



Premier & Cabinet
Division of Local Government

Division of Local Government
Department of Premier and Cabinet

Framework for Implementing Early Intervention Orders



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Performance improvement and suspension orders

Introduction

Councils are responsible for driving their improvement and are generally best placed to do so. Where councils are dysfunctional or failing to meet their legal obligations, the Minister and the Division of Local Government encourages and supports councils to act voluntarily to fix the problem. Where this fails, new powers to issue performance improvement and suspension orders may be used.

Why have these powers been introduced?

It is clear from persistent high-profile dysfunction in a small number of councils that the current approach to tackling poor performance does not always work.

Where voluntary action failed, a public inquiry was the next available option. While a public inquiry is an important and necessary process when facing the serious prospect of dismissing a council, it usually follows years of dysfunction which could have been avoided, costs over \$200,000 on average, and has tended to result in the public being deprived of democratic representation at this vital level of government.

The NSW Auditor General has said that government needs greater powers to tackle poor performance of councils.

These powers fill the large gap between voluntary action and public inquiry, are designed to improve the performance of councils in NSW by balancing measures to encourage councils to drive their own improvement with sanctions for failing to take action.

How will the powers be used?

The Minister and the Division aim to intervene early when councils are experiencing problems and, in the first instance, will encourage councils to meet their obligations. Any intervention or improvement response will be proportionate to the circumstances. The aim of any intervention is to encourage councils and individuals to act appropriately.

The intervention system is designed to be:

- Flexible – to enable different measures to be used to suit different types of dysfunction, depending on the severity and nature of council's breach and/or failed processes;
- Timely – to enable prompt action to be taken when required and avoid drawn-out processes with unnecessary layers of investigation, with a strong emphasis on early intervention; and

- Efficient – to provide a sufficient deterrent or sanction at an acceptable cost, commensurate with the severity and nature of the circumstances of a council.

To achieve these objectives, new powers to intervene when councils are underperforming include:

- powers to issue a performance improvement order; and
- powers to temporarily suspend all councillors for up to 3 months, with a possible extension of a further 3 months.

These powers complement existing intervention options, which include:

- informal intervention, for example advice, support, formal letters
- instigating a section 430 investigation
- recommending a section 438U public inquiry be convened.

The Division's approach to intervention is to generally use the 'softest' available intervention option first and then progress to stronger powers where a council fails to improve. There is however no requirement to progress through the 'hierarchy' of intervention powers available and the decision as to which power is appropriate will be based on the nature and seriousness of the performance issue.

What is the purpose and scope of this Framework document?

This Framework document has been developed to guide the Minister's and the Division's decisions and processes in implementing performance improvement and suspension orders. This Framework identifies:

- the criteria to be considered in deciding whether to issue a performance improvement order or to decide to suspend a council;
- the processes involved in decision making;
- the processes involved in issuing the relevant orders;
- the monitoring of compliance with an order;
- the appointment of relevant advisers or interim administrators; and
- further options available should the intervention be ineffective.

Section 1

Performance improvement orders

Section One –performance improvement orders

Purpose

The purpose of a performance improvement order is to provide a mechanism for a council to remedy an emerging issue quickly. An order is issued by the Minister for Local Government or his/her delegate.

How a request to issue a performance improvement order is initiated

Requests to the Minister for Local Government to issue a performance improvement order may be made by any person including the Chief Executive, or others, such as council officials, members of the public, other Ministers and other Members of Parliament.

The Minister is not obliged to act on every request to issue a performance improvement order.

Criteria to be considered to determine whether to issue a performance improvement order

Section 438A of the *Local Government Act 1993* (the Act) enables the Minister (or his delegate) to issue an order to a council, or to individual councillors or to both, to do or refrain from doing anything to improve council's performance within a time specified in the order.

Section 438A also enables the Minister, by order, to set the quorum for a meeting of the council. For example, where a group of councillors intentionally leave the meeting without a quorum to disrupt meetings or to stop a decision being made, it is contemplated that this power would be exercised to prevent the ongoing damage that such conduct causes to the effective performance of the council's functions.

Section 438A provides that a performance improvement order may be issued if the Minister "*reasonably considers*" that action must be taken to improve the performance of the council. Therefore, the issues or conduct in question should be sufficiently serious to warrant the order.

