Rights Analysis

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020

According to the Department for Child Protection Reporting and Statistics page, as of 30th December 2020 there were 3,827 children on a Guardianship to 18 years of age order in South Australia. 544 were on a Guardianship to 12 months order. The pool of children this Bill defines as 'eligible' are those on an order to 18 years old – minus Aboriginal and Torres Strait Islander children, who are the only vulnerable group *not* included in this push for adoption from care.

The Bill contains numerous significant changes to the Adoption Act 1988 but none of the changes are amendments of the Adoption Act. Instead, they are classed as "modifications" of the Adoption Act 1988 *from* the Child and Young People (Safety) Act 2017. This is despite the ability to dispense with consent to adoption already existing in the Adoption Act 1988. There has been no justification given as to why it was deemed necessary to avoid the Adoption Act completely and take such a radically different legislative approach to the one New South Wales used when it introduced adoption from care.

Complexity of legislation restricts the ability of those affected by the law to understand their legal rights and obligations. That alone is cause for concern, but the changes themselves give concerningly wide discretionary powers to the Chief Executive and delegates while drastically reducing the powers and independent decision-making capacity of the court, and they contain no mention of any associated safeguards or protections for the child-then-adult or their family.

This paper contains a summary of the rights-based implications of this Bill and adoption from care, then a detailed explanation/discussion of each point made in the summary with comparisons between existing and proposed legislation.

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Summary

1. **Removal of child's best interests in Court decision making; Royal Commission Recommendation 157; Right to privacy**
   - Chapter 7A, Part 1, 113C – The Bill requires that when considering if adoption is preferable to any alternative order the Court must disregard any other order that could be made under the Child and Young People (Safety) Act 2017. So even if the court finds that long-term guardianship is in the best interests of the child, this cannot be taken into consideration in their decision – the adoption order will be required to be made instead.
   - Contradiction to actioning of Recommendation 157 of the Royal Commission
   - Right to privacy contravened by arbitrary interference when guardianship suffices.
   Rights implications – Article 14 & 17 ICCPR, Articles 3 & 21 UNCRC, General Comment No. 14 (2013) para 38.

2. **The downgrading of the paramountcy of the child's rights and best interests in adoption**. This Bill removes the requirement for the paramountcy of the rights of the child in the decision-making process on adoption from care, contravening Article 21 of the UNCRC.
   Rights implications - Articles 3 (best interests a primary consideration) & 21 UNCRC (interests of the child in adoption paramount); General Comment No. 14(2013).

3. **Consent requirements -** Consent of child over 12 not needed, even if the child refuses to consent to adoption; views of the child and parents not given weight; loss of requirement to give the opportunity to follow up paternity of child before adoption – these are some of the consequences of the removal of Part 2, Division 2 which is the section dispensing with consent from the Adoption Act 1988.
   – Chapter 7A, Part 3, 113I 3(b) The child will be able to be forced to be adopted even if they refuse to consent, and even if they are over 12 years old.
   The views of the child are "heard" but given less weight. The parent's views can be "heard" but the Court is discouraged from giving them any weight; and the consent of the child can be dispensed with if the Court considers adoption is in the child's "best interests".
   Rights implications – Article 12 (views of the child) UNCRC.

   - Removal of Part 2, Division 2 dispensing with consent from the Adoption Act 1988 means there is no need to follow up the requirements of Part 2, Division 2, 15 (7): 'consent of the father of a child born outside lawful marriage' allowing that father the opportunity to establish paternity prior to an adoption order being made if that has not been done.
   Rights implications – Article 14 and 17 ICCPR among others.

4. **Open adoption is excluded if adoption is from care** – Chapter 7A, Part 1, 113C (1) (l) If the pathway to adoption is through the Child and Young People (Safety) Act 2017 the Bill specifically excludes open adoption completely (by excluding section 26A of the Adoption Act (1988) where there is a weak – unenforceable - option of open adoption).
   Rights implications – Article 3 UNCRC, Article 14 ICCPR, Article 12 (views of the child) UNCRC.

