

# Our advice

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<b>Date</b>	25 May 2026

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## Council decision-making in relation to the "Head Start Pathway"

### Background

The Government has recently announced a new "Head Start Pathway", which was developed as a direct response to feedback on the Government's earlier Simplifying Local Government proposals.

In summary, the Head Start Pathway creates a new avenue for potential local government reorganisation, by providing a three-month window (until August 2026) for groups of local authorities (but excluding regional councils) to prepare and submit outline proposals to reorganise into unitary authorities (**Proposals**).<sup>1</sup>

Once Proposals have been submitted, Cabinet will decide which Proposals to progress (on an in-principle basis) later in 2026. Final Proposals will then be submitted in early 2027, with further consideration by Cabinet in mid-2027, and the introduction of enabling legislation later in 2027 which is to be enacted in early 2028. On the face of the timeline included in the material produced by the Department of Internal Affairs (**DIA**),<sup>2</sup> it is not clear whether the intention is for any Proposals to be implemented by the next triennial elections in October 2028.

A "backstop process" (which will apply after the 2028 local elections) has also been announced, with a view to the compulsory reorganisation of any local authorities who chose not to use the "Head Start Pathway". It is not clear whether this "backstop process" will be used for any local authorities whose Proposals were not approved by Cabinet.

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- 1 We focus in this advice on the obligations that apply to territorial authorities because the materials released by the Government indicate that only territorial authorities and unitary authorities (other than Auckland Council) may submit a Proposal.
  - 2 [https://www.dia.govt.nz/diawebsite.nsf/Files/Local-Government-2026/\\$file/Head-Start-pathway-policy-document-simplifying-local-government.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Local-Government-2026/$file/Head-Start-pathway-policy-document-simplifying-local-government.pdf)

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**Question**

As the Head Start Pathway announcements do not specifically address any council decision-making obligations, you have sought our advice on:

- (a) whether decision-making in relation to any Proposals is subject to the decision-making requirements in the Local Government Act 2002 (**LGA**);
  - (b) the decision-making requirements in the LGA that local authorities should consider when considering the development of any Proposals; and
  - (c) how local authorities should approach the assessment of decisions to submit a Proposal, in the context of their significance and engagement policies (**SEPs**).
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**Summary advice**

At present, there is no statutory basis for the “Head Start Pathway”, with any legislation to enable the implementation of approved Proposals to reorganise the structure of local government not likely to be introduced until 2027. What this means is that:

- there is no current exemption from the existing decision-making requirements in the LGA, including those in Part 6; and
- any local authority that submits a Proposal will be doing so in reliance on its general power of competence in section 12 of the LGA.

As a result of the above, when officers provide advice to elected members in relation to Proposals, we recommend that their advice specifically considers the existing decision-making requirements in the LGA. In summary, these are:

- The requirement (per s 76 of the LGA) for “every decision” to be made in accordance with ss 77, 78, 80, 81, and 82, as are applicable, which involves the identification of all reasonably practicable options, and consideration of the views and preferences of those likely to be affected or interested (among other things);
- Due to s 12 being relied on, discussion that links the proposed decision to the purpose and role of local government in ss 10 and 11; and
- An assessment of the advantages and disadvantages of the Proposal, including in relation to the criteria that the “Head Start Pathway” has identified.

In all cases, councils will need to form a view as to the significance of a decision to submit a Proposal, by reference to their SEP. That assessment will be relevant to how to achieve compliance with the requirements of Part 6.

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Appropriate compliance with Part 6 of the LGA may involve consultation, although there is no strict obligation to consult, and the “Head Start Pathway” material does not expressly contemplate extensive consultation. However, when making decisions local authorities are required to consider the views and preferences of persons likely to be affected by, or to have an interest in, the matter being decided. Without consultation, it is generally more challenging to have confidence that there is an understanding of community views, but this will need to be balanced against the significance of the decision under consideration and the practical ability to consult, given the time that has been allowed to submit a Proposal.

In our view, councils should give active consideration to targeted, time-limited forms of engagement (for example, public statements inviting feedback), as a means of mitigating legal risk while recognising the compressed timeframe (including in any consultation material). As most SEPs include a statement that acknowledges circumstances involving urgency, there may be an ability to rely on that reason for limiting consultation. However, this may not easily apply in all cases given that participation in the “Head Start Pathway” process will be voluntary, as opposed to mandatory.

For completeness, a failure to comply with the requirements of s 12 or Part 6 of the LGA when making any decision could lead to vulnerability to legal challenge by way of judicial review.

