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'Urgent' Legislation in the New Zealand House of Representatives and the Bypassing of Select Committee Scrutiny

The day after the opening of the new Parliament in December 2008, the National Party minister and Leader of the House, Gerry Brownlee, moved a motion to accord urgency to certain aspects of business. This was passed by 63 votes to 52, with the Māori Party abstaining. It was resolved 'that urgency be accorded the introduction and passing of Government bills dealing with taxation, employment relations, bail, education and sentencing', and some other aspects of House business (New Zealand House of Representatives (NZHR), 2008). Although National had insufficient votes to govern on its own (58 in the 122-seat House) it knew that the House would approve the urgency motion because National had the support of three other parties, the Māori Party (five), the ACT party (five) and United Future (one), giving the government a secure majority so long as either ACT or the Māori Party voted for its bills and procedural motions. The above bills were not referred to select committees for public submissions and scrutiny.

'Urgency' has been possible since 1903 (Martin, 2004, p.193; McGee 2005, p.153). When urgency is successfully moved by the political executive, the House sits for extended hours. Additionally, the normal passage of bills through the House can be abbreviated. Bills awarded urgency

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are debated in the House, but the stand-down periods between the stages of the bill accorded urgency disappear. Any or all stages of the bill can be accorded urgency, and if the urgency motion includes both the first and second stages of the bill the select committee stage is eliminated (NZHR, 2011, SO 55, 56). Legislation can, if so wished by a determined government, be passed in a single sitting. Once a government has majority support in the House, even only a simple majority, bills can be rapidly fast-tracked through the unicameral Parliament by being declared to be urgent and the necessary support being obtained. Governments do not have to provide full formal public justification for so doing.

'Extraordinary urgency' is somewhat different, and dates from the 1985 changes to the standing orders (NZHR, 1985). 'Extraordinary urgency' has to be successfully moved if the government wants to sit all night. The threshold is slightly higher than for ordinary urgency in that 'the Minister shall inform the House of the nature of the business and the circumstances which warrant the claim for extraordinary urgency' (NZHR, 2011, SO 57(2)). Since the 1995 standing orders changes (Standing Orders Committee, 1995) the Speaker has been required to approve extraordinary urgency: 'Extraordinary urgency is designed to facilitate the passing of a particularly urgent piece of legislation, such as Budget legislation or legislation to deal with the collapse of a commercial or financial organisation, or a matter involving state security' (McGee, 2005, p.155). It 'may be claimed only if the Speaker agrees that the business to be taken justifies it' (NZHR, 2011, SO 58(3); McGee, 2005, p.155). Like ordinary urgency, extraordinary urgency needs only a simple majority of votes to be approved by the House.

So, when National fast-tracked some of its key legislative measures during its first months in office, was it in fact behaving any differently from previous governments? The advent of a proportionally elected House of Representatives after the implementation of the mixed-member electoral system (MMP) in 1996 had seemed to slow down the legislative process, including reducing the number of bills passed under urgency. Was this not the case after all? More fundamentally, has the use of urgency detrimentally affected the quality of legislation and New Zealand democracy? These were some of the key questions we asked when we began research on the use of urgency in the New Zealand legislative process. The full results of that research are available in Geiringer, Higbee and McLeay, *What's the Hurry? Urgency in the New Zealand legislative process 1987–2010* (2011). This article focuses primarily on the most radical form of urgency: bills that pass through the House without being referred to select committee, in particular bills that were fast-tracked in this way after the introduction of MMP in 1996.

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If judgments are to be made on the strengths and weaknesses of taking urgency, especially urgency bypassing select committees, normative criteria need to be formulated against which to assess the legislative process and its democratic and constitutional implications. In the next section of this article we briefly discuss the democratic principles that define good parliamentary practice in so far as the legislative process is concerned. We then discuss the main findings on the use of urgency, before focusing on the most extreme cases of taking urgency – fast-tracking bills to the extent that the select committee stage is avoided. The final section briefly explains the impact of the 2011 standing orders changes on the practice of urgency and assesses their adequacy in so far as the select committee stage of the legislative process is concerned.

The principles of good law-making

Drafting laws is one of the central roles of government; and approving them after appropriate discussion, criticism, scrutiny and amendment is one of the central roles of all legislatures aspiring to be democratic. In order to evaluate the part played by expedited legislation within this crucial policy process we needed to identify the principles of democratic and effective legislative processes and outputs. Building on the list designed to help evaluate fast-tracked bills in the British Parliament (House of Lords Select Committee on the Constitution, 2009), we developed 10 criteria that distinguish good lawmaking per se (Geiringer, Higbee and McLeay, 2011b, pp.15-19). These are:

1 Legislatures should allow the time and opportunity for informed and open policy deliberation.
2 The legislative process should allow enough time and opportunity for the adequate scrutiny of bills.
3 Citizens should have the opportunity to participate in the legislative process.
4 Parliaments should operate in a transparent manner.
5 The House should strive to produce high-quality legislation.
6 Legislation should not jeopardise fundamental constitutional rights and principles.
7 Parliament should follow stable procedural rules.
8 Parliament should foster, not erode, respect for itself as an institution.

