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14 Harfield Village Centre
48 2nd Avenue
Harfield Village
CAPE TOWN
7708

Tel: 021 671 6756
Cell: 072 98 55 456
Fax: 086 575 0399
Email: timgordon@gbf.org.za
Web: www.gbf.org.za

Undercurrents

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RESPONDING TO THREE 'PROBLEMATIC Ps'

After our piece on the Protection of Personal Information Act (POPI) last week, we move on today to the second of the "problematic Ps", namely Proxies.

PROXIES

What is a proxy?

Certain (relatively minor) differences emerge when one tries to find a definition for the term "proxy". The differences noted do not place the definitions sufficiently far apart to cause any major problems, but for the record, here are three slightly different definitions that we have sourced:

- The *Oxford Dictionary of Law* defines a proxy as "a person appointed by a company member to attend and vote instead of him at a company meeting". In terms of this definition, **a proxy is a person who votes or acts on behalf of someone else.**
- The *Oxford Concise Dictionary*, by contrast, allows the use of the word proxy to indicate not only "the person authorised to act as a substitute, especially in voting" but provides further that the term may refer to "the authorisation given to a substitute or deputy; or a document giving the power to act as a proxy ..." – i.e. a proxy can also be **an authorization to vote on behalf of someone else.**
- The third definition refers to the proxy as the **vote which is brought out by the person to whom the authority has been given** (also the *Oxford Concise Dictionary*).

The questions that arise

In a practical sense, we are more concerned with the logistics of proxies than whether we are using the broader or narrower definitions. What gave rise to our discussion of the matter was a series of questions asking:

- Are proxy votes allowed at a governing body meeting?
- May an SGB member, in giving someone a proxy vote, stipulate how that person must vote?
- May the proxy be given to anybody; or only to another member of the SGB; or only to someone from the same SGB "constituency" (parent to parent member, educator to educator member, etc.); or only to the Chair of the governing body? (This latter prescription was one which a senior official from one of our provincial education departments tried to force on a governing body)

What does our legislation say about proxies?

Unfortunately, it appears that we have no common law prescriptions on proxies which go beyond the very generalised notes found in the *Oxford Dictionary of Law* definition, and as far as we have been able to ascertain, the only places in education legislation where proxies are referred to, are the following:

- The Gauteng regulations on governing bodies make allowance for one parent to give a proxy to another parent for use **at the election meeting for the constitution of a governing body.** In this instance, it limits any one parent to **a maximum of two proxy votes.**
- In the Western Cape, the Measures for the Election of Governing Bodies specifically **exclude the right to grant a proxy or bring out a proxy vote.**

Please recognize, though, that the prescriptions quoted above refer very specifically to SGB elections, and not to SGB meetings or any other meetings. The law, it appears, is silent on proxies at ordinary SGB meetings.

Are there any other credible sources we can draw on to guide us on proxies?

Not too many. As a start, though, our overarching advice is that governing bodies should avoid proxy votes wherever possible. We have long contended that SGB decisions should not be decided by a vote at all, but rather by consensus, wherever this is practicable. There are, however, certainly credible sources which suggest that you may ignore our advice and rule differently if you as a governing body should so resolve: for example, in terms of the basic principles embodied in the definition provided by the *Oxford Dictionary of Law*, a governing body, in putting in place its own protocols, **may rule either in favour of, or against, allowing proxy votes** at SGB meetings.

If you decide to go against our recommendation, and indeed to allow for proxies, we suggest that you bear the following in mind:

- “The articles of association of the company may confer more extensive rights on members or proxies than are conferred by the Companies Act” (The *Oxford Dictionary of Law*).
- “... The [proxy form] must enable members to direct a proxy whether to vote for or against the resolution; [alternatively], it may specify that the proxy is to use his discretion” (The *Oxford Dictionary of Law*”).

Thus far the law or quasi-legal suggestions. Beyond that, and looking at best practice, we add the following:

- Within the governing body context, it is our understanding that if proxy votes are allowed, **any member may give his or her proxy to any other member of that SGB**, regardless of the constituency (e.g. parents, educators, non-educators) that happened to vote such other member onto the SGB.
- At the same time, we believe that it would be quite **untenable for members to grant their proxy to a non-member, or even a non-voting member of the SGB**.
- We can also find **no grounds for prescribing that the SGB Chair should be in a favoured position**, and be the only legal recipient of the right to bring out a proxy vote.

Why does the GBF recommend that proxies not be allowed?

Even if all the protocols are in place, given the way governing bodies ought to operate, we see certain red lights beginning to flash when we come to the issue of proxies. For example:

- Except in the most proscribed of circumstances, how will an absent member know when, whether or under what circumstances a vote is to be taken?
- How will he or she, should he or she wish to instruct a proxy how to vote, come to such a decision prior to – or, worse still, without – hearing the debate and considering the various points of view?
- It is also quite conceivable that, if the SGB decides to proceed to a vote, the actual motion put to the meeting could be worded differently from what the granter of the proxy might have expected, and this could render any prior instructions not only meaningless, but even end up forcing a vote from the proxy voter which does not necessarily reflect the views of the absent member.
- On a more philosophical level, an unencumbered proxy vote undermines the most basic of democratic principles – that of one person, one vote – in that it introduces a situation of one person, two, three or four votes.

In the absence of legal prescriptions, is there a basis for the GBF’s advice, or is it based on a subjective preference?

This is not just a personal whim or fancy – though it is anchored in many years of governing body experience. Instead, we have taken our final view from others in the educational milieu, and we would like to fall back on guidelines from the statutes and practices of some of our institutions of higher education which have been brought to our attention.

Generally, proxies are not allowed at university Council meetings (the tertiary institutions’ equivalent of SGB meetings). They do, however, allow for an interesting approach: namely that while a proxy is not in order, **the views of an absentee member may be made known to the meeting and considered by those deliberating on a matter**. The actual wording of the statute reads as follows: “The views of a member of the council who is unable to attend a meeting may be submitted to the meeting in writing **but may not count as a vote of such member**” (emphasis ours). Two universities have confirmed that this is the approach that they adhere to, and that it is both generally acceptable and highly practicable.

THE “TO DO” BOX

It is our considered opinion, after taking various advices on the matter, that:

- proxy votes should not be allowed at SGB meetings;
- the approach common in tertiary education institutions (absent members may inform the meeting, in writing, of their views, but that such expression of views does not constitute a vote) be implemented also in our secondary and primary institutions ;
- proxy votes can only be introduced at a governing body meeting if the **individual school’s SGB protocols make clear provision for this to happen**, but that we recommend that this provision should not be written into your protocols;
- if you ignore our advice above and decide to allow proxies after all, the protocols should be quite clear on the matters of:
 - whether or not the holder of the proxy vote is free to choose how to vote, or is required to bring out a vote in a manner as preordained by the person who granted the proxy (we recommend a free decision by the proxy after considering all inputs);
 - who may be given a proxy vote (**we suggest any other voting member of the SGB**);
 - **whether any single member may bring out more than one proxy vote: if so, state clearly how many (we suggest only one per person); and**
 - specify that a proxy vote granted to a member **cannot count as one of the number of attendees required to reach a quorum**.

May the above lead to more effective functioning of your SGB meetings!