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**Please call or email to discuss any aspect of this advice**

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## Reasoning explained

**Decision-making in relation to any Proposals will need to be made in accordance with the LGA**

1. Although Cabinet has announced (and approved) the “Head Start Pathway”, there is no recognition in existing legislation of the new process. Instead, the Government has announced an intention to introduce legislation in 2027 that will enable the implementation of any Proposals approved by Cabinet, as well as the backstop process.
2. It follows that, at present, the operative statutory provisions applying to the reorganisation of local government are those in Part 3 and Schedule 3 of the LGA, which involve process steps, certain requirements, and (to some extent) similar considerations / criteria when compared with the “Head Start Pathway”. The existing reorganisation pathways also involve the Local Government Commission, as the relevant decision-maker.
3. In addition, because the “Head Start Pathway” is not currently supported by any bespoke legislative provisions, including in relation to council decision-making, our view is that any decisions (to develop and submit a Proposal) will need to be made in accordance with the existing requirements of the LGA. In particular, the requirement in s 76 of the LGA for “every decision” to be made in accordance with ss 77, 78, 80, 81, and 82, as are applicable.
4. For completeness, we note that it is well established in New Zealand that Government press-releases or announcements cannot suspend or amend the law, even in circumstances where:<sup>3</sup>

...there can be no doubt as to the government’s intention to introduce the legislation indicated in the Prime Minister’s public announcement. There can be little doubt that the legislation will be enacted.
5. In the present circumstances, there is likely less certainty as to the enactment of any enabling legislation to implement any accepted Proposals. We say this as any legislation will not be introduced, let alone enacted, until after the general election in November 2026. This may be dependent on the eventual make-up of the Government formed after the general election, which gives rise to potential uncertainty and which has a bearing on the risks and strategic options we have identified in the remainder of this advice.

**High-level overview of relevant decision-**

6. Local authorities derive their powers, functions and responsibilities from statute. In addition to the particular functions, powers and responsibilities that are conferred on them, s 12 of the LGA provides a

<sup>3</sup> *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 623.

**making  
requirements in  
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- “power of general competence”, which enables the doing of any act and entry into any transaction subject to specific limitations in ss (2) to (5).
7. In our view, any local authorities who intend to submit a Proposal would be relying on the power of general competence, as there is no current statutory basis for the “Head Start Pathway” in the LGA or otherwise.
  8. Without addressing ss (2) to (5) specifically, we do not consider those limitations to create any particular risk for the making of any Proposal, given the current broad expression of the purpose of local government in s 10.<sup>4</sup>
  9. However, prior to deciding whether to submit a Proposal, local authorities should consider whether the Proposal would align with their statutory purpose and role, and be in pursuit of benefit for their relevant district or area.<sup>5</sup> In doing so, it will be necessary to consider:
    - (a) the consequences of any Proposal on the democratic representation of residents within any district or unitary area, and the extent to which a Proposal enables “democratic territorial decision-making and action”;
    - (b) whether any Proposal promotes “the social, economic, environmental, and cultural well-being of communities in the present and for the future” (that being the current purpose of the LGA, noting that this will change when the Local Government (System Improvements) Bill becomes law); and
    - (c) the benefits of implementing any Proposal, including any efficiency gains that might arise from a unitary structure, and whether those will outweigh the costs of transition to that new structure.
  10. We note that the considerations in paragraph 9(a) to (c) above generally reflect the criteria announced as part of the Head Start Pathway, which include whether a Proposal will: “maintain local voice”, deliver “economies of scale” and provide “more efficient regional governance”.
  11. Section 12(3) provides that the power of general competence is subject to any constraints, prescriptions or requirements contained in the LGA,
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4 We note, however, that s 12(4) contemplates the exercise of the s 12 powers wholly or principally for the benefit of the district. Given the context here, where proposals are required to cover at least two districts, it is implicit that a broader assessment is required, but the implications for each district will need to be considered.

5 We note that the “head start pathway” appears to prevent regional councils from being able to join a group that decides to submit a Proposal.

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which engages the LGA decision-making requirements in Part 6. These include:

- (a) s 77, relating to the need to identify all reasonably practicable options for the achievement of the objectives of the decision;
- (b) s 78, which requires councils to consider the views and preferences of those who may be influenced by or affected by the decision-making;
- (c) s 80, in terms of any inconsistency with any policy or plan (particularly the relevant long-term plans and the funding and financial policies); and
- (d) if consultation is undertaken to meet the obligations under s 78, compliance with ss 82 and 82A of the LGA.

