

Briefing Note: Update on charter school contract termination negotiations

To:	Hon Chris Hipkins, Minister of Education		
Date:	16 November 2018	Priority:	High
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Purpose of Report

The purpose of this paper is for you to:

Note that we have progressed mutual termination discussions with seven of the ten sponsors to a point where we are almost ready to present proposals to you for your approval;

Note that negotiations with three of the sponsors is proving more challenging and there remains a possibility that we are unable to reach an agreement;

Note that, in line with the Ministry's overarching mutual termination approach, a range of factors from Committed Costs, to payments to make Sponsors "whole" have been considered to secure Mutual Termination Agreements;

Note that to protect confidential negotiations and confidential settlement amounts, the overall sum total of all charter school contract settlement information will be proactively released, and individual sums per agreement will be withheld;

Note that this Briefing Note is not recommended for proactive release as negotiations are still underway.

Summary

- Under Termination for Minister's Convenience process, all charter school contracts will terminate on the last day of school, 2018 unless otherwise mutually agreed.
- The Ministry has been engaged with all sponsors towards termination by mutual agreement. Agreement with seven of the ten sponsors is close while three others have some distance to go.
- Development of Mutual Termination Agreements have been guided by the need for any financial outcome to be evidence-based, auditable and justifiable. The agreements take into account the case-by-case circumstances of each sponsor but also, to the extent practicable, consistent methodology and treatment is applied to all sponsors.
- The components of the draft Mutual Termination Agreements have included: Committed Costs, contributions to administrative costs and disengagement activities, the 2018 1% retained operational funding, contributions to costs related to exiting the contract, sum to secure agreement and "make whole" factors specific to each sponsor.
- Other benefits or considerations, including commitments to apply Round 5 charter school establishment payments to the new State schools or the value of securing an agreement have also been factored into the draft Mutual Termination Agreements. Although Termination for Minister's Convenience may appear to have a lower cost compared to Mutual Termination Agreements, there are increased risks of dispute and on-going administrative costs under this course of action.
- A table providing a high-level overview of the possible quantum of financial settlements to terminate all current contracts is included in the Annexes. For the sponsors where the positions remain distant, estimating termination costs are difficult.
- It is recommended that when all charter school contracts are terminated that the overall sum is released. This figure would be based on the sums payable from the Crown plus the payments returned to the Crown as part of the Agreements. This figure would not include the amounts sponsors have agreed to apply to the new state schools or other educational purposes or the establishment funding retained by some sponsors.
- Release of the individual settlements by contract would invite speculation and possible accusations of unfair treatment without context or understanding of the particular requirements of the contracts and the specific circumstances of each sponsor. Confidentiality provisions would have to be carefully considered in any release of information.



Ellen MacGregor-Reid
Deputy Secretary
Early Learning Student Achievement

16/11/2018



Hon Chris Hipkins
Minister of Education

17/11/18

Background

1. On 14 May 2018, Cabinet agreed to commence the termination for Minister's convenience (TfMC) process for all remaining charter schools to provide certainty that the charter schools will end on their last day of 2018, consistent with the Government's policy to remove the charter school model and to focus on a quality, comprehensive State school system that gives every child the opportunity to succeed [CAB-18-MIN-0220].
2. In June 2018 you exercised the Minister's contractual right to terminate all remaining charter schools contracts through the TfMC process. Under TfMC, the contracts will be terminated on the schools' last days of Term 4, 2018. At the same time you directed the Ministry to resume discussions with each sponsor to reach termination by mutual agreement (TbMA) as it has the potential for both parties to reach more favourable outcomes.
3. Confidential negotiations have been guided by the Ministry's overarching approach to TbMA. Underlying principles include: the financial outcome of the negotiation process must be evidence-based, auditable and justifiable. Each agreement and sponsor will be considered on a case-by-case basis, but to the extent practicable it will employ a methodology that is consistent across the Mutual Termination Agreements (MTAs).
4. The Ministry has also taken a "make whole" approach to the negotiations. This has meant the Ministry would consider reasonable and substantiated further costs (that are in addition to what the sponsor might be eligible for as committed costs), if they were incurred by the sponsor in relation to terminating the agreement. Consideration of these costs would be guided by the cap of \$1 million (inclusive of GST) in the contract for TfMC unless there were strong reasons to depart from this.

