largely closed to the environment	The ‘system’ is largely open to the environment

(Flood & Jackson, 1991)

(b) SoSM “ideal-type” grid

	Unitary	Pluralist	Coercive
Simple	Simple-unitary Quantitative system dynamics	Simple-pluralist Strategic assumption surfacing and testing	Simple-coercive Critical systems heuristics
Complex	Complex-unitary Viable system diagnosis Soft system dynamics	Complex-pluralist Interactive planning Soft systems methodology Participatory appraisal of needs and the development of action (PANDA)	Complex-coercive None identified

(Jackson & Keys, 1984; Jackson, 1990)

(c) Unitary - pluralist - coercive spectrum for problem contexts



(Flood & Jackson, 1991)

Figure 3.5 SoSM assessment of the constitutional ‘system’

(a) Assessing the constitution against the simple-complex dichotomy

Aspect	Simple	Complex
Number of elements	Small	Large
Number of interactions between elements	Few	Many
Are attributes of elements predetermined?	Predetermined	Not predetermined
Are interactions between elements highly organised or loosely organised?	Highly organised	Loosely organised
Is behaviour governed by well-defined laws or is it probabilistic?	Well-defined laws	Probabilistic
Does the system evolve over time?	No	Yes
Do sub-systems pursue their own goals?	No	Yes
Is the system affected by behavioural influences?	No	Yes
Is the system largely closed or open to its environment?	Closed	Open

Key

Constitution

2011 Act

(b) Assessing the constitution and the 2011 Act against the unitary-pluralist-coercive spectrum

	Unitary	Pluralist	Coercive
Interests	Common interests shared	Basic compatibility of interests	No shared common interests
Values & beliefs	Highly compatible	Some divergence	Likely conflicts between values and beliefs
Ends & means	Largely agreed	Compromise is possible where there is no agreement	No agreement; genuine compromise not possible
Decision-making	Full participation in decision-making	Full participation in decision-making	Some coerce others to accept decisions
Agreed objectives	Participants act in accordance with agreed objectives	Participants act in accordance with agreed objectives	Agreement over objectives not possible given extant systemic arrangements

Absent enabling legislation there is limited power to coerce parts of the system to accept decisions

A plurality of objectives, and diverging values and beliefs means that behaviour is less unified and the system response can be hard to predict.

Decisions are likely to be made in accordance with different objectives, but usually based on consistent fundamental underlying principles. Conflicts tend to be worked out through legislative process

	Unitary	Pluralist	Coercive
Interests	Common interests shared	Basic compatibility of interests	No shared common interests
Values & beliefs	Highly compatible	Some divergence	Likely conflicts between values and beliefs
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Decision-making	Full participation in decision-making	Full participation in decision-making	Some coerce others to accept decisions
Agreed objectives	Participants act in accordance with agreed objectives	Participants act in accordance with agreed objectives	Agreement over objectives not possible given extant systemic arrangements

Decisions are likely to be made in accordance with different objectives, but usually based on consistent fundamental underlying principles. Conflicts tend to be worked out through legislative process

Environment may appear stable as a result of coercion, but it is at risk of longer-term instability

Legislation was used to create common goals

Figure 3.6 TSI assessment of system methodologies against the constitutional problem context



Figure 3.7 Mingers-Brocklesby grids for system methodologies under consideration

(a) Soft system dynamics

	Appreciation	Analysis	Assessment	Action
Social	Moderate Social practices	Moderate Distortions	Weak Challenging / altering power	Empower
Personal	Individual beliefs	Perceptions	Alternatives	Accomodate
Material	Strong Physical circumstances	Strong Underlying causal structure	Moderate Alternatives	Moderate Select and implement

Key

Strong

Moderate

Weak

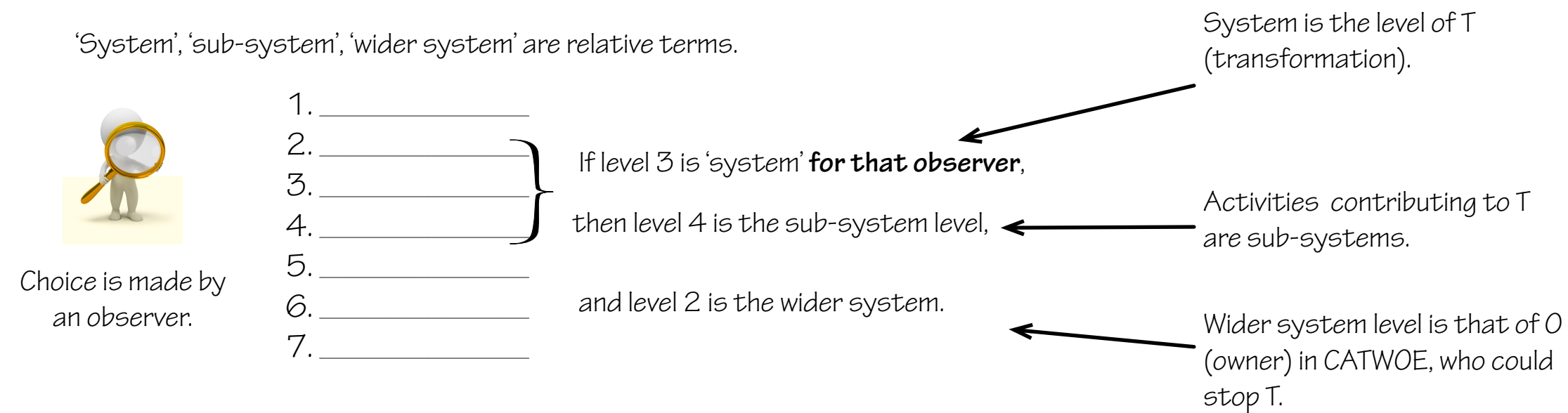
(b) Soft systems methodology

	Appreciation	Analysis	Assessment	Action
Social	Moderate Social practices	Distortions	Challenging / altering power	Empower
Personal	Moderate Individual beliefs	Perceptions	Strong Alternatives	Moderate Accomodate
Material	Weak Physical circumstances	Underlying causal structure	Alternatives	Select and implement

(c) Interactive planning

	Appreciation	Analysis	Assessment	Action
Social	Moderate Social practices	Weak Distortions	Weak Challenging / altering power	Weak Empower
Personal	Individual beliefs	Perceptions	Alternatives	Strong Accomodate
Material	Moderate Physical circumstances	Weak Underlying causal structure	Moderate Alternatives	Strong Select and implement

Figure 3.8 Layered systems thinking is observer-dependent



This approach ensures thinking at three levels:

- what
- how
- why.

“Do P by Q in order to achieve R” covers the three levels.

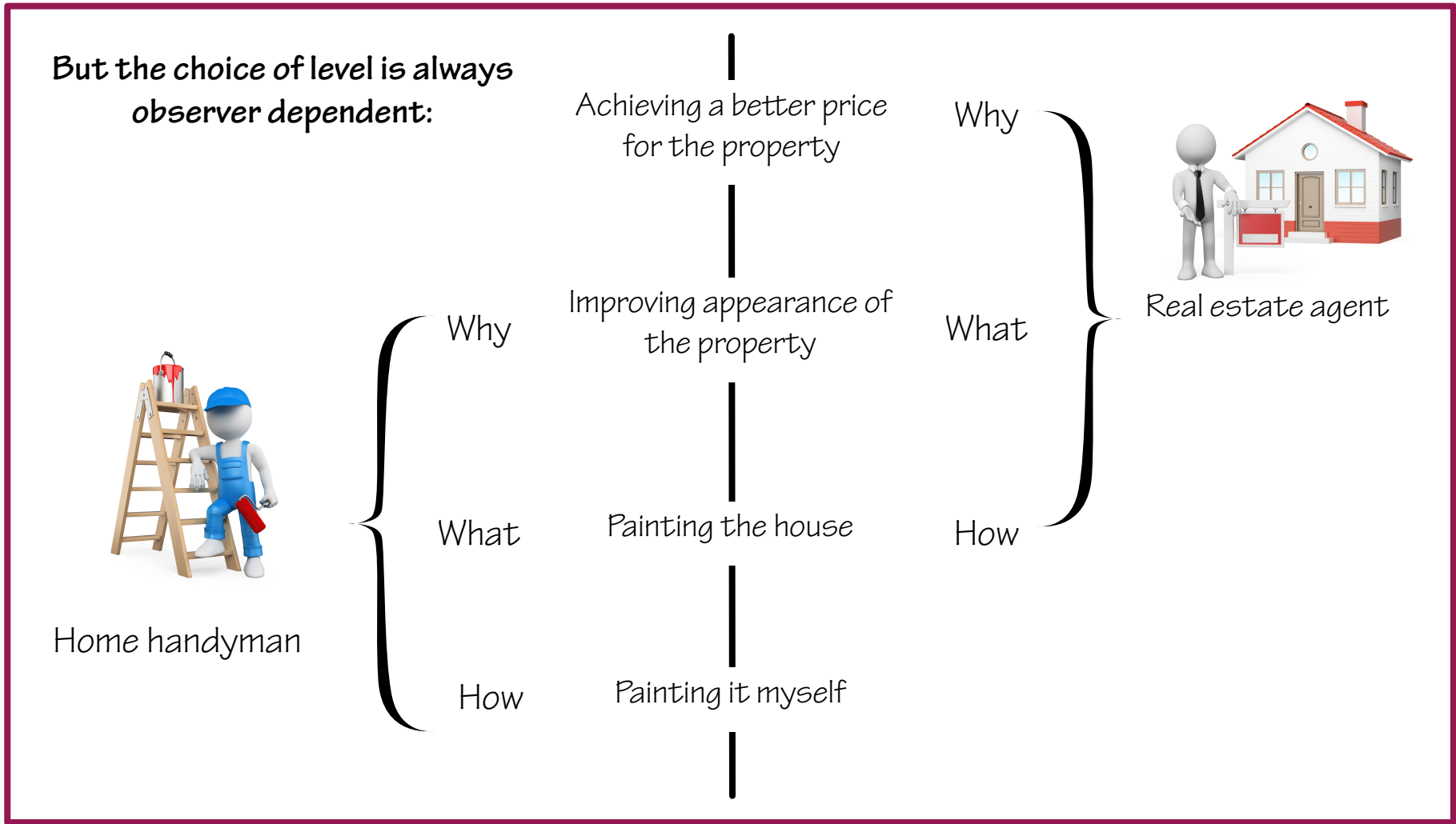
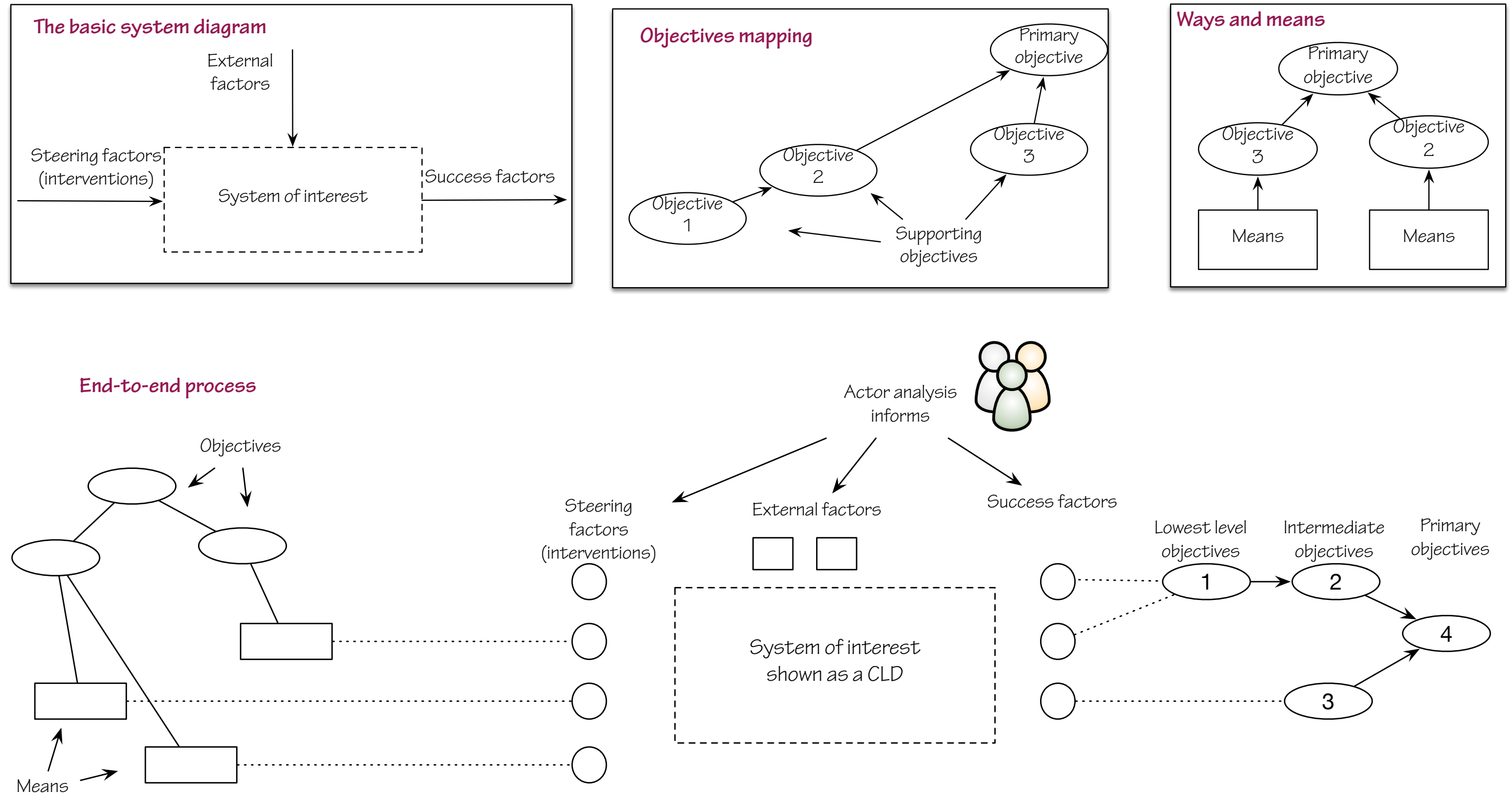


Figure 3.10 Systems diagram for complex policy issue analysis



(van der Lei et al, 2011)

Figure 4.2 SSM Analysis 2: mapping of roles in Canterbury earthquake recovery

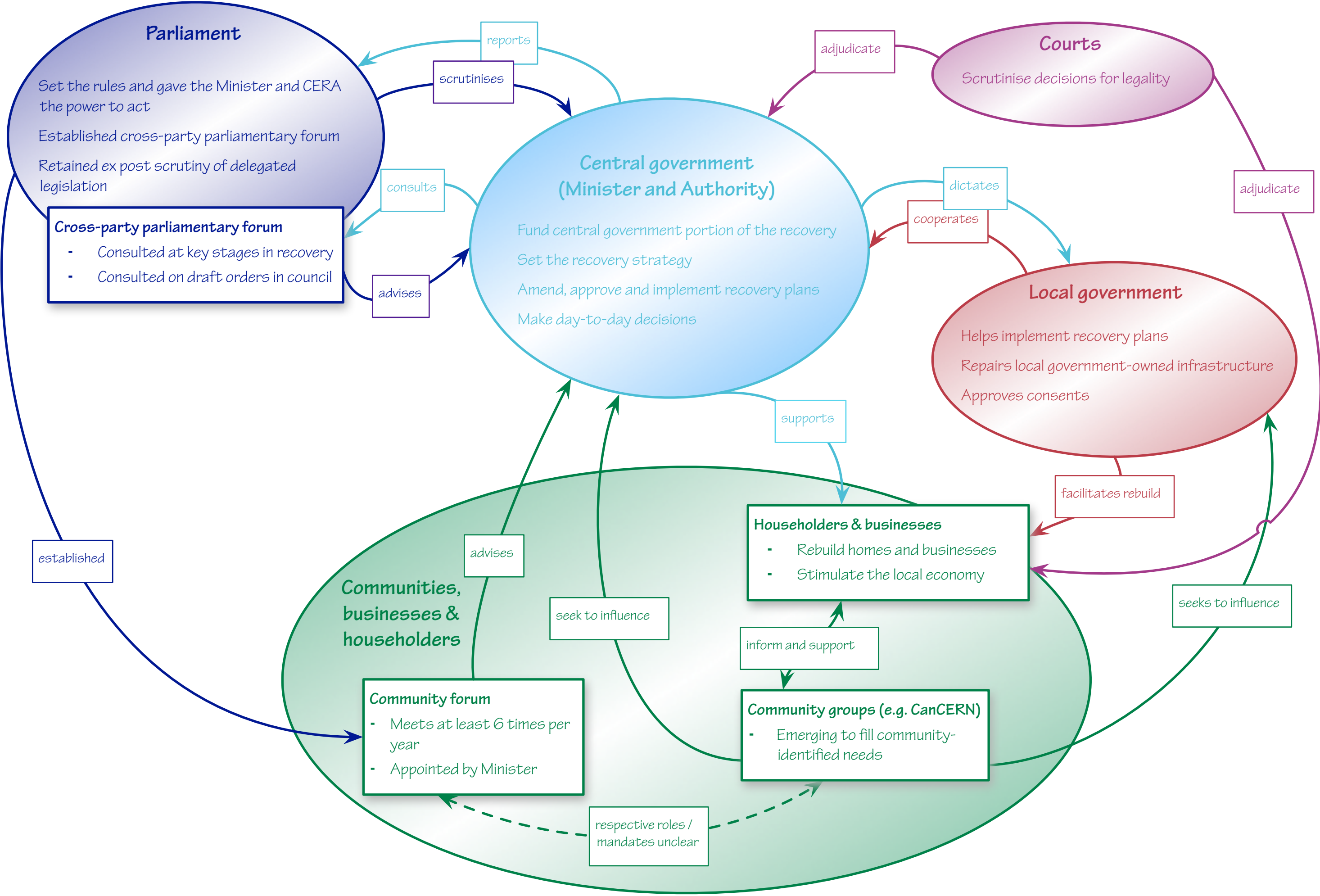


Figure 4.3 SSM Analysis 3: mapping how power was shifted by the 2011 Act

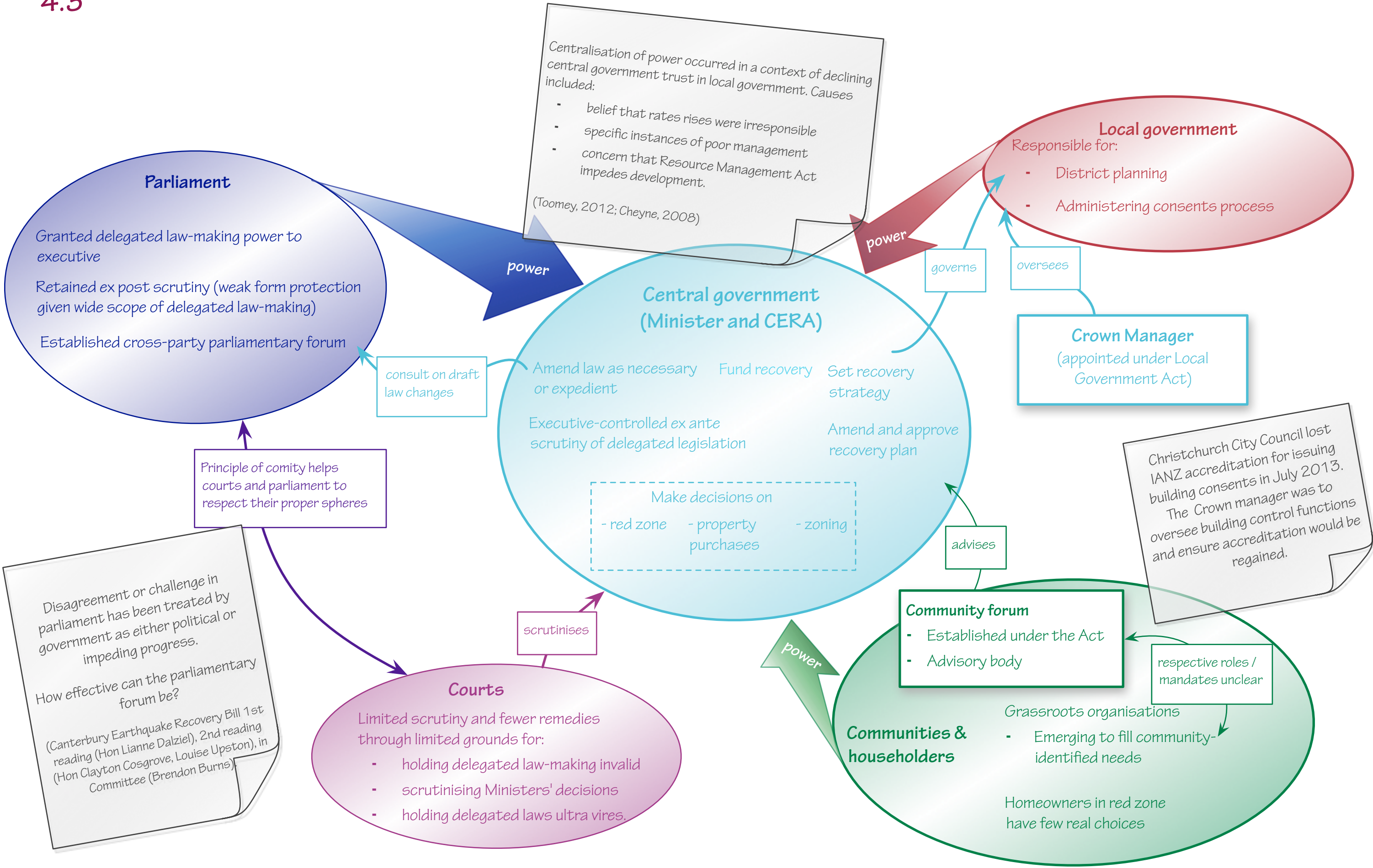


Figure 5.1 The levers required to ensure legitimacy in State decision-making

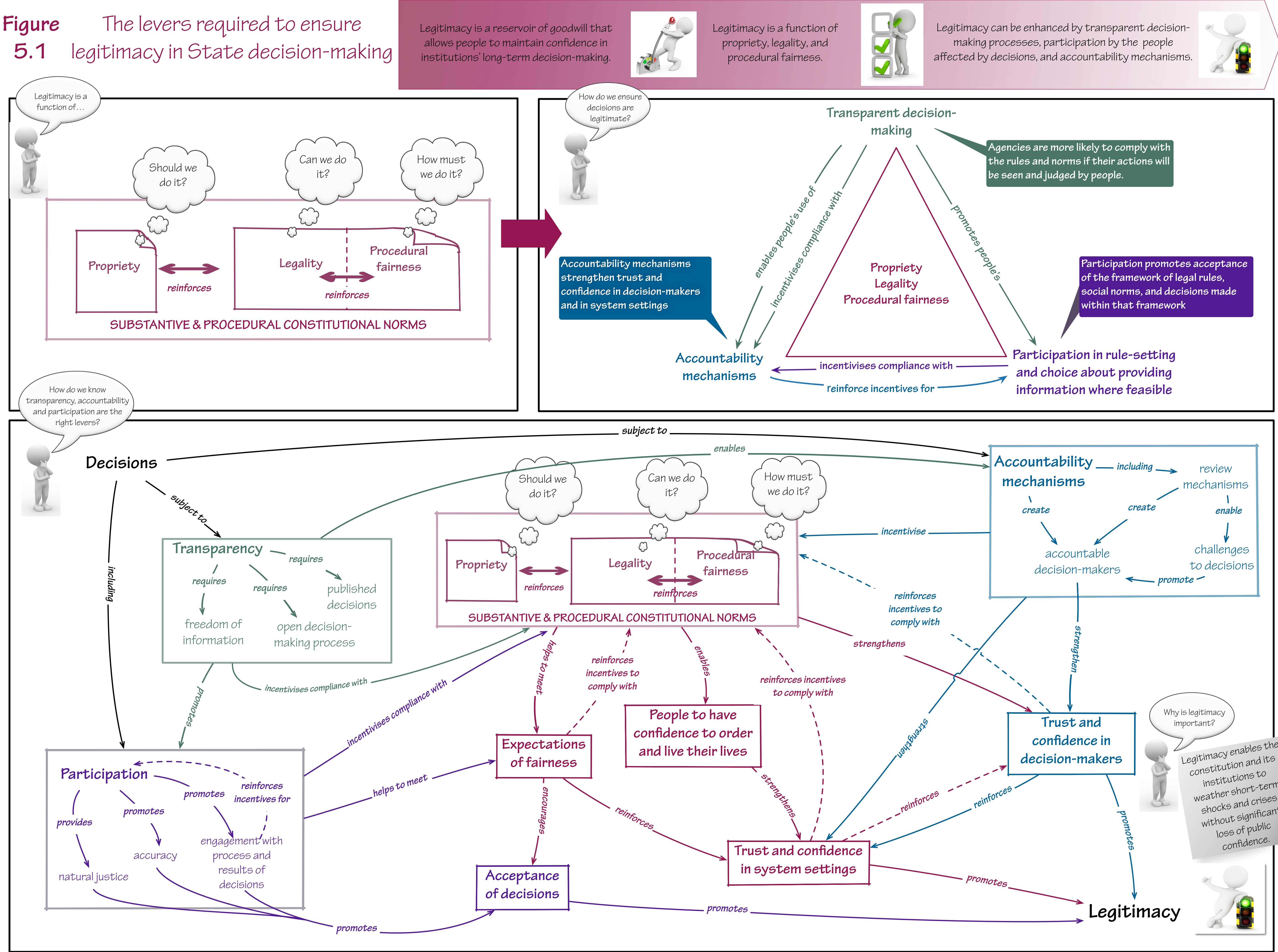


Figure 5.2 The constitutional norms that underpin legitimacy in State decision-making



The transparency, accountability, and participation levers increase incentives to comply with the norms of propriety, procedural fairness, and legality.



Together these norms create legitimacy.



Legitimacy is a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making.



Propriety requires...

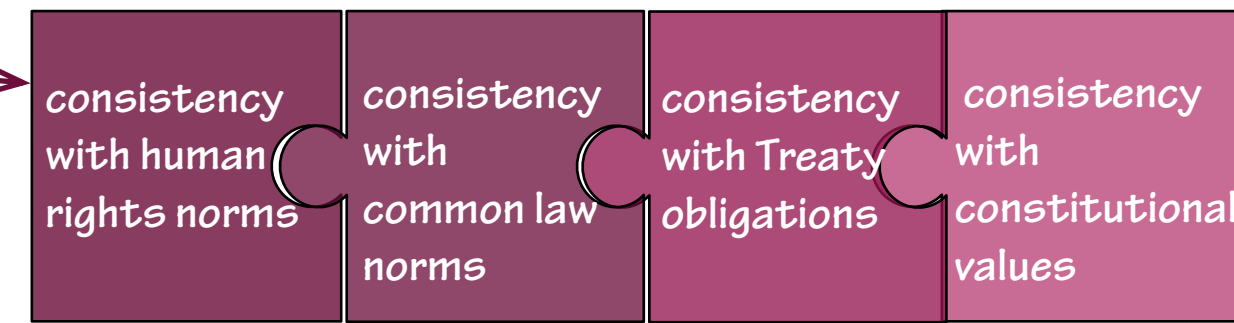
- decisions don't discriminate on prohibited grounds (race, gender etc)
- freedom of thought, conscience, expression, association, movement, peaceful assembly
- protection against torture, cruel treatment, scientific experimentation
- right to refuse medical treatment
- electoral rights (suffrage, voting rights)
- due process rights of people arrested, or detained, or charged with an offence

(New Zealand Bill of Rights Act 1990; Human Rights Act 1993; international human rights covenants ratified by NZ such as the International Covenant on Civil and Political Rights, Universal Declaration on Human Rights)

New Zealand constitutional culture characterised by ambivalence to public power

Liberalism and egalitarianism don't always sit well together: we advocate individual responsibility but believe government has a significant role in economic and social spheres.

Authoritarianism is tempered by egalitarianism manifesting as an expectation that those in government don't see themselves as "superior" to the governed.



- Freedom from arbitrary arrest and detention
- Freedom from unreasonable search and seizure
- Public powers must derive from law; they cannot be asserted through usage alone (*Entick v Carrington*)
- Protection of property interests, including compensation for compulsory acquisition (*Joseph, 2007, p. 25-29*)

- A partnership that needs to be worked out in practice in changing circumstances
- Partners must act reasonably, honourably, and in good faith
- Reciprocity and mutual benefit: needs of both cultures must be provided for. Compromise may be needed.
- Crown must actively protect Māori interests within reason.
- Redress consistent with fiduciary obligations in Treaty partnership. (*M S R Palmer, 2008; Te Puni Kokiri, 2001*)

Liberalism

- People are best judges of their own interests and should be left to make their own choices. Autonomy is the means for achieving self-realisation.

Egalitarianism / fairness

- Expectation of a fair state and a "fair go". Manifests as support for collective solutions in economic and social spheres (e.g. welfare state).

Pragmatism

- Willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints. Strongly prevailing value in NZ.

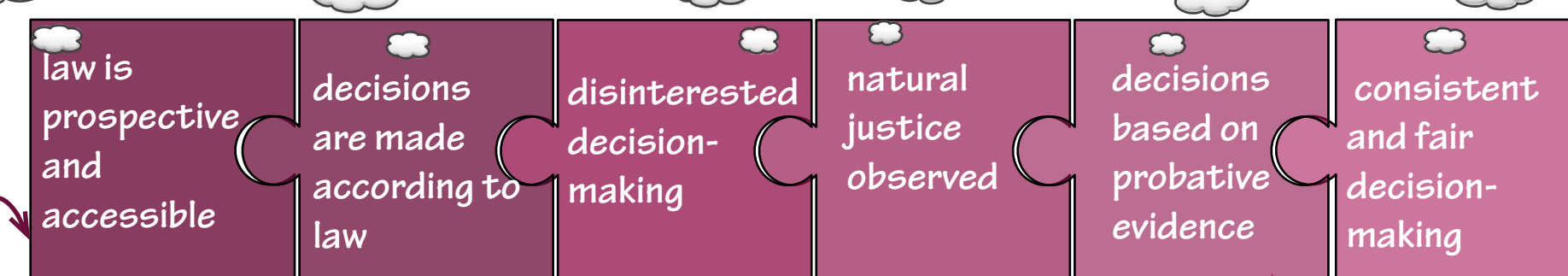
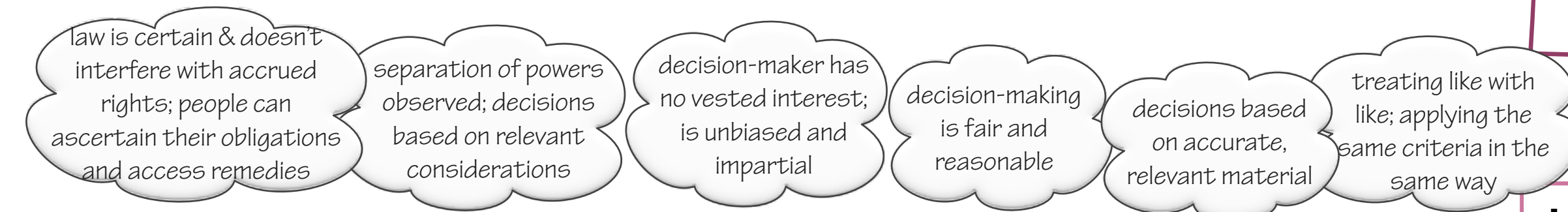
Authoritarianism

- High expectations that government will exercise power firmly, effectively (but fairly).
- "Just do it" - take charge and fix problems.

(*Barker, 2010; M S R Palmer, 2007*)

NZ's constitutional history is a series of ad hoc pragmatic responses to difficult situations

Legal and procedurally fair decision-making requires...



- The law is prospective unless it is explicitly made retrospective.
- Retrospective law undermines certainty by changing the rules of the game midstream. That can be unfair.
- If the law interferes with acquired interests, it must do so explicitly.
- The law needs to be accessible and clear so people can ascertain and understand their obligations.
- Rights and obligations should be enforceable.
- There should be avenues for appeal or review of decisions made by public bodies.

- There is functional or formal separation between those responsible for making, and those enforcing, the law.
- Decision-makers must have legal authority to make decisions.
- The more expansive a public power, the more certain and specific its legal source must be.
- Compulsorily acquired property must be compensated.
- The correct power must be used, and it must be used correctly.
- Courts assume that decision-making authority delegated by Parliament is not conclusive and remains subject to judicial review.
- Decision-makers cannot abdicate their discretionary powers by adopting fixed rules of policy, acting under direction, fettering their discretion, or refusing or failing to exercise them.

(*Joseph, 2007, ch. 21, 22, 23*)

- Nemo iudex in causa sua* - no one may judge in his or her own cause.
- A person exercising public powers must use them for the public good, and not for some ulterior, fraudulent or malicious purpose.

(*Joseph, 2007, ch. 22, 24*)

- Decisions must be based on material which has probative value.

(*Joseph, 2007, ch. 24*)

Justice should not only be done but should manifestly and undoubtedly be seen to be done.
R v Sussex Justices: Ex p McCarthy

- "The rules of natural justice promote decisions that are informed and accurate and which instil a sense of fairness."
- People affected by a decision have a right to a fair hearing.
- Legitimate expectation promotes the principle that public bodies must act fairly and reasonably. Breach of a legitimate expectation is an abuse of power.
- Decision-makers should give prior notice of a hearing.
- Decision-makers should disclose relevant material that will be taken into account.
- Decision-makers are unbiased and don't pre-determine matters.

(*Joseph, 2007, ch. 23, 24*)

- All are subject equally to the law and to the equal application of the law (*Dicey, 1915*).
- Decision-makers must "provide equal treatment for those equally placed" (*Daniels v A-G 3/4/02, HC Auckland, Bardgwanath J.*)
- Consistency is both procedural and substantive.
- Substantive unfairness in decision-making can lead to decisions being quashed by the courts.
- Penalties imposed must be proportionate (*Institute of Chartered Accountants of NZ v Bevan [2003] 1 NZLR 154*).
- The punishment should fit the crime (*Bill of Rights 1688, art 10*).

(*Joseph, 2007, ch. 22, 23, 24*)

Proportionality is "one of a cluster of elemental principles that are intrinsic to the concept of 'law' - fairness, equality, generality, impartiality, certainty, accessibility and proportionality. Proportionality goes to the heart of public law." (*Joseph, 2007, p. 945*)

"The essential purpose [of the rule of law] is to ensure that public bodies comply with the law."
Peters v Davison [1999] 3 NZLR 744

What it comes down to is this...



Decision-makers must:

- Act lawfully
- Act reasonably and fairly, and without bias
- Take into account all mandatory considerations and discount all irrelevant ones
- Take into account all relevant facts
- Promote any relevant statutory objects and purposes
- Respect the rights, interests, and freedoms of people affected by decisions
- Give affected persons a fair hearing.

it is the duty of the courts to uphold the rule of law over executive government (*Joseph, 2007*)



Figure 5.3 The effect of removing transparency from the legitimacy equation

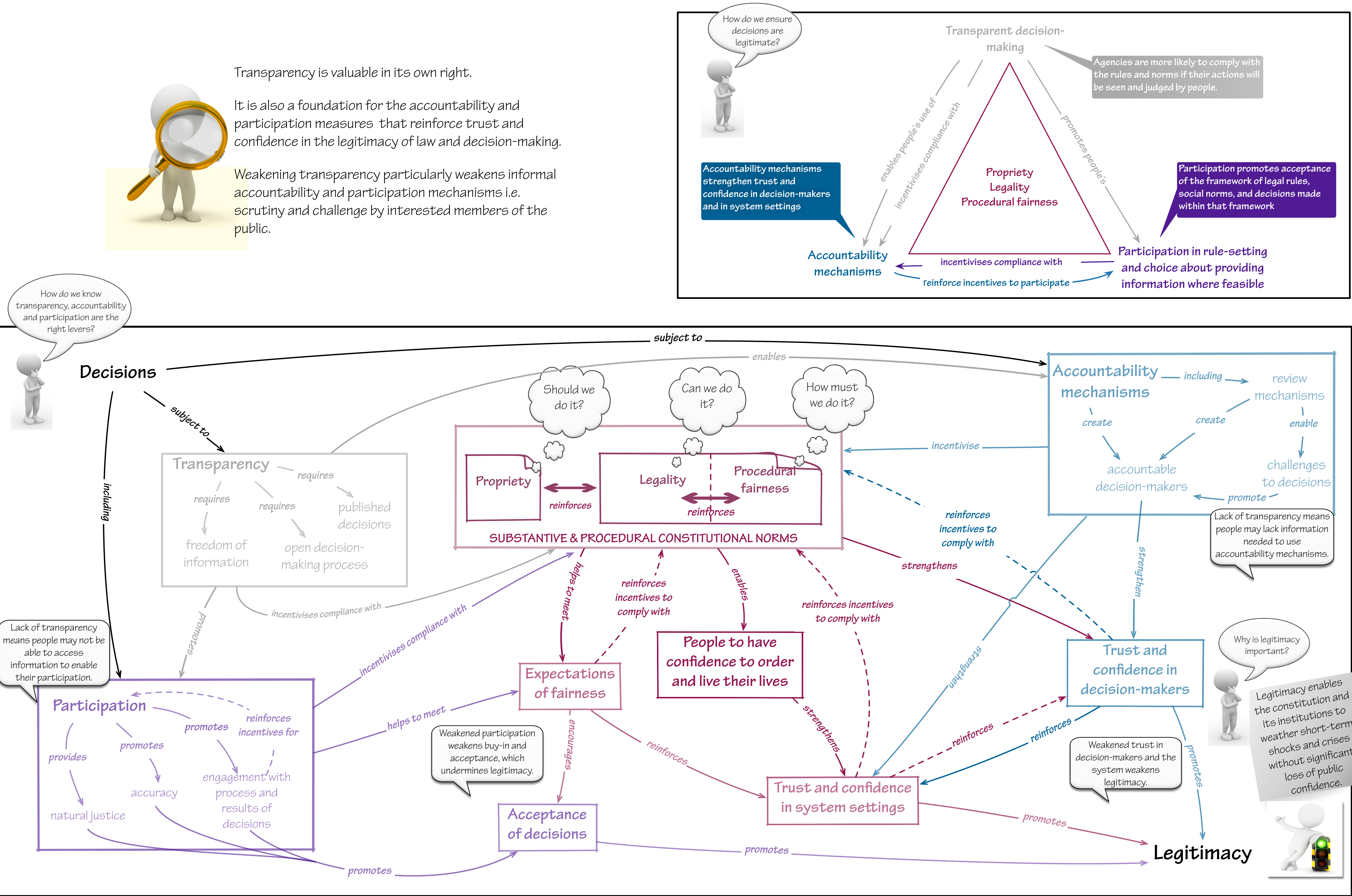
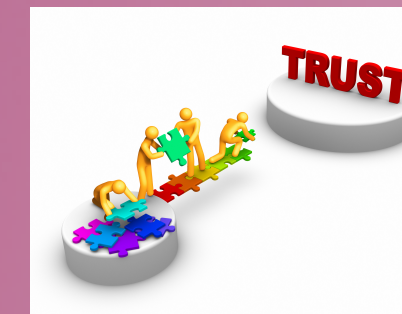


Figure 5.4 The effect of removing accountability from the legitimacy equation

By enabling supervision of decision-making, accountability mechanisms strengthen public trust and confidence in decision-makers.



Accountability mechanisms reinforce decision-makers' incentives to comply with constitutional norms.



Limiting accountability will undermine trust and confidence, and reduce legitimacy over the longer-term.



Accountability mechanisms reduce the risk of modifying normal decision-making procedures in response to extraordinary circumstances.

Neutralising accountability measures removes a direct means of controlling decision-makers' behaviour. That may weaken trust and confidence in decision-makers and in system settings.

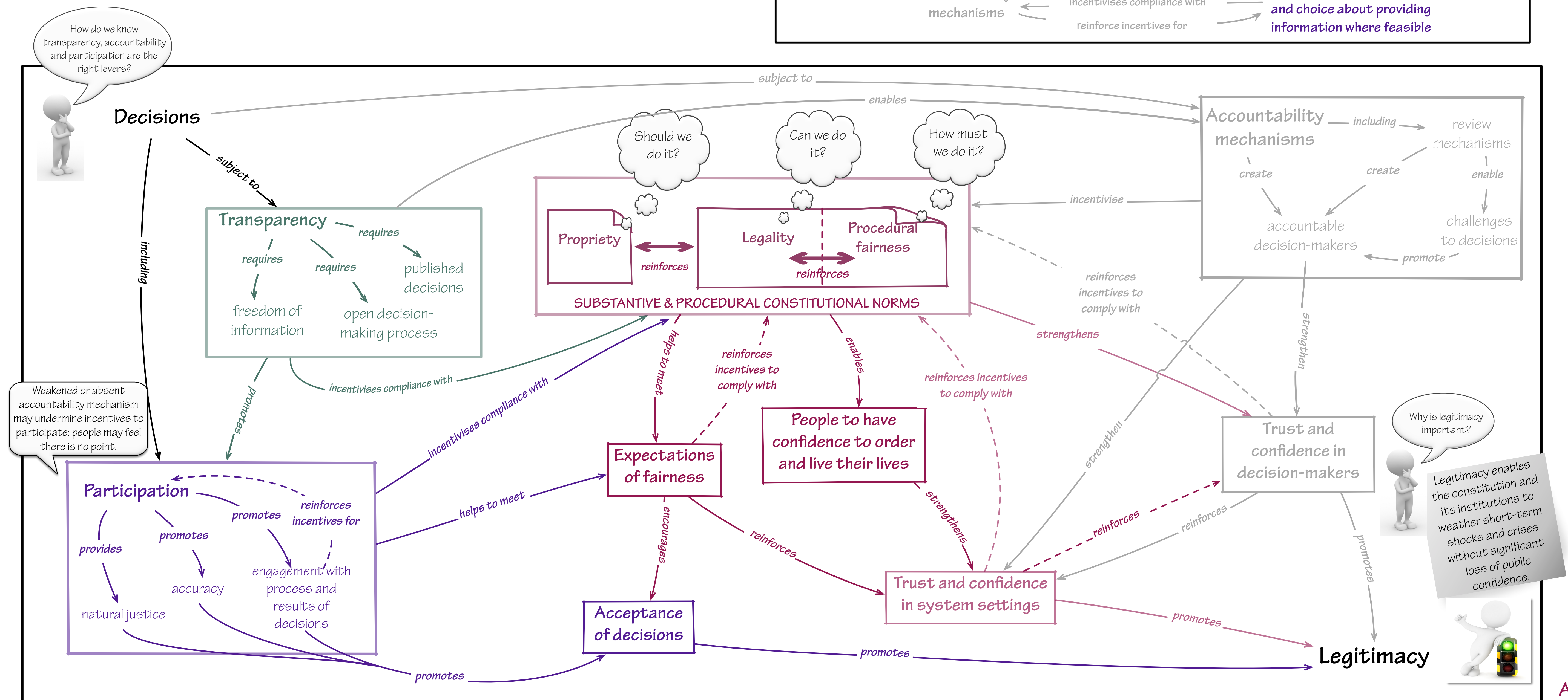
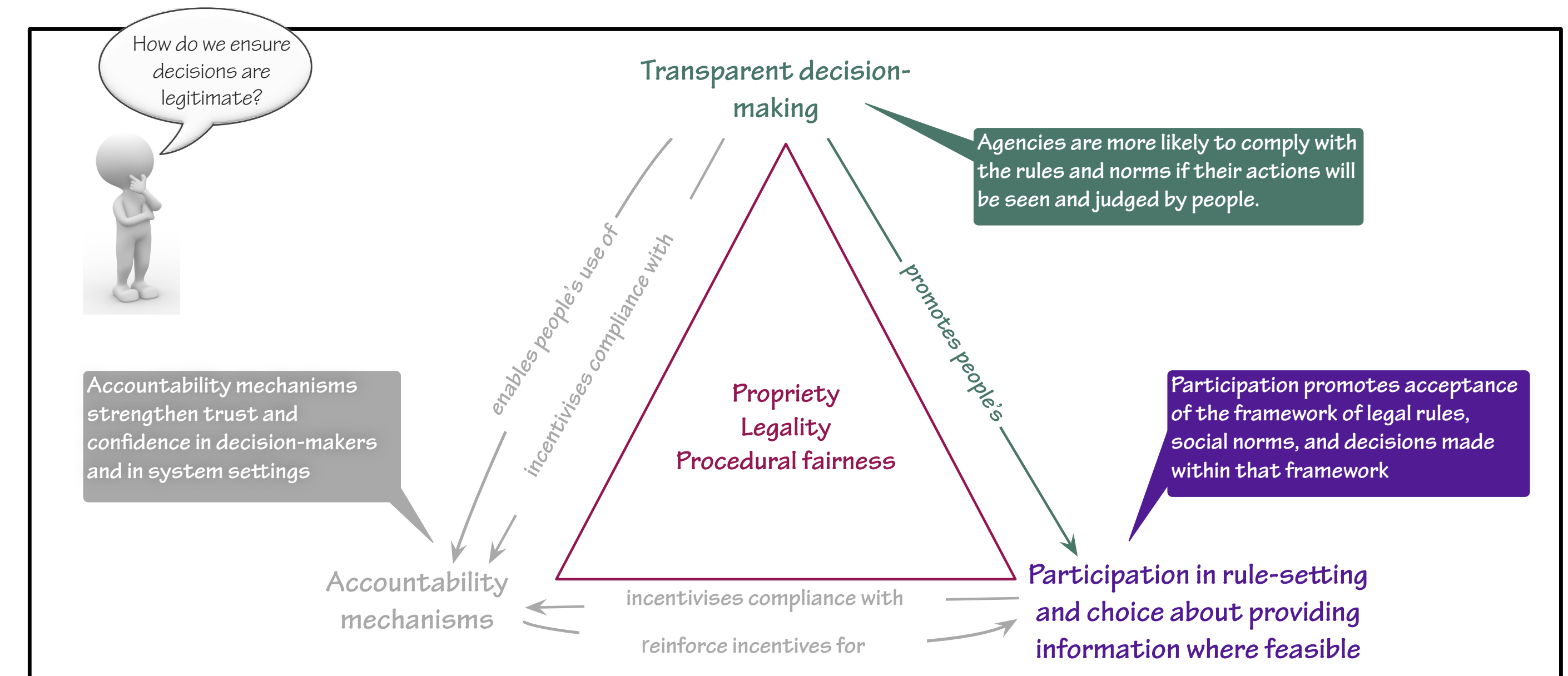



Figure 5.5 The effect of removing participation from the legitimacy equation


"In an open society there are many channels of communication between citizens and the state"

Negar Patow (2016)




The more complex and controversial an issue is, the more deliberative and inclusive the consultation process should be.

Vallance (quoted in Harvie, 2014))



Limiting participation will reduce trust and confidence in the State, and reduce its legitimacy over the longer-term.



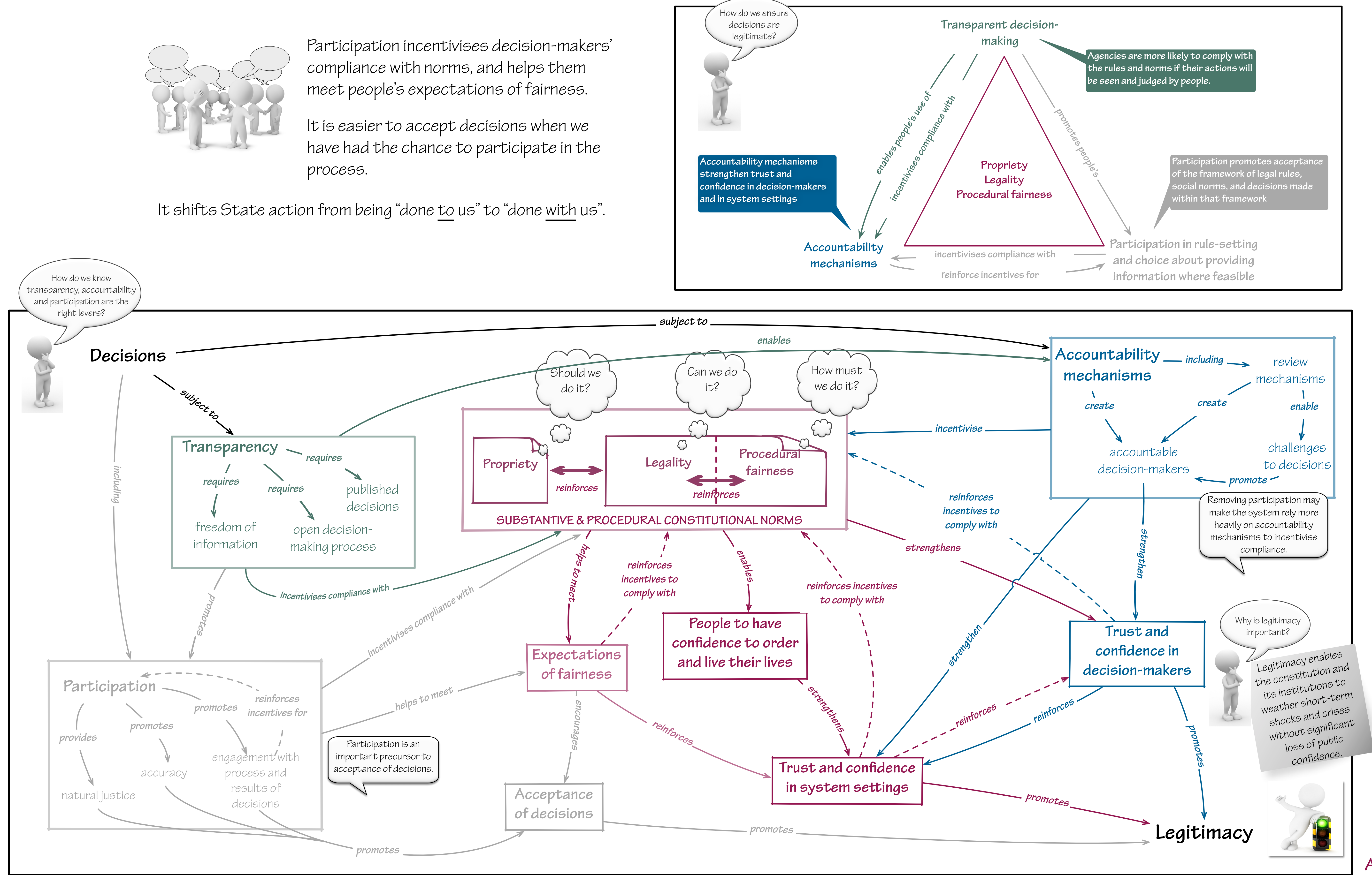


Figure 5.6 The need to ensure recovery decisions are seen as legitimate

Central government is making big decisions that will profoundly affect people's lives for many years to come.

Let's ground the discussion. Why does legitimacy matter?

So, how would we normally seek legitimacy?

Normally, decision-making with long-term effects would have an element of public participation. Local decisions would be made a local level.

If people don't view these decisions as legitimate, they may lose confidence in decision-makers and the recovery.

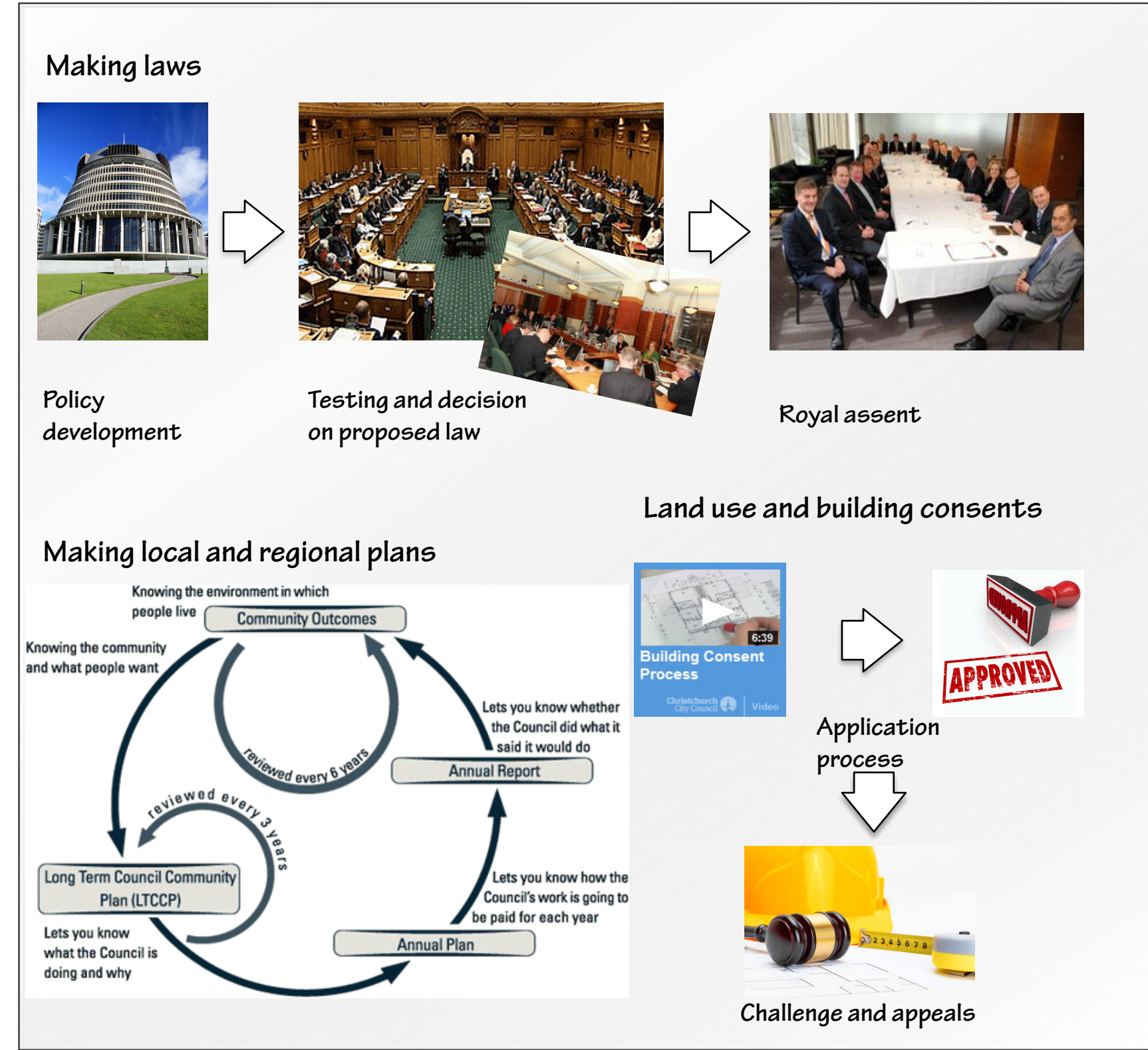
Legitimacy is...

Legitimacy is a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making.

Legitimacy enables institutions to weather short-term shocks and crises without significant loss of confidence.

(Easton, 1965)

Normally separation of powers and traditional law-making powers would ensure decisions were transparent and accountable, and complied with human rights and norms like the rule of law, procedural fairness, transparency, and accountability.

