A. INTRODUCTION

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Children and Social Work Bill (“the Bill”). The memorandum deals with two amendments tabled for Commons Report on 7 March 2017.

B. SUMMARY OF THE AMENDMENTs

2. The new amendments deal with the provision of relationships education in primary schools, relationships and sex education in secondary schools, and personal, social, health and economic (PSHE) education in primary and secondary schools.

3. Teaching of relationships, and relationships and sex education is to be mandated by the secretary of state by regulations and supporting guidance. Teaching of PSHE may be mandated by regulations and supporting guidance.

4. The provisions will extend to England and Wales but apply only to England.
C. ANALYSIS OF DELEGATED POWERs

PART 1: CHILDREN

New clause 15¹: Education relating to relationships and sex

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative procedure where the regulations repeal or amend a provision made by or under an Act referred to in subsection (6) (subsection (9)). Any other regulations under subsection (1) would be subject to the negative procedure (subsection (10)).

Context and purpose:

5. These provisions confer a duty on the Secretary of State to make regulations that will require all schools in England to provide relationships education to pupils of compulsory school age receiving primary education and relationships and sex education to pupils receiving secondary education. The duty would apply in relation to Academy schools and independent schools as well as maintained schools.

6. The purpose of new clause 15 is to place a duty on the Secretary of State to make regulations which require all schools in England to teach relationships education to pupils receiving primary education, and relationships and sex education to pupils receiving secondary education.

7. Subsection (2) sets out matters which must be included in the regulations. It requires the Secretary of State to give guidance to schools in relation to such provision and to review this guidance from time to time. The regulations must require the proprietors of schools to have regard to the guidance, to make statements of policy setting out how such education is to be provided, and to make those statements available to parents or other persons. The regulations must also make provision about the circumstances in which a pupil (or a pupil below a specified age) is to be excused from receiving relationships and sex education or specified elements of that education.

¹ Clause numbers are those cited in the notices of amendments for Commons Report
8. Subsections (3) and (4) make further provision with respect to content of such guidance. In particular, subsection (3) specifies that such guidance is to be given with a view to ensuring that pupils learn about specified matters and that the education is appropriate having regard to age and religious background.

9. The Secretary of State has published a policy statement setting out further detail on the rationale behind the Government’s proposed approach to teaching these subjects. It also sets out the terms of reference for the review, including the issues that the guidance should cover and how it is proposed that the regulations will address parental rights and appropriate teaching.

10. Subsection (6) provides that the regulations may amend any provision (including provision conferring powers) that is made by or under the Act specified in that subsection. The legislation listed in subsection (6)) which may be amended by regulations made under subsection (1)) consists of legislation that sets out the current duty for schools to provide sex education or, for those schools that are not under that duty, consists of the legislation which is most likely to be amended to include the new legislative requirements to be imposed by way of regulations made under sub-section (1)).

11. Maintained schools: there is already a statutory duty for the provision for sex education in maintained secondary schools and in the case of a special school, for all registered pupils at the school who are provided with secondary education in Part 6 of the Education Act 2002. Sections 403-405 of the Education Act 1996 provide for the Secretary of State to issue guidance, for schools to have a policy and for the right of withdrawal with regard to the provision of sex education.


14. Independent schools: These schools are required to comply with the Education (Independent School Standards) Regulations 2014 (“the 2014 Regs”) underpinned by section 94 of the Education and Skills Act 2008 (“the 2008 Act”). However there is currently no requirement for sex education to be provided at these schools.

15. Academies: Though dependent on the government for funding, academies are independent schools. Academies are principally funded directly by the Department under contract (generally known as the funding agreement). Although academy arrangements are contractual, there is a statutory basis for them in the Academies Act 2010. There is no current requirement in legislation or in the funding agreement for provision of sex education in academies. However in academies that do teach sex education, the funding agreements stipulate that they must have regard to any Guidance, further to section 403 of the Education Act 1996 and to the requirements in section 405 of the Education Act 1996, as if the Academy were a maintained school.

