The Rt Hon David Gauke MP  
Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  

13 November 2018  

Re: T (A CHILD)

I am writing to draw your attention to concerns that have been highlighted by the decision in this case, which was handed down by the Court of Appeal on 4 October 2018 (neutral citation [2018] EWCA Civ 2136). The lead judgment was given by the President of the Family Division, Sir Andrew McFarlane, who directed that the Justice Committee be sent a copy of the Court’s decision. I believe that a copy of the decision has also been sent to your Department.

The case, which concerned the question of consent to deprivation of liberty, arose from an application to the High Court by a local authority for authorisation to place a child for welfare reasons in a unit that has not been approved as secure accommodation; such applications must be made under the High Court’s inherent jurisdiction, rather than under Section 25 of the Children’s Act 1989. The need for these applications arises because there are insufficient places in secure children’s homes in England and Wales; the Court of Appeal quotes official figures stating that, as of March 2018, there are around 255 places in approved units, which represents a disparity with the increasing number of children who need placements.

In its judgment (at paragraph 5), the Court of Appeal drew attention to its concerns about the volume of High Court applications that are being made outside the normal statutory regime laid down by Parliament – estimated to be at least 150 per year. According to the Court, this places pressure on the justice system, requires local authorities to engage in more costly court processes and leads to young people being placed in units that have not been approved as secure placements, contrary to the stipulations of Parliament. The Court of Appeal went on to point out (at paragraph 88) that, unlike the Secretary of State, the court is not able to inspect the accommodation on offer and must rely on the evidence presented to it.

At paragraph 89 of its judgment, the Court listed further, unresolved matters that were beyond the remit of the appeal, including the impact on children of there being two parallel processes, especially the potential for arbitrary unfairness and the effect on children’s rights under Articles 5 (the right to liberty and security) and 6 (the right to a fair trial) of the European Convention on Human Rights. We note that this is not the first occasion that the courts have seen fit to raise this issue (see,
for example: O (a child: no available secure accommodation) [2018] EWFC B60; A Local Authority v AT and FE [2017] EWFC 2458 (Fam)).

My Committee shares the concerns that have been raised by the Court of Appeal. We do not consider it acceptable that fact-sensitive decisions on placements for vulnerable children should be determined under the inherent jurisdiction of the High Court rather than under the statutory regime that Parliament has prescribed. Moreover, we consider it undesirable to have two parallel systems, whereby some children are placed in secure units that have been approved for this purpose by the Secretary of State, and others are placed via a different court process in units that have no such approval. Using the High Court’s inherent jurisdiction appears to us an inappropriate use of the court’s limited resources, also placing the Court in an unfortunate position that it clearly does not welcome (see paragraph 4 of the judgment).

We recognise that the Department for Education has primary responsibility for secure children’s homes. Nonetheless, the overall availability of places is of clear interest to the Ministry of Justice, as it contracts around 120 places per year for young people who are committed by the courts to undertake a custodial sentence in secure accommodation. In addition, we hope you will share our concerns about the impact on High Court resources of resolving these applications and on the fairness of the overall process for the children involved, as well as the implications for their fundamental rights.

As we understand that the MOJ, and formerly the Youth Justice Board, has decommissioned some of the places it used to contract in secure children’s homes, it is at least plausible that this may have had some effect on the viability of these homes, and if so, that may have led local authorities to close some affected homes. What assessment have your Department, or the Department of Education, made of this possibility? Given the burden on the courts now being caused by the lack of secure children’s homes, what observations would you make on the wider effects of changes to the use by the MOJ of secure children’s homes?

In addition, the judgment is an opportunity to reflect on the “separate but similar” settings and pathways through which children may receive secure care, including in YOIs, STCs, and secure children’s homes under the Youth Justice System, in secure children’s homes under the Children Act, and in hospital under the Mental Health Act. In the context of the recently announced new approach to secure schools, and following the research published this year by Bartlett, Warner and Hales, we would be grateful if you would let us know what discussions you and your ministerial counterparts in other departments have had on ensuring that the use of these different pathways is not arbitrary. This is particularly relevant given research evidence showing that a young person’s first contact with one of these pathways may have an impact on the likelihood that they will later engage with the Justice system. I am sure you will agree that these differences must be clearly understood, and the correct solution must be used for every young person, in order to give every individual the care and support they may need as well as giving those who may be at risk of engaging in criminal
behaviour a better chance of a law-abiding future.

I am copying this letter to Robert Halfon MP, Chair of the Education Select Committee.