WHERE'S THE FIRE?: THE USE AND ABUSE OF URGENCY IN THE LEGISLATIVE PROCESS

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The frequent use of the urgency motion in the New Zealand House of Representatives has been increasingly lamented in the public in recent months.[1] Particularly, criticism was levelled at the number of bills passed through all stages within single days, thereby bypassing the democratically important select committee stage. During the term of the 49th Parliament, 23 bills were passed in such a way, more than twice as many as during the previous three terms combined. Naturally, this development raises concerns about the propriety of such regular use of urgency, and the adequacy of the bills passed in such haste.

The regular use of urgency in New Zealand is by no means a new phenomenon; indeed, it may well be called a tradition. In the first edition of *Unbridled Power*, Geoffrey Palmer ironically referred to New Zealand's legislative process as the "fastest law in the West".[2] Some years, the House spends over one third of its sitting hours under urgency,[3] while more than half of all bills pass at least some of their stages under urgency.[4]

In 1990, John Burrows and Philip Joseph pointed out the dangers of the frequent use of urgency, such as lack of consultation and poorly drafted law.[5] Yet, 20 years on, the practice has changed little. Several attempts to limit the use of urgency have proved largely fruitless. Although the introduction of the Mixed Member Proportional electoral system (MMP) temporarily lead to a slight decline in urgency motions, the amount has recently risen to levels similar to pre-MMP times: for example, the percentage of sitting hours under urgency in the year to 30 June 2009 was higher than that of the year to 30 June 1989, and almost as high as that of the year up to 30 June 1990.[6] Furthermore, over 70% of bills passed in 2009 and 2010 had at least one of their stages passed under urgency. It seems, therefore, that the use of urgency is as popular as ever.[7]

But what is the foundation of this popularity? It would be easy to ascribe it to governments, drunk on legislative power, wanting to sidestep the opposition's scrutiny of unpopular legislation. Of course, such instances

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1 See, for example, David Farrar "Use of Urgency" (2011) Kiwiblog <www.kiwiblog.co.nz>; Grant Robertson MP "Urgency – some real information" (2011) <www.grantrobertson.co.nz>.

2 Geoffrey Palmer *Unbridled Power?* (Oxford University Press, Wellington, 1979) at 157.

3 Indeed, the Speaker of the House Lockwood Smith remarked during the adjournment speech of the House on 6 October 2011 that during the 49th Parliament the House had sat for a quarter of its time under urgency.

4 This data is based on an analysis of the Annual Reports of the Office of the Clark of the House of Representatives, accessible at <www.parliament.nz>.

5 John Burrows and Philip Joseph "Parliamentary Law Making" [1990] NZLR 306.

6 See also Claudia Geiringer *et al*, The Urgency Project "Standing Orders review 49th Parliament – Submission to Standing Orders Committee" at 7.

7 The use of urgency has declined to more normal levels during the year leading up to 30 June 2011.

occur from time to time – notable recent legislation that may thusly be accused are the Environment Canterbury Act[8] and the Employment Relations (Film Production Work) Amendment Act.[9] But even though passing 23 "single day" bills within one parliamentary term is alarming, urgency is most commonly used in a different way: in the same period, 153 bills were accorded urgency for *only a portion* of their stages. These urgency motions usually concern the Introduction and First Reading stages, or the Committee of the Whole House and the Third Reading stages. This serves to accelerate the bill's referral to the select committee in the former case, and its passage through the House in the latter. Combining the Introduction and First Reading stages will generally have a rather benign effect, as a bill is subject to proper parliamentary and public scrutiny during the select committee stage. The same applies to combining the Whole House and Third Reading stages, because the only effect of urgency in this case is that the mandatory stand-down period of one sitting day between the stages is omitted. The bill will be generally well known by this stage in the legislative process, so that the impact of combining the stages will often be minimal.

To find an explanation for the popularity of urgency one may look to the reasons the Minister is required to give when moving the motion. An analysis of these reasons reveals that most times, urgency is simply used to create more sitting time in the House. Parliament is facing the difficulty of an ever-mounting workload of legislative and non-legislative business, and often uses urgency for the benign reason of creating more sitting time and reducing the number of bills on the Order Paper.

Therefore, the urgency motion fulfils an important and useful function. It allows the House to address the backlog of bills on the Order Papers, so it is used as a constitutional tool of efficiency and convenience. Yet, the fact that the motion can be used in both a benign and a potentially malignant way, without any change of procedure or additional safeguards, calls into question the wisdom of its use. The many occasions of benign use hinders the detection of malignant motions. This is exacerbated by the fact that it is difficult, if not impossible, to determine whether in any particular incidence of urgency the need to accelerate the legislative process outweighs the risk of abuse or poorly drafted legislation (in fact, it is uncertain *when, and if at all*, hastily passed bills necessarily lead to poorer legislation). In other words, distinguishing between benign and harmful uses of urgency is neither practical nor practicable.

Consequently, continuing the practice of employing urgency as a way of dealing with the House's workload is undesirable. Yet, simply restricting urgency cannot be the answer by itself, as it would dramatically affect the House's ability to efficiently legislate. Moreover, time pressures force governments to prioritise within their legislative programmes and to choose which bills to promote and which to leave on the back-burner. The

8 Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010.