12. A local authority has discretion as to how it complies with these requirements, which is to be exercised largely in proportion to the significance of the decision being made.<sup>6</sup> "Significance" is defined in s 5 of the LGA as follows:

**significance**, in relation to any issue, proposal, decision, or other matter that concerns or is before a local authority, means the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for,—

- (a) the current and future social, economic, environmental, or cultural well-being of the district or region;
- (b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter;
- (c) the capacity of the local authority to perform its role, and the financial and other costs of doing so

13. Assessment of those matters must be done with reference to the local authority's SEP.

14. A failure to comply with the requirements of s 12 or Part 6 of the LGA could result in any decision being challenged by way of judicial review. Successful judicial review proceedings would likely result in the relevant decision being declared invalid, and potentially require the local authority to embark on a fresh decision-making process. This may not be possible in relation to the "Head Start Pathway", given the limited time allowed to submit a Proposal, and reality that any determination by the High Court would be after the announced date for submission of any outline proposal (9 August 2026).

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<sup>6</sup> Sections 77 and 78 of the LGA are subject to s 79 which confers a discretion on local authorities as to how to achieve compliance that is largely in proportion to the significance of the matters and in making judgments under section 79(1), local authorities must have regard to the significance of relevant matters and other matters in s 79(2): *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [39].

**The nature of the decision under consideration is relevant in terms of the requirements of Part 6**

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15. The Cabinet papers and DIA material that have been proactively released describe Proposals as being “outline proposals”.
  16. We understand that this terminology has been used because, as explained in the Cabinet papers, where Cabinet provides in-principle approval to any Proposal, the next step will be “detailed design and the policy decisions required to support enabling legislation”.<sup>7</sup>
  17. In addition, the DIA material notes that in relation to any Treaty settlement arrangements, “Councils will have an opportunity to further engage with Māori as they continue to develop outline proposals ahead of final decisions in 2027”.
  18. There may be two ways to interpret these statements:
    - (a) On the one hand, what these statements could suggest is that any Proposals are not expected to provide all of the detail that may usually be expected if one of the Schedule 3 reorganisation pathways was used. Instead, there may be the potential to submit a Proposal that *outlines* the key components of a Proposal, in the knowledge that further detail will be required before enabling legislation can be considered (including after further engagement or consultation).
    - (b) On the other hand, once a Proposal is submitted and in-principle approved, the expectation of the Government may be that the key components will not be allowed to be reconsidered during the detailed design phase. This could act to remove the ability for any local authority to characterise the submission of a Proposal as “in principle” or “preliminary” in nature, pending further community consultation or engagement with, for example, Māori.
  19. In our view, the Government’s expectations of any Proposal (ie preliminary or otherwise) would be usefully clarified, so that it is clear to any local authorities considering making such a Proposal what ability there is to depart from the terms of the Proposal in the event of receiving ‘in-principle’ approval from Cabinet.

**Local authorities have a discretion in relation to any consultation**

**That discretion should be**

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20. Separately from the observations made in the section above, any local authorities that intend to submit a Proposal will need to make a decision in accordance with the requirements in Part 6 of the LGA. This will involve forming a view as to the significance of that decision by reference to their SEP.
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<sup>7</sup> Cabinet Economic Policy Committee (29 April 2026) Simplifying Local Government – Head start pathway (**Cabinet Paper**) at [38].

**exercised relative to the significance of the decision to submit a Proposal, based on a councils SEP**

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21. Although the criteria for assessing significance will vary between SEPs, there are issues that will likely be relevant to the assessment of significance for all local authorities. In particular:
- (a) As discussed above, the nature of the decision being asked of local authorities by the Government, including whether it is possible to characterise a Proposal as “in principle” or “preliminary”. Given that Cabinet may want certainty before it provides any ‘in principle’ approval, Proposals made with a higher degree of abstraction or on a conditional basis (ie subject to community consultation) could be at a greater risk of rejection.
  - (b) Where any local authority decides not to submit a Proposal, the Government has signalled that it will use a “backstop process” to achieve reorganisation. While the details of that process are not currently clear, the fact it has been signalled – and may remove council-influence – could incentivise the making of Proposals through the “Head Start Pathway” and provide policy support for a less rigorous approach to, for example, consultation.
  - (c) There is likely to be a high level of interest in Proposals, either from the community as a whole or from particular parts of the community.