9 The government has a right to govern, as long as it commands a majority in the House.
10 Parliament should be able to enact legislation quickly in (actual) emergency situations.[1]

As can be seen, the ten principles include standards that relate to due process as well as to the production of good quality policy, the statutes themselves. In fact, we saw the various principles as intrinsically interrelated: without good process, good law is much more difficult to achieve. This is because statutes are almost always complex, many are multifaceted in terms of their policy ramifications, and precise and defensible wording is essential. It can generally be assumed that, because of policy complexity and the contestability of determining the public good, the more expert and participant appraisal that occurs, the better the end product will be. Moreover, and conversely, in a democratic state, legislatures lack legitimacy when their law-making does not follow the formal and normal procedures, is secretive rather than transparent, and is elitist rather than participatory. Nonetheless, as criterion 10 indicates, in certain circumstances fast-tracking legislation can be justified. Indeed, in a time of crisis it might be essential.

The normal legislative process in New Zealand generally complies with the high democratic and constitutional standards we identified, fulfilling most of the above 10 criteria. Although certainly not flawless, the pathway of bills through the House, with its three stages, committee of the whole, stand-down periods and select committee scrutiny, generally follows a predictable and considered process, allowing time for reflection and deliberation, examination and amendment, by elected officials, public servants and citizens alike. In particular, the open and participatory select committee process, with considerable revision and amendment powers in the hands of the committees, enhances the legislative process, going some way to compensating for the lack of an upper house (Palmer, 1987, p.236).

The question is, however, whether, in terms of both process and quality, legislation passed under urgency can achieve the high standards outlined above. Certainly, bills that escape the usual scrutiny and debate run the risk of infringing the democratic values outlined. Without extensive further research we cannot tell whether or not urgency invariably or even mostly has a detrimental impact on the actual quality of legislation. Interview data, however, and many comments during parliamentary debates revealed a range of examples of bills that participants and observers believed contained shortcomings because they were rushed through the House. Further, it was observed, bills passed through urgency had frequently been subsequently amended. Note that the Standing Orders Committee that reviewed the House's processes in 2011, when commenting on the consequences of abbreviated time frames imposed on select committees for reporting back to the House on bills, observed that, 'The truncation of the select committee process can have serious implications for legislative quality' (Standing Orders Committee, 2011, p.40). It follows that elimination of the select committee stage altogether can have even more serious effects on the quality of bills.

Even if the democratic criteria around flawed process (deliberation, opposition, amendment and so forth) are alone considered, however, there is reason to be anxious about fast-tracking bills for no justifiable reason. How severe is the actual problem, and has the pattern of usage of urgency changed from time to time? And how does select committee consideration fit into the patterns thus discovered?

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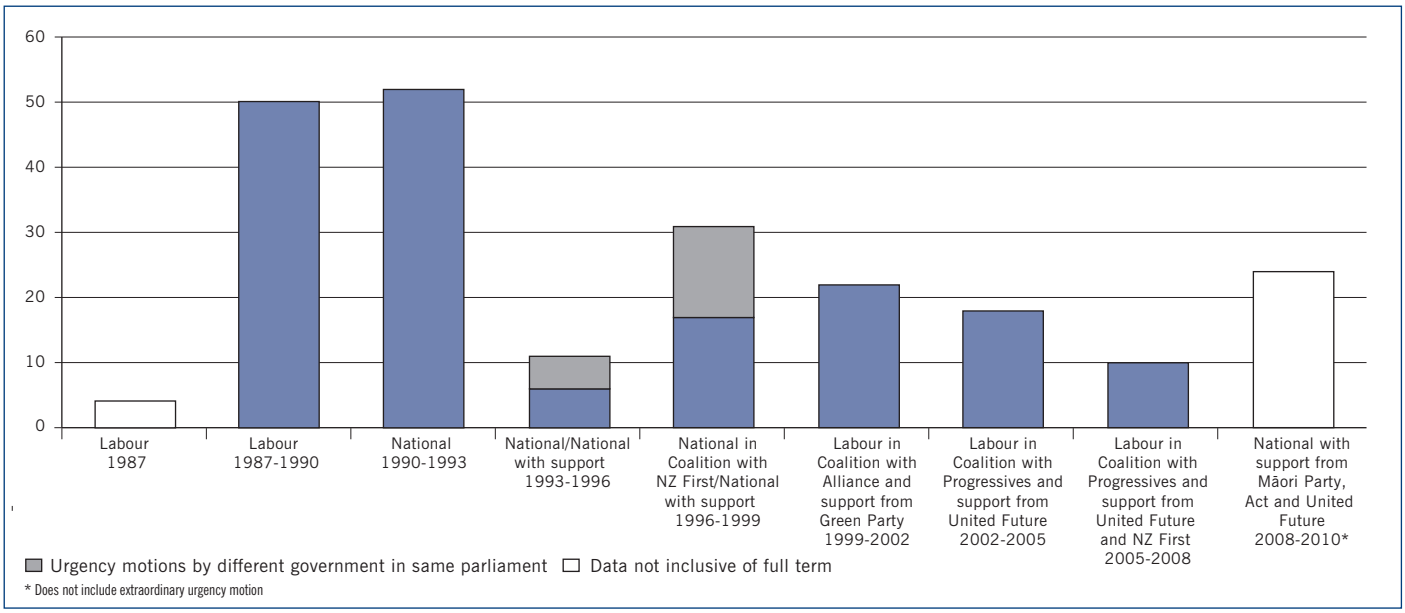
Urgency: patterns and explanation