5. **Timeframe for adoptions**

- Chapter 7A, Part 1, 1 'eligible child'(b) and '*prescribed qualifying period*' (a) - How long before an adoption can be applied for is dependent on the 'eligibility' status of the child (they are deemed eligible when they are the subject of an order to 18, which most children currently in care are) and the *'prescribed qualifying period'*. This '*prescribed qualifying period*' is potentially an extremely short time because the only timeframe stated is 'not less than 2 years' – *only if* the regulations do not state a different time.
- What the timeframe is before an adoption can be ordered should be one of the determining key issues in a decision on the passing of this Bill and yet this is relegated to subordinate legislation.
- There is no recognition in the Bill of time needed for other vulnerable groups, eg. disabled parents, parents from culturally and linguistically diverse (CALD) backgrounds, other groups with intergenerational trauma, etc.

Rights implications - Article 14 (Right to a fair hearing) and Article 17, ICCPR, among others.

Chapter 7A, Part 3, 113H - once the adoption application is made, the parents (if they are to be served) are entitled to notice of just 3 business days before the adoption hearing.
Rights implications – Article 14 & 17, ICCPR. Article 2, UNCRC

6. **Criteria for eligibility and assessment of adopters**

– **Who can adopt from care, and criteria for assessment of adopters**

Chapter 7A, Part 2, 113D (1) (c) refers to 'an approved carer, **or an approved carer of a class**, prescribed by the regulations'. As the Children and Young People (Safety) Regulations 2017 do not currently have any sections describing approved carers, this would seem to create an additional definition of 'approved carer' – but again with no indication of what the criteria would be, and no clear reason to not have this criteria in the Adoption Act itself.
- Other than this undefined category, the adopter can also be eligible if they are an approved carer who has a child in their care for the "*prescribed qualifying period*" (1)(b) or someone with guardianship (1)(a). These are very wide eligibility criteria.

Rights implications - ICCPR Article 14 (Right to a fair hearing); Articles 3 & 21, UNCRC**,** Articles 24 & 26, ICCPR.

Chapter 7A, Part 2, 113E: This Bill sets a potentially much lower threshold for criteria used to assess potential adopters from care and this raises questions about the best interests of the child, and the potential for discrimination against children in care because of different criteria than adoptions through the Adoption Act 1988.
- Despite there being full and comprehensive criteria for adopters in the Adoption (General) Regulations 2018, no criteria for adopters is stated in the Bill – except that the "requirements" will again be set out in the regulations – of an Act based on Child Protection, not Adoption.

Rights implications - Article 14 (Right to a fair hearing) ICCPR; Articles 3 & 21, UNCRC**;** Articles 24 & 26, ICCPR.

7. **Possible unforeseen consequence** of 113F 'Eligible carer need not be in a relationship' potentially places vulnerable children at further risk. The intention may have just been to allow single people to adopt, but the concern is that it appears to allow adoption by someone in a relationship where their partner does not also adopt the child (which was excluded within the Adoption Act 1988). This is also linked to the concern about extremely wide eligibility criteria.
   Rights implications - Articles 3 and 21, UNCRC**,** Articles 24 and 26 UCCPR.

8. **Rights relating to culture and ethnic group** - The rights of children-then-adults of ethnic, religious or linguistic minorities to maintain their connections to their language and culture - e.g. CALD are a group usually recognised as vulnerable but ignored in this Bill.
   Rights implications – Article 27, ICCPR; Article 30, UNCRC.

9. **Lack of equal protection** under the law due to age. For example: a child is removed at or near birth and foster-to-adopted by an 'eligible carer'. The child is then adopted at 1 to 2 years old. They have no right to be told they are adopted within this Bill or the Adoption Act 1988, as well as no point where they can consent (despite being a 'party'). There are no proactive measures within this Bill to allow them a voice to provide equality due to their age status as an infant/young child at the time of the adoption.
   Rights implications - Article 26 ICCPR; Article 2 UNCRC.

10. **'inhuman and degrading treatment' and lack of review rights** - sealed birth certificates to 18 years old - and beyond 18 at the discretion of the Chief Executive/delegates, and the restrictions around access to identity information.
    Rights implications – Articles 7 & 14, ICCPR.

11. **The right to impart information and ideas of all kinds** – limited for those adopted, with an offence carrying a maximum penalty of $40,000 or imprisonment for 4 years.
    Rights implications – Article 19, ICCPR.

12. **The right of children in care to follow up welfare checks –** is ignored in this Bill.
    Rights implications – Articles 20 & 25, UNCRC

In every case, the rights limitations or abrogation this Bill enables are not reasonable or reasonably justified because adoption is a non-evidence based, highly controversial practice, and alternative measures are available which provide stability without loss of rights.