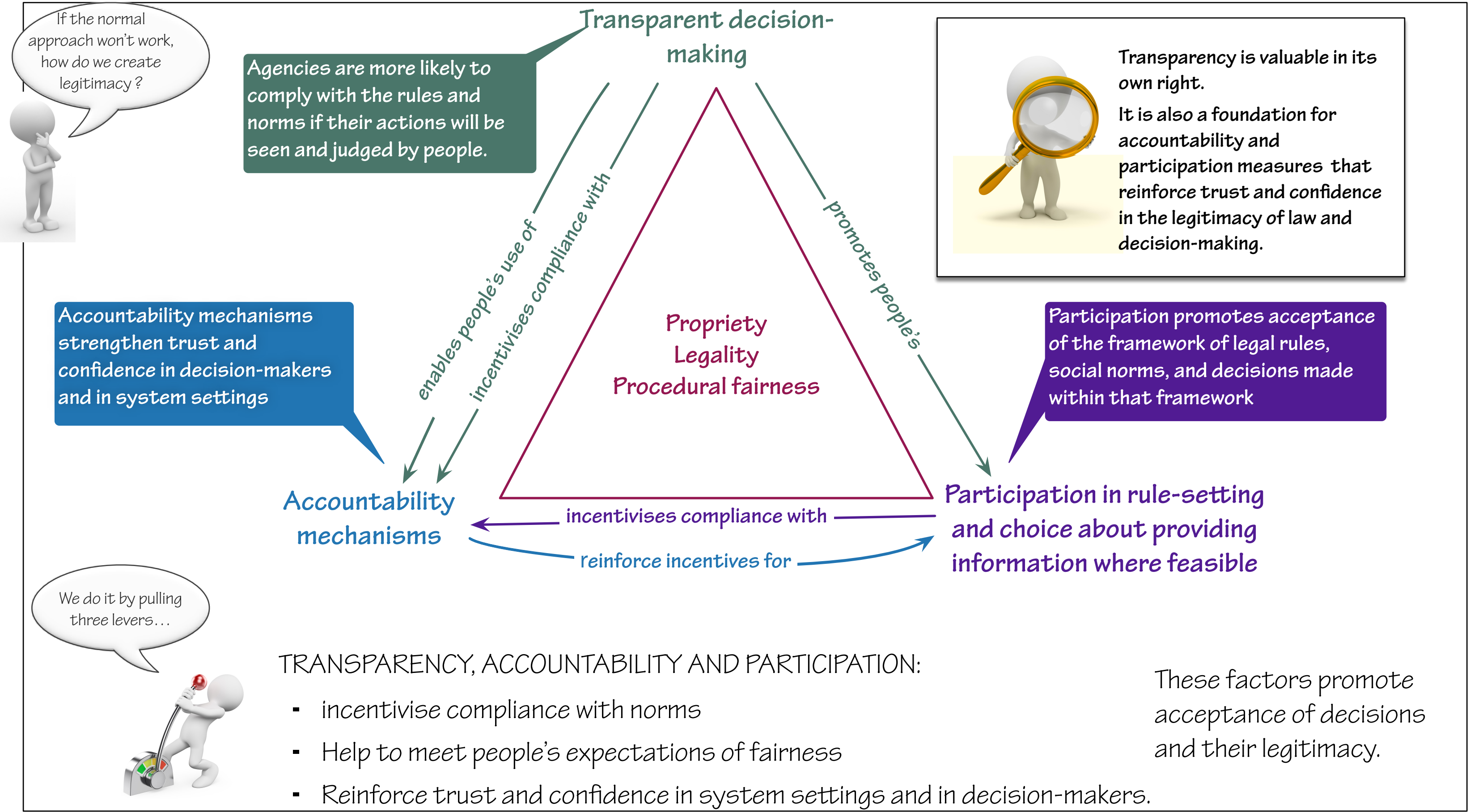


OK. That's not going to work here...

We're not in a normal situation. People expect us to react accordingly.

Seriously? You're worried about process? My house is broken. My toilet is a bucket.

So how can we act quickly while still ensuring decisions are fair and follow a fair process, and are right for local conditions?



A lack of transparency leads to these kinds of questions...

Those questions can lead to these concerns...

What will happen if I don't take the government payout?

How did this decision get made?

Why can't we make submissions on the Cathedral's rebuild?

Why is this heritage building being demolished?

Why is my land classified as TC3?

What considerations led to this decision?

What were they thinking when...?

I'm not taking their offer, and I'm not moving.

I can't understand why...

I'm off to court!

That's government. They just do stuff to you.

I don't like the plans for...

It's just not fair!

I've been treated differently from...

I'm leaving.

And these questions and concerns are symptomatic of...

A loss of trust and confidence in government

A loss of trust and confidence in the constitution's ability to protect its people

A loss of faith in the legitimacy of the law

To avoid this outcome, we need a way of making decisions more quickly.

We need faster decision-making processes that protect against arbitrary and unfair decisions, so people can be confident in the decisions we make.

We need faster decision-making processes to be TRANSPARENT and ACCOUNTABLE and to include appropriate levels of PARTICIPATION for different levels of decision-making.

Figure 5.7 A system to ensure legitimate decision-making - SSM model

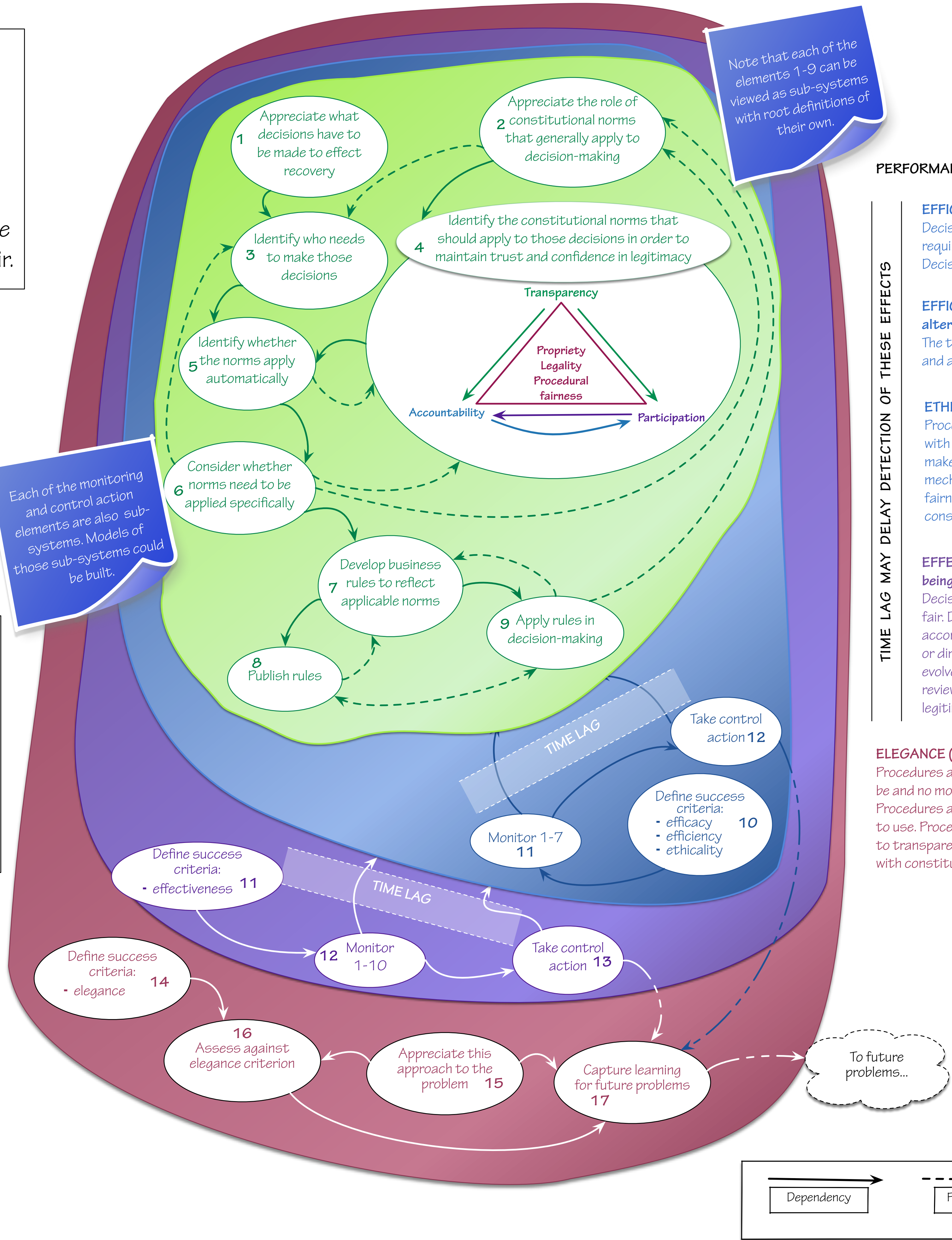
Root definition*
A system to promote public trust and confidence in recovery decisions by ensuring the decision-making procedure is transparent, decision-makers are accountable, and proportionate opportunities for public participation are available; that will ensure decisions are consistent with New Zealand's constitutional norms and values, so that the exercise of public power over people is proportionate, reasonable, and fair.

* Root definition = a system to do P by Q to achieve R, where P is the transformation (T). CATWOE factors inform the system model and its success criteria.

- C** Customers = "beneficiaries" are people affected by decisions, politicians, the judiciary, constitutional lawyers and academics, and the general public. "Victims" are decision-makers, central government and local government.
- A** Actors = Decision-makers, including Cabinet, government departments, independent boards, local government

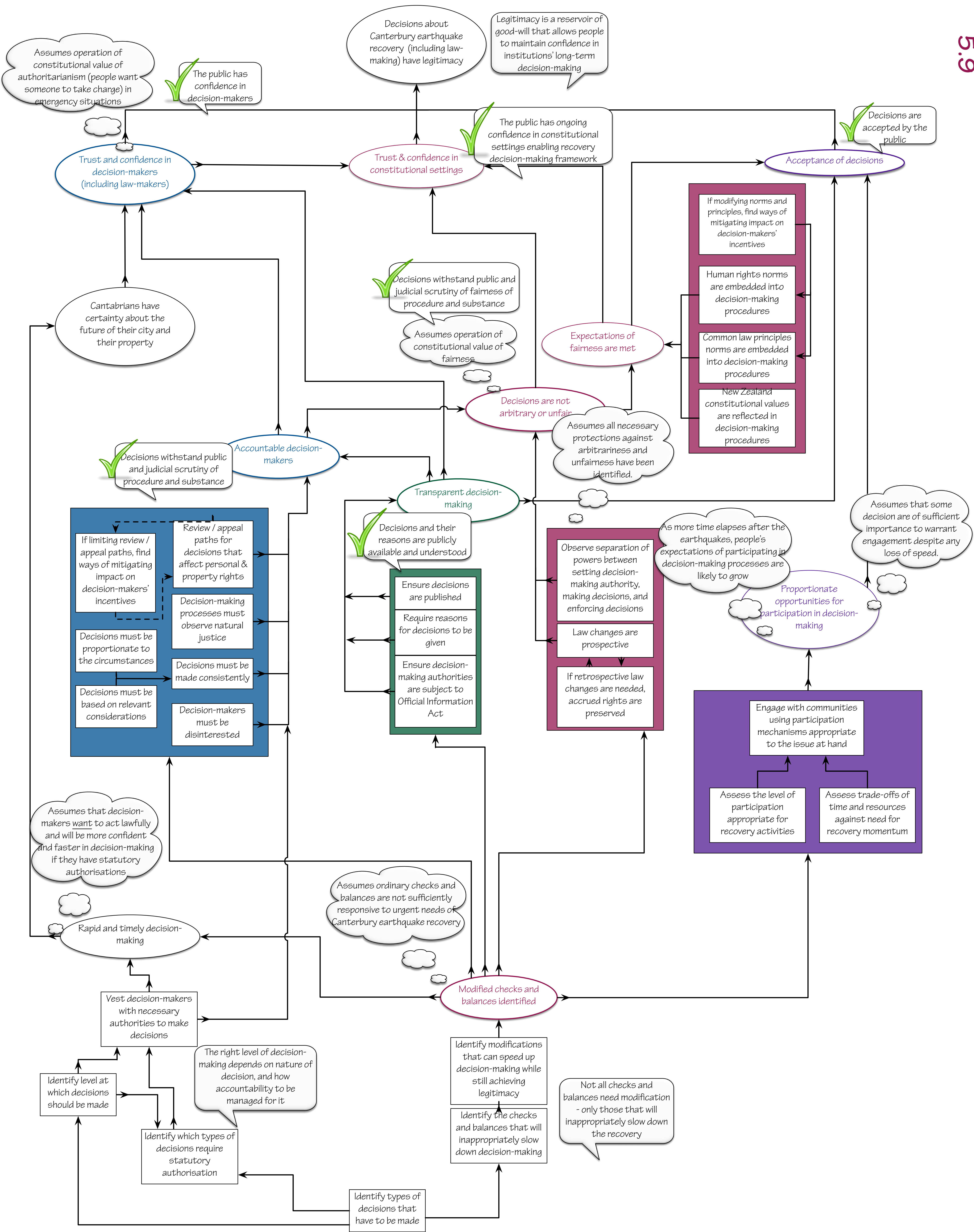
T **Transformation**
Decision-making is opaque; reasons are unclear; normal review mechanisms may not apply; public does not have confidence in legitimacy of decisions
→ Decision-making is transparent; reasons are expressed; normal review mechanisms clearly apply and can be used based on available information (or are replaced by appropriate bespoke mechanisms); decisions reflect core constitutional norms; public trusts and has confidence in decision-making processes

- W** Weltanschauung = the recovery will be enduring if decisions are perceived to be legitimate. Legitimacy is a reservoir of goodwill that enables the constitution and its institutions to weather short-term shocks and crises without significant loss of public confidence.
- O** Owners = Cabinet (in reality), Parliament (in theory)
- E** Environmental constraints = Tensions in New Zealand's constitutional culture mean people will expect a pragmatic solution that enables timely recovery decisions, and will expect the government to take charge. At the same time, people will want to ensure decision-makers, particularly political decision-makers, can be held accountable.



- PERFORMANCE MEASURES**
- EFFICACY (or, does it work?)**
Decisions comply with procedural fairness requirements and constitutional norms. Decisions are transparent and reviewable.
- EFFICIENCY (or, is it better than the alternative?)**
The trade-offs between speed, transparency and accountability are balanced appropriately.
- ETHICALITY (or, is it the right thing to do?)**
Procedures for transparency are consistent with Official Information Act norms. Decision-makers are subject to accountability mechanisms. Decisions comply with procedural fairness requirements and with core constitutional norms, including the rule of law.
- EFFECTIVENESS (or, are the right decisions being made?)**
Decisions are proportionate, reasonable, and fair. Decision-makers revisit their decisions in accordance with reviewers' recommendations or directions. Decision-making processes evolve in response to problems identified by reviewers. Decisions are accepted as legitimate and binding.
- ELEGANCE (or, structurally, does it make sense?) -**
Procedures and mechanisms are as simple as they can be and no more complex than they need to be. Procedures are easy to follow and mechanisms are easy to use. Procedures and mechanisms add substantively to transparency and accountability, and are consistent with constitutional structures and norms.

Figure 5.9 Legitimate decision-making in Canterbury earthquake recovery - ways and means map showing success factors



Legend

Colours correspond with the legitimacy triangle

Arrows indicate "if..then" logic

Objective

Intervention

Assumption


Success criteria

Observation


Figure 5.10 Legitimate decision-making system map

Legitimacy is a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making.


Easton (1965)

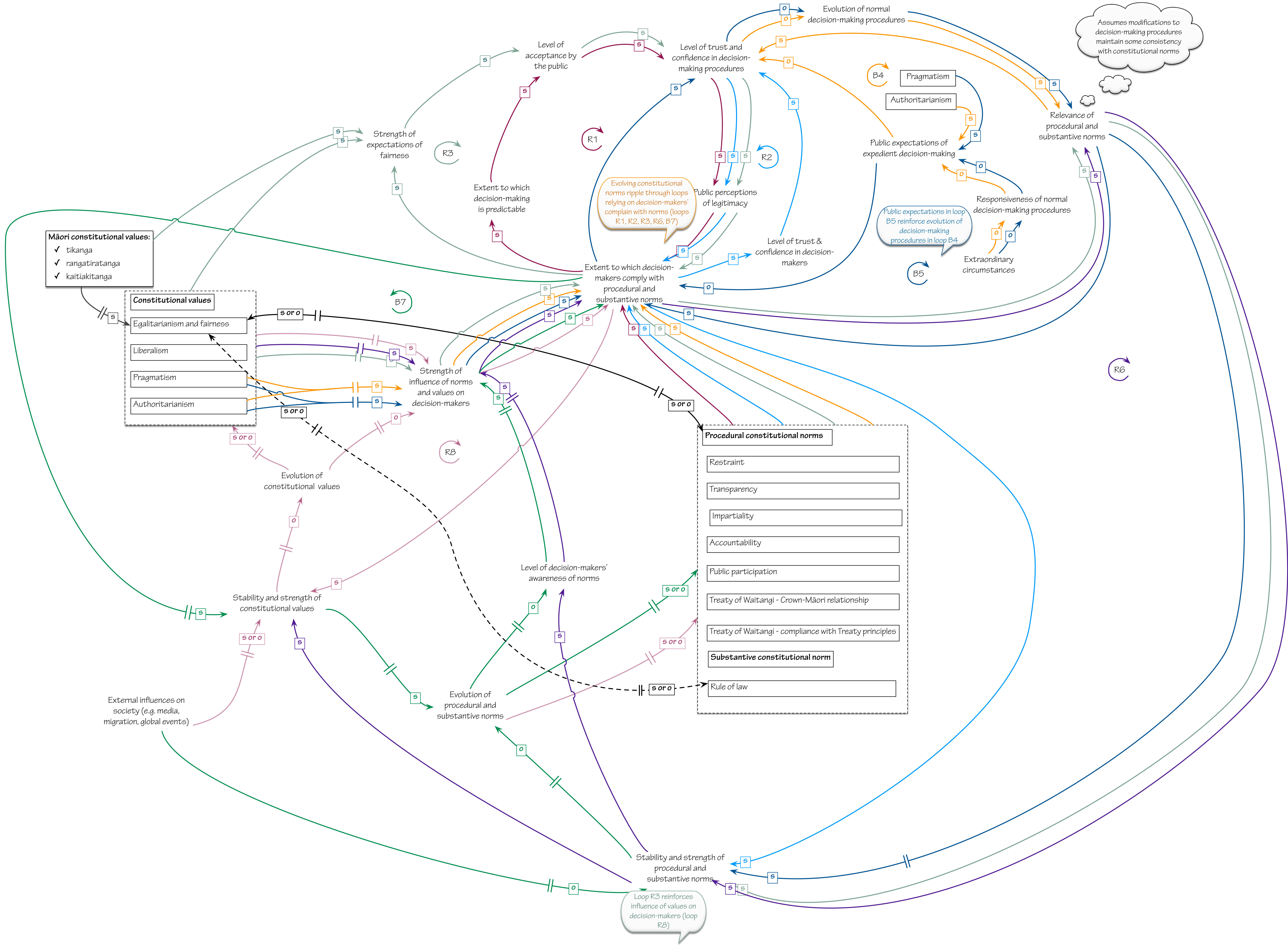


Legitimacy is a function of propriety, legality, and procedural fairness.



Legitimacy can be enhanced by transparent decision-making processes, participation by the people affected by decisions, and accountability mechanisms.





Legend

- Arrows signal causal links between elements of the system, and surrounding factors
- Double lines across an arrow signal a delay between cause and effect

"S" and "O" signal the direction of the causal link:

- S means that the first variable causes a change in the second variable in the same direction
- O means that the first variable causes a change in the second variable in the opposite direction

Shows the direction of an R (reinforcing) loop or a B (balancing) loop

Colour is used to distinguish between feedback loops

Norms and values are described in Figure 5.2 and in Technical Appendix 1. Variables are defined in Technical Appendix 1.

Links between variables are described in Technical Appendix 2. Feedback loops are described in Technical Appendix 3.

Technical appendices are on the appended CD-ROM.

Figure 5.11 Legitimacy intervention map - legality intervention

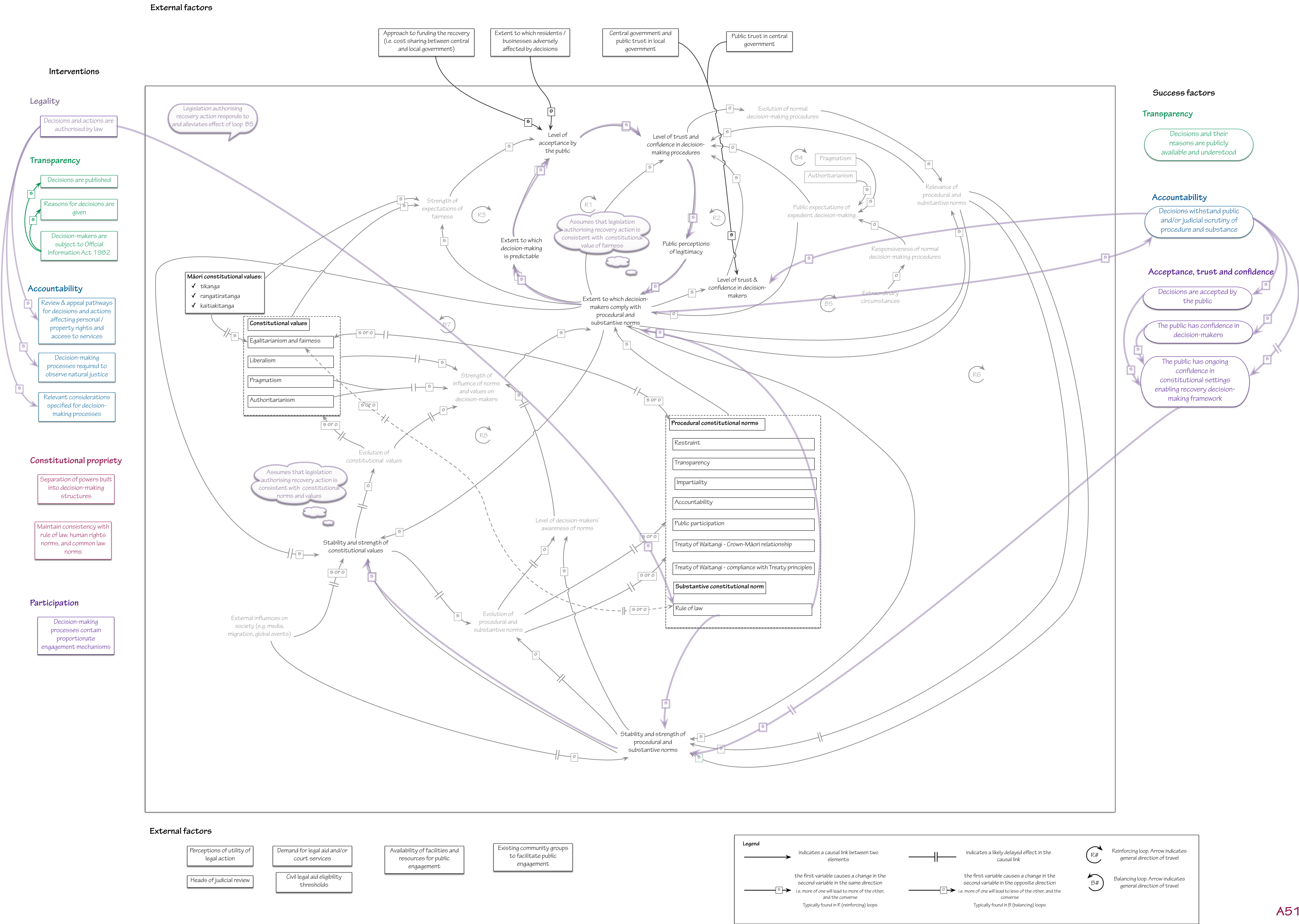


Figure 5.12 Legitimacy intervention map - transparency interventions

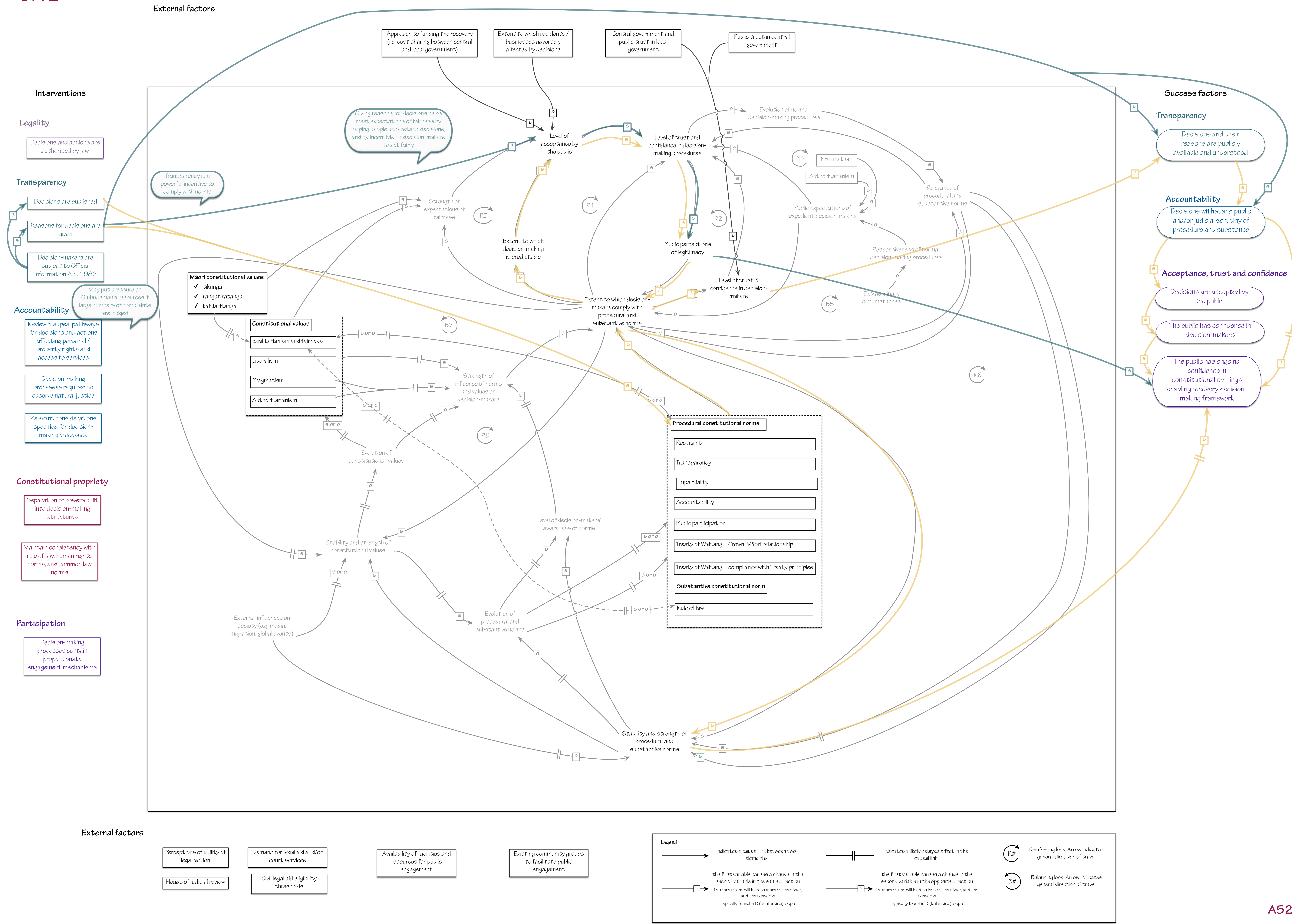


Figure 5.13

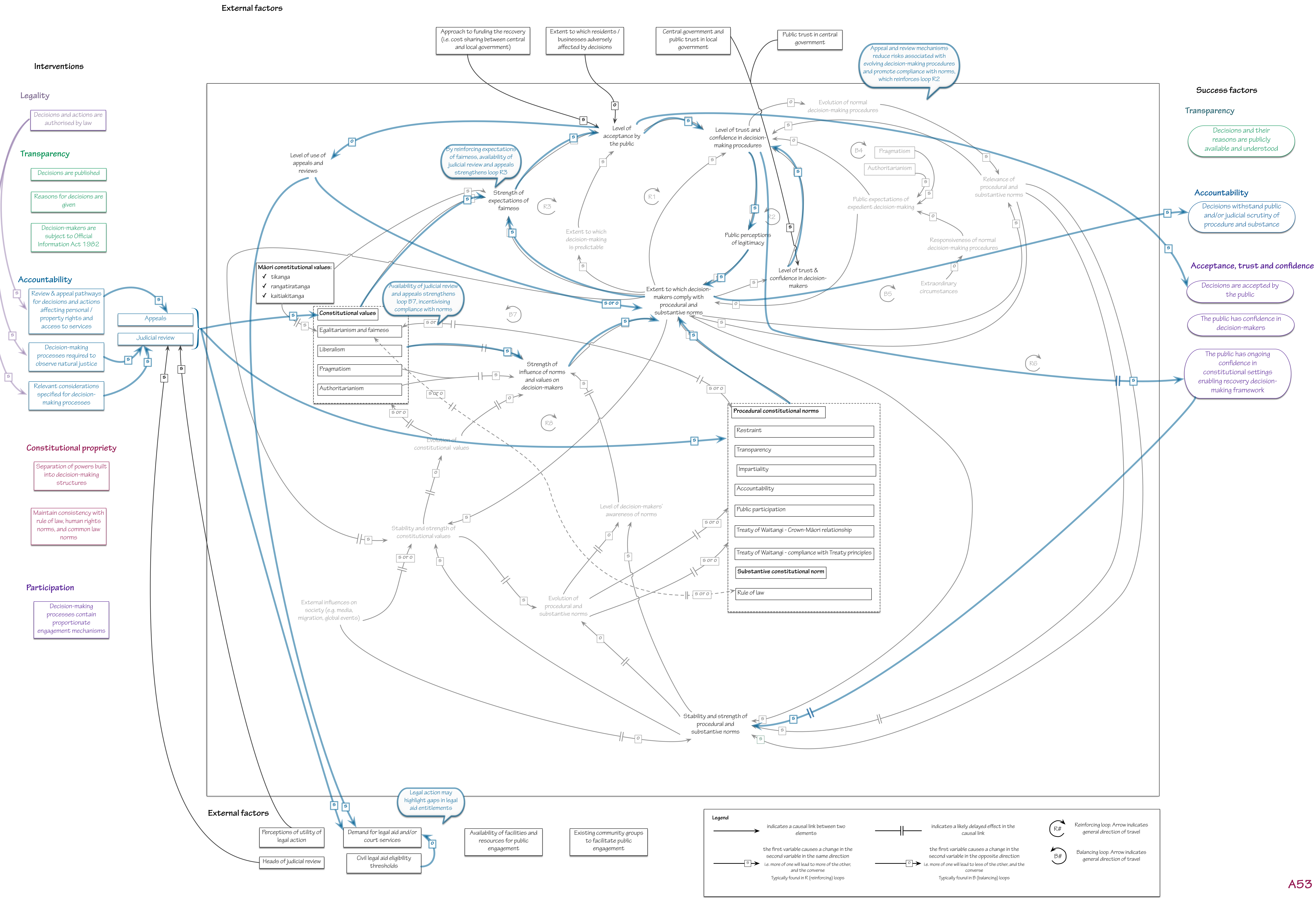


Figure 5.14 Legitimacy intervention map - accountability interventions (2): natural justice

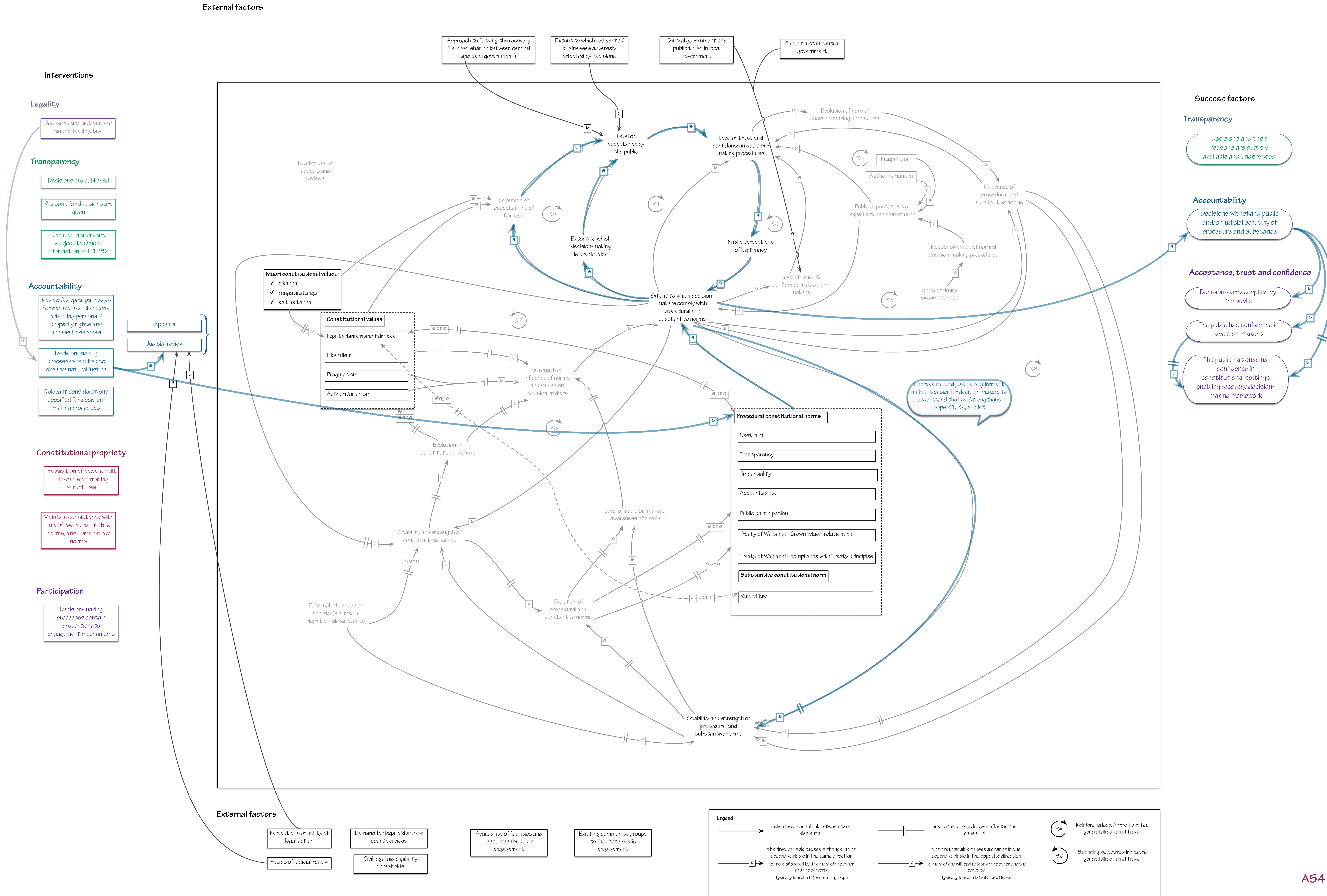


Figure 5.15 Legitimacy intervention map - accountability interventions (3): relevant considerations

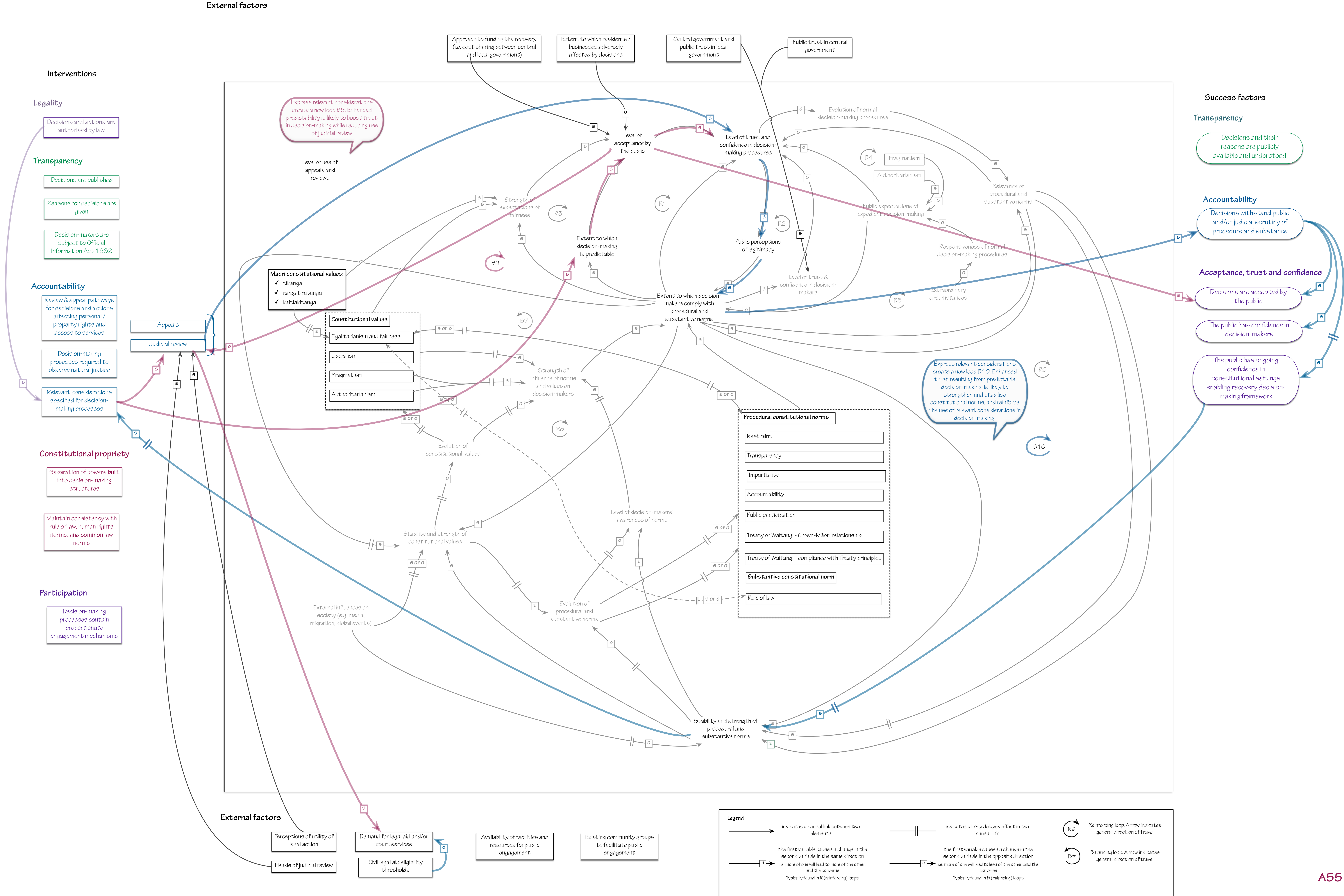


Figure 5.16 Legitimacy intervention map - constitutional propriety interventions (1): separation of powers

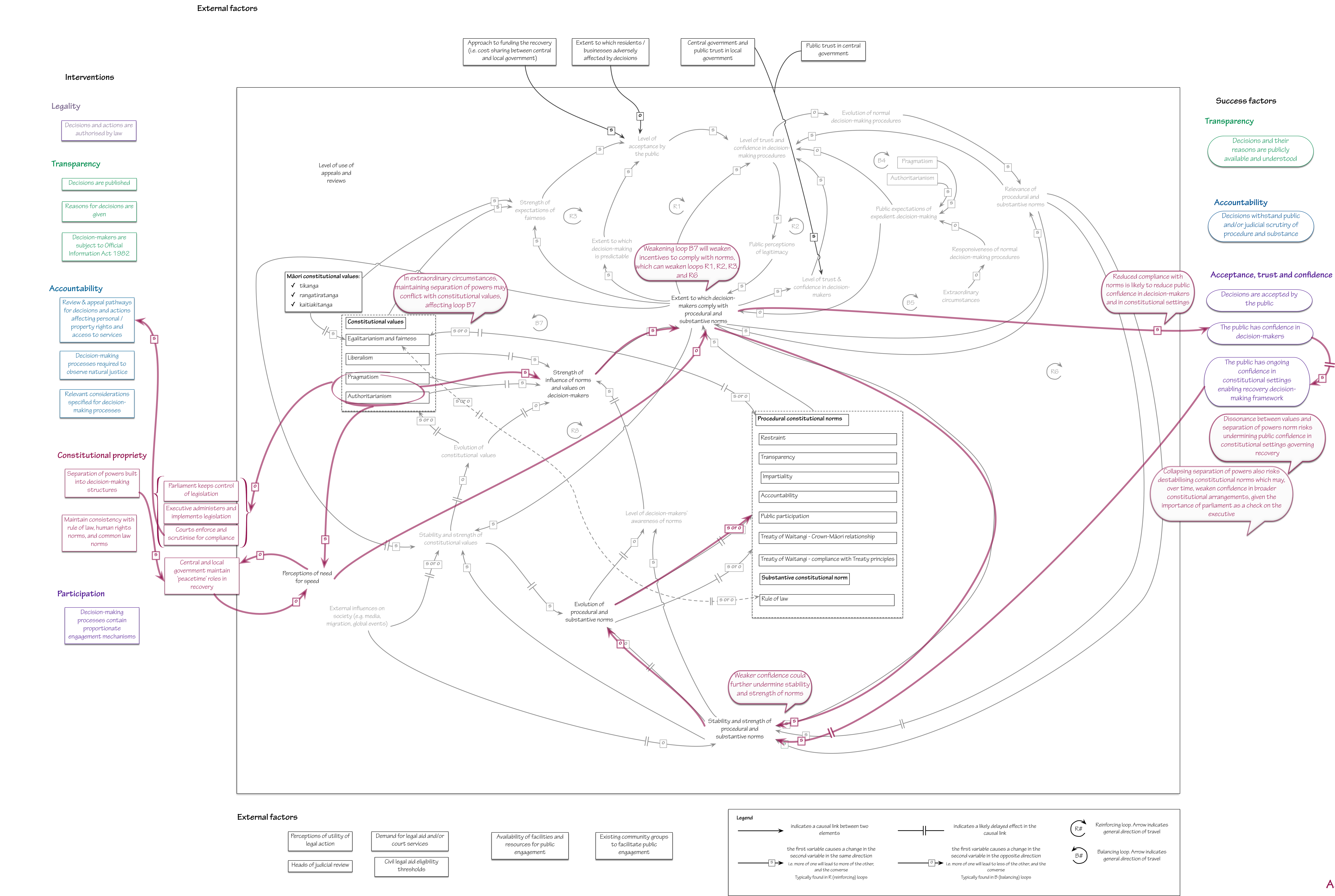


Figure 5.17 Legitimacy intervention map - constitutional propriety interventions (1A): modified separation of powers

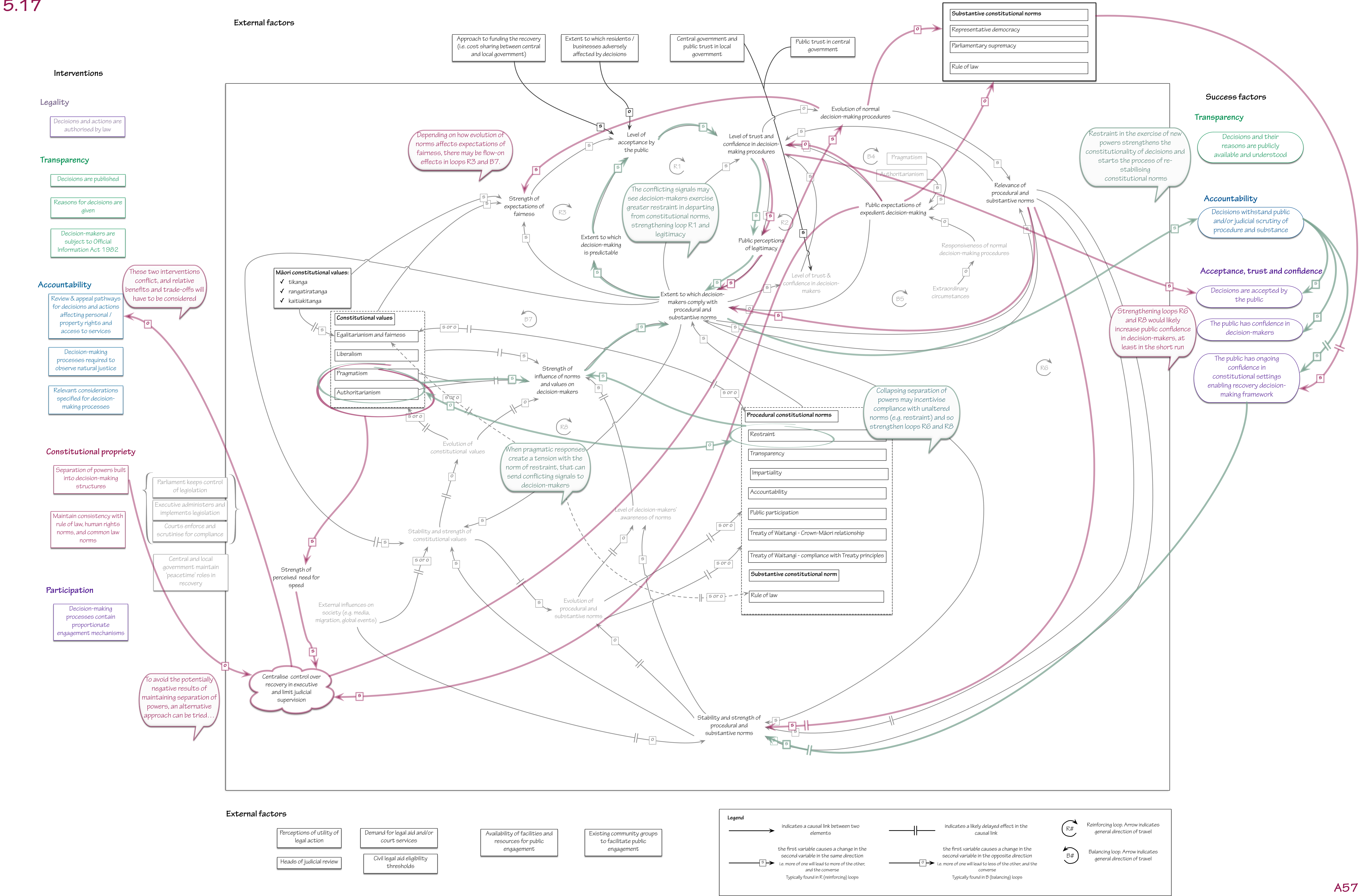


Figure 5.18 Legitimacy intervention map - constitutional propriety interventions (2): consistency with substantive and procedural constitutional norms

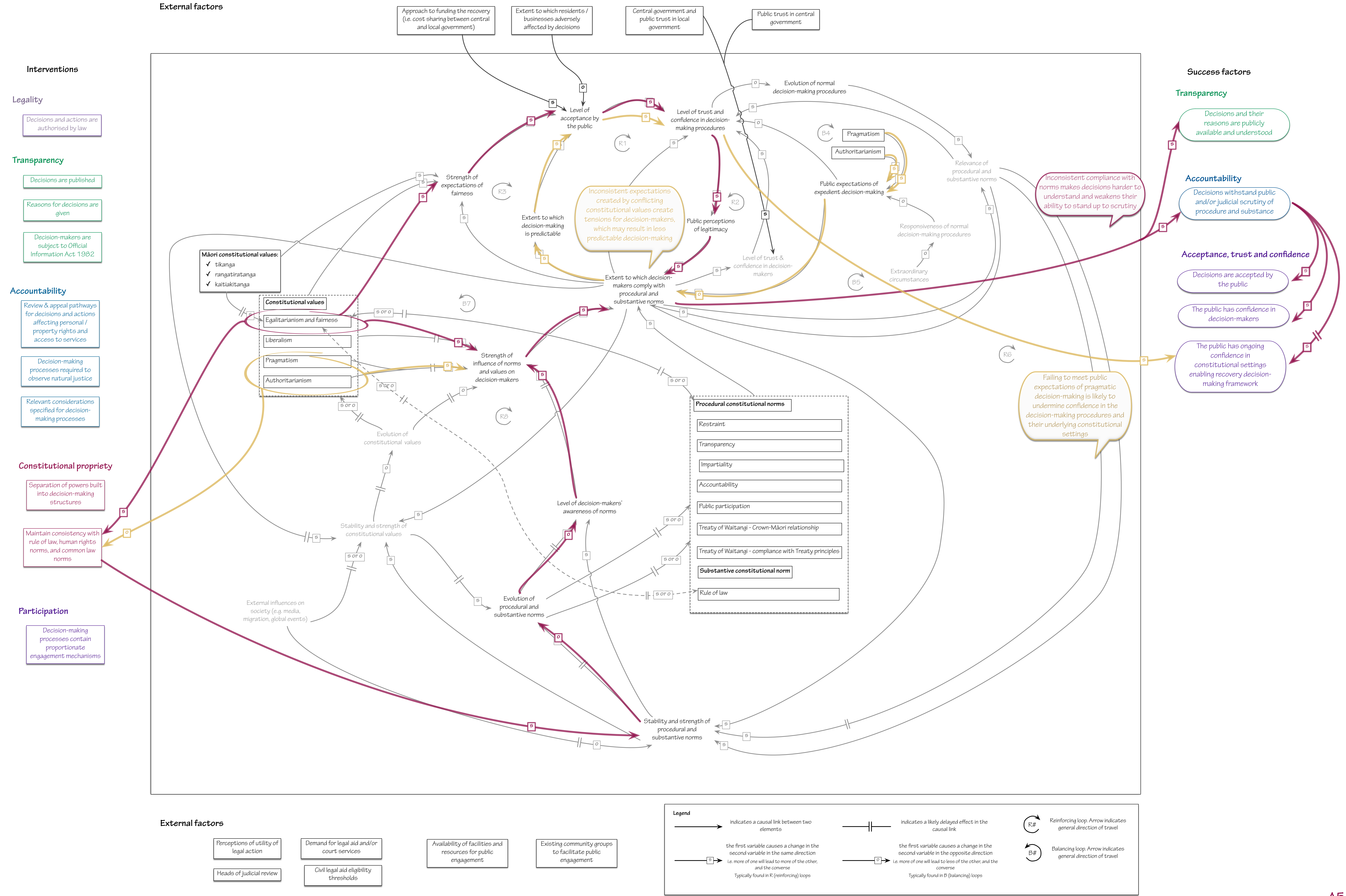


Figure 5.19 Legitimacy intervention map - constitutional propriety interventions (2A): modified consistency with substantive and procedural constitutional norms

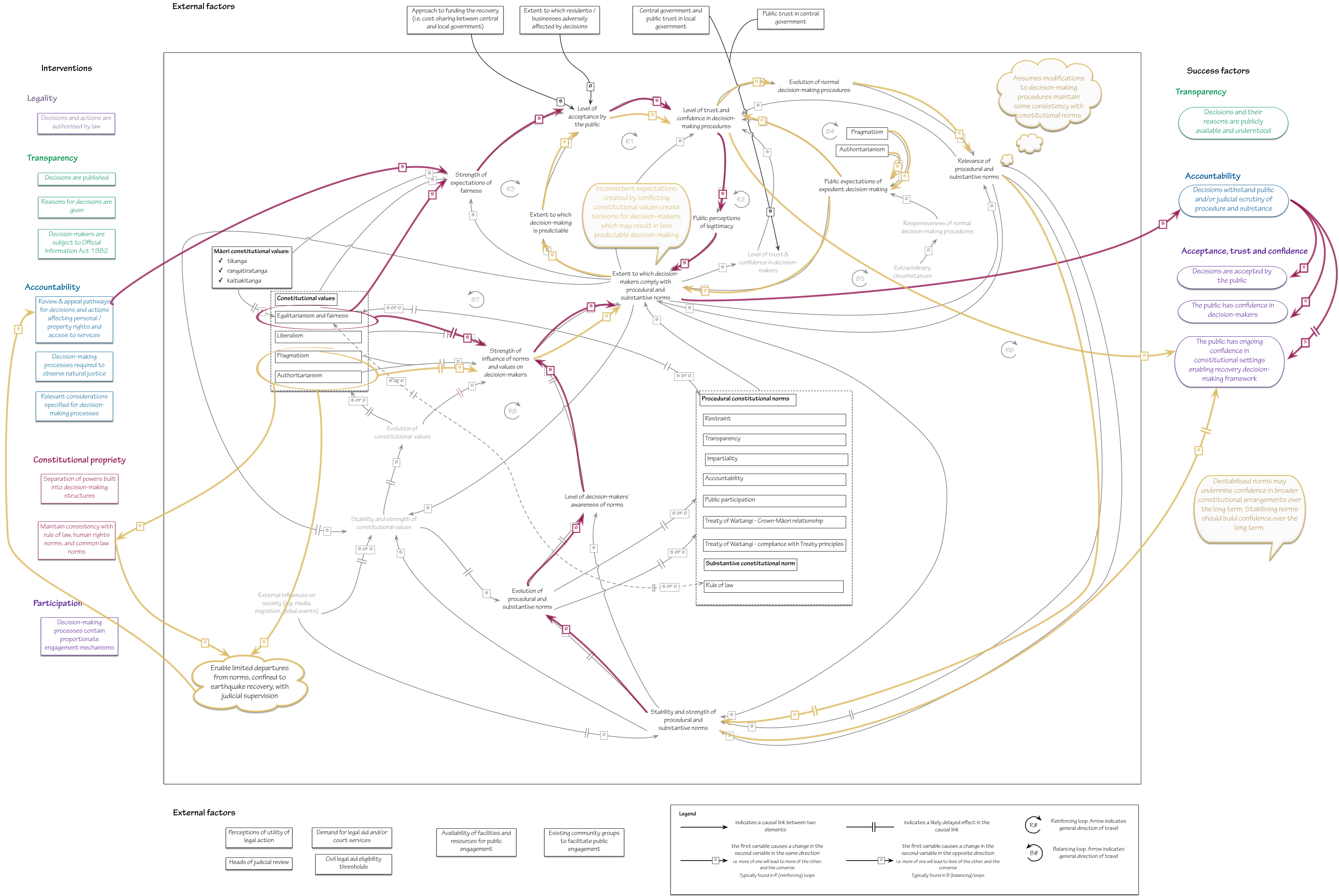


Figure 5.20 Legitimacy intervention map - participation intervention

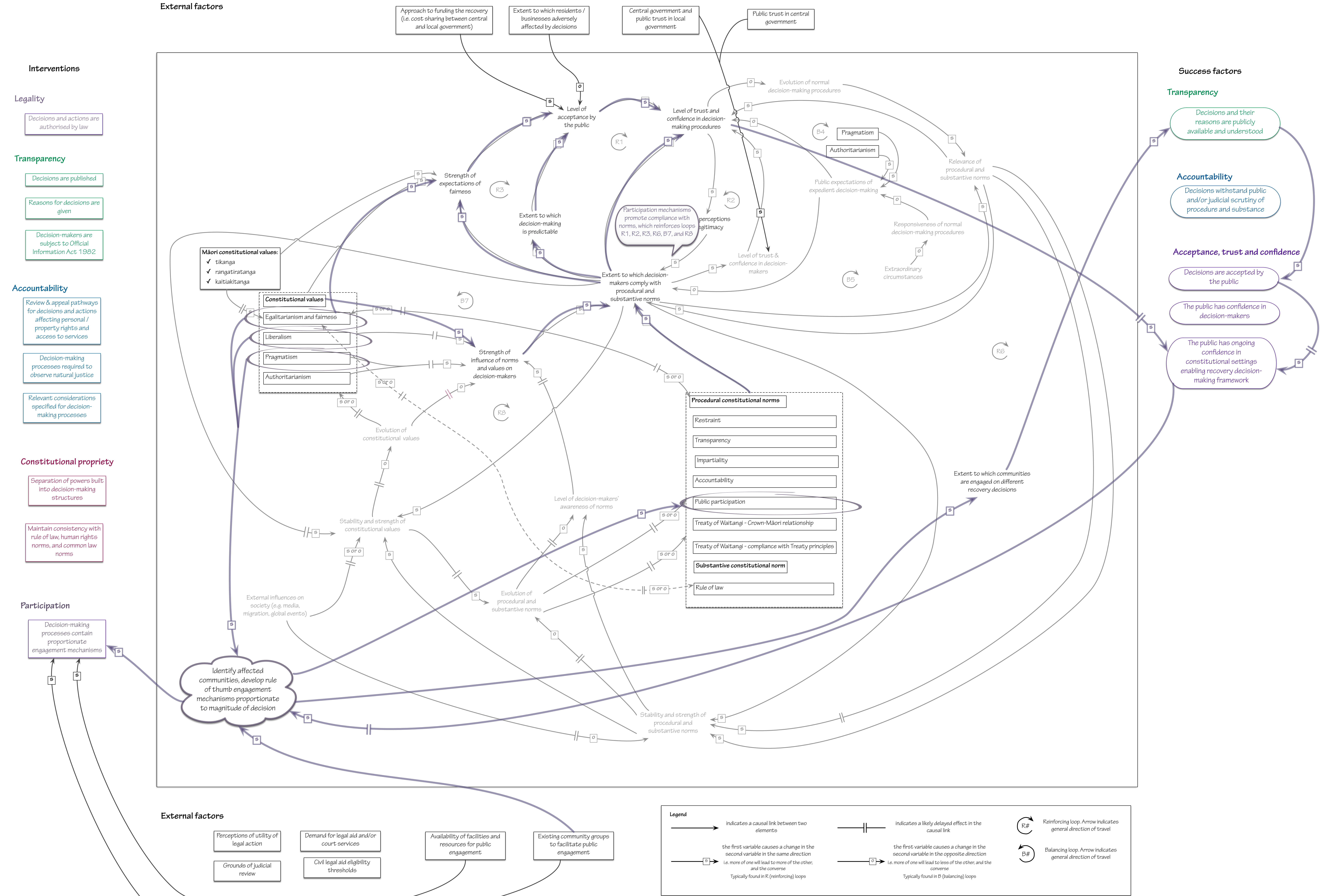
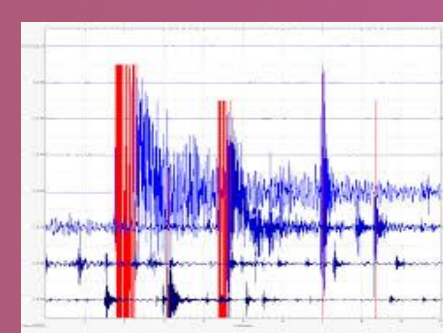
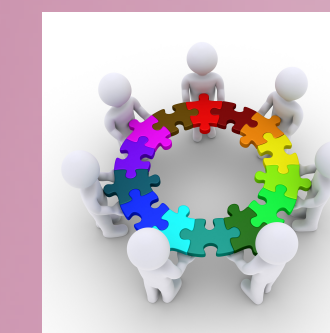


Figure 6.1 Recovering from the Canterbury earthquakes: a range of interests, perspectives, and questions



The earthquakes broke lives, houses, buildings and infrastructure. Recovery will require coordination between agencies from central and local government, and a range of sectors.



