

Governance support resources

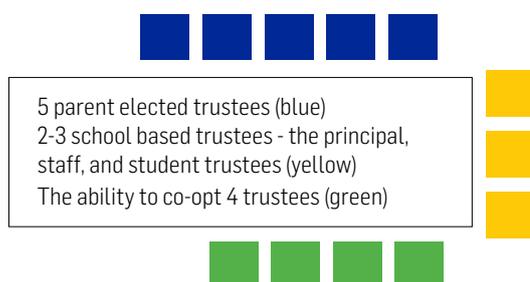
A guide to board constitution and filling casual vacancies

“Casual vacancy blues” – filling a casual vacancy

Many boards faced with a member resigning may be a little confused about the options they have in terms of filling the casual vacancy. Firstly, it is important to note that the position on the board may only be left vacant if the vacancy occurs in the six month period before a general (triennial) election. Prior to that the vacancy may be dealt with in a number of ways, but it does need to be formally addressed.

The first question most boards ask is, “Can we select?” In order to select the board needs to be clear about its current membership and how each member came to sit at the table. After a general election the majority of boards will look something like this:

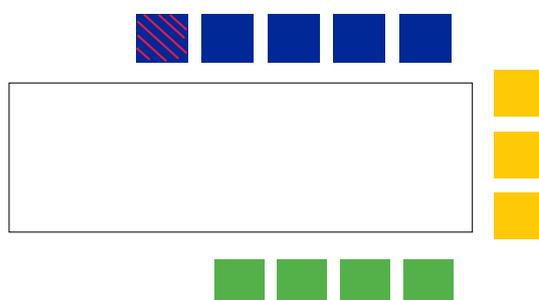
Figure 1



Many boards will not utilise the option to co-opt and these seats remain empty. In the case of an integrated school the proprietor of the school holds the right to fill a maximum of four of the green seats (proprietors' appointments). Some boards may have reduced their constitution so they have fewer blue seats in which case they also have fewer green seats. Alternatively they may have increased their constitution and have more blue seats and consequently the option of more green. More about these options later. It is also important to note that any person who is able to be elected to sit in the staff representative yellow seat can never be elected, selected, or co-opted to sit in either blue or green seats. A trustee in a yellow seat may never chair a meeting of the board.

When the board is considering a vacancy it may choose to follow the selection process. For this process to be done properly the community needs to be notified that the board intends to fill a casual vacancy by selection and that there are 28 days for 10 percent or more of eligible voters to request a by-election. Once the 28 days are up, without the 10 percent threshold being reached, the board can select someone to fill the vacancy. The board now looks something like this with the selected member sitting in the seat with red stripes:

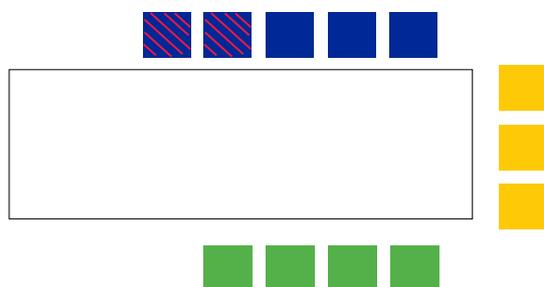
Figure 2



The most important aspect of their seat is that for all aspects of the board's work it is actually a blue seat – the only time the red stripe matters is when dealing with further casual vacancies on that side of the table.

Say another board member sitting in a blue seat resigns. The law requires that at any time the number of elected parent representatives must be more than the number of selected parent representatives. If the board chooses to fill the vacancy by selection this time, the board will look like this:

Figure 3

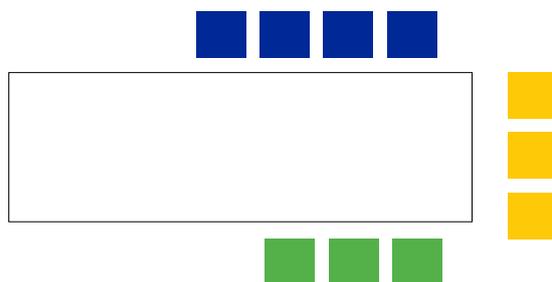


This board now has the maximum allowable number of selected parent representatives possible for a board with five parent representatives. If anyone else in a blue seat resigns the vacancy must be filled by the by-election process. A by-election must also be held where the vacancy occurs because the board has resolved to increase the number of its parent representatives.

NB: A board can choose to run a by-election any time it has a casual vacancy and does not have to use the selection process first.