1. Removal of the child's best interests in Court decision making.

According to 113C(1) (i) **adoption is not required to be "clearly preferable to any alternative order" like long-term guardianship.** Adoption can be the worst option, yet under this clause, if adoption is applied for, it will be the *only* option because the court *cannot take into account an alternative order like long-term guardianship* – even if it is preferable!

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
Chapter 7A, Part 1, 113C – Modification of Adoption Act 1988
(1) (e) section 10(1) of that Act is modified such that, in considering whether adoption is preferable to any alternative order that may be made under the laws of the State or the Commonwealth, the Court—
(i) **must disregard any order that may be made under this Act;** and
(ii) must have regard to the operation of Part 2 of Chapter 2 of this Act;

"modifies":

Adoption Act 1988 Part 2, Division 1
10—No adoption order in certain circumstances
(1) The Court will not make an adoption order in relation to a child who is less than 18 years of age unless satisfied that adoption is in the best interests of the child and, taking into account the rights and welfare of the child, **clearly preferable to any alternative order that may be made under the laws of the State or the Commonwealth**.

Chapter 7A, Part 1, 113C (i) prevents the consideration of any alternative order which may be preferable to an adoption order because any other long-term order is specifically ruled out due to being in "this act" ie the Children and Young People (Safety) Act 2017.

Chapter 7A, Part 1, 113C in (ii) directs the court outside of the Act where best interests of the child are not paramount by saying the Court must have regard to the operation of Part 2 of Chapter 2 of the Children and Young People (Safety) Act 2017 when considering whether adoption is preferable to any alternative order.

This makes a mockery of any best interest decision. If the Court is required to make an adoption order even if there are other clearly preferable alternative orders that are in the child-then-adult's best interests just because the Court "must disregard any order" in the Children and Young People (Safety) Act, then this prevents the Court from truly considering the child's best interests.

The Court is told to "have regard to the operation of Part 2, Chapter 2" (below) in the Children and Young People (Safety) Act which places the safety of children as paramount, whereas the Adoption Act at Section 3 – Objects and guiding principles, (1) (a) – following the UNCRC (Article 21) states that the "best interests, welfare and rights of the child concerned, both in childhood and in later life, must be the paramount consideration in adoption law and practice".

> *"In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "a primary consideration" but "the paramount consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues."(General Comment No. 14 (2013) para 38)*

Children and Young People (Safety) Act 2017
Chapter 2, Part 2—Priorities in the operation of this Act
7—Safety of children and young people paramount
The paramount consideration in the administration, operation and enforcement of this Act must always be to ensure that children and young people are protected from harm.
8—Other needs of children and young people
(1) In addition to the paramount consideration set out in section 7, and without derogating from that section, the following needs of children and young people are also to be considered in the administration, operation and enforcement of this Act:
(a) the need to be heard and have their views considered;
(b) the need for love and attachment;
(c) the need for self-esteem;
(d) the need to achieve their full potential.
(2) To avoid doubt, the requirement under this section applies to the Court.
(3) Without derogating from any other provision of this Act, it is desirable that the connection of children and young people with their biological family be maintained.
9—Wellbeing and early intervention
Without limiting a provision of this or any other Act or law, State authorities whose functions and powers include matters relating to the safety and welfare of children and young people must have regard to the fact that early intervention in matters where children and young people may be at risk is a priority.

A comparison with NSW adoption from care shows the opposite approach which retains the paramountcy of the best interests of the child, and even *suggests other orders* which should be compared and taken into account, to ensure that best interest principles are fully applied:

NSW Adoption Act 2000
Part 9 – Adoption orders
90 Court to be satisfied as to certain matters

(3) The Court may not make an adoption order unless it considers that the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child.

Note—
Other action that could be taken in relation to a child includes a parenting order under the Family Law Act 1975 of the Commonwealth or a care order under the Children and Young Persons (Care and Protection) Act 1998. Part 1 of Chapter 4 describes the persons who may be adopted and the persons who may adopt.

This "modification" also appears to contradict and nullify Royal Commission Recommendation 157 which was to:

> Consider the question of adoption where that is in the best interests of the child **and an Other Person Guardianship order would not be appropriate**.