But first we need to identify the range of needs, interests and perspectives relevant to recovery.



Infrastructure is critical...

Infrastructure is critical to day-to-day normality

We take it for granted until it stops working

Most people will judge recovery by infrastructure (i.e. water, sewerage, power, phone)

Infrastructure includes

- Sewerage and water supply
- Electricity
- Telecommunications
- Roads

Infrastructure providers

Concerns

- Identifying and prioritising repairs
- Sequencing of repairs to avoid rework
- Consents for waste disposal, temporary lines and sub-stations

More concerns

- Costs and insurance
- Dealing with further damage caused by aftershocks
- Workforce issues - safety, fatigue, rostering

Infrastructure providers need information about what needs to be repaired, access to affected infrastructure, ways of dealing with waste removal. They need to be able to coordinate repairs with other infrastructure providers and may need permits for temporary solutions (e.g. lines over land, effluent discharge).



Responsibilities include

- Infrastructure (especially sewerage and water, and local roads)
- Planning and consenting (land use, building)
- Waste disposal
- Provision of amenities (parks, libraries, sports facilities etc)

Local government

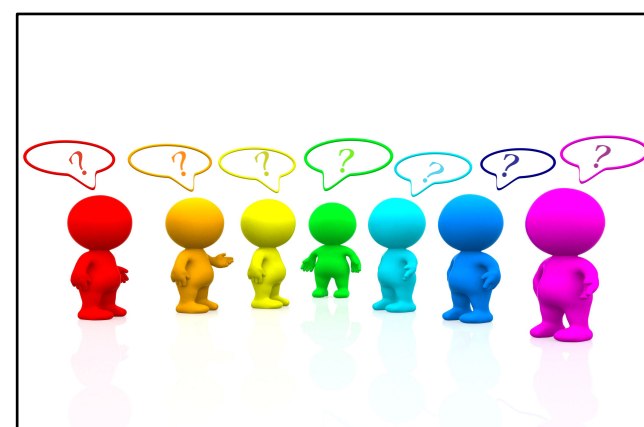
Short term concerns include

- Reconnecting sewerage and water supply
- Road repairs
- Managing greatly increased waste disposal
- Assessing safety of council-owned amenities
- Assessing safety of buildings
- Temporary accommodation for displaced households
- Keeping the local economy going

Longer term questions include

- What kind of rebuild do we want?
- How do we pay for it?
- How do we attract businesses and households back?
- How are our communities coping?

Local government needs to be able to coordinate repairs with other infrastructure providers and reach a deal with central government over contribution to overall costs. Any changes to planning and consenting processes will affect local government.



The constitutional perspective

The main concerns

- People affected by the earthquakes naturally want someone to take charge of the recovery.
- They have more immediate concerns than protecting their constitutional interests. And they shouldn't have to do that.
- The constitution should be able to respond to emergencies without undermining constitutional norms significantly or long-term.

Day-to-day survival questions

- When will electricity / water / sewerage be reconnected?
- How do I get around? Which roads are open?
- When can I get back into my building?
- How long before my customers can get back in?
- Can my employees get to work? Are my employees likely to leave the area?

Businesses

How long before my cash runs out?

Businesses need information to meet day-to-day and longer term needs, including information about access to (and demolition of) their premises. They may need financial support to tide them over the worst of the interruption to business activities. Business recovery is critical to Canterbury's economic recovery.

Bigger, longer term recovery questions

- How long will the insurance assessment take?
- Could my building be demolished with my stuff still inside?
- Where, when and how will we move?
- Will I still be trading in a year's time?
- How am I coping? How are my employees coping?



Responsibilities include

- Roading (other than local roads)
- Health services funding
- Social welfare
- State education system
- Day to day governing
- Providing court services

Longer term priorities include

- Schools, courts, public services continue to function
- Community wellbeing and resilience is rebuilt
- Insurance companies can't fail - they will fund much of the rebuild
- Local economy recovers with minimal business casualties

Central government infrastructure and services will often be affected by local emergencies. In this case, central government needs to be able to coordinate with local government and reach a deal over contribution to overall costs. People may expect central government to take charge.

Central government

Short term priorities include

- Earthquake happened on our watch - we have to respond effectively
- Short term help for businesses so they don't fail
- People's basic welfare needs met (food, water, shelter, sanitation)
- Hospitals and emergency services are functional
- Law and order maintained

Some of the questions

- Do people expect us to take charge?
- Who pays for the recovery?
- How do we stop businesses from falling over?
- What kind of rebuild do we want?

Day-to-day survival questions

- When will electricity / water / sewerage be reconnected?
- Which supermarkets/shops are open?
- How do I get around? Which roads are open?
- Do I still have a job? Where are the kids going to school?

Bigger, longer term recovery questions

- How long will the insurance assessment take?
- Where, when and how will we repair /move / rebuild?
- How secure is the school? Will it merge or close?
- How secure is my job? Will my employer recover?

Householders

How am I coping? How are my family, friends and neighbours coping?

Householders need information to meet day-to-day and longer term needs. They may have to coordinate a range of agencies across different sectors to effect their own long-term recovery. Householders' recovery is critical to Canterbury's ongoing viability as a region.



Day-to-day survival questions

- How secure is our road access to other areas?
- When will essential services be reconnected?
- When will the local shops and schools re-open?
- How can we make it easy for less mobile people to get to shops, schools, sports grounds and so on?
- How can we support each other?

Bigger, longer term recovery questions

- How secure are our schools? Will they merge or close?
- Will local businesses still be trading in a year's time?
- How long will community facilities be out of action? Where will people meet and play in the meantime?
- Will people drift away? How can we entice them back?

Communities need information to meet their day-to-day and longer term needs. Communities depend on basic infrastructure (power, water, sewerage, roads), as well as the facilities that bring people together into a community (e.g. local businesses, schools, shops, sports facilities, places for people and groups to meet). To remain viable, communities depend on the recovery of householders, survival of local businesses, and reconstruction of schools, infrastructure, and facilities.

Communities

The critical questions

- Who is going to fix the earthquake damage, and what powers do they need?
- How do we ensure decision-makers don't exceed their powers?
- How do we protect people against arbitrary or unfair state action?

Parliament

Parliament won't want to seem to be 'playing politics', and will want to act decisively. Canterbury-based members' local perspective will strengthen that imperative. These factors may distract from Parliament's core constitutional role.

Some of the questions

- How is power distributed and exercised? Is the separation of powers maintained?
- What are the accountability and transparency requirements?
- Is judicial scrutiny circumscribed?
- How is the rule of law observed?
- Are civil liberties and human rights abridged?



The constitutional perspective seeks to ensure constitutional norms, laws and conventions are observed. It is a long-term perspective, concerned to ensure decisions taken to fix problems in the short-term don't inadvertently undermine constitutional norms in the longer term. The perspective is often advocated by the New Zealand Law Society, academics, and the Legislation Design Advisory Committee.

Figure 6.2 Recovering from the Canterbury earthquakes: a complex matter requiring coordination

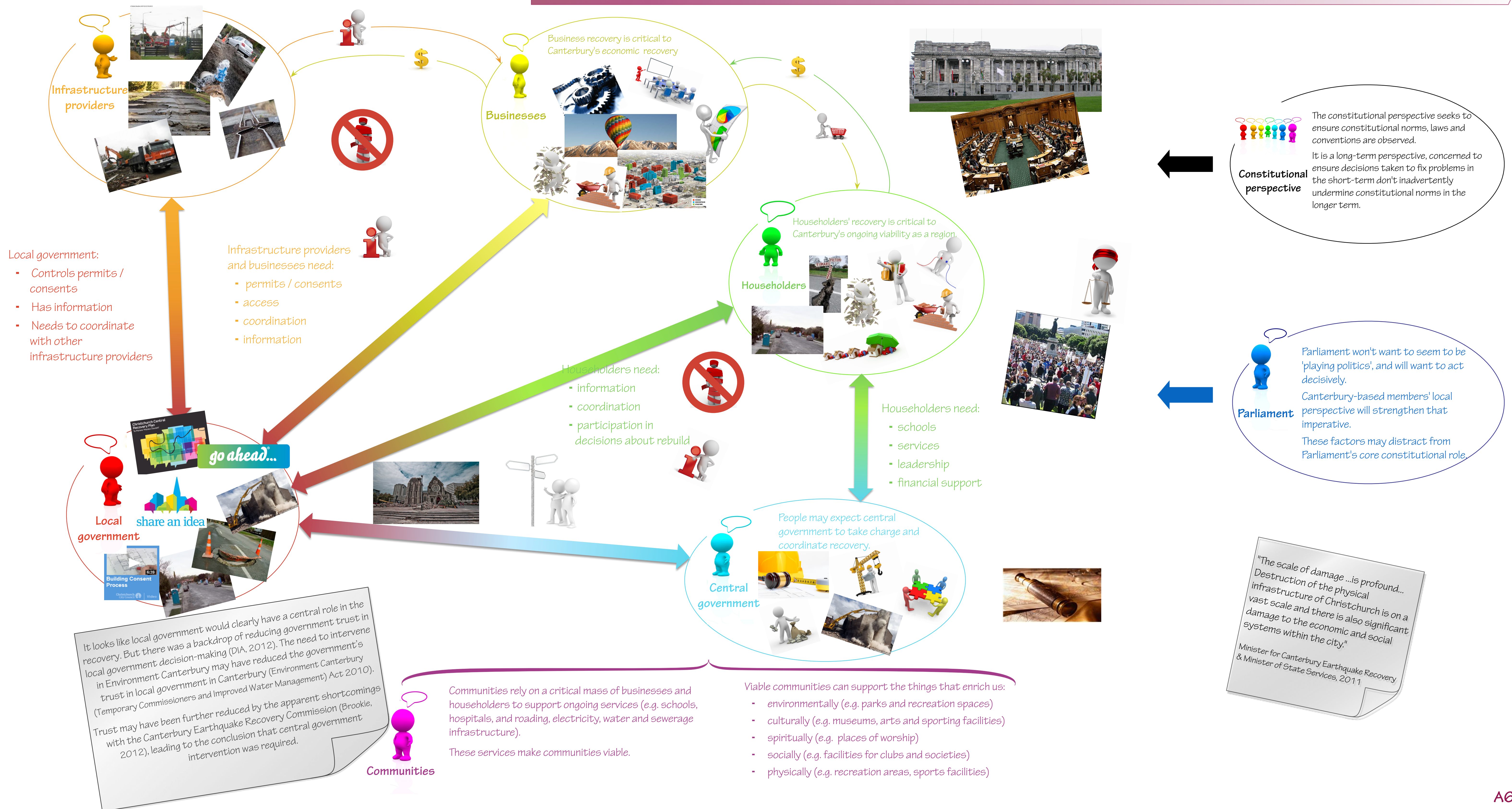
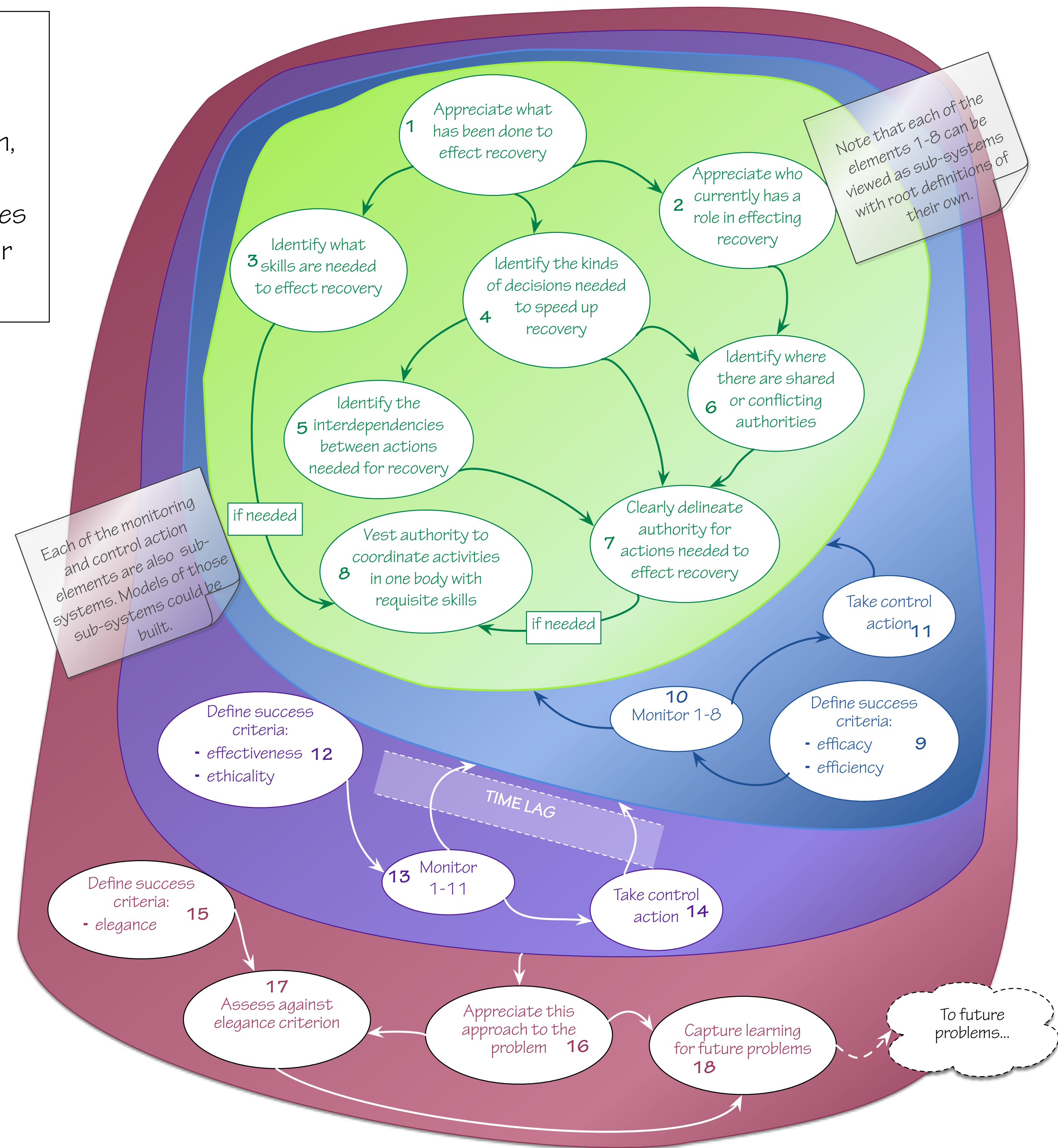


Figure 6.3 A system to coordinate recovery-related activity - SSM model 1

Root definition*
A system to speed up and coordinate earthquake recovery activities through: centralised decision-making and property acquisition; expedited law-making; and coordinated demolition, repair, and rebuilding in order to enable the people affected by the earthquakes to get back to their normal lives and activities as quickly as possible while not being subjected to arbitrary or unfair decision-making.

*Root definition = a system to do P by Q to achieve P, where X is the transformation (T).
CATWOE factors inform the system model and its success criteria.

- C** Customers = People affected by the earthquakes (including householders, residents, schools, local businesses, insurance companies, recovery workers, infrastructure providers, local authorities, and communities)
- A** Actors = Cabinet, Parliament, central government agencies, local authorities, infrastructure providers
- T** **Transformation**
Uncoordinated activity, unclear authority, slow decision-making → Timely, coordinated activities with clear authority
- W** Weltanschauung (worldview) = It's best for Christchurch (and New Zealand) if it recovers quickly; central and local government can work cooperatively to achieve the recovery if regulatory obstacles are removed
- O** Owners = Government (primary), Parliament (secondary)
- E** Environmental constraints = New Zealand's constitutional culture emphasises authoritarianism and pragmatism - people will expect someone to take charge



PERFORMANCE MEASURES

EFFICACY (or, does it work?)
All recovery-related matters clearly fall within the responsibilities of an identified decision-maker. Decision-makers know the scope of their authority. Decisions are being made and implemented without delay.

EFFICIENCY (or, is it better than the alternative?)
Decisions are made without delay. Decision-makers have the right skills (or have access to the right skills) to make decisions.

EFFECTIVENESS (or, is it worth doing?)
Decisions are accepted by the affected parties. Decisions do not have to be revisited. Where challenged, decisions are not overturned by reviewers (including the courts).

ETHICALITY (or, is it the right thing to do?)
Decision-making processes are transparent and include proportionate opportunities for participation. Decision-makers are accountable. Decisions are publicly perceived as legitimate.

ELEGANCE (or, structurally, does it make sense?)
Procedures and mechanisms are as simple as they can be, and no more complex than they need to be. Framework for recovery decision-making should reflect and be consistent with New Zealand's pluralist constitutional system.

TIME LAG MAY DELAY DETECTION OF THESE EFFECTS

Figure 6.4 A system to coordinate recovery-related activity - SSM model 2

Root definition*

A system to speed up and coordinate earthquake recovery activities through: central government-controlled strategy, planning and implementation; powers to require people, local authorities and council organisations to do things necessary or desirable for the recovery, including powers to direct and call-up functions and powers; and through limitations on appeals, reviews and liability to ensure that recovery from the earthquakes and the restoration of the social, environmental, economic, and cultural wellbeing of greater Christchurch communities is focused, timely, and expedited.

* Root definition = a system to do P by Q to achieve P, where X is the transformation (T). CATWOE factors inform the system model and its success criteria.

- C

Customers = People affected by the earthquakes (including householders, residents, schools, local businesses, insurance companies, recovery workers, infrastructure providers, local authorities, and communities)
- A

Actors = Cabinet, Parliament, central government agencies, local authorities, infrastructure providers
- T

Transformation

Uncoordinated activity, unclear authority, slow decision-making

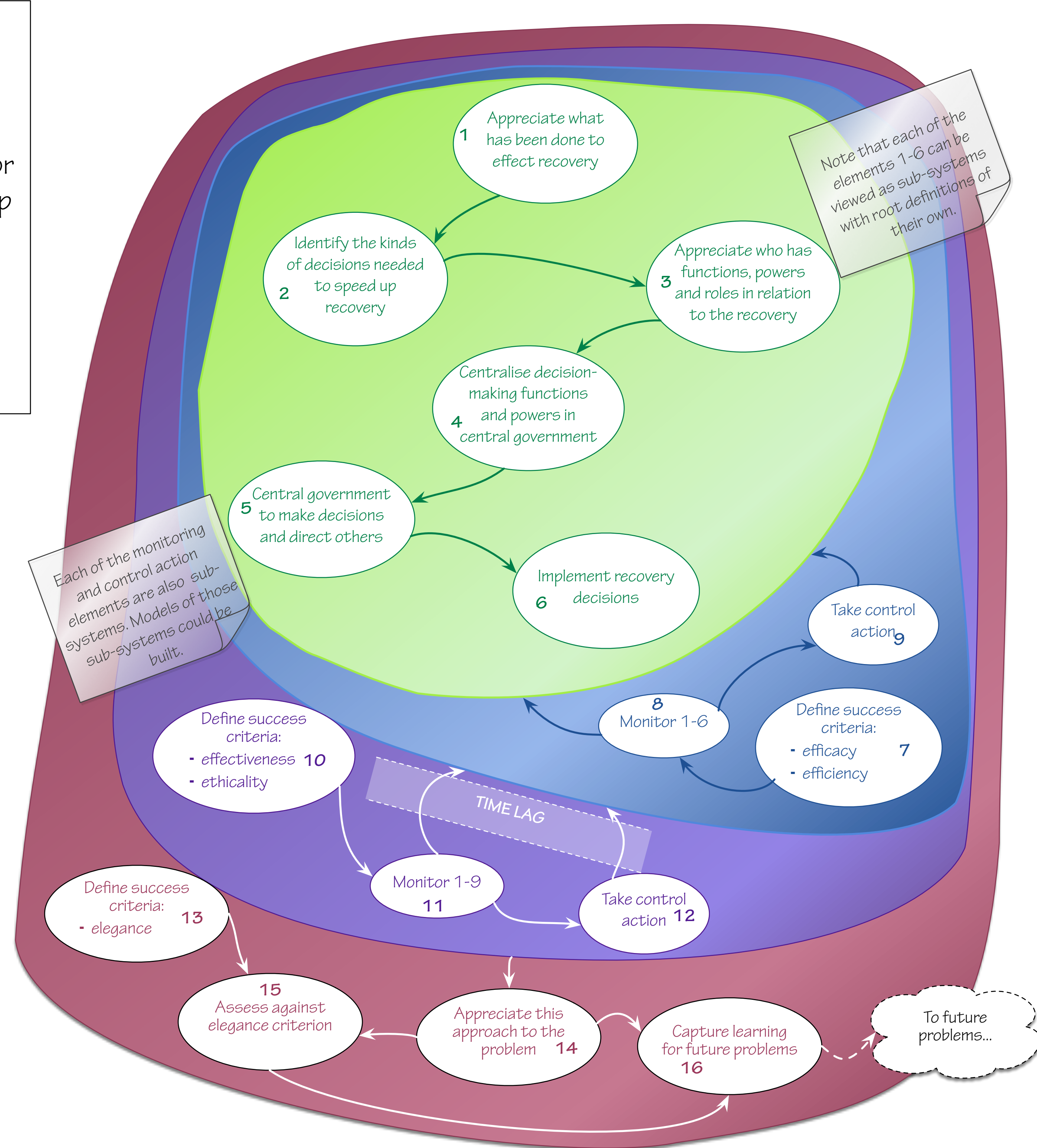
→

Timely, coordinated activities with clear authority
- W

Weltanschauung (worldview) = It's best for Christchurch (and New Zealand) if it recovers quickly, so nothing can be allowed to impede a focused, timely, and expedited recovery
- O

Owners = Government (primary), Parliament (secondary)
- E

Environmental constraints = New Zealand's constitutional culture emphasises authoritarianism and pragmatism - people will expect someone to take charge



PERFORMANCE MEASURES

EFFICACY (or, does it work?)
All recovery-related matters clearly fall within the responsibilities of an identified decision-maker. Decision-makers know the scope of their their authority. Decisions are being made and implemented without delay.

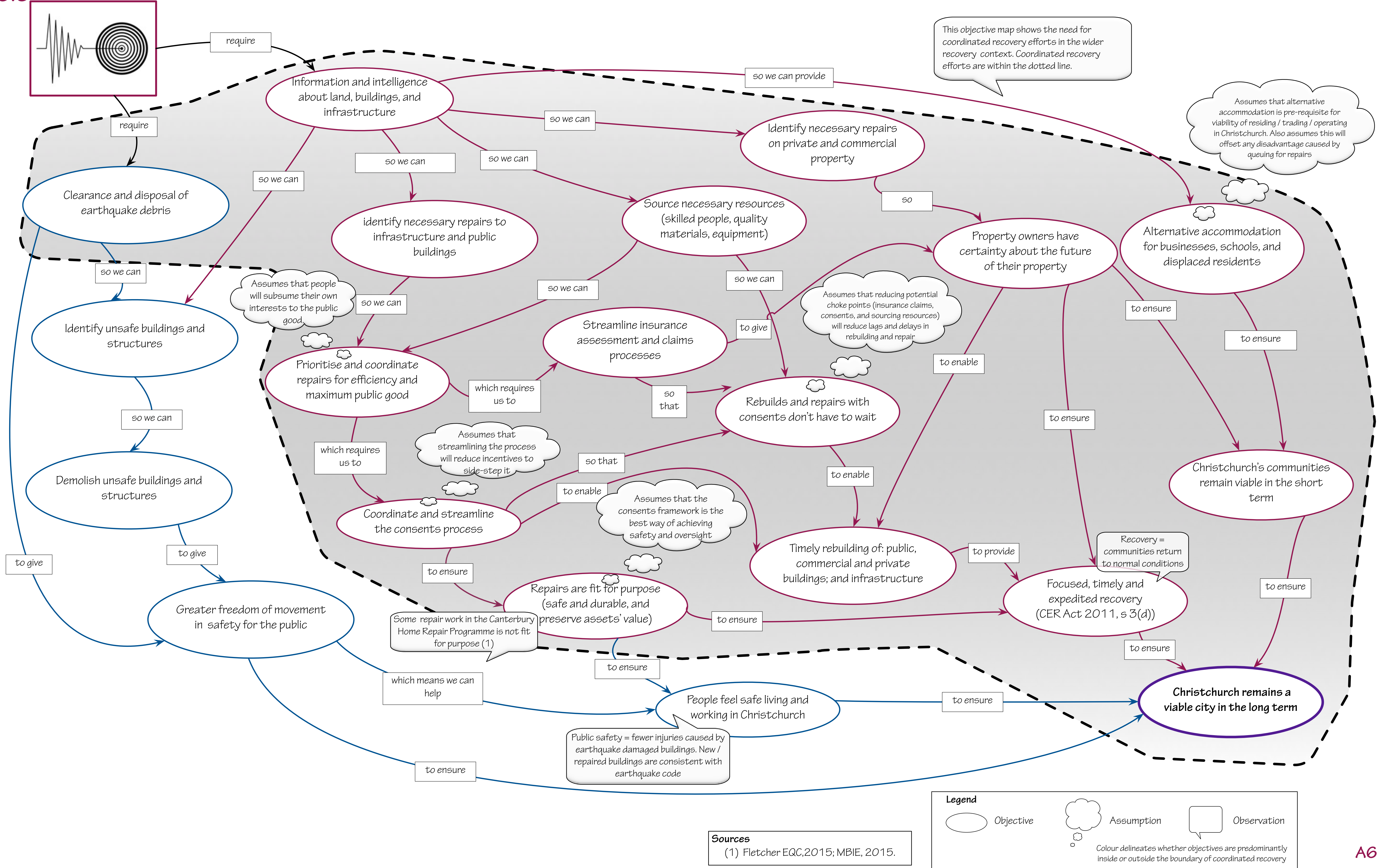
EFFICIENCY (or, is it better than the alternative?)
Decisions are made without delay. Decision-makers have the right skills (or have access to the right skills) to make decisions.

EFFECTIVENESS (or, are the right decisions being made?)
Decisions are made without delay and tangibly improve the social, environmental, economic, or cultural wellbeing of greater Christchurch communities.

ETHICALITY (or, is it the right thing to do?)
Decision-making processes are transparent and include proportionate opportunities for participation. Decision-makers are accountable. Decisions are publicly perceived as legitimate.

ELEGANCE (or, structurally, does it make sense?) -
Procedures and mechanisms are as simple as they can be, and no more complex than they need to be. Framework for recovery decision-making should reflect and be consistent with New Zealand's pluralist constitutional system.

Figure 6.5 Canterbury earthquake recovery coordination - objective map showing assumptions



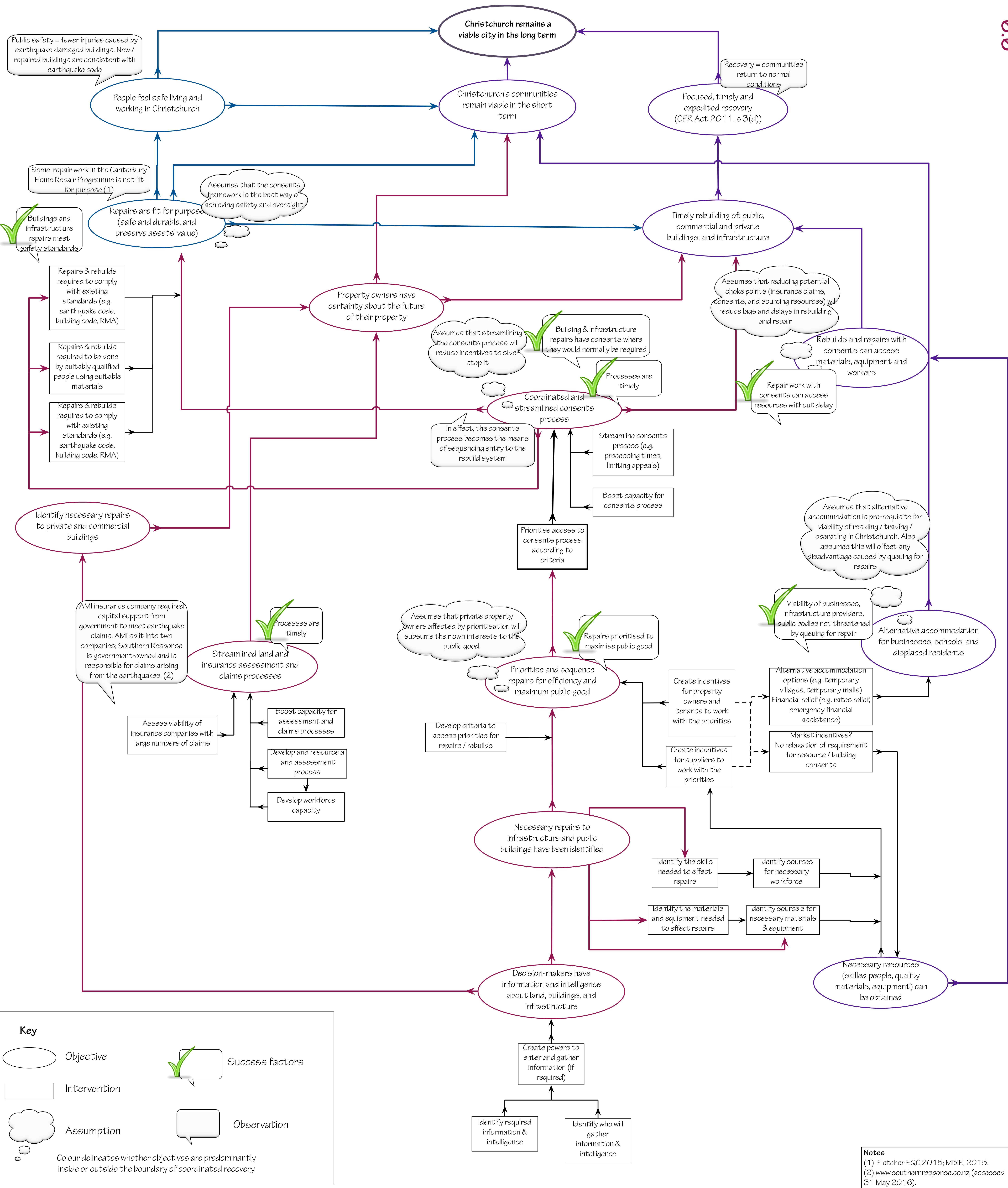


Figure 6.7 Canterbury earthquake recovery coordination - causal loop diagram highlighting factors likely to affect durable repairs and rebuilds

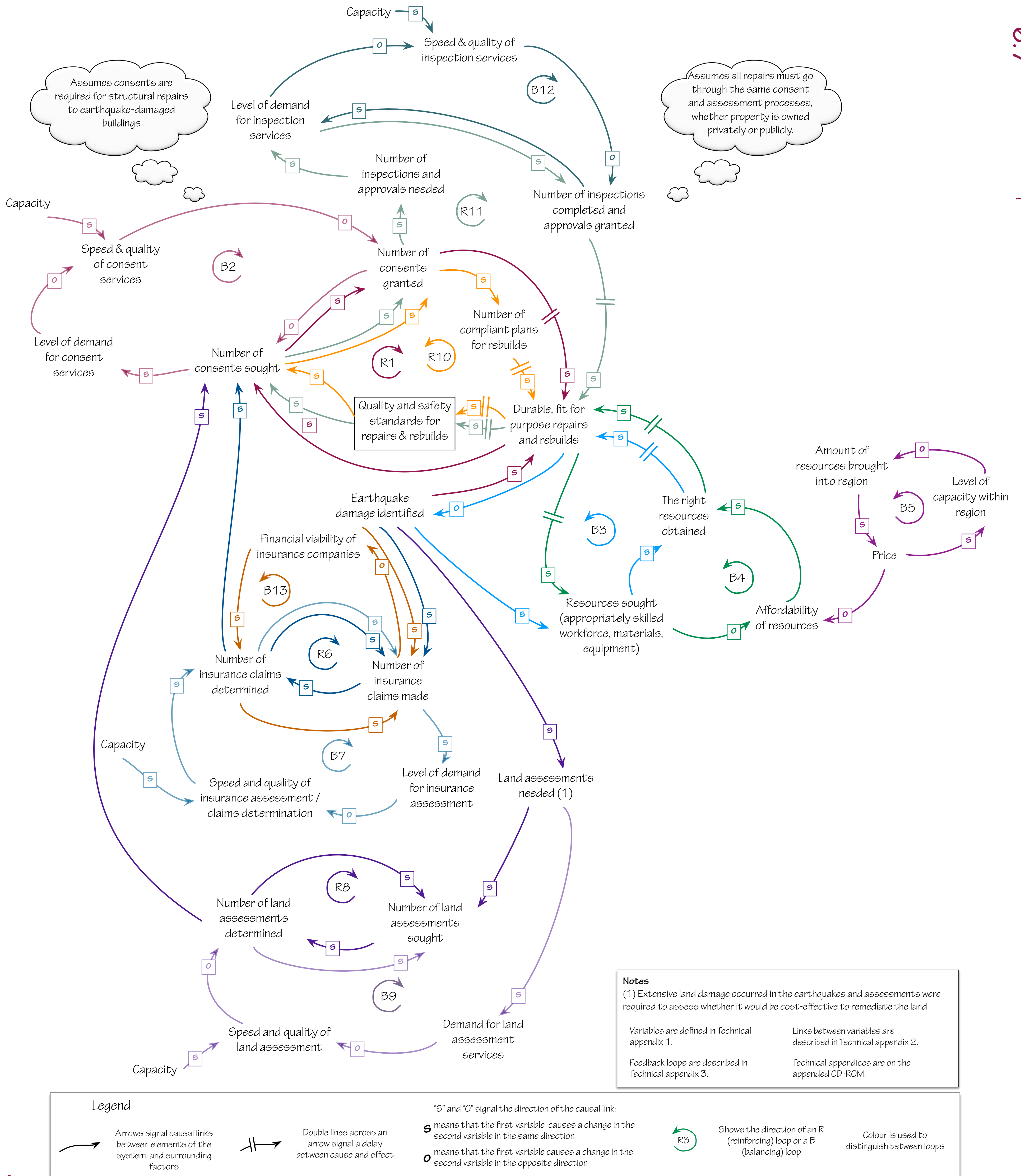
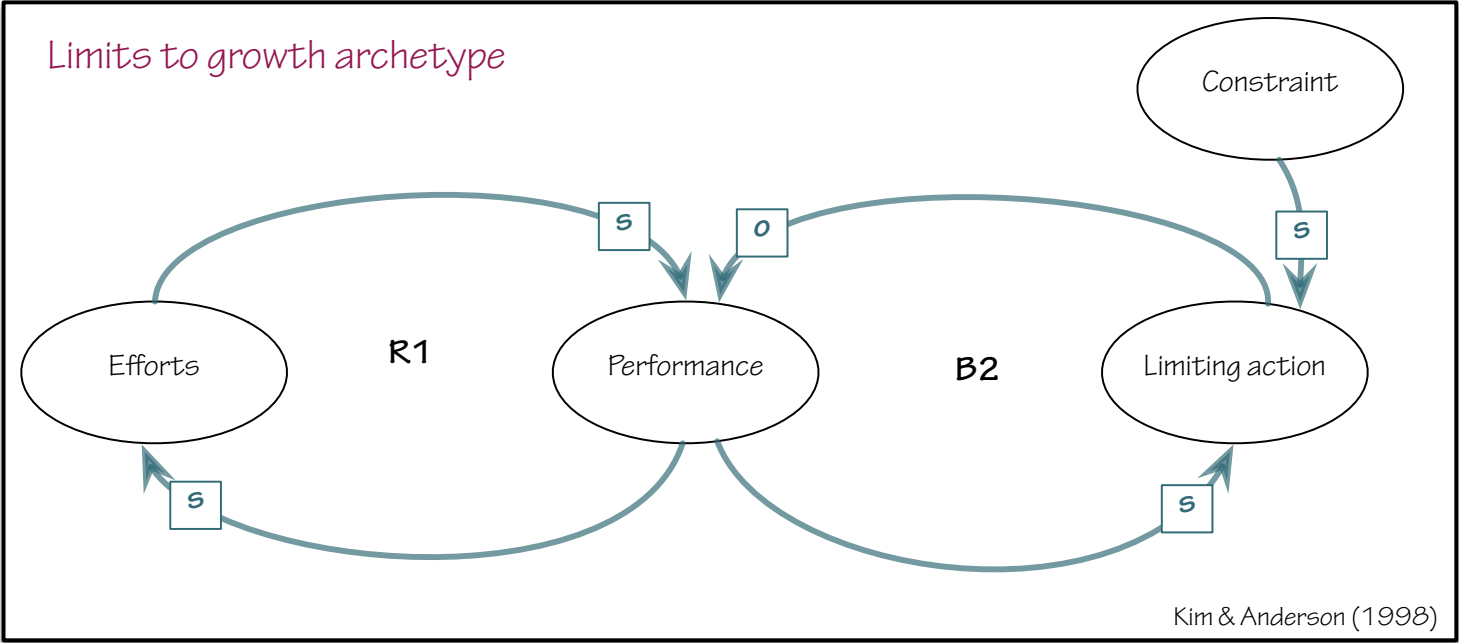
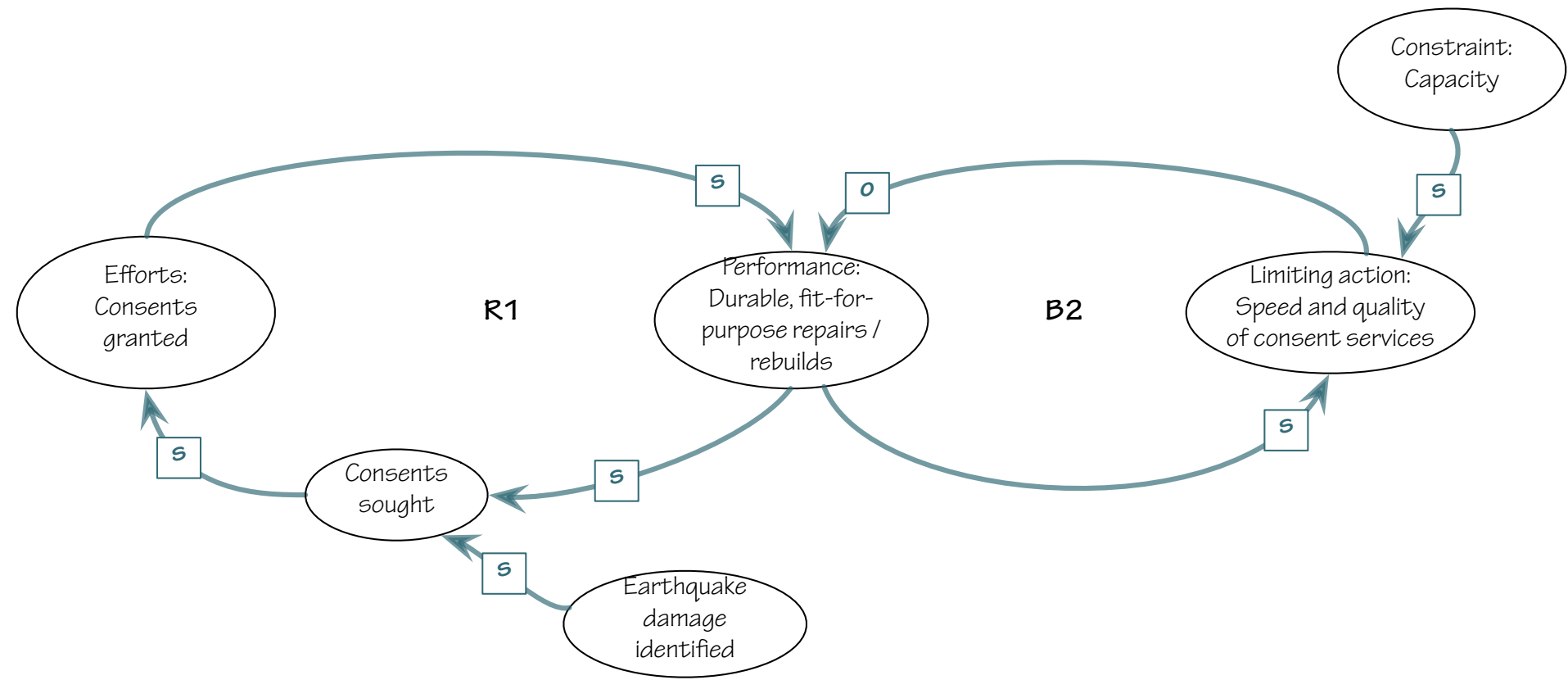


Figure 6.8 Limits to growth system archetype



Example of archetype in Canterbury earthquake recovery coordination



B2 assumes slower or poorer quality consent services will result in people avoiding the consents process or in poorer scrutiny through consents process. Either result risks undermining quality of repairs and rebuilds.

Figure 6.9 Canterbury earthquake coordination - intervention map showing quality-focused interventions

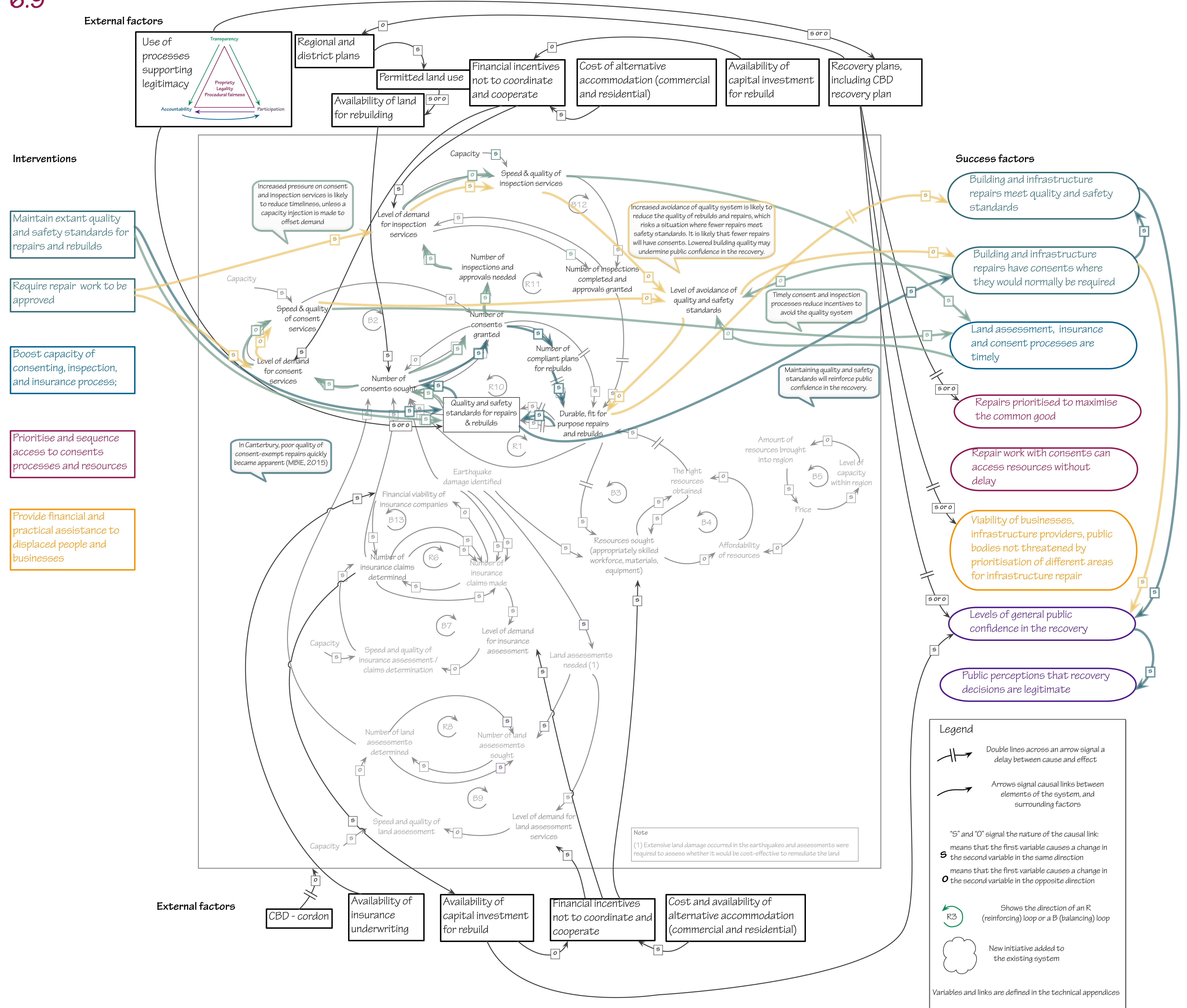


Figure 6.10 Canterbury earthquake coordination - intervention map showing capacity-focused interventions

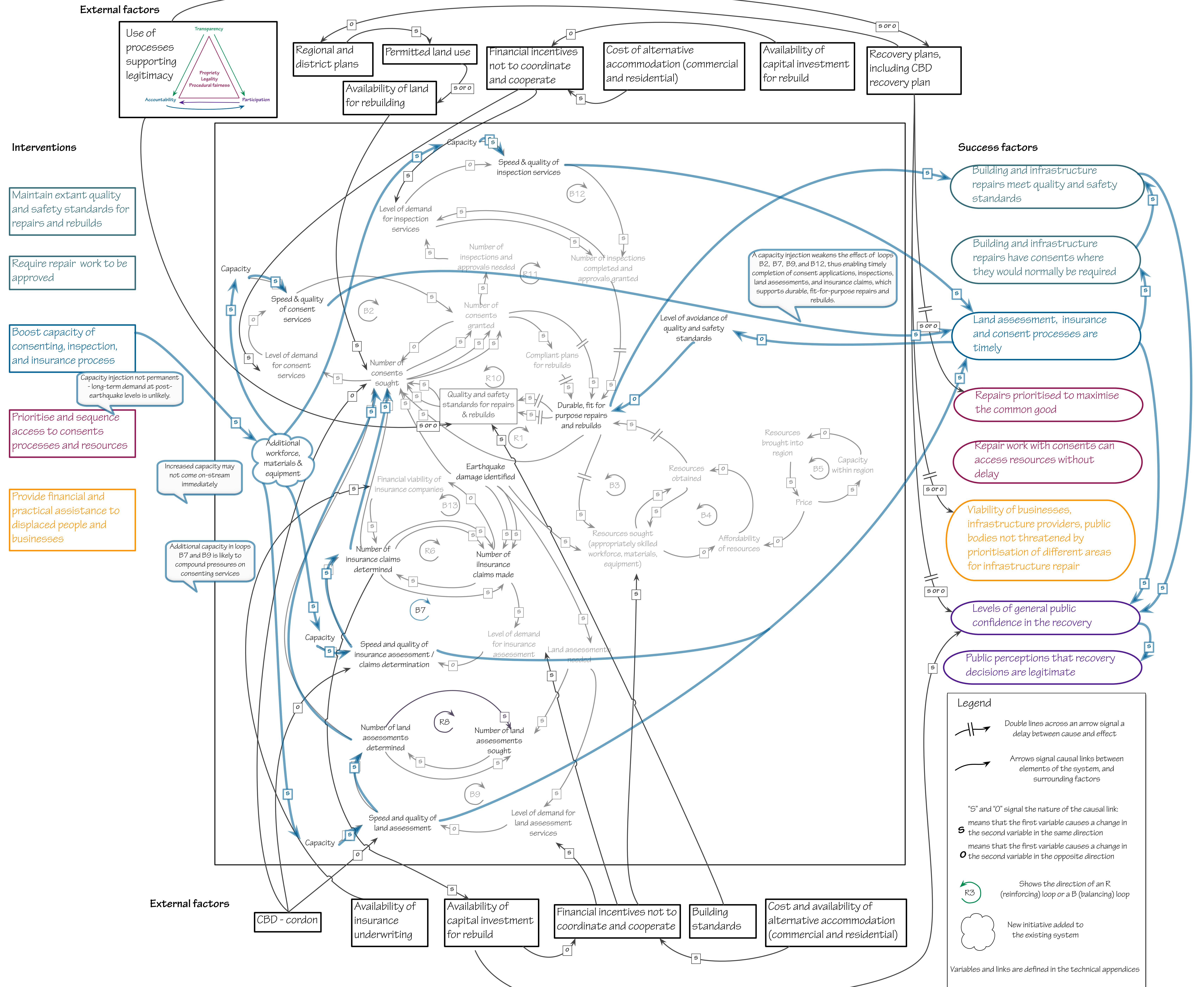


Figure 6.11 Canterbury earthquake coordination - intervention map showing quality-focused interventions

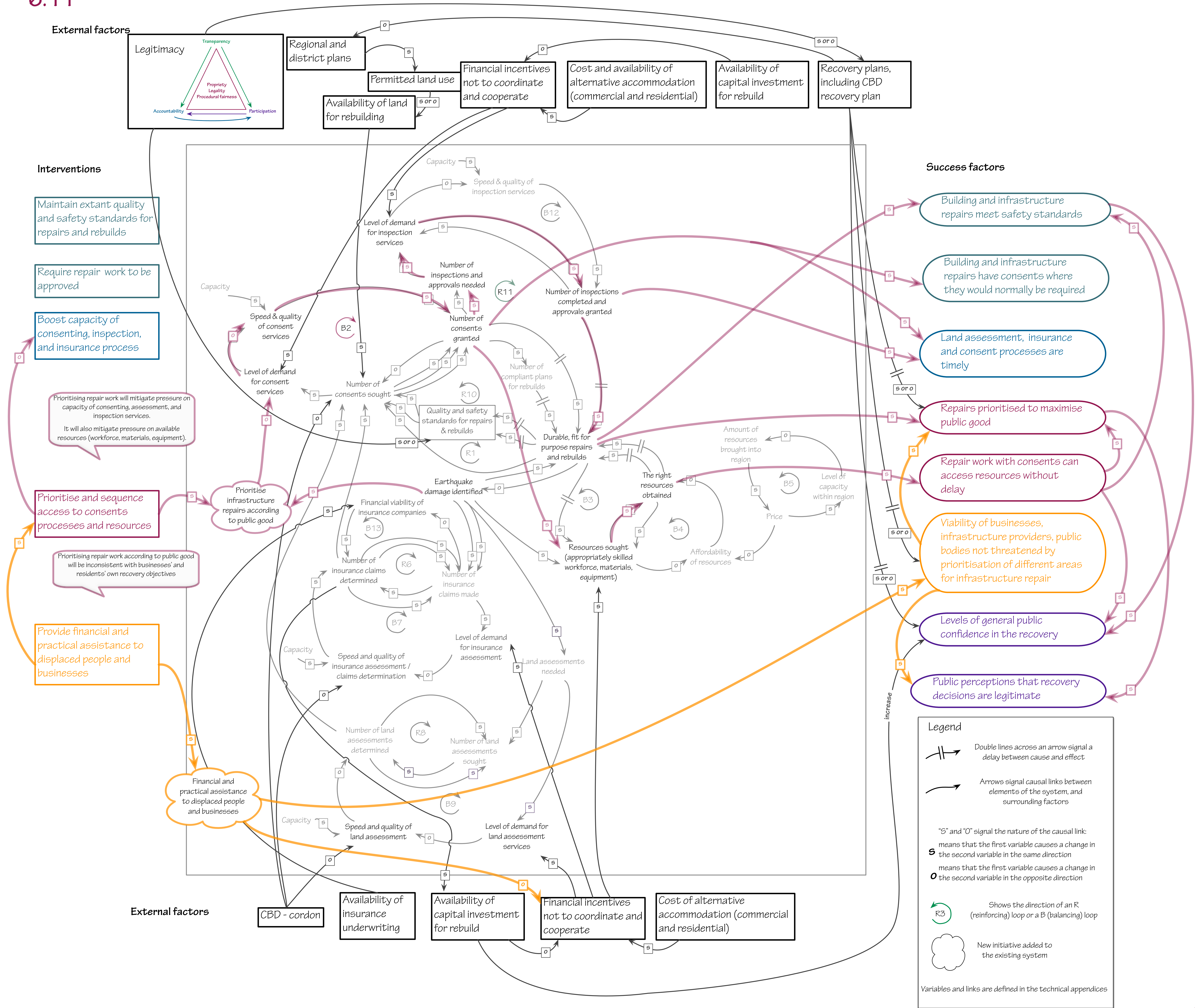


Figure 7.1 Recovering from the Canterbury earthquakes - expedited law-making to authorise recovery activities



Many different activities are needed to enable people to recover from the earthquakes.

The earthquakes disrupted normal business, planning and reporting processes - some may not be able to be complied with easily or at all.



Sustained recovery momentum will require expedited law changes to protect people against unnecessary or unfair legal liability.

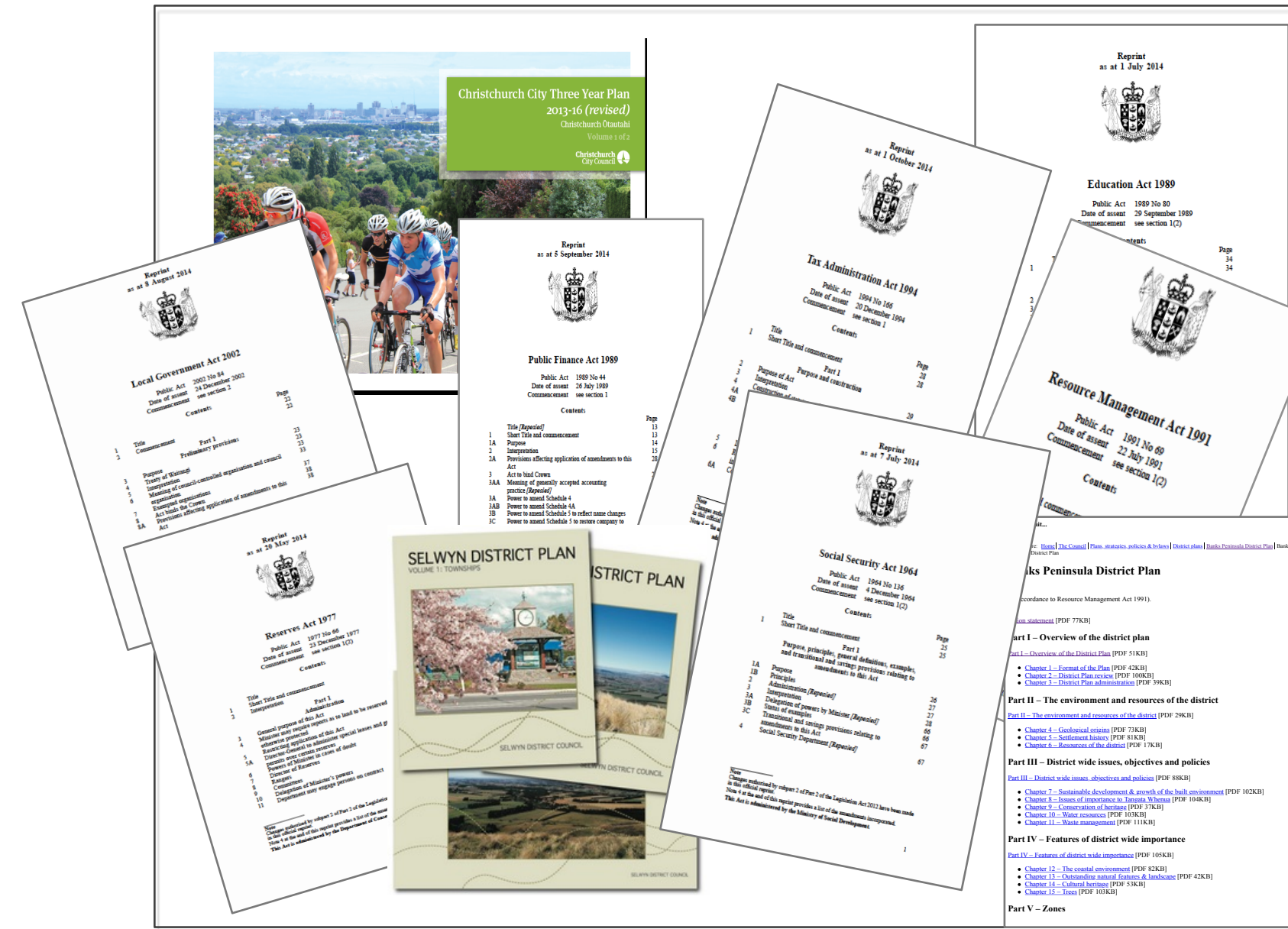
At the same time the process can't be abused or expose people to arbitrary or unfair laws.