From time to time we are asked how to alter the number of parent representative seats on a board which is called altering the board constitution. To do this a board needs to follow the process described in section 94B of the *Education Act 1989*. The school community needs to be notified of the meeting time and place where the motion to alter the constitution will be discussed and decided and reminded that they are entitled to attend. Assuming all goes smoothly the board may now look something like this:

Figure 4



Boards need, however, to understand the consequences of this action. The board can now only have up to three co-opted trustees, and only one vacancy can be filled by selection, in order to maintain a majority of elected trustees over selected parent representatives. In addition, this option is not available to integrated schools, unless the proprietor consents to a reduction of their seats on the board to three. It would also be difficult for a board in the position described in Figure 3 to do this, if the decision to reduce the constitution was due to another trustee in a blue seat leaving. In such a case it would be in a two-selected/two-elected position which is invalid.

“It's not easy being green”

– co-opted, appointed, and proprietors' representatives.

In terms of parent representative trustees (the blue seats) and school based trustees (the yellow seats), the boards of both state and state integrated schools are the same. Where they differ is in how the green seats are filled.

At the first meeting of a new board after a board election, a state school may have four empty green seats, which represent their ability to co-opt trustees. An integrated school will have those four seats filled by trustees who have been appointed by the proprietor of the school.

Here are some frequently asked questions:

We are a state school. On what basis can we co-opt a trustee?

The answer to this is found in section 99 of the Education Act. The two key areas are issues of equity (eg ethnicity, gender) or to ensure the board has appropriate expertise available to it.

How long is a co-opted trustee's term of office?

Co-opted trustees are on the board for a term of three years from the time of co-option, unless the board decides on a shorter term at the time of co-option. For instance a board might co-opt someone to assist with a particular project that is expected to be completed within six months – in that case the motion should be “to co-opt _____ until the _____ project is complete, to assist the board in _____ area”.

We are an integrated school and we want to co-opt someone for their expertise. How do we do that?

There are several options, two of which involve the cooperation of the proprietor.

1. You could ask the proprietor to appoint the person you had in mind as a proprietor's representative – this usually only works if you have a “vacancy” for a proprietor's representative. The proprietor does have the right to decide who will be appointed to the board to represent them and can dismiss an appointment and replace that person with someone else if they so choose.
2. You could use section 94A of the Education Act and ask the proprietor to consent to a reduction in the number of trustees they are entitled to appoint. Such consent needs to be in writing and include the dismissal of enough appointees to give effect to the reduction consented to.
3. You could use section 94B and alter the constitution of the board to increase the number of parent elected trustees from five to six. You have to then call a by-election for the new position (you could nominate the person you wanted to co-opt). This gives the board the ability to increase the available green seats by one. The proprietor can only fill a maximum of four green seats so this leaves one available for the board to co-opt someone to. Effectively this option gives the board the ability to have two new members when they only want one, but it also gets around the need for the proprietor's consent, or the loss of good proprietor's representatives.

We would like to have a representative from our local marae or past pupils' association or similar organisations. How do we do that?

When a board wants a representative from an organisation that has a recognised legal status, eg they are an incorporated society or trust, they can recognise that organisation as a body corporate and approve the appointment by that body of one or more trustees to the board (section 94B(1)(c)). The board also has the right to withdraw such an approval with the obvious consequence that the trustee(s) appointed by the body corporate immediately goes out of office.

It is worth noting here that section 94B(1)(c) is not referring to an informal group within the school. Where there is a whanau group or other special interest group within the school a board could co-opt an individual member of that group, however once on the board they stay on the board for their full term, regardless of any change of status of the group within the school, eg it disbanding.

Important to know:

- Co-opted, body corporate appointments, and proprietors' representatives are board members with full rights and responsibilities. They are included when counting for a quorum, can chair the board, and are entitled to meeting fees. A board can continue to operate if there are more co-opted trustees than parent elected trustees due to one or more casual vacancies for parent elected trustees, as long as the casual vacancies are in the process of being filled (described as being “in transition”).
- Proprietors and approved body corporates are entitled to appoint (and dismiss) their representatives on the board as they see fit.
- The same eligibility rules apply to these trustees as to parent elected trustees, in particular section 103(3), which states a permanently appointed member of the board staff is ineligible to be a trustee. The staff representative and the principal are the exceptions to the rule.
- You cannot co-opt someone into a casual vacancy, it must be filled by holding a by election or using the selection process.



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