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020 has not yet passed of course, but Minister Sanderson did announce her intention to implement the promotion of adoption from care in September 2019. Yet according to the 2020 Recommendation Update - PDF here this 'Accepted' Recommendation is in Phase 3, and the progress is advised as 'implementing' – when it seems what is being implemented is the direct opposite.

Article 17 ICCPR
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

The right to privacy is limited by the amendments in the Bill to the extent that they interfere with families and sever ties between families through the adoption order or distort them in kin adoption. As any removal of a child – however warranted and necessary – limits rights, the actual legal severance of the child then adult is an even more radical limitation. Adoption is a highly controversial practice and Article 17 (1) of the ICCPR also states that the interference should not be unlawful or arbitrary. Due to the lack of an evidence base supporting the supposed long-term positive effects of adoption, any decision made to apply an adoption order is, by definition, an arbitrary decision.

The alternative option of long-term guardianship which does not use such a radical approach to enable care exists, yet this Bill specifically excludes the use of any alternative care order in the

Children and Young People (Safety) Act and leaves the Court with no ability to make a decision based on the child-then-adult's best interests.

With this Bill, a child-then-adult who is under a long-term guardianship order in safe, stable and supportive permanent care could lose their birth certificate, their identity, their relationship rights to their siblings and extended family, and their ancestry – for life – even if such a loss and radical severing was not considered to be their 'best interests'.

Article 14 & 17 ICCPR, Articles 3 (best interests a primary consideration) & 21 UNCRC (interests of the child in adoption paramount).

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2. The downgrading of the paramountcy of the child's rights and best interests in adoption

Article 21 of the Convention on the Rights of the Child: ***"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration..."***

If paramountcy applies:

> *"It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration" (*General Comment No. 14 (2013) para 97).
>
> Paramountcy "… *requires that in adoption decisions, the best interests of the child take precedence over all other interests, including those of birth parents, adoptive parents and political, state security or economic interests. It calls for the child and his or her needs to be at the centre of any decisions about adoption*. (Victorian Law Reform Commission: The best interests and rights of the child 5.7)

This is a stronger protection of best interests and rights than the 'primacy' stated at Article 3 ***"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*** Convention on the Rights of the Child.

- and it is certainly stronger than what is stated in this Bill, where 'safety' is paramount, and best interests (with no mention of rights) do not have primacy let alone paramountcy.

Part 2—Amendment of Children and Young People (Safety) Act 2017
4—Amendment of section 8—Other needs of children and young people
(2) Section 8—after subsection (3) insert:
(4) Each person or body involved in the administration, operation and enforcement of this Act must, when performing a function or exercising a power in relation to a child or young person, act in the **best interests** of that child or young person (however, this subsection does not displace, and cannot be used to justify the displacement of section 7).

A hybrid chapter of the Adoption Act is created in the Children and Young People (Safety) Act 2017 with the addition of 7a. The only purpose for this seems to be to remove the rights and welfare of the child as paramount from the decision-making process in adoption - ignoring one of the key requirements of the Convention on the Rights of the Child on adoption: Article 21.

The Convention on the Rights of the Child General Comment No. 14 (2013) explicitly and repeatedly emphasises the necessity and importance of rights to the child's best interests. It also advises that the concept of the child's best interests has been abused by Governments and other State authorities (para 34) and recommends formal processes with strict procedural safeguards to prevent this. An argument might be made that being required to refer to Chapter 2, Part 2 of the Children and Young People (Safety) Act 2017 could give meaning to the concept of best interests, at Section 8 where being heard, love, attachment, self-esteem and reaching full potential are listed as needs of the child. But this potential 'addition' does not add procedural instructions. It just adds extra terms that are similarly open to misinterpretation at the cost of downgrading a child's best interests and rights from the foremost consideration to just 'one' of many considerations.

> *"With regard to implementation measures, ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of Government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of implementation" (*General *Comment No. 14 (2013) para 35).*

Without procedural safeguards, the concept of 'best interests' or even the additional 'needs' stated at Section 8 of Chapter 2, Part 2, can allow the abuse of discretionary powers based on individual value judgements – and there are disturbingly wide discretionary powers provided to the Chief Executive and her delegates in this Bill combined with the removal of the paramountcy concept.

> *"An adult's judgment of a child 's best interests cannot override the obligation to respect all the child's rights under the Convention*" (General comment No. 13(2011), para 61).