Mutual Agreement considerations

5. In *Briefing Note: Update on Charter School Contract Termination Negotiations* (METIS 1152410) the status of negotiations with each sponsor was provided and some areas of difference were highlighted. The Ministry also outlined the key characteristics of the draft MTA to be used as a basis for the negotiations.
6. In line with the overarching approach to TbMA, the Ministry has considered costs and factors related to:
 - a. Committed Costs: These are costs that would be payable under TfMC and these costs formed the starting point of our MTA discussions. The Committed Costs (listed in the Annex) are the Ministry's current best evaluation of the expected costs based on the information provided by sponsors to date.
 - b. Contribution to the administrative costs of exiting the agreement (e.g. accounting and legal costs): Extensive financial information and evidence for claims have been sought by the Ministry in considering sponsor requests. External accounting and legal advice should be sought by all sponsors and we consider the contribution to these costs supports the negotiations towards reasonable and evidenced MTAs.
 - c. Contribution to additional costs of exiting the contract/sum to secure agreement: This includes reasonable costs specific to the individual circumstances of each sponsor. This may range from general additional staffing costs incurred to respond to the negotiations to specific costs incurred to support the discussions.

- d. Contribution to disengagement activities: Although the expected activities are not onerous, the contract is silent on whether the Crown contributes to the sponsors costs. There will be actions that need to be taken to ensure a smooth transition into the State education system.
 - e. 2018 1% retained operation payment: As you agreed in *Education Report: Charter school reporting, performance assessment, and administration matters* (METIS 1129228), the 2018 1% retained operational funding has been included as part of the mutual termination discussions.
 - f. Other “make whole” factors: As each sponsor has its own unique circumstances, consideration has been given to specific issues raised by individual sponsors. The Ministry has sought to work with sponsors to understand if they may be left with financial commitments that are not Committed Costs but because of the termination of the contract would leave them in a worse financial position than before they signed the contract.
 - g. Other benefits/considerations: The negotiations include two sponsors where the schools were not opened as charter schools but charter school establishment payments were made as required under the contract. The sponsors have no legal obligation to return that funding and are free to use it as they wish. By securing a TbMA, the Ministry can ensure that establishment payment funds will be put towards the newly established State schools.
7. In addition to the above considerations, the Ministry has also looked at the value of securing agreement. Although difficult to quantify, securing an agreement and the waiver of future legal claims is another significant factor in these negotiations. As negotiations with some sponsors becomes more challenging the risk of disputes arising increases. The Crown can increase its settlement offers but to do so may require your specific approval.

Termination for Minister’s Convenience

- 8. If TbMA is not reached, TfMC will apply for each of the schools on their last day of term 4, 2018.
- 9. The current estimated Committed Cost amounts are listed in the Annex based on the information provided by sponsors.
- 10. If TfMC were to apply, it is possible that sponsors may dispute or challenge the Ministry's assessment of Committed Costs. This could result in protracted legal processes even if we are confident that our approach complies fully with the contract. It would nevertheless cost the Ministry (and sponsors) time and have financial implications. The benefit of increasing our proposed settlements so that sponsors accept a MTA therefore could avoid considerable cost (e.g. legal fees, time). We will ensure you are advised about any portion that is effectively a premium for achieving a result in the accompanying Education Report.
- 11. Reaching agreeable mutual termination terms ensures the EBOTs can focus their attention on ensuring the new State schools are established successfully.