9 Employment Relations (Film Production Work) Amendment Act 2010.

consequence is that high-profile and controversial bills are preferred over technical and law reform bills; the latter are often of great importance and could be passed with greater ease as they tend to be less controversial.

The answer may lie in a three-pronged approach: first, restrict the use of urgency to genuinely urgent situations; second, extend the sitting hours of the House; and third, reform the legislative process so it enables rapid passage of uncontroversial bills while retaining the ability to properly scrutinise and discuss controversial and complex legislation.

I. The Theory and Practice of Urgency – How it Works and How it is Used

A. Effect of the Urgency Motion

Since the late nineteenth century, the ability to accord urgency has allowed the New Zealand Parliament to prioritise certain business, and thus accelerate its completion. This is done primarily by extending the House's sitting hours until the urgent business has been completed. Normally, the House sits for six and a half hours on Tuesdays and Wednesdays, and for four hours on Thursdays.[10] However, under SO 55 urgent sittings can be extended to last from 9 am to midnight on any day apart from Sunday. Under extraordinary urgency pursuant to SO 56, sittings can even be extended beyond midnight and into Sunday, although this rarely happens.[11]

Under ordinary circumstances, a bill must pass a number of stages on its way to becoming an act. The introduction of a bill into the House is followed by three readings, each separated by a committee stage. The first committee stage is the select committee, the second the Committee of the Whole House. The Standing Orders provide for "stand-down" periods between stages, so that no two stages proceed on the same day.[12] Under urgency, however, a sitting of the House will not end until the urgent business has been completed. The "stand-down" periods between stages can thus be eliminated. For example, normally one sitting day must pass between the second reading and the Committee stage, and another between the Committee stage and the third reading.[13] If these stages have been accorded urgency, however, they are all debated on the same sitting day. Moreover, SO 280(1) provides that an urgent bill does not have to be referred to a select committee. Accordingly, an urgent bill can be introduced, read a first and second time, debated in the Committee, and read a third time in one sitting day.

In some circumstances speed may be desirable, but rushing legislation comes with downsides. The different stages of the legislative process have an important purpose: they are designed to *improve the quality of the bill*.[14] The committee stages are meant to scrutinise the bill as to its ability and efficiency

10 Standing Orders of the House of Representatives 2008, SO 43.

11 Standing Orders of the House of Representatives 2008, SOs 56, 57; an explanation of this could be the stricter requirements of extraordinary urgency: the Speaker of the House must consent.

12 Standing Orders of the House of Representatives 2008, SOs 277, 287, 290 and 301.

13 Standing Orders of the House of Representatives 2008, SOs 290 and 301.

14 David McGee "Concerning Legislative Process" (2005) 11 Otago LR 417 at 421.

to achieve the goals it purports to attain. The readings are general debates on the principles and purpose of the bill, and on changes and amendments to the bill following a committee stage.[15] The reason that stages commence on different days is that the Opposition and the public should have the opportunity to study and familiarise themselves with the bill or changes to it,[16] enabling a more informed and constructive debate.[17] Therefore, hurried and ill-prepared debates may lead to bad law-making, resulting in acts that soon require amending.[18] Particularly in the case of "single-day" bills, if an urgent bill is not referred to a select committee, the democratic process suffers. Apart from thoroughly scrutinising bills, select committees hear submissions from affected interest groups and the general public. In New Zealand, this is the *only time* that the public has the opportunity to participate directly in the legislative process.[19]

B. Reality of Urgency Use

On the other hand, these disadvantages must be weighed against the practical realities of modern parliamentary business. The workload of modern parliaments has drastically increased since the early days of the Westminster system: whereas 100 years ago the New Zealand law books contained only about 200 acts, they now incorporate over 1100 acts, and 100 or more bills are passed every year.[20] Besides legislating, the House has further roles to fulfil, such as scrutinising and controlling the government.[21] Select committees are increasingly undertaking non-legislative work, such as scrutinising government departments and state owned enterprises.[22] This proliferation of both legislative and non-legislative activity impacts on the pace of the law-making process; the more bills that have to be discussed within the time allocated during a sitting day, the more will have to be postponed if the House has not dealt with them by the end of the day. This, in turn, creates a backlog of legislation that either has been introduced

15 See David McGee "The Legislative Process", *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005) at ch 27.

16 John Burrows *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 74-76.

17 Of course, urgency is not always accorded to more than one stage. In cases where only a single stage proceeds under urgency, the effect on its passage is merely that it receives priority over other business, and that it may be discussed at a later than usual time of the day. The length of the debate remains, at least theoretically, the same. But in seven out of the last ten years, urgency was accorded to *at least* two stages of a bill on over 80% of occasions. Urgency motions that address only a single stage of a bill are therefore rather rare. See also The Urgency Project, above n 6, at 13.

18 Burrows and Joseph, above n 5, at 307; see for example Immigration Amendment Bill 2010 (30 April 2010) 661 NZPD 9926, which was passed under urgency in one sitting to amendment the Immigration Act 2009, whose Whole House committee stage was accorded urgency only a few months earlier: (15 October 2009) 658 NZPD 7112.