Moving adoption decisions into the Children and Youth (Safety) Act 2017 does not add any procedural benefits for the child-then-adult and instead means a child's best interests and rights may be set aside. Best interests themselves are not treated as primary, and this Bill removes protections that prevent their interests being placed on a par with others – including the interests of the State wanting to funnel children into adoption as a cost-saving and accountability-avoiding measure.

3. Consent requirements and views of the child and parents

Consent of child over 12 not needed, even if the child refuses to consent to adoption; views of child and parents not given weight; loss of requirement to follow up paternity of child before adoption, other limitations.

Removal of Part 2, Division 1, 8A in the Adoption Act 1988 to be replaced with 113K in the Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020 limits the right of the child to have their views considered.

Adoption Act 1988
Part 2, Division 1
8A—Court must consider opinion of child – is removed:
(1) Before making an order for the adoption of a child **of or over 5 years of age**, the Court must interview the child to determine what the child's opinion is in relation to the proposed order (unless satisfied that the child is intellectually incapable of expressing an opinion).
(2) An interview under this section must not be conducted in the presence of any party to the adoption.
(3**) In determining whether to make an order for adoption of a child the Court must take into account any opinion expressed by the child in an interview under this section.**
(4) The Court may determine the weight to be given to an opinion expressed by a child in an interview under this section, taking into account the age of the child and any other factors the Court considers relevant

– and this is what replaces 8A:

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113K—Views of child or young person to be heard
(1) In proceedings on an application for an adoption order contemplated by this chapter, a child or young person to whom the application relates must be given a reasonable opportunity to personally present to the Court their views related to the proposed adoption.
(2) However, subsection (1) does not apply if the Court is satisfied that—
(a) the child or young person is not capable of doing so; or
(b) to do so would not be in the best interests of the child or young person.
(3) Subsection (1) applies whether or not the child or young person is represented by a legal practitioner in the proceedings.

2(e) in 'Objects and guiding principles' remains, but seems to be contradicted by 113K (and 113I(3) among others).

Adoption Act 1988
Part 1, 3 – Objects and guiding principles – is retained:
(2)(e) if a child is able to form views on a matter concerning the child's adoption, the child must be given an opportunity to express those views freely and those views are to be given **due weight in accordance with the developmental capacity of the child and the circumstances;**

There appears to be an expectation that the child should be able to "personally present to the Court their views related to the proposed adoption" (with no safeguard of privacy noted as there was in 8A) rather than having a private interview. An "opportunity to present views" is very different to a requirement that the Court "must take into account any opinion expressed by the child".

The removal of **Part 2, Division 2 of the Adoption Act 1988** which is made up of Sections 15 to 19 over two pages in the Act enables:

- accidental or intended removal of the need to follow up the requirements of Part 2, Division 2, 15 (7) regarding 'consent of the father of a child born outside lawful marriage' and allowing that father the opportunity to establish paternity.
- a new power to be added which allows a child over 12 to be adopted against their wishes, and without their consent.

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113C – Modification of Adoption Act 1988
(1)(h) Part 2 Division 2 of that Act does not apply

Adoption Act 1988
Part 2, Division 2—Consent to adoption
15—**Consent of parent or guardian**
(1) to (6) [includes details of consent of mother and revocation of consent – n/a]
(7) The consent of the father of a child born outside lawful marriage is not required unless his paternity is recognised under the law of this State *but if it appears to the Court that a particular person may be able to establish paternity of the child (not being a person whose paternity arises from unlawful sexual intercourse with the mother), the Court will not proceed to make an adoption order without allowing that person a reasonable opportunity to establish paternity.*

In the Adoption Act 1988 if a child is 12 or over and does not consent to the adoption, the adoption order will not be made unless the child appears to be intellectually incapable of giving consent. Under this Bill they can be forced to be adopted if it appears to the court that adoption is in their "best interests….despite the lack of, or refusal of such consent". Again, no information is given about requirements for assessing best interests.

Adoption Act 1988
Consent of the child Part 2, Division 2
16—Consent of child
(1) ***An adoption order will not be made in relation to a child over the age of 12 years unless—***
(a) the child has consented to the adoption; and
(b) 25 days have elapsed since the giving of consent; and
(c) the Court is satisfied, after interviewing the child in private, that the child's consent is genuine and the child does not wish to revoke it.