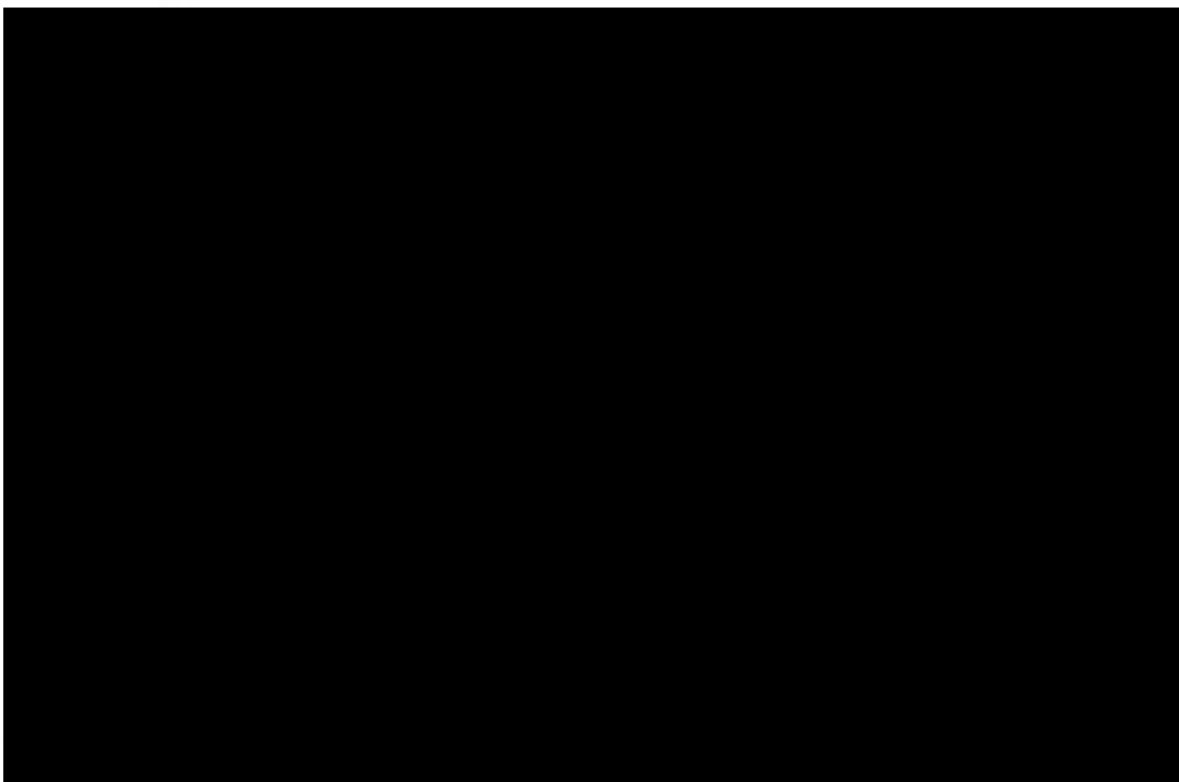
Negotiations progressing towards agreement

- 12. Discussions with seven of the sponsors have progressed to the point that we believe that MTAs may be reached soon. These will then be presented to you for your approval and signature.

13. For three of the sponsors, specific issues remain which mean that reaching a MTA is proving challenging. We remain engaged in negotiations.
14. Under TfMC, the Crown is required to pay out any Committed Costs as per the contracts. Due to the Ministry picking up the majority of the property leases for the new State schools, the level of Committed Costs have generally proven to be much lower than they otherwise would have been.
15. The Ministry has been undertaking TbMA negotiations to reach an Agreement which would provide mutual benefit to both parties. Under this course of action, the level of payments will be higher, however these have been balanced by wider considerations and benefits.
16. Based on discussions, proposals and information provided by sponsors, the tables in the Annex provide a high-level overview of the potential MTAs and what the possible Committed Costs payment could be under TfMC if TbMA is not reached.
17. Please note, each of these negotiations and the individual circumstances of each sponsor mean that a comparison between *Estimated Committed Costs* and the *Current TbMA proposal* does not provide all of the non-financial benefits in each of the proposals. While the *Notes* section provides some of the analysis which sits behind these, the Education Reports which will accompany each of the MTAs will provide a fulsome justification of each of the proposals we recommend to you.
18. In the proposed MTAs, all sponsors have been offered, in addition to Committed Costs and costs specific to their circumstances, contributions to accounting and legal costs, disengagement activities, additional costs of exiting the agreement/sum to secure agreement and where relevant the 2018 1% retained operational funding. [REDACTED]