In order for us to gain the full picture of what had been happening when the House took urgency we needed to gather and analyse empirical data that had generally been lacking (but see Malone, 2008). Hence we constructed databases that included every urgency motion, and every urgency bill introduced into the House, between 1987 and 2010. During this time the House approved 221 urgency motions that related to the passage of bills. There were also eight motions concerning bills accorded extraordinary urgency, which has a higher threshold for approval, as explained. The data had to be analysed bill-by-bill as well as by parliamentary motion, because under standing orders single motions could include a number of bills, as shown in the December 2008 example. Between 1987 and 2010, the urgency motions included 1,608 bills, some being granted urgency at more than one stage of their progression though the House. In all, 830 bills were introduced that were accorded urgency at some stage or other of their passage through the House. The apparent discrepancy between these figures is explained by the fact that bills can be divided or split after introduction (see Geiringer, Higbee and McLeay, 2011b, pp.8-10 for a fuller explanation).

For various reasons, including pinpointing the governments responsible for putting particular bills into the House under urgency, we categorised the bills according to their year of introduction (ibid., p.9). These data

Figure 1: Urgency motions moved by Parliament, 1987-2010



gave us the fundamental statistics we needed in order to assess the frequency and distribution of urgency bills between different parliaments and governments.

By extending the time period under analysis back to the beginning of the 1987 Parliament, we could include two houses elected under the previous electoral system (first-past-the-post (FPP)), each governed by a different parliamentary party, Labour (in its second term) between 1987 and 1990, and National from 1990 to 1993. These two administrations were the last single-party majority governments to be formed during the 1987–2010 research time period. From midway through the last FPP-elected Parliament (1993–1996) until the end of our data collection period in 2010, every government had to seek support from one or more other parliamentary parties in order to pass its legislation, either through formal governing coalition with another party or parties and/or legislative support arrangements.

We chose not to analyse pre-1987 parliaments because in 1985 the House adopted radically new standing orders, thus making earlier sessions more difficult to compare with the post-1987 parliaments. Not only was all legislation except for money bills referred to select committee after the 1985 reforms, but also the category of extraordinary urgency was added to the standing orders. As it happened, the 1987–2010 data period was almost perfectly enclosed by two sets of rule changes that had an impact on urgency. There were the 1985 changes already mentioned. Then, in 2011, the House modified standing orders again in a way that affected fast-tracking legislation (NZHR, 2011). (Our data, however, do not include 2011, the last year in which the 2008 standing orders were in operation and the year in which a general election was held.)

The statistics were supplemented by 19 in-depth interviews with key participants and observers (including one response via email) (Geiringer, Higbee and McLeay, 2011b, pp.10-11). These conversations provided contextual information on urgency and general perceptions of the legislative process and the parliamentary legislative culture. In particular, the interviews enabled identification of the reasons for, and different uses of, taking urgency.

The broad pattern of bills introduced under urgency is depicted in Figure 1 (Geiringer, Higbee and McLeay, 2011b, p.69). As can be seen, both of the single-party majority FPP governments were very high users of this process. The National-led governments between 1996 and 1999 also employed urgency very extensively. Between the 1999 and 2008 general elections there were three Labour-led governments that were less prolific users of urgency, a situation that changed after the election of the National-led government in 2008. MMP appeared at times to have moderated the use of urgency by placing minor parties in potential negotiating positions. Such parties, for example the Green Party, could forestall the use of urgency if they so wished, not necessarily by voting against the parliamentary motion but by putting their views about this procedure to the dominant governing party with some force behind the scenes, thus forestalling urgency motions in the House. MMP, however, while providing the opportunity for the smaller parties to argue or act against the use of urgency, could not of course guarantee it, for much depended on precisely how the votes were distributed among the government-supporting parties and the attitudes towards parliamentary procedure of those parties, including how they, and their senior legislative partners, chose to interpret their formal and informal support agreements (Geiringer, Higbee and McLeay, 2011b, especially pp.99-119). Hence the contrast between the different levels of usage by different governments.

Without knowing how many bills in total proceeded through the House between 1987 and 2010, however, we could not confirm that particular governments and parliaments were in fact prolific or modest users of urgency. High rates of urgency use might simply have reflected particularly high numbers of bills put through the House by particular governments, for example. Table 1 shows the percentages of bills introduced under urgency as proportions of the total

numbers of bills introduced (Geiringer, Higbee and McLeay, 2011b, p.72). It confirms the general trends outlined above, but places the performances of the three Labour-led governments between 1999 and 2008 in a less laudable light, although it must be remembered that the figures for the National-led government elected in 2008 are incomplete.