16. The subsection (1) duty to make provision by regulations may be discharged by making that provision by regulations under another Act (subsection (7)). Before making the regulations, the Secretary of State is under a duty to consult such persons as the Secretary of State considers appropriate (subsections (5) and (7)).

17. The provision which may be made under by regulations made under subsection (1) by virtue of clause 70 of the Bill may include provision amending, repealing, or revoking any provision made by or under any Act or other instrument or document, whenever passed or made (subsection (8)).
Justification for taking the power

18. In taking this power we have taken into account the general principles set out in our memorandum of November 2016, in particular that the legislative framework must be clearly presented on the face of the Bill with secondary legislation used to provide the detail; and that within that framework the provisions must support effective implementation and contain sufficient flexibility to respond to changing circumstances.

19. This clause places the Secretary of State under a duty to make regulations in relation to the teaching of the above subjects in all schools, including Academy schools and independent schools as well as maintained schools. The government’s intention is to ensure pupils are taught the knowledge and life skills they will need to stay safe and to develop healthy and supportive relationships, particularly dealing with the challenges of growing up in an online world, and in an age-appropriate manner.

20. The subject matter of the duty is necessarily complex, as are the associated issues regarding the content and manner of teaching and the provision which may be made regarding the circumstances in which a pupil may be excused from receiving such education.

21. The government’s intention is to provide for a clear set of requirements with an appropriate degree of flexibility so as to ensure that schools teach in a way that is appropriate to the age and religious background of their pupils. The making of the regulations and associated guidance will potentially require consultation and engagement with a wide variety of interested groups (appropriate consultation is required by subsections (5) and (7)). The government anticipates that it is likely that such matters would be subject to regular review and updating (subsection (2) requires guidance to be reviewed from time to time). The need for a responsive and flexible legal framework is particularly great given the potential range of matters to be taken into account and the need to keep pace with wider social and technological changes. In the government’s view the best way to achieve this balance is through placing the Secretary of
State under the duty to make regulations set out in subsection (1), to publish guidance which is in accordance with the requirements in subsections (3) and (4); with the further detail to be set out in the regulations and guidance themselves.

**Justification for the procedure**

22. Regulations made under subsection (1) which amend any provision by or under an Act would be subject to the affirmative procedure (subsection (9)). Regulations under subsection (1) which do not amend provision made by or under an Act would be subject to the negative resolution procedure (subsection (10)).

23. The government respects the need for Parliamentary involvement where an Act of Parliament is to be amended. It therefore considers that this approach provides an appropriate degree of scrutiny as it would provide for the affirmative procedure where either primary or secondary legislation is being amended.

24. This is consistent with the use of similar powers in Part 6 of the Education Act 2002. For example The Secretary of State may alter the subject content of the National Curriculum by way of affirmative order (section 84(6), 86 and 210(3) Education Act 2002. In addition for each National Curriculum subject the Secretary of State prescribes a “programme of study” by order under section 87(3) EA 2002. The programmes of study describe the subject knowledge, skills and understanding pupils are expected to develop during each key stage. The Secretary of State makes an order giving legal effect to a separate document which sets out the programme of study in a teacher friendly manner. The sub-delegation is permitted by section 87(5) EA 2002. Such orders are subject to the negative resolution procedure.
PART 1: CHILDREN
New clause 16: Other personal, social, health and economic education

*Power conferred on:* Secretary of State
*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative procedure where the regulations repeal or amend a provision made by or under an Act. Any other regulations would be subject to the negative procedure (subsections (6) and (7))

*Context and purpose*

25. These provisions confer a power conferred on the Secretary of State to make regulations that would require all schools in England to provide personal, social, health and economic education to pupils of compulsory school age receiving primary and secondary education. The power could be exercised in relation to all schools, or just in relation to schools of a particular kind, for example Academy schools and maintained schools.

26. The purpose of new clause 16 is to confer on the Secretary of State a power to make regulations to require schools in England to teach personal, social, health and economic education to pupils of compulsory school age receiving primary and secondary education.

