PROCESS FOR MAKING COUNCIL BY-LAWS

The process for making by-laws is in accordance with section 278 of the *Local Government Act 2019* (**the Act**). The following steps should be followed.

Before you start

Before beginning the by-law making process, councils should note that:

- making or amending by-laws is a formal legislative process;
- throughout this document reference to:
    - **DHLGCD** means the Department of Housing, Local Government and Community Development;
    - **LGCD** means the Local Government and Community Development Unit in DHLGCD;
    - **OPC** means the Office of the Parliamentary Counsel;
- all local government by-laws are drafted by the OPC
- the Legislation, Policy and Governance team within the Local Government and Community Development unit of the Department of Housing, Local Government and Community Development coordinates the drafting process between councils and the Office of the Parliamentary Counsel; and
- councils should allow at least several months for the drafting and consultation process before by-laws can be made. The timeframe depends on the complexity of the proposed by-laws.

Preparation stage

1. Council decides what type of by-laws the council is interested in having or amendments to current council by-laws.

2. A council staff member should be chosen to be the “instructing officer”. This is the person who will liaise with the LGCD in DHLGCD and the legislative drafter (**the drafter**) from the OPC.

3. All council by-laws are drafted by the OPC, as it is the office responsible for drafting legislation and statutory instruments and it has the required expertise.

4. Council notifies LGCD that it is proposing to make or amend by-laws. A document is prepared setting out the drafting instructions. The LGCD officer can assist the instructing officer in preparing this document. A poorly worded set of instructions can cause problems and delays during the drafting process.

5. Council provides its proposed drafting instructions to LGCD. LGCD can then forward the drafting instructions to OPC for early review before the council formally resolves to make or amend the by-laws. This early review can help identify any issues with the proposed approach or drafting instructions before the council proceeds to make a formal resolution approving the drafting instructions.

6. Following the early review, council can consider and incorporate any feedback from the OPC and finalise drafting instructions before making the council resolution. Further information on drafting instructions is at **Appendix A**.

PROCESS FOR MAKING COUNCIL BY-LAWS

Drafting stage

7. Council resolves to approve the drafting instructions and to have the by-laws drafted. This is the first time that a council resolution is required. It is worth noting that once council makes a resolution on the drafting instructions, no substantial changes can be made to the drafting instructions unless council makes another resolution changing the instructions.

8. The instructing officer sends the council resolution and the drafting instructions to the LGCD officer who will forward the drafting instructions to the drafter.

9. The drafter will prepare and send drafts of the by-laws back to the instructing officer for comment. The LGCD officer should be copied in or forwarded this correspondence and can help the instructing officer prepare a response. The instructing officer should read the correspondence and draft versions carefully to see if everything the council wants is covered. The drafter will probably have a number of questions or need clarification from the instructing officer.

10. The process of sending drafts back and forth with questions will continue until the instructing officer and the drafter are content. The LGCD officer can provide input or clarification every step of the way.

Consultation stage

11. It is recommended that a “plain English” explanation of the by-laws (otherwise known as the public information paper) be prepared. Before the public information paper is used, it can be run past the LGCD officer to ensure it accurately reflects what the by-laws say.

12. A public consultation draft of the by-laws will be prepared by the drafter.

13. The public consultation draft by-laws must go back to the council for approval for consultation as set out in section 278 of the Act. Council must pass a resolution to approve the public release of both the consultation draft by-laws and the public information paper and the required consultation period (which the legislation states must be at least 21 days). If the council approves consultation on the draft by-laws, the council must, at least 28 days before the meeting at which the council proposes to make the by-laws:

    - publish the proposed by-laws on its website
    - make copies of the proposed by-laws available for public inspection, without fee, at the council's public office
    - give notice in a newspaper circulating in the area of the council of the availability of the by-laws and of its general nature and effect.

14. The council must allow at least 21 days for members of the public to make written submissions to the council about the by-laws.