There's a lot to be done...



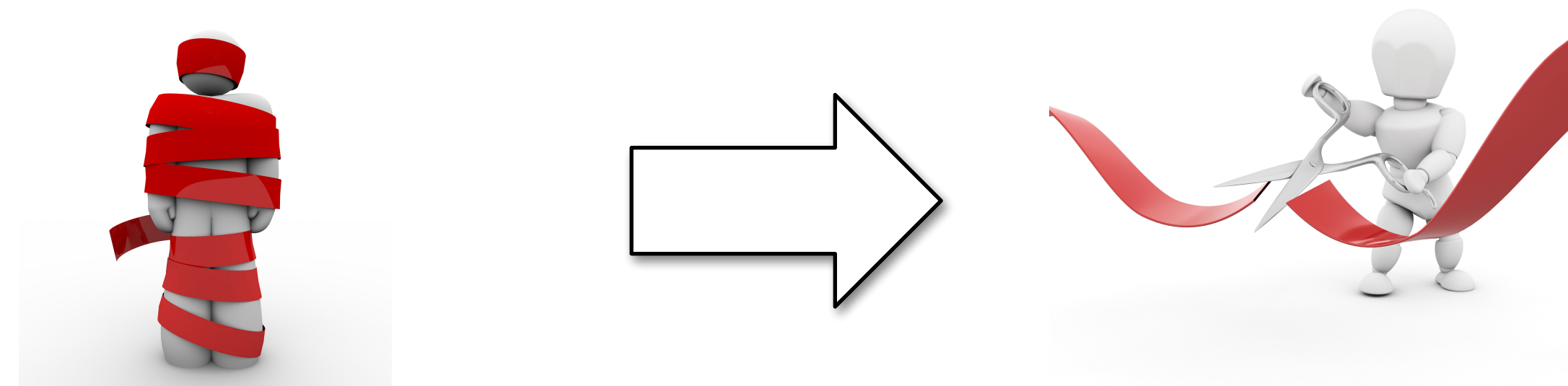
...and there are a lot of laws, plans, and procedures governing what gets done, how, and when.



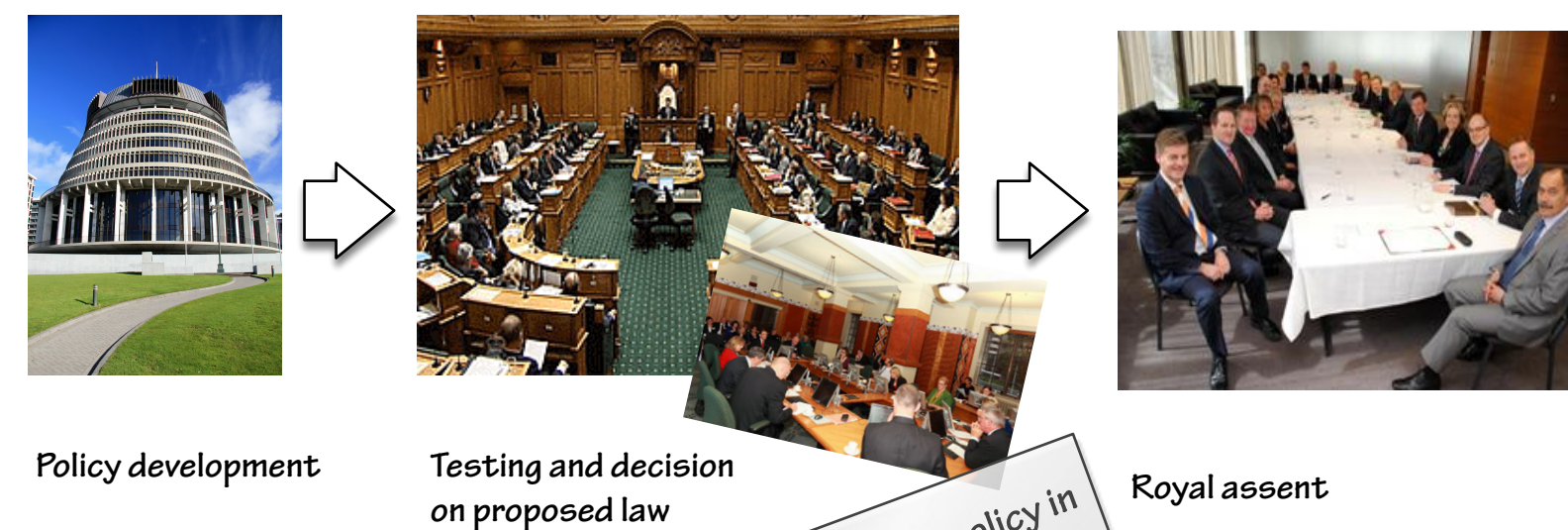
Not all of those laws, plans, and procedures can be complied with easily now.



People may lose confidence if recovery gets tied up in red tape, so we need to find a way to cut through it



The usual law-making process is too slow



But the testing of policy in the House and with the public in select committee is a good way of protecting against arbitrary and unfair law...

We need to find a faster way of authorising recovery activities with the right checks and balances so people will be confident in the law



Take it outside parliament so law-making is quicker, but:

- Use consultation where possible - because consultation helps to test policy to ensure it's workable
- Use transparent decision-making - because that's a precursor to accountability
- Enable scrutiny - before the decision is made to head off bad decisions - and afterwards, to test how things went
- Keep faith with constitutional norms so law is proportionate and fair

Scrutiny bodies - could use Regulations Review Committee and Parliament

Or set up something bespoke

But first we need to know what needs to be authorised:

An open-ended law-making power would undermine parliament

And it wouldn't keep faith with constitutional norms

Is it possible to predict what activities need to be authorised?

Figure 10 Recovering from the Canterbury earthquakes - activities that needed to be authorised

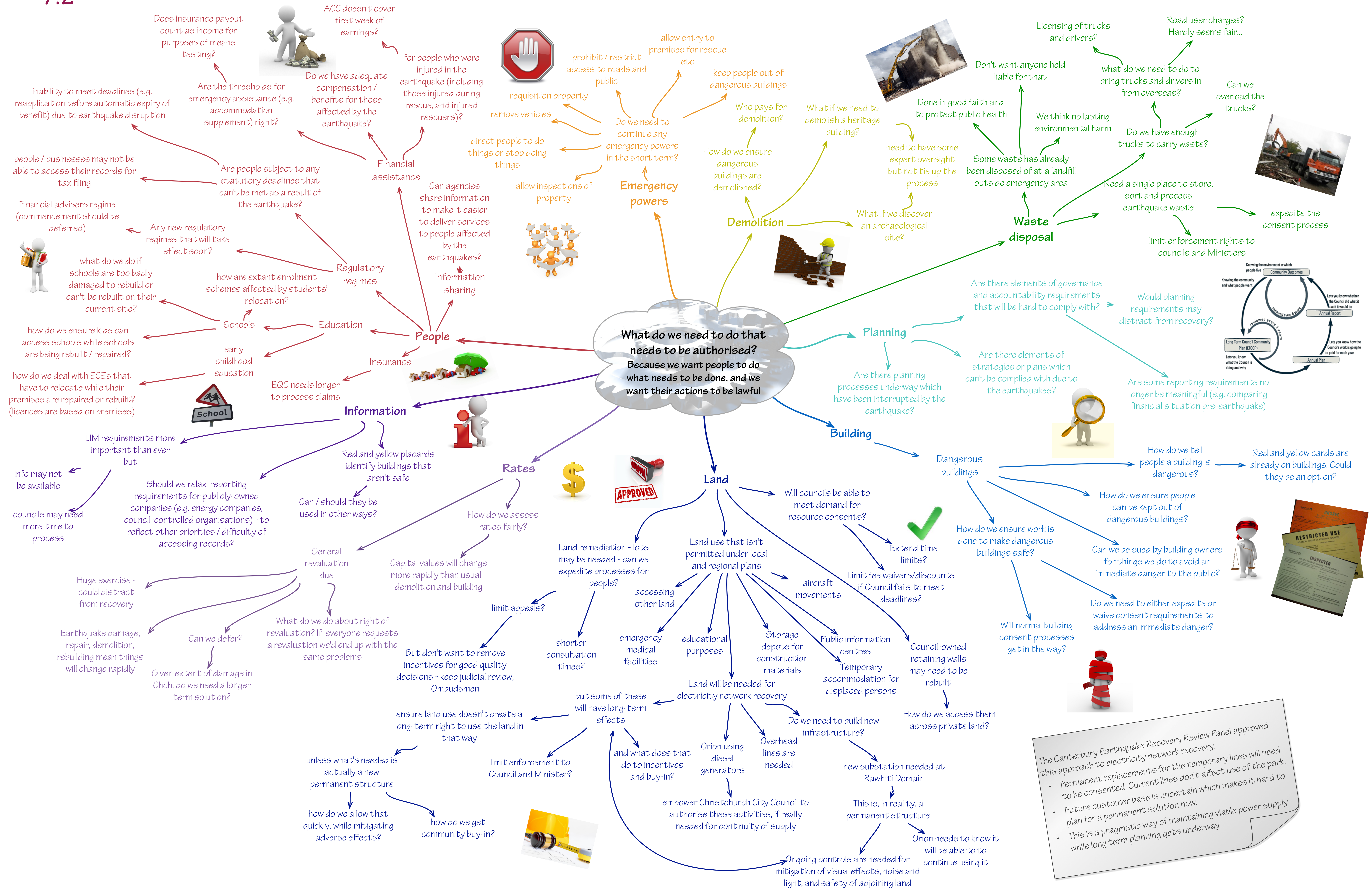


Figure 7.3 A system to make law quickly to enable timely recovery - SSM model

Root definition*

A system to authorise recovery-related activities by an alternative law-making procedure that emphasises speed and flexibility together with transparency and accountability, in order to mitigate the harms caused by the earthquakes by enabling the people affected to recover as quickly as possible while being protected from arbitrary and unfair laws, and to protect those working on earthquake recovery against liability for not following business-as-usual rules and procedures.

* Root definition = a system to do P by Q to achieve R, where P is the transformation (T). CATWOE factors inform the system model and its success criteria.

C Customers = People affected by the earthquakes (including householders, residents, schools, local businesses, insurance companies infrastructure providers, and councils) and people working on earthquake recovery (central government agencies, local government, private companies and individuals contracted to do recovery work)

A Actors = Cabinet, Parliament

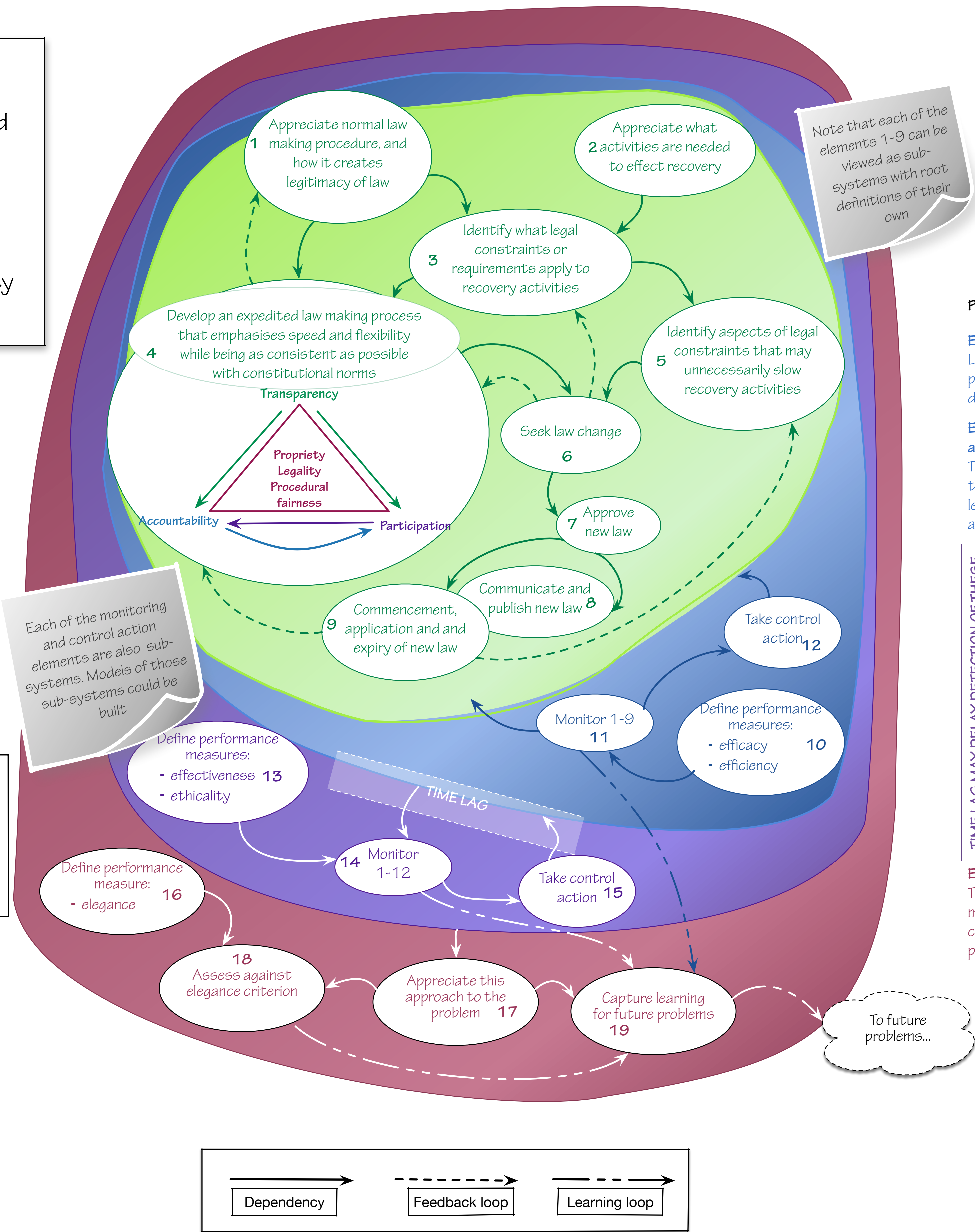
Transformation

T Recovery slowed by BAU requirements; recovery workers who don't follow BAU are at risk of liability → Recovery expedited by relaxed or modified processes; recovery workers who follow modified requirements are protected from liability

W Weltanschauung = It's best for Christchurch (and New Zealand) if it recovers quickly; ongoing legitimacy of the law requires the law to be fit-for-purpose and capable of fair and rational application, even in the post-earthquake context

O Owners = Government (in reality), Parliament (in theory)

E Environmental constraints = New Zealand's constitutional culture emphasises authoritarianism and pragmatism - people will expect someone to take charge. The rule of law generally requires law to be certain, predictable, accessible, prospective. Earthquake recovery needs to be done within legal constraints.



PERFORMANCE MEASURES

EFFICACY (or, does it work - is Q achieving P?)
Legal restrictions and requirements make sense in the post-earthquake environment and do not unreasonably divert resources away from recovery activities.

EFFICIENCY (or, is it better than other ways of achieving P?)
The time and effort needed to get a law change is less than the time and effort needed to work with existing legal restrictions or requirements, or to seek amendments through the parliamentary process.

EFFECTIVENESS (or, are the right decisions being made - is P achieving R?)
Law changes are authorising and expediting recovery work so that tangible progress can be seen. Recovery workers are confident that their activities are lawful.

ETHICALITY (or, is P the right transformation and is R the right broader objective?)
Law changes are transparent and are subject to control by the legislative and judicial branches of state. Law changes are notified and publicly accessible and disturb the status quo to the minimum extent necessary. Law changes are neither arbitrary nor unfair.

ELEGANCE (or, structurally, does it make sense?) -
The law-making process is as simple as it can be, and no more complex than it needs to be. The process is broadly consistent with the rule of law and results in law that is publicly accepted as legitimate.

TIME LAG MAY DELAY DETECTION OF THESE EFFECTS

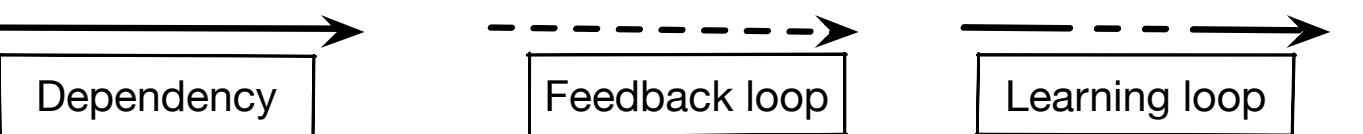
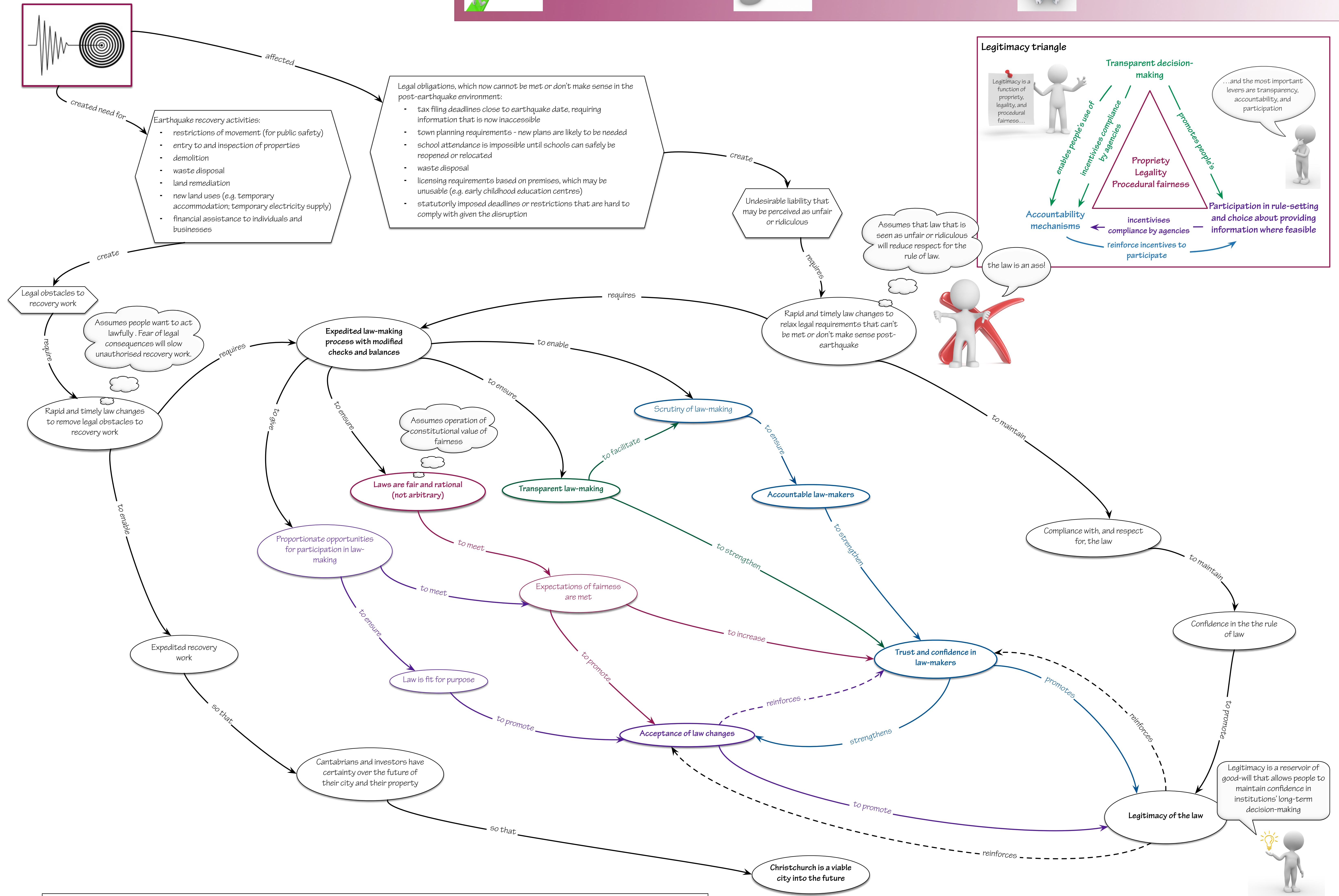


Figure 7.4 Expedited law-making in Canterbury earthquake recovery - objectives map showing assumptions



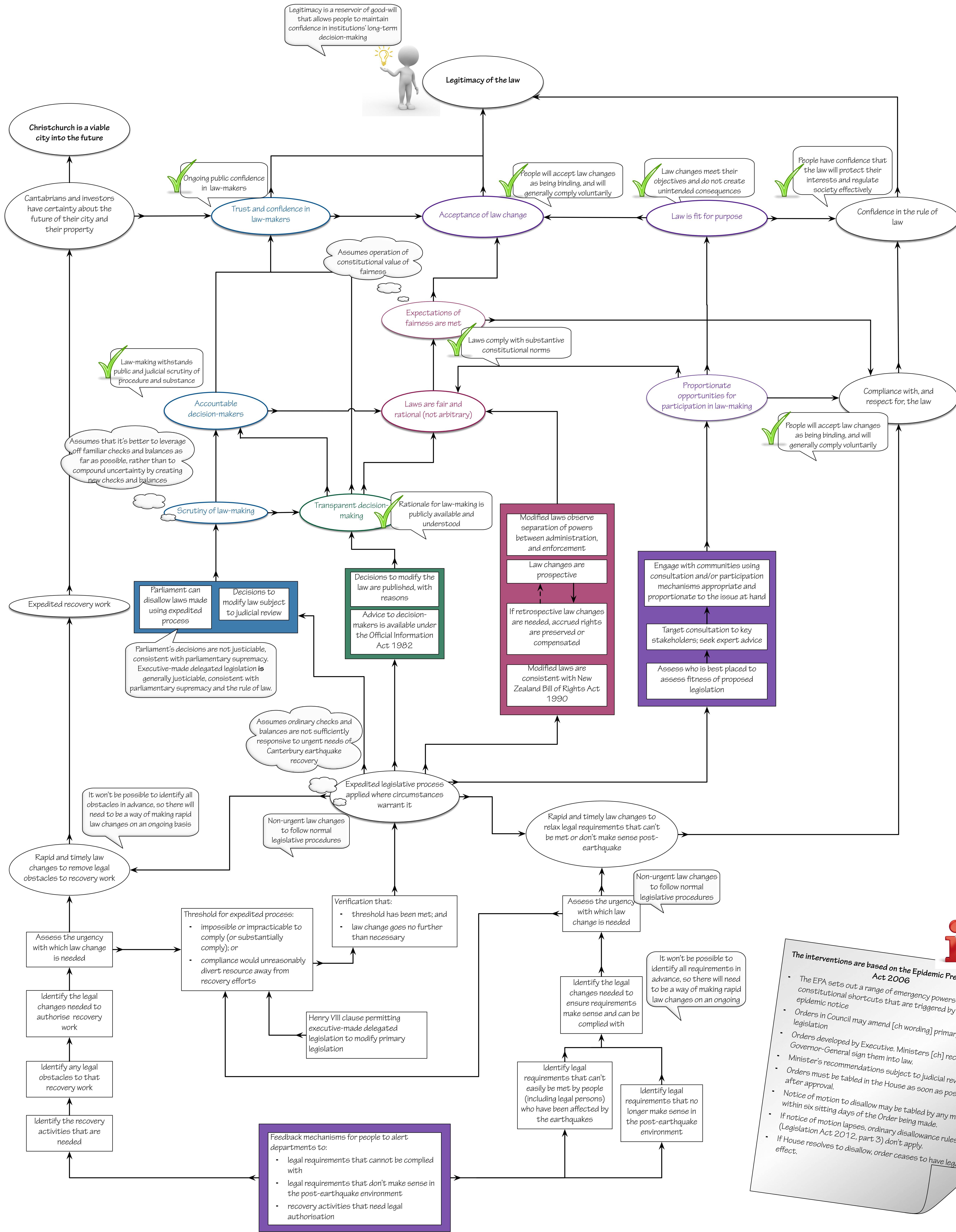


Figure 7.6 System map highlighting factors supporting legitimate law-making

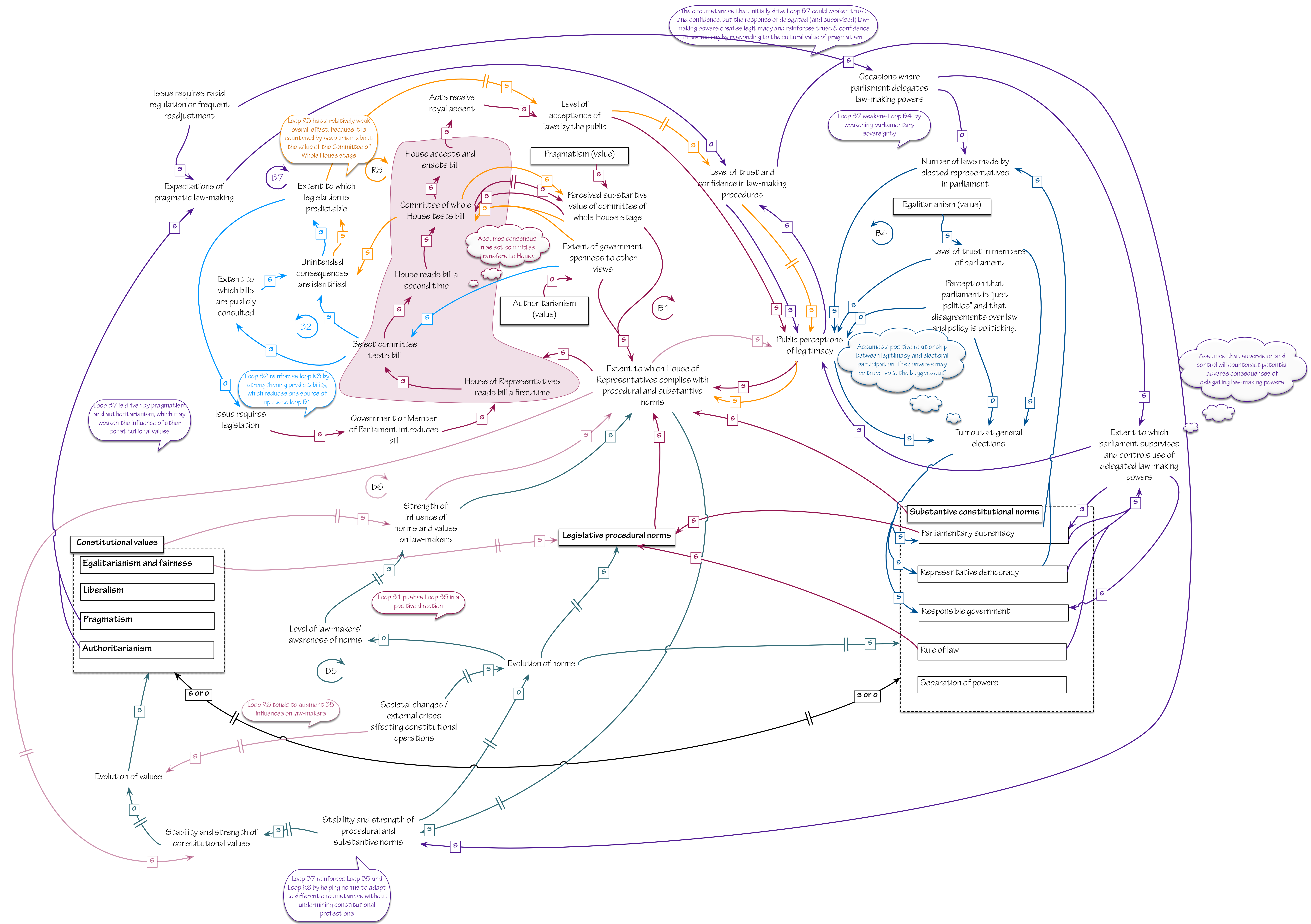


Figure 7.7 Expedited law-making — intervention map showing effect of threshold and triage process

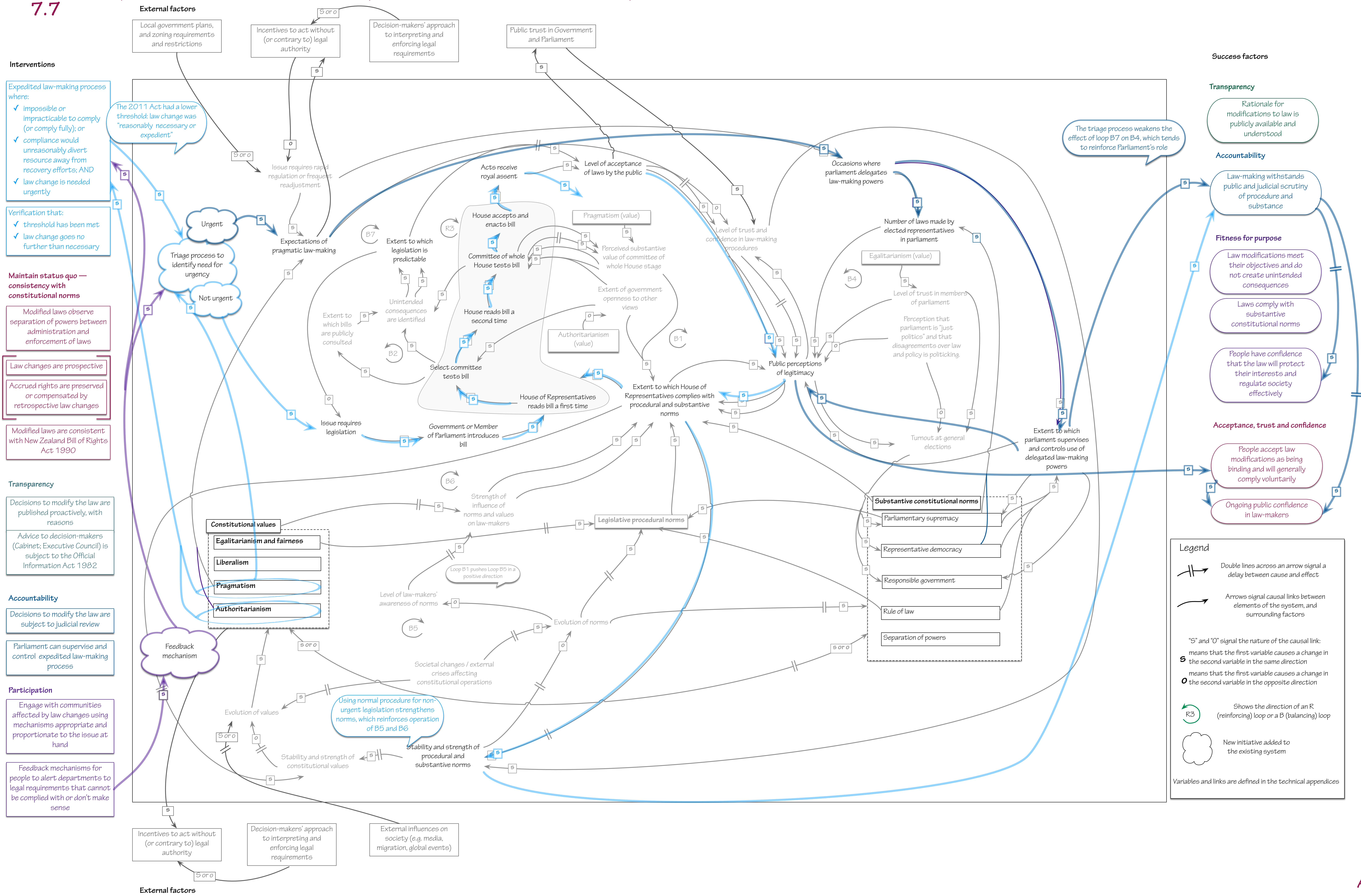


Figure 7.8 Expedited law-making — intervention map comparing effect of two approaches to verification

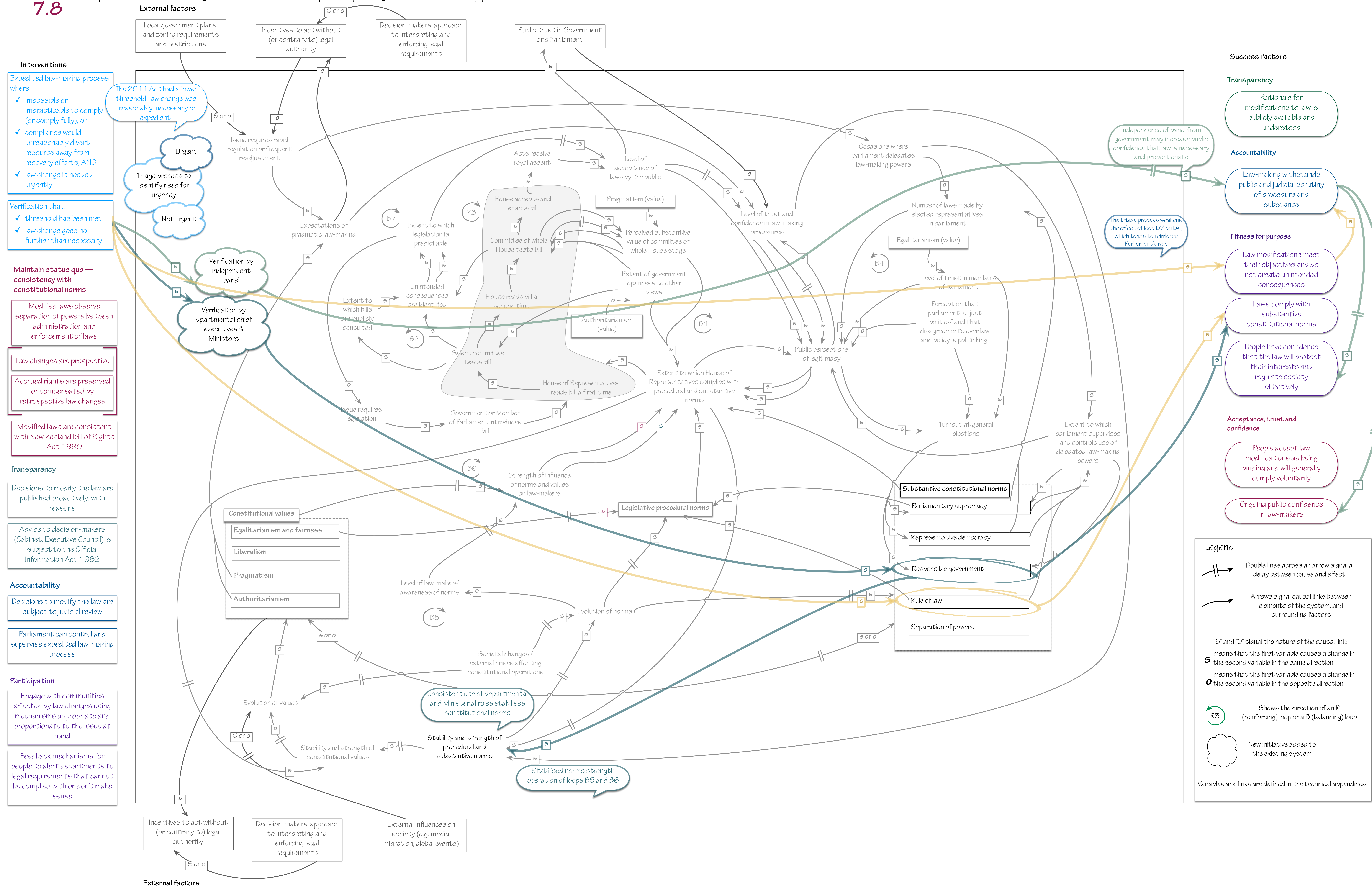


Figure 7.9 Expedited law-making — intervention map showing effect of maintaining constitutional norms

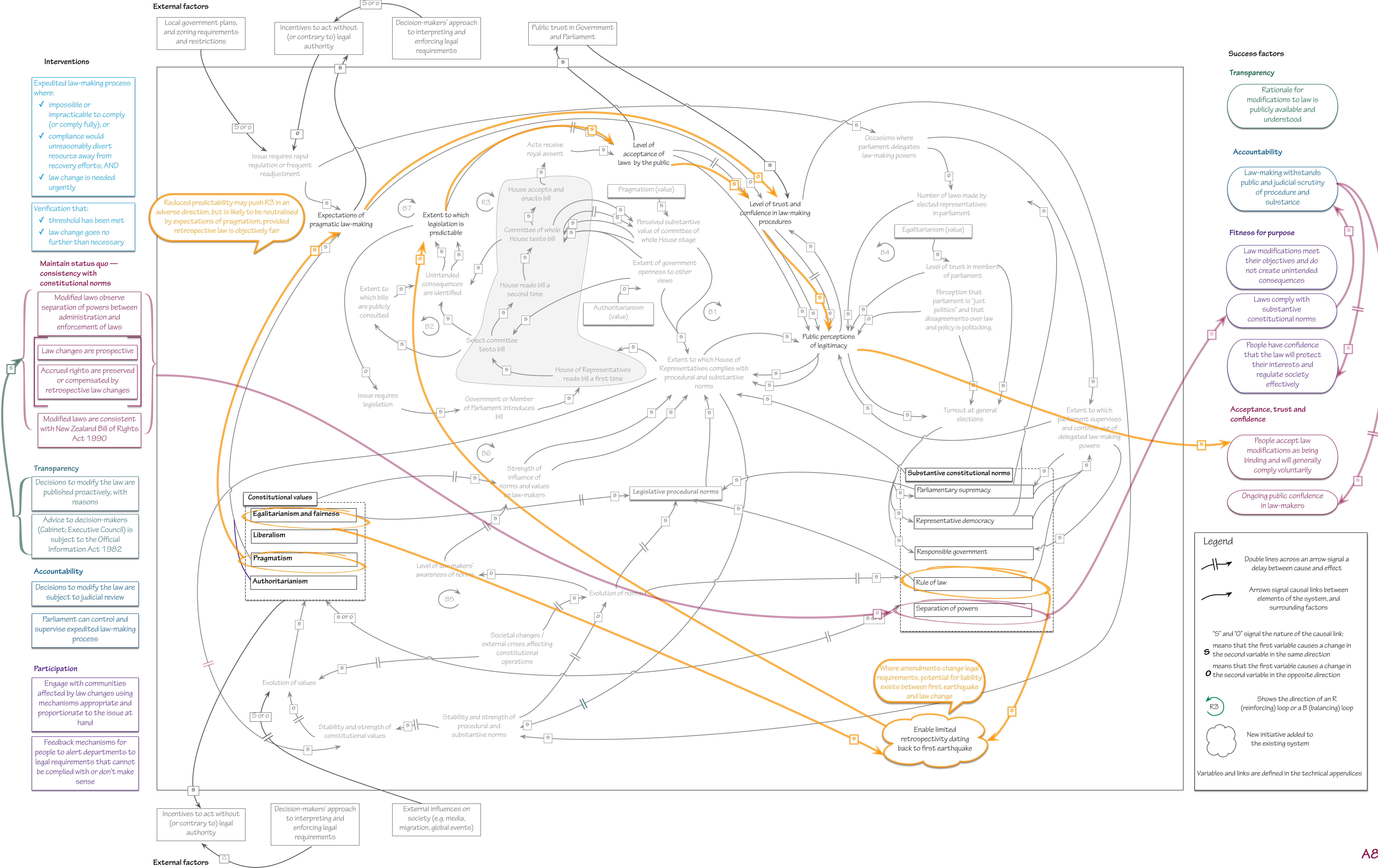


Figure 7.10 Expedited law-making — intervention map showing effect of transparent decision-making

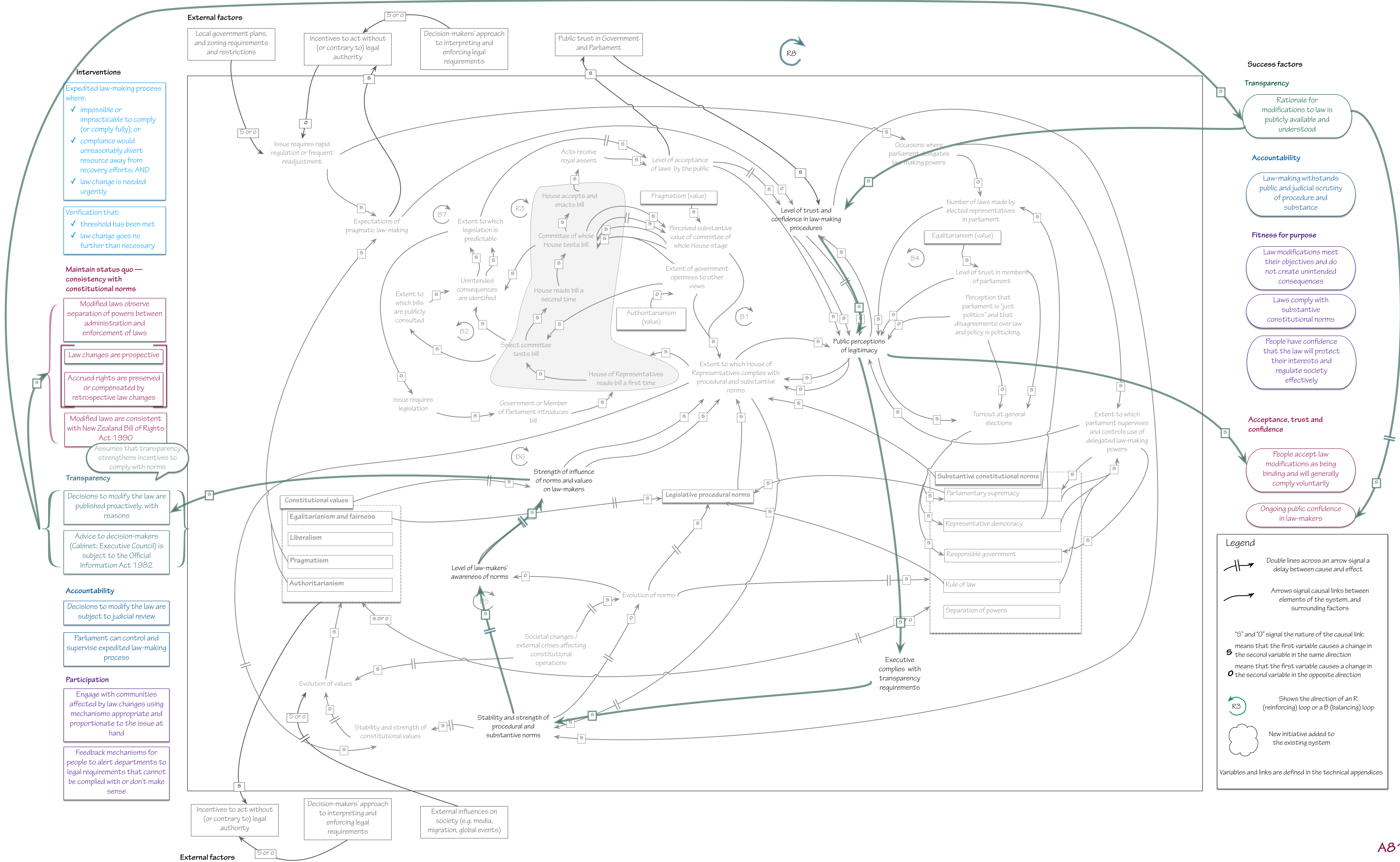


Figure 7.11 Expedited law-making — intervention map showing effect of judicial review

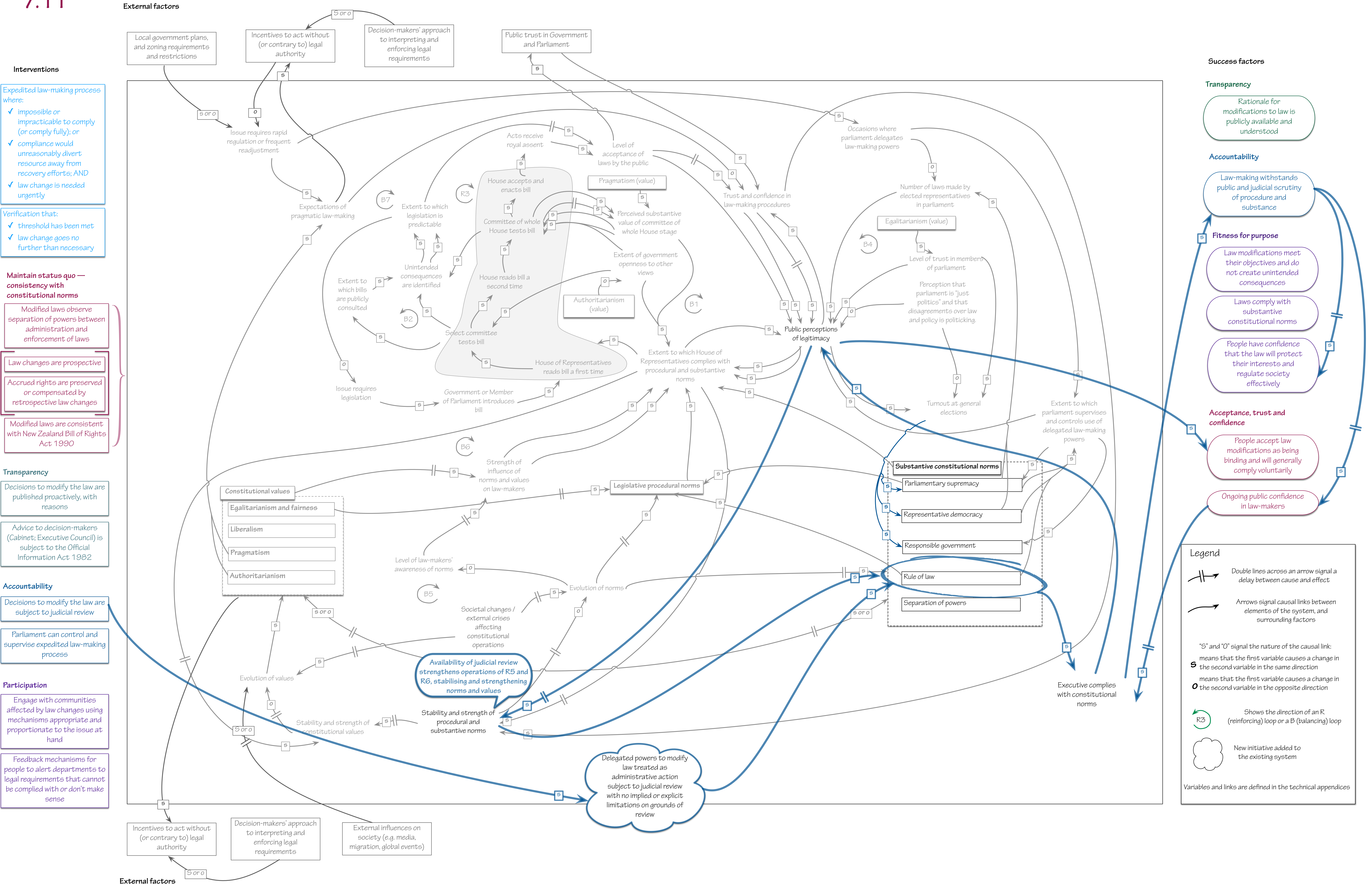


Figure 7.12

Expedited law-making — intervention map showing effect of 2011 Act limiting judicial review

Interventions

Expedited law-making process where:

- ✓ impossible or impracticable to comply (or comply fully); or
- ✓ compliance would unreasonably divert resource away from recovery efforts; AND
- ✓ law change is needed urgently

Verification that:

- ✓ threshold has been met
- ✓ law change goes no further than necessary

Maintain status quo — consistency with constitutional norms

Modified laws observe separation of powers between administration and enforcement of laws

Law changes are prospective

Accrued rights are preserved or compensated by retrospective law changes

Modified laws are consistent with New Zealand Bill of Rights Act 1990

Transparency

Decisions to modify the law are published proactively, with reasons

Advice to decision-makers (Cabinet; Executive Council) is subject to the Official Information Act 1982

Accountability

Decisions to modify the law are subject to judicial review

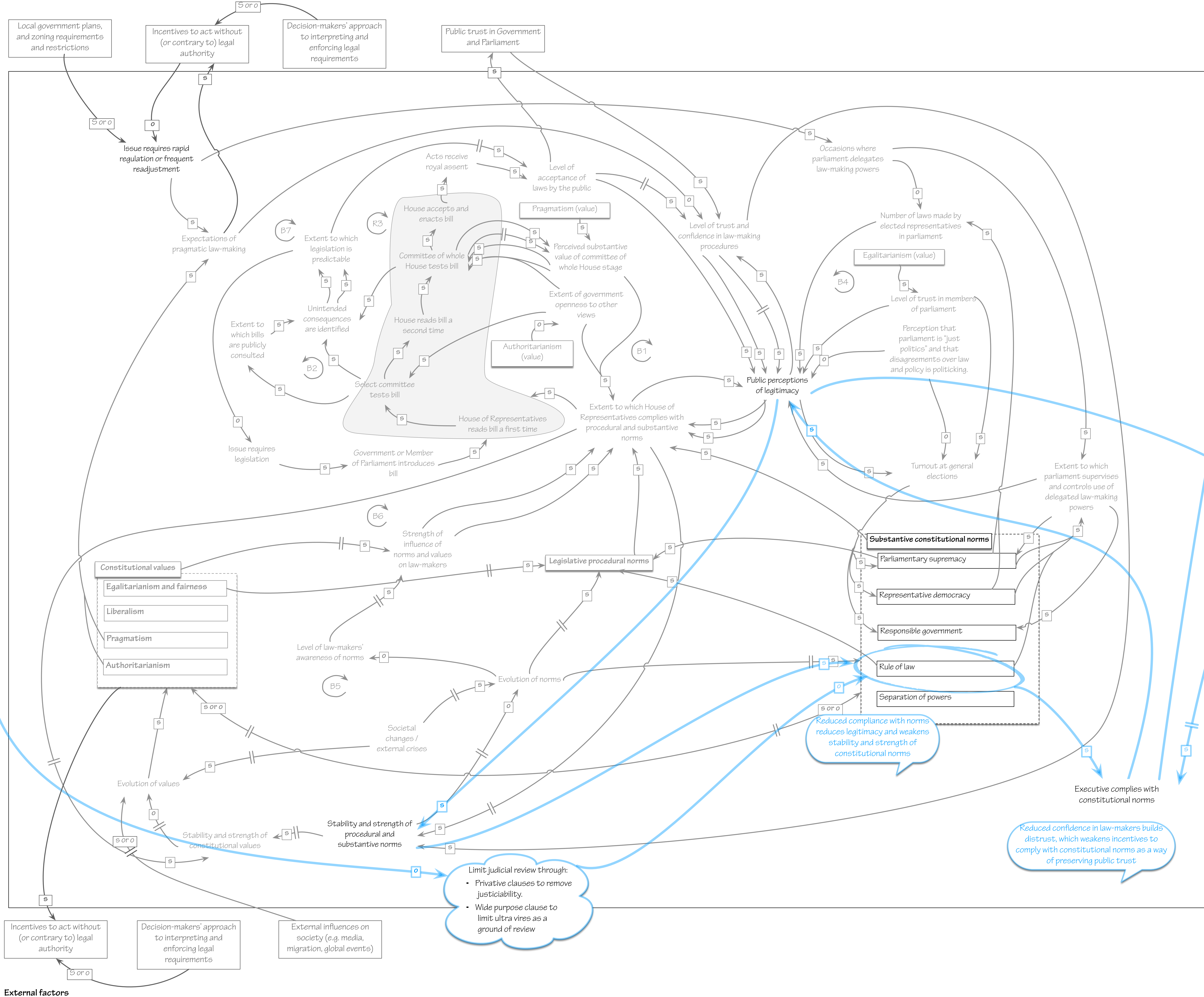
Parliament can control and supervise expedited law-making process

Participation

Engage with communities affected by law changes using mechanisms appropriate and proportionate to the issue at hand

Feedback mechanisms for people to alert departments to legal requirements that cannot be complied with or don't make sense

External factors



Success factors

Transparency

Rationale for modifications to law is publicly available and understood

Accountability

Law-making withstands public and judicial scrutiny of procedure and substance

Fitness for purpose

Law modifications meet their objectives and do not create unintended consequences

Laws comply with substantive constitutional norms

People have confidence that the law will protect their interests and regulate society effectively

Acceptance, trust and confidence

People accept law modifications as being binding and will generally comply voluntarily

Ongoing public confidence in law-makers

Legend

Double lines across an arrow signal a delay between cause and effect

Arrows signal causal links between elements of the system, and surrounding factors

"S" and "O" signal the nature of the causal link:
S means that the first variable causes a change in the second variable in the same direction
O means that the first variable causes a change in the second variable in the opposite direction

R3 shows the direction of an R (reinforcing) loop or a B (balancing) loop

New initiative added to the existing system

Variables and links are defined in the technical appendices

Figure 7.13 Expedited law-making — intervention map showing effect of parliamentary disallowance of executive-made law

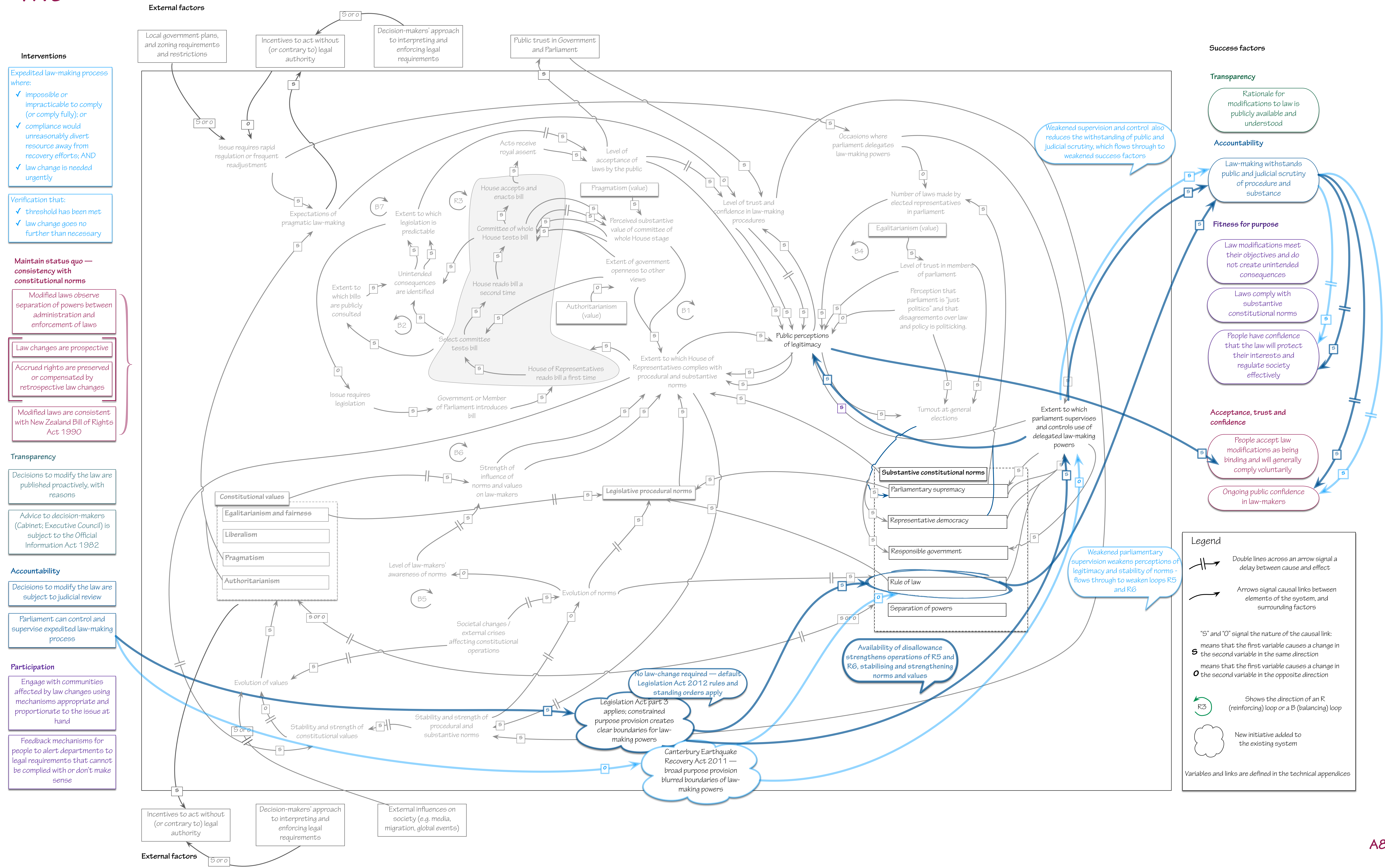
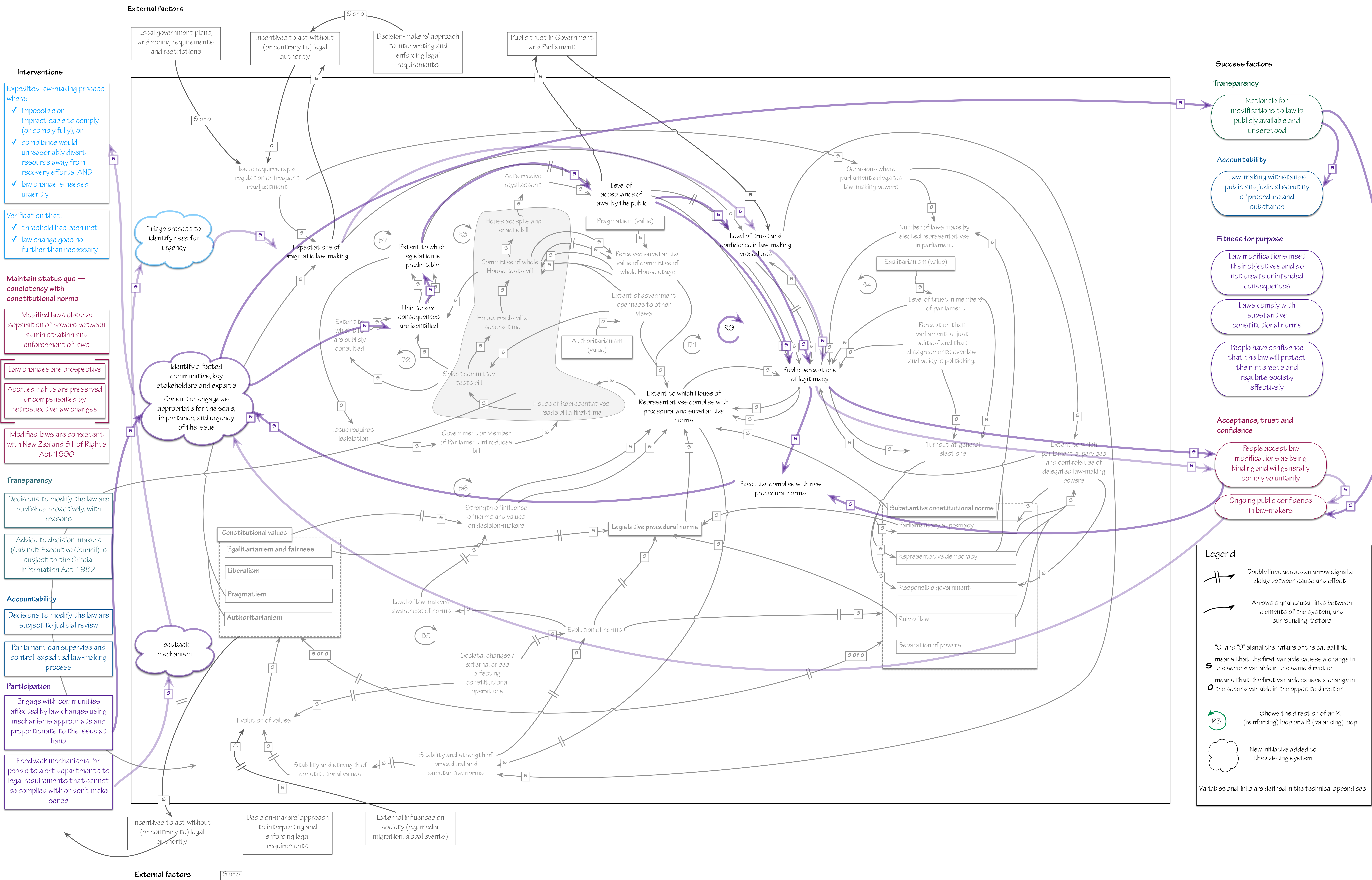


Figure 7.14 Expedited law-making — intervention map showing effect of participation



Technical appendices: Chapter IV

SSM Analysis 2: explanation of terms (to inform Table 4.2)

Social norm	Comment
Accountability	Accountability measures include the convention of ministerial responsibility and Cabinet’s collective responsibility to parliament. Accountability can be required by statute (e.g. Ombudsmen Act 1975, State Sector Act 1988). Elections allow the public to hold members of parliament and political parties accountable for their performance. The publicity created by transparency is an informal type of accountability.
Democracy	Generally, significant decisions should be made by elected representatives, who are directly accountable to the people. Democracy underlies the legitimacy of both the Sovereign’s sovereignty and parliamentary sovereignty, and is a key cultural norm of New Zealand as a constituted state (M. S. R. Palmer, 2011). While New Zealand is a representative democracy, our constitution does allow for direct democracy (e.g. government or citizens’ initiated referendums). The term here encompasses both dimensions of democracy.
Impartiality	Impartiality is a dimension of the rule of law, reinforced by the New Zealand constitutional value of fairness. Decision-makers should not have any stake in the decisions they make. Impartiality is reinforced through grounds of judicial review (Joseph), through guidance on managing conflicts of interest (Public sector code of conduct / Cabinet manual), and through devices such as the register of pecuniary interests for members of parliament. ¹
Judicial independence	Judges’ tenure and salary is protected against interference from the executive so that judges can act, and be seen to act, without fear or favour.
Legality	There is a general expectation that power – particularly coercive power – will be exercised lawfully. This expectation underpins the rule of law and is articulated at common law (e.g. <i>Entick v Carrington</i> [1765] 19 St Tr 1029, <i>De Keyser’s Royal Hotel Ltd v R</i> [1919] 2 Ch 197, <i>Quake Outcasts and Fowler Developments Ltd v Minister for Canterbury Earthquake Recovery and Anor</i> [2015] NZSC 27) and in statutes (e.g. New Zealand Bill of Rights Act 1990, Search and Surveillance Act 2012).
Political neutrality	Political neutrality is a core tenet of the Westminster system that enables the public service to maintain the trust of successive governments so it can serve effectively the government of the day. Public servants must offer – and be seen to offer – the same standard of loyalty to future governments as to the government of the day (G. Palmer & Palmer, 2004, p. 102). Political neutrality is reflected in the Public Service Code of Conduct (State Services Commissioner, 2007).
Public participation	Disaster recovery is not just a technical matter; it is a social process that requires participation (Brookie, 2012; Nigg, 1995). The social context of disaster recovery is influenced by victims’ expectations; they must be heard and reconciled for recovery to be successful (Middleton & Westlake, 2011). The assumption that local issues are best decided by local communities, particularly long-term decisions underpins the purpose of local government (Local Government Act 2002, section 10). Participation in New Zealand following disasters tends more towards consultation than collaboration (Brookie, 2012).
Restraint	Informal and formal influences that act as a practical curb on even theoretically unconstrained power. Restraint keeps the state on the right side of social norms, and protects against arbitrary and autocratic uses of power. Informal restraints include public opinion, international obligations (e.g. human rights treaties), and constitutional conventions (e.g. Cabinet collective responsibility) (Cabinet Office, 2008; G. Palmer & Palmer, 2004, pp. 85–89, 156). Formal restraints include legal limits on powers in statute or at common law (e.g. limits on search and seizure, obligations of natural justice, and fair and impartial decision-making). In practice, restraint relies on transparency.
Transparency	Transparency enables accountability. Formal transparency requirements include the Official Information Act 1982, the Public Finance Act 1993, and parliamentary scrutiny of departmental expenditure. A free and independent media informing the public and challenging the state is critical to transparency.