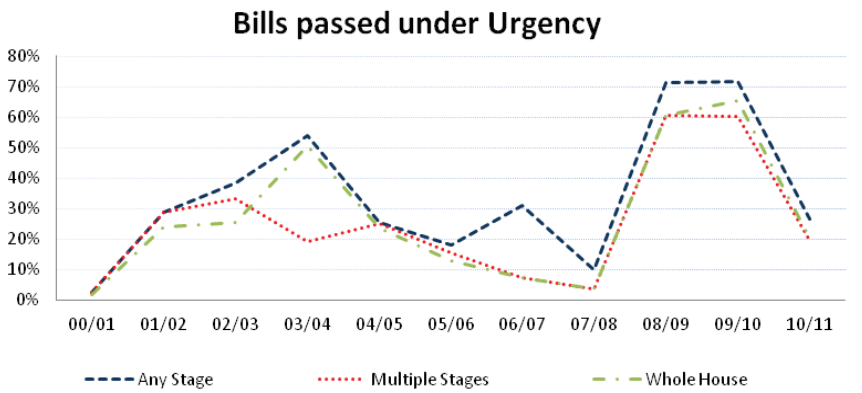
19 Another way of participation in the legislative process is by way of referenda. However, referenda are not binding on Parliament in New Zealand. In any case, referenda tend to only give the public the opportunity to decide on whether a certain bill/policy should be adopted into law; they do not allow the public to comment on the content of that bill/policy.

20 Law Commission *Presentation of New Zealand Statue Law* (NZLC R104, 2008) at 7.

21 McGee, above n 15, at 2-5.

22 Ryan Malone *Rebalancing the Constitution* (Institute of Policy Publishing, Wellington, 2008) at 209.

into parliament but proceeds only slowly through the stages, or cannot be dealt with at all.[23] In order to ameliorate this situation, governments may allow themselves "to fall into the temptation of taking shortcuts".[24] Urgency provides that convenient shortcut.



The amount of bills that are accorded urgency fluctuates over the years, depending mostly on the composition of the government. The two years between 1 July 2008 and 30 June 2010 have seen an extraordinary amount of use of urgency.

In the 10 years leading up to 30 June 2011, Parliament sat under urgency for 18.1% of its time, on average. The Committee of the Whole House spent even more time under urgency: an average of 31.4%. In the same period, almost 42.3% of bills that were passed by parliament were accorded urgency to at least one stage in their passage. The most extreme example in recent years was the 2008/09 election year period. The outgoing Labour government was aware of its slim chance of retaining its position in the upcoming election. It therefore used urgency on many bills "to complete the Government's intended legislative programme before the House [rose] for the general election".[25] The incoming National government, after nine years in opposition, was eager to implement its own legislative programme, and used urgency to quickly repeal Labour legislation it objected to and replace it with its own. The result was that in the 2008/09 period, parliament sat under urgency for 35% of its time, the Committee of the Whole House for 41%, and *71% of all bills passed during the period* were accorded urgency at least once during their passage.[26]

One reason for this profusion of urgency, and for the government's preference to employ it, is the ease with which urgency can be accorded. There are only three requirements for moving an urgency motion: general business must be completed; it can only be moved by a government Minister; and the Minister must 'inform the House with some particularity why the

23 Standing Orders Committee "Review of Standing Orders" [1995] I AJHR 18a at 53.
24 Burrows and Joseph, above n 5, at 306.
25 (23 September 2008) 650 NZPD 18909.
26 The percentage figure takes into account bills that have been separated in the Committee of the Whole House or during the 3rd Reading, to reflect the overall number of acts that have at one point during their passage experienced urgency.

motion is being moved.'[27] The latter requirement, however, enjoys a very low threshold and can be regarded as a pure formality. For example, in 2008 an intention "to make progress, and as much progress as possible" was deemed sufficient by the Speaker of the House to meet the requirement.[28] When the Opposition protested, the Speaker replied that:[29]

> … if the Opposition feels an inadequate reason has been given, the Opposition may not support the motion, and that is the remedy it has, of course. But if the Minister is happy with the explanation he has given, the question is that the motion be agreed to.

This illustrates that as long as the moving Minister gives *any* reason, the urgency motion will be put to the question. If the government commands the majority of the House, the motion will pass. No other safeguards for the use of urgency under SO 55 exist.[30] Consequently, a majority government will be able to accord urgency to *any business it wishes*.

This was especially prevalent before the introduction of the MMP electoral system. Under the First Past the Post (FPP) electoral system, governments were formed by single-party majorities. They thus had complete control over urgency motions, causing parliament to regularly sit under urgency for a third of its time, or more.[31] Recommendations were made for impeding excessive use of urgency; the committee that reviewed the Standing Orders in 1995 noted the frequency with which urgency was employed and recommended that in order "to discourage the taking of urgency […] urgency sitting hours should not commence until the day following the motion for urgency has been agreed".[32] It was thought that this delay between motion and effect would discourage the use of urgency. However, this recommendation did not find its way into the resulting changes to the Standing Orders.