15. Council must consider written representations made by members of the public about the proposed by-laws.

16. After consultation, any final amendments should be communicated to the drafter so that the draft can be finalised. Depending on the scope of changes required, further drafts may be needed. The drafting process continues y until the instructing officer and drafter are satisfied that the draft is ready to proceed .

17. Any major changes in policy may require fresh approval from council and a second consultation round.

18. The instructing officer asks for a settled version only after the instructing officer and drafter are satisfied the draft by-laws are legally effective and give effect to what the council wants. The settled version is treated as final and is the formal version used by council to make the by-laws.

Making of the by-laws

19. Once the drafter settles the by-laws, the Chief Executive Officer of DHLGCD will issue a certificate confirming the by-laws are consistent with the Act. This certificate is required by section 278 of the Act. The certificate and settled by-laws will be forwarded to the council.

20. The settled by-laws and certificate should be presented to the council with a report concerning any submissions received during the consultation process. The final resolution to adopt the by-laws must be a special resolution of the council (supported by the votes of at least three-quarters of the total number of members of the council). The council should also resolve who has the authority to sign the by-laws (usually the council's CEO). It is not necessary to affix the common seal to the by-laws. The wording of the resolution may be as follows:

That Council,
a) Note and accept the report on written submissions on XX By-Laws
b) Make the XX By-laws
c) Authorise the Chief Executive Officer to sign the XX By-laws

21. Once the council makes these resolutions, the by-laws must be signed by the person authorised to do so, indicating that the council has resolved to make the by-laws.

Gazetting and tabling of the by-laws

22. The council must then send the following documents to LGCD:

a) a copy of the final by-laws made by council signed by the authorised person;

b) a copy of the council resolution;

c) details and results of the consultation undertaken on the by-laws.

Note: Under section 63A(2) of the *Interpretation Act 1978*, the Minister responsible for Local Government must publish the by-laws and notify them in the *Gazette* as

soon as practicable after they are made. For this reason, we ask that you provide the above documents to LGCD as soon as possible after the by-laws are made, i.e. the next business day.

23. After LGCD receives these documents, it will request an instrument for the Minister to notify the by-laws in the *Gazette* and will arrange for the by-laws to be tabled by the Minister in the Legislative Assembly.

24. The by-laws take effect from the day specified in the by-laws.

A visual flowchart for outlining the process for making council by-laws is provided at **Appendix B.**

Amending on repealing existing by-laws

The process for amending or repealing existing by-laws is the same as the process for making new by-laws.

If a council wishes to amend or repeal by-laws or provisions of existing by-laws, the council should:

1. Pass a council resolution confirming its intention to amend or repeal the relevant by-law(s) and approve drafting instructions.
2. Provide drafting instructions to LGCD for onward transmission to the OPC.
3. OPC prepare the draft by-laws:
    - Amendment By-laws – where particular by-laws or provisions are to be amended or repealed; or
    - Repeal By-laws – where an entire set of existing by-laws is to be repealed.
4. Once prepared, the draft Amendment or Repeal By-laws are provided to the Council for consideration at a Council meeting.
5. The Council must follow the requirements under section 278 of the *Local Government Act 2019*, including publishing the proposed by-laws, allowing time for public submissions and considering any submissions received.
6. Obtain the required certificate from the CEO of the Agency confirming that the proposed by-laws are consistent with the principles in Part 13.1 of the Act.
7. The Council must pass a special resolution to make the Amendment or Repeal By-laws. The by-laws must then be signed by a person authorised by the Council and forwarded to the Minister.
8. The by-laws are notified in the Gazette and tabled in the Legislative Assembly in accordance with the *Interpretation Act 1978*.

Questions?

PROCESS FOR MAKING COUNCIL BY-LAWS

For assistance with the by-law making process, contact the Legislation, Policy and Governance team in the Local Government and Community Development Unit.