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Remaining negotiations



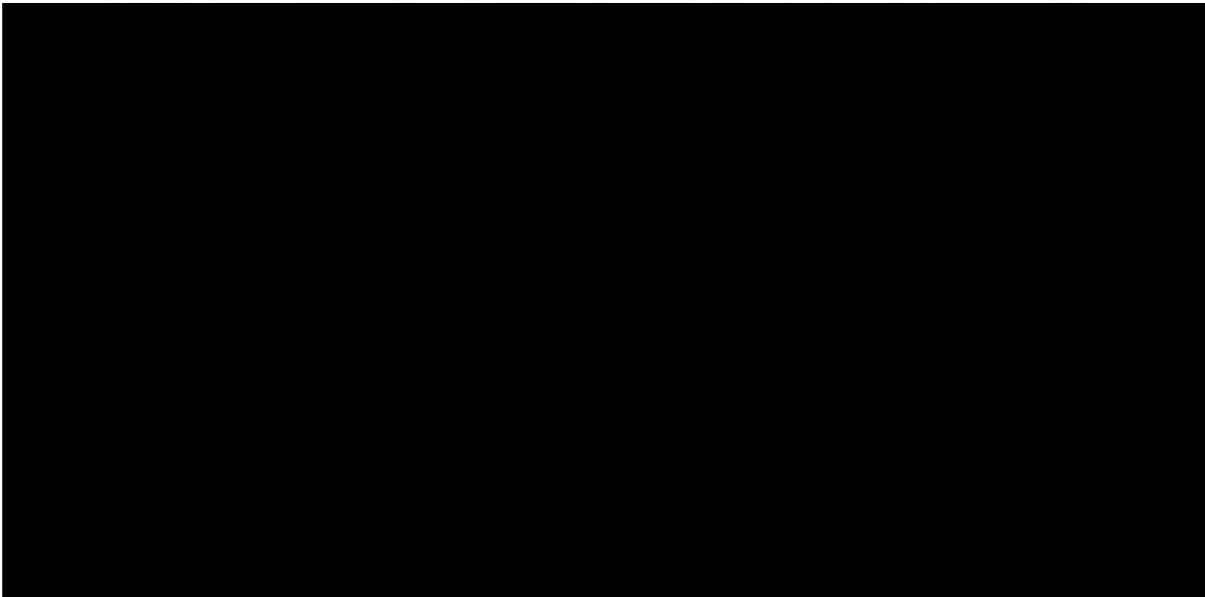
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Financial implications

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27. We consider the funding available  in the tagged contingency *Removal of the charter school model* (METIS 1096725) will be sufficient for contract termination purposes. One option we are considering is drawing down the balance shortly, so we can be ready to meet expected costs in the new year, including additional legal resourcing requirements that are likely to be required for the Charter Schools Treaty Claim (Wai 2770).
28. We will seek approval from Joint Ministers (Finance and Education) to complete the drawdown of funds.

Release of contract termination information

29. In addition to the current contracts to be terminated above, four other charter school contracts have been terminated. One was in 2016 for non-performance while three others were terminated after negotiation earlier this year.
 30. The MTAs and related papers for those already terminated have not been proactively released as negotiations have been on-going with other sponsors. Once all contracts have been terminated, any release of information will have to carefully consider the provisions of the Official Information Act as well as the confidentiality provisions of the original charter school contract, the Confidentiality Agreement and the MTA.
 31. You have responded to media queries that the overall financial settlement for these contract terminations will be released but due to confidentiality, not the individual settlements.
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Proactive Release

35. We recommend that this Briefing Note is not released at this time as negotiations towards mutually agreed termination are on-going.