The change to MMP moderated the use of urgency to some degree. Since the introduction of MMP in 1996, no single party has held a majority in parliament. The only majority coalition government was formed between National and New Zealand First during the 45th Parliament (1996-1999). Every subsequent government has been a minority government that had to rely on support parties to control the House. Since 1996, therefore, no single party could unilaterally accord urgency to business. As a result, the average sitting time under urgency in the House has dropped significantly, from one third to less than one fifth. This has led some commentators to assert that it is much more difficult for governments to secure urgency under MMP, as they have to negotiate with their support parties.[33] That view is supported by the use of urgency during the 48th Parliament (2005-2008): in the three years up to 30 June 2008, the House sat under urgency for only about 7% of its time. The main reason was that the Green Party, as the

27 Standing Orders of the House of Representatives 2008, SO 54.
28 (16 December 2008) 651 NZPD 728.
29 Ibid.
30 Compare the Speaker's consent for extraordinary urgency; Standing Orders of the House of Representatives, SO 56.
31 Malone, above n 22, at 211.
32 Standing Orders Committee, above n 23, at 20.
33 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, Oxford University Press, Melbourne, 2004) at 193; Malone, above n 22, at 208; McGee, above n 14, at 420.

Labour government's support party, often refused to vote in favour of the government in an urgency vote, because they were opposed to using urgency in non-urgent situations.[34] However, MMP has not effectively put an end to the excessive use of urgency; as mentioned above, the amount of sitting hours under urgency have dramatically risen in the 2008/09 (35%) and 2009/10 (25%) period. This can most likely be attributed to a very strong government party with one or two willing support parties.

C. Isolating the "True Purpose" of Urgency

As urgency allows the government to bypass the legislative process with very few requirements or safeguards, the frequency with which it makes use of urgency is a cause for concern. The question is, then, whether such extensive use is appropriate? The answer to this may be informed by determining the constitutional purpose of urgency. If urgency is used mainly in line with its purpose, it is more likely to be legitimate. However, the "true purpose" of urgency is not easily found.

The frequency with which urgency is employed stands in contrast to the implications of the word. "Urgency" suggests that an external factor demands immediate attention and thus justifies the acceleration of the process. Accordingly, Burrows and Joseph state that urgency was "originally intended as an exceptional measure".[35] Indeed, when in 1884 the possibility of rushing legislation was first formalised in New Zealand, SO 331 provided that "bills of an urgent nature are sometimes passed with unusual expedition through their several stages".[36] "Urgent nature" suggests not that the passage of the bill had to be urgent, but that its content demanded expediency. This, in turn, implies that SO 331 would have been intended to be an emergency measure. The hurried passage of a bill due to its content can surely only be required if the bill addresses a situation that must be remedied immediately, lest the public suffers a disproportional disadvantage. This entails the comparison of two interests: on the one hand, the interest in remedying the situation; on the other hand, the interest in properly considered and well-drafted legislation. Only if the former outweighs the latter can such an emergency procedure be appropriate. As any piece of legislation is likely to affect a great amount of people on a great number of occasions, the interest in properly drafted legislation is very high. The disadvantage to the public if the situation was not remedied immediately must therefore be exceptionally grave and, accordingly, rare. This is further highlighted when one considers the surrounding circumstances in 1884; then, the Standing Orders included virtually no time limits or "stand-down" periods between stages, and bills could be progressed with haste even without using SO 331. Therefore, if a bill could be passed rapidly under the normal rules, an exception such as SO 331 could only have been meant for situations posing a true emergency. It thus appears that the use of urgency was meant to be truly exceptional.

34 Malone, above n 22, 212.
35 Burrows and Joseph, above n 5 at 306.
36 Standing Orders of the House of Representatives 1884, SO 331.

Whether or not urgency was originally meant as an emergency measure, even from its inception it was used to different ends than the original wording suggests. By the end of the 19th century, the tradition had been established that in the last two weeks of each session, bills could be read and passed on the same day.[37] At the time, a parliamentary session lasted only for a few months during winter and spring, usually ending by mid-November and not commencing until June or July the following year.[38] The practice of a prolonged recess continued into the 1980s, when parliament sat from May to November or December.[39] The result was a lengthy break in parliamentary business. Understandably, in order to prevent bills lying dormant for many months, parliament needed to accelerate the passage of the remaining bills. However, by the 1920s governments were not only according urgency at the end of the session, but throughout the year. Within decades, urgency was accepted as part of the way government conducted its business, rather than as an exceptional measure.[40]

The wording of the Standing Orders has changed in accordance with the practice of urgency. While the Standing Orders 1884 referred to 'bills of an urgent nature",[41] the Standing Orders 1929 allowed the Minister to move for urgency if it was in the public interest to do so.[42] The content of the bill itself, or rather the situation the bill was meant to address, did not have to require urgent attention anymore; rather, it was sufficient to claim a public interest in *accelerating business in general*. This marked a shift away from urgency as an emergency tool towards urgency as a policy measure, albeit with a public interest qualifier. Today, the public interest qualifier has also disappeared, leaving only the requirement of the Minister to inform the House of the reasons urgency is being accorded.[43]

This discrepancy between theory, or original intent, and practice makes it difficult to determine the modern purpose of urgency. If the purpose is framed by its common practice, urgency is used exactly as it is intended: as a policy tool that enables the acceleration of parliament business. However, urgency is not only used as such a policy tool: it is increasingly used to push through bills in a single day. This indicates that the motion carries a dual purpose: as a procedural tool of convenience to deal with the ever-mounting backlog of parliamentary business, and as an emergency instrument to enable swift response to a dire situation (whether such situation in fact exists or not). Unfortunately, neither the Standing Orders nor practice in the House makes this distinction.