For the purposes of section 438B, the criteria to be considered in assessing whether to issue a performance improvement order are prescribed under the *Local Government (General) Regulation 2005* at clause 413D.

The following are the prescribed criteria to be considered in issuing a performance improvement order:

- a. whether the council concerned has failed to comply with its legislative responsibilities, standards or guidelines,
- b. whether there are significant risks facing the council that are not being addressed,
- c. whether previous intervention attempts have failed,
- d. whether council business is being disrupted and the council failing to exercise its functions,
- e. whether the appointment of a temporary adviser is necessary, in the opinion of the Minister, to restore the proper or effective functioning of the council,
- f. whether there is a pattern of poor or inappropriate behaviour, either by one or more councillors or members of staff of the council, that has not been rectified,
- g. any other matter that, in the opinion of the Minister, is relevant to the issuing of the order.

Examples where it may be appropriate to issue an order include:

- the council is not following the required processes to manage the general manager's performance. For example, not entering into a performance agreement with its general manager; not undertaking a performance review process as required by the Division's guidelines;
- the council has consistently failed to implement required legislation, such as Integrated Planning and Reporting, or other guidelines, has ignored letters from the Division of Local Government and refused offers of help. For example, continuing non-compliance with the Division's guidelines on section 252 policies; failure to implement the Model Code administrative procedures;
- the conduct of individual or a group of councillors, which is not more appropriately addressed under the council's Code of Conduct, is disrupting the ability of the council to function;
- the council has failed to follow proper process in making a decision that will impose significant costs on the community. For example, a council failing to satisfactorily undertake the capital expenditure review requirements or where a council has failed to address an auditor's concerns.

Process for issuing a performance improvement order

1. The Minister or his delegate may issue performance improvement orders.
2. The Division of Local Government will conduct relevant preliminary enquiries and review available information to inform an assessment of the criteria to recommend whether to issue a performance improvement order.

Recommendation and approval

3. Where a decision has been made that it is necessary to issue a performance improvement order, the notice of intention will be served on the council, within 7 days, where practicable, of the date of the decision.
4. The issuing of a notice of intention to issue a performance improvement order can be approved by the Minister or his delegate.

Notice of intention and draft performance improvement order

5. The consultation period on the notice of intention to issue a performance improvement order is no less than 21 days.
6. In cases of urgency, the notice period will be shortened to not less than 7 days. (*Section 438C(4)*) For example, where the order is to prevent an action that would place the council at serious risk, or would be in breach of legislation, and this decision/action is due to take place within the 21 day period.
7. The requirement to give notice of intention to issue a performance improvement order may be dispensed with where the council is suspended or the order is issued in response to a public inquiry. (*Section 438C(6)*)
8. The notice of intention to issue a performance improvement order is by way of a letter to the General Manager, or other persons to which the order relates, that outlines the process and what is expected of the council or other persons in responding to the notice of intention.
9. A copy of the draft performance improvement order should be attached to the notice of intention.
10. To ensure clarity, transparency and accountability in the use of this power, the notice of intention and draft performance improvement order are to contain the following information:
 - the reasons for the proposal by the Minister to issue the performance improvement order;
 - the evidence supporting the need for improvement;
 - the period for compliance with the order;
 - terms of the proposed performance improvement order including the issue, what action is required, the timeframe for action, what evidence is required to be presented to the Minister and reporting milestones;

- whether the council needs to take advice from a temporary adviser, and if so, the criteria for the appointment. Whether the person to be appointed as temporary adviser is to be nominated by the Minister or by the council. If the appointment is to be made on the recommendation of the council, a request for council to identify who it would recommend to act as adviser; and
 - the options available to the Minister for further intervention if the council does not meet the requirements in the performance improvement order. For example, for unsatisfactory progress, unsuitable process, unwillingness to comply.
(Section 438A(3) and 438C(2))
11. It may be appropriate, in some cases, for the performance improvement order to allow a council to identify the timeframe for the implementation of action. For example, the order could require a council to submit an improvement plan within a specified period about the actions to be taken and when.
(Sections 438A and 438C)

