



# Making Tough Choices

A brief guide to writing bylaws for your nonprofit with CLEO's bylaw builder

## How this guide will help you?

This guide was written for users of CLEO's Bylaw Builder Guided Pathway – an online tool that helps nonprofits develop a set of bylaws that comply with Ontario's Not-for-Profit Corporations Act (ONCA). However, it can be used by anyone writing or updating a nonprofit's bylaws.

You have to make a lot of choices when deciding on a set of bylaws for your nonprofit. Some choices are big and important, like who will qualify to be a member. Others may seem small and technical, like whether or not you will count the day a notice is sent to your members as part of the notice period.



This guide is not legal advice and does not recommend any bylaw option over another. It is only meant to focus your thinking and make you aware of the practical aspects tied to certain bylaws. There may be other equally or more important factors that you need to consider when deciding on your bylaws. Speak with your team and get legal advice as needed.

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# Trade-offs

Each of these choices involves a trade-off. A trade-off is when you have 2 desirable but incompatible features. For example, it is desirable for members to get documents long in advance of meetings but it is also desirable to be able to call meetings on short notice.

This guide explains some of the key trade-offs you are faced with when using CLEO's Bylaw Builder Guided Pathway to develop a set of bylaws for your nonprofit. Understanding the pros and cons that come with each option or trade-off and how it could impact the way your nonprofit functions, may help you answer questions as you work your way through the pathway.

## Efficiency and convenience or checks and balances?

Probably the most difficult trade-off you will face when deciding on your bylaws is whether you want speed and efficiency or accountability and due process. Do you want your bylaws to allow your nonprofit to move quickly and efficiently by having fewer checks and balances in place? Or do you want your bylaws to allow for more member input and greater accountability at the risk of slowing things down?

You face this trade-off when answering questions on the following issues in the pathway:

**Filling vacancies on the board:** Electing directors is one of the most important rights a nonprofit's member has. By allowing the board to appoint a director to fill a vacant position until the next members' meeting is held, you allow the board to operate at full capacity quickly but members do not decide.

**Delegating officer duties:** Officers should be responsible for their duties, for example, a board secretary is responsible for taking minutes of board meetings. However, they cannot always be available. Allowing an officer to delegate their duties can be helpful.

**Removing officers:** Allowing the board chair to remove a nonprofit's officers is faster than requiring the board to vote on the issue. But this gives the chair more power and increases the risk of abuse.

**Notice of board meetings:** Requiring board directors get more notice of upcoming board meetings gives directors more time to prepare for the meeting and read documents, but it can also delay meetings. Note: directors can always waive their right to notice.

**Board voting threshold:** Allowing the board to make decisions by simple majority -51% - is faster than requiring more than 51%. However, a higher threshold ensures that the board's decisions reflect more perspectives as more directors have to support them.

**Chair as tie-breaker:** Some nonprofits give their board chair a tie-breaking vote. The vote can be instead of, or in addition, to a regular vote. This can help move a board move forward on a contentious decision. But when a chair doesn't have a tie-breaker vote it forces the board to build more support for an idea.

**Member class rights:** The more rights you give members, the more accountable your nonprofit is. But making sure those member rights are respected and followed may take more time and slow things down.

**Becoming a member:** The harder you make it for a person to join as a member, the more difficult it is to grow your membership. But it may help your nonprofit get members who are dedicated to its purpose.

**Member discipline:** The smaller the group of people who have the power to discipline members, the faster they will be able to manage the process. But the greater the risk of abuse.

**Discipline member-notice:** The more notice you have to give a member that they are going to be disciplined, the longer the process will take. But you will also have more time to make sure the process is fair.

**Timing of member response:** The more time a member has to respond to a notice that says they are going to be disciplined, the longer the process will take. But the process is also likely to be more fair.

**Calling special members' meetings:** Members have a right to call for a special members' meeting if a certain number of them agree to it. The lower the number of members needed to call for a special members' meeting, the easier it is for a member to exercise this right. But a lower number can also allow a small group of members unhappy with things to call for meetings that the majority do not want.

**Members' meeting quorum:** Setting a lower quorum makes it easier to hold a meeting, but it can also allow a small minority of members to make decisions for the whole organization.