37 John E Martin *The House – New Zealand's House of Representatives 1854-2004* (Dunmore Press, Palmerston North, 2004) at 120.
38 Martin, above n 37, at 120.
39 McGee above n 14, at 420.
40 Martin, above n 37, at 241.
41 Standing Orders of the House of Representatives 1884, SO 331.
42 Standing Orders of the House of Representatives 1929, SO 309.
43 Standing Orders of the House of Representatives 2008, SO 54.

II. Urgency and the "Reason-Requirement"

But why has the urgency motion acquired this dual purpose? In particular, why do governments use urgency as a tool of convenience with such frequency? Indicators may be found in the reasons that the Minister has to give pursuant to SO 55; while their contents are often less than satisfying, they still shed some light on this question. The reasons show that urgency motions are generally not moved to accelerate the passage of a particular bill, but because the House lacks the time to adequately process the amount of bills it desires to pass.

Parliament	**46th**		**47th**		**48th**		**49th**	
# of occasions of reasons given for urgency	**49**		**104**		**83**		**128**	
	#	%	#	%	#	%	#	%
Contents-based reasons	**7**	**14%**	**25**	**24%**	**3**	**4%**	**64**	**50%**
Urgent situations	2	4%	4	4%	0	0%	6	5%
Third party interests	4	8%	16	15%	2	2%	25	20%
Election promises	1	2%	5	5%	0	0%	17	13%
Other	0	0%	0	0%	1	1%	30	23%
Time-based reasons	**45**	**92%**	**85**	**82%**	**80**	**96%**	**67**	**52%**
Upcoming event	23	47%	52	50%	80	96%	36	28%
Extra sitting hours	18	37%	31	30%	0	0%	29	23%
Other	4	8%	2	2%	0	0%	2	2%

In the context of reasons for urgency, counting only the times a particular reason has been given for an urgency motion would fail to count the number of bills for which this reason was used. It would also not reflect the fact that multiple reasons may be given, or that a reason applies to some bills but not to others within the same motion. Therefore, 'occasions' of a reason count the number of bills that have been justified by that reason during a single urgency motion. If a bill is accorded urgency a second time at a later stage, the reason given at the time is counted as another separate 'occasion'.

The reasons stated for moving urgency during the 46th to 49th Parliament fall into two main categories: *contents-based* and *time-based* reasons.[44] Each of these categories will be examined below.

A. Contents-related Reasons

Most commonly, contents-related reasons refer to some form of *stakeholder interest* in passing particular legislation as rapidly as possible, be it an election promise which needs to be fulfilled or the interest of a particular group that deems fast passage of a bill desirable.

44 It is interesting to note that the reasons within both categories are most often divorced from the content of the bills, as they only refer to external arguments. Only on very few occasions does the Minister attempt to justify the use of urgency on the basis of the content of the bill and the exigency of the situation itself.

Election promises are an important part of the democratic process.[45] They form the basis on which the incumbent government had been campaigning and therefore affords the government a mandate to implement them rapidly. While there is no legal or constitutional compulsion for the government to fulfil its election promises, there is a strong moral expectation for it to do so; indeed, governments tend to fulfil the majority of their campaign promises.[46] New governments are often judged by their performance within the first 100 days of their term. In order to create a bar against which their progress can be measured, they tend to implement a programme that describes the aims they wish to achieve within this timeframe. These 100-day programmes often include the implementation of new legislation, or repealing legislation created by the previous government. For example, only weeks after its election in 2008, the National government introduced and passed five acts implementing election promises in a single day,[47] and two acts repealing previous legislation a week later.[48] The justification of fulfilling election promises is also used to rush bills through the Introduction and First Reading stages so it can go to the select committee quickly.[49]

Besides specific election promises, the government often justifies the use of urgency through benefit to the general public, such as the clarification of ambiguous legislation, or when the government wants to alleviate uncertainty about future legislation. The Social Security Amendment Bill (No 2) 2001, for example, was passed under urgency through the Committee of the Whole House and the Third Reading with the reason that it clarified the law surrounding social benefits for unlawfully resident spouses.[50] Other examples are the Student Loan Scheme (Repayment Bonus) Amendment Bill 2009, which was accorded urgency to allow the Inland Revenue Department to prepare information for its participants about coming changes introduced by the bill to the student loan scheme;[51] and the Dairy Industry Restructuring (Raw Milk Pricing Methods) Bill 2009, which was accorded urgency to create certainty about future pricing methods regarding raw milk.[52] More common, however, is the reasoning that the legislation is desirable for certain interest groups, or for a majority within the population. As such, on 1 April 2003, several bills were accorded urgency to their final stages for the reason that they were "widely supported".[53] More recently, the Resource Management (Simplifying and Streamlining) Amendment Bill 2009 was rushed through its remaining stages because it was "very much awaited by

45 Andrew Heywood *Political Theory - An Introduction* (3rd ed, Palgrave Macmillan, 2004), at 236.

46 Nathan McCluskey "A Policy of Honesty: Election Manifesto Pledge Fulfilment in New Zealand 1972-2005" (PhD Dissertation, University of Canterbury, 2008).