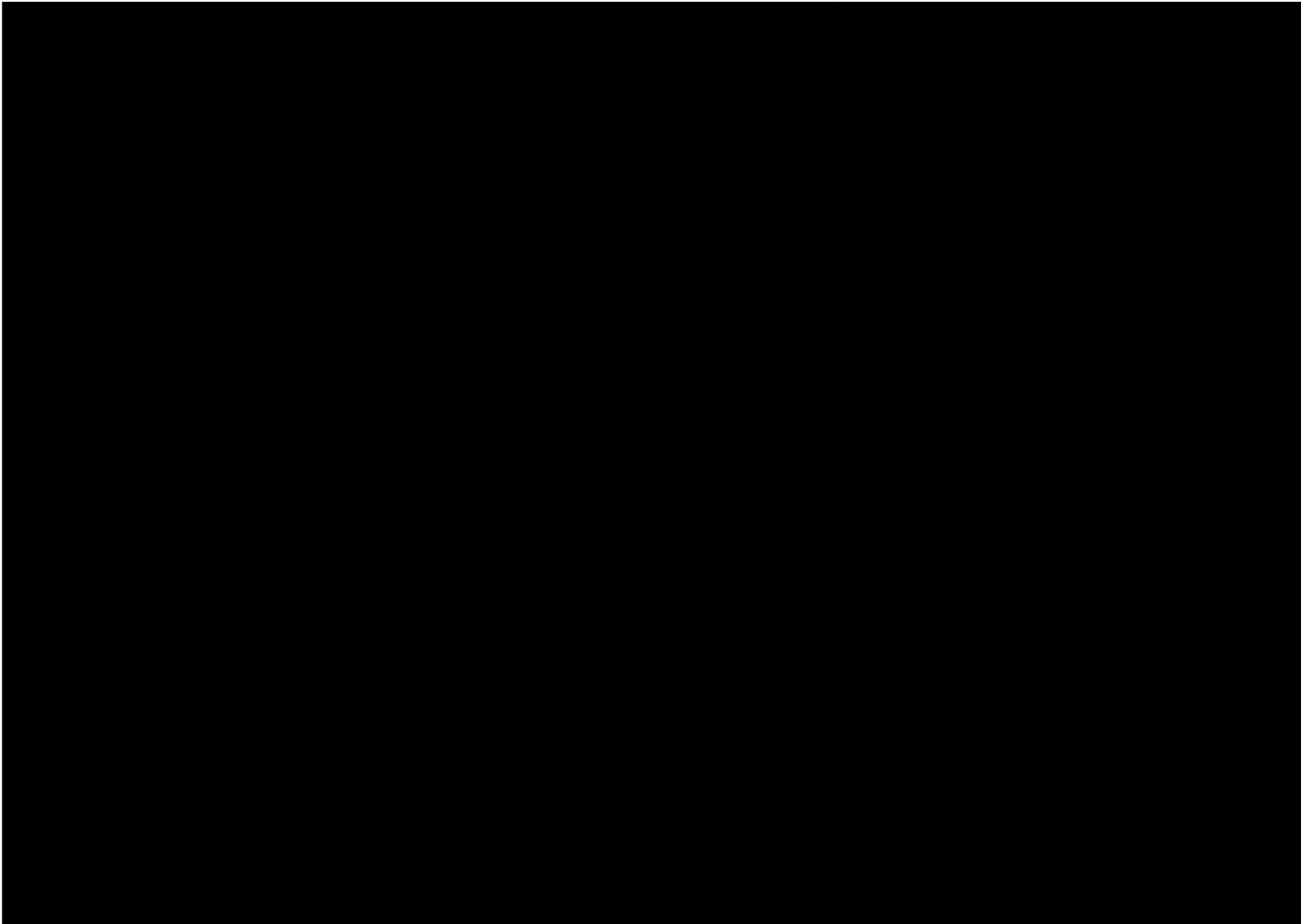
Annexes

Annex one: Current mutual termination proposals – close to reaching agreement

Annex two: Current mutual termination proposals – negotiations ongoing

Annex one: Current mutual termination proposals – close to reaching agreement

Annex two: Current mutual termination proposals – negotiations ongoing



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