**Losing members' meeting quorum:** If a members' meeting lasts a long time, some members may leave before all decisions are voted on and you may no longer have quorum. If you require quorum, you have to schedule another members' meeting to continue with unfinished business and this can be inconvenient. But if you allow a members' meeting to continue without quorum, it may lead to a smaller group of members making decisions for the whole organization.

**Members' meeting voting threshold:** The higher the percentage of votes you need to pass something, the more democratic and accountable your decisions will be. But a higher threshold may also make it more difficult for your nonprofit to move ahead if you don't have enough of votes. You have to spend time getting members to agree.

**Members' meeting voting method:** A show of hands is much quicker than a written ballot. But with a written ballot, you have clear proof of the final result especially if the vote is close.

**Asking for written ballots at members' meetings:** Giving members, or other meeting participants, the right to ask for a written ballot ensures that the vote counting was done properly. But it also slows down the entire process.

**Tied vote:** You can say that a tied vote will automatically go to a written ballot. This will take time, but it also makes sure the vote is accurate.

**Adjourning members' meetings:** Sometimes you have to adjourn a members' meeting without finishing all your business. You can require members get notice of when and where the meeting will continue. Requiring notice can delay that meeting, but it also gives all your members the chance to participate.

**Timing of Notice:** Requiring members get more notice of upcoming members meetings gives them more time to prepare for it and read documents. But this means you to have meeting documents ready sooner which may delay meetings.

**Changing bylaws:** The higher the voting threshold to change bylaws, the harder it will be to make changes. But it also means you have more support when you get enough votes to change a bylaw.

**Board's power to change bylaws:** Allowing boards to temporarily change their bylaws means they will not have to wait for a members' meeting if you need a new bylaw. But even if you give the Board this power, the members are required to vote on it at the next members' meeting and can approve or reject the change.

**Limits of board's power to change bylaws:** Even if you want the board to be able to temporarily change bylaws, you can still specify bylaws they are not able to change. This improves member oversight but may slow things down.

## Well defined or flexible?

Bylaws are harder to change than internal policies. This can be helpful because it keeps things consistent and predictable. But because it is impossible to think of all situations in advance when writing your bylaws, it may also force your board or members to follow bylaws that are inappropriate for certain situations.

You face this trade-off when answering questions on the following issues in the pathway:

**Board committees:** Giving your board the responsibility to define the rules that committees have to follow may encourage a streamlined and consistent approach. But giving committees the power to define the rules themselves may result in rules best suited to the unique needs of each committee.

**Officer positions:** Having a set list of officer positions lets your board know what roles need to be filled. But if you do not have a set list then your board is not forced to name an officer for a role that is not needed any more.

**Officer duties:** Including the duties of each officer in your bylaws lets everyone know what is expected from people holding those positions. But if you want to change any of those duties, your members have to agree to the change.

**Reason for removing officers:** Including the reasons for which an officer can be removed from their position, for example, for missing meetings, lets an officer know what their responsibilities are. It also protects them from dismissed for no good reason if they've fulfilled their responsibilities. But if the reasons don't cover every situation, it may be difficult to remove an officer that isn't doing their job.

**Calling board meetings:** When few people have the power to call for a board meeting, it's clear who has to do it. But this also means it can be difficult to call one if those people are unavailable or don't have the nonprofit's best interests at heart.

**Location of board meetings:** Having your board meetings at a fixed place can create a sense of continuity for your organization, for example, at a certain clubhouse or headquarters. But that place may not always be available.

**Timing of board Meetings:** Having a fixed day and time for board meetings, for example, the 2nd Sunday of the month, can create a sense of continuity and save time planning the meeting as it sets clear expectations of when directors will need to be available. But the day or time may not always work for your board.

**Back-up chair for board meetings:** Naming who will fill the role of chair when your board chair is absent makes that responsibility clear. But the person named, may not always be the best choice.

**Ending class membership:** It is important to say in your bylaws how someone stops being a member. But changing the terms of membership can be difficult as you need membership approval for that. It may be best to define membership in your bylaws by referring to certain policies that are separate from your bylaws and therefore do not need to go through the same approval process for changes.