Council's response to notice of intention

12. The councillors must consider the notice of intention to issue a performance improvement order at an open council meeting, where the notice is to be tabled. The council is required, by resolution, to provide the Minister with its response within the period specified by the notice.
13. The Minister is to have regard to any submissions made by the council when deciding whether to issue or change the terms of the proposed performance improvement order.
(Sections 438C(3) and 438C(5))

Issuing of performance improvement order

14. The Minister or his delegate issues the performance improvement order.
15. The draft performance improvement order is retracted, or a performance improvement order will be issued, with or without amendment, where practicable, within 7 days of receiving the council's response to the notice.
16. If the draft performance improvement order is retracted, the council will be advised in writing of the reasons and requested to table this advice at the next available council meeting.
17. A performance improvement order may be served by registered post to the General Manager or other persons or by electronic means if the council or person has given the Division of Local Government an email address for the service of documents. (Section 438ZD)
18. Performance improvement orders can require specific actions of individual councillors that are not required of, or are different to, the actions required of other councillors. Each councillor is obliged to comply with the actions required of them in the order issued to them. (Section 438A(5))
19. The council is required to publish the order on its website. (Section 438D)

20. The council is required to table the performance improvement order at the next available council meeting.
21. The performance improvement order will be published on the Division's website. (*Section 438D*)
22. The council will be provided with a compliance report template which must be completed and provided to the Chief Executive at the reporting milestones identified in the order. If a temporary adviser has been appointed, council's progress report will need to be endorsed by the adviser. (*Sections 438F and 438H(2)*)

Procedures for appointing temporary advisers (Section 438G)

The Minister, the Division or the council may determine that a council needs assistance to make the improvements the subject of a performance improvement order. In those cases, the Minister may order that a temporary adviser or panel of temporary advisers is appointed to undertake this role.

A council may nominate a suitable person or persons to act as temporary adviser/s. Staff from another council could act as an adviser. The Minister must approve such nomination by way of order to appoint the person/s. The appointed temporary adviser is the person responsible for assisting the council for the purpose of ensuring compliance with the performance improvement order.

Temporary advisers should be suitably qualified persons who have relevant expertise in the area of the matter the subject of the performance improvement order.

An advisory panel may include a representative from the Division. Temporary advisers may be persons known to the Minister, the Chief Executive or the council. They may include persons from the panel of interim administrators.

Temporary advisers are appointed at the council's cost. The council is responsible for determining the payments to an adviser/members of an advisory panel where an adviser is appointed on the recommendation of the council. Where there is a dispute, the Chief Executive will determine the payment to be made to the adviser/s.

Where the temporary adviser is appointed on the Minister's own initiative, the payment is determined by the Minister and paid from the council's funds.

Monitoring implementation

23. The performance improvement order will prescribe the timeframe for action, the reporting milestones for the implementation of the order and the evidence of compliance required by the Minister.
24. The council will be required to provide the Minister with a compliance report on the implementation of the performance improvement order at the reporting milestones.
25. The compliance report will be used by the Division to make its assessment of council's progress.
26. The finalisation of the implementation of the performance improvement order is approved by the Minister based on the final report from the council and the Division's assessment.
27. When the council has implemented a performance improvement order to the satisfaction of the Minister, it will be advised in writing that no further action is contemplated.
28. The order, the final compliance report and the Division's assessment, will be published on a "completed orders" section of the Division's website. These documents will remain on the website.
29. If the council has not implemented the performance improvement order to the satisfaction of the Minister, further intervention options will be considered (see below).

Further options

If for any reason the council does not comply with a performance improvement order, then the Minister and the Division may undertake or recommend any other intervention strategy that may be appropriate to respond to the issue of concern. These options may include, but are not limited to:

- ordering a suspension period
- issuing an additional order to do, or refrain from doing, something
- instigating a section 430 investigation
- recommending a section 438U public inquiry be convened.

Non-compliance with a performance improvement order may include: the council not tabling the notice of intention to issue a performance improvement order; failing to respond to the notice of intention; failing to meet reporting milestones; insufficient progress; failing to take action on the performance improvement order once issued; failing to appoint an adviser.

If the council has failed to effectively implement the performance improvement order, it is important that further action is taken.