(and)
Part 2, Division 2
18-Court may dispense with consents
(1) The Court may dispense with the consent of a person (other than the child) to an adoption where it appears to the Court—
(a) that the person cannot, after reasonable inquiry, be found or identified; or
(b) that the person is in such a physical or mental condition as not to be capable of properly considering the question of consent; or
(c) that the person has abandoned, deserted or persistently neglected or ill-treated the child; or
(e) that there are other circumstances by reason of which the consent may properly be dispensed with.
(2) The Court may dispense with the consent of a child to an adoption where it appears to the Court that the child is intellectually incapable of giving consent.
(3) An application may be made under this section by the Chief Executive or a party to the adoption (including the child)

but in the Bill:

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113I (3) The Court may dispense with the consent of a child or young person in relation to an adoption order contemplated by this Chapter where it appears to the Court—
(a) that the child or young person is not capable of properly considering the question of consent, or giving such consent;
or
(b) that it is in the best interests of the child or young person that the adoption order be made ***despite the lack of, or refusal, of such consent*.**

Article 12 UNCRC
1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

With this Bill, the views of the child are "heard" but the Court is prevented from giving them proper consideration, and their consent to adoption is dispensed with according to their "best interests".

Other limitations on the views of the child being taken into account:

The views of the child regarding contact with siblings and other members of their extended family are required to be included as far as possible in a foster care plan, but there is no protection or safeguard to allow the child to see or hear from the siblings and extended family once they are no longer considered related to due to the adoption order. The child moves from an order with a care plan where they are required to be consulted to an order with no plan and no requirements to allow contact.

Also there is the potential for lack of *informed* consent* of the child given the common misunderstandings in general society about what adoption really means. If the child does "agree" there is also the possibility of coercion. There could be the impression from the child's perspective that they must agree even if they have reservations, especially due to the obvious promotion of adoption from the Department. Skilled, informed, unbiased, independent adoption competent counsellors are needed to assist the child in understanding the implications to be able to give *informed* consent without duress – and no facility for this is mentioned in the Bill.

*Given the lifelong and drastic implications of adoption, many adoptee rights advocates have concerns that a child should not have the option of consenting to this legal arrangement. A child is not considered mature enough to agree to marriage, or to drink alcohol as a minor, and adoption has a substantial effect on their rights and freedoms as adults (although they are currently also given no option to consent when they do reach adulthood).

The voice of the parent: The legal status of 'party' to the adoption is removed from the parents:

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113C (1) (b) **a reference in that Act to a party to an adoption will be taken not to include a reference to the birth parents of a child.**

A blanket removal of the parents as parties to an adoption makes interpretation of the Adoption Act more difficult as 'Birth-parent' seems to sometimes be used interchangeably with 'party' in the Act.

113L – Right of birth parents etc to be heard
(1) In proceedings on an application for an adoption order contemplated by this Chapter, the Court may, on the application of the birth parent or birth parents, or a sibling or siblings, of the child or young person, hear submissions the applicant wishes to make in respect of the child or young person, despite the fact that the applicant is not a party to the proceedings.

(2) However, subsection (1) does not apply if the Court is satisfied that to allow the applicant to do so would not be in the best interests of the child or young person.

113M – Court to have regard to additional matters
(1) Before making an adoption order contemplated by this Chapter, the Court must have regard to the following matters:
(a) the extent to which the child or young person has formed an attachment to the prospective adoptive parents and any members of their family.
(b) any submissions made in accordance with section 113L;
(c) any other matter prescribed by the regulations.

(2) To avoid doubt, nothing in this section requires the Court to seek to give effect to a submission made in accordance with section 113L.

(3) The requirements under this section are in addition to, and do not derogate from, any other matter to which the Court must have regard.

In this type of suit, the child's best interests should be the determining factor, but this does not mean the rights of the parents should not be taken into account where possible. Yet in this Bill, the intention seems to be to rule out that possibility. The weight of any case a parent might try to make is first removed by removing their 'party' status, then more specifically diluted by 113M (1) and (2) having implications for their right to a fair hearing under Article 14 of the ICCPR:

Article 14 ICCPR
All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

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4. Open adoption is excluded if adoption is from care.

South Australia has no enforceable open adoption in contrast to New South Wales where an 'open adoption' adoption plan becomes part of the adoption order. This SA Bill not only removes the parents as 'party' to the adoption, it also specifically removes 26A of the Adoption Act 1988, which enables 'parties' to engage in an (albeit unenforceable) "open" adoption in South Australia.