27. Subsection (2) sets out matters which may be included in the regulations. The regulations may include provision requiring the Secretary of State to give guidance to schools in relation to such provision. Proprietors of schools may be required to have regard to the guidance, to make statements of policy setting out how such education is to be provided, and to make those statements available to parents or other persons. The regulations may also make further provision in connection with the provision of the education.

28. The Secretary of State has published a policy statement setting out further detail on the rationale behind the Government’s approach to teaching this subject as well as the matters covered by new clause 15. It also sets out the
terms of reference for the review including the issues that the guidance should cover.

29. The subsection (1) power to make provision by regulations may be discharged by making that provision by regulations under another Act (subsection (9)). Before making the regulations, the Secretary of State is under a duty to consult such persons as the Secretary of State considers appropriate (subsections (3)) except to the extent that another power to make provision provides otherwise (subsection (9)).

30. Subsection (4) provides that the regulations may amend any provision (including provision conferring powers) that is made by or under the Act specified in that subsection; and the provision which may be made under the regulations by virtue of clause 70 of the Bill may include provision amending, repealing, or revoking any provision made by or under any Act or other instrument or document, whenever passed or made (subsection 3). Subsection (6) lists the legislation where such legislation is likely to be placed.

31. At present only independent schools (not including academies) are required to teach PSHE under section 94 of the Education and Skills Act 2008 and the Education (Independent School Standards) Regulations 2014, SI 2014/3283 (made under subsections (1), (2) of the 2008 Act). Should the Secretary of State make provision for PSHE to be taught in other types of schools, for example in maintained schools and academies, it is likely that, when making provision in primary legislation, this will be done by way of amendments to the legislation specified in subsection (6) that currently makes provision for sex education.

Justification for taking the power

32. As in relation to new clause 15, in taking this power we have taken into account the general principles set out in our memorandum of November 2016, in particular that the legislative framework must be clearly presented on the face of the Bill with secondary legislation used to provide the detail; and that within
that framework the provisions must support effective implementation and contain sufficient flexibility to respond to changing circumstances.

33. This clause provides the Secretary of State with a power to make regulations in relation to the teaching of the above subject in some or all schools, including Academy schools and maintained schools. As in relation to new clause 15, the government’s intention is to ensure pupils are taught the knowledge and life skills, in an age-appropriate manner, that they will need to stay safe and to develop healthy and supportive relationships, particularly dealing with the challenges of growing up in an online world.

34. The subject matter of the power is necessarily complex, as are the associated issues regarding the content, which has significant overlap with relationships and sex education; and the manner of teaching. Given the duty on the Secretary of State under new clause 15, the government considers that it will be important to consider PSHE as part of the engagement and consultation on the content of relationships education and relationships and sex education. This will then determine what any additional statutory elements of PSHE might be needed, and is a necessary step before making provision with respect to PSHE.

35. The government’s intention is to provide for a clear set of potential requirements with an appropriate degree of flexibility so as to ensure that schools teach this subject. The making of the regulations and associated guidance will potentially require consultation and engagement with a wide variety of interested groups (appropriate consultation is required by subsection (3)). The government anticipates that it is likely that such matters would be subject to regular review and updating. The need for a responsive and flexible legal framework is particularly great given the potential range of matters to be taken into account and the need to keep pace with wider social and technological changes. In the government’s view the best way to achieve this balance is by providing the Secretary of State with a power to make regulations set out in subsection (1), with a set of potential requirements with the further detail to be set out in the regulations and guidance themselves.
Justification for the procedure

Regulations made under subsection (1) which amend provision by or under an Act would be subject to the affirmative procedure (subsection (6)). Other regulations under subsection (1) which do not amend provision made by or under an Act would be subject to the negative resolution procedure (subsection (7)).

36. The government respects the need for Parliamentary involvement where an Act of Parliament is to be amended. It therefore considers that this approach provides an appropriate degree of scrutiny as it would provide for the affirmative procedure where either primary or secondary legislation is being amended. Subsection (9) puts it beyond doubt that the Secretary of State may rely on existing powers to exercise her duty under subsection (1) for example section 94 of the Education and Skills Act 2008.

Department for Education
7 March 2017