Thank you for your letter of 13 November regarding capacity in secure children's homes (SCHs). I apologise for the delay in responding. I acknowledge your concerns about the availability of places in SCHs and the process through which they are allocated.

In your letter you particularly highlight the Court of Appeal's concerns about the volume of High Court applications being made outside the statutory regime set out in section 25 of the Children Act 1989. I too am concerned by the issues raised in Sir Andrew McFarlane's judgment and I know that he will be meeting shortly with Sir Alan Wood, Chair of the Residential Care Leadership Board, to discuss plans to improve the supply of secure accommodation. We need to develop a fuller understanding of the number of cases being referred to the High Court, the reasons behind any such rise, and consider whether mitigating actions are required. Officials are investigating whether these cases can be identified from existing data or whether a new mechanism for gathering the data would be required. I will provide you with an update on our findings once this work has been completed.

In response to the other issues you raise about provision of secure accommodation, I thought it might be helpful to set out the different processes for allocating secure accommodation places for children, including what the planned changes to the Mental Capacity Act will mean for 16-17 year-olds. I have also set out how my Department works with the Department for Education (DfE), Children's Homes and local authorities to consider capacity issues in the SCH sector when commissioning justice beds in SCHs, and current DfE work to increase capacity in the sector.

The allocation of secure welfare places

The Department for Education (DfE) is responsible for setting the legislative framework for secure children's homes, while local authorities are responsible for making sure there are sufficient places for the children they look after. There are two different court processes which deal with two distinct cohorts of vulnerable children who may need to be deprived of their liberty (in cases where there is not a justice issue which could result in custody): those that lack mental capacity; and those that pose a risk to themselves or others. While these cohorts overlap, it is for local authorities using their own professional judgement to determine which route is most appropriate for a child based on their individual needs and circumstances.

Local authorities can place children in secure children's homes on welfare grounds under section 25 of the Children Act 1989 with approval from the courts and in the case of children under the age of 13 with the prior approval of the Secretary of State for Education. The decision on whether to accept a referral rests with registered managers of SCHs, who must evaluate each referral on a case-by-case basis.
At the moment, when 16 and 17-year olds lack mental capacity and cannot consent to care and treatment arrangements which would give rise to a deprivation of liberty (and when their parents do not consent on their behalf), local authorities or others (such as the NHS) must apply to the Court of Protection for an order in accordance with the Mental Capacity Act 2005. Since the Mental Capacity Act 2005 generally does not apply to children under the age of 15, local authorities and other bodies or individuals are required to apply to the High Court under its inherent jurisdiction for the authorisation of the deprivation of liberty. The High Court can use its inherent jurisdiction to rule that a child lacks mental capacity or competence, and where appropriate it can rule that suitable accommodation must be found for that child. There is currently no central guidance to advise local authorities or others on decisions relating to these deprivation of liberty orders. They are expected to comply with relevant human rights jurisprudence and use their professional judgment, taking into consideration the individual needs of the child.

In instances where mental capacity is not the dominant concern, the local authority may seek to rely on section 25 of the Children Act 1989 to place a child in a children's home that has been approved by the Secretary of State as secure accommodation. Section 100 of the Children Act 1989 sets out the circumstances where the High Court's power to act under its inherent jurisdiction is limited, including to require a child to be accommodated by or on behalf of a local authority. However, an application for the exercise of High Court's inherent jurisdiction may also be made in certain other circumstances, such as to approve accommodation where there is agreement under section 20 of the Children Act 1989 from parents to a child being accommodated. This is subject to the conditions that, first, the desired outcome could not be achieved through any other order that could be applied for by a local authority, and second that there is reasonable cause to believe that the child will suffer significant harm if the inherent jurisdiction is not exercised.

The Department for Health and Social Care is replacing the Deprivation of Liberty Safeguards system through the Mental Capacity (Amendment) Bill which is currently before Parliament. The new system will be extended to 16 and 17-year olds. This will mean that court orders are no longer necessary to authorise the deprivation of liberty of those aged 16 and 17, and instead such authorisations can be provided by local authorities and the NHS.

**Capacity in the SCH sector**

The DfE recognises there are capacity issues within the SCH estate and is working with the sector on reforms to increase capacity. The DfE is providing funding of £40 million between April 2016 and March 2020 to improve facilities at SCHs and enable some homes to increase their capacity. In addition, the DfE has recently provided grant funding to three local authorities to conduct feasibility studies into opening new secure provision to increase available capacity.

The DfE has established a Residential Care Leadership Board in order to drive forward system and practice change. The Board will play a key role in supporting the government to refine proposals to establish a central commissioner for welfare beds in SCHs and is working with local authorities to open new secure provision to increase capacity. The Chair is also supporting the government to secure wider buy-in for these reform proposals through discussions with senior stakeholders across the sector. In addition, the DfE continues to fund the Secure Welfare Coordination Unit to help plan and coordinate welfare placements, based on individual needs, and to consider capacity issues.

**The allocation of secure justice placements**

Children can also be placed in secure children's homes (SCHs) when remanded or sentenced to custody. They are intended to accommodate children aged 10-17 who are assessed as particularly vulnerable. The Ministry of Justice is responsible for commissioning SCH bed provision in the youth custody estate and placement decisions on justice grounds are made by the Youth Custody Service. SCH beds currently make up about one tenth of capacity in the youth custody estate.

Over the past decade we have seen a sustained fall in the number of first time entrants in to the youth justice system. The number of children in custody has also fallen dramatically, and in 2017/18 the
average population was just over 900, a decrease of 69% from the peak in 2006/7. This sustained decline has enabled us to reduce the number of beds across all three sectors of the youth secure estate and saw us reduce the number of justice SCH beds from 120 to 107 during our recent retender exercise, thus creating savings and enabling reinvestment back into the system.

We are of course pleased that there are fewer children in custody now than in previous years. However, we know that there are interdependencies between welfare and justice bed capacity in SCHs, and that the changing demand can cause uncertainty for Homes. We were mindful of this relationship when pursuing our SCH contract retendering exercise and therefore took the unusual decision to pursue a Direct Award Contract rather than a competitive retender. This allowed us to undertake detailed, individualised negotiations with each home interested in providing justice beds. We tested the thresholds for the continued viability of each home with individual homes and local authorities and commissioned contracts that cover a longer period and include the ability to flexibly re-negotiate provision in line with changing demand throughout the contract lifetime to ensure further stability in the sector.

Where the MoJ has reduced contracted justice capacity — in line with our assessment of demand for, and affordability of, provision — any decision to permanently reduce SCH capacity rests with the Home or local authority, as they retain the option to offer these beds to local authorities for secure welfare placements.

Future provision and commissioning

We are working with the DfE — alongside the NHSE, DHSC and the Welsh Government — to develop their Central Commissioning Framework for the SCH sector. This work aims to provide central government departments with stronger strategic oversight of the estate, a better understanding of the cohort that the secure estate caters for and improved forecasting of demand to inform the development of future provision and ensure young people are matched to the right placements to meet their needs.

Thank you again for your letter, I hope you find this reply helpful. I have copied this response to Damian Hinds MP and Robert Halfon MP.

Yours ever,

RT HON DAVID GAUKE MP