The SA Adoption Act 1988 has included what the public understands as 'Open' Adoption provisions at Section 26A Arrangements between parties to adoption since 5th October 1997. But these

arrangements are **"not enforceable in any court and breach of an arrangement or failure to enter into such an arrangement does not affect the validity of an adoption order or of any consent to an adoption,"** (**26A (7) Adoption Act 1988**).

Adoption Act 1988, Section 26A

(1) If a party to the adoption or proposed adoption of a child wishes to enter into an arrangement with another party to the adoption for the provision of information, contact or any other matters related to the welfare of the child, or to vary such an arrangement, the Chief Executive will endeavour to facilitate the making of the arrangement or variation.

(2) For the purposes of this section, the birth parents and the adoptive parents will be taken to be the parties to the adoption.

(3) The Chief Executive must ensure that the **opinions of the child** (so far as they are ascertainable) are taken into account in formulating any arrangement or variation under this section.

(4) An arrangement may not be entered into under this section in relation to an adopted child who has attained the age of 18 years and an arrangement relating to an adopted child will terminate on the child attaining the age of 18 years.

(5) The Chief Executive must ensure that an arrangement entered into under this section, or any variation to such an arrangement, is reduced to writing and that copies of the arrangement or variation are provided to the parties to the arrangement.

(6) The Chief Executive will maintain a register of arrangements entered into under this section.

(7) An arrangement entered into under this section is not enforceable in any court and breach of an arrangement or failure to enter into such an arrangement does not affect the validity of an adoption order or of any consent to an adoption.

(8) This section applies only in relation to children adopted after the commencement of this Act.

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020

113C (1) (l) **"Section 26A of that Act does not apply".**

So the parents are not just generally removed as parties, but specifically excluded from making an adoption plan ('open' adoption) with the adopters even if they should want to. This is in stark contrast to NSW legislation where it is required that a non-consenting parent be given as far as possible an opportunity to have an adoption plan ('open' adoption).

With the powers provided to the Chief Executive and her delegates in this Bill, it's unlikely much effort will be expended on persuading parents to "choose" adoption for their child in the system, and it's not clarified whether a "consenting" parent will even be offered the adoption via the Adoption Act 1988, instead of its further restricted and partitioned pathway in the Children and Young People (Safety) Act 2017. If 'open' adoption via the Adoption Act is going to be used as the carrot to get parents to agree to adoption in response to the 'stick' via the Children and Young People (Safety) Act 2017 (if this Bill is passed) of never seeing their children again, then these parents also need to be made aware that any agreement they make with the adopters will be unenforceable.

By 'punishing' the parents for not agreeing to the adoption, this Bill also has the effect of punishing a child who may have gained benefit from contact with their family while growing up. It also abrogates the right of any child in care having their opinions taken into account about such an arrangement.

To get an idea of the scale of concern there should be about this version of 'open' adoption or about the rights of the parents and the child-then-adult compare the SA legislation/Bill with that of NSW.

Here is the adoption from care legislation in NSW, which *does* have enforceable 'open adoption' – via adoption plans, and which *does* legislate support for the parents to be included even if they do not consent to the adoption, and is almost entirely based – appropriately - in the NSW Adoption Act 2000 (not in their Child Protection Act):

NSW Adoption Act 2000
Part 4. Adoption Plans, 50:
Registration of adoption plans
(4) An adoption plan that is registered has effect, on the making of the relevant adoption order, as if it were part of the order.
and:
Part 4. Adoption plans, 46:
(2A) A birth parent who has not consented to the adoption of a child (a non-consenting birth parent) is, as far as possible, to be given the opportunity to participate in the development of, and agree to, an adoption plan in relation to the child.

(2B) A non-consenting birth parent who agrees to an adoption plan is, for the purposes of sections 47, 48, 50, 51 and 90, to be treated as if the non-consenting birth parent were a party to the adoption of the child.

5. Timeframe for adoptions

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
Part 1 – Preliminary
113A – Interpretation
prescribed qualifying period means –
(a) if the regulations prescribe a period for the purposes of this paragraph – that period; or
(b) if the regulations do not prescribe such a period – a period of not less than 2 years.