Email LGQuestions.DHLGCD@nt.gov.au

PROCESS FOR MAKING COUNCIL BY-LAWS

Appendix A – Preparation of drafting instructions

Instructing officers

The council must nominate an instructing officer to be the contact point for the drafter during the drafting of the by-laws.

The instructing officer must:

- have detailed knowledge of the particular subject and the authority to make decisions on issues that arise during the course of drafting (or ready access to those who have that authority);
- have a comprehensive understanding of what the proposed by-laws intended to achieve;
- be capable of explaining, to the drafter, the objectives of the proposed by-laws and the precise nature of the problems involved and the proposed solution; and
- promptly consider the drafts prepared by the drafter and provide comments on those drafts.

Form of drafting instructions

There is no set format for drafting instructions as such. Instructions must be in writing, comprehensive and expressed in straightforward, non-technical language. They should be in narrative form wherever possible and have numbered paragraphs for ease of referencing during drafting. The instructions should set out the objectives sought to be achieved by the proposed by-laws and include all information necessary to enable the drafter to prepare a draft to give effect to those objectives. Background information can be provided, but it must be clearly identified as separate from the matters to be included in the by-laws.

Minor straightforward by-law amendments may require only minimal drafting instructions. In other cases, more detailed instructions will be required.

Instructions must not be in the form of draft by-laws. The drafter is to be informed of the objectives sought to be achieved by the proposed by-laws. The choice of language to be used to give legal effect to those objectives is within the drafter's expertise.

The language of the instructions should be consistent in order to maximise the likelihood that the council's objectives will be achieved. If the same idea is expressed in different ways in the same instructions, the drafter may assume that a different result is intended. Conversely, a word should not be used in the same instructions to mean different things.

Instructions should:

- deal with every aspect of the proposal and indicate every requirement that the council considers to be necessary to give effect to the proposal;
- where relevant, identify existing by-laws that need to be considered and possibly amended to give effect to the proposal, as well as how the transition from the state of the law before the proposal is adopted to how the new state of the law is to be managed;
- provide a reference to any other council's by-laws which may satisfactorily deal with the subject of the proposal and indicate whether enquiries have found it to operate satisfactorily, as well as how other council's by-laws would be adapted for the proposed by-laws; and
- include the proposed commencement arrangements for the by-laws.

PROCESS FOR MAKING COUNCIL BY-LAWS

APPENDIX B – FLOWCHART PROCESS FOR MAKING COUNCIL BY-LAWS

PREPARATION STAGE
Instructing Officer nominated by Council.
Drafting Instructions prepared.
Proposed drafting instructions sent to LGCD and approved by OPC.

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DRAFTING STAGE
Council resolution to approve drafting instructions and have the by-laws drafted (sent to LGCD and OPC)
OPC drafts by-laws.
Draft by-laws reviewed by Council.

↓

CONSULTATION STAGE
Council resolution to approve the draft by-laws for public consultation, the public information paper and the consultation period (of at least 21 days).

↓

CONSULTATION STAGE
Council must at least 28 days before meeting at which the council proposes to make the by-laws:
• Publish the proposed by-laws on its website • Make copies of proposed by-laws available for public inspection • Publish notice in local newspaper
Council allow consultation period of at least 21 days for public to make written submission.

↓

CONSULTATION STAGE
Council consider all submissions received during consultation period.
If required any amendments given to the OPC and further drafts reviewed by Council.
Draft by-laws settled and given to LGCD.

↓

Certificate from CEO of the Agency issued to Council confirming by-laws consistent with the Act (s278(1)(d))

↓

Council resolutions required:
• special resolution making the by-laws • ordinary resolution authorising person to sign the by-laws
Signed by-laws, council resolutions and consultation details sent to LGCD.

↓

LGCD arrange:
• Ministerial Instrument to notify the making of the by-laws in the *Gazette*
• Tabling of the by-laws in the Legislative Assembly

↓

By-laws take effect from date specified in the by-laws