Section 2

Suspension orders

Section Two – suspension orders

Purpose

The purposes of suspension is to enable prompt action to be taken to correct a problem, provide time out to build or restore relationships, allow effective business to resume and/or to remedy a failure by a council to do something that is required of it. The Minister for Local Government has the power to suspend a council.

How a request to order suspension is initiated

Requests to the Minister for Local Government to issue a suspension order may be made by any person including the Chief Executive, or others, such as council officials, members of the public, other Ministers and other Members of Parliament.

The Minister is not obliged to act on every request to issue a suspension order.

Criteria to be considered to determine whether to issue a suspension order

Section 438I of the *Local Government Act 1993* provides the Minister with a power to suspend all councillors as the governing body of council for up to three months if the Minister believes on reasonable grounds that the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council.

Additionally, section 438W provides the Minister with a power to suspend all councillors during the conduct of a public inquiry relating to that council.

Generally, a performance improvement order will be issued before suspension is considered.

Generally, a suspension order would not be considered where the suspension would commence in the period of 3 months before an ordinary election (see criteria below).

Section 438I provides that a suspension order may be issued if the Minister “*reasonably believes*” that the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council. Therefore, the issues or conduct in question should be sufficiently serious to warrant the order.

For the purposes of section 438J the criteria to be considered in assessing whether to issue a suspension order are prescribed under the Local Government (General) Regulation 2005 at clause 413E.

The following are the prescribed criteria to be considered in issuing a suspension order:

- a. whether the council has failed to comply with its legislative responsibilities, standards or guidelines,
- b. whether there are significant risks facing the council that are not being addressed,
- c. whether previous intervention attempts have failed,
- d. whether council business is being disrupted and the council failing to exercise its functions,
- e. whether the appointment of an interim administrator is necessary, in the opinion of the Minister, to restore the proper or effective functioning of the council,
- f. whether there is a pattern of poor or inappropriate behaviour by one or more councillors that has not been rectified,
- g. whether an ordinary election of councillors will occur within 3 months after the making of the order,
- h. any other matter that, in the opinion of the Minister, is relevant to the suspension of the council.

Examples where it may be appropriate to issue an order include:

- the situation where a council is continually unable to function because of the inability to maintain a quorum, resulting in delays to important decisions, such as development applications;
- willingness or capacity to improve in relation to serious underperformance is not demonstrated;
- the appointment of an interim administrator is necessary because the relationship between members of the elected body has broken down;
- there is a significant negative impact on the reputation of a council and/or local government generally arising from the council's poor performance.

Examples where suspension orders will not be issued include:

- to overturn a legitimate political decision of a council;
- suspension orders will not be issued in order to achieve an amalgamation or alteration of boundaries as per section 438T.

Process for issuing a suspension order

1. The Minister or his delegate may issue a suspension order.
2. The Minister will give careful consideration as to whether to make a suspension order in respect of a council if the suspension would commence in the period of 3 months before an ordinary election.
3. The Division of Local Government will conduct relevant preliminary enquiries and review available information to inform an assessment of the criteria to recommend whether to issue a suspension order.

Recommendation and approval

4. Where a decision has been made that it is necessary to issue a suspension order, the notice of intention will be served on the council, within 7 days, where practicable, of the date of the decision.

Notice of intention to suspend

5. The issuing of a notice of intention to issue a suspension order can be approved by the Minister or his delegate.
6. The consultation period on the notice of intention to issue a suspension order is no less than 14 days.
7. In cases of urgency not less than 7 days notice will be provided. (*Section 438K(4)*) For example where the suspension is to prevent a decision being made/action being taken that would place the council at serious financial risk or would be in breach of legislation and this decision/action is due to take place within the 14 day period.
8. A notice of intention to issue a suspension order is issued in writing by the Minister to the Mayor of the council with a copy to the general manager.
9. To ensure clarity, transparency and accountability in the use of this power, the notice of intention to issue a suspension order will contain the following information:
 - the factual circumstances that give rise to the suspension;
 - the reasons for issuing a suspension order;
 - what action may be required of councillors during the period of suspension;
 - the Minister's intention to appoint one or more interim administrators at council's cost; and
 - the duration of the suspension.(*Sections 438I and 438K*)