47 Employment Relations Amendment Act 2008, Taxation (Urgent Measures and Annual Rates) Act 2008, Bail Amendment Act 2008, Education (National Standards) Amendment Act 2008, and Sentencing (Offences Against Children) Amendment Act 2008.

48 Electricity (Renewable Preference) Repeal Act 2008, and Energy (Fuels, Levies, and References) Biofuel Obligation Repeal Act 2008.

49 (22 December 1999) 581 NZPD 62; (10 February 2009) 652 NZPD 1075.

50 (2 August 2001) 593 NZPD 10628.

51 (15 September 2009) 657 NZPD 6338.

52 (30 March 2010) 661 NZPD 9926.

53 (1 April 2003) 607 NZPD 4546.

many people in New Zealand",[54] while on 20 September 2009, six bills were accorded urgency because "outside groups" were eager to see them passed "as rapidly as possible".[55]

Neither election promises nor third party interests of these should by themselves be an appropriate reason for circumventing constitutional processes. Election promises certainly form an important part of democracy,[56] since parties are elected at least in some part based on their campaign promises. An incoming government may thus be expected to rapidly implement these undertakings. But while it may be justified in prioritising bills based on election promises, using urgency in order to hasten their implementation creates several issues. First, it is unclear whether the government has an absolute mandate to implement any one particular election promise. Supporters may not have cast their vote based on each and every party promise, but rather because the party's programme most closely reflects the voter's opinions and interests in general. This means that any single topic may not necessarily enjoy the favour of all people who voted for a party. It is therefore difficult to determine whether any election promise holds the favour of an actual majority of the population. Even if an election promise *is* favoured by the population, the implementing bill may not necessarily conform to the promise. For example, an election promise to "increase employment" may be used to justify urgency for a bill decreasing the minimum wage. A decrease in the minimum wage may be far from what the voters envisaged, making it questionable whether the bill has an active mandate to be passed urgently. The proper legislative process, with all its consultations and debates, is more likely to achieve working and lasting legislation than a rushed bill. It would therefore be more advantageous to the people if election promise legislation was simply prioritised by the government.

The same is true for policies that, although not election promises, purportedly enjoy popularity among the people. Just because a policy is popular does not mean that its hasty implementation will be, as well. The interest of "outside groups" as a reason to fast-track legislation is particularly questionable. Interest groups can exercise their influence by submitting to select committees, or influence the direction of government policy through lobbying. The legislative process, however, is a parliamentary one and should therefore represent the whole of the people. Accelerating the process reduces public input and, more importantly, the opposition's ability to influence the legislation. The interests of particular groups cannot justify this reduction.

B. Time-related Reasons

The majority of occasions on which urgency is accorded, however, are justified by timing issues: the House requires additional sitting hours; bills need to be progressed before a certain imminent event; or it is practical and expedient to progress a bill at the time of the motion.[57]

54 (8 September 2009) 657 NZPD 6038.

55 (20 September 2009) 658 NZPD 7195.

56 Heywood, above n 45, at 236.

57 See also The Urgency Project, above n 6, at 5; expediency is only rarely used as a reason for urgency. It is sometimes employed as a reason in order to finish business that had been interrupted during the previous sitting day: see, for example, (1 August 2000) 585 NZPD

In the vast majority of cases, urgency is accorded to extend the House's sitting hours. Since 2000, the need to progress legislation before an upcoming event was used as a reason on over 50% of occasions. These events are most commonly adjournments of Parliament, such as the two-month recess over summer,[58] and breaks over Easter[59] or before pending elections.[60] At other times, bills were rushed in order to be effective before certain fiscal dates, such as 1 April or 1 July.[61] An additional 20% of occasions were justified simply by a need to gain extra sitting hours.[62] Time-related reasons feature so prominently, that in the years prior to 2009 it was used 80-90% of the time. These reasons for urgency have little to do with the contents of the bills, but rather with the desire to accelerate their progression. Reflecting this, before longer adjournments, urgency is often accorded either to the First Reading or to the remaining stages of several unrelated bills. Rushing the First Reading enables parliament to refer a bill to a select committee, so that it will not lie dormant during the adjournment. Alternatively, bills are hurried through their remaining stages so that they can be passed before the break. A cluster of ten or more bills are frequently accorded urgency for the same time-related reason.