**Transferring between classes:** It is important to say in your bylaws how someone stops being a member. But changing the terms of membership can be difficult as you need membership approval for that. It may be best to define membership in your bylaws by referring to certain policies that are separate from your bylaws and therefore do not need to go through the same approval process for changes.

**Reasons for member discipline:** Including the reasons for which a member can be disciplined, for example, for breaking a code of conduct, lets a member know what their responsibilities are. It also protects them from being discipline for not good reason if they've fulfilled their responsibilities. But if the reasons don't cover every situation, it may be difficult to discipline a member.

**Timing of members' meeting:** Having a fixed time for members' meetings, for example, the 2nd Sunday of April, can create a sense of continuity and save time a meeting. Members also know when they need to prepare for it. But the time may not always be the most convenient time.

**Location of members' meeting - Ontario:** Making it clear that the members' meeting must take place in Ontario sets expectations for members. But it may be inconvenient if your nonprofit's members often travels.

**Location of members' meeting:** Having your members meeting in a fixed place can create a sense of continuity for your organization, for example, at a certain clubhouse or office. But the place may not always be available or the most convenient to get to.

**Annual members' meeting agenda:** By adding items to your standard members' meeting agenda, you can make sure that future boards deal with certain matters. However, members' meetings usually are already long and it can be difficult to go through every item on the standard agenda. Adding items that need to be discussed may make things worse.

**Back-up chair for members' meeting:** Naming who will fills the role of chair when the regular member's meeting chair is absent makes that responsibility clear. But the person named, may not always be the best choice.

**Ways to deliver notice:** Saying how notices must be sent to your board and members lets them know how they can receive them. But as your membership and technology changes this may not be the most effective way to send notices.

**Signing authority:** Setting out a specific procedure as to who will sign will set clear expectations for both the Board and members. However, this procedure may not be the most effective as the internal structure of the nonprofit and technology both change.

## All in one place and long or short and quick to read?

Ontario's Not-For-Profit Corporations Act (ONCA) has several mandatory and default rules.

**Mandatory rules** apply to your nonprofit whether or not you put them in your bylaws. They apply, even if you put something else in your bylaws. For example, the ONCA includes mandatory rules on when a director stops being a director.

**Default rules** will apply only if you do not have a rule about a certain issue in your bylaws. For example, the default quorum for your board meetings is 51% of your directors.

So in both cases, you can choose to leave these rules out of your bylaws. You may want to do this to keep your bylaws short in the hope they will be read more. But if you leave these rules out, you force your directors and members to look for the rules somewhere else should they need to know what to do in those situations. This can take time and money as they may need the help of a lawyer.

You face this trade-off when answering questions on the following issues in the pathway:

**End of office:** The ONCA has a mandatory rule that says when a director's term ends, whether or not you include it in the bylaws.

**Paying directors of charities:** Charities have to follow more rules than nonprofits that are not charities, when paying their directors. It may be difficult for charities to include all those rules in their bylaws. But it may be helpful for your directors and members if your bylaws said charities have to follow additional rules apply, said where they could find that information.

**Conflicts of interest:** The ONCA has a mandatory rule that says when the conflict of interest rule applies, whether or not you include it in your bylaws.

**Special members' meetings:** There are default rules about calling special meetings that apply if you say nothing in your bylaws. If you do not want the default rule to apply, you have to include your own rule in your bylaws.

**Financial statements before members' meetings:** The ONCA has a default rule on when members have the right to your nonprofit's financial statements. It applies if you say nothing in your bylaws. If you want to give members more time you can say so in your bylaws.

**Definitions:** It is helpful to define key terms as it helps directors and members understand your bylaws and it also helps to resolve disputes where a term may have more than one meaning. But this may become a very long list. You may choose to refer users to an external source for some or all of them.

**Corporate seal:** You can include your corporate seal in your bylaws so you have a record of it. However, you do not have to include them in your bylaws.

## Accessible but complex or simple but inaccessible?

There are many ways that allow more people to participate in your nonprofit's decision-making. Some of them are through the use of technology, procedure, and how you define your members. All these methods however, involve more work and time to put them into practice. There is also a risk that the more complex they are, the less likely they will be followed.