Council's response to notice of intention

10. The councillors must consider the notice of intention to issue a suspension order at an open council meeting, where the notice is to be tabled. The council is required, by resolution, to provide the Division with its response within the period specified in the notice.
11. Each councillor may individually respond to the notice of intention.
12. The Minister is to have regard to any submissions made by the council when deciding whether to issue or change the terms of the proposed suspension order.
(Section 438K)

Issuing of order to suspend

13. The Minister or his delegate issues the suspension order.
14. The draft suspension order is retracted, or a suspension order will be issued, with or without amendment, by the Minister, where practicable, within 7 days of receiving council's response to the notice.
15. If the draft suspension order is retracted, the council will be advised in writing of the reasons and requested to table this advice at the next available council meeting.
16. If the Minister determines to suspend the council, the suspension order is published in the Gazette. (section 438I)
17. The suspension order is to be served on all the councillors and a copy provided to the council's general manager.
18. A suspension order may be served by post to the Mayor or by electronic means if the Mayor has given the Division of Local Government an email address for the service of documents. (Section 438ZD)
19. Where the council is suspended, the Minister will appoint an interim administrator. (Section 438M)
20. The suspension order, or by subsequent order published in the Gazette, names the person or persons appointed as the interim administrator/s, the conditions of the interim administrator's appointment and may be accompanied by an order that identifies what action may be required to be undertaken by the interim administrator during the suspension period.
21. The interim administrator is required to table the suspension order at the next available council meeting and publish the order on the council's website.
22. The suspension order will be placed on the Division's website.
23. During the period of suspension councillors are suspended from civic office and as such are not entitled to exercise any functions of civic office or to receive any fee or other remuneration including the payment of expenses or use of council facilities. (Section 438L)
24. Despite the provisions of section 438L, the interim administrator may decide to allow councillors to:

- a. retain some council property or equipment during the suspension period, and/or
 - b. to use council facilities for the purposes of meeting a requirement under an order.
- This decision will be made on a case by case basis.
25. The council's interim administrator will be provided with a report template which should be completed and provided to the Minister at the reporting milestones identified in the suspension order. (*Section 438N*)

Process for appointment of interim administrators (Section 438M)

Interim administrator appointments are made by the Minister on the advice of the Chief Executive.

Interim administrators may be selected from a panel of suitably qualified persons who are approved by the Minister. The Minister may select other persons they deem suitable to act as interim administrators and are not limited to the panel of suitably qualified persons.

An interim administrator may include a senior member of staff from another council. This could include from a council where there is a NSW sister city relationship.

Interim administrator appointments should be considered on the basis of persons who are suitably qualified and who have capacity to oversee the council. Consideration may be given to persons with relevant expertise in the matter the subject of any performance improvement order that may have been issued.

Interim administrators are appointed at the council's cost. The remuneration for administrators is determined by the Minister and will be set out in the suspension order. The level of remuneration will be generally based on the current cost of councillor and mayoral fees for the relevant council as set by the Local Government Remuneration Tribunal.

The following role specification applies to interim administrator positions:

Role: The interim administrator's role is to perform the functions of the governing body of council under the *Local Government Act 1993* and any other Act. (*section 438M*)

This includes undertaking the roles identified in sections 232(1) and 226 of the *Local Government Act 1993* relating to councillors and the mayor.

The interim administrator is responsible for oversight of the implementation of the suspension order and any performance improvement order and reporting on progress to the Minister at the identified reporting milestones.

Criteria: Capacity to implement effective local government practices;

An understanding of local government;

Relevant expertise in the area of the matter that gave rise to the suspension or matter the subject of a performance improvement order; and

Knowledge of, and experience in, public administration.

Place of work: The interim administrator is expected to attend the council administration centre when undertaking the administrative functions of the role. The council is to provide office space and other necessary support.

Term of appointment: An interim administrator's term of appointment will be specified in the relevant suspension order, but will not exceed the period during which the council is suspended. The term of appointment may be extended if the duration of the council suspension is extended.

The interim administrator's appointment can be terminated prior to the completion of the appointment term where the Minister considers this necessary. (*section 438M*)

Time commitment: The interim administrator is expected to commit the necessary time to effectively:

- conduct the relevant council meetings
- undertake the civic and ceremonial functions of the governing body
- undertake the administrative functions of the role, such as oversight of the general manager and implementation of any performance improvement orders.