Since 2009, the incoming government has changed its practice regarding giving reasons for urgency: it has relied more on contents-based reasons. Ostensibly, this change of practice has had the effect that the "lack of time" justification has decreased from about 90% to only just over 50% of occasions. However, a closer look reveals that many of the contents-based reasons are founded on time-related problems as well. Apart from a few exceptions, bills that are purportedly desirable to a certain group of people, or that implement an election promise, are generally rushed through the Reading stages or the Committee of the Whole House – comparatively short phases in the process. Compared to the select committee stage, all other stages take place (in accordance with the Standing Orders) in relatively rapid succession: a bill that is rushed through its Second Reading, Committee of the Whole House, and Third Reading in one sitting, for example, could proceed through the same stages without urgency within only three sitting days.[63] But bills passed under urgency for interest-group or general population reasons rarely skip the select committee stage, which lasts for six months by default.[64] If according urgency to a bill reduces its passage only by a few days, why is it so readily employed?

3769. On other occasions, Ministers justify urgency simply by saying that it is important to progress the bill without the usual separation period: see, for example, (30 March 2004) 616 NZPD 12098; (8 September 2009) 657 NZPD 6038.

58 See, for example, (5 December 2001) 597 NZPD 13484; (14 December 2004) 622 NZPD 17685 ; (13 December 2005) 628 NZPD 747; (12 December 2006) 636 NZPD 7091; (11 December 2007) 644 NZPD 13672; (9 December 2010) 669 NZPD 16011.

59 See, for example (30 March 2004) 616 NZPD 12098; (12 April 2005) 625 NZPD 19757.

60 See, for example (11 June 2002) 601 NZPD 16803; (2 August 2005) 627 NZPD 22203; (23 September 2008) 650 NZPD 18909.

61 See, for example (22 June 2010) 664 NZPD 11940.

62 See, for example (2 May 2002) 600 NZPD 15969; (1 July 2003) 609 NZPD 6716; (21 October 2003) 612 NZPD 9336; (20 October 2009) 658 NZPD 7195; (16 November 2010) 668 NZPD 15347.

63 Standing Orders of the House of Representatives 2008, SOs 290 and 301.

64 Standing Orders of the House of Representatives 2008, SO 286; however, the government can, and does, reduce the six-month period if it views rapid passage of the bill as desirable.

The reasons are rather more pragmatic. Debates of a single Reading of a bill can be up to two hours long.[65] Taking into account the general business of the House, which is addressed prior to the legislative business, this leaves only two or three full Reading debates per sitting day. Admittedly, few debates last for the full two hours;[66] still, given the amount of bills on the Order Papers, the actual passage of a bill may be delayed far beyond the stand-down periods as set by the Standing Orders. Moreover, debating several stages on the same sitting day means that a bill will not have to wait in line on another sitting day.

Consequently, regardless of the reason stated in the motion, the vast majority of urgency occasions have the underlying pragmatic motive of *extending the sitting hours of the House* to process more legislation in less time. Indeed, the moving Minister frequently alludes to the otherwise relatively short working week of Parliament.[67] The only exceptions are urgency motions that allow bills to circumvent the select committee stage, as these motions genuinely shorten the legislative process. But even though the amount of the latter has dramatically increased over the last two years, they are still few and far between.

If the House considers that it lacks sufficient time to properly pass legislation, urgency appears to be an obvious solution: parliament can sit for longer hours and reduce the time it takes to advance the bill through the stages. However, the use of urgency for time-related reasons is undesirable on two fronts. First, urgency is not designed as a tool to allow the House to shorten the legislative process in order to ease its workload. It does not include a mechanism to discriminate between different types of bills, or between situations in which acceleration of legislation may, or may not, be appropriate. This, coupled with the ease with which governments can employ it, leaves the motion vulnerable to exploitation. Governments may, at times, use urgency to hurry a bill as a way of minimising the time the opposition or public interest groups have to criticise it. Second, due to the amount of urgency motions, such malignant uses of urgency are hard to detect, particularly when moving urgency for several bills simultaneously.

III. The Vexed Question – If Not Urgency, Then What?

Urgency seems inappropriate as a means to accelerate merely desirable legislation. Yet, the House's inability to deal with its workload is a serious problem. It forces the government to prioritise bills, as it will not be able to pass all bills it deems necessary. While this may prevent the government from executing an overambitious legislative programme, many bills, whose passing would be worthwhile, are set aside in favour of populist and high-profile bills. The Parliamentary Council Office has noted that a government with less time in the House is less likely to promote technical legislation, minor changes or reforms.[68] In contrast, high-profile or controversial bills, which by

65 Standing Orders of the House of Representatives 2008, Appendix A.
66 McGee, above n 14, at 423.
67 (9 December 2010) 669 NZPD 15991.
68 Parliamentary Counsel Office "Statement of Intent for the Period 1 July 2005 to 30 June 2008" [2005] I AJHR A9 at 15.

their very nature should receive proper consideration and consultation, are more likely to be awarded urgency.[69] Moreover, there is now so little time to debate bills in the Whole House that the Standing Orders provide that the default position is to discuss bills part by part, rather than clause by clause.[70] As a consequence, bills tend to be drafted in as few parts as possible, even at the cost of a logical structure.[71]

Since the use of urgency helps the House to address time and workload issues, restricting its use may do more harm than good. It would thus be necessary to create a mechanism specifically designed for the purpose of relieving the House of these pressures; a mechanism that allows for extended sitting times and/or for a sped-up process in certain circumstances and with specific safeguards and restrictions.