You face this trade-off when answering questions on the following issues in the pathway:

**Holding meeting online and over the phone:** Your bylaws can allow you to hold board and member meetings online and over the phone. This allows people who would not be able to attend a meeting in person still take part. However, you have to find a way to verify the identity of everyone who takes part and you have to make sure they can vote without you knowing how they voted.

**Proxy voting:** Your bylaws can allow members to vote by proxy at members' meetings. This allows members who would not be able to attend a meeting in person to still take part. However, you must have a process that allows members to name their proxy-holder and possibly direct how they will vote.

**Members' meeting attendance rights:** While voting members, directors, and your auditor have a right to attend members' meeting, you can also give this right to others. While this opens up your members' meeting to more people, their presence may add increased complexity to the meeting.

**Member classes:** There are many ways you can structure your membership to include as many people as possible. However, every new class introduces more complexity. For example, you must define how someone of that class joins, leaves, or transfers between classes. And you must define their rights. Respecting the rights of every member class can be difficult with many classes. For example, planning separate elections for directors that represent different classes.

**Individuals and corporate members:** You may want to open your membership up to corporations if they are important stakeholders. However, if corporation can be members, you must say things like how they appoint a representative.

**Members' meeting voting power:** By increasing the number of votes needed to pass ordinary resolutions, members that are in the minority know that their opinions matter. However, this makes it more difficult to pass resolutions.

**Member's response to discipline notice:** You can allow member to respond to a notice of discipline in many ways. For example, by mail, email, or in person. But with each method, you have to have a process in place to make sure the decision-makers can get and work with the member's submissions.

## Attract directors or minimize opportunities for pay-outs?

Nonprofits that are not-charities are legally allowed to pay their directors and to compensate them for legal costs they incur due to their role as director. This improves their chances of recruiting competent directors. However, when nonprofits compensate directors, there is always a risk that members will think the compensation is inappropriate.

You face this trade-off when answering questions on the following issues in the pathway:

**Paying directors for work as directors:** The advantage of paying directors is that it may promote greater professionalism and higher expectations of board members. It could, however, create more opportunities for conflict of interest.

**Paying directors for work in other capacities:** Sometimes, a director may be the only or best option to provide a professional service to your organization. In such a situation, it may not make sense to ask your director to resign so they can provide the service.

**Indemnification:** Knowledgeable directors are usually aware of the risks that come with being a director. They may prefer not to join the board unless the nonprofit promises to cover them for the harm or loss they may incur in their capacity as director. However, legal costs can be expensive and indemnifying a board can be a large expense for an organization.

## Miscellaneous

Some questions in the Bylaw Builder Guided Pathway have trade-offs that don't fit into the categories above.

You face another kind of trade-off when answering questions on the following issues in the pathway:

### Continuity vs renewal

**Timing of director election:** By electing your board all at once, you create an opportunity for renewal. By electing only some of your board at any one time, which means you have a staggered board, you ensure there is overlap between experienced and new directors which helps with the continuity of institutional knowledge.

**Director term of office:** Longer terms for directors - up to 4 years- can help ensure they have the time to learn their roles and plan for the medium-term. But shorter terms help ensure that boards do not get complacent and there is opportunity for new ideas and energy. Directors can be re-elected unless your bylaws say otherwise.

## **Sustainability vs efficiency**

**Holding multiple offices:** Allowing one person to hold multiple officer roles can be useful if you have a capable individual and the roles complement each other. But giving one person too much responsibility may make you overly dependent on them and they may suffer from the amount of work.

**Class membership term:** Granting memberships that last for a long time may help to keep members involved longer. However, if they do not stay involved it may lead to problems with getting quorum and passing motions as you will have a larger membership list with members that do not participate.

## **Easy to remember vs clearly distinct name**

**Member class names:** Choosing names like “member” or “supporter” for your member classes make them easy to remember. But your members may not realize that each membership class has specific technical requirements when they have such generic names.

## **Value for member vs risk mitigation**

**Transferring membership:** Allowing a member to transfer their membership to someone else adds value to their membership. But it also means that the person they transfer it to may be someone who isn't a good fit for your nonprofit. You may need to include some rules and criteria about who a member can transfer their membership to.

## **Familiarity vs Independence**

**Chair of members' meeting:** The chair of the board may be a good person to chair a members' meeting because they are familiar with the business. However, members may want an independent third party.