The average time commitment is expected to be between one to three days per week.

Payment:

The interim administrator's remuneration will be set out in the suspension order. The level of remuneration will be generally based on the current cost of councillor and mayoral fees for the relevant council as set by the Local Government Remuneration Tribunal.

The council will provide facilities sufficient for the interim administrator to perform their duties. Reasonable out of pocket expenses will be reimbursed in accordance with the council's adopted expenses and facilities policy under section 252 of the Act.

Obligations:

The interim administrator is subject to the Model Code of Conduct for Local Councils in NSW. Complaints about the conduct of an interim administrator are made to the Chief Executive of the Division of Local Government.

The interim administrator's ongoing appointment is subject to satisfactory performance.

Reporting requirements:

The interim administrator is required to report to the Minister on a regular basis. The interim administrator may be required to prepare an improvement plan and report progress on its implementation in accordance with the suspension order and performance improvement order (if one is issued).

The interim administrator is to give the Minister or Chief Executive a written report about their administration of the council no less than 14 days before the end of the initial suspension period. *(section 438N)*

If the initial suspension period is extended, the interim administrator is to prepare a further report no less than 14 days before the end of the extended suspension period.

Monitoring the suspension period

26. The suspension order will detail what action is required to be taken by the interim administrator and, if applicable, the suspended councillors, the evidence required to be presented to the Minister and reporting milestones during the suspension period.
27. The interim administrator will be required to provide progress reports as required by the suspension order.
28. The interim administrator will be required to prepare a final written report 14 days before the end of the suspension period. (*Section 438N*)
29. The Division will make an assessment of the interim administrator's report, including an analysis of evidence provided by the interim administrator and any observations made during the monitoring of the suspension period.
30. If the suspension period is not extended, each individual councillor and council's general manager will be provided with a copy of the report and assessment and advised in writing that the Minister is satisfied and that no further action is required.
31. The completed progress report and the Division's assessment will be published on the Division's website with the suspension order.
32. When the suspension period has ended, the suspension order and final progress report, with the Division's assessment, will be published on a "completed suspensions" section of the Division's website. These documents will remain on the website.
33. If the council has not implemented the suspension order to the satisfaction of the Minister, further intervention options will be considered (see below).

Further options

The legislation enables a suspension order to be amended, on the recommendation of the Chief Executive or the interim Administrator, to extend the period during which the council is suspended, but only to a maximum total period under that suspension order of 6 months. (*Section 438O*)

34. The Minister may amend the suspension order to extend or further extend the suspension period, by order published in the Gazette on or before the end of the suspension period.
35. Notice is to be given to the council, in writing, at least 7 days before the order extending the suspension is made.
36. The notice to extend the suspension is to include the reasons and duration of the extension.
37. Submissions in respect of the extension are not to be invited.
(*Section 438O*)

If for any reason the Minister is concerned about the emergence of more serious issues during the suspension period, or with the interim administrator's progress in implementing the suspension order, that warrant further action by the Minister

or the Division, any other intervention may be utilised to remedy or address the issue of concern. This may include, but is not limited to:

- ordering a further suspension period on different factual matters
- issuing an order to do, or refrain from doing, something
- instigating a section 430 investigation
- instigating a section 438U public inquiry (if not already commenced).

The legislation only enables a maximum of two suspension periods (of 3 months) on the same factual matters in a four year council term. (*Section 438Q*) This does not prevent the consideration of an additional suspension period in relation to different factual matters.

Non-compliance with a performance improvement order and/or with the implementation of the suspension order could include: the council not tabling the notice of intention to issue an order to suspend all councillors; failing to respond to the notice of intention; little progress made by the interim administrator at reporting milestones; insufficient progress made by the interim administrator to implement the performance improvement order and/or suspension order; suspended councillors failing to take any action requested of them; failing to take action on the performance improvement order or the suspension order.

If the interim administrator has failed to effectively implement the performance improvement order and/or suspension order, it is important that action is taken to remedy the situation. The ongoing appointment of an interim administrator is subject to satisfactory performance. The interim administrator can be replaced at any time during the suspension period if the Minister is dissatisfied with the progress being made.