¹ www.parliament.nz/en/mps-and-elections/mps-financial-interests/ (Accessed 28 July 2016).

Delft approach – detailed actor analyses

This analysis is the basis from which Table 4.3 was extrapolated.

NB. This analysis was done before the 2011 Act expired. References to the Act, the Authority, and the Community Forum are now obsolete.

Actor: Residents				
Interests ²	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>In the short term, meeting day-to-day needs:</p> <ul style="list-style-type: none">Accommodation (including adequate temporary accommodation where necessary)Reconnection of essential services (sewerage, electricity, telecommunications, roads)Shopping, petrolOvercoming disruptions to children’s educationOngoing stability of employment <p>Repairing or rebuilding homes to get life “back to normal” – getting through insurance and other assessment processes, finding alternative land if needed, consenting and building</p> <p>Coping with financial consequences of earthquakes (on home as major asset, on job security); coping with uncertainty.</p>	Speed recovery so life gets back to normal.	Infrastructure damage is complex and may take time to repair (Vallance, 2011). ³ In the meantime, people have to navigate road closures and detours, and manage with sewerage systems that don’t function as they did before the earthquakes.	Council’s decisions about septic tank and sewerage (Vallance, 2011). ⁴ Decisions about priorities for infrastructure repairs.	Participate in consultation processes. Participate in local protests. Vote in local and central government elections. Complain to local member of parliament.
	Temporary accommodation - secure tenancies in adequate accommodation	Shortage of adequate temporary accommodation and social housing. Significant increase in rents (Canterbury Earthquake Recovery Authority, 2015, sec. 5; Wood, Noy, & Parker, 2016). Unrepaired houses may not be weathertight or warm. Families may be squeezed into inadequate accommodation.	Landlords profiting from accommodation shortage.	None. There aren’t any specific obligations about heating, size, weathertightness in the RTA, so no grounds to challenge landlords in Tenancy Tribunal. ⁵ Complain to local member of parliament.
	Certainty as to where and when repairs or rebuilding can be done, and about insurance payouts.	Insurance claims are complex and take time to assess. ⁶ Consent processes slow (in July 2013, compliance with statutory timeframes was only 45%, although that has now improved significantly (Martin, 2014) .	Insurance companies are overwhelmed by claim numbers – they should have more staff. The same problem is extant for resource consents processing and the building industry.	Complaints to insurance and savings ombudsmen; Local Government New Zealand. Enter a bidding war for builders. Complain to local member of parliament.
	House repairs are durable, fit for purpose.	Government-sponsored repair work, especially re-levelling, seems to have been substandard in some cases (Ministry of Business, Innovation and Employment, 2015).	Government trying to do it on the cheap. Allowing a private company to do it means they can cut corners.	Can possibly challenge quality of work through civil law – e.g. breach of contract. No direct challenge to government other than through voting in general elections.

² Interest includes the interests, objectives, and problem perceptions of the different actors. These include the desired situation/goals, perceived causes, and possibilities to influence the outcome.

³ See also SCIRT: <http://strongerchristchurch.govt.nz/our-infrastructure> (accessed 28 July 2016).

⁴ See also SCIRT information about smart wastewater systems: <http://strongerchristchurch.govt.nz/smarter-wastewater-systems> (accessed 28 July 2016).

⁵ Landlords have an obligation to maintain premises in a reasonable state of repair having regard to: the age and character of premises; and the period during which they are likely to remain habitable and available for residential purposes (Residential Tenancies Act 1986, section 45(1)).

⁶ For instance, CanCERN has now wound up as a community organisation to focus on providing Breakthrough, a facilitation service for Southern Response clients who need help to resolve their insurance claims. Southern Response is the government-owned company responsible for settling claims by AMI policyholders. <http://www.cancern.org.nz/index.html%3Fp=7255.html> (accessed 5 April 2016).

Actor: Residents				
Interests ²	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
	Earthquake doesn't ruin us financially – we can repair or rebuild without losing equity; we can keep jobs without having to move away from the area.	<p>Insured losses may be capped below what it will cost to rebuild.</p> <p>Some businesses will relocate; some may fail.</p>	<p>Insurance companies delay processing applications; EQC delays; insurance not paid out to the extent expected.</p> <p>Red zone decisions remove market for land, leaving few choices. Quake Outcasts have fewer choices than insured residential red zone homeowners (Canterbury Earthquake Recovery Authority, 2012; Geddis, 2011).</p>	Legal challenge to government decisions.
	Children can attend their pre-quake schools. Schools are repaired and reopened.	Some significant reorganisation of schools in and around Christchurch. Damage and population movement meant the education network could not be returned to how it was (Ministry of Education, 2012).	<p>The Minister and Ministry of Education are taking the opportunity to address pre-existing problems.</p> <p>It's about the cost of repairs. Schools are being singled out because of the damage they suffered. The Minister was imposing solutions, not asking schools and communities for their suggestions (Bayer, 2013; Radio New Zealand, 2013).</p> <p>The approach taken was difficult for already fragile communities (Hayward, 2013).</p>	<p>Participate in consultation processes.</p> <p>Lobby Minister, Ministry, and members of parliament (Bayer, 2013; Wong, 2013).</p>

Actor: Businesses and business representative groups				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Businesses are interested in meeting day-to-day needs:</p> <ul style="list-style-type: none"> Accommodation (including adequate temporary premises where necessary) Reconnection of essential services (sewerage, electricity, telecommunications, roads) Retaining employees, who may also be dislocated by the earthquakes Maintaining cash flow through disruption Compliance with legal requirements (e.g. tax obligations) where business systems have been lost, destroyed, or are inaccessible. <p>Longer term, businesses need to find permanent suitable accommodation, resolve insurance claims, build a permanent workforce, continue to trade.</p> <p>Business representative groups have an additional interest – maintaining the confidence of business members in order to keep the representative group viable. People elected or appointed to the representative group will have an interest in being seen as an effective representative.</p>	<p>Speed recovery so life gets back to normal (e.g. poor roads and road closures mean clients, customers and employees can't easily access the business's premises).</p>	<p>Infrastructure damage is complex and may take time to repair. SCIRT notes repairs are needed to 528 km of sewer system, 1021 km of roads, 51 km of water supply mains, and to 111 fresh water wells.⁷</p>	<p>Council's decisions about septic tank and sewerage (Vallance, 2011).</p> <p>Decisions about priorities for infrastructure repairs.</p>	<p>Participate in consultation processes. Vote in local and central government elections. Participate in local protests.</p> <p>Mobilise business lobby groups to influence decision-makers.</p> <p>Lobby local members of parliament.</p>
	<p>Suitable temporary / long-term premises.</p>	<p>Shortage of adequate temporary and long-term accommodation creates difficulties – spiralling rents, periodic tenancies with no security of tenure.</p> <p>"I was gazumped out of six commercial properties by larger firms and am on a month-to-month residential tenancy. Very stressful" sole practitioner lawyer (Finn & Toomey, 2015, p. 17)</p>	<p>Landlords profiting over accommodation shortage.</p> <p>In the first instance, government is taking too long over reducing CBD cordon.</p>	<p>Mobilise business lobby groups to influence decision-makers.</p> <p>Lobby local members of parliament.</p>
	<p>Certainty as to where and when repairs or rebuilding can be done, and about insurance payouts.</p>	<p>Insurance claims are complex and take time to assess.⁸</p> <p>Consent process slow: in July 2013, compliance with statutory timeframes was only 45%, although that has now improved significantly (Martin, 2014).</p>	<p>Insurance companies are overwhelmed by claim numbers – they should have more staff.</p> <p>The same problem is extant for resource consents processing and the building industry.</p>	<p>Complaints to insurance and savings ombudsmen; Local Government New Zealand.</p> <p>Enter a bidding war for builders.</p> <p>Mobilise business lobby groups to influence decision-makers.</p> <p>Lobby local members of parliament.</p>
	<p>Other businesses and government-run institutions (e.g. courts) are operating relatively normally.</p>	<p>All businesses and services in Christchurch were affected to some degree by the earthquakes, and all have to find workarounds in the short-term and create new long-term normality.</p>	<p>Earthquake response e.g. CBD cordon.</p> <p>Some services and processes still cannot be done online or over the phone, but require a physical presence (e.g. court processes).</p>	<p>Participate in consultation processes. Vote in local and central government elections. Participate in local protests.</p> <p>Mobilise business lobby groups to influence decision-makers.</p> <p>Lobby local members of parliament.</p>

⁷ (SCIRT, n.d.-a, n.d.-b, n.d.-c, n.d.-d)

⁸ For instance, CanCERN has now wound up as a community organisation to focus on providing Breakthrough, a facilitation service for Southern Response clients who need help to resolve their insurance claims. Southern Response is the government-owned company responsible for settling claims by AMI policyholders. <http://www.cancern.org.nz/index.html%3Fp=7255.html> (accessed 5 April 2016).

Actor: Communities and community groups				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Short-term interests in:</p> <ul style="list-style-type: none"> Security of road access Reconnection of essential services Re-opening of shops and schools Temporary replacement facilities (e.g. meeting places, sports facilities, libraries) Access to shops, schools, sports grounds and other community facilities by less mobile community members <p>Longer term interests in:</p> <ul style="list-style-type: none"> Security of local schools – school closures can result in parents moving away to be closer to their children’s schools (particularly if they have to rebuild anyway) Local business viability to maintain shopping and commercial hubs in the community Permanent fixes for community facilities Rebuilt Christchurch is a vibrant, liveable city that reflects its communities’ aspirations. 	Speed recovery of essential infrastructure so life gets back to normal.	Infrastructure damage is complex and may take time to repair. SCIRT notes repairs are needed to 528 km of sewer system, 1021 km of roads, 51 km of water supply mains, and to 111 fresh water wells. ⁹	Decisions about priorities for repairs.	<p>Participate in consultation processes. Vote in local and central government elections. Participate in local protests.</p> <p>Mobilise representative groups to influence decision-makers.</p> <p>Lobby local members of parliament.</p>
	Certainty as to where and when repairs or rebuilding can be done for community facilities.	<p>Community facilities may be closed or temporarily relocated; location may not meet needs of some parts of the community (e.g. limited disabled access; distance from the main users).</p> <p>Loss of youth-focused spaces (Pine, Tarrant, Lyons, & Leathem, 2015).</p>	Decisions about priorities for repairs.	Complaints to insurance and savings ombudsmen; Local Government New Zealand.
	Schools re-open.	<p>Some significant reorganisation of schools in and around Christchurch. Damage and population movement meant the education network could not be returned to how it was (Ministry of Education, 2012).</p> <p>Schools can contribute to children’s recovery through emotional processing of experiences and through activities that acknowledge students’ voices. Students’ return to a steady educational setting and the re-establishment of a consistent predictable routine is a central feature of recovery for young people (Pine et al., 2015).</p>	<p>The Minister / Ministry are taking the opportunity to address pre-existing problems.</p> <p>It’s about the cost of repairs. Schools are being singled out because of the damage they suffered. The Minister was imposing solutions, not asking schools and communities for their suggestions (Bayer, 2013; Radio New Zealand, 2013).</p> <p>The approach taken was difficult for already fragile communities (Hayward, 2013).</p>	<p>Participate in consultation processes.</p> <p>Lobby Minister, Ministry, and members of parliament (Bayer, 2013; Wong, 2013).</p>
	Certainty about long term support for retaining local communities.	Some land likely to be “retired”, leaving empty suburbs and breaking up communities (red zone announcements; others?)	Technical land classifications are driving decisions about the future of communities.	<p>Participate in any consultation processes. Participate in local protests. Vote in local and central government elections.</p> <p>Lobby local members of parliament.</p>

⁹ (SCIRT, n.d.-a, n.d.-b, n.d.-c, n.d.-d)

Actor: Community Forum established under the 2011 Act				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Provide the Minister and the Authority with:</p> <ul style="list-style-type: none"> well-informed and wide-ranging community perspectives on recovery matters a common-sense perspective and reality check for proposed actions a safe sounding board for agencies developing recovery initiatives a link between the government and the community (Community Forum, 2015). <p>To avoid duplicating or substituting for other grassroots community bodies (Murdoch, 2013).</p>	Recovery decisions and community perspectives align as far as possible.	Gaps in understanding – recovery decisions aren't always aware of what communities think and want; communities don't always appreciate why things are being done in a particular way (Community Forum, 2015).	<p>Technical jargon and bureaucratic language.</p> <p>Different perspectives and priorities in communities.</p> <p>Difficulty of balancing confidentiality with public engagement.</p> <p>(Community Forum, 2015).</p>	Direct line to the Minister.

Actor: Infrastructure service providers including Stronger Christchurch Infrastructure Rebuild Team (SCIRT)				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Repair horizontal infrastructure (roads, water supply, stormwater, wastewater, telecommunications and energy infrastructure).</p> <p>Coordinate for efficiency – “dig once and dig right”.</p> <p>Prioritise for engineering, efficiency, community needs.</p> <p>Ensure infrastructure standards and specifications are fit for purpose.</p> <p>Cost is manageable and appropriate for Christchurch into the future.</p> <p>(Canterbury Earthquake Recovery Authority, 2012).</p>	Clarity about who pays for repairs, and on what basis.	<p>Cost of repairs is likely to exceed what local government / owners can pay. Cost sharing will be needed with central government.</p> <p>Whether to simply repair, or to invest in improved infrastructure (Vallance, 2013, p. 69).</p>	Seismic shifts have altered ground – what may have been fit for purpose may no longer be so (references to come).	Infrastructure alliance – a proven way of delivering results for major infrastructure projects, especially where there is a high level of uncertainty. ¹⁰
	“Dig once and dig right” (Canterbury Earthquake Recovery Authority, 2012, p. 41)	Prioritising and sequencing of repairs, including with private providers who are not part of SCIRT (e.g. telecommunications and energy companies).	Conflicting priorities.	Infrastructure alliance. Prioritisation tool developed by SCIRT makes decisions transparent.
	Public accept the prioritised approach – even those who have to wait the longest.	<p>Infrastructure damage is complex and may take time to repair</p> <p>Competition for consents and resources (material, equipment, workforce) may push up prices and/or cause delays.</p>	What makes sense to customers will not necessarily make sense from an engineering perspective.	<p>Educate people about the engineering issues.</p> <p>Seek input from communities to understand their perspectives on infrastructure repair.</p> <p>Communicate openly about prioritisation decisions and progress.</p>

Additional source: www.strongerchristchurch.govt.nz (accessed 28 July 2016).

¹⁰ SCIRT website: www.strongerchristchurch.govt.nz/about/structure (accessed 7 April 2016).

Actor: Local government				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Fulfilling its democratic mandate to plan for and implement the city's and region's future.</p> <p>Rebuilding greater Christchurch to make it a vibrant, liveable, viable city and region in the long term.</p> <p>Preserving asset base of the affected Councils (Christchurch, Waimakariri, Selwyn) by repairing or replacing damaged properties. Preserving the Councils' long term fiscal viability by making the city and region attractive places to work and live.</p> <p>Maintaining rate-payer confidence in the Councils and in the recovery process.</p>	Speed recovery so life gets back to normal.	<p>Infrastructure damage is complex and may take time to repair (Vallance 2011, SCIRT). In the meantime, people have to navigate road closures and detours, and manage with sewerage systems that don't function as they did before the earthquakes.</p> <p>There's an opportunity to do things better: building for the future (Christchurch City Council, 2011, pp. 121–124; Vallance, 2013, p. 69)</p>	<p>Earth has moved and some old solutions will not work as they used to. In particular, new wastewater systems are needed but they may have to be run by pumps connected to residents' power.¹¹</p> <p>Scale of damage and changes in communities mean that rebuilding as things were will not always be possible.</p>	<p>Understand communities' needs and educate them about engineering solutions.</p> <p>Agree a level of investment with central government that permits a future-focused rebuild.</p>
	Act lawfully throughout the recovery.	<p>Some legal obligations cannot easily be met; some no longer make sense in the post-earthquake environment.</p> <p>Resource management planning, and zoning schemes, may have been rendered redundant by the earthquakes.</p> <p>Some legal limitations (e.g. on landfills) may make clean-up and repairs harder than they should be.</p> <p>Councils are likely to face significantly increased demand for resource and building consents, and associated inspections. They may struggle to process applications within statutory timeframes.</p>	<p>Changes caused by the earthquakes mean planning processes may need to begin again.</p> <p>Volume of waste materials, numbers of demolitions, inspections and consents are likely to rise sharply as the rebuild gets underway.</p>	<p>Lobby central government to introduce local legislation or to relax legal restrictions and requirements that do not make sense in the context.</p> <p>Scale up consenting and inspection staff by tapping into other regions.</p>
	Rebuild public confidence in building consent and inspection processes.	People lost confidence in building inspections after the CTV and Pine Gould building collapses.	Extant engineering and design issues with those buildings.	<p>This is largely a central government issue.</p> <p>Councils need to implement any law changes / amend processes as recommended or directed by central government.</p> <p>Communicate to communities about how inspections work, and how those processes are being strengthened.</p>
	Build public confidence in recovery process and objectives of rebuilding a viable city and region that reflects local needs and aspirations.	<p>Role and function of local government in the recovery process is not as clear as it might be.</p> <p>For instance, Christchurch City Council had responsibility for writing the CBD recovery plan (CER Act, s 17), but no other explicit role:</p> <p>“The Council welcomes its role in leading the development of the CBD recovery plan, but is concerned that the legislation otherwise places it on the same footing as any other organisation in relation to the recovery. There seems little acknowledgement that the Council has, under the Local Government Act 2002, exercised responsibility for promoting the social, economic, cultural and environmental wellbeing of Christchurch and has the knowledge and</p>	<p>Central government has taken over:</p> <p>Having developed a draft CBD recovery plan, informed by extensive community consultation through the “Share an Idea” programme, the Council's plan was shelved. On the advice of CERA's then-general manager of economic recovery, Steve Wakefield, the Minister decided the Government should take the lead role in determining the future of the shattered CBD. The CCC plan was shelved, and the Minister advised Cabinet that it would not deliver a coordinated recovery in the CBD, where there was a risk of “lingering uncertainty” and delay (Macfie, 2016).</p> <p>In Kaiapoi, Waimakariri District Council had engaged closely with the community in reaching decisions</p>	<p>Lobby central government.</p> <p>Involve community in local government planning tools (Vallance, 2013)</p>

¹¹ SCIRT: www.strongerchristchurch.govt.nz/pressure-wastewater accessed 28 July 2016.

Actor: Local government				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
		<p>expertise to continue to do that. It, unlike any central Government agency, has experience in the day to day life of a city, for example the development and maintenance of streets, parks, urban facilities, waterworks, stormwater drainage, sewerage disposal, and urban development and renewal, and so on.” (Christchurch City Council, cited in Local Government and Environment Committee, 2011, p. 66).</p>	<p>about how to progress with the rebuild. The Council had decided to coordinate with EQC, and sought funding, so that it could coordinate repairs “across the boundary”. It proposed to repair damage location by location, coordinating repairs to horizontal infrastructure on council and privately owned land (Vallance 2015). “Machinery was already being deployed to the first sites when another earthquake of magnitude 6.3 hit the region and on June 13th [the] Minister ... issued a media statement Red Zoning Kairaki.” (Vallance, 2013, p. 60).</p>	
	Maintaining a viable funding base.	Foreseeable expenses have vastly increased, but rating base has also changed.	It does not seem fair to charge people rates on houses they can no longer inhabit.	<p>Seek support from central government.</p> <p>Offer a rates amnesty, on the basis that it will protect the rating base over the long term.</p> <p>Engage with communities about prioritisation of the rebuild and / or ways of offsetting the costs (e.g. through asset sales).</p>

Actor: Central government (including Cabinet and public sector departments)				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>To respond effectively and strongly to the earthquakes – to be seen as a strong and effective government (Geddis, 2010a):</p> <p><i>"If government can't work quickly and effectively to fix up this mess, then its basic legitimacy comes into question."</i></p> <p>To prevent the failure of Christchurch as a viable city.</p> <p>To manage the economy effectively in the face of decreased revenues from Christchurch.</p>	<p>The law doesn't get in the way of sensible recovery-related activities (e.g. getting rid of earthquake rubble, planning and consenting processes). People and businesses aren't punished for non-compliance with legal requirements (e.g. filing tax returns) when it was out of their hands.</p>	<p>Legal and bureaucratic requirements e.g. limitations on how much rubble trucks can carry, deadlines for tax filing.</p>	<p>Insufficient flexibility in the law.</p>	<p>Ask Parliament to allow the executive to relax these requirements as and when the need becomes apparent.</p>
	<p>People and businesses can cope with the short-term disruption caused by the earthquakes.</p>	<p>Businesses may face cash flow difficulties due to disruption (e.g. displacement from premises, inability to access equipment and records, need to cover employees' salaries).</p> <p>People may be forced out of their homes and need to pay for accommodation while still being liable for rent or mortgage payments on their uninhabitable homes</p>	<p>Disruption caused by earthquakes – accommodation; inaccessibility to customers; customers concerned with their own problems.</p> <p>Shortage of alternative residential and commercial accommodation.</p> <p>Profiteering by some landlords.</p>	<p>Welfare assistance to residents and businesses (Canterbury Earthquake Recovery Review Panel, 2011, 2012; Inland Revenue, 2011; Ministry of Social Development, 2012; Stevenson et al., 2011).</p> <p>Work with local government on temporary accommodation (Human Rights Commission, 2013, sec. 5).</p>
	<p>Recovery is funded fairly and adequately.</p>	<p>Local government cannot bear the full cost, but neither should taxpayers have to. Insurance companies may fail.¹² People expect central government to take charge.</p>	<p>Central government has more resources than local government.</p>	<p>Local government need central government – use that in negotiating funding agreements.</p>
	<p>People have confidence in the recovery.</p>	<p>Consent process is taking too long.</p> <p>People expect government to take charge</p>	<p>Business as usual approach adopted by Christchurch City Council not appropriate for this context (Macfie, 2016; Minister for Canterbury Earthquake Recovery & Minister of Local Government, 2013).</p>	<p>Call in local government functions where necessary (e.g. Crown Manager installed in CCC when it lost its accreditation to issue consents).</p> <p>Centralise planning and coordination through a central government agency (i.e. CERA).</p>
	<p>Tax revenues from Christchurch recover to pre-earthquake levels.</p>	<p>Lost productivity, reduced retail spending and potentially reduced business presence in Christchurch combine to mean lower tax revenues (Stevenson et al., 2011).</p>	<p>Businesses need places to operate.</p> <p>Investors need to have confidence in recovery process.</p>	<p>Create opportunities like the Restart Mall.</p> <p>Christchurch City Council's investor initiative (Meier, 2015).</p>
	<p>Strong, integrated leadership of the recovery that results in timely and effective decisions that are coordinated across a range of agencies, entities, businesses, and communities (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a).</p>	<p>There is no single entity in charge of and responsible for recovery efforts.</p> <p>Significant coordination is needed between local government, central government, residents of greater Christchurch, Ngai Tahu, NGOs, business, and the private sector.</p> <p>Timely and effective decision-making procedures are needed.</p>	<p>Scale of the damage:</p> <p>"Destruction of the physical infrastructure of Christchurch is on a vast scale and there is also significant damage to the economic and social systems within the city."</p> <p>Advisory capacity of the Canterbury Earthquake Recovery Commission is no longer sufficient (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011a).</p> <p>Special powers are needed to ensure timely and coordinated recovery without inappropriate risk of judicial review (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b).</p>	<p>Ask parliament to legislate for a single agency with appropriate powers.</p>

¹² In April 2011, AMI (an insurance company) received capital support from government to ensure the interests of all AMI policyholders were protected and that their claims would continue to be met. Southern Response is a government-owned company that was established to take responsibility for settling earthquake-related claims to AMI occurring before the date AMI was sold to another insurance company. Source: www.southernresponse.co.nz (accessed 28 July 2016).

Actor: Canterbury Earthquake Recovery Authority / Minister for Canterbury Earthquake Recovery				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Enable a focused, timely and expedited recovery.</p> <p>Demonstrate capable, decisive leadership.</p>	<p>A strategic approach to reconstruction, rebuilding and recovery so it is coordinated and sequenced (Canterbury Earthquake Recovery Act, section 11).</p>	<p>No clear mechanism to get an overarching strategy – recovery interests cross local and central government boundaries, and touch Ngai Tahu, communities, private sector, and NGO interests.</p>	<p>Local government may not coordinate sufficiently – Canterbury Earthquake Recovery Commission was not a successful model: it lacked the mandate to manage, coordinate or direct the recovery effort needed after the February 2011 earthquake (Gall, 2012).</p>	<p>Bespoke legislation.</p> <p>A recovery strategy that sits over extant planning documents, and takes precedence over them.</p>
	<p>Planning, demolition, rebuilding, repairing activities are coordinated – and enforced where necessary.</p>	<p>No means of forcing coordination or compliance with recovery plans.</p>	<p>People / businesses may delay acting or resist coordination.</p> <p>Communities may resist change as they seek to rebuild themselves in familiar patterns (Nigg, 1995).</p>	<p>Bespoke legislation with powers (Minister for Canterbury Earthquake Recovery & Minister of State Services, 2011b; State Services Commission, 2011).</p> <p>Recovery plans (Canterbury Earthquake Recovery Act 2011, ss 16-26).</p>
	<p>Social, economic, cultural, and environmental wellbeing of greater Christchurch communities is restored.</p>	<p>People and communities have been disrupted – extensively in some cases. Psychosocial issues are still emerging (Canterbury Earthquake Recovery Authority, 2015; Espiner & Brownlee, 2016; Human Rights Commission, 2013).</p>	<p>Visible signs of earthquakes are still apparent, especially with iconic landmarks like ChristChurch Cathedral (Pine et al, 2015).</p> <p>People are still living with insurance and rebuilding uncertainties.</p> <p>Ongoing aftershocks, some still damaging (NZ Herald, 2016; Stuff, 2016).</p>	<p>Make these dimensions of recovery an explicit part of the recovery strategy.</p> <p>Surveys of wellbeing, linked to interventions and support for residents (Vallance, 2013).</p>
	<p>People are confident that government will deliver the recovery.</p>	<p>For a long time people may not see much progress – planning, demolitions, and clearing all takes time fore rebuilding can commence.</p> <p>Some people will be adversely affected and will not like recovery decisions.</p>	<p>People have faced different and some very difficult situations (Espiner & Brownlee, 2016, at 8.40 minutes):</p> <p>Minister Brownlee, responding to interruptions from a heckler in a live interview: “...if you were able to talk to that guy, I'll guarantee that there's something that he's got going on that's not working well. People do lash out, that's just the way it is.”</p>	<p>Visible leadership by Minister.</p> <p>The Authority has a tangible presence in Christchurch.</p> <p>Clear communication about decisions and progress.</p>

Actor: Parliament				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Exercise its legislative supremacy responsibly and wisely – parliament is the highest source of law in the land; it can either enable or impede response efforts.</p> <p>Maintain solidarity with Canterbury’s people (Geddis, 2010b) – as a body of elected representatives, parliament is influenced by a responsive to public sentiment.</p>	<p>Ensure recovery in greater Christchurch is enabled under law, so it can proceed smoothly and efficiently:</p> <p>“...the people of New Zealand expect their legislators to work together to assist the recovery ... without unnecessary delay.”(Hon Phil Goff, MP Hansard, 2010a).</p>	<p>There is no one empowered to take charge of the whole recovery; business as usual approaches will not be sufficient.</p>	<p>The law can get in the way because it has not been designed for a situation of the scale of the Canterbury earthquakes.</p> <p>Normal situations do not require extraordinary measures, and there was no ready-made legislation ready to use.</p>	
	<p>Supervise the executive’s use of powers and hold it to account.</p>	<p>Extraordinary powers granted to the executive to deal with the extraordinary circumstances in Canterbury require supervision to maintain public trust and confidence that the powers will not be abused.</p>	<p>“The Government is essentially saying we must trust it not to do anything silly. But trust is not the normal ingredient of the political process. The reason for political principles, legislative acts, and judicial review is so that societal trust can be applied to executive action. This is no disrespect to the Government. Our Cabinet Ministers may be as pure as the driven snow; it would still be irrelevant. Personal trust and societal trust are different creatures. We can all personally trust Cabinet Ministers yet require that they remain within the law and not suspend it.” (Kennedy Graham, MP Hansard, 2010a).</p>	<p><u>Parliamentary supervision</u> is enabled through:</p> <ul style="list-style-type: none"> Regulations Review Committee’s supervision of delegated legislation (reference the interim reports) Finance and Expenditure Select Committee conducts financial reviews of departments, to review expenditure against appropriations. <p><u>Judicial supervision</u>. Note in this case, judicial supervision was ousted to some degree by the CER Act, against advice from constitutional experts:</p> <p>“... we feel ... they too quickly and readily abandoned basic constitutional principles in the name of expediency.” (Geddis, 2010b)</p>

Actor: Cross party parliamentary forum				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Ensuring the perspectives of constituents are heard by the Minister.</p> <p>Providing a locally-informed non-executive perspective on executive decisions.</p> <p>Being seen as effective local representatives.</p>	<p>Recovery is consistent with local perspectives and meets local needs.</p>	<p>Recovery processes are not highly engaging with the community. People wanted to take time to think about recovery before the legislation (Hon Ruth Dyson, Canterbury Earthquake Response and Recovery Bill second reading,Hansard, 2010a)</p>	<p>Speed trumps consultation. Assumption underpinning CER Act is that consultation gets in the way of timely decision-making (see, for example, s 3(a): “to enable community participation in the planning of the recovery of affected communities without <u>impeding</u> a focused, timely, and expedited recovery”</p>	<p>Direct engagement with the Minister.</p> <p>Finance and Expenditure Select Committee reviews of CERA.</p>

Actor: Courts				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
Upholding the rule of law – upholding the rights of individuals, and ensuring government agencies stay within the law.	Explain and apply the law in relation to recovery-related disputes.	Differing interpretations of the law and/or challenges to executive decisions.	Competing views of what is a fair outcome. Competing views of what is a fair process.	Apply common law principles and precedents, to help all actors understand how the new law operates.

Actor: Taxpayers				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
<p>Seeing Canterbury recover from the earthquakes – constitutional value of fairness and egalitarianism is likely to see general acceptance of a collective solution to the needs created by the earthquakes (Barker, 2010).</p> <p>Prudent use of taxpayer funds.</p>	The government funds a portion of the earthquake recovery.	<p>Government comments after the September earthquake acknowledged that local authorities could not meet reconstruction costs, and accepted they would need a way of looking at costs and repairs across the region (Hon Gerry Brownlee, Canterbury Earthquake Response and Recovery Bill, in committee Hansard, 2010b)</p> <p>Loss of tourism affects whole economy, not just Canterbury.</p>	<p>Scale of damage.</p> <p>Local government funding sources – rates cannot cover it.</p>	No direct input to solution, but can make views (for and against taxpayer funding) known through media, blogs, petitions, lobbying local elected representatives.
	The recovery isn't wasteful and spends money wisely.	What is the plan to be? The job is so huge. How do we know what is prudent expenditure?	<p>Scale and scope of the damage.</p> <p>Different agencies having different perspectives.</p> <p>How well does government run large projects?</p>	<p>As above.</p> <p>Can participate in grassroots initiatives to assist with design and rebuild (e.g. generating ideas).</p>

Actor: Reserve bank				
Interests	Desired situation / objective	Existing or expected situation / gap	Causes as perceived by actor	Possibilities to influence / courses of solution
Maintaining price stability through monetary policy (Reserve Bank of New Zealand Act 1989, section 1A(1)).	Short term shock caused by earthquake does not result in longer-term loss in confidence.	Immediate shock to economy caused by disruption to people living and working in the city. Substantial damage to assets and disruption of economic activity – flows beyond Christchurch.	Timing of earthquakes, on the back of weaker than expected national economic activity through 2010. Immediate loss of production.	Reserve bank controls official cash rate – reduce OCR to avoid unnecessary instability in economic activity, exchange rate and interest rates.. Support government-initiated support programmes for businesses.
	Medium-term inflationary pressures are managed	Price pressures in Canterbury.	Demand and supply of labour, materials, and equipment. Availability of finance. Government policy that affects regulatory standards and the rebuild. Economic activity skewed by earthquake recovery – increased employment almost exclusively in construction.	Respond to medium-term generalised inflationary pressures.
	Economy in Canterbury recovers	Economic disruption most pronounced in Canterbury, but flow through to other regions. Consumer spending, tourism and residential investment expected to deteriorate.	Most businesses with operations in central Christchurch have lost production, generally from impact on workforce (about 30% of businesses in Christchurch were materially affected). Subdued economy due to wealth losses, weakness in tourism and constructions, and obstacles like damage to infrastructure and capital.	Official cash rate. Monitoring and reporting on economic activity.
	Lessons learned from economic impact of Canterbury earthquakes.	Insurance cover and cost.	Uncertainty over assessments, which has delayed settlement of claims. Insurance costs have more than doubled from 2010 levels.	Analysis and reporting to inform government policy interventions.
		House prices, contributing to a sharp increase in rents.	Shortage in housing has resulted in sharp increase in house prices (more than 40% higher than pre-quake levels). Rents up by nearly 50% by 2015 (national average was 15% increase), now declining with increased residential construction. .	

Sources: Bollard, 2011; Wood et al, 2006).

Technical appendix 1: definition of variables

The variables defined in this table are used in the system maps in Chapters V, VI and VII.

Unless specified, the default timescale is the three-year parliamentary term. The default timescale for variables in Figures 6.7, 6.9-6.11 is 12 months.

“Decision-maker” refers to people and institutions who are responsible for exercising public power, which is the power of the state over private citizens (both natural and legal persons), their actions, and their property. “Decision-making” has a corresponding meaning.

Variable name	Definition	Unit of measure	Used in Figures...
Accountability	This is not a variable so much as it is a procedural norm that informs constitutional operations. It is a check on power to ensure power is exercised reasonably, rationally, proportionately, and fairly.		5.10-5.20
Acts receive royal assent	Legislation enacted by the House are submitted to the Governor-General for royal assent. With royal assent, a law becomes an Act of Parliament, which is legally binding.	Number of Acts given royal assent (data available from parliament).	7.6-7.14
Advice to decision-makers (Cabinet; Executive Council) is subject to the Official Information Act 1982	This intervention makes executive decision-making transparent	Whether the Official Information Act applies to the decision-makers	7.7-7.14
Affordability of resources	Considers cost of resources against anticipated profits.	Cost of resources compared against costs under normal circumstances; impact of change on profit margins.	6.7, 6.9-6.11
Amount of resources brought into region	Amount of materials and equipment, and numbers of workforce that need to be brought into the region to meet additional demand created by the earthquakes.	Amount of materials and equipment. Numbers of workers.	6.7, 6.9-6.11
Approach to funding the recovery (i.e. cost sharing between central and local government)	External conceptual factor that can influence the system. It reflects the fact that the general public and Canterbury’s communities are likely to expect a level of central government contribution to the recovery.	Relative proportions of central government and local government contribution to the recovery	5.11-5.20
Authoritarianism	This is a constitutional value, rather than a variable. Authoritarianism a strongly prevailing facet of New Zealand constitutional culture. It manifests as high public expectations that government will exercise power firmly and effectively (although in this it is moderated by the constitutional value of fairness - governments need to act fairly). There is a ‘just do it’ dimension, where the public generally expects in time of crises that someone (usually the government) will take charge and fix the problem (Palmer, 2007).		5.10-5.20, 7.6-7.14
Availability of capital investment for rebuild	Self-explanatory.	Estimate of capital investment.	6.9-6.11
Availability of facilities and resources for public engagement	External factor that can influence the system. It is concerned with the extent to which there are facilities (e.g. community gathering places; digital spaces for the community to share ideas) and resources (e.g. people and budget to produce information and reach out to communities) for public engagement.	Number, capacity of gathering places. Budget and for engagement.	5.11-5.20
Availability of insurance underwriting	Insurance underwriting helps insurance companies to maintain their financial viability while meeting their obligations under insurance policy documents.	Number of insurance companies who have / can continue to access insurance underwriting. Extent to which insurance companies are financially exposed.	6.9-6.11
Availability of land for rebuilding	An external factor that influences operation of the system. Land availability is determined by a range of factors, including zoning of land under regional and district plans.	Amount of unimproved land within a certain radius around greater Christchurch.	6.9-6.11
Boost capacity of consenting, inspection, and insurance processes	This is an intervention that aims to give existing processes capacity to respond to significantly increased demand.	Quantitative assessment of waiting / queuing times.	6.9-6.11
Capacity	Workforce required to: process insurance claims, consents, and assessments; or conduct inspections. Also includes the supports required by that workforce to carry out their functions (e.g. vehicles, computers, working space etc).	Number of FTE staff / contractors and associated costs.	6.7, 6.9-6.11
CBD - cordon	The cordon refers to the area in the CBD to which public access was restricted for safety reasons.	Area restricted by the cordon.	6.9-6.11

Variable name	Definition	Unit of measure	Used in Figures...
Central government and public trust in local government	External factor recognising that influences outside the system affect central government and public trust in local government (e.g. local government performance in non-recovery related areas).	Levels of trust. Qualitative assessment from ministerial statements, news coverage. Quantitative assessments, possibly from surveys.	5.11-5.20
Centralise control over recovery in executive and limit judicial supervision	New initiative based on the approach taken by the 2011 Act. Decision-making on recovery vested in the executive rather than local government; Henry VIII clause moves parliament's law-making to the executive; and privative clauses limit judicial supervision of executive decision and law-making.		5.17
Civil legal aid eligibility thresholds	Thresholds are set in law and limit the pool of people eligible for legal aid to support proceedings. The thresholds have a material influence on the numbers of civil cases (including judicial reviews and appeals).	Thresholds	5.11-5.20
Committee of whole House tests bill	The House resolves itself into committee for a detailed testing of the bill, in which each clause or each part of the bill is discussed and voted on. At this stage, any member may introduce a supplementary order paper (SOP) proposing amendments to the bill. SOPs are voted on with the clause they seek to amend.	Number of bills examined in committee (data available from parliament).	7.6-7.14
Constitutional values	This is a collection of the constitutional values that comprise New Zealand constitutional culture. The individual values are defined separately. See Chapter II.4.4.2 for further discussion about these values and how they work.	Qualitative assessment of values needs to be done across multiple parliamentary terms.	5.10-5.20, 7.6-7.14
Consult or engage as appropriate for the scale, importance, and urgency of the issue	New initiative that requires a systematic approach to deciding who, how, and when to consult or engage communities and stakeholders on proposed law modifications. As a rule of thumb, modifications with significant, long-term effects, and modifications that affect property interests, or have economic impacts on particular sectors should have more engagement than would be required for modifications affecting only a few people over the short-term.	Number of law modifications; nature of engagement.	7.14
Cost of alternative accommodation (commercial and residential)	This variable reflects that people's decisions to stay and rebuild or repair will be influenced in part by the cost and availability of alternative accommodation on a temporary or permanent basis.	Numbers and nature of alternative accommodation. Longitudinal assessment of rents.	6.9-6.11
Decision-makers are subject to Official Information Act 1982	This is an intervention. It reflects the status quo, whereby public sector (and many state sector) agencies are subject to the Official Information Act 1982, which enforces transparency in public decision-making.		5.12
Decision-making processes contain proportionate engagement mechanisms	This is an intervention. It would require specific consideration of the nature of decisions being made and the communities affected, to inform the right nature and level of engagement needed to build decision legitimacy in the eyes of the affected communities.		5.20
Decision-making processes required to observe natural justice	This is an intervention that seeks to ensure status quo rule of law approaches are applied to recovery decision-making.		5.13, 5.14
Decisions and actions are authorised by law	This is an intervention. It reflects the rule of law principle that the executive's actions need to be authorised by law.		5.11, 5.15
Decisions and their reasons are publicly available and understood	This is a success factor. It is concerned with the extent to which the public has the opportunity to understand recovery decisions and their rationales, and with the actual level of public understanding of those decisions.	Procedures for communicating decisions and their reasons. Assessment of public understanding (based on survey data).	5.11-5.20
Decisions are accepted by the public	This is a success factor. It is concerned with levels of public acceptance of recovery decisions, because that is an indicator of legitimacy.	Qualitative assessment of acceptance based on presence or absence of 'noise' - public comment; news media and blog comment; public protest.	5.11-5.20
Decisions are published	This is an intervention. It requires decision-makers to make their decisions publicly available.		5.11, 5.12
Decisions to modify the law are published proactively, with reasons	This intervention makes executive decision-making transparent.	Number of law changes made using the expedited process which have published reasons	7.7-7.14
Decisions to modify the law are subject to judicial review	This intervention ensures the executive can be held to account for its use of the expedited process.	Whether judicial review is ousted by the empowering Act	7.7-7.14
Decisions withstand public and/or judicial scrutiny of procedure and substance.	This is a success factor. It is concerned with the extent to which decisions can successfully withstand scrutiny, because this is an indicator of compliance with constitutional norms.	Number of appeals or reviews of decision (and result) as a proportion of total number of decisions made.	5.11-5.20

Variable name	Definition	Unit of measure	Used in Figures...
Demand for legal aid and/or court services	This external factor affects operation of aspects of the system and the accountability interventions. It requires consideration of the level of demand for legal aid (financial assistance for court proceedings) and on demand for court services (e.g. to bring judicial review proceedings or have an appeal heard).	Number of recovery-related legal aid applications granted as a proportion of applications lodged. Number of court cases involving recovery-related proceedings (e.g. judicial reviews, appeals, cases brought under contract law).	5.11-5.20
Durable, fit for purpose repairs and rebuilds	Repairs and rebuilds meet relevant building standards.	Number of repairs and rebuilds; proportion of repairs and rebuilds with problems that emerge in a 10 year period (10 years is the long-stop period set by the Building Act 2004 relating to negligent construction - because problems with buildings can take a long time to become apparent)	6.7, 6.9-6.11
Earthquake damage identified	Structural and cosmetic damage to buildings and damage to land caused by earthquakes.	Number of properties affected; nature of damage.	6.7, 6.9-6.11
Egalitarianism and fairness	This is a pair of related constitutional values, rather than a variable. These values consider people are equal and that a 'fair go' should be given to all. They manifest as an expectation of a fair state and support for collective solutions in economic and social spheres (Barker, 2010; Palmer, 2007).		5.10-5.20, 7.6-7.14
Enable limited departures from norms, confined to earthquake recovery, with judicial supervision	This is an intervention. It would allow recovery decision-making procedures not to comply with constitutional norms. The departures would be context-specific and determined at a lower level of detail than this intervention map describes. Judicial supervision would be the formal check and balance to ensure powers were wielded proportionately and reasonably. The intervention assumes that modifications would maintain some consistency with constitutional norms, so that the departures were no greater than what was reasonable in the circumstances.		5.19
Enable limited retrospectivity dating back to first earthquake	This is a new initiative based on the 2011 Act. It enables modified laws to be backdated to the first earthquake to neutralise any liability that might have been created between the earthquake and the modification as a result of the unmodified law. Retrospectivity is generally inconsistent with the rule of law.		7.9
Engage with communities affected by law changes using mechanisms appropriate and proportionate to the issue at hand	This intervention requires the executive to consider how it can engage with communities	Number of law changes which have some form of public engagement	7.7-7.14
Evolution of constitutional values	This variable is concerned with the nature and rate of change to constitutional values over time.	Rate of change. Quantitative and qualitative assessment of shifts in values (e.g. surveys, constitutional research). Timescale: multiple parliamentary terms.	5.10-5.20, 7.6-7.14
Evolution of normal decision-making procedures	Changes made to decision-making procedures to respond to changing circumstances or sudden crises.	Qualitative assessment of changes, based on a comparison with baseline procedures.	5.10-5.20
Evolution of procedural and substantive norms	This variable is concerned with the rate of change to procedural and substantive norms in response to altered stability and strength of norms.	Qualitative assessment of shifts in norms (e.g. constitutional research). Timescale: multiple parliamentary terms.	5.10-5.20, 7.6-7.14
Executive complies with constitutional norms	This variable is self-explanatory.	Number of modified laws that are consistent versus inconsistent with constitutional norms.	7.11
Executive complies with new procedural norms	This new variable is created by interventions in Figure 7.14 that require systematic consideration of participation and engagement. It considers the executive's compliance with these new procedural norms.	Number and nature of engagements on proposed law modification.	7.14
Executive complies with transparency requirements	This new variable is created by interventions in Figure 7.10 which impose transparency requirements on the executive. It is concerned with the executive's compliance with those requirements.	Number of law modifications with proactively released policy material (as a proportion of total modifications). Number of Official Information Act requests received and responded to. Number of complaints to the Ombudsmen about refused requests.	7.10
Existing community groups to facilitate public engagement	External factor that can influence the system. It is concerned with the number, nature, and scope of influence of existing community groups that can be drawn on to facilitate public engagement.	Number, nature and scope of existing groups.	5.20
Expectations of pragmatic law-making	This variable is concerned with expectations that law-makers will act pragmatically when the circumstances warrant it, and the signals to that effect that the public may send to law-makers. Expectations may be held by the general public, and also by members of parliament (government and opposition).	Quantitative and qualitative assessment of public expectations as perceived by law-makers (surveys; comparisons of laws made with perceived public expectations).	7.6-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Expedited law-making processes where: <ul style="list-style-type: none"> it is impossible or impracticable to comply (or comply fully); or compliance would unreasonably divert resource away from recovery efforts; AND law change is needed urgently 	This intervention seeks to limit use of the expedited process to situations where it is necessary to mitigate constitutional impacts of the earthquakes.	Qualitative assessment of law changes made using the expedited process against the criteria	7.7-7.14
Extent of government openness to other views	This variable considers how open the government is to modifying a bill in response to views from other political parties and the public. It is singled out for consideration because government openness to views will influence the select committee process and the extent to which the select committee is free to redraft the bill, and also the government's choices about how hard to push for departures to normal legislative procedures.	Number and nature of changes. Qualitative assessment focusing on indicators from public statements preceding the bill's introduction, debates in the House, and comparing the introduction version to the select committee's reported version. Also consider any departures from normal legislative procedures and the justification offers.	7.6-7.14
Extent to which bills are publicly consulted	Giving the public an opportunity to make submissions on a bill to the select committee considering it.	Number of bills referred to select committee. Number of bills where select committee calls for submissions. (data available from parliament)	7.6-7.14
Extent to which communities are engaged on different recovery issues.	This variable requires consideration of the methods used to engage communities, or segments of communities, on different recovery issues.	Number of recovery decisions engaged on as a proportion of all recovery decisions. Qualitative assessment of the scope and nature of engagement.	5.20
Extent to which decision-makers comply with procedural and substantive norms	Compliance with the procedural norms noted on the diagram, and with any substantive constitutional norms (not all substantive norms are noted on the diagram - the rule of law is of primary importance for legitimacy, but other norms may be relevant in different contexts).	Proportion of decisions that comply, based on random sampling.	5.10-5.20
Extent to which decision-making is predictable	Predictable application of the law is a core tenet of the rule of law: it means that people can arrange their affairs and engage in transactions with confidence of the outcome	Level of confidence in predictability of law (surveys). Qualitative assessment of judicial review decisions that indicate decisions were not predictable.	5.10-5.20
Extent to which House of Representatives complies with procedural and substantive norms	The House follows normal parliamentary procedures for testing and enacting legislation, set out in Standing Orders.	Number of bills passing through all parliamentary stages compared with number of bills departing from normal procedures (data available from parliament)	7.6-7.14
Extent to which legislation is predictable	Predictable law is a core tenet of the rule of law: predictable law means that people can arrange their affairs and engage in transactions with confidence of the outcome	Level of confidence in predictability of law (surveys). Reviews of individual Acts that indicate levels of predictability.	7.6-7.14
Extent to which parliament supervises and controls use of delegated law-making powers	Parliament can use disallowance procedures to supervise and control the use of delegated law-making powers. A standing committee, the Regulations Review Committee supervises all disallowable legislative instruments through a process of inquiry. Disallowance procedures allow parliament to amend or disallow a legislative instrument. The effect of disallowance is to revoke the legislative instrument, which means it is of no effect.	Numbers of regulation-making powers and Henry VIII clauses that are disallowable (either by operation of the Legislation Act 2012 or through express provision). (data searchable on www.legislation.govt.nz) Numbers of legislative instruments scrutinised by the Regulations Review Committee, and the outcome of that scrutiny. (data available from parliament).	7.6-7.14
Extent to which residents / businesses are adversely affected by decisions	External factor recognising that acceptance of decisions will be influenced by whether, and the extent to which, they adversely affect people's interests. It is external to the system map because the map focuses on the influences on, and of, decision-makers.	Nature of adverse effect - may be quantifiable depending on context.	5.11-5.20
External influences on society (e.g. media, migration, global events)	Factors that influence how New Zealanders think about public power, and the relationship between citizens and the state.	Number of influences; qualitative assessment of influences' impact.	5.10-5.20