Table 1: Percentages of bills accorded urgency, 1987–2010

Parliament	Bills introduced	Accorded urgency	%Urgency
1987-1990	262	188	71.8
1990-1993	229	135	59
1993-1996	207	43	20.8
1996-1999	273	151	55.3
1999-2002	206	82	39.8
2002-2005	202	73	36.1
2005-2008	238	66	27.7
2008-2010	211	75	35.5

Not all uses of urgency have similarly dramatic effects on the passage of bills. Some uses of urgency are plainly relatively benign, taking just one stage under urgency, for instance. Taking urgency that bypasses the select committee stage, in contrast, is a much more radical and potentially worrying form of fast-tracking bills, given how little scrutiny they are then given. This happens when bills are either passed through all their stages under an urgency motion, or, since the 2003 standing orders changes (NZHR, 2003), when urgency is accorded in the one motion for at least the first and second readings of a bill. The next section of this article discusses this phenomenon in more detail.

Urgency used to avoid the select committee stage of the legislative process

In the New Zealand House of Representatives almost all bills are routinely referred to their subject select committee after their first reading. These 13 subject committees are multifunctional in that, as well as scrutinising bills, the committees hear and recommend on petitions, scrutinise the estimates and deal with the financial reviews of the government agencies within their areas of jurisdiction, can initiate and conduct inquiries (without the permission of the House itself), and examine international treaties (McGee, 2005, pp.236-42).

As far as their legislative roles are concerned, the committees have the power to recommend amendments to the House (ibid., pp.351-8). The committees usually have six months in which to conduct their scrutiny of bills, although they may seek permission from the Business Committee to extend that time. Conversely, sometimes, and sometimes controversially, governments give committees less than the usual time to report back to the House. The committees advertise for submissions, will accept them from anyone (not always the case in other parliaments), and hold public hearings where submitters have the opportunity to make their points to the committee in public. However, committee deliberations are held in private. The committees have considerable powers, although when governments hold the majority on committees (not always the case since the adoption of MMP) government and government-supporting members can dominate the decision-making process. After 1985, an opposition MP always chaired the Regulations Review Committee. Committee chairpersons, who are in formal terms elected by their committees, have not had casting votes since the 1995 standing orders changes. Since 1996 some opposition MPs have chaired committees, although there has been some variation in the extent to which governing parties have allowed these positions to go to MPs not of their own persuasion. Because governments can and do very often dominate the committees, therefore, the select committee process is far from perfect when considered as a constraint on the executive.

Despite the deficiencies of the New Zealand select committee system, referral to select committees strengthens the legislative process (Ganley, 2001; McLeay, 2006; Palmer and Palmer, 2004, pp.197-8, 160-75). It allows time for reflection on the content and detail of bills, it provides the opportunity for amendment and correction, it encourages participation by members of the public, and it enhances the transparency of different viewpoints. On balance, the select committee stage contributes to fulfilling the criteria for good law-making outlined earlier. Despite its manifest strengths and its particular importance for a unicameral parliament, however, between 1987 and 2010 select committee scrutiny was bypassed 88 times (an average of 3.7 occasions per calendar year). Unsurprisingly, this figure is very close to the 81 occasions when bills were passed through all their stages in one sitting. (This is almost always the case for bills granted extraordinary urgency.) Notable offenders were the two pre-MMP single-party majority governments, with a total of 33 bills escaping select committee scrutiny in just six years. Labour between 1987 and 1990 put through more bills in this category than National between 1990 and 1993. Other culprits were the two post-MMP National-led governments (1996–1999 and 2008–2010).

But were the bills put through the House without select committee scrutiny justifiably hastened because they concerned genuinely 'urgent' matters? Or, on the other hand, did they concern policy matters that should have been fully discussed and scrutinised in select committee? Given the importance of select committees in New Zealand's unicameral Parliament this issue deserved further investigation. Accordingly, we examined all 55 bills in the post-MMP period (1996–2010) that were not referred to select committees. We were particularly interested in the more recent period because one of our goals was to analyse the impact of MMP, in particular the influence of the smaller parties, on the practice of urgency (not fully discussed in this article).