Extending the House's sitting hours seems the most obvious and simple solution. Over time, the sitting hours of the House have gotten progressively shorter. The Standing Orders 1884 provided for open-ended sittings on four days of the week.[72] This amounted to at least 23 sitting hours per week, as opposed to the current 17. Permanently extending the hours, by lengthening the daily session or adding another day, would enable Parliament to address more legislation.[73] However, extending the sitting hours of the House would be to the detriment of Members' other duties. In addition, the House spends much of its time on non-legislative business, and additional sitting hours may not necessarily be used exclusively for legislative purposes. Moreover, SO 45 already provides for the ability to appoint Mondays, Fridays and Saturdays as sitting days; yet this is rarely done.

The frequency with which stages are accorded urgency may thus be read as a *problem with the legislative process itself*. The rigidity of the process may not be suitable for all types of bills: three debates and two committees may be too cumbersome for simple or uncontroversial bills. Many other jurisdictions have a lower number of stages in their legislative processes. The UK and Irish legislative processes, for example, feature only one committee stage after the first debate of the bill. The bill is referred to *either* a select committee, *or* the Committee of the Whole House.[74] In this way, only important and controversial bills will be discussed by the Whole House, while less controversial and simple bills can be trusted to a select committee.[75] In other jurisdictions, such as Norway and the Netherlands, the final reading only takes place if the bill has been amended in committee.[76] Consequently, three

69 George Tanner "Confronting the Process of Statute-Making", *The Statute – Making and Meaning* (LexisNexis, Wellington, 2004), at 107.

70 Standing Orders of the House of Representatives 2008, SO 293.

71 Malone, above n 22, at 221.

72 Standing Orders of the House of Representatives 1884, SOs 37, 38.

73 See also the recommendations to the Standing Orders Committee by The Urgency Project, above n 6, at 12.

74 House of Commons Information Office "Legislative Process" (2010) Legislation Series at 5 <www.parliament.uk> ; Standing Orders relative to Public Business 2008 (Ireland), SO 122.

75 Ibid, House of Commons Information Office, at 6.

76 The Storting's administration "The Norwegian Parliament" (2009) at 16 <www.stortinget.no>; Rules of Procedure of the House of Representatives of the States-General 1994 (Netherlands), s 105.

general debates may not be necessary in all cases, particularly for technical or uncontroversial bills. By introducing more flexibility into the New Zealand legislative process bills that have potential cross-bench support could be fast-tracked in an ordered manner that does not rely on the use of an emergency provision. This could include, for example, enabling a qualified majority in the House to omit a reading stage altogether.

Another possibility is reducing the time a bill has to spend in the House. The legislative process in New Zealand relies heavily on the involvement of the entire House. Parliament takes part in all three Readings as well as the Committee of the Whole House stage. Obviously, reducing the time the House spends on a bill also diminishes the amount of scrutiny the bill receives, which would replicate one of urgency's disadvantages. But if a representative sub-committee of the House would work on a bill, legislation could be passed more efficiently and thereby faster. This could be done by way of a Main Committee, such as exists in the Parliament of Australia.[77] This committee is made up by a representative proportion of the Members of Parliament and is set up as an alternative to the Committee of the Whole House. It deals with bills that are expected to be uncontroversial and works on a basis of unanimity. This leaves more time for the Whole House to debate more controversial bills. Another way could be to entrust more responsibility to select committees, or to discuss only those changes recommended by the select committee in the Whole House.

This would leave urgency to be used in the manner for which it is most suited: as an emergency tool. It allows parliament to act quickly in dire situations, where waiting for the normal legislative process would mean a disproportionate disadvantage to the people. As it would only be used for true emergency situations, a requirement of a qualified majority could be added, to reduce the possibility of abuse. Yet, it is far from certain that urgency is necessary even in emergency situations. Indeed, it can be argued that during the most recent example of the use of urgency in an emergency situation – to pass the Canterbury Earthquake Recovery Act 2011 – the motion was *not* used to deal with the emergency situation itself; it was rather used to enable the national state of emergency to be lifted. Not urgency, but the emergency powers of the government allowed a swift response in the days following the February earthquake in Christchurch. These emergency powers may be better suited to deal with emergency situations: they are only temporary and will not leave permanent legislation in their wake.

The permanence and broad application of legislation demands a proper and ordered legislative process. The unrefined and crude urgency tool is both inappropriate and disproportionate to deal with the parliamentary backlog of unfinished business. It should not remain in its current form and should be strictly limited to genuine emergency situations. In its stead, sitting hours of the House should be extended and the legislative process should be altered to allow faster processing of technical and uncontroversial bills. This will raise the efficiency and productivity of the House and lessen the possibility of governments misusing the urgency motion.

77 Parliament of Australia "Infosheet 16 – The Main Committee" (2011) <www.aph.gov.au>.