Variable name	Definition	Unit of measure	Used in Figures...
Extraordinary circumstances	An external event or set of circumstances that influences the kinds of decisions that need to be made or how those decisions can be made.	Number and nature of extraordinary circumstances.	5.10-5.20
Feedback mechanisms for people to alert departments to legal requirements that cannot be complied with or don't make sense	This intervention mitigates the effects of legal requirements that don't make sense post-earthquake	Existence and usage of feedback mechanisms	7.7-7.14
Financial incentives not to coordinate and cooperate	Coordination and cooperation here refers to compliance with any sequencing of repairs imposed on the recovery.	Qualitative assessment of nature of financial incentives. Quantitative assessment if analysis warrants it.	6.9-6.11
Financial viability of insurance companies	Extent to which insurance companies can meet the quantum of claims they receive for earthquake damage.	Identification of the point at which insurance companies would be unable to meet quantum of claims; estimates of claims.	6.7, 6.9-6.11
Government or member of parliament introduces bill	A bill (draft legislation) is introduced to the House of Representatives. Introduction is an administrative process that gives a bill formal existence (parliamentary info). Bills can only be introduced by the government or by a member of parliament whose bill is drawn from the ballot.	Number of bills introduced (data available from parliament)	7.6-7.14
Heads of judicial review	This is an external factor that can affect the operation of the system, and influence the accountability interventions. The grounds of judicial review are basis on which judicial review cases can be brought.		5.11-5.20
House accepts and enacts bill	This variable incorporates two stages of the legislative process: the House takes itself out of committee and reports to the Speaker on the committee's findings. Then the bill is set down for third reading. Third reading is essentially a formality: bills that pass their committee stage invariably pass their third reading. Therefore, the two stages are incorporated in this single variable. Upon passing the third reading, bills are enacted.	Number of bills enacted (data available from parliament)	7.6-7.14
House of Representatives reads bill a first time	First reading is the first opportunity for the House to debate the bill and to decide if it is to proceed to the next step (referral to select committee)	Number of first readings (data available from parliament)	7.6-7.14
House reads bill a second time	The House debates the bill as reported back by the select committee and decides if it is to proceed to the next step (Committee of the whole House).	Number of second readings (data available from parliament)	7.6-7.14
Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	New initiative that identifies the inputs needed to develop a sliding scale framework for engagement with the community on recovery-related matters.	Does the framework exist?	5.20
Identify affected communities, key stakeholders and experts	New initiative that requires proposals for law modifications to identify the communities and stakeholders that will be affected by those modifications, and experts in the area who may be able to offer perspectives on the proposals.		7.14
Impartiality	This is not a variable so much as it is a procedural norm that informs constitutional operations. It manifests as disinterested, neutral, unbiased decision-making, and is reinforced by the constitutional value of fairness (see Figure 5.2).		5.10-5.20
Issue requires legislation	A situation in the real world which creates problems that can only be rectified through legislation that e.g. imposes or reallocates rights and obligations	Number of issues (surveys of regulators, industry and professional bodies)	7.6-7.14
Issue requires rapid regulation or frequent readjustment	This variable is concerned with issues that emerge suddenly and require an urgent legislative response and with issues that, if legislated, will require frequent readjustment (e.g. some electoral finance regulations are required to be adjusted annually). Normal legislative procedures can be cumbersome and slow when applied to these kinds of issues.	Numbers of such issues.	7.6-7.14
Law changes are prospective Accrued rights are preserved or compensated by retrospective law changes	This intervention seeks to mitigate the constitutional impact of the expedited process by limiting the impact on people's property interests	Number of retrospective law changes; number of retrospective law changes that do not preserve accrued rights	7.7-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Legislation Act part 3 applies; constrained purpose provision creates clear boundaries of law-making powers	New initiative. Part 3 of the Legislation Act relates to disallowance, which ensures parliament can supervise and control use of the Henry VIII clause. Constraining the purpose provision ensures ultra vires is an effective limitation on use of the Henry VIII clause.	Number of Regulations Review Committee reports on law modifications; number of disallowance motions. Number of judicial reviews citing ultra vires, plus outcome of proceedings.	7.13
Legislative procedural norms	Legislative procedural norms are set out in Standing Orders (the House’s rules of procedure). Standing Orders are departed from only with leave from the House, which requires a debate and a majority vote if there are any objections. Normal legislative procedure requires debate at all stages, and a vote to indicate the House’s support to proceed to the next stage. The stages are: <ul style="list-style-type: none">• Introduction• First reading - debate plus vote (including referral to select committee)• Testing by select committee (usually 6 months, includes public consultation) and report back to House• Second reading - consideration of select committee report plus vote on bill as amended by select committee• Committee of the whole House - part-by-part (or clause-by-clause) consideration, including consideration of supplementary order papers (SOP). Voting on part-by-part (or clause-by-clause) and SOPs.• Third reading of bill as reported back by committee of the whole House - debate plus vote.• Bills that pass the third reading are duly enacted and sent to the Governor General for royal assent.	Number of changes to legislative procedural norms Timescale: multiple parliamentary terms	7.6-7.14
Level of acceptance by the public	People consider that decisions made by constitutional actors and public officials are legitimately made and legally binding.	Proportion of people who consider decisions (including legislative decisions) as legitimately made and legally binding (based on survey data) Levels of non-compliance with laws (based on data from regulators)	5.10-5.20, 7.6-7.14
Level of avoidance of quality standards	This variable considers the willingness of property owners and tradespeople to make repairs or rebuild buildings without going through the quality system.	Nature of work likely to be done outside the quality system. Scale of non-compliance likely to have to be modelled on incomplete data	6.9, 6.10
Level of capacity in the region	Extent to which materials, equipment and workforce are available in the region, and can be freed up to work on earthquake-related rebuilds and repairs.	Amount of materials and equipment and numbers of workers that can be diverted to earthquake-related work.	6.7, 6.9-6.11
Level of decision-makers’ awareness of norms	This variable is concerned with how strongly and consciously decision-makers are aware of the procedural and substantive norms that govern how their decision-making.	Quantitative assessment of decision-makers’ awareness of norms (survey; percentages). Qualitative assessment of consistency of decisions with substantive norms (constitutional research). Timescale: multiple parliamentary terms.	5.10-5.20
Level of demand for consent services	How many requests for consent services received in a 12 month period.	Number of requests for consents compared against normal levels of demand.	6.7, 6.9-6.11
Level of demand for inspection services	Inspections are needed of buildings at various stages in construction to ensure buildings comply with relevant building standards. This variable is concerned with the level of demand for those inspections.	Number of requests for inspections to be carried out compared against normal levels of demand.	6.7, 6.9-6.11
Level of demand for insurance assessment	Self-explanatory.	Number of claims compared with the number of claims in ordinary circumstances.	6.7, 6.9-6.11
Level of demand for land assessment services	Self-explanatory.	Number of requests compared against normal levels of demand for this service.	6.7, 6.9-6.11
Level of law-makers’ awareness of norms	This variable is concerned with how strongly and consciously law-makers are aware of the procedural and substantive norms that govern how law should be made and limit what the law may do. The term ‘law-makers’ is used here because this variable applies both to primary legislation made by parliament and legislative instruments made by other constitutional actors under delegated law-making powers (e.g. regulations or other instruments made by the Governor-General in the executive council, or rules issued by departmental chief executives, or binding codes of practice issued by the Privacy Commissioner).	Quantitative assessment of law-makers’ awareness of norms (survey; percentages). Qualitative assessment of consistency of legislation/delegated legislation with substantive norms (constitutional research). Timescale: multiple parliamentary terms.	7.6-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Level of trust and confidence in decision-makers	Extent to which the public has a firm belief in the ability and reliability of constitutional decision-makers to carry out their functions.	Levels of confidence in constitutional decision-makers (based on survey data). Levels of public criticism of constitutional decision-makers (e.g. news media / blogs) Trust can move quickly in response to one-off events, but should also be measured across multiple parliamentary terms.	5.10-5.20
Level of trust and confidence in decision-making procedures	Firm belief by the public in the ability of decision-making procedures to result in decisions that are consistent with New Zealand constitutional norms and values (see Chapter II; Figure 5.1).	Quantitative assessment of public trust and confidence (survey; percentages). Qualitative assessment based on comments in news media / blogs. Timescale: multiple parliamentary terms	5.10-5.20
Level of trust in members of parliament	Extent to which the public has a firm belief in the ability and reliability of members of parliament to carry out their representative and law-making functions. Trust can be undermined by perceptions that members abuse their privileges or benefit unduly from their positions (e.g. lifetime of free travel for members and their spouses started being phased out a few years ago). Trust can also be undermined by perceptions that a member has been ‘captured’ by a particular lobby group, which may be exacerbated by ‘gifts’ such as hospitality.	Levels of confidence in members of parliament (based on survey data, correlated with voting patterns). Levels of public criticism of members of parliament and parliamentary law-making (e.g. news media / blogs) Trust can move quickly in response to one-off events, but should also be measured across multiple parliamentary terms.	7.6-7.14
Level of use of appeals and reviews	The frequency with which decisions are tested in the courts with judicial review of decision-making procedures or appeals against the substance of decisions.	Number of cases brought as a proportion of decisions made.	5.13
Levels of trust and confidence in law-making procedures	Firm belief by the public in the ability of law-making procedures to deliver law that is consistent with New Zealand constitutional norms and values (see Chapter II.4.4).	Quantitative assessment of public trust and confidence (survey; percentages). Qualitative assessment based on comments in news media / blogs. Timescale: multiple parliamentary terms	7.6-7.14
Liberalism	This is a constitutional value, rather than a variable. Liberalism here is defined as the idea that individuals are best served by being free to make their own choices (Berger, 2007; Buchanan, 2009). There is a tension between this sense of liberalism and fairness-based support for collective solutions to problems.		5.10-5.20, 7.6-7.14
Limit judicial review through privative clauses to remove justiciability	New initiative based on the approach taken by the 2010 and 2011 Acts. Privative clauses oust the courts’ jurisdiction to scrutinise the administrative actions protected by the clause (see 2011 Act, section 74(2)).	Number and nature of privative clauses.	7.12
Limit judicial review through: <ul style="list-style-type: none"> • privative clauses (to remove justiciability) • wide purpose clause to limit ultra vires as a ground of review 	New initiative based on the approach taken by the 2010 and 2011 Acts. Privative clauses oust the courts’ jurisdiction to scrutinise the administrative actions protected by the clause (see 2011 Act, section 74(2)). ‘Ultra vires’ is a ground of judicial review that allows an action to be quashed if it is ‘beyond the power’ of the statutory authorisation. The wider the purpose clause, the more actions can be brought within its ambit. In this way, a wide purpose clause can effectively limit the scope of judicial review.	Number of successful judicial review applications.	7.12
Maintain consistency with rule of law, human rights norms and common law norms	This is an intervention that applies the status quo position to the recovery framework.		5.18, 5.19
Maintain extant quality and safety standards for repairs and rebuilds	This is an intervention that ensures there is no drop in building standards for earthquake-related repairs and rebuilds. While the process may change, the outcome (fit-for-purpose structures) should remain the same.	Proportion of earthquake rebuilds and repairs that meet standards compared with proportion of other structures that meet standards.	6.9-6.11

Variable name	Definition	Unit of measure	Used in Figures...
Māori constitutional values: <ul style="list-style-type: none"> • tikanga • rangatiratanga • kaitiakitanga 	<p>Tikanga means correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol; it is the customary system of values and practices that have developed over time and are deeply embedded in the social context (Māori dictionary http://maoridictionary.co.nz/search?keywords=tikanga accessed 14 August 2016).</p> <p>Rangatiratanga appears to be that Māori should control their own tikanga and taonga, including their social and political organisation and, to the extent practicable and reasonable, fix their own policy and manage their own programmes. The guarantee of rangatiratanga was a guarantee to all iwi, and implicit in it is a guarantee that the Crown would not, by its actions, allow one advantage over another. Where the Crown promotes projects for the benefit of Māori generally, it should act impartially and adopt fair procedures to achieve that end (M S R Palmer, 2008, pp. 116-117).</p> <p>Kaitiakitanga is the idea of guardianship, stewardship, and trusteeship (Māori dictionary http://maoridictionary.co.nz/search?idiom=&phrase=&proverb=&loan=&histLoanWords=&keywords=kaitiakitanga accessed 14 August 2016).</p>		5.10-5.20
Modification of law treated as administrative action subject to judicial review	New initiative that is the opposite of a privative clause. It means there is no restriction on the courts' ability to review decisions and recommendations relating to law modifications under the Henry VIII clause.	Number of privative clauses (there should be none).	7.11
Modified laws are consistent with the New Zealand Bill of Rights Act 1990	This intervention seeks to mitigate the constitutional impact of the expedited process by ensuring the executive complies with its human rights obligations	Number of retrospective law changes; proportion which do not comply with NZBORA	7.7-7.14
Modified laws observe separation of powers between administration and enforcement of law	This intervention seeks to mitigate the constitutional impact of the expedited process by ensuring the executive cannot take advantage of the process for its own benefit	Number of law changes that preserve functional separation between executive administration and enforcement	7.7-7.14
No implied or explicit limitations on grounds of judicial review	New initiative that focuses on whether the empowering statute is framed in a way that limits judicial review. One point of focus would be the statute's purpose, and how widely it was framed.	Qualitative assessment of empowering statute against judicial review grounds.	7.11
Number of consents granted	Self-explanatory.	Number of consents granted as a proportion of requests for consent.	6.7, 6.9-6.11
Number of consents sought	Number of consents sought under the Resource Management Act 1991 and Building Act 2004 for recovery-related repairs, rebuilds, and new buildings.	Numbers of consents.	6.7, 6.9-6.11
Number of inspections and approvals needed.	Self-explanatory.	Numbers of inspections and approvals received by inspection agency.	6.7, 6.9-6.11
Number of inspections completed and approvals granted.	Approvals refers to the sign-off process required for compliance with the Building Act.	Numbers of inspections and approvals as a proportion of requests for inspection and approval.	6.7, 6.9-6.11
Number of insurance claims determined	Numbers of earthquake-related insurance claims determined, and the value paid out in insurance.	Numbers of earthquake related claims paid out; total value paid out.	6.7, 6.9-6.11
Number of insurance claims made	Numbers of earthquake-related insurance claims made, and the value of those claims	Numbers of earthquake related claims; total value of claims.	6.7, 6.9-6.11
Number of land assessments determined	Self-explanatory.	Number of assessments completed as a proportion of requests for assessment.	6.7, 6.9-6.11
Number of land assessments sought	Extensive land damage occurred in the earthquakes, and assessments were required to decide whether it would be cost-effective to remediate the land so it could be built on again.	Number of requests for land assessment (made by property owners or by insurance companies).	6.7, 6.9-6.11
Number of laws made by elected representatives in parliament	This variable is a statement of the effect of two constitutional norms: representative democracy and parliamentary supremacy (see definitions in this table).	<p>Proportion of laws made by elected representatives compared with laws made by direct democracy (e.g referendum) and legislative instruments made using delegated powers.</p> <p>Qualitative assessment of courts' interpretation of laws (e.g. declarations of inconsistency under NZ Bill of Rights Act 1990).</p>	7.6-7.14
Numbers of compliant plans for rebuilds	Numbers of plans for rebuilds that comply with the regulated standards.	Number of compliant plans as a proportion of all plans submitted with a consent application.	6.7, 6.9-6.11
Occasions where parliament delegates law-making powers	Parliament can, if it wishes, delegate its law-making powers to the executive (e.g. Governor General in Council) or to a specified person (e.g. the Privacy Commissioner has delegated law-making powers in the Privacy Act).	Numbers of regulation-making powers and Henry VIII clauses (powers to amend an Act of Parliament through a legislative instrument).	7.6-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Parliament can supervise and control expedited law-making process	This intervention ensures the executive can be held to account for its use of the expedited process	Whether disallowance applies	7.7-7.14
Parliamentary supremacy	This is not a variable so much as it is a substantive constitutional norm that informs constitutional operations. Under the doctrine of parliamentary sovereignty, parliament is the highest source of law in the land. It can delegate its law-making power, but will scrutinise, and can disallow, delegated legislation (Dicey, 1915; Joseph, 2007).		7.6-7.14
Perceived substantive value of committee of whole House stage	<p>This variable questions the value members of parliament place on this stage in the parliamentary process. It is singled out for consideration because it is the last opportunity detailed consideration of individual clauses in a bill, and the last opportunity to amend a bill before it is enacted.</p> <p>In recent years, standing orders have been amended to cut down the time needed for this stage (e.g. by enabling bills to be considered part-by-part), but that has resulted in bills being drafted with fewer parts (and more clauses in each part), which reduces the opportunity for scrutiny. Governments are also likely to ensure they have the numbers to pass the committee stage, which means submitting an SOP to change the bill may be a hollow exercise.</p>	<p>Quantitative assessment of MPs' opinion of value of committee of whole House stage (survey; percentages)</p> <p>Timescale: multiple parliamentary terms</p>	7.6-7.14
Perception of utility of legal action	An external factor that influences operation of the system. The stronger the perception that legal action will bring about useful results, the more likely it is that people will take legal action.	Survey data of public perceptions.	5.11-5.20
Perception that parliament is 'just politics' and that disagreements over law and policy is politicking	<p>Belief by the public that members of parliament are more interested in scoring political points than ensuring that legislation is fit for purpose or that genuine problems are resolved.</p> <p>Belief likely to be exacerbated by scenes of verbal 'brawling and barracking' during question time and debates, particularly on matters of parliamentary procedure that have little relevance for the general public.</p>	<p>Quantitative assessment of public perceptions (survey; percentages).</p> <p>Qualitative assessment based on comments in news media / blogs.</p> <p>Trust can move quickly in response to one-off events, but should also be measured across multiple parliamentary terms.</p>	7.6-7.14
Perceptions of need for speed	The strength of the perception held by central government that speedy decision-making is required for effective earthquake recovery	Qualitative assessment of government perceptions, manifested in Cabinet decisions and public statements.	5.16
Permitted land use	Land uses permitted under the Resource Management Act and/or governed by regional and district plans.	Types of land use; amount of land subject to land use restrictions.	6.9-6.11
Pragmatism	This is not a variable. It is a strongly prevailing constitutional value in New Zealand. Pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007).		5.10-5.20, 7.6-7.14
Prioritise and sequence access to consents processes and resources	This is an intervention that aims to manage significantly increased demand by prioritising and sequencing access to consents process according to public good. The consents process is an entry point over which control can be exercised as it is a statutory purpose.		6.9-6.11
Procedural constitutional norms	<p>This is a collection of the procedural norms that inform and guide law-making. The individual norms are defined separately. Combined, procedural norms require decision-makers to:</p> <ul style="list-style-type: none"> • act lawfully • be accountable • be transparent • be disinterested • be reasonable • observe natural justice. 		5.10-5.20
Provide financial and practical assistance to displaced people and businesses	This intervention aims to offset any disadvantage accruing from prioritisation and sequencing of access to the consents process and resources. In so doing, it aims to neutralised incentives to buck the system.	Number of rebuilds and repairs without consents that ought to have them	6.9-6.11
Public expectations of expedient decision-making	The extent to which people expect decision-makers to adapt to extraordinary circumstances and get things done despite any constitutional short-cuts that might be necessary. These expectations respond to the constitutional values of pragmatism and authoritarianism.	Qualitative assessment of public responses to decisions based on constitutional values.	5.10-5.20
Public participation	This is not a variable so much as it is a procedural norm that informs constitutional operations. It recognises that the key role of citizens in a democracy is participation. Participation includes being informed, monitoring the conduct of leaders and representatives, and debating issues. It is important at both national and local levels (Stanford University, n.d.)		5.10-5.20

Variable name	Definition	Unit of measure	Used in Figures...
Public perceptions of legitimacy	People are confident in constitutional decision-making over the long term. This confidence means people accept decisions, including legislation, even when they are opposed to the decision or think it damaging to their interests.	Levels of confidence in constitutional decision-making (based on survey data) Levels of public criticism of decision-making (e.g. news media / blogs / public statements by opposition members of parliament) Timescale: multiple parliamentary terms	5.10-5.20, 7.6-7.14
Public trust in central government	External factor recognising that influences outside the system affect public trust in central government.	Levels of trust. Polling data and surveys can provide quantitative assessments. Qualitative assessments from relevant news coverage.	5.11-5.20
Quality and safety standards for repairs and rebuilds	This variable reflects the regulated standards that must be complied with in buildings and repairs.	Qualitative assessment of standards.	6.7, 6.9-6.11
Reasons for decisions are given	This is an intervention. It requires decision-makers to provide their reasons for decisions, as an aid to public understanding of decisions.		5.12
Recovery plans, including CBD recovery plan	Recovery plans were imposed by the 2011 Act, which prescribed how recovery plans should be made and their legal effect. Recovery plans override planning documents (regional and district plans). The CBD recovery plan is singled out because of the commercial importance of the CBD to Canterbury's economy.	Number and nature of plans.	6.9-6.11
Regional and district plans	An external factor that influences operation of the system. Regional and district plans are prepared by territorial authorities under the Resource Management Act 1991.	Identify plans that exist.	6.9-6.11
Relevance of procedural and substantive norms	Strength of belief by the public in the ability of norms to result in decisions that are consistent with New Zealand constitutional values. Relevance is likely to manifest as (1) relatively widespread compliance with norms and (2) public expectations that norms will be complied with.	Quantitative assessment of public perceptions (survey; percentages). Qualitative assessment based on comments in news media / blogs. Trust can move quickly in response to one-off events, but should also be measured across multiple parliamentary terms.	5.10-5.20
Relevant considerations specified for decision-making processes	This is an intervention. It isolates a ground of judicial review that can pose particular problems for decision-makers and seeks to neutralise the problem by requiring relevant considerations for decisions to be specified: that should help decision-makers to take into account the right considerations and to ignore the irrelevant ones.		5.13, 5.15
Representative democracy	This is not a variable so much as it is a substantive constitutional norm that informs constitutional operations. In New Zealand, parliament comprises the sovereign and the House of Representatives. The House comprises elected representatives who are accountable to the public through regular, free and fair general elections (Palmer, 2011; Ekins, 2011).		7.6-7.14
Require repair work to be approved.	This is an intervention. It assumes that regulatory intervention is required to ensure compliance with standards. Currently that is done through a system of approvals and inspections, and the intervention looks to continue that.	Proportion of earthquake rebuilds and repairs that have approvals, compared with the proportion that would have to have had approvals but for the earthquakes.	6.9-6.11
Resources sought (appropriately skilled workforce, materials, equipment)	Resources needed to repair or rebuild earthquake-damaged buildings, or to build new buildings for people displaced by the earthquakes.	Number and nature of resources needed.	6.7, 6.9-6.11
Responsible government	This is not a variable so much as it is a substantive constitutional norm that informs constitutional operations. It requires that the executive government is responsible to parliament and must maintain its confidence, manifested through the procedure of votes of confidence in the House. If the government loses parliament's confidence, it must resign (Palmer & Palmer, 2004, p. 85).		7.6-7.14
Responsiveness of normal decision-making procedures	Extent to which normal decision-making procedures can adapt to changing circumstances or sudden crises.	Presence of discretions and open-ended decision-making criteria that enable adaptability.	5.10-5.20
Restraint	This is not a variable so much as it is a procedural norm that informs constitutional operations. It refers to informal restraints of the use of public power deriving from public opinion, international obligations, common law, and constitutional conventions (Palmer & Palmer, 2004, p. 156).		5.10-5.20
Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	This is an intervention. It reflects current settings supporting the rule of law that require there to be review and appeal pathways for public decisions, particularly those affecting people personally and their rights relating to their property and ability to access services.		5.11, 5.13, 5.16, 5.17, 5.19

Variable name	Definition	Unit of measure	Used in Figures...
Rule of law	<p>This is not a variable so much as it is a substantive constitutional norm that informs constitutional operations. It requires that:</p> <ul style="list-style-type: none"> • Laws should be proportionate, reasonable and generally consistent with human rights (Bingham, 2010). • Laws should be prospective; retrospective effect must be explicit on the face of the statute (Legislation Advisory Committee, 2014, chapter 3). • Laws should be accessible and certain (Bingham, 2010; Tamanaha, 2007). • The executive can act only within the scope of its powers in statute and at common law (Joseph, 2007, pp. 647-649; <i>De Keyser's Royal Hotel Ltd v R</i> [1920] AC 508 (HL); <i>Quake Outcasts and Fowler Developments Ltd v Minister for Canterbury Earthquake Recovery and Anor</i> [2015] NZSC 27). 		5.11, 7.6-7.14
Select committee tests bill	Select committees examine the bill in detail, usually with assistance from departmental advisors and parliamentary counsel, and may recommend amendments or, occasionally, that the bill not proceed. Select committees normally call for public submissions on the bill.	<p>Number of bills referred to select committee</p> <p>Number of bills reported from select committee (data available from parliament)</p>	7.6-7.14
Separation of powers	<p>This is not a variable so much as it is a substantive constitutional norm that informs constitutional operations. The separation of powers requires that the functions of making the law, implementing the law, and enforcing the law should be performed by different bodies (Joseph, 2007, ch. 7; Waldron, 2012).</p> <p>Parliament and the judiciary should observe the principle of comity, or mutual respect for their respective spheres of control (Privileges Committee, 2013).</p>		7.6-7.14
Separation of powers built in to decision-making structures	This is an intervention that applies the status quo position to the recovery framework.		5.16, 5.17
Societal changes / external crises affecting constitutional operations	Factors that influence how New Zealanders think about public power, and the relationship between citizens and the state.	Number of influences; qualitative assessment of influences' impact.	7.6-7.14
Speed and quality of consent services	This variable assumes a balance between speed and quality: that consent services are as efficient as possible without undermining the quality of the scrutiny and consideration to ensure the consents system achieves its purpose of durable, fit for purpose buildings.	<p>Days elapsed between request for consent and consent being granted.</p> <p>Number of buildings with design-based problems that should have been picked up by consent process (timescale: 10 years).</p>	6.7, 6.9-6.11
Speed and quality of inspection services	This variable assumes a balance between speed and quality: that inspection services are as efficient as possible without undermining the quality of the scrutiny and consideration to ensure inspections system contribute effectively to the purpose of durable, fit for purpose buildings.	<p>Days elapsed between request for inspection and inspection taking place.</p> <p>Number of buildings with problems that should have been picked up by inspection (timescale: 10 years).</p>	6.7, 6.9-6.11
Speed and quality of insurance assessment / claims determination	This variable assumes a balance between speed and quality: that insurance assessment and claims determination is as efficient as possible while ensuring robust and fair consideration of insurance claims.	<p>Days elapsed between lodging and determination of claim.</p> <p>Number of appeals/reviews/disputes</p> <p>Proportion of successfully-disputed determinations out of the total number of disputed determinations.</p>	6.7, 6.9-6.11
Speed and quality of land assessment	This variable assumes a balance between speed and quality: that land assessment is as efficient as possible without undermining the quality of the scrutiny and consideration to ensure it minimises the risk of people building on land that is unlikely to withstand future seismic shaking.	<p>Days elapsed between request for land assessment and assessment being done.</p> <p>Number of properties that experience structural problems related to ground movement that should have been predictable based on the land assessment (timescale: 10 years).</p>	6.7, 6.9-6.11
Stability and strength of constitutional values	<p>This variable is concerned with how much and how rapidly constitutional values are changing, and how much influence they have on how people (particularly constitutional actors) think and behave.</p> <p>The underlying assumption of this variable is that the stronger and more stable values are, the more predictable their influence on law-makers will be.</p>	<p>Quantitative assessment of law-makers' values (survey; percentages).</p> <p>Qualitative assessment of consistency of legislation/delegated legislation with values (constitutional research).</p> <p>Timescale: multiple parliamentary terms.</p>	5.10-5.20, 7.6-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Stability and strength of procedural and substantive norms	<p>This variable is concerned with how much and how rapidly procedural and substantive norms are changing, and how much influence they have on how people (particularly constitutional actors) think and behave.</p> <p>The underlying assumption of this variable is that the stronger and more stable norms are, the better understood they are, and the more influence they have on the constitution’s day-to-day operation.</p>	<p>Quantitative assessment of actors’ awareness of norms (survey; percentages).</p> <p>Qualitative assessment of shifts in norms (e.g. constitutional research).</p> <p>Timescale: multiple parliamentary terms.</p>	5.10-5.20, 7.6-7.14
Strength of expectations of fairness	This variable is concerned with how strongly people expect decisions to be fair.	Qualitative assessment of public responses to decisions based on perceived fairness.	5.10-5.20
Strength of influence of norms and values on decision-makers	This variable is concerned with how much importance law-makers place on substantive and procedural norms. The term ‘law-makers’ applies both to primary legislation made by parliament and legislative instruments made by other constitutional actors under delegated law-making powers (e.g. regulations or other instruments made by the Governor-General in the executive council, or rules issued by departmental chief executives, or binding codes of practice issued by the Privacy Commissioner)	<p>Level of consistency of decisions with substantive and procedural norms and with constitutional values (qualitative assessment based on constitutional research). Quantitative survey data not useful here, because law-makers are likely to over-estimate reported importance of norms.</p> <p>Timescale: multiple parliamentary terms.</p>	5.10-5.20, 7.6-7.14
Strength of perceived need for speed	The strength of the perception held by central government that speedy decision-making is required for effective earthquake recovery	Qualitative assessment of government perceptions, manifested in Cabinet decisions and public statements.	5.17
Substantive constitutional norms	This is a collection of the substantive constitutional norms that inform and guide law-making. The individual norms are defined separately.		5.10-5.20, 7.6-7.14
The public has confidence in decision-makers	This is a success factor concerned with levels of confidence in decision-makers, because that is an indicator of legitimacy.	Qualitative assessment of acceptance based on presence or absence of ‘noise’ - public comment; news media and blog comment; public protest. Quantitative assessment would be possible with survey data.	5.11-5.20
The public has ongoing confidence in constitutional settings enabling recovery-decision-making framework.	This is a success factor that links public confidence in the recovery decision-making framework to wider constitutional settings. It enables consideration of the extent to which constitutional settings might need to evolve to maintain ongoing legitimacy.	Qualitative assessment of confidence based on presence or absence of ‘noise’ - public comment; news media and blog comment; public protest. Quantitative assessment would be possible with survey data.	5.11-5.20
The right resources obtained	Appropriately skilled workforce, materials, and equipment needed to repair or rebuild earthquake-damaged buildings, or to build new buildings for people displaced by the earthquakes.	Numbers of resources obtained as a proportion of resources needed.	6.7, 6.9-6.11
Transparency	This is not a variable so much as it is a procedural norm that informs constitutional operations. Transparency is a check in itself - sunlight is the best disinfectant. It is also a necessary precursor to accountability (Palmer & Palmer, 2004, p. 237; see also Figures 5.1 and 5.3).		5.10-5.20
Treaty of Waitangi: compliance with Treaty principles	<p>This is not a variable so much as it is a procedural norm that reflects jurisprudence on the principles animating the Treaty of Waitangi. Differences between the texts, coupled with the need to apply the Treaty in contemporary circumstances have led to reliance on animating principles to guide decisions (Te Puni Kokiri, 2001, p. 74). The principles include:</p> <ul style="list-style-type: none">• partnership (which includes the duty to act reasonably, honourably and in good faith; reciprocity; mutual benefit; and the duty to make informed decisions (Te Puni Kokiri, 2001, pp. 78-85)).• active protection• redress.		5.10-5.20
Treaty of Waitangi: Crown-Māori relationship	This is not a variable. It is a procedural norm that recognises the increasingly multi-faceted and evolving relationships between the Crown and Māori (Ministry of Justice, 2014). The relationship is important — it is the embodiment of the agreement represented by the Treaty and it will affect the legitimacy of many decisions. Relationships can be formalised through Crown-Māori Relationship Instruments (Te Puni Kokiri & Ministry of Justice, 2006) and in settlement agreements (Ministry of Justice, 2014). Care needs to be taken that undertakings are met, so as to preserve the relationship.		5.10-5.20
Triage process to identify need for urgency	New initiative to ensure the expedited law-making process is proportionate and measured. It triages law-making needs according to urgency. Urgently needed modifications can go through the expedited process; non-urgent modifications can go through the normal law-making process.	Urgently-needed modifications that go through the expedited process as a proportion of the total of all recovery-related law changes.	7.7, 7.8, 7.14
Turnout at general elections	This variable is largely self-explanatory. It includes both constituency members of parliament and political parties to reflect the two votes people have under the mixed member proportional representation (MMP) voting system.	Voting turnout at general elections (data available from Electoral Commission.	7.6-7.14

Variable name	Definition	Unit of measure	Used in Figures...
Unintended consequences are identified	<p>Unintended consequences can arise through a bill’s interaction with other legislation or because it is likely to influence behaviour in undesirable ways. Unintended consequences can be undesirable, and should ideally be identified before a bill is enacted.</p> <p>This variable assumes that identification of unintended consequences results in steps being taken to neutralise or mitigate them, rather than making this a separate step, because in practice the identification of unintended consequences tends to lead straight to steps being taken.</p>	<p>Numbers of unintended consequences identified at select committee (based on select committee reporting).</p> <p>Numbers of unintended consequences arising after enactment.</p> <p>Timescale: lifetime of legislation.</p>	7.6-7.14
Use of processes supporting legitimacy	An external factor that influences operation of the system. Legitimacy is defined in Chapter II as a reservoir of goodwill that allows people to maintain confidence in institutions' long-term decision-making. Chapter V explains why transparency, accountability and participation are important legitimacy levers.	<p>Qualitative assessment of public confidence in relevant institutions.</p> <p>Timescale: multiple parliamentary terms.</p>	6.9-6.11
Verification that: <ul style="list-style-type: none">• the threshold has been met• law change goes no further than necessary	This intervention seeks to ensure the expedited process is not overused	Qualitative assessment of law changes made using the expedited process against the criteria	7.7-7.14
Wide purpose clause to limit effectiveness of ultra vires as a ground of review	New initiative based on the approach taken by the 2011 Act. ‘Ultra vires’ is a ground of judicial review that allows an action to be quashed if it is ‘beyond the power’ of the statutory authorisation. The wider the purpose clause, the more actions can be brought within its ambit. In this way, a wide purpose clause can effectively limit the scope of judicial review.	Qualitative assessment of purpose clause.	7.12

Technical appendix 2: Definition of links in system diagrams

In these tables, the direction of a link is represented by an arrow “⇒” and the polarity is represented by “S” (cause and effect move in the same direction) or “O” (cause and effect move in opposite directions).

Table TA.2.1 Chapter 5

Unless specified, the default timescale is the three-year parliamentary term.

Link			Definition	Figures
Appeals / judicial review	S ⇒	Constitutional values	Appeal and judicial review pathways support constitutional values, particularly egalitarianism and fairness: New Zealanders do not generally consider decision-makers to be ‘better’ than ordinary people or infallible, and so expect to be able to revisit their decisions.	5.13
Appeals / judicial review	S ⇒	Procedural and substantive constitutional norms	Appeal and judicial review pathways provide a means of enforcing procedural and substantive norms.	5.13
Appeals / judicial review	S ⇒	Demand for legal aid and/or court services	The more people seek appeals or judicial review, the greater demand there will be for court services. Where people meet the criteria for legal aid, they are likely to seek it, given the cost of litigation.	5.13, 5.15
Approach to funding the recovery (i.e.. cost sharing between central and local government)	S ⇒	Level of acceptance by the public	The approach to funding affects the pool of people with ‘skin in the game’, which affects the size of the pool of people who have a reason to care about decisions. Therefore, the more funding mechanisms involve cost sharing, the more people will care about decisions, which should boost overall acceptance of decisions, all things being equal.	5.11-5.20
Authoritarianism	S ⇒	Strength of influence of norms and values on decision-makers	Authoritarianism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations.	5.10-5.20
Authoritarianism	S ⇒	Public expectations of expedient decision-making	The value of authoritarianism manifests as high public expectations that government will act firmly and effectively in times of crisis.	5.10-5.20
Authoritarianism	S ⇒	Strength of perceived need for speed	Authoritarianism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations. It is likely to drive up central government’s perceptions that it needs to take charge of recovery decisions to ensure recovery gets underway quickly.	5.17
Authoritarianism	O ⇒	Separation of powers: <ul style="list-style-type: none">• Parliament keeps control of legislation• Executive administers and implements legislation• Courts enforce and scrutinise compliance	Because authoritarianism is characterised by high public expectations that government will exercise power firmly and effectively and take charge in times of crisis that someone, it is unlikely to be consistent with strict observance of the separation of powers in all circumstances.	5.16
Authoritarianism	S ⇒	Perceptions of need for speed	Authoritarianism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations. It is likely to drive up central government’s perceptions that it needs to take charge of recovery decisions to ensure recovery gets underway quickly.	5.16
Availability of facilities and resources for public engagement	S ⇒	Decision-making processes contain proportionate engagement mechanisms	This is not a causal link per se, but it acknowledges that existing facilities and resources will influence the nature of engagement mechanisms and their proportionality (it is easier to do public engagement when there are existing facilities that can be called on at little or no cost - e.g. using council-owned facilities such as a library to hold meetings rather than having to hire space in a commercially-owned building).	5.20

Link			Definition	Figures
Central and local government maintain ‘peacetime’ roles in recovery	O ⇔	Perceptions of need for speed	This is not strictly a causal link. It shows a disconnect between a facet of the intervention and a variable that is likely to strongly influence decision-makers. ‘Peacetime’ roles would give local authorities a reasonable level of autonomy in decision-making. Because the earthquake damage crossed the boundaries of three districts, a certain amount of coordination and cost-sharing might be necessary for infrastructure that also crosses district boundaries. That is unlikely to be consistent with strongly held perceptions that decision-making needs to be fast so that recovery gets moving and maintains momentum.	5.16
Central government and public trust in local government	S ⇔	Level of trust and confidence in decision-makers	In ‘peacetime’ many of the decisions at issue would be made by local government. It stands to reason that the more trust central government and the public have in local government, the greater their levels of trust in local government decision-makers.	5.11-5.20
Centralise control over recovery in executive and limit judicial supervision	O ⇔	Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	Limited judicial supervision over recovery decisions is inconsistent with review and appeal pathways, which require judicial supervision.	5.17
Centralise control over recovery in executive and limit judicial supervision	S ⇔	Evolution of normal decision-making procedures	Centralising control over the recovery will result in changes to normal decision-making procedures.	5.17
Civil legal aid eligibility thresholds	O ⇔	Demand for legal aid and/or court services	When the threshold for civil legal aid is high (i.e. legal aid is hard to get) use of court proceedings is likely to decrease, reducing demand for both legal aid and court services. Conversely, when the threshold is low (i.e. legal aid is easy to get),	5.13
Constitutional values	S ⇔	Strength of influence of values and norms on decision-makers	Decision-makers who are inculcated in New Zealand’s constitutional values will likely be influenced by those values in carrying out those functions. This influence is often implicit, or even unconscious, because of the largely unspoken nature of the constitutional values. The influence will be mitigated by other factors that influence decision-makers and by factors that weaken or strengthen the values and their related constitutional norms (loops B7 and R8). This link is likely to be felt over a long timescale because values tend to evolve very slowly.	5.10-5.20
Courts enforce and scrutinise for compliance	S ⇔	Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	This is not a causal link per se. It acknowledges that review and appeal pathways are more effective when reviews and appeals are heard by courts that are independent of, and separate from, the institutions that make and administer the law.	5.16
Decision-making processes required to observe natural justice	S ⇔	Judicial review	This is not a causal link per se. Natural justice is one of the heads of judicial review.	5.13, 5.14
Decision-making processes required to observe natural justice	S ⇔	Procedural constitutional norms	When decision-making processes comply with natural justice, those processes will also be consistent with the procedural norms of transparency, impartiality, accountability, and public participation.	5.14
Decisions and actions are authorised by law	S ⇔	Rule of law	When decisions and actions are authorised by law, that strengthens compliance with the rule of law.	5.11
Decisions and actions are authorised by law	S ⇔	Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	This is not a causal link per se. It reflects the principle that where decisions are authorised by law, there ought to be pathways for people to test and/or challenge those decisions.	5.11, 5.13
Decisions and actions are authorised by law	S ⇔	Decision-making processes required to observe natural justice	This is not a causal link per se. It reflects the rule of law principle that when people’s interests are affected by a decision (especially if it is adverse to them), they ought to be afforded an opportunity to put their case. This principle serves several objectives: it promotes acceptance of the decision through participation; it helps to ensure decision-makers base their decisions on accurate and relevant information; and it incentivises decision-makers to act fairly and impartially.	5.11, 5.13, 5.14
Decisions and actions are authorised by law	S ⇔	Relevant considerations specified for decision-making processes	This is not a causal link per se. It acknowledges that, when decisions and actions are authorised by law, it is likely that someone will have contemplated the considerations that are likely to be relevant for those decisions. Specifying relevant considerations provides a structure for the courts to scrutinise decision-making, while limiting the courts’ opportunity to augment the framework by specifying their own relevant considerations for decision-makers to follow.	5.11, 5.13, 5.15
Decisions and their reasons are publicly available and understood	S ⇔	Decisions withstand public and/or judicial scrutiny of procedure and substance	When decisions and their reasons are publicly available and understood, that is likely to increase the chance that those decisions will withstand scrutiny, because of the incentive effect on decision-makers: if decision-makers know people are watching they are more likely to follow procedures that will result in a defensible decision.	5.12

Link			Definition	Figures
Decisions are accepted by the public	S ⇨	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	When decisions are accepted by the public because they are consistent with New Zealand’s constitutional values, that will help to build confidence in the constitutional settings underpinning the recovery decision-making framework. Confidence is likely to be implicit and built over a longer timescale than the three-year parliamentary term.	5.11, 5.20
Decisions are accepted by the public	S ⇨	The public has confidence in decision-makers	The conditions resulting in acceptance of decisions by the public are likely to boost confidence in decision-makers.	5.12
Decisions are published	S ⇨	Procedural constitutional norms	Publishing decisions supports procedural constitutional norms (particularly transparency and accountability) by making decisions transparent, which is the precursor to supervision and control of decision-making. Publishing decisions also promotes impartiality and restraint, and compliance with Treaty principles by creating incentives for decision-makers to follow these norms in making their decisions (people are more likely to follow the norms if they know other people are watching).	5.12
Decisions withstand public and/or judicial scrutiny of procedure and substance	S ⇨	Level of trust and confidence in decision-makers	Decisions that can withstand judicial scrutiny of procedure and substance are, by definition, consistent with constitutional norms. Decisions that can withstand public scrutiny are likely to meet public expectations of fairness and egalitarianism. Both of these things create confidence in decision-makers. Decisions that can withstand neither form of scrutiny are unlikely to create that confidence.	5.11
Decisions withstand public and/or judicial scrutiny of procedure and substance	S ⇨	Decisions are accepted by the public	Decisions that can withstand judicial scrutiny of procedure and substance are, by definition, consistent with constitutional norms. Decisions that can withstand public scrutiny are likely to meet public expectations of fairness and egalitarianism. Both of these things increase the likelihood that people will accept the decisions as legitimate and binding on them.	5.11, 5.12, 5.14, 5.15, 5.17, 5.18, 5.19
Decisions withstand public and/or judicial scrutiny of procedure and substance	S ⇨	The public has confidence in decision-makers	Decisions that can withstand judicial scrutiny of procedure and substance are, by definition, consistent with constitutional norms. Decisions that can withstand public scrutiny are likely to meet public expectations of fairness and egalitarianism. Both of these things create confidence in decision-makers. Decisions that can withstand neither form of scrutiny are unlikely to create that confidence.	5.11, 5.12, 5.14, 5.15, 5.17, 5.18, 5.19
Decisions withstand public and/or judicial scrutiny of procedure and substance	S ⇨	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	When decisions can withstand scrutiny because they comply with constitutional norms, that can build confidence in the constitutional settings enabling the recovery decision-making framework. This confidence may manifest slowly, over a longer timescale than other links in this CLD. Confidence may also be implicit and built over a longer timescale than the three-year parliamentary term.	5.11, 5.12, 5.14, 5.15, 5.17, 5.18, 5.19
Decisions withstand public and/or judicial scrutiny of procedure and substance	S ⇨	Decisions are accepted by the public	When decisions can withstand scrutiny because they comply with constitutional norms, that will promote wider public acceptance of decisions.	5.12, 5.15
Egalitarianism and fairness	S or O ⇔	Procedural constitutional norms	Egalitarianism and fairness influence the content and operation of procedural constitutional norms, and vice versa. The norms that require disinterested and transparent decision-making, participation, and accountability, result in processes that generally ensure decisions are made for the public good, and are made fairly and consistently.	5.10-5.20
Egalitarianism and fairness	S or O ⇨	Rule of law	The rule of law influences, and is influenced by, the values of egalitarianism and fairness. It is a weaker link than the relationship between egalitarianism and fairness and procedural constitutional norms (denoted by a dotted line). The norms that require disinterested decision-making, transparency and accountability, help to ensure that decisions are lawful and open to scrutiny and support consistent decision-making. These are outcomes that are important to the rule of law.	5.10-5.20
Egalitarianism and fairness	S ⇨	Strength of expectations of fairness	Fairness is a strongly prevailing constitutional value in New Zealand, and it tends to strengthen expectations that decision-makers will behave fairly.	5.10-5.20
Egalitarianism and fairness	S ⇨	Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	The values of egalitarianism and fairness suggest that communities will expect to be involved in recovery decision-making that affects their space, use of land, and ongoing viability: it goes against the national psyche for others to make these decisions on the basis that ‘they know what is best’ for communities. Fairness dictates that people should have a say in matters that directly affect them.	5.20
Egalitarianism and fairness	S ⇨	Maintain consistency with rule of law, human rights norms, and common law norms	The constitutional values of egalitarianism and fairness, and a liberal view of the state, tend to reinforce the importance of compliance with the rule of law, human rights norms and common law norms because those norms focus on people’s inherent dignity and treating people fairly, consistently, and exercising power proportionately and impartially.	5.18
Egalitarianism and fairness	S ⇨	Strength of influence of norms and values on decision-makers	Decision-makers who are inculcated in New Zealand’s constitutional values will likely be influenced by those values in carrying out those functions. This influence is often implicit, or even unconscious, because of the largely unspoken nature of the constitutional values. The influence will be mitigated by other factors that influence decision-makers and by factors that weaken or strengthen the values and their related constitutional norms (loops B7 and R8). This link is likely to be felt over a long timescale because values tend to evolve very slowly.	5.18, 5.19

Link			Definition	Figures
Egalitarianism and fairness	S ⇔	Strength of expectations of fairness	Public expectations of fairness are created by the operation of constitutional values of egalitarianism and fairness.	5.18, 5.19, 5.20
Enable limited departures from norms, confined to earthquake recovery, with judicial supervision	S ⇔	Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	This is not a causal link per se. It reflects that the intervention is consistent with review and appeal pathways.	5.19
Evolution of constitutional values	S or O ⇔	Constitutional values	This is not a causal link per se. It reflects that evolution of constitutional values will result in changes to the content of constitutional values.	5.10-5.20
Evolution of constitutional values	O ⇔	Strength of influence of norms and values on decision-makers	The evolution of constitutional values is likely to be slow and unspoken. Therefore, changed norms may have a weaker influence on decision-makers, particularly if decision-makers are not aware of, or do not agree with, changes to values.	5.10-5.20
Evolution of normal decision-making procedures	S ⇔	Relevance of procedural and substantive norms	Assuming decision-making procedures evolve consistently with constitutional values, allowing procedures to evolve should support the relevance of substantive and procedural norms because the evolved procedures will be reflected in altered norms. It will demonstrate that the norms, too, can evolve to meet extraordinary circumstances.	5.10-5.20
Evolution of normal decision-making procedures	O ⇔	Substantive constitutional norms: <ul style="list-style-type: none"> Representative democracy Parliamentary supremacy Rule of law 	<p>In the context of centralised control over decision-making and limited judicial supervision the evolution of normal decision-making procedures is likely to be inconsistent with the substantive constitutional norms of:</p> <ul style="list-style-type: none"> representative democracy at a local level - local authorities are elected to make decisions on behalf of their communities, and would normally make recovery-related decisions parliamentary supremacy - parliament is normally the highest source of law in the land, and the executive cannot amend or unmake parliament-made law the rule of law - judicial supervision of executive decisions is a key norm for ensuring limited public power and restraint in its exercise. 	5.17
Evolution of normal decision-making procedures	S ⇔	Strength of expectations of fairness	The evolution of normal decision-making procedures may strengthen expectations of fairness (particularly if procedures produce manifestly unfair outcomes, or if they generally produce fair outcomes).	5.17
Evolution of procedural and substantive norms	S or O ⇔	Procedural and substantive constitutional norms	This is not a causal link per se. It reflects that evolution of norms will result in changes to their content.	5.10-5.20
Evolution of procedural and substantive norms	O ⇔	Level of decision-makers' awareness of norms	The evolution of constitutional norms is generally slow and somewhat implicit. Therefore, time may elapse before decision-makers are aware of changes to norms. This may manifest as differences in decision-making procedures, or different emphases on aspects of norms by different decision-makers.	5.10-5.20
Existing community groups to facilitate public engagement	S ⇔	Decision-making processes contain proportionate engagement mechanisms	This is not a causal link per se, but it acknowledges that the existence of community groups who can assist with community engagement will influence the nature of engagement mechanisms and their proportionality (it is easier to find ways into communities when there are existing groups who can be called on to advise on the best way of reaching their members, who can be relied on to encourage their members to participate, and who can represent the views of their members).	5.20
Existing community groups to facilitate public engagement	S ⇔	Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	This is not a causal link per se, but it acknowledges that the existence of community groups who can assist with community engagement will influence the nature of engagement mechanisms and their proportionality (it is easier to find ways into communities when there are existing groups who can be called on to advise on the best way of reaching their members, who can be relied on to encourage their members to participate, and who can represent the views of their members).	5.20
Extent to which communities are engaged on different recovery decisions	S ⇔	Decisions and their reasons are publicly available and understood	More engagement on issues should increase the level of public understanding of decisions and their reasons.	5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Stability and strength of constitutional values	High levels of compliance with procedural and substantive norms suggests a reasonably strong identification with the underpinning values. It also tends to reinforce, albeit implicitly, those underpinning values. That reinforcing stabilises and strengthens constitutional values.	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Stability and strength of procedural and substantive norms	Compliance with norms strengthens and stabilises them by meeting expectations that norms will be complied with, which strengthens expectations that norms ought to be complied with.	5.10-5.20

Link			Definition	Figures
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Strength of expectations of fairness	When decision-makers comply with procedural and substantive norms they generally act fairly (fairness is a strongly prevailing constitutional value that underpins most of the procedural constitutional norms). In this way, compliance with norms tends to strengthen expectations of fairness by validating them.	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Extent to which decision-making is predictable	When decision-makers comply with constitutional norms, their decisions are more likely to be predictable because decisions will be made in consistent ways, and based on consistent application of relevant criteria.	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Level of trust and confidence in decision-making procedures	in ordinary circumstance, decision-makers’ compliance with procedural and substantive norms should boost public trust and confidence in decision-making procedures because the norms resonate with New Zealand's constitutional values.	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Level of trust and confidence in decision-makers	<p>When decision-makers comply with constitutional norms, that tends to increase trust and confidence in decision-makers because of the way that constitutional norms tend to reinforce order, stability, and predictability in society. Compliance with norms also tends to lead decision-makers to make decisions that are substantively defensible; because the processes that require disinterested and transparent decision-making, participation, and accountability are the processes that decisions are made for the public good, fairly, and consistently with any relevant democratic mandate.</p> <p>When norms are generally considered relevant, decision-makers who depart from norms are likely to face questions about why they have done so.</p>	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Relevance of procedural and substantive norms	The more decision-makers comply with procedural and substantive norms, the more relevant those norms will seem to be to decisions relating to the exercise of public power. The counter-factual seems true: if norms are not seen as relevant, it is unlikely that they would be used by decision-makers.	5.10-5.20
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Decisions withstand public and/or judicial scrutiny of procedure and substance	Decisions that can withstand judicial scrutiny of procedure and substance are, by definition, consistent with constitutional norms. Decisions that can withstand public scrutiny are likely to meet public expectations of fairness and egalitarianism, which are given effect through constitutional norms. It stands to reason then, that better compliance with constitutional norms will result in decisions that can better withstand scrutiny.	5.11, 5.13-5.19
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	The public has confidence in decision-makers	Generally, the more decision-makers comply with procedural and constitutional norms, the more confidence people will have in decision-makers because those decisions are likely to resonate with the constitutional values underpinning the norms.	5.16
Extent to which decision-makers comply with procedural and substantive norms	S ⇔	Decisions and their reasons are publicly available and understood	The more decision-makers comply with norms, including rule of law norms, the more predictable and transparent their decisions will be, which means their decisions will be publicly available and understood.	5.18
Extent to which decision-making is predictable	S ⇔	Level of acceptance by the public	Greater predictability of decisions is likely to increase their acceptance by the public, because people are more likely to resist an unpleasant surprise than something they can predict will come.	5.10-5.20
Extent to which residents / businesses adversely affected by decisions	O ⇔	Level of acceptance by the public	While decisions made using good process carry a level of legitimacy, that is likely to be eroded if the decision causes too much hardship. If the adverse effects of decisions are too harsh, or too widely spread, that may reduce acceptance even amongst members of the public who are unaffected.	5.11-5.20
External influences on society (e.g. media, migration, global events)	S or O ⇔	Stability and strength of constitutional values	Global events (e.g. terrorist attacks on the United States of America on 11 September 2001) can cause us to rethink the values underpinning constitutional norms. Similarly as New Zealand’s population changes through migration, the ideas and values brought by immigrants can be expected to have an ongoing influence on New Zealand’s society and values in the foreseeable future. Over time, these external influences can destabilise constitutional values.	5.10-5.20
External influences on society (e.g. media, migration, global events)	O ⇔	Stability and strength of procedural and substantive norms	<p>Global events (e.g. terrorist attacks on the United States of America on 11 September 2001) can trigger changes in how state power is allocated and used, particularly given the influence of pragmatism on the New Zealand psyche. It can weaken and destabilise norms as New Zealand adjusts to new ways of thinking.</p> <p>Although events like the September 11 attacks can cause abrupt shifts in constitutional norms, the effect on norms’ long-term stability and strength is not necessarily significant (see Chapters V and VII for discussion of the constitution’s self-correcting faculty). However, longer-term shifts in thinking (e.g. the effect of ever-increasing digital footprints on individual privacy) can have a destabilising effect that is more insidious and difficult to see.</p>	5.10-5.20
Extraordinary circumstances	O ⇔	Responsiveness of normal decision-making procedures	Extraordinary circumstances can test the effectiveness of normal decision-making procedures, particularly where decisions need to be made more quickly than the normal procedures can accommodate.	5.10-5.20
Heads of judicial review	S ⇔	Judicial review	This is not a causal link per se. It acknowledges that the heads of judicial review (grounds on which judicial review actions can be based) influence the availability of judicial review.	5.13-5.15

Link			Definition	Figures
Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	S ⇔	Decision-making processes contain proportionate engagement mechanisms	This link articulates that the participation intervention requires that communities be identified and rule of thumb engagement mechanisms be developed to inform decisions about what kind of participation will be proportionate to particular issues.	5.20
Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	S ⇔	Public participation	The intervention supports and reinforces the procedural norm of public participation.	5.20
Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	S ⇔	Extent to which communities are engaged on different recovery issues	The rule of thumb mechanism needs to be deployed in practice. This link asserts that if the mechanism is deployed, then communities will be engaged on recovery issues. The extent of the engagement should be informed by the rule of thumb mechanism.	5.20
Judicial review	S ⇔	Level of trust and confidence in decision-making procedures	The existence of judicial review pathways can boost trust and confidence in decision-making procedures by providing reassurance that poorly-made decisions can be revisited and by strengthening decision-makers' incentives to make decisions in compliance with norms.	5.15
Level of acceptance by the public	S ⇔	Level of trust and confidence in decision-making procedures	A pattern of public acceptance of decisions is assumed to reinforce trust and confidence in decision-making procedures: it would be counter-intuitive for a decision-making procedure that was noticeably deficient and not trusted to consistently produce decisions that were accepted by the public, given that the procedure and the people are inculcated in the same set of constitutional values.	5.10-5.20
Level of acceptance by the public	O ⇔	Level of use of appeals and reviews	High levels of acceptance of decisions are likely to result in low numbers of appeals and reviews being sought. Low levels of acceptance might see an increase in the numbers of appeals and reviews being sought, although other factors will influence demand for legal aid and court services.	5.13
Level of acceptance by the public	O ⇔	Judicial review	High levels of acceptance of decisions are likely to result in low numbers of appeals and reviews being sought. Low levels of acceptance might see an increase in the numbers of appeals and reviews being sought, although other factors will influence demand for legal aid and court services.	5.15
Level of acceptance by the public	S ⇔	Decisions are accepted by the public	This link reflects that high levels of public acceptance of decisions will achieve one of the success factors.	5.13, 5.15
Level of decision-makers' awareness of norms	S ⇔	Strength of influence of norms and values on decision-makers	It seems logical to assume that the more aware decision-makers are of norms, the stronger the influence those norms will have: it is difficult for norms to have any influence if decision-makers are unaware of them.	5.10-5.20
Level of trust and confidence in decision-makers	S ⇔	Level of trust and confidence in decision-making procedures	The value of pragmatism requires that decision-making procedures have some wriggle-room to deal with unforeseen circumstances. Decision-makers must be trustworthy, because their role often involves following constitutional norms and procedures wherever possible, but always acting consistently with constitutional values. Trusted decision-makers will therefore tend to reinforce trust and confidence in decision-making procedures	5.10-5.20
Level of trust and confidence in decision-makers	S ⇔	Decisions and their reasons are publicly available and understood	When people trust decision-makers they are more likely to engage effectively with decision-making processes. That, and their their expectations, incentivises decision-makers to comply with norms. Here that means complying with transparency norms, which means people are more likely to access and understand decisions.	5.12
Level of trust and confidence in decision-making procedures	O ⇔	Evolution of normal decision-making procedures	When there is high trust and confidence in decision-making procedures, there is little reason to tinker with those procedures to make them more effective or responsive. Conversely, where the public do not have confidence in procedures, perhaps because they are not sufficiently responsive in a crisis situation, there are strong reasons to alter those procedures, to make them more effective and responsive.	5.10-5.20
Level of trust and confidence in decision-making procedures	S ⇔	Public perceptions of legitimacy	Trust and confidence in decision-making procedure reinforces legitimacy of the decisions generated using the system, and of the decision-makers. The counterfactual seems true: if the legitimacy of decisions and decision-makers was perceived as being poor, it is unlikely that the public would have much trust and confidence in the decision-making procedures producing the decisions in question.	5.10-5.20
Level of trust and confidence in decision-making procedures	S ⇔	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	When decision-making procedures are well-trusted, that is likely to to build trust in the constitutional settings enabling those procedures. Confidence is likely to be implicit and built over a longer timescale than the three-year parliamentary term.	5.13, 5.18-5.20
Level of trust and confidence in decision-making procedures	S ⇔	Decisions are accepted by the public	When there is a high level of trust and confidence in decision-making procedures, people are more likely to accept decisions made using those procedures. There will be more suspicion of decisions if there are poor levels of trust and confidence in decision-making procedures.	5.17
Level of use of appeals and reviews	S or O ⇔	Extent to which decision-makers comply with procedural and substantive norms	The use of appeals and reviews can incentivise decision-makers' compliance with norms. The polarity of this link is not clear. High levels of use might incentivise compliance so as to avoid becoming entangled in reviews or appeals. Similarly, low levels of use might also incentivise compliance so as to avoid becoming entangled in reviews or appeals.	5.13