Table 2: Bills not referred to select committee between 1996 and 2010

1996–1999 (20 bills) National–NZ First coalition; and National-led minority governments	
A: Identifiable rationale	*Voting at 3rd Reading*
*Customs and Excise Amendment Bill 1998 (extrordinary urgency)	Opposed by Labour and Alliance parties
*Estate Duty Repeal Bill 1999 (omission of select committee stage not criticised by opposition)	Unopposed
Farm and Fishing Vessel Ownership Savings Schemes (Closure) Bill 1998 (essentially a tidying up bill)	Unopposed
Immigration Amendment Bill (No. 2) 1999 (response to anticipated event; process criticised)	Opposed by Labour and Alliance parties and N. Kirton
Māori Reserved Land Amendment Bill (No. 2) 1998 (remedial; process criticised)	Opposed by Labour and Alliance parties
Oaths and Declarations (Validation) Amendment Bill 1998 (remedial)	Unopposed
Stamp Duty Abolition Bill 1999 (extraordinary urgency)	Opposed by Alliance Party
B: Non-identifiable rationale	*Voting at 3rd Reading*
*Accident Insurance Amendment Bill 1999	Unopposed
*Broadcasting Amendment Bill (No. 3) 1999	Unopposed
*Copyright (Removal of Prohibition on Parallel Importing) Amendment Bill 1998	Opposed by Labour and Alliance parties
Education Amendment Bill 1998	Opposed by Labour and Alliance parties
Fire Service Amendment Bill 1998	Opposed by Labour, Alliance and United parties
Immigration (Migrant Levy) Bill 1998	Unopposed
*Social Security Amendment Bill (No. 5) 1998	Opposed by Labour and Alliance parties
Social Welfare (Transitional Provisions) Amendment Bill 1998	Opposed by Labour, Alliance and NZ First parties, and N. Kirton and C. Fletcher
State Sector Amendment Bill 1997	Opposed by Labour, Alliance and United parties
State-Owned Enterprises (Contact Energy Limited) Amendment Bill 1998	Opposed by Labour, Alliance and NZ First parties and N. Kirton
*State-Owned Enterprises (Meteorological Service of NZ Limited and Vehicle Testing NZ Limited) Amendment Bill 1999	Opposed by Labour, Alliance and NZ First parties and N. Kirton
Tariff (Zero Duty) Amendment Bill 1998	Opposed by Labour, Alliance and NZ First parties
C: Tax measures	Voting at 3rd Reading
*Taxation (Parental Tax Credit) Bill 1999	*Unopposed*
1999–2002 (7 bills) Labour–Alliance minority government	
A: Identifiable rationale	*Voting at 3rd Reading*
Customs and Excise Amendment Bill 2000 (extrordinary urgency)	Opposed by National, ACT, NZ First and United parties
Customs and Excise Amendment Bill (No. 5) 2002 (extraordinary urgency)	Opposed by National, ACT, NZ First and United parties
Local Government (Rodney District Council) Amendment Bill 2000 (preemptive legislation; process criticised by ACT)	Unopposed
Road User Charges Amendment Bill 2002 (timing of charges involved; process criticised)	Opposed by ACT and NZ First parties
B: non-identifiable rationale	*Voting at 3rd Reading*
Local Government (Prohibition of Liquor in Public Places) Amendment Bill 2001	Opposed by National, ACT, Green and United parties
Tariff (Zero Duty Removal) Amendment Bill 2000	Opposed by National, ACT and United parties

C: Tax measures	*Voting at 3rd Reading*
Taxation (Tax Rate Increase) Bill 1999	Opposed by National, ACT, NZ First and United parties
2002–2005 (4 bills) Labour–Progressive minority government	
A: Identifiable rationale	*Voting at 3rd Reading*
Customs and Excise (Alcoholic Beverages) Amendment Bill 2003 (extraordinary urgency)	Opposed by National, NZ First and ACT parties
B: Non-identifiable rationale	*Voting at 3rd Reading*
Electoral (Vacancies) Amendment Bill 2003	Opposed by National, NZ First, ACT and United parties
Immigration Amendment Bill (No. 2) 2003	Opposed by National, NZ First, ACT and Green parties
C: Tax measures	*Voting at 3rd Reading*
*Future Directions (Working for Families) Bill 2004	Bill was divided
2005–2008 (4 bills) Labour–Progressive minority government	
A: Identifiable rationale	*Voting at 3rd Reading*
Biosecurity (Status of Specified Ports) Amendment Bill 2005 (retrospective validation of non-intended illegal action)	Unopposed
B: Non-identifiable rationale	*Voting at 3rd Reading*
Appropriation (Parliamentary Expenditure Validation) Bill 2006	Opposed by National and ACT parties. Green Party abstained
C: Tax measures	*Voting at 3rd Reading*
*Taxation (KiwiSaver and Company Tax Rate Amendments) Bill 2007	Opposed by National and ACT parties. Māori Party abstained.
*Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Bill 2008	Unopposed
2008–2010 (20 bills) National minority government (incomplete parliamentary term)	
A: Identifiable rationale	*Voting at 3rd Reading*
Civil Aviation (Cape Town Convention and Other Matters) Amendment Bill 2010 (technical bill on issue that had been topic of inquiry by a select committee)	Unopposed
Crown Retail Deposit Guarantee Scheme Bill 2009 (extension of existing scheme; process criticised)	Unopposed
Electoral Amendment Bill 2009 (repeal of an act, with interim measures)	Opposed by Green Party
Excise and Excise-Equivalent Duties Table (Tobacco Products) Amendment Bill 2010 (extraordinary urgency)	Opposed by four ACT MPs.
Immigration Act 2009 Amendment Bill 2010 (rectified omission in earlier act)	Opposed by Green Party
Policing (Constables' Oaths Validation) Amendment Bill 2009 (rectified legislation that validated certain actions)	Unopposed
Summary Proceedings Amendment Bill (No. 2) 2010 (rectified legislation)	Unopposed. Green Party abstained
B: Non-identifiable rationale	*Voting at 3rd Reading*
Bail Amendment Bill 2008	
Corrections (Use of Court Cells) Amendment Bill 2009	Opposed by Green Party
Education (National Standards) Amendment Bill 2008	Opposed by Labour and Green parties
Electricity (Renewal Preference) Repeal Bill 2008	Opposed by Labour, Green, Progressive and Māori parties
Employment Relations (Film Production Work) Amendment Bill 2010	Opposed by Labour, Green and Progressive parties