*Consultation before making a decision on a Proposal*

22. Where any decision is considered to be significant, Part 6 of the LGA does not impose a general obligation to consult. However, the need to comply with ss 77 and 78 - in a way that is largely in proportion to the significance of the matters affected by a decision – generally means that consultation is more likely required for decisions of “higher significance”.
23. Under s 78(1) local authorities are required to consider, in the course of the decision-making process, the views and preferences of persons likely to be affected by, or to have an interest in, the matter being decided. In the context of decision-making on Proposals, it may be difficult for a council to show that it has considered the views and preferences of potentially affected or interested persons before making a decision where it has not carried out consultation. This is likely the case where limited information is held in relation to communities’ views and preferences as to reorganisation, or the different possible forms of any reorganisation of local authorities within their region. There could also be a lack of understanding as to how a unitary model functions, versus the regional and district / city council structures that are common across the majority of the country.
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24. In making these observations, we acknowledge that the 9 August 2026 deadline imposes significant limitations on the ability for territorial authorities to undertake comprehensive consultation, let alone prepare the information that may be required for such consultation. However, there is discretion as to how any consultation is undertaken, subject to appropriate compliance with the principles in s 82 of the LGA.<sup>8</sup> These principles are to be observed in such a manner as the local authority considers, in its discretion, to be appropriate. Section 82(4) sets out matters that are relevant to the exercise of this discretion, and includes the costs and benefits of any consultation process or procedure.
25. In our view, it is relevant to the approach that a council may take towards any consultation, and the manner in which it complies with the s 82 principles, that:
- (a) the timeframe allowed for Proposals to be submitted is compressed; and
  - (b) subject to the political uncertainty that we discuss in the first section of this advice, councils that do not submit Proposals may be required to reorganise in any case through a “backstop process”. As a result, the potential disadvantages or costs of not submitting a Proposal (in terms of the potential loss of control or influence) are potentially high.
26. In our view, councils should give active consideration to targeted, time-limited forms of community engagement (for example, public statements inviting feedback), as a means of mitigating legal risk while recognising the compressed timeframe.
27. In our experience, most SEPs recognise that consultation is not always possible in circumstances involving urgency. Whether these provisions can be relied on will depend on the precise wording in the relevant SEPs (ie they may be linked to specific types of decisions, as opposed to general statements). However, as there is no statutory requirement to submit a Proposal, the urgency only arises if a council decides – on its own – to submit a proposal.<sup>9</sup>
28. The material released by the Government does not point to, or guide, the level of consultation expected before any Proposals are submitted. For example, in the “questions and answers” section of the DIA website,
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8 This is because there is not a requirement to use the special consultative procedure to consult on a Proposal, nor are there any other legislative requirements that are specific to consultation on a Proposal.

9 On this point, we note that the Head Start Pathway has been pitched as a “voluntary” process for councils to consider engaging with.

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under the heading “Will communities be consulted on Head Start proposals?”, the following is stated:

Given the short window for submitting, councils will be limited in how they consult on initial outline proposals. We are looking for mayors and councils to provide territorial leadership. Councils will have the opportunity to consult with communities before final decisions are made by Cabinet in May 2027.

29. Similarly, the Cabinet paper envisages that councils will engage with stakeholders and consult their communities after the Government has made in-principle decisions on the Proposals.<sup>10</sup> However, as noted above, any consultation that occurs at that point may find itself limited by the decisions already made by Cabinet.<sup>11</sup> Put another way, it is not clear whether it will be open for local authorities to consult at a later date, and then (in response to feedback received) submit an updated version of the Proposal which revisits aspects of the Proposal approved in-principle by Cabinet. The benefits of consultation if there is such a constraint would be limited, which may run the risk of marginalising communities and creating legal risk.
30. We recommend that officers’ advice to elected members specifically address and make recommendations in relation to consultation. In particular, officers’ advice should clearly explain:
- (a) if consultation is not proposed, why; and
  - (b) if consultation is proposed, the rationale for the form of consultation, particularly if it is to be abridged when compared to the type of consultation that the council would normally carry out for equivalent decisions.
31. Specifically recording the council’s position on consultation will address the type of issues that have been previously raised before the High Court, which have led to the Court holding that:<sup>12</sup>

...There is no material that would allow me to infer the council had turned its mind to the issue of consultation. As was noted in *Minotaur* the council is not required to meticulously minute every decision in its process, however the level of information in the decision papers should be sufficient to enable the court to satisfy itself that the councillors had, or at best appeared to have, considered the issue of consultation.

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<sup>10</sup> Cabinet Paper at [40].

<sup>11</sup> Refer to paragraph 21(a) above.

<sup>12</sup> *New Zealand Motor Caravan Association Inc v Marlborough District Council* [2021] NZHC 3157 at [68].