Link			Definition	Figures
Level of use of appeals and reviews	S ⇔	Demand for legal aid and/or court services	When the numbers of reviews and appeals increase, so too does demand for court services and, depending on civil legal aid thresholds, demand for legal aid	5.13
Liberalism	S ⇔	Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	The liberal idea that people are best served by being free to make their own choices suggests that communities will expect to be involved in recovery decision-making that affects them.	5.20
Maintain consistency with rule of law, human rights norms, and common law norms	S ⇔	Stability and strength of procedural and substantive norms	Ensuring that the recovery is conducted in a way that is consistent with the rule of law, human rights norms, and common law norms (i.e. consistently with procedural and substantive norms) will tend to stabilise and strengthen those norms by assuming that they are relevant and appropriate for the recovery.	5.18
Maintain consistency with rule of law, human rights norms, and common law norms	O ⇔	Enable limited departures from norms, confined to earthquake recovery, with judicial supervision	This link reflects that maintaining consistency with norms is the opposite of allowing departures from those norms, however limited.	5.19
Māori constitutional values	S ⇔	Egalitarianism and fairness	This is not strictly a causal link, but Māori constitutional values, particularly ideas of tikanga and rangatiratanga, resonate with ideas of egalitarianism and fairness. Marae protocols, for instance, dictate how debates are carried out, so that all perspectives are heard and considered before decisions are made (Potaka, 2010). The rangatiratanga of iwi implies that Crown policies should not give one iwi an unfair advantage over others (M S R Palmer, 2008, pp. 116-117).	5.10-5.20
Māori constitutional values:	S ⇔	Strength of expectations of fairness	Because of the resonance between Māori constitutional values and egalitarianism and fairness, Māori constitutional values will strengthen expectations of fairness.	5.10-5.20
Perceptions of need for speed	O ⇔	Central and local government maintain ‘peacetime’ roles in recovery	When central government strongly perceives the need for speedy decision-making, it is likely to view decentralised decision-making by local authorities as too slow.	5.16
Perceptions of need for speed	O ⇔	Extent to which decision-makers comply with procedural and substantive norms	When decision-makers strongly perceive a need for speedy decision-making, they are less likely to comply with procedural and substantive norms that are seen as ‘constitutional niceties’ that get in the way of sensible decision-making.	5.16
Perceptions of utility of legal action	S ⇔	Appeals / judicial review	When people perceive that legal action is useful (i.e. it gives them tangible benefits), they are more likely to lodge appeals or seek judicial review. Conversely, people are unlikely to use legal action if they perceive it is unlikely to result in any benefits.	5.13-5.15
Pragmatism	S ⇔	Strength of influence of norms and values on decision-makers	Pragmatism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations.	5.10-5.20
Pragmatism	S ⇔	Public expectations of expedient decision-making	The value of pragmatism manifests as an expectation that decision-makers will modify procedures as required to get things done in times of crisis.	5.10-5.20
Pragmatism	O ⇔	Separation of powers: <ul style="list-style-type: none"> Parliament keeps control of legislation Executive administers and implements legislation Courts enforce and scrutinise compliance 	Because pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007), it is unlikely to be consistent with strict observance of the separation of powers in all circumstances.	5.16
Pragmatism	S ⇔	Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	Pragmatism suggests that there may be less noise about decisions in the long-term if the communities affected by those decisions are involved (even co-opted) in the decision-making process.	5.20
Pragmatism	S ⇔	Perceptions of need for speed	Pragmatism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations. It is likely to drive up central government’s perceptions that recovery decisions need to be enabled so they can be made quickly.	5.16

Link			Definition	Figures
Pragmatism	S ⇔	Strength of perceived need for speed	Pragmatism is a strongly prevailing constitutional value in New Zealand that is particularly apparent when extraordinary circumstances (like the Canterbury earthquakes) arise. Decision-makers inculcated in New Zealand values are likely to be influenced by this value internally, as well as in responding to public expectations. It is likely to drive up central government's perceptions that recovery decisions need to be enabled so they can be made quickly.	5.17
Pragmatism / authoritarianism	O ⇔	Restraint	Restraints on the use of public power are not really consistent with the values of pragmatism and authoritarianism, which tend to prize taking command and acting to resolve problem situations, often without too much consideration of the constitutional principles involved.	5.17
Pragmatism / authoritarianism	O ⇔	Maintain consistency with rule of law, human rights norms, and common law norms	Pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007). Authoritarianism manifests as expectations that a strong leader will take charge and take the steps needed to resolve a problem situation. Together, these values are unlikely to be consistent with strict observance of procedural and substantive norms in all circumstances.	5.18, 5.19
Pragmatism / authoritarianism	S ⇔	Enable limited departures from norms, confined to earthquake recovery, with judicial supervision	Pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007). Authoritarianism manifests as expectations that a strong leader will take charge and take the steps needed to resolve a problem situation. Together, these values support departures from norms where those departures will expedite earthquake recovery.	5.19
Procedural constitutional norms	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	This is not really a causal link, but rather observes that a range of procedural constitutional norms apply to decision-making, and that decision-makers are expected to comply with those norms.	5.10-5.20
Public expectations of expedient decision-making	O ⇔	Extent to which decision-makers comply with procedural and substantive norms	Assuming there are feedback links between decision-makers and public opinion, it is likely that strong public expectations of expedient decision-making will reduce the extent to which decision-makers comply with procedural and substantive norms. Decision-makers are more likely to feel incentives to make decisions expediently in order to keep faith with the public.	5.10-5.20
Public expectations of expedient decision-making	O ⇔	Level of trust and confidence in decision-making procedures	When there are strong public expectations of expedient decision-making, that is likely to reduce the level of trust and confidence in extant decision-making procedures.	5.10-5.20
Public expectations of expedient decision-making	O ⇔	Substantive constitutional norms: <ul style="list-style-type: none"> • Representative democracy • Parliamentary supremacy • Rule of law 	In the context of extraordinary circumstances, public expectations of expedient decision-making (driven by the constitutional values of pragmatism and authoritarianism) are unlikely to be met by full adherence to the substantive constitutional norms of representative democracy, parliamentary supremacy, and the rule of law.	5.17
Public expectations of expedient decision-making	S ⇔	Centralise control over recovery in executive and limit judicial supervision	Public expectations of expedient decision-making are likely to influence government to seek to centralise control over the recovery and to limit judicial supervision, because of the resonance with the constitutional values of pragmatism and authoritarianism: if government is affected by these values public expectations may find a sympathetic home.	5.17
Public perceptions of legitimacy	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	Legitimacy tends to become self-reinforcing. Where decisions and decision-makers are perceived as having high levels of legitimacy, that will give decision-makers incentives to continue making decisions using the procedures that have strengthened legitimacy.	5.10-5.20
Public trust in central government	S ⇔	Level of trust and confidence in decision-makers	In the recovery, many of the decisions at issue were made by central government. It stands to reason that the more trust the public had in central government, the greater their levels of trust in central government decision-makers	5.11-5.20
Reasons for decisions are given	S ⇔	Procedural constitutional norms	Providing reasons for decisions supports strengthens compliance with procedural constitutional norms in the same way as publishing decisions. Making the reasoning available incentivises proper consideration in decision-making. It also supports the rule of law by helping to make the application of the law predictable - as a body of decision-making 'jurisprudence' emerges, people are better able to predict how a decision-maker will respond in different circumstances.	5.12
Reasons for decisions are given	S ⇔	Level of acceptance by the public	People find it easier to accept decisions (particularly decisions that are not in their favour) if they understand the reasons for those decisions because that helps to put decisions in their wider context. The constitutional value supporting this is probably fairness. This suggests that providing reasons for decisions should promote public acceptance, providing decisions accord with underlying constitutional values.	5.12
Reasons for decisions are given	S ⇔	Decisions and their reasons are publicly available and understood	When decisions and their reasons are publicly available, that should achieve the success factor that decisions and their reasons are publicly available and understood.	5.12
Reasons for decisions are given	S ⇔	Decisions withstand public and/or judicial scrutiny of procedure and substance	When reasons for decisions are given, decisions are more likely to withstand scrutiny because people will be better able to understand the reasons, and because decision-makers are more likely to follow procedures that will result in a defensible decision.	5.12

Link			Definition	Figures
Relevance of procedural and substantive norms	S ⇔	Level of trust and confidence in decision-making procedures	When procedural and substantive norms resonate with the public by being seen as relevant and important, then decision-making procedures based on those norms will be more trusted.	5.10-5.20
Relevance of procedural and substantive norms	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	The more relevant norms norms are the stronger the incentives will be on decision-makers to comply with norms, which should result in them being complied with more often. Consistent non-compliance with norms may well be a symptom of their declining relevance.	5.10-5.20
Relevance of procedural and substantive norms	S ⇔	Stability and strength of constitutional norms	The more relevant norms norms are the stronger and more stable their content will be, assuming that relevance translates into acceptance of, and support for norms.	5.10-5.20
Relevant considerations specified for decision-making processes	S ⇔	Judicial review	When decision-making frameworks specify relevant considerations, that provides a structure for scrutiny of the decision - the courts can test whether the decision-maker has taken into account the relevant considerations and ignored irrelevant considerations. Specifying the relevant considerations limits the courts' opportunity to augment the framework by specifying relevant considerations.	5.13, 5.15
Relevant considerations specified for decision-making processes	S ⇔	Extent to which decision-making is predictable	The existence of relevant considerations enhances predictability of decision-making by offering a set of considerations that are applied consistently to a range of decisions.	5.15
Responsiveness of normal decision-making procedures	O ⇔	Public expectations of expedient decision-making	When the normal decision-making procedures are sufficiently responsive to the exigencies of any givens situation, that will dampen down expectations of expedient decision-making. Conversely, when a decision-making procedure is not responsive, and is seen as cumbersome or bureaucratic, that is likely to boost expectations of expediency.	5.10-5.20
Restraint	S ⇔	Strength of influence of norms and values on decision-makers	Restraint is a procedural norm and as such is one source of influence on decision-makers.	5.17
Restraint	O ⇔	Pragmatism / authoritarianism	Restraints on the use of public power are not really consistent with the values of pragmatism and authoritarianism, which tend to prize taking command and acting to resolve problem situations, often without too much consideration of the constitutional principles involved.	5.17
Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	S ⇔	Appeals / judicial review	The existence of review and appeal pathways will mean that there can be appeals and judicial review cases.	5.13
Review and appeal pathways for decisions and actions affecting personal / property rights and access to services	S ⇔	Strength of expectations of fairness	The very existence of judicial review and appeal pathways can reinforce expectations of fairness by providing a means of challenging decisions. It also sends a signal that expectations of fairness are legitimate, which will tend to reinforce those expectations.	5.19
Rule of law	S ⇔	Stability and strength of procedural and substantive norms	When the rule of law is overtly complied with, that strengthens and stabilises it as a constitutional norm. Conversely, if the rule of law is weakened through consistent non-compliance, that will destabilise it, and send weaker signals to decision-makers and the public about its function as a constitutional norm.	5.11
Rule of law	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	When the rule of law is overtly recognised and built in to decision-making procedures, that increases decision-makers' compliance with substantive constitutional norms.	5.11
Separation of powers built in to decision-making structures	S ⇔	Central and local government maintain 'peacetime' roles in recovery	This is not strictly a causal link. It reflects one kind of separation of functions, which is the division of functions between central and local government. Local government functions are specified under existing law, including the Local Government Act 2002, the Resource Management Act 1991 and the Building Act 2004. This intervention proposes maintaining the separation of functions under those Acts for earthquake recovery purposes.	5.16
Separation of powers built in to decision-making structures	S ⇔	Separation of powers: <ul style="list-style-type: none"> • Parliament keeps control of legislation • Executive administers and implements legislation • Courts enforce and scrutinise compliance 	This link describes the effect of the intervention, which is the division of power and responsibility between the three identified branches of state.	5.16

Link			Definition	Figures
Separation of powers built into decision-making structures	O ⇔	Centralise control over recovery in executive and limit judicial supervision	If the separation of powers is built into decision-making structures, that will create the opposite of centralised control and limited judicial supervision.	5.17
Stability and strength of constitutional values	O ⇔	Evolution of constitutional values	The stronger and more stable values are, the less likely they are to change and evolve. Conversely, the weaker and less stable they are, the more likely it is that decision-makers will draw on other values to guide their decision-making.	5.10-5.20
Stability and strength of constitutional values	O ⇔	Evolution of procedural and substantive norms	This link responds to the relationship between norms and values. IN essence, if constitutional values are stable and strong, and reflected in norms, there’s no reason for the norms to change. If, however, constitutional values are shifting and do not resonate with constitutional norms, it is likely that decision-makers will reinterpret norms or apply them differently to reduce the dissonance between norms and values.	5.10-5.20
Stability and strength of procedural and substantive norms	S ⇔	Level of decision-makers’ awareness of norms	The stronger and more stable norms are, the more aware of them decision-makers are likely to be. Conversely, the weaker and less stable norms are, the less coherent they are likely to be in decision-makers’ collective awareness.	5.10-5.20
Stability and strength of procedural and substantive norms	O ⇔	Evolution of procedural and substantive norms	The stronger and more stable norms are, the less likely they are to change and evolve. Conversely, the weaker and less stable they are, the more likely it is that decision-makers will interpret and apply them differently, leading to evolution of the norms.	5.10-5.20
Stability and strength of procedural and substantive norms	S ⇔	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	When the norms governing recovery decision-making are stable and strong, people will be able to have confidence in the decision-making framework and, by extrapolation, in the constitutional settings governing that framework. Confidence may be implicit, and built over a longer period than the three-year parliamentary term.	5.12, 5.19
Stability and strength of procedural and substantive norms	S ⇔	Relevant considerations specified for decision-making processes	When procedural and substantive norms are strong and stable by virtue of public confidence in them, that will reinforce the desirability of specifying relevant considerations for decision-making to keep decision-making compliant with norms.	5.15
Stability and strength of procedural and substantive norms	S ⇔	Stability and strength of constitutional values	The stronger and more stable norms are, the more they will resonate with, and reinforce, underlying constitutional values.	5.10-5.20
Strength of expectations of fairness	S ⇔	Level of acceptance by the public	Meeting expectations of fairness causes acceptance of decisions because of the strongly prevailing constitutional value of fairness. Decisions that are objectively fair will have a level of public acceptance even by people whose interests are not met by the decisions in question.	5.10-5.20
Strength of influence of norms and values on decision-makers	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	The stronger the influence of norms and values on decision-makers, the more decision-makers are likely to comply with procedural and substantive norms. While the influence of values is implicit and even unconscious, it will tend to reinforce compliance with norms shored up by those values. If decision-makers do not comply with norms, that may raise a question about the strength of those norms and their underpinning values.	5.10-5.20
Strength of perceived need for speed	S ⇔	Centralise control over recovery in executive and limit judicial supervision	Where the government strongly perceives the need for speed in recovery decision-making, it is likely to want to centralise control over the recovery and to limit judicial supervision because dispersed or coordinated decision-making is likely to take more time than centralised decision-making and because reviews and appeals can slow down decision-making (because of the time needed to conclude a review or appeal, and because decisions may have to be revisited following a successful review or appeal).	5.17
Substantive constitutional norms	S ⇔	Extent to which decision-makers comply with procedural and substantive norms	This is not really a causal link, but rather observes that a range of substantive constitutional norms will apply to decision-making, depending on context, and that decision-makers are expected to comply with those norms. In Chapter V, the substantive constitutional norm of primary importance is the rule of law. It is, thus, identified on Figures 5.10-5.20. In other contexts, different substantive norms will be relevant (Chapter VII sets out a range of substantive norms applying to Henry VIII clauses).	5.10-5.20
Substantive constitutional norms	S ⇔	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	Generally, the more decision-makers comply with procedural and constitutional norms, the more confidence people will have in the constitutional settings enabling recovery decision-making because decisions are likely to resonate with the constitutional values underpinning the norms.	5.17
The public has confidence in decision-makers	S ⇔	The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	When people have confidence in decision-makers that is likely to reinforce their confidence in the constitutional settings giving those decision-makers their functions. Confidence is likely to be implicit and built over a longer timescale than the three-year parliamentary term.	5.11, 5.12, 5.14, 5.16
The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	S ⇔	Stability and strength of constitutional norms	When the public has confidence in the settings for the recovery framework, that will stabilise and strengthen constitutional norms because those norms will be seen to have been valuable in the recovery framework and instrumental in legitimising recovery decisions. Stabilisation may take place over a longer timescale than the three year parliamentary term.	5.11, 5.13, 5.15, 5.16, 5.17

Link			Definition	Figures
The public has ongoing confidence in constitutional settings enabling the recovery decision-making framework	S ⇨	Identify affected communities, develop rule of thumb engagement mechanisms proportionate to magnitude of decision	Public confidence is likely to manifest as a level of satisfaction and a comparative absence of ‘noise’ about decisions (e.g. angry letters, negative news articles, public protests). Public confidence should incentivise decision-makers to continue to use decision-making methods that produced satisfaction and the lack of noise. However, the confidence may be implicit and hard to see, so this link may only manifest over a number of years. That may make it a relatively unhelpful piece of feedback for recovery decision-making.	5.20

Table TA2.2 Chapter 6 (Figures 6.7, 6.9-6.11)

Unless specified, the default timescale is 12 months.

Link			Definition	Figures
Additional workforce, materials, and equipment	S ⇔	Capacity	Additional workforce, materials, and equipment by definition boosts capacity.	6.10
Affordability of resources	S ⇔	The right resources obtained	As resources become more affordable, more resources can be obtained without affecting profit margins or budgets. As resources become less affordable, fewer resources may be obtained as organisations make hard choices about how much they can afford to buy.	6.7, 6.9-6.11
Amount of resources brought into region	S ⇔	Price	As more resources are brought into the region, price will decrease (prices tend to increase as resources become more scarce).	6.7, 6.9-6.11
Availability of capital investment for rebuild	O ⇔	Financial incentives not to coordinate and cooperate	When there is plenty of capital investment for the rebuild, organisations will have more certainty about securing investment at the time when they need it, regardless of when the repairs in their area are scheduled. If organisations have to compete for scarce capital investment, their financial needs may outweigh the ‘common good’ element in coordination and cooperation.	6.9-6.11
Availability of capital investment for rebuild	S ⇔	Levels of general public confidence in the recovery	The more capital investment there is for the rebuild, the more people will have confidence that the recovery will succeed. Capital investment will provide the tangible signs of recovery as new buildings are erected and damaged buildings are repaired.	6.9-6.11
Availability of insurance underwriting	S ⇔	Financial viability of insurance companies	When insurance underwriting is available, insurance companies can meet their claims obligations without having to incur debt or maintain significant levels of funds in an easily liquidated form.	6.9-6.11
Availability of land for rebuilding	S ⇔	Number of consents sought	In the earthquake recovery context, when land is made available for rebuilding, people with an interest in that land are likely to seek consents to build on it.	6.9-6.11
Boost capacity of consenting, inspection, and insurance processes	S ⇔	Additional workforce, materials, and equipment	An intervention to boost capacity of consenting, inspection, assessment and insurance processes will require additional workforce, materials, and equipment.	6.10
Building and infrastructure repairs have consents where they would normally be required	S ⇔	Building and infrastructure repairs meet quality and safety standards	The quality and safety system for building assumes that where building and repair work has consents, that work will meet quality and safety standards because the consent process enables that work to be supervised and checked against the standards.	6.9, 6.10
Building and infrastructure repairs have consents where they would normally be required	O ⇔	Level of avoidance of quality standards	By definition, the more work that has consents, the less avoidance there will be of quality and safety standards. When more work is consented, that will create expectations that work will be consented, which is likely to push non-compliance to the margins.	6.9
Building and infrastructure repairs meet quality and safety standards	S ⇔	Levels of general public confidence in the recovery	When buildings and repairs meet quality and safety standards, that will tend to reinforce public confidence in the recovery because people will view the city as becoming resilient.	6.9-6.11
Capacity	S ⇔	Speed and quality of inspection services	Identifying the primary constraint on inspection services and boosting its capacity will allow delivery targets to be met without compromising quality.	6.7, 6.9-6.11
Capacity	S ⇔	Speed and quality of consent services	Identifying the primary constraint on consent services and boosting its capacity will allow delivery targets to be met without compromising quality.	6.7, 6.9-6.11
Capacity	S ⇔	Speed and quality of land assessment	Identifying the primary constraint on land assessment services and boosting its capacity will allow delivery targets to be met without compromising quality.	6.7, 6.9-6.11
Capacity	S ⇔	Speed and quality of insurance assessment / claims determination	Identifying the primary constraint on insurance assessment and claims determination its capacity will allow delivery targets to be met without compromising quality.	6.7, 6.9-6.11
CBD cordon	O ⇔	Speed and quality of land assessment	Restricted access will prevent land assessments behind the cordon.	6.9-6.11
CBD cordon	O ⇔	Speed and quality of insurance assessment / claims determination	Restricted access will slow down insurance assessments and claims determinations, if assessors cannot inspect properties.	6.9-6.11
CBD cordon	O ⇔	Number of consents sought	Restricted access will reduce the number of consents sought in relation to properties behind the cordon - there is little point in obtaining a consent to build on land that may not be accessible for an indeterminate time.	6.9-6.11

Link			Definition	Figures
Cost and availability of alternative accommodation (commercial and residential)	S ⇔	Financial incentives not to coordinate and cooperate	If alternative accommodation is reasonably affordable, people and organisations are more likely to comply with sequencing of repairs and to cooperate with others to coordinate repairs. Conversely, if alternative accommodation is relatively unaffordable, people and organisations have strong incentives to promote their own repairs above the common good.	6.9-6.11
Demand for land assessment services	O ⇔	Speed and quality of land assessment	As demand for services increases, speed or quality will decrease assuming capacity remains the same. Quality can be compromised to maintain the same delivery times, and timeliness can be compromised to maintain quality.	6.7, 6.9-6.11
Durable, fit for purpose repairs and rebuilds	S ⇔	Quality and safety standards for repairs and rebuilds	When repairs and rebuilds are durable and fit for purpose, that will strengthen the case for the regulated standards that are designed to ensure durable, fit for purpose buildings. Conversely, if buildings meet those regulated standards but prove not to be durable or fit for purpose, that will undermine support for those standards. This link may take some years to be felt, given that problems with buildings can take some years to manifest.	6.7, 6.9-6.11
Durable, fit for purpose repairs and rebuilds	S ⇔	Resources sought (appropriately skilled workforce, materials, equipment)	When repairs are durable and fit for purpose, that will reinforce the behaviour of seeking the right resources in terms of appropriately skilled workforce and quality materials. It will also incentivise tradespeople to build in the same way, relying on appropriate quality materials and an appropriately skilled workforce.	6.7, 6.9-6.11
Durable, fit for purpose repairs and rebuilds	S ⇔	Number of consents sought	To ensure repairs and rebuilds are durable and fit for purpose, the law may require building consents be obtained. That will mean consents will have to be sought.	6.7, 6.9-6.11
Durable, fit for purpose repairs and rebuilds	S ⇔	Building and infrastructure repairs meet quality and safety standards	When repairs and rebuilds are durable and fit for purpose they will, by definition, meet quality and safety standards. This link may take some years to be felt, given that problems with buildings can take some years to manifest.	6.9-6.11
Earthquake damage identified	S ⇔	Durable, fit for purpose repairs and rebuilds	The identification of earthquake damage will make many property owners want to seek durable, fit for purpose repairs and rebuilds, to protect their interest in the property and to house their families or businesses safely.	6.7, 6.9-6.11
Earthquake damage identified	S ⇔	Resources sought (appropriately skilled workforce, materials, equipment)	The identification of earthquake damage will make many property owners seek resources in the form of appropriately skilled tradespeople, and/or materials and equipment so they may repair or remediate the damage.	6.7, 6.9-6.11
Earthquake damage identified	S ⇔	Land assessments needed	The identification of earthquake damage may trigger a land assessment, if there is any question that the earthquake has changed the structure or boundaries of the land, so that people may protect their property interests and assess whether it is economic to rebuild on the affected land.	6.7, 6.9-6.11
Earthquake damage identified	S ⇔	Number of insurance claims made	The identification of earthquake damage will trigger insurance claims so that people may repair or replace property damaged in the earthquakes.	6.7, 6.9-6.11
Earthquake damage identified	S ⇔	Prioritise infrastructure repairs according to the common good	This is not strictly a causal link. Identifying earthquake damage is, however, a necessary precursor to the prioritisation process.	6.11
Financial and practical assistance to displaced people and businesses.	O ⇔	Financial incentives not to coordinate and cooperate	Providing financial and practical assistance will reduce the financial incentives not to coordinate and cooperate by mitigating the hardship that could be caused by prioritising and sequencing repairs.	6.11
Financial and practical assistance to displaced people and businesses.	S ⇔	Viability of businesses, infrastructure providers, public bodies not threatened by prioritisation of different areas for infrastructure repair	Providing financial and practical assistance will mitigate any hardship caused by prioritising and sequencing repairs, which should improve the financial viability of those affected by prioritisation.	6.11
Financial incentives not to coordinate and cooperate	S ⇔	Level of demand for consent services	When financial incentives put people's own interests ahead of the sequencing for the common good, it is likely to result in people seeking consents out of sequence, thus increasing demand for consent services	6.9-6.11
Financial incentives not to coordinate and cooperate	S ⇔	Level of demand for inspection services	When financial incentives put people's own interests ahead of the sequencing for the common good, it is likely to result in people seeking inspections and approvals out of sequence, thus increasing demand for inspection services	6.9-6.11
Financial incentives not to coordinate and cooperate	S ⇔	Level of demand for insurance assessment	When financial incentives put people's own interests ahead of the common good, it is likely to result in people seeking to progress their own repairs and rebuilds, thus increasing demand for speedy insurance settlement.	6.9-6.11
Financial incentives not to coordinate and cooperate	S ⇔	Level of demand for land assessment services	When financial incentives put people's own interests ahead of the sequencing for the common good, it is likely to result in people seeking land assessment out of sequence, thus increasing demand for assessment services	6.9-6.11
Financial incentives not to coordinate and cooperate	S ⇔	Resources sought (appropriately skilled workforce, materials, equipment)	When financial incentives put people's own interests ahead of the sequencing for the common good, it is likely to result in people seeking to progress their repairs and rebuilds out of sequence, thus increasing demand for resources.	6.9-6.11

Link			Definition	Figures
Financial viability of insurance companies	S ⇔	Number of insurance claims determined	When insurance companies are confident in their financial viability, they have no reason to slow down determinations or to reject marginal claims. Thus, viability is likely to result in more determinations of insurance claims.	6.7, 6.9-6.11
Land assessment, insurance and consent processes are timely	O ⇔	Level of avoidance of quality standards	When assessment and consent processes are timely, there will be little reason to avoid using the processes, so that should see a reduction in the level of avoidance of quality standards.	6.9, 6.10
Land assessment, insurance and consent processes are timely	S ⇔	Building and infrastructure repairs have consents where they would normally be required	When these processes are timely, it is more likely that building and infrastructure repairs will have any required consents, because there will be fewer incentives to avoid the system.	6.10
Land assessment, insurance and consent processes are timely	S ⇔	Levels of general public confidence in the recovery	Land assessment, insurance, and consent processes are critical to people's decision-making about the future of their property, homes, and businesses. Enabling those processes to be completed in a timely way will give people certainty about their futures, which will give them confidence in the recovery. Conversely, if those processes are protracted, people will be in a state of uncertainty for longer, which will likely reduce their confidence in the recovery.	6.10
Land assessments needed	S ⇔	Demand for land assessment services	An increase in the number of land assessments sought will see a corresponding increase in demand for land assessment services, because capacity to conduct assessments will need to match the numbers sought if backlogs are to be avoided.	6.7, 6.9-6.11
Land assessments needed	S ⇔	Number of land assessments sought	Where land assessments are needed because there is some question as to land's viability for use or its earthquake resilience, that is likely to see an increase in the number of applications for land assessment.	6.7, 6.9-6.11
Level of avoidance of quality standards	O ⇔	Durable, fit for purpose repairs and rebuilds	A high level of avoidance of quality standards is likely to result in fewer repairs and rebuilds being durable and fit for purpose. A low level of avoidance (i.e. a high rate of compliance) is likely to result in more repairs and rebuilds being durable and fit for purpose. This link assumes that the quality standards are technically correct - that compliance with standards will result in durable, fit for purpose repairs and rebuilds.	6.9, 6.10
Level of avoidance of quality standards	O ⇔	Building and infrastructure repairs have consents where they would normally be required	A high level of avoidance of quality standards is likely to result in fewer building and infrastructure repairs having required consents. A low level of avoidance (i.e. a high rate of compliance) is likely to result in more building and infrastructure repairs having the required consents. This link assumes that consents are required for the work in question.	6.9
Level of capacity within region	O ⇔	Amount of resources brought into region	When there is more capacity in the region, less has to be brought in to boost capacity. Conversely, when the region has fewer resources, more will need to be brought in to boost capacity.	6.7, 6.9-6.11
Level of demand for consent services	O ⇔	Speed and quality of consent services	As demand for services increases, speed or quality will decrease assuming capacity remains the same. Quality can be compromised to maintain the same delivery times, and timeliness can be compromised to maintain quality.	6.7, 6.9-6.11
Level of demand for inspection services	S ⇔	Number of inspections completed and approvals granted	As demand for services increases, speed or quality will decrease assuming capacity remains the same. Quality can be compromised to maintain the same delivery times, and timeliness can be compromised to maintain quality.	6.7, 6.9-6.11
Level of demand for inspection services	O ⇔	Speed and quality of inspection services	As demand for services increases, speed or quality will decrease assuming capacity remains the same. Quality can be compromised to maintain the same delivery times, and timeliness can be compromised to maintain quality.	6.7, 6.9-6.11
Level of demand for insurance assessment	O ⇔	Speed and quality of insurance assessment / claims determination	As demand for services increases, speed or quality will decrease assuming capacity remains the same. Quality can be compromised to maintain the same delivery times, and timeliness can be compromised to maintain quality.	6.7, 6.9-6.11
Levels of general public confidence in the recovery	S ⇔	Public perceptions that recovery decisions are legitimate	Where the public has confidence in the recovery, there is likely to be a stronger perception that recovery decisions are legitimate (refer to the definition of legitimacy in Table TA1, and the discussion in Chapter II).	6.9, 6.10
Maintain extant quality and safety standards for repairs and rebuilds	S ⇔	Quality and safety standards for repairs and rebuilds	An intervention to maintain extant quality and safety standards will result in quality and safety standards being implemented.	6.9
Number of compliant plans for rebuilds	S ⇔	Durable, fit for purpose repairs and rebuilds	Where plans for rebuilds comply with standards and consent conditions, it is reasonable to expect the rebuilds will be durable and fit for purpose, assuming the build follows the plans.	6.7, 6.9-6.11
Number of consents granted	O ⇔	Number of consents sought	As more consents are granted, over time that can be expected to reinforce that consents need to be sought for building work, which should see an increase in the number of consents. There may be a delayed reaction before the effect of this link is felt, given the timescale on which building takes place and because it is, essentially, a behavioural change.	6.7, 6.9-6.11
Number of consents granted	S ⇔	Number of inspections and approvals needed	Where building work requires a consent, it usually requires an inspection to ensure relevant buildings standards and any consent conditions have been met. Therefore, if more consents are granted, more inspections and approvals will be needed.	6.7, 6.9-6.11
Number of consents granted	S ⇔	Number of compliant plans for rebuilds	The more consents that are granted, the more compliant plans there will be , because the plans will have been scrutinised in the consent process.	6.7, 6.9-6.11

Link			Definition	Figures
Number of consents granted	S ⇔	Durable, fit for purpose repairs and rebuilds	Assuming the consents process is the entry point for quality, as the number of consents increases, so too should the number of durable fit-for-purpose rebuilds and repairs, all things being equal. A delayed effect is likely, given the time needed to build houses.	6.7, 6.9-6.11
Number of consents granted	S ⇔	Resources sought (appropriately skilled workforce, materials, equipment)	This is more of a process link than a causal link. When people have consents for rebuilds or repairs, they will be able to seek the resources needed to commence work. People might line up resources ahead of the consent being granted.	6.11
Number of consents granted	S ⇔	Building and infrastructure repairs have consents where they would normally be required	When more consents are granted, more repairs will have consents where they would normally be required.	6.11
Number of consents sought	S ⇔	Number of consents granted	An increase in the number of consents sought should see a corresponding increase in the number of consents granted, assuming there have been no other policy setting changes that have incentivised the seeking of consents in circumstances where consents are unlikely to be granted.	6.7, 6.9-6.11
Number of consents sought	S ⇔	Level of demand for consent services	An increase in the number of consents sought will see a corresponding increase in demand for consent services, because capacity to process consents will need to match the level of consents sought if backlogs are to be avoided.	6.7, 6.9-6.11
Number of inspections and approvals needed	S ⇔	Level of demand for inspection services	An increase in the number of inspections and approvals sought will see a corresponding increase in demand for inspection services, because capacity to conduct inspections will need to match the level of inspections sought if backlogs are to be avoided.	6.7, 6.9-6.11
Number of inspections completed and approvals granted	S ⇔	Level of demand for inspection services	As more inspections are completed and approvals granted, over time that can be expected to reinforce that consents need to be sought for building work, which should see an increase in the number of consents. There may be a delayed reaction before the effect of this link is felt, given the timescale on which building takes place and because it is, essentially, a behavioural change.	6.7, 6.9-6.11
Number of inspections completed and approvals granted	S ⇔	Durable, fit for purpose repairs and rebuilds	As more inspections are completed and approvals granted, that can be expected to increase the numbers of repairs and buildings that are durable and fit for purpose, assuming that inspectors are competent and approvals are consistent with building standards. Conversely, if fewer inspections are completed, that will result in a greater proportion of uninspected work. Over time, reduced inspection is likely to incentivise the cutting of corners, which may decrease standards and mean building work is not durable and fit for purpose.	6.7, 6.9-6.11
Number of inspections completed and approvals granted	O ⇔	Land assessment, insurance and consent processes are timely	The more inspections and approvals that have to be completed, the longer it will take for those processes to be done, assuming there are no increases to capacity. That will make the processes less timely.	6.11
Number of insurance claims determined	S ⇔	Number of insurance claims made	As more insurance claims are determined, over time that can be expected to increase the numbers of claims made as customers shift to insurance companies with a track record of fairly settling insurance claims. There may be a delayed reaction before the effect of this link is felt, given that it is, essentially, a behavioural change.	6.7, 6.9-6.11
Number of insurance claims determined	S ⇔	Number of consents sought	As insurance claims for earthquake damage are determined, that is likely to increase the numbers of consents sought for building work: people are more likely to initiate building work when they know they have the funds required for it. This link assumes building consents are required for remedial structural repairs (which are currently exempt from consent requirements under the Building Act).	6.7, 6.9-6.11
Number of insurance claims determined	S ⇔	Availability of capital investment for rebuild	The more insurance claims that are determined, the more capital investment there will be for the rebuild: many (if not most) people will use insurance payouts to fund their rebuilds.	6.9-6.11
Number of insurance claims made	S ⇔	Level of demand for insurance assessment	An increase in the number of insurance claims made will see a corresponding increase in demand for insurance assessment services, because capacity to process insurance claims will need to match the number of claims if backlogs are to be avoided.	6.7, 6.9-6.11
Number of insurance claims made	S ⇔	Number of insurance claims determined	An increase in the number of insurance claims made should see a corresponding increase in the number of claims determined, all things being equal.	6.7, 6.9-6.11
Number of insurance claims made	O ⇔	Financial viability of insurance companies	An increase in the number and quantum of insurance claims made could undermine the financial viability of insurance companies if they are unable to pay out on claims.	6.7, 6.9-6.11
Number of land assessments determined	S ⇔	Number of land assessments sought	As more land assessments are done, over time that can be expected to reinforce that land assessments are desirable (particularly if consents or insurance becomes contingent on a land assessment). There may be a delayed reaction before the effect of this link is felt because it is, essentially, a behavioural change.	6.7, 6.9-6.11
Number of land assessments determined	S ⇔	Number of consents sought	As land assessments are completed, that is likely to increase the numbers of consents sought for building work: people are more likely to initiate building work when they know it is feasible to build on their land.	6.7, 6.9-6.11
Permitted land use	S or O ⇔	Availability of land for rebuilding	Permitted land use under a district plan may either increase or reduce the availability of land for rebuilding.	6.9-6.11
Price	S ⇔	Level of capacity within region	Normal operation of markets suggests that where the price of something goes up, the capacity will also go up as suppliers flock to that market.	6.7, 6.9-6.11

Link			Definition	Figures
Price	O ⇔	Affordability of resources	Normal operation of markets suggests that where the price of something goes up, its affordability will decrease, assuming purchasers' buying power is unchanged.	6.7, 6.9-6.11
Prioritise and sequence access to consents processes and resources	O ⇔	Boost capacity of consenting, inspection, and insurance processes	The more prioritising and sequencing of access to the consents process, the less it is necessary to boost capacity of that process, because the prioritisation process can smooth demand.	6.11
Prioritise and sequence access to consents processes and resources	S ⇔	Prioritise infrastructure repairs according to the common good	This is not strictly a causal link. The intervention requires a prioritisation process to be put into place, which is organised around the common good.	6.11
Prioritise infrastructure repairs according to the common good	O ⇔	Level of demand for consent services	Prioritising infrastructure repairs will smooth demand for consent services by constricting inflow to the consents process.	6.11
Provide financial and practical assistance to displaced people and businesses	S ⇔	Prioritise and sequence access to consents processes and resources	Providing financial and practical assistance will mitigate any hardship caused by prioritising and sequencing repairs, which should enable the prioritisation process to be implemented with public support.	6.11
Quality and safety standards for repairs and rebuilds	S ⇔	Building and infrastructure repairs have consents where they would normally be required	The system for building standards uses the consent process as the primary means of supervising compliance with the system.	6.9
Quality and safety standards for repairs and rebuilds	S ⇔	Number of consents sought	Where standards exist for repairs and rebuilds, and those standards are imposed and regulated through a consenting system, the number of consents sought should increase.	6.7, 6.9-6.11
Recovery plans, including CBD recovery plan	S or O ⇔	Repairs prioritised to maximise public good	Recovery plans could prioritise repairs to maximise the common good, or could be prioritised according to some other criteria.	6.9-6.11
Recovery plans, including CBD recovery plan	S or O ⇔	Viability of businesses, infrastructure providers, public bodies not threatened by prioritisation of different areas for infrastructure repair	Recovery plans could include measures to ensure that the viability of businesses, infrastructure providers, and public bodies is not threatened by prioritisation of different areas for infrastructure repair. Alternatively, recovery plans might not include such measures.	6.9-6.11
Recovery plans, including CBD recovery plan	S or O ⇔	Levels of general public confidence in the recovery	Depending on their content and how they were made, recovery plans may increase or diminish public confidence in the recovery.	6.9-6.11
Recovery plans, including CBD recovery plan	O ⇔	Regional and district plans	Recovery plans override regional and district plans	6.9-6.11
Regional and district plans	S ⇔	Permitted land use	Regional and district plans establish permitted land uses, under normal circumstances.	6.9-6.11
Repair of infrastructure and public buildings prioritised to maximise the common good	S ⇔	Public perceptions that recovery decisions are legitimate	Prioritising repairs according to the common good is likely to enhance perceptions of legitimacy because the decisions will resonate with the constitutional value of egalitarianism and fairness (see Chapter II).	6.11
Repair work with consents can access resources without delay	S ⇔	Levels of general public confidence in the recovery	When consented work can access resources without delay, work can get started immediately. When people see work being undertaken, that will give them a sense of momentum, which will help to build confidence in the recovery.	6.11
Repair work with consents can access resources without delay	S ⇔	Repairs prioritised to maximise public good	If repair work with consents can access resources without delay, repairs will be able to be prioritised to maximise public good, given the sequencing and prioritisation at the consent stage.	6.11
Repair work with consents can access resources without delay	S ⇔	Building and infrastructure repairs meet quality and safety standards	If repair work with consents can access resources without delay, repairs are more likely to meet safety standards because prioritisation at consent stage will give public good repairs a head start.	6.11
Require repair work to be approved	S ⇔	Level of demand for inspection services	Where repair work has to be approved more inspections and approvals will be needed, so there will be more demand on these services.	6.9
Require repair work to be approved	S ⇔	Level of demand for consent services	Where repair work has to be approved, more consents will be needed, so there will be more demand on consent services.	6.9
Resources sought (appropriately skilled workforce, materials, equipment)	S ⇔	The right resources obtained	Where people seek particular resources for repairs and rebuilds, the market can be expected to supply the right resources subject to cost and availability.	6.7, 6.9-6.11

Link			Definition	Figures
Resources sought (appropriately skilled workforce, materials, equipment)	O ⇔	Affordability of resources	Market forces dictate that heightened demand for resources will increase price, if the level of resource remains the same.	6.7, 6.9-6.11
Speed and quality of consent services	O ⇔	Number of consents granted	The balance between speed and quality will limit the number of consents that can be processed and granted, assuming capacity is unchanged. If capacity increases, altering the balance between speed and quality, that will increase the number of consents that can be processed. Similarly if capacity decreases, that will also alter the balance between speed and quality, reducing the number of consents that can be processed.	6.7, 6.9-6.11
Speed and quality of consent services	O ⇔	Level of avoidance of quality standards	If consent services are timely and are known to contribute to durable, fit for purpose builds, people will have more incentives to seek consents, thus reducing the level of avoidance of quality standards.	6.9
Speed and quality of consent services	S ⇔	Land assessment, insurance and consent processes are timely	Increasing speed of consent processing helps to make it timely.	6.9, 6.10
Speed and quality of inspection services	O ⇔	Number of inspections completed and approvals granted	The balance between speed and quality will limit the number of inspections that can be completed, assuming capacity is unchanged. If capacity increases, altering the balance between speed and quality, that will increase the number of inspections that can be made. Similarly if capacity decreases, that will also alter the balance between speed and quality, reducing the number of inspections that can be made.	6.7, 6.9-6.11
Speed and quality of inspection services	S ⇔	Land assessment, insurance and consent processes are timely	Increasing speed of inspection services helps to make them timely.	6.9, 6.10
Speed and quality of inspection services	O ⇔	Level of avoidance of quality and safety standards	There is an inverse relationship between speed and quality of inspection services and the level of avoidance of quality and safety standards, assuming that delay is a cause of frustration for people seeking to complete a project.	6.9
Speed and quality of insurance assessment / claims determination	S ⇔	Number of insurance claims determined	The balance between speed and quality will limit the number of insurance claims that can be determined, assuming capacity is unchanged. If capacity increases, altering the balance between speed and quality, that will increase the number of determinations that can be made. Similarly if capacity decreases, that will also alter the balance between speed and quality, reducing the number of determinations that can be made.	6.7, 6.9-6.11
Speed and quality of insurance assessment / claims determination	S ⇔	Land assessment, insurance and consent processes are timely	Increasing speed of insurance claims determination helps to make it timely.	6.10
Speed and quality of land assessment	S ⇔	Number of land assessments completed	The balance between speed and quality will limit the number of assessments that can be completed, assuming capacity is unchanged. If capacity increases, altering the balance between speed and quality, that will increase the number of assessments that can be completed. Similarly if capacity decreases, that will also alter the balance between speed and quality, reducing the number of assessments that can be completed.	6.7, 6.9-6.11
Speed and quality of land assessment	S ⇔	Land assessment, insurance and consent processes are timely	Increasing speed of land assessment helps to make it timely.	6.10
The right resources obtained	S ⇔	Durable, fit for purpose repairs and rebuilds	The right resources, particularly good quality building materials and qualified, competent tradespeople, will help to ensure repairs and rebuilds are durable and fit for purpose.	6.7, 6.9-6.11
The right resources obtained	S ⇔	Repair work with consents can access resources without delay	By prioritising and sequencing public works, demand for resources can be smoothed, enabling repair work that has consents to access resources without delay.	6.11
Use of processes supporting legitimacy	S or O ⇔	Recovery plans, including CBD recovery plan	This is not strictly a causal link. It is shown to acknowledge the importance of using processes that support legitimacy to develop recovery plans because those plans will contribute to the overall effectiveness and legitimacy of the recovery. Those processes may or may not be used, which is why the link is shown as an 'S or O'.	6.9-6.11
Use of processes supporting legitimacy	S or O ⇔	Quality and safety standards for repairs and rebuilds	This is not strictly a causal link. It is shown to acknowledge the importance of using processes that support legitimacy to develop quality and safety standards for repairs and rebuilds because that will contribute to the overall effectiveness and legitimacy of the recovery. Those processes may or may not be used, which is why the link is shown as an 'S or O'.	6.9-6.11
Viability of businesses, infrastructure providers, public bodies not threatened by prioritisation of different areas for infrastructure repair	S ⇔	Repairs of infrastructure and public buildings prioritised to maximise the common good	When their ongoing financial viability is not threatened by prioritisation, businesses etc. will have fewer reasons to object to the prioritisation process, which means that repairs can be prioritised to maximise the public good.	6.11

Link			Definition	Figures
Viability of businesses, infrastructure providers, public bodies not threatened by prioritisation of different areas for infrastructure repair	S ⇔	Public perceptions that recovery decisions are legitimate	When the ongoing financial viability of businesses etc. is not threatened by prioritisation, people will be more likely to view this part of the approach to recovery as legitimate.	6.11

Table TA2.3 Chapter 7 (Figures 7.6-7.14)

Unless specified, the default timescale is the three-year parliamentary term.

Link			Definition	Figures
Acts receive royal assent	S ⇨	Level of acceptance of laws by the public	All Acts of Parliament that receive royal assent have a constitutional mandate and should, therefore, be accepted by the public as legitimately made and legally binding on them. To deny that the law is legitimately made and legally binding is to reject the constitutional basis of parliament’s authority to enact legislation.	7.6-7.14
Authoritarianism	S ⇨	Expedited law-making process	The value of authoritarianism manifests as high public expectations that government will will take charge and fix the problem (Palmer, 2007). It will create support for measures such as an expedited law-making process that enables the government to act swiftly and decisively to do what is needed to enable the recovery.	7.7
Authoritarianism	S or O ⇨	Extent of government openness to other views	Openness of government to other ideas and views is likely to be influenced by how strongly it feels the need to take charge and be seen as authoritative and in control.	7.6-7.14
Canterbury Earthquake Recovery Act 2011 - broad purpose provision blurred boundaries of law-making powers	O ⇨	Extent to which parliament supervises and controls use of delegated law-making powers	Parliament’s supervision and control of delegated law-making powers focuses on whether the use of those powers strays beyond the delegation. By widening and blurring the boundaries of law-making powers, the 2011 Act lessened parliament’s ability to supervise and control the use of those powers. The boundary was harder to police, and the wide ambit of the Act enabled more delegated legislation to be made within the Act's scope.	7.13
Canterbury Earthquake Recovery Act 2011 - broad purpose provision blurred boundaries of law-making powers	O ⇨	Rule of law	Blurred boundaries for delegated legislation undermine certainty in the law by leaving room for unconstrained or arbitrary law-making by the executive.	7.13
Committee of whole House tests bill	S ⇨	House accepts and enacts bill	If a bill passes its committee stage it is set down for third reading. Bills that pass committee stage invariably pass their third reading. Bills that do not pass committee stage are unlikely to pass third reading.	7.6-7.14
Committee of whole House tests bill	S ⇨	Unintended consequences are identified	The committee stage is parliament's final opportunity to consider a bill in detail after changes are made at select committee stage. Its detailed consideration can surface unintended consequences. This stage enables supplementary order papers, which can be used to remedy unintended consequences.	7.6-7.14
Committee of whole House tests bill	S ⇨	Perceived substantive value of committee of the whole House stage	When the committee of the whole House tests the bill and strengthens it as a result, that should increase the perceived substantive value of this stage.	7.6-7.14
Constitutional values	S ⇨	Strength of influence of norms on law-makers	Constitutional values can drive compliance with constitutional norms because of the relationship between values and norms. Constitutional values can resonate with norms, strengthening the meaning of the norm at a personal level with law-makers, which strengthens the norm’s influence on law-makers (Palmer, 2007). This tends to happen at an unconscious level, because values can be thought of as mental models (Maani & Cavana, 2007). This link is likely to emerge over an extended period of time.	7.6-7.14
Constitutional values	S or O ⇕	Substantive constitutional norms	This is a two-way link: norms and values influence each other. Constitutional norms that are supported by constitutional values are more likely to be observed in day-to-day constitutional operations (Palmer, 2007). Similarly, constitutional norms can reinforce their underlying constitutional values. Laws that are consistent with constitutional norms are likely to be supported by constitutional values, and laws that are consistent with constitutional values are likely to be broadly consistent with constitutional norms.	7.6-7.14
Consult or engage as appropriate for the scale, importance, and urgency of the issue	S ⇨	Unintended consequences are identified	Consulting and engaging with the people who will be regulated, and who are affected by the regulation, will surface additional perspectives on how the regulation will work in practice, which will help to identify unintended consequences.	7.14

Link			Definition	Figures
Decisions to modify the law are subject to judicial review	O ⇔	Limit judicial review through: <ul style="list-style-type: none"> • privative clauses to remove justiciability • wide purpose clause to limit effectiveness of ultra vires as a ground of review 	This intervention seeks to ensure that the expedited law-making power is subject to judicial scrutiny to ensure that the power is not used beyond its scope. Judicial scrutiny can be limited by privative clauses wide purpose clauses. Therefore, this intervention militates against the use of such clauses.	7.12
Decisions to modify the law are subject to judicial review	S ⇔	Modification of law treated as administrative action subject to judicial review with no implied or explicit limitations on grounds of review	The intervention seeks to ensure that the expedited law-making power is subject to judicial scrutiny. It thus requires the modification of law to be treated as an administrative action and thus requires the enabling statute to not limit any of the grounds of review.	7.11
Delegated powers to modify law are treated as administrative action subject to judicial review, with no implied or explicit limitations on grounds of review	S ⇔	Rule of law	When delegated powers to modify the law are subject to judicial review, that supports the rule of law because it means that the use of the delegated law-making power can be supervised and controlled.	7.11
Egalitarianism & fairness	S ⇔	Legislative procedural norms	The values of egalitarianism and fairness inform legislative procedural norms, especially those which give all political parties an opportunity to be heard and an equal vote to all members of parliament.	7.6-7.14
Egalitarianism & fairness	S ⇔	Enable limited retrospectivity dating back to first earthquake	The values of egalitarianism and fairness support an intervention to apply delegated legislation from the date of the first earthquake to protect those people whose actions (or inaction) breached the law that applied at the time of the earthquake, where those actions would comply with the delegated legislation. It would seem unfair to hold those people liable in the circumstances.	7.9
Enable limited retrospectivity dating back to first earthquake	O ⇔	Extent to which legislation is predictable	Retrospective legislation by definition makes the law less predictable because the law that applied at a particular point in time is deemed no longer to have applied and another law, which no-one could have anticipated, is deemed to have applied instead.	7.9
Engage with communities affected by law changes using mechanisms appropriate and proportionate to the issue at hand	S ⇔	Identify affected communities and consult or engage as appropriate for the scale, importance, and urgency of the issue	The intervention seeks to ensure that use of the expedited law-making power involves proportionate engagement with the communities affected by law changes. That requires the affected communities to be identified so that they may be engaged with as appropriate.	7.14
Evolution of norms	S ⇔	Substantive constitutional norms	This link reflects the change in normative content resulting from evolution. It assumes that where norms evolve, their content will change. Where norms do not evolve, their content will remain static.	7.6-7.14
Evolution of norms	S ⇔	Legislative procedural norms	This link reflects the change in normative content resulting from evolution. It assumes that where norms evolve, their content will change. Where norms do not evolve, their content will remain static.	7.6-7.14
Evolution of norms	O ⇔	Level of law-makers' awareness of norms	This link asserts that evolving norms will result in reduced awareness of norms amongst law-makers. Particularly with substantive norms, the content is not necessarily well-known or well-understood. Heavy reliance tends to be placed on the parliamentary counsel who draft law and legislative instruments to identify normative problems. This link assumes that if the content of norms starts to evolve, there will be an initial drop-off in awareness of the changes amongst law-makers until those changes are embedded and start to filter into a collective consciousness.	7.6-7.14
Evolution of values	S ⇔	Constitutional values	This link reflects the change in values resulting from evolution. It assumes that where values evolve, their content and descriptions will change will change. Where values do not evolve, their content will remain static.	7.6-7.14
Executive complies with constitutional norms	S ⇔	Public perceptions of legitimacy	Public confidence in executive action over the long-term (legitimacy) is strengthened by the fact that the executive complies with constitutional norms - it makes the executive more trustworthy and shows that the executive shares the same constitutional values as the people.	7.11, 7.12
Executive complies with constitutional norms	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	When the executive complies with constitutional norms, that is likely to result in law-making that can withstand judicial scrutiny because judicial review will focus on consistency with constitutional norms. It is also likely to enable law-making to withstand public scrutiny because of the connection between substantive constitutional norms and constitutional values.	7.11, 7.12
Executive complies with new procedural norms	S ⇔	Identify affected communities and consult or engage as appropriate for the scale, importance, and urgency of the issue	Compliance with new procedural norms requires the executive to identify affected communities and consult or engage as appropriate for the scale, importance, and urgency of the issue.	7.14