Employment Relations Amendment Bill 2008	Opposed by Labour, Green and Māori parties
Energy (Fuels, Levies, and References) Biofuel Obligation Repeal Bill 2008	Opposed by Labour, Green, Māori and United Future parties
Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill 2010	Opposed by Labour, Green, Māori and Progressive parties
Policing (Involvement in Local Authority Elections) Amendment Bill 2010	Opposed by Green and Māori parties
Sentencing (Offences Against Children) Amendment Bill 2008	Unopposed
C: Tax measures	*Voting at 3rd Reading*
*Taxation (Budget Measures) Bill 2010	Bill divided
*Taxation (Budget Tax Measures) Bill 2009	Unopposed
Taxation (Urgent Measures and Annual Rates) Bill 2008	Opposed by Labour, Green and Progressive parties

* Asterisked legislation was included in a Budget day urgency motion.

The criteria for justifiable and non-justifiable non-referral of bills to select committees are inevitably contestable. However, we divided the bills into three main groups: bills that had identifiable reasons for select committee avoidance (group A); those that did not (B); and bills concerning tax measures where avoidance of select committee scrutiny was institutionally the practice but actually debatable (C). This did not mean that we agreed that those bills in the A (or indeed the C) category had democratically justifiable reasons for going through the House under urgency and without select committee scrutiny. It simply meant that they fulfilled one or more rationales for being fast-tracked in this way.

In the first group, A, the bills with identifiable rationales for this form of fast-tracking, were placed in that category because they complied with at least one of four criteria relating to content, or one of three criteria relating to process (see also Geiringer, Higbee and McLeay, 2011b, pp.81-4). Identifiable reasons could be related to the content and policy goals of the bills. Thus, these bills were fast-tracked for at least one of the following reasons:

- to reduce the potential for speculative behaviour;
- to respond to an unexpected event or court decision;
- to remedy an anomaly, oversight or uncertainty in existing legislation; or
- to respond to external factors creating a deadline for the proposed legislative change.

Alternatively, or as well, identifiable rationales could be provided on the grounds of particular processes and procedures:

- they had been granted extraordinary urgency, and therefore had been approved by the Speaker of the House;
- both the bill received unanimous support in the House, as indicated by voting at the third reading, and also the omission of the select committee stage was not criticised by MPs; or
- the bill repealed an act that itself had gone through select committee scrutiny and the repealing legislation received widespread (if not complete) parliamentary support.

We identified 19 bills in the A category, 34.5% of the total number (55) between 1996 and 2010. Table 2 includes the rationale for escaping select committee scrutiny for each of the 19 bills.

Into the second, B category went all those bills for which we could identify none of the above rationales for their fast-tracking. Note that often these bills proposed major policy, even constitutional, change. Thus, an argument can be made that they should have been referred to select committee because their policy impact on citizens was potentially significant or because they concerned important issues about rights and responsibilities. We identified 27 bills, 49.1% of the total of 55, that, when judged against our criteria for good legislative processes outlined above, should have been referred to their relevant select committees.

Category C included the nine bills that were tax measures. These bills historically have often been treated as 'urgent', in part because of fitting in with the timetable of the tax year. Thus we followed tradition and did not place them in the reprehensible B grouping. Nevertheless, where such measures involve significant policy changes there is a strong democratic case for referring these also to select committee. If we had classified tax measures as B, then the picture would have changed quite dramatically, with the majority of the bills that escaped select committee scrutiny between 1996 and 2010 falling into that category. The picture becomes even blacker if we believe that some of the bills we placed in the A category had unconvincing or weak rationales for select committee avoidance.

When arranged in terms of the governments responsible for this radical fast-tracking of bills, it can be seen that there was considerable variance among the different governments and parliaments, as can be seen from Table 2 (an expanded version of Geiringer, Higbee and McLeay, 2011b, p.83, Table 4.4).

Table 2, as well as listing the bills that were not considered by select committees between 1996 and 2010 according to the governments in office at the time, also provides information as to whether or not the bills were contested by opposition parties at the time of their third readings. It should be noted, though, that there were many occasions when opposition parties allowed uncontested third readings, having earlier criticised the lack of select committee consideration. Over the whole period, eight of the 19 bills in the A category (containing those bills where there were identifiable reasons for skipping the select committee stage) were

unopposed at their third readings, and a further four bills were unopposed by the other major party but opposed by one of the smaller parties. In comparison, of the 27 bills without rationales for non-select committee consideration, a mere four were unopposed, with two further bills opposed by just one of the smaller parties. These results give some further credence to the categorisation: some bills are more controversial than others and these certainly should be placed before select committees. But it might be that for similar sorts of reasons – issue salience, policy complexity and issue contestability – some bills that we put in the A category should have also gone to select committees.

To summarise so far, although the number of bills put through the House without being referred to select committee is not large when placed against the total number of bills that are processed through the House under urgency, there are too many examples of important bills that are expedited in this way without sufficient cause. This is a case of political executives abusing the democratic process.