How long it will be before an adoption can be applied for by someone fostering to adopt is dependent on the 'eligibility' status of the child (they are deemed eligible when they are the subject of an order to 18, which most children currently in care are) and the *'prescribed qualifying period'*. This '*prescribed qualifying period*' is potentially an extremely short time because the only timeframe stated is 'not less than 2 years' – *only if* the regulations do not state a different time.

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
Part 1 – Preliminary
113A – Interpretation
Eligible child or young person means a child or young person (not being an Aboriginal or Torres Strait Islander child or young person)
who –
(a) is pursuant to an order of the court under this Act or the repealed Act, **under the guardianship of the Chief Executive, or another person or persons, until they attain 18 years of age**; and

(b) has been in the guardianship of the Chief Executive or the other person or persons for not less than the prescribed qualifying period

There are no safeguards or clarification here for parents with a disability, including an intellectual, cognitive or psychosocial disability which has been used to justify why they can't care for their child. No legislation is included requiring the Chief Executive or delegates to show that parents have been supported in a reunification process if appropriate. This, combined with the potential for a very short timeframe before an adoption order is sought, limits the rights of parents who may be affected by issues beyond their control like:

- socio-economic disadvantage, eg poverty - food, housing issues
- mental health - depression, anxiety, personality disorders
- health issues
- substance abuse
- disability
- being very young parents
- intergenerational trauma
- being in a recognised vulnerable group, eg. CALD

Article 27(3) of the UNCRC requires that the State provide 'material assistance and support programmes' where this is needed to enable parents to care for their children. Such a potentially short timeframe does not allow these programmes to take effect, especially for some disadvantaged and vulnerable groups.

Whatever is put into the Children and Young People (Safety) Regulations 2018 will dictate the speed with which any child or young person (who is not an Aboriginal or Torres Strait Islander child or young person) and who is under orders to 18 years of age will be "eligible" to be adopted by an "eligible carer".

And, as per 113H below, once the adoption application is made the parents (if served) are entitled to only **3 business days** notice before the adoption hearing.

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
Part 3 – Orders under Adoption Act 1988
113H – Copy of application to be served on birth parents
(4) The Court must not proceed to hear an application for an adoption order contemplated by this Chapter unless each birth parent served with the application has had at least **3 business days** of notice of the hearing.
(5) The Court may, for any proper reason, dispense with service under this section, or reduce the period between service and the time for the hearing of the application.

Article 2 UNCRC:
1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

and Article 14 ICCPR

6. Criteria for eligibility and assessment of adopters

Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
Part 2—Eligible carers
113D—Eligible carers
(1) For the purposes of this Act, the following persons are eligible carers in respect of a child or young person:
(a) a person under whose guardianship (whether solely or with another person) a child or young person is placed until they attain 18 years of age by order of the Court under this Act or the repealed Act;
(b) an approved carer in whose care an eligible child or young person (being an eligible child who is under the guardianship of the Chief Executive until they attain 18 years of age) has been for the prescribed qualifying period;
(c) an approved carer, or an approved carer of a class, prescribed by the regulations, in each case being a person who has been assessed in accordance with section **113E** as being a suitable adoptive parent in respect of the child or young person and who satisfies any other requirements set out in the regulations for the purposes of this subsection.

(2) The regulations may make further provision in relation to eligible carers (including provisions prohibiting or limiting a specified person or class of persons from being an eligible carer).

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113E—Assessment of suitability of prospective adoptive parents
Before making an adoption order contemplated by this Chapter, the Court must be provided with the results of an assessment of the suitability of each prospective adoptive parent conducted in accordance with any requirements set out in the regulations.

113D (1) (c) above refers to 'an approved carer, **or an approved carer of a class**, prescribed by the regulations'. As the SA Children and Young People (Safety) Regulations 2017 do not currently have any sections describing approved carers, this would seem to create an additional option for a new definition of 'approved carer' – but with no indication of what the criteria would be, and no clear reason to not have this criteria in the Adoption Act itself.

Concerns and questions –
There are already comprehensive criteria for adopters set out in the Adoption (General) Regulations 2018 (Part 4 – Prospective Adoptive Parents Register - which contains at Section 10-Assessment report – which includes 17 different criteria to be assessed, plus further sub-headings under those criteria in a report to go with an application for registration).

How different are the criteria for adopters that will be added to the Children and Young People (Safety) Regulations 2017? There are currently no requirements set out in those regulations for approved