Link			Definition	Figures
Executive complies with transparency requirements	S ⇨	Stability and strength of procedural and substantive norms	Compliance with transparency requirements stabilises and strengthens procedural and substantive norms in two ways. First, it incentivises compliance with norms by the executive, because decision-makers know their decision-making processes will be open to scrutiny. Secondly, it shows the norms in action, which reinforces that the norms are and should be used.	7.10
Expectations of pragmatic law-making	O ⇨	Level of trust and confidence in law-making procedures	When circumstances have heightened public expectations of pragmatic law-making, that is likely to undermine trust and confidence in the normal law-making procedures, because they will seem cumbersome, slow, and bureaucratic. In essence, the stronger public expectations are of pragmatic law-making, the less trust and confidence people will have in the normal law-making procedures. The weaker those expectations are, the more trust and confidence there will be.	7.6-7.14
Expedited law-making process	S ⇨	Triage process to identify need for urgency	For the expedited law-making process to be proportionate and measured, it should be confined to law changes that are needed for recovery that are also needed urgently. To identify the urgently-needed changes with any rigour, a triage process is needed. The link here is a process link, rather than being truly causal.	7.7
Extent of government openness to other views	S ⇨	Extent to which House of Representatives complies with procedural norms	The more open the government is to modifying a bill based on feedback from parliamentary parties and the public, the more it is likely to comply with normal legislative procedures. When governments do not wish to modify a bill (e.g. they have a strong commitment to an unpopular policy or believe that enactment is needed urgently), they may view the legislative procedure as ‘going through the motions’ and try to shorten the procedure (e.g. by truncating or bypassing select committee consideration).	7.6-7.14
Extent of government openness to other views	S ⇨	Select committee tests bill	Select committee testing is a normal part of the parliamentary process but is sometimes avoided where a matter is very urgent. It is more likely to be avoided where a matter is urgent <u>and</u> the government has a clear preference and does not want to deal with arguments that differ from that.	7.6-7.14
Extent of government openness to other views	S ⇨	Committee of whole House tests bill	The more open a government is to hearing parliament’s view, the more seriously it will take the Committee stage. The converse is true and may see a government seeking to limit this stage, scheduling it late at night under urgency, and using proxy votes to enable members to absent themselves from the House.	7.6-7.14
Extent to which bills are publicly consulted	S ⇨	Unintended consequences are identified	Public consultation is likely to identify unintended consequences, because of the wider range of people involved in scrutinising the bill. The counterfactual is true, too: the fewer people who look at a bill, the less likely it is that unintended consequences will be identified because of the narrower range of perspectives brought to bear.	7.6-7.14
Extent to which House of Representatives complies with procedural and substantive norms	S ⇨	Stability and strength of procedural and substantive norms	Compliance with norms strengthens and stabilises them by meeting expectations that norms will be complied with, which strengthens expectations that norms ought to be complied with.	7.6-7.14
Extent to which House of Representatives complies with procedural and substantive norms	S ⇨	Stability and strength of constitutional values	Compliance with constitutional norms that are consistent with constitutional values helps to strengthen and stabilise constitutional values - it reinforces the unspoken values that drove a decision to comply. The rewards that come from compliance (e.g. legitimacy of legislation; an absence of complaints about the content of law or how it was made) are assumed to incentivise law-makers to adopt a similar approach the next time a law is made.	7.6-7.14
Extent to which House of Representatives complies with procedural and substantive norms	S ⇨	Public perceptions of legitimacy	Assuming commentators and the public are aware of constitutional norms, the House's compliance with them should boost perceptions of legitimacy	7.6-7.14
Extent to which House of Representatives complies with procedural and substantive norms	S ⇨	Parliamentary process (the shaded shape)	This is a series of procedural steps.	7.6-7.14
Extent to which legislation is predictable	O ⇨	Issue requires legislation	The more predictable legislation is, the less it will create issues that require further legislation. Predictable, well-functioning legislation should therefore decrease one input to the pool of issues that require legislation.	7.6-7.14
Extent to which legislation is predictable	S ⇨	Level of acceptance of laws by the public	Legislation that is predictable enables people to organise their lives and affairs with certainty, which is likely to promote their acceptance of law. The converse is true: laws whose operation and requirements are difficult to predict are likely to grate with the public and become an annoyance. Such laws are less likely to be publicly acceptable.	7.6-7.14
Extent to which parliament supervises and controls use of delegated law-making powers	S ⇨	Parliamentary supremacy Responsible government	When parliament supervises and controls the use of delegated law-making powers, that strengthens the constitutional norm of parliamentary supremacy by asserting parliament’s status as the supreme law-maker: all power to make law comes from the parliament.	7.6-7.14
Extent to which parliament supervises and controls use of delegated law-making powers	S ⇨	Public perceptions of legitimacy	When parliament supervises and controls the use of delegated legislation, that heightens perceptions of the legitimacy of delegated legislation. Scrutiny by the Regulations Review Committee followed by a decision not to disallow constitutes parliament’s acceptance of delegated legislation, which is tantamount to parliament placing its imprimatur on it. That strengthens the legitimacy of delegated legislation.	7.6-7.14

Link			Definition	Figures
Extent to which parliament supervises and controls use of delegated law-making powers	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	When parliament supervises and controls the use of delegated law-making power it means law-making is more likely to withstand public and judicial scrutiny of procedure and substance because law-makers will have stronger incentives to comply with constitutional norms (it is embarrassing for the government to have parliament disallow its legislation) and also because non-compliant law can be corrected by parliament.	7.7, 7.13
Feedback mechanisms for people to alert departments to legal requirements that cannot be complied with or don't make sense	S ⇔	Expedited law-making process	This is a process link; it is not truly a causal link. The feedback mechanism enables people to alert government departments to recovery-related law changes. To be acted on, the information needs to get from the feedback mechanism to the expedited law-making process so the proposed law changes can be assessed against the threshold criteria.	7.7, 7.14
Government or member of parliament introduces bill	S ⇔	House of Representatives reads bill a first time	All bills introduced to the House are read a first time, unless first withdrawn by their sponsor. First reading is, therefore, caused by introduction. The correlation is not absolute: some bills may be withdrawn before being read a first time.	7.6-7.14
House accepts and enacts bill	S ⇔	Acts receive royal assent	All Acts passed by parliament must be submitted to the Governor-General (as the sovereign's representative) for royal assent. By convention, the Governor-General always assents to Acts passed by parliament - for the Governor-General to withhold assent would come close to causing a constitutional crisis.	7.6-7.14
House of Representatives reads bill a first time	S ⇔	Select committee tests bill	Normally, bills that pass their first reading are referred to a select committee for examination. Bills cannot proceed to select committee without first being read a first time, therefore the first reading causes the referral to select committee. The correlation is not absolute: some bills do not pass their first reading, and parliament may agree to bypass select committee examination.	7.6-7.14
House of Representatives reads bill a second time	S ⇔	Committee of whole House tests bill	If a bill passes second reading it is set down for the committee of the whole House stage. Bills cannot proceed to the committee stage without having first been read a second time. Bills that do not pass second reading are not referred to the committee stage.	7.6-7.14
Identify affected communities, key stakeholders and experts and consult or engage as appropriate for the scale, importance, and urgency of the issue	S ⇔	Rationale for modifications to law is publicly available and understood	When communities are consulted on or engaged with over law-making decisions, they are more likely to understand the rationale for the modifications finally made.	7.14
Issue requires legislation	S ⇔	Government or member of parliament introduces bill	If an issue requires legislation, then it can be enacted only if the government or a member of parliament introduces a bill. The introduction of bills is, therefore caused by issues requiring legislation (assuming that parliament generally does not legislate unnecessarily). The correlation is not absolutely direct: not all issues that require legislation will capture the attention of government or members of parliament.	7.6-7.14
Issue requires rapid regulation or frequent readjustment	S ⇔	Expectations of pragmatic law-making	Issues that require a rapid legislative response or issues that require frequent regulatory readjustment are likely to heighten public expectations of a pragmatic approach to law-making. People are likely to become frustrated by normal procedure, perceiving it as cumbersome or bureaucratic.	7.6-7.14
Issue requires rapid regulation or frequent readjustment	S ⇔	Occasions where parliament delegates law-making powers	Parliament tends to delegate its law-making powers when issues require frequent readjustment because it is more efficient to supervise the executive making regulations than to devote parliamentary time to it. Parliament will, if the circumstances warrant it, delegate its law-making powers to the executive to allow a rapid response to an unfolding situation (e.g. emergencies such as natural disasters or epidemics). Parliament doesn't delegate its law-making powers unless the circumstances warrant it.	7.6-7.14
Law modifications meet their objectives and do not create unintended consequences	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	Law modifications that meet their objectives and do not create unintended consequences can be considered as regulatory successes, and are therefore likely to be able to withstand scrutiny. The counterfactual seems to hold true: law modifications that do not achieve their objectives or that cause unintended consequences can be seen as regulatory failures and are unlikely to be able to withstand public scrutiny. Depending on the nature of the unintended consequences, the law modifications may not withstand judicial scrutiny.	7.8
Law-making withstands public and judicial scrutiny of procedure and substance	S ⇔	People have confidence that the law will protect their interests and regulate society effectively	Law that can withstand judicial scrutiny of its procedure and substance is, by definition, consistent with constitutional norms. Law that can withstand public scrutiny is likely to meet public expectations of fairness and egalitarianism. Both of these things create confidence that the law will protect people's interests and regulate society effectively. Law that can withstand neither form of scrutiny is unlikely to create that confidence.	7.7, 7.8, 7.9, 7.11, 7.12, 7.13
Law-making withstands public and judicial scrutiny of procedure and substance	S ⇔	Ongoing public confidence in law-makers	Law that can withstand judicial scrutiny of its procedure and substance is, by definition, consistent with constitutional norms. Law that can withstand public scrutiny is likely to meet public expectations of fairness and egalitarianism. Both of these things create confidence in law-makers. Law that can withstand neither form of scrutiny is unlikely to create that confidence.	7.7, 7.8, 7.9, 7.11, 7.12, 7.13
Laws comply with substantive constitutional norms	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	If laws comply with substantive constitutional norms, they will be able to withstand judicial scrutiny, because judicial scrutiny focuses on compliance with procedural and substantive norms. Because of the links between constitutional norms and values, laws that comply with substantive norms are also likely to be able to withstand public scrutiny, particularly scrutiny for fairness.	7.9

Link			Definition	Figures
Legislation Act part 3 applies; constrained purpose provision creates clear boundaries for law-making powers	S ⇔	Rule of law	Clear boundaries for delegated legislation create certainty in the law by limiting the potential for unconstrained or arbitrary lawmaking by the executive. In this way clear boundaries for delegated legislation support the rule of law.	7.13
Legislation Act part 3 applies; constrained purpose provision creates clear boundaries for law-making powers	S ⇔	Extent to which parliament supervises and controls use of delegated law-making powers	Part 3 of the Legislation Act and clear boundaries for law-making powers enhance parliamentary supervision and control by giving parliament clear boundaries to patrol to ensure delegated law-making does not stray outside the delegation.	7.13
Legislative procedural norms	S ⇔	Extent to which House of Representatives complies with procedural and substantive norms	This is not a causal link per se. It reflects that the House is bound by legislative procedural norms, which are set by standing orders, parliament's rules of procedure. The rules of procedure are enforced by the Speaker, assisted by the Clerk of the House. Governments wishing to depart from the norms must persuade the House to suspend the relevant standing order, which may require a majority vote. To depart from the norms may require governments to spend political capital on a procedural matter, which means it is done sparingly.	7.6-7.14
Level of acceptance of laws by the public	S ⇔	Public perceptions of legitimacy	Acceptance of law strengthens confidence in parliament's law-making	7.6-7.14
Level of acceptance of laws by the public	S ⇔	Level of trust and confidence in law-making procedures	When people accept a law as binding on them because of the way it has been made, it implicitly reinforces their trust and confidence in the procedures used to make that law. Conversely, if people don't accept a law as binding on them (e.g. because it contravenes human rights or offends against a sense of fairness), that is likely to cause people to question the methods used to make that law - it may cause them to question how parliament could agree to such a law.	7.6-7.14
Level of law-makers' awareness of norms	S ⇔	Strength of influence of norms and values on law-makers	This link assumes a positive correlation between law-makers' awareness of norms and the importance they place on those norms in their law-making. The counterfactual seems to hold true: if law-makers are not aware of a norm, they cannot place any particular importance on it.	7.6-7.14
Level of trust and confidence in law-making procedures	S ⇔	Public perceptions of legitimacy	If the public have trust and confidence in law-making procedures, that will contribute to their confidence in parliament's law-making over the long-term. It is not the only causative factor (loops R1, B4, and B7 also help to drive perceptions of legitimacy. The converse is true: if the public do not trust law-making procedures to deliver law that is consistent with New Zealand constitutional norms and values, they are less likely to have confidence in parliament's law-making over the long term.	7.6-7.14
Level of trust and confidence in law-making procedures	S ⇔	Stability and strength of procedural and substantive norms	Trust and confidence in law-making procedures reinforces the stability and strength of those procedures. If the procedures are seen to be working (in that they result in legitimate law), there is little call to consider changes to them.	7.6-7.14
Level of trust in members of parliament	S ⇔	Public perceptions of legitimacy	If the public have trust and confidence in members of parliament, that will strengthen their confidence in parliament's law-making over the long-term, because parliament is made up of those members. It is not the only causative factor (loops R1, B3, and B7 also help to drive perceptions of legitimacy. The converse is true: if the public do not trust members of parliament, they are less likely to have confidence in parliament's law-making over the long term.	7.6-7.14
Level of trust in members of parliament	S ⇔	Turnout at general elections	This link asserts that if people trust members of parliament, they are more likely to vote at general elections. Assuming that people value parliament because of its law-making function, they are likely to care about who they choose to have in parliament to make law and govern the country. If people trust their member of parliament, they are likely to vote for that member at the next election. Conversely, if member of parliament (or a parliamentary party) has lost the public's trust, it is less likely that people will vote for that member or party at the next election.	7.6-7.14
Limit judicial review through: <ul style="list-style-type: none">• privative clauses to remove justiciability• wide purpose clause to limit effectiveness of ultra vires as a ground of review	O ⇔	Rule of law	The use of privative clauses undermines the rule of law by removing a source of supervision and control that ensures expedited law-making powers are used proportionately and reasonably, and within the confines of their statutory authorisation. When ultra vires is effectively excluded as a ground of review, the courts' ability to supervise and control administrative action is limited. That blunts incentives on decision-makers to act with probity and may create the risk of arbitrary action and reduced certainty of the law.	7.12
Maintain status quo - consistency with constitutional norms	S ⇔	separation of powers	The separation of powers (defined in Technical Appendix 1) is part of the status quo constitutional norms. Ergo, maintaining consistency with constitutional norms includes observing the separation of powers.	7.9

Link			Definition	Figures
Number of laws made by elected representatives in parliament	S ⇔	Public perceptions of legitimacy	Public confidence in parliament's law-making over the long-term is strengthened by the fact that law has been made by elected representatives in parliament because of the people's ability to hold elected representatives to account at the ballot box. That accountability gives members of parliament incentives to understand the issues being legislated and to act consistently with New Zealand constitutional norms and values. Acting consistently with norms and values strengthens public confidence in parliament's law-making over the long term.	7.6-7.14
Occasions where parliament delegates law-making powers	O ⇔	Number of laws made by elected representatives in parliament	When parliament delegates its law-making powers, it gives people other than elected representatives in parliament the power to make law. Therefore, the more that parliament delegates its law-making powers, the fewer laws are made by elected representatives in parliament.	7.6-7.14
Occasions where parliament delegates law-making powers	S ⇔	Extent to which parliament supervises and controls use of delegated law-making powers	It is a long-standing practice that when parliament delegates its law-making powers, it will also supervise and control the use of those powers to ensure the delegation is not exceeded or abused.	7.6-7.14
Ongoing public confidence in law-makers	S ⇔	Executive complies with constitutional norms	When people have confidence in law-makers, that creates an incentive for the executive to keep complying with constitutional norms in order to maintain that confidence.	7.11, 7.12
Ongoing public confidence in law-makers	S ⇔	Identify affected communities and consult or engage as appropriate for the scale, importance, and urgency of the issue	When people have confidence in law-makers, law-makers are likely to respond by using the same methods to make the law as gained that confidence in the first place. If that confidence has been created through the use of consultation or engagement methods, it should incentivise law-makers to continue to consult or engage with affected communities.	7.14
Parliament can control and supervise expedited law-making process	O ⇔	Canterbury Earthquake Recovery Act 2011 - broad purpose provision blurred boundaries of law-making powers	The intervention seeks to ensure parliament can control and supervise the expedited law-making process. That intervention works against the approach of the 2011 Act, which effectively limited parliamentary supervision and control by blurring the boundaries of the delegated law-making powers.	7.13
Parliament can control and supervise expedited law-making process	S ⇔	Legislation Act part 3 applies; constrained purpose provision creates clear boundaries for law-making powers	The intervention seeks to ensure parliament can control and supervise the expedited law-making process. It thus requires the application of the Legislation Act part 3, and a constrained purpose provision to create clear boundaries for law-making powers.	7.13
Parliamentary supremacy Representative democracy	S ⇔	Number of laws made by elected representatives in parliament	The system of representative democracy means that laws are made by elected representatives in parliament. The doctrine of parliamentary supremacy means that parliament is the highest source of law in the land.	7.6-7.14
Parliamentary supremacy Representative democracy	S ⇔	Extent to which parliament supervises and controls use of delegated law-making powers	The constitutional norms of parliamentary supremacy and representative democracy create the imperative for parliament to supervise and control the use of delegated law-making powers. As the body of New Zealand's elected representatives, parliament is the highest source of law in the land. Delegated legislation can only be made within the scope permitted by parliament, and parliament retains the right to amend or disallow delegated legislation as it thinks appropriate.	7.6-7.14
Parliamentary supremacy	S ⇔	Legislative procedural norms	The norm of parliamentary supremacy provides the House with its mandate to set legislative procedural norms. Only the House may regulate its own procedure: the courts may not interfere with law-making by the House.	7.6-7.14
People accept law modifications as being binding and will generally comply voluntarily	S ⇔	Ongoing public confidence in law-makers	When a the laws made by a law-making institution are accepted as binding, that tends to reinforce public confidence in the law-making institution itself, in a way that reinforces its legitimacy. The counterfactual is true, too: if the laws made by an institution with poor legitimacy are not accepted as binding, it will tend to reinforce declining legitimacy. If a law-making institution enjoys strong legitimacy but makes an unpopular or poorly judged law, that will not necessarily undermine its legitimacy - the poor decision will not necessarily be enough to undermine public confidence in the institution's long-term decision-making (Gibson et al).	7.7, 7.12, 7.14
People accept law modifications as being binding and will generally comply voluntarily	S ⇔	Executive complies with new procedural norms	Public compliance and acceptance are incentives for the executive to continue to follow prescribed procedures for law-making, as it makes governing both easier and less controversial.	7.14
Perceived substantive value of committee of whole House stage	S ⇔	Committee of whole House tests bill	The more value members place on it, the more they will engage with it, and the more this stage is engaged with, the more it can influence the quality of legislation, which is likely to reinforce incentives to engage properly with this stage.	7.6-7.14
Perceived substantive value of committee of whole House stage	S ⇔	Extent to which House of Representatives complies with procedural and substantive norms	When the committee of the whole House stage is viewed as a set piece with little substantive value, the House of Representatives has few incentives to engage properly with the stage, which means it has few incentives to comply fully with this stage and will look to cut corners. Similarly, when this stage is viewed as valuable, the more they will engage with it.	7.6-7.14

Link			Definition	Figures
Perception that parliament is ‘just politics’ and that disagreements over law and policy is politicking	O ⇔	Public perceptions of legitimacy	Belief by the public that members of parliament are more interested in scoring political points than ensuring that legislation is fit for purpose or that genuine problems are resolved is likely to undermine confidence in parliament’s law-making over the long term, because parliament is made up of those members. This is not the only causative factor (loops R1, B3 and B7 also help to drive perceptions of legitimacy). The converse is true: if people see parliament rising above petty politicking, that will strengthen their confidence in parliament’s law-making.	7.6-7.14
Perception that parliament is ‘just politics’ and that disagreements over law and policy is politicking	O ⇔	Turnout at general elections	Belief by the public that members of parliament are more interested in scoring political points than ensuring that legislation is fit for purpose or that genuine problems are resolved is likely to weaken the incentives to vote for members of parliament and parties at general elections, unless there is a genuine alternative choice, in which case voting numbers may increase as people opt to ‘vote the buggers out’.	7.6-7.14
Pragmatism	S or O ⇔	Perceived substantive value of committee of the whole House stage	The more value this stage has, the more it is likely to be engaged with. Pragmatism will influence decisions to cut short a process that is seen as adding little substantive value.	7.6-7.14
Pragmatism	S ⇔	Expectations of pragmatic law-making	The constitutional value of pragmatism drives public expectations of pragmatic law-making. Without such a value underpinning public expectations tolerance for following procedures would be higher than it is.	7.6-7.14
Pragmatism	S ⇔	Triage process to identify need for urgency	Pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007). It creates acceptance for an expedited law-making process for urgently-needed law changes to enable the government to do what needs to be done to enable the recovery. A triage process will be needed to identify the law changes which are needed urgently.	7.7
Pragmatism	S ⇔	Expedited law-making process	Pragmatism is characterised by a willingness to modify institutions and procedures without rigid adherence to cultural and legal blueprints (Palmer, 2007). It creates acceptance for an expedited law-making process that will enable the government to do what needs to be done to enable the recovery.	7.7
Public perceptions of legitimacy	S ⇔	Turnout at general elections	This link assumes that the more confident people are in parliament’s law-making power, the more they will care about who can become a member of parliament, which is likely to manifest as increased voting numbers.	7.6-7.14
Public perceptions of legitimacy	S ⇔	Stability and strength of procedural and substantive norms	Public perceptions of legitimacy stabilise and strengthen norms by reinforcing expectations that the norms will be complied with. The norms come to be seen as enabling ‘good law-making’. Those expectations incentivise law-makers to comply with norms.	7.11, 7.12
Public perceptions of legitimacy	S ⇔	People accept law modifications as being binding and will generally comply voluntarily	When people perceive the law is legitimate, they will generally accept it as being binding on them and will comply with it voluntarily. Institutions with a higher level of legitimacy are more successful at generating public acquiescence to their decisions, which suggests that it is the legitimacy of the law-making body (parliament, or the executive under parliament’s supervision and control) that creates the compliance (Gibson et al).	7.7, 7.9, 7.10, 7.11, 7.12, 7.13, 7.14
Public perceptions of legitimacy	S ⇔	Extent to which House of Representatives complies with procedural and substantive norms	Perceptions of legitimacy manifest as compliance with law and an absence of criticism of parliamentary law-making. House responds to these signals by following the procedures that resulted in legislation that has been accepted for the next bills introduced for enactment. The House is likely to respond to criticism of the content of legislation or the process of law-making by being cautious about legislating in the same way or on similar matters. For example, public criticism of the procedure proposed for enacting the Video Camera Surveillance (Temporary Measures) Bill strengthened Labour party opposition to the procedure, and forced the Government to modify the proposed approach (see thesis, footnote 7).	7.6-7.14
Public perceptions of legitimacy	S ⇔	Executive complies with new procedural norms	Public compliance and acceptance are incentives for the executive to continue to follow prescribed procedures for law-making, as it makes governing both easier and less controversial.	7.14
Public perceptions of legitimacy	S ⇔	Level of trust and confidence in law-making procedures	When law is perceived to be legitimate that will strengthen trust and confidence in the procedures used to make the law. This stands whether the law is made by parliament or is delegated legislation supervised and controlled by parliament.	7.6-7.14
Public perceptions of legitimacy	S ⇔	Executive complies with transparency requirements	As public perceptions of legitimacy strengthen, that is likely to increase the executive’s incentives to comply with transparency requirements. Decision-makers who comply with norms should be comfortable that their decisions can withstand scrutiny, and they can be expected to respond to the legitimacy signals given by a public that is well-informed about, and comfortable with, compliant law-making.	7.10
Rationale for modifications to law is publicly available and understood	S ⇔	Level of trust and confidence in law-making procedures	When the rationale for law modifications is understood, that is likely to boost trust and confidence in law-making procedures because people will be able to satisfy themselves that the law modifications were necessary, proportionate, and compliant with constitutional norms and values.	7.10
Rationale for modifications to law is publicly available and understood	S ⇔	Ongoing public confidence in law-makers	When the rationale for law modifications is understood, that is likely to strengthen ongoing confidence in law-makers because people will be able to satisfy themselves about law-makers’ compliance with norms and values.	7.10, 7.14
Rationale for modifications to law is publicly available and understood	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	When the rationale for law modifications is understood, the public and judiciary will be able to factor that in to their scrutiny of the procedure and substance, which should help law-making to withstand scrutiny.	7.14

Link			Definition	Figures
Responsible government	S ⇔	Laws comply with substantive constitutional norms	Because the doctrine of responsible government means the executive must maintain the confidence of the House of Representatives, it incentivises the executive to ensure the laws it modifies using delegated powers are consistent with constitutional norms, to avoid having its actions called into question in the House.	7.8
Responsible government	S ⇔	Stability and strength of procedural and substantive norms	Responsible government is a substantive constitutional norm. The more this norm is observed, the stronger and more stable it will be. Responsible government reinforces other constitutional norms, such as representative democracy and parliamentary supremacy, so the stronger it is, the stronger and more stable they will be.	7.8
Rule of law	S ⇔	Legislative procedural norms	Principles of the rule of law inform the types of law that parliament may make (it should not make law that is arbitrary or unfair, or that allows the state to unreasonably intrude upon the private lives of citizens) and how it should make law (transparently and with allowance for public participation). In this context, the rule of law operates as a set of ideals; it is not legally binding on the House.	7.6-7.14
Rule of law	S ⇔	Laws comply with substantive constitutional norms	If the rule of law has been observed, then laws will comply with substantive constitutional norms.	7.8
Rule of law	S ⇔	Extent to which parliament supervises and controls use of delegated law-making powers	If parliament is concerned to uphold the rule of law it will supervise and control the executive’s use of law-making powers to ensure the executive does not act unlawfully, unfairly or disproportionately.	7.6-7.14
Rule of law	O ⇔	Enable limited retrospectivity dating back to first earthquake	One dimension of the rule of law is certainty of the law. Retrospective legislation undermines certainty of the law. Limiting retrospectivity to a specific period and specific event mitigates, but does not remove, the uncertainty created by retrospective legislation.	7.9
Rule of law	S ⇔	Executive complies with constitutional norms	The rule of law requires the executive to comply with constitutional norms, because those norms are focused on preventing arbitrary or unfair action and maximising certainty of the law.	7.11, 7.12
Rule of law	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	Delegated law-making that complies with the rule of law means it will be able to withstand judicial scrutiny because it meets the substantive and procedural requirements that judicial review would consider. Complying with the rule of law should also enable the law-making to withstand public scrutiny because of the connection between substantive constitutional norms and constitutional values.	7.13
Select committee tests bill	S ⇔	Extent to which bills are publicly consulted	Assuming normal legislative procedures are followed, public consultation will be part of a select committee testing of a bill. The select committee testing therefore causes public consultation on the bill. Note that normal legislative procedures are not always followed, so public consultation will not always follow select committee testing.	7.6-7.14
Select committee tests bill	S ⇔	Unintended consequences are identified	When select committees thoroughly test a bill, including through receiving public submissions, they are more likely to identify unintended consequences because the bill has been scrutinised by a range of people who bring different perspectives to it. The counterfactual is true, too: the fewer people who look at a bill, the less likely it is that unintended consequences will be identified because of the narrower range of perspectives brought to bear.	7.6-7.14
Select committee tests bill	S ⇔	House of Representatives reads bill a second time	The select committee reports the bill back to the House, whereupon the House reads it a second time. Bills cannot be read a second time without first having been considered by select committee unless the House has decided to bypass select committee examination. This causal link assumes that any consensus in the select committee transfers into the House. The correlation is not absolute: in some cases, a bill will proceed straight from first reading to second reading. In others, a bill may not pass its second reading.	7.6-7.14
Separation of powers	S ⇔	Laws comply with substantive constitutional norms	When law-making observes the separation of powers, it helps to ensure that laws comply with substantive constitutional norms by removing the potential for law-makers to favour the interests of regulators or segments of the regulated population.	7.9
Societal changes / external crises affecting constitutional operations	S ⇔	Evolution of values	These changes that affect how New Zealanders think about public power and the relationship between citizens and the state could result in shifts in values over time.	7.6-7.14
Stability and strength of constitutional values	O ⇔	Evolution of constitutional values	Stability and strength of values will influence the content of the values. Where stability and strength is weakened (e.g. the values are not shared by an increasing proportion of the population) the imperative for those values. Other values are likely to emerge to take the place of weakened values. The stronger and more stable the values are, the less they will change. The weaker and less stable they are, the more the they will change. Change is likely to be gradual, as values tend to evolve slowly. Given the values are largely unspoken, change may be hard to identify.	7.6-7.14

Link			Definition	Figures
Stability and strength of procedural and substantive norms	O ⇨	Evolution of norms	<p>Stability and strength of norms will influence the content of the norms. Where stability and strength is weakened (e.g. the normal procedures become increasingly viewed as impractical and bureaucratic, or as unable to protect basic human rights against incursions by the state), that may lead to demand for changes to the procedures. The stronger and more stable the norms are, the less they will change. The weaker and less stable they are, the more the norms will change.</p> <p>Change may be gradual, if the strength of norms is eroded over a number of years, or it could be a quick response to an external crisis.</p>	7.6-7.14
Stability and strength of procedural and substantive norms	S ⇨	Stability and strength of constitutional values	<p>This link asserts that stable and strong constitutional norms will reinforce their underpinning constitutional values. Where the norms operate in a way that resonates with the underpinning values, that will reinforce, albeit unconsciously, that it was the right thing to do or the right way of doing something.</p> <p>Conversely, where norms are weakened it may tend to call into question the values underpinning the norms.</p> <p>This process is likely to be gradual, as norms and values tend to evolve slowly. Given that the values are largely unspoken, change may be hard to identify.</p>	7.6-7.14
Stability and strength of procedural and substantive norms	S ⇨	Law-making withstands public and judicial scrutiny of procedure and substance	<p>The stronger and stabler substantive norms are, the more likely it is that law-making will comply with those norms (they will be both understood and respected). That compliance will make law-making able to withstand scrutiny.</p>	7.7
Stability and strength of procedural and substantive norms	S ⇨	Level of law-makers’ awareness of norms	<p>The stronger and more stable norms are, the more likely it is that law-makers will be aware of, and understand, them.</p>	7.10
Stability and strength of procedural and substantive norms	S ⇨	Rule of law	<p>Procedural and substantive norms give effect to the rule of law. The stronger and more stable the norms are, the better compliance will be with the rule of law.</p>	7.11, 7.12
Strength of influence of norms and values on law-makers	S ⇨	Extent to which House of Representatives complies with procedural and substantive norms	<p>If norms influence law-makers, it stands to reason that the House of Representatives (a law-maker) is likely to comply with those norms in its law-making. The counterfactual seems to hold true: if norms have no or little influence on law-makers, the House is unlikely to bother about complying with those norms in its law-making.</p>	7.6-7.14
Strength of influence of norms and values on law-makers	S ⇨	Decisions to modify the law are published proactively, with reasons	<p>As the influence of norms on law-makers strengthens, that is likely to increase the frequency with which decisions and reasons are published proactively. Decision-makers who comply with norms should be comfortable that their decisions can withstand scrutiny, and they will respond to the legitimacy signals given by a public that is well-informed about, and comfortable with, compliant law-making.</p>	7.10
Substantive constitutional norms	S ⇨	Extent to which House of Representatives complies with procedural and substantive norms	<p>This is not a causal link per se. It reflects that the House is bound by a range of substantive constitutional norms.</p>	7.6-7.14
Transparency interventions	S ⇨	Maintain status quo - consistency with constitutional norms	<p>The transparency interventions reflect status quo constitutional norms: the Official Information Act applies to the executive and, increasingly, departments are adopting proactive release policies. Therefore, adopting the transparency interventions here essentially supports status quo norms.</p>	7.9, 7.10
Transparency interventions	S ⇨	Rationale for modifications to law is publicly available and understood	<p>If transparency interventions are in place, the public will have access to information about law modifications that will enable them to understand the rationale for those modifications.</p>	7.10
Triage process to identify need for urgency (not urgent)	S ⇨	Issue requires legislation	<p>Where the triage process identifies non-urgent law changes, that will increase the number of issues that need to be legislated using the normal parliamentary process.</p>	7.7
Triage process to identify need for urgency (urgent)	S ⇨	Expectations of pragmatic law-making	<p>Where the triage process identifies urgently needed law changes, that will tend to reinforce expectation that a pragmatic (i.e. expedited) approach to law-making is needed.</p>	7.7, 7.14
Turnout at general elections	S ⇨	Parliamentary supremacy Representative democracy Responsible government	<p>When electors participate in general elections that strengthens and stabilises the substantive constitutional norms that underpin parliament, including representative democracy and parliamentary supremacy, with responsible government as an appropriate democratic model for New Zealand.</p> <p>Weakening electoral participation may weaken the representative nature of parliament, which may eventually weaken the legitimacy of parliamentary-made law. That may manifest as calls for binding citizens’ initiated referendums or as challenging parliament’s power to legislate on some matters without some form of direct democracy. It may also manifest as calls for greater supervision of parliamentary law-making (e.g. by the courts), which would weaken the doctrine of parliamentary supremacy.</p>	7.6-7.14
Unintended consequences are identified	S ⇨	Extent to which legislation is predictable	<p>The more unintended consequences are identified (and mitigated or neutralised)</p>	7.6-7.14

Link			Definition	Figures
Verification by departmental chief executives and ministers	S ⇔	Responsible government	Verification by departmental chief executives and ministers relies on extant constitutional roles and uses public sector neutrality to create confidence in departments’ technical advice, and ministerial responsibility to ensure the executive is accountable to parliament for its use of the law-making powers.	7.8
Verification by independent panel	S ⇔	Law-making withstands public and judicial scrutiny of procedure and substance	Verification by an independent panel of suitably qualified experts can help the executive to ensure its law-making complies with constitutional norms, which will enable it to withstand public and judicial scrutiny.	7.8
Verification of threshold and limited nature of law change	S ⇔	Rule of law	Ensuring that the statutory limitations on the law-making power have been met will help the executive to ensure it does not stray beyond the limits, which will help it maintain consistency with the rule of law.	7.8
Verification of threshold and limited nature of law change	S ⇔	Law modifications meet their objectives and do not create unintended consequences	The purpose of this initiative is to ensure that law modifications meet their objectives and minimise the risk of unintended consequences. The purpose of verification is to achieve that purpose. If verification works, then the purpose should be achieved.	7.8

Technical appendix 3: description of feedback loops

Table TA 3.1: Chapter 5 Figures

Feedback loop	Description	Figures
R1	<p>This loop shows the self-reinforcing nature of legitimacy, through its incentive effect on decision-makers. It reflects that when decision-makers comply with constitutional norms and values, they create an environment of certainty, predictability and order. This environment allows people to order and live their lives without being worried about (or even necessarily aware of) the constitutional system and the state. Public trust and confidence in decision-making procedures may be implicit or even unconscious, but it will strengthen the legitimacy of decision-making, which means decisions will be accepted as binding and people will have confidence in decision-makers' long-term decision-making.</p> <p>Loop R1 is based on a set of assumptions about the normative effect of constitutional procedure on decisions. It assumes that legitimacy cannot be viewed purely procedurally, and that constitutional procedural norms are often sufficient to encourage decision-makers to make a substantively-appropriate decision. It is shored up by loops B8 and R9: if decision-makers identify with New Zealand constitutional values (loop R9), the procedures required for legitimacy will ensure decision-makers identify and consider relevant perspectives and act in a way that is at least broadly consistent with values, because they will know their decisions will be scrutinised and they themselves held to account (loop B8).</p>	5.10-5.20
R2	<p>This loop describes the relationship between decision-makers, procedure, trust, and legitimacy. When decision-makers comply with constitutional norms, that tends to reinforce trust and confidence in decision-making. It is a reinforcing loop because legitimacy tends to reinforce compliance with norms, due to its effect on decision-makers' incentives. That compliance with norms tends to reinforce the stability and strength of norms, which (through the operation of loop R6) tends to further strengthen decision-makers' incentives to comply.</p> <p>The paradox in loop R2 is that the influence of pragmatism in New Zealand's constitutional culture means that we tend to rely on decision-makers who can be trusted to follow norms and procedures wherever possible, but to modify them where necessary to meet extraordinary circumstances. Loop R2 therefore separates out trust in decision-makers and trust in decision-making procedures.</p>	5.10-5.20
R3	<p>This loop centres on fairness, which is one of New Zealand's key constitutional values. Most of the procedural and substantive norms on the CLD contribute to fairness, including the rule of law (which requires prospective and accessible laws, with legal avenues for redress), restraint and impartiality. The expectation that decision-makers will be disinterested, reasonable, consistent, and observe natural justice plays to the value of fairness. For many New Zealanders, fairness requires acting consistently with the Treaty of Waitangi and upholding commitments made in Treaty settlements. Some key components of Māori constitutional culture - tikanga and rangatiratanga - resonate strongly with ideas of fairness. Kaitiakitanga resonates more strongly with ideas of egalitarianism. This loop describes how the values create public expectations of fairness which, when met, tend to result in acceptance of decisions as legitimate (and therefore binding). That legitimacy, which tends to manifest as compliance and a lack of criticism, strengthens decision-makers' incentives to continue making decisions in ways that comply with constitutional norms. When decisions comply with norms, that reinforces the norms' relevancy, which strengthens and stabilises them. In this way, loops R1, R2 and R3 reinforce each other in a virtuous spiral. Were expectations of fairness to be consistently undermined, this feedback loop could become a vicious spiral that would affect perceptions of legitimacy and compliance.</p>	5.10-5.20
B4	<p>This loop shows the effects of extraordinary circumstances on trust and confidence in normal decision-making procedures, and the effect that diminishing confidence there can have on the relevance of constitutional norms. Given the influence of pragmatism, constitutional 'niceties' will usually be trumped by concerns about public safety and a desire to return to normality. This means public expectations for expedient decision-making will generally increase in extraordinary circumstances. If decision-making procedures do not adapt to meet those expectations, diminished trust and confidence in those procedures is likely to result. It is likely that an evolution of normal decision-making procedures is likely to result. Assuming that evolution maintains some consistency with underlying constitutional norms and values, the evolution is likely to strengthen perceptions of relevancy, which means people will continue to see the norms as relevant, which is likely to stabilise and strengthen norms, strengthening the operation of loop B7.</p>	5.10-5.20
B5	<p>This loop shows the effect of extraordinary circumstances on decision-makers' incentives to comply with norms. Loop R2 shows that decision-makers are incentivised to respond to public perceptions: the stronger the perception that their decisions are legitimate, the more they will tend to comply with constitutional norms in decision-making. Bearing that in mind, if extraordinary circumstances strengthen public expectations of expedient decision-making, that is likely to weaken decision-makers' compliance with norms, which will result in a corresponding weakening in trust and confidence in the decision-making procedures. That is likely to see an evolution (or possibly a very quick and decisive change, as with the Canterbury Earthquake Response and Recovery Act 2010) in normal decision-making procedures. Assuming that evolution maintains some consistency with underlying constitutional norms the evolution is likely to increase decision-makers' compliance with the (modified) procedural and substantive norms, which will start the normalisation process described in loops R1 and R2.</p>	5.10-5.20
R6	<p>This loop describes how compliance with norms stabilises and strengthens those norms and their underpinning values, and reinforces compliance with those norms in a virtuous cycle. The effect of this loop is relatively implicit. If norms are being used without apparent difficulty, there is no reason to question their relevance. The counterfactual is that, if norms are not complied with and the public generally accepts that, the norms are clearly not that relevant to our society. If norms are not relevant, their content and importance will be less stable and less enduring. Over time, decision-makers will likely find reasons not to follow weakened norms, and may be less aware of them, which further reduces the likelihood of compliance with those norms. The stability and strength of norms has an effect on constitutional values, which affects the operation of loop R8.</p>	5.10-5.20
B7	<p>This loop shows the influence of constitutional values on norms, and how decision-makers' compliance with norms strengthens constitutional values. Constitutional values are not necessarily considered or articulated explicitly, but implicitly influence decision-makers. This can mean that the real reasons for decisions are not articulated,, which leaves room for misunderstanding and misinterpretation. Constitutional values influence compliance with norms. If those values weaken, so too could their influence on decision-makers' compliance with norms. In this way loop B7 influences the core loops that create legitimacy (R1, R2, and R3).</p> <p>Loop B7 shows that external influences on society can influence the evolution of procedural and substantive norms, thus altering our perceptions of what norms should be.</p> <p>Constitutional norms tend to evolve slowly, and constitutional values more so. That makes the effect of loop B7 hard to see.</p>	5.10-5.20

Feedback loop	Description	Figures
R8	<p>This loop shows the reinforcing effect of constitutional values on decision-makers. The influence of values on decision-makers is likely to be implicit, even sub-conscious, which can mean the real reasons for decisions are not articulated, leaving room for misunderstanding and misinterpretation. Decision-makers who follow prescribed decision-making procedures which have been informed by constitutional values will reinforce the stability and strength of those values. The stronger the underlying values are, and the more stable they are, will have a reinforcing effect on decision-makers. The more strongly they are riven by constitutional values, they more incentives they have to comply with constitutional norms.</p> <p>Loop R8 is open to external influences on society that can influence our constitutional values. The effects of changing values can take a long time to manifest, and will likely be felt over a much longer timescale than the more short-lived effects of extraordinary circumstances.</p>	5.10-5.20

Table TA3.2 Chapter 6 Figures

The default timescale for variables in Figures 6.7, 6.9-6.11 is 12 months.

Feedback loop	Description	Figures
R1	<p>This loop describes the relationship between quality and safety standards for repairs and rebuilds (most likely regulated through a combination of the Building Act 2004), the consents process through which those standards are implemented, and the result of durable, fit for purpose repairs and rebuilds. It assumes that durable, fit for purpose repairs and rebuilds is a desirable outcome that will reinforce the seeking of consents - people will come to associate the consent process as a means to obtain that outcome.</p> <p>There is a delayed effect between the granting of consents and the outcome, because it takes time to build houses. That delayed effect may weaken the reinforcing nature of this loop.</p>	6.7, 6.9-6.11
B2	<p>This loop describes the limiting effect of capacity on the consents process. That will limit the number of consents that can be granted in a a given time period, which will balance the reinforcing nature of loop R1. Capacity injections will be required following a significant event like the Canterbury earthquakes to meet significantly increased demand.</p>	6.7, 6.9-6.11
B3	<p>Loop R3 describes the relationship between using the right resources (skilled workforce, quality materials) and durable, fit for purpose rebuilds, which over time should reinforce the mindset that the right resources are needed to achieve that desirable outcome.</p> <p>There are delayed effects in this loop because of the time needed to build houses, and because time may elapse between repairs and rebuilds. That may make loop R3 more difficult to see in operation, and may weaken its effect on behaviour.</p>	6.7, 6.9-6.11
B4	<p>This loop describes the limiting effect of affordability on loop R3. Particularly following an event like the Canterbury earthquakes, resources will be sought in larger quantities than usual. The normal behaviour of markets means that scarcity drives up prices, limiting the affordability of the right resources. That may weaken the operation of loop R3, with the result that repairs and rebuilds may be less durable and less fit for purpose.</p> <p>There are delayed effects in this loop, because of the the time needed to build houses, and because time may elapse between repairs and rebuilds. That delayed effect may make loop B4 difficult to see in operation and may drive people towards short-term fixes (e.g. less skilled workforce, lower-quality materials) and discounting the longer-term consequences of those fixes.</p>	6.7, 6.9-6.11
B5	<p>This loop describes the relationship between price, capacity, and importing resources, which affect affordability in loop B4.It is based on normal market behaviour that sees scarcity drive up prices, encouraging further supply, which will ultimately bring prices back down.</p>	6.7, 6.9-6.11
R6	<p>Loop R6 describes the reinforcing relationship between insurance claims made and determined. In essence, an insurance company with a good reputation for paying out on claims is likely to gain more customers, who over time will make more claims. The more claims that are determined, the stronger the insurance company’s reputation, which will see it gaining more customers...</p>	6.7, 6.9-6.11
B7	<p>Following an event like the earthquakes, insurance companies’ ability to process claims will be limited by capacity. That will balance the reinforcing nature of loop R6. Capacity injections may be required to meet significantly increased demand.</p>	6.7, 6.9-6.11
R8	<p>Land assessments may be required following a significant earthquake. Insurers may want land assessment information as part of their risk determination. In this way, land assessments may come to affect the value of land. If that happens, more people will want land assessments to help them assess risk and protect the value of a significant asset. The more land assessments that are done, the more they will become a form of currency, and the more people will want them done... Loop R8 shows this reinforcing relationship.</p>	6.7, 6.9-6.11
B9	<p>This loop describes the limiting effect of capacity on the land assessment process. That will limit the number of land assessments that can be performed in a a given time period, which will balance the reinforcing nature of loop R8. Capacity injections will be required following a significant event like the Canterbury earthquakes to meet significantly increased demand.</p>	6.7, 6.9-6.11
R10	<p>This loop describes the relationship between quality and safety standards, the consents process through which those standards are implemented, the plans on which consents are based, and the result of durable, fit for purpose repairs and rebuilds. it assumes that durable, fit for purpose repairs and rebuilds is a desirable outcome that will reinforce people seeking plans for rebuilds, and ensuring those plans are compliant. Like loop R1, this loop is balanced by loop B2.</p>	6.7, 6.9-6.11
R11	<p>This loop describes the relationship between consents, inspections and approvals, and durable, fit for purpose repairs and rebuilds. Inspections and approvals are part of the quality system, and serve to certify that the standards and any conditions imposed on consents have been met. It assumes that durable, fit for purpose repairs and rebuilds is a desirable outcome that will reinforce the value of the quality standards and the seeking of consents - people will come to associate the consent, inspection and approval process as a means to obtain the outcome.</p>	6.7, 6.9-6.11
B12	<p>This loop describes the limiting effect of capacity on the inspections and approval process. That will limit the number of inspections that can be conducted in a a given time period, which will balance the reinforcing nature of loop R11. Capacity injections will be required following a significant event like the Canterbury earthquakes to meet significantly increased demand.</p>	6.7, 6.9-6.11
B13	<p>An event like the Canterbury earthquakes will result in a significant increase in claims over the norm. That may affect an insurance company’s ongoing financial viability. In this way, loop B13 balances the reinforcing nature of loop R6.</p>	6.7, 6.9-6.11

Table TA3.3 Chapter 7 Figures

The default timescale for variables in Figures 7.6-7.14 is the three-year parliamentary term.

Feedback loop	Description	Figures
B1	<p>This loop describes the relationship between the core elements of parliamentary law-making. Issues that require legislation will often (but not always) lead to the government introducing a bill (draft legislation) to parliament or or a member of parliament submitting a member’s bill to the ballot. The shaded shape contains the sequential steps in the legislative process in sequential order. A bill can proceed to the next step only after it has successfully completed the step before. In this way, there is a causal relationship between the steps.</p> <p>The normal legislative procedure (contained in a shaded shape) enables political testing of the bill’s overall policy and detailed testing of its design. The steps are sequential and can be omitted or modified only with agreement of the House. If a bill successfully passes all its stages and is enacted, it then receives royal assent. The process by which law is made is one of the factors that leads to acceptance of the law by the public, which in turn strengthens public perceptions of legitimacy. When laws are accepted as legitimate, that incentivises the House to make laws in the same way, which means that the House will again follow the process contained in the shaded shape.</p> <p>This loop is particularly vulnerable to the influence of pragmatism, which can incentivise the House to take procedural short-cuts. It is also vulnerable to the influence of authoritarianism, which can make a government less receptive to other views about whether and how to legislate. That can influence a government’s openness to the select committee and committee of the whole House stages, which can minimise the effect of those stages.</p>	7.6-7.14
B2	<p>This loop describes the effect of select committee consideration. Select committee consideration is the only point in the parliamentary process at which the public have an opportunity to comment on a bill. Select committees nearly always call for public submissions: it is extremely rare for a select committee to be prevented from calling for submissions, and relatively rare for select committees to have insufficient time to allow for a public consultation process. By inviting public submissions on a bill, select committees increase the likelihood that unintended consequences will be identified, simply because the bill will have been considered from a variety of perspectives. With more unintended consequences identified before a bill is enacted and implemented, its operation will be that much more predictable.</p> <p>The key value from this loop is that it limits one source of issues that require legislation (fixing up unintended consequences of legislation). Thus, loop B2 reduces one source of inputs to loop B1.</p>	7.6-7.14
R3	<p>Committee of the whole House stage is an important step in law-making. It is the last opportunity to make amendments to a bill. Amendments may be proposed by any member of parliament, which makes the legislation truly an act of parliament, rather than a piece of government-owned law. It is an opportunity to test changes made by the select committee and to neutralise any unintended consequences brought about as a result of select committee changes. That neutralising helps to make legislation more predictable, which helps it gain public acceptance. Because acceptance of law tends to reinforce trust and confidence in law-making procedures, and because that tends to reinforce perceptions of legitimacy, the House has an incentive to comply with procedural norms relating to committee of the whole House stage.</p> <p>This loop is particularly vulnerable to the influence of pragmatism, which can incentivise the House to take procedural short-cuts. It is also vulnerable to the influence of authoritarianism, which can make a government less receptive to other views about whether and how to legislate. In practice, this stage has been undermined by changes to Standing Orders made to reduce the time needed for the committee stage. Those changes to standing orders (allowing bills to be considered part-by-part rather than clause-by-clause) have precipitated changes to drafting practice, with bills now being drafted into as few parts as possible, to minimise the time needed for the committee stage. That tends to reduce the ability of members of parliament to single out particular clauses for objection: they have to vote for or against the entire part in which the objectionable clause is located.</p> <p>In practice, R3 has a relatively weak effect because of perceptions that the committee stage is largely a set piece with voting numbers worked out in advance.</p>	7.6-7.14
B4	<p>Loop B4 is a significant contributor to public perceptions of legitimacy of parliamentary-made law. It is concerned with who makes law, whereas loops B1, B2 and R3 are concerned with how law is made.</p> <p>B4 gives effect to the constitutional norms of parliamentary supremacy and representative democracy, which require that laws be made by elected representatives in parliament. Confidence in parliament’s law-making power is assumed to drive interest in the choice of elected representatives, which is likely to manifest as increased voting numbers. Participation in general elections tends to reinforce the constitutional norms underpinning our system of government: parliamentary supremacy, representative democracy, and responsible government. Conversely, declining participation could eventually undermine the legitimacy of parliamentary-made law because it would no longer be made by a body that was representative of New Zealand’s people.</p>	7.6-7.14
B5	<p>This loop shows how compliance with norms further strengthens norms, which further incentivises compliance with them. In essence, norms gain their strength and stability through their usage. B5 is hard to see in operation because it moves on a relatively long timescale - its effects might be felt over several parliamentary terms. B5 reflects that norms do evolve over time, particularly if an external event destabilises their operation. Norms may also evolve in response to societal changes, and to changes in values. That evolution can also take place over a relatively long timescale. When norms evolve, there can be a diminishing of law-makers’ awareness because constitutional norms tend to be unwritten and knowledge tends to be assumed. The more aware law-makers are of constitutional norms, the more they are likely to be influenced by those norms, which is a further incentive for the House to comply with norms in its law-making endeavours.</p> <p>Loops B1 and B5 tend to reinforce each other, and loop R1 can be a source of normative evolution reflected in B5.</p> <p>B5 also influences the strength and stability of constitutional values, whose influence is described in loop B6: in essence, the stronger and more stable constitutional norms are, the more they shore up constitutional values that inform those norms.</p>	7.6-7.14

Feedback loop	Description	Figures
B6	<p>This loop reflects that constitutional values influence decision-makers, either consciously or unconsciously. The influence may go unremarked because values tend to be unspoken, and decision-makers may prefer to characterise their decisions as rational or logical. To the extent that decision-makers are influenced by New Zealand constitutional values, that will increase compliance with procedural and substantive norms because of resonances between constitutional norms and constitutional values. On the diagram, the resonance is shown by a double-headed arrow, and is not analysed in further detail. Palmer (2007) details examples of constitutional norms that are supported by constitutional values. The resonance means that laws that are consistent with constitutional norms are likely to be supported by constitutional values, and laws that are consistent with constitutional values are likely to be broadly consistent with constitutional norms. The resonance also means that the House’s compliance with procedural and substantive norms is likely to stabilise and strengthen constitutional values.</p> <p>Values change, albeit slowly over time, triggered by societal changes. Where values evolve, that will flow through to their influence on law-makers, which will flow through to affect the operation of loop B1. It will also flow through to change the content of constitutional norms (loop B5).</p>	7.6-7.14
B7	<p>This loop reflects the way substantive constitutional norms can adapt to difficult circumstances without undermining constitutional protections. This loop is characterised by the values of authoritarianism and pragmatism asserting themselves to bolster public expectations of a pragmatic response that requires law-making at a speed that parliament generally cannot manage. Such circumstances can reduce public trust and confidence in law-making procedures, which can undermine the stability and strength of procedural and constitutional norms. If parliament responds by delegating its law-making powers (while maintaining supervision and control) it can bolster perceptions of legitimacy, thus boosting trust and confidence in law-making procedures and re-stabilising the underpinning norms.</p> <p>There is a paradox at the core of this loop. The parliamentary procedures that create trust and confidence and enhance perceptions of legitimacy are the same procedures that, in some circumstances will undermine trust and confidence and reduce legitimacy. Delegating power away from parliament, while appearing to weaken parliamentary supremacy, actually drives trust and confidence and strengthens norms.</p> <p>B7 is the product of pragmatism and, to some extent, authoritarianism. It is, however, balanced by the values of fairness and egalitarianism and fairness, and liberalism, which will tend to reassert themselves and support representative democracy and responsible government. That tends to strengthen the operation of the variable ‘laws made by elected representatives in parliament’.</p>	7.6-7.14
R8	<p>This loop describes the reinforcing effect of transparency on legitimacy. Transparency incentivises good regulatory behaviour, and it also helps to inform the public about the rationale for government decisions. Together, these factors strengthen trust and confidence in the relevant procedures and further incentivise compliance with norms.</p>	7.10
R9	<p>This loop reflects the reinforcing effect that consultation and engagement can have on executive compliance with norms. By learning from affected communities and stakeholders, the executive can improve the quality and effectiveness of recovery-related law changes. That builds legitimacy and public confidence in the laws and law-makers. That legitimacy is likely to incentivise executive compliance with the new procedural norms, resulting in further consultation and engagement. Assuming the executive learns from experience, consultation and engagement processes will become more efficient and effective over time.</p>	7.14

References

- Barker, F. (2010). Political culture: patterns and issues. In *New Zealand Government and Politics* (Fifth, pp. 13–28). Melbourne: Oxford University Press.
- Berger, B. L. (2007). Law's religion: rendering culture. *Osgoode Hall Law Journal*, 45(2), 277–314.
- Bingham, T. (2010). *The rule of law*. London: Penguin Books.
- Buchanan, P. (2009, August 11). Are We There Yet? A conceptual framework for evaluating democracy in Aotearoa. Retrieved June 26, 2016, from <http://www.scoop.co.nz/stories/print.html?path=HL0908/S00080.htm>
- Dicey, A. V. (1915). *Introduction to the study of the law of the constitution* (Eighth). London: MacMillan & Co, Ltd.
- Ekins, R. (2011). The value of representative democracy. In *We, the People(s): Participation in Governance* (pp. 29–49). Wellington, New Zealand: Victoria University Press.
- Joseph, P. A. (2007). *Constitutional and administrative law in New Zealand* (3rd ed.). Wellington, New Zealand: Brookers.
- Legislation Advisory Committee. (2014). *Guidelines on the content and process of legislation*. Wellington: Legislation Advisory Committee. Retrieved from <http://www.ldac.org.nz/guidelines/lac-revised-guidelines/>
- Maani, K. E., & Cavana, R. Y. (2007). *Systems Thinking, System Dynamics: Managing Change*. Auckland: Pearson.
- Ministry of Justice. (2014). *2014 briefing for the incoming Minister: Attorney-General*. Wellington, New Zealand: Ministry of Justice. Retrieved from <http://www.justice.govt.nz/publications/global-publications/b/bim-2014/documents/attorney-general-2014>
- Palmer, G., & Palmer, M. (2004). *Bridled Power: New Zealand's constitution and government* (4th ed.). Melbourne: Oxford University Press.
- Palmer, M. S. R. (2007). New Zealand constitutional culture. *New Zealand Universities Law Review*, 22(December), 565–.
- Palmer, M. S. R. (2008). *The Treaty of Waitangi in New Zealand's law and constitution*. Wellington: Victoria University Press.
- Palmer, M. S. R. (2011). Open the doors and where are the people? Constitutional dialogue in the shadow of the people. In C. Charters & D. R. Knight (Eds.), *We, the People(s): Participation in Governance*. Wellington, New Zealand: Victoria University Press.
- Potaka, T. W. (2010). Legislation and the Legislature. In M. Mulholland & V. Tawhai (Eds.), *Weeping Waters: the Treaty of Waitangi and constitutional change* (pp. 83–108). Wellington, New Zealand: Huia Publishers.
- Privileges Committee. (2013). *Question of privilege concerning the defamation action Attorney- General and Gow v Leigh: report of the Privileges Committee* (No. I.17A). Wellington: New Zealand Parliament.
- Stanford University. (n.d.). SOME BASIC PRINCIPLES OF DEMOCRACY. Retrieved March 10, 2016, from <https://web.stanford.edu/~ldiamond/iraq/DemocracyEducation0204.htm>
- Tamanaha, B. (2007). *A concise guide to the rule of law* (Legal Studies Research Paper Series No. Paper #07-0082). St John's University School of Law. Retrieved from [Http://ssrn.com/abstract=1012051](http://ssrn.com/abstract=1012051)

Te Puni Kokiri. (2001). *He Tirohana o Kawa ki te Tiriti o Waitangi: a guide to the principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*. Wellington, New Zealand: Te Puni Kokiri.

Te Puni Kokiri, & Ministry of Justice. (2006). *Crown-Maori relationship instruments: guidelines and advice for government and state sector agencies*. Wellington, New Zealand: Te Puni Kokiri.

Waldron, J. (2012). Separation of powers or division of power? *Public Law and Legal Theory Research Paper Series*, (Working Paper No. 12-20), 33. Retrieved from <http://ssrn.com/abstract=2045638>