Having established that governments use urgency very frequently and at times abuse it to bypass the select committee stage, we should ask: Why do governments use urgency? (Geiringer, Higbee and McLeay, 2011b, pp.45-65). The answers are many and complex, as we found when we discussed this issue with participants, but the first of these is to prioritise government business over other House business (such as members' bills, and also, at times, question time) in order to get government legislation through Parliament. Especially for a government that has a heavy legislative programme, urgency is seen as a way of getting legislation passed through, in part, increasing the time spent in plenary sessions of Parliament. This is seen as an acceptable strategy despite the possible detrimental effects on Parliament's reputation and the quality of the acts passed in this way. Further, not only is Parliament a competitive environment, with the opposition parties chipping away at government policy, but also cabinet ministers compete amongst themselves for parliamentary time. And they have public servants who are also energetically promoting their pet schemes and draft bills. (Although we did not have the resources to interview public servants about this, we heard anecdotal evidence suggesting that, sometimes at least, the public service pushes for bills to be made urgent.)

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Thus, there is considerable pressure on governments to implement their legislative programmes.

New governments in particular, on the evidence of the interviews and the patterns of urgency usage (Geiringer, Higbee and McLeay, 2011b, pp.84-7), are impatient to implement their policies, and, indeed, at times have promulgated the wholly indefensible view that because they have a 'mandate' their key policies should be able to escape the usual measured legislated process. At times, also, governments have chosen to use urgency for tactical reasons, perhaps to get a controversial issue out of the way or to embarrass the opposition and starve it of parliamentary time.

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. Urgency has been the main weapon wielded by governments to deal with the problem of too little time and too much legislation, as our figures and interviews demonstrated.[2] It is little surprise, then, that such a useful and expedient practice as urgency has been a feature of the House for well over a century. Yet, at the same time, the New Zealand House of Representatives has changed both its rules and its practices around urgency. It has evaluated its processes from time to time, adapting them somewhat to changing attitudes about due process, accountability and participation, even though, in our view, the House has not gone far enough, especially concerning permitting bills to skip the select committee stage of the legislative process. This is the topic of the last part of this article.

Urgency, select committee referral and parliamentary reform

When the Standing Orders Committee reviewed the House rules in 2011 there had been some adverse publicity around the use of urgency by the National-led government elected in the 2008 general election. It was unsurprising, then, that a number of the submitters to the review (including the authors of this article) proposed changes to the rules on taking urgency (Geiringer, Higbee and McLeay, 2011a). In the event the committee made several recommendations of relevance to urgency, all subsequently formally adopted by the House.

First, ad hoc extensions to the House's sitting hours were permitted, with formal notice having been given the week before to the Business Committee, as an attempt to increase the parliamentary time available to governments (Standing Orders Committee, 2011, pp.15-16). The select committees cannot meet during extended sittings unless they have been given permission to do so, either by the House or by the Business Committee. So there could be adverse effects on the committees' work schedules and capacity to deal with their workloads. Other, streamlining measures have also been put into place (see also the discussion in Geiringer, Higbee and McLeay, 2011b, pp.132-8).

Second, instructions to select committees were made debatable

(Standing Orders Committee, 2011, p.41). After bills are read a first time they stand referred to a select committee (unless the bill is under urgency). The member in charge of the bill moves a motion that nominates the committee that is to consider it. As part of that motion, which until 2011 had been non-debatable, special instructions could be given, including permitting select committee sittings during House sittings (posing difficulties for the smaller parties) and abbreviating the usual six-month time frame for committees to report back. Such instructions are now to be debatable except when these instructions only reduce the time for reporting back to between four and six months. The aim is to provide a disincentive to imposing shorter deadlines by taking up time in the House to debate such measures.

Another change relevant to urgency procedures is a requirement that the person who moves an urgency motion now must provide greater specificity about the reason for doing so, although the instruction is not as strong as we recommended (Standing Orders Committee, 2011, p.17). Unfortunately, the committee did not take up our recommendation that greater transparency be given to bills being dealt with under urgency by requiring a separate motion for each separate bill (see Geiringer, Higbee and McLeay, 2011b, pp.153-7).

And what did the committee recommend to constrain the avoidance of the select committee stage of the legislative process, the most worrying use of urgency of all? Most unfortunately, no reform was recommended, despite some 'tut-tutting' about the practice expressed in the committee's report (as we saw above). In our submission we recommended that the Speaker be given a role similar to that the presiding officer already has in relation to taking extraordinary urgency. Thus, the Speaker would have to approve the circumstances under which the select committee might be bypassed (Geiringer, Higbee and McLeay, 2011a). The committee rejected this recommendation on the grounds that such an innovation would make the Speaker's role more political (NZHR, 2011a, p.17). The Green Party's proposal that all bills accorded urgency for the first and second stages would go to a select committee for between three and five sitting days was also dismissed (Graham, 2010, recommendation 12).

It is a pity that the 2011 Standing Orders Committee did not address the most serious infringement of the principles of good law-making: using urgency in such a way that select committee consideration is bypassed.

It is a pity that the 2011 Standing Orders Committee did not address the most serious infringement of the principles of good law-making: using urgency in such a way that select committee consideration is bypassed. It remains to be seen whether present and future governments continue to abuse the legislative process in this undemocratic way.

1 Apart from the House of Lords report (2009), we drew especially upon the following sources when developing the 10 criteria: Barnett and Higbee, 2009; Butler and Butler, 2005; Consultative Steering Group on the Scottish Parliament, 1998; Craig, 2007; Geiringer, 2007; Held, 2006; International Institute for Democracy and Electoral Assistance, 2011; Joseph, 2007; McGee, 1995; McGee, 2005, p.4; Mulgan, 2004; and Wheare, 1963.

2 The problem of adequate time for legislation and the possible problems of the House's sitting hours and sitting days is a whole separate issue which we do not discuss here. Although the time issue was not the focus of the urgency project, Geiringer, Higbee and McLeay (2011b) devote some time to the problem, and the authors' submission to the Standing Orders Committee (2011a) also contains some data on it.

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References

Barnett, T. and P. Higbee (2009) 'Engaging in the Future: overcoming the limitations of parliamentary representation', *Australasian Parliamentary Review*, 24, pp.61-74

Butler, A. and P. Butler (2005) *The New Zealand Bill of Rights Act: a commentary*, Wellington: LexisNexis

Consultative Steering Group on the Scottish Parliament (1998) *Shaping Scotland's Parliament,* section 2.2, Scottish Office

Craig, P. (1997) 'Formal and substantive conceptions of the rule of law: an analytical framework', *Public Law,* pp.467-87

Ganley, M. (2001) 'Select committees and their role in keeping Parliament relevant: do New Zealand select committees make a difference?', *Australasian Parliamentary Review,* 16, pp.14-150

Geiringer, C. (2007) 'The dead hand of the Bill of Rights? Is the Bill of Rights Act 1990 a substantive legal constraint on Parliament's power to legislate?', *Otago Law Review,* 11, pp.389-415

Geiringer, C., P. Higbee and E. McLeay (2011a) 'The urgency project: revised submission to Standing Orders Committee 2011', Wellington

Geiringer, C., P. Higbee and E. McLeay (2011b) *What's the Hurry? Urgency in the New Zealand legislative process 1987–2010*, Wellington: Victoria University Press

Graham, K. (2010) 'Review of standing orders, procedures and practices of the House: submission from Green parliamentary caucus, October 2010'

Held, D. (2006) *Models of Democracy,* 3rd edn, Cambridge: Polity Press

House of Lords Select Committee on the Constitution (2009) 'Fast-track legislation: constitutional implications and safeguards', House of Lords paper 116-1, London

International Institute for Democracy and Electoral Assistance (2011) 'Basic principles and mediating values', http://www.idea.int/sod/framework/basic_principles.cfm

Joseph, P.A. (2007) *Constitutional and Administrative Law in New Zealand*, 3rd edn, Wellington: Thomson Brookers

McGee, D. (1995) 'The legislative process and the courts', in P.A. Joseph (ed), *Essays on the constitution*, Wellington: Brookers

McGee, D. (2005) *Parliamentary Practice in New Zealand*, 3rd edn, Wellington: Dunmore

McLeay, E. (2006) 'Scrutiny and capacity: an evaluation of the parliamentary committees in the New Zealand Parliament', *Australasian Parliamentary Review*, 21, pp.158-77

Malone, R. (2008) *Rebalancing the Constitution: the challenge of government law-making under MMP*, Wellington: Institute of Policy Studies

Martin J.E. (2004) *The House: New Zealand's House of Representatives 1854–2004*, Palmerston North: Dunmore

Mulgan, R. (2004) *Politics in New Zealand*, 3rd edn, updated by Peter Aimer, Auckland: Auckland University Press

New Zealand House of Representatives (1985) *Standing Orders of the New Zealand House of Representatives*, Wellington

New Zealand House of Representatives (2003) *Standing Orders of the New Zealand House of Representatives*, Wellington

New Zealand House of Representatives (2008) New Zealand Parliamentary Debates, www.parliament.nz/en-NZ/PB/Debates/Journals/6/9/d/49HOHJournals200812081-Journals-of-the-House-for-the-week-beginning.htm#_Toc221951414

New Zealand House of Representatives (2011) *Standing Orders of the New Zealand House of Representatives,* Wellington, http://www.parliament.nz/NR/rdonlyres/65E97824-9EED-447E-832A-E4A4418EAEA2/206415/standingorders2011_1.pdf

Palmer, G. (1987) *Unbridled Power: an interpretation of New Zealand's constitution and government*, Auckland: Auckland University Press

Palmer, G. and M. Palmer (2004) *Bridled Power: New Zealand's constitution and government*, 4th edn, Melbourne: Oxford University Press

Standing Orders Committee (1995) 'Report of the Standing Orders Committee on the review of standing orders', *Appendices to the Journals of the New Zealand House of Representatives*, I 18A, Wellington: New Zealand House of Representatives

Standing Orders Committee (2003) 'Report of the Standing Orders Committee on the review of standing orders', *Appendices to the Journals of the New Zealand House of Representatives*, I 18B, Wellington: New Zealand House of Representatives

Standing Orders Committee (2011) 'Review of standing orders', *Appendices to the Journals of the New Zealand House of Representatives*, I 18B, Wellington: New Zealand House of Representatives

Wheare, K.C. (1963) *Legislatures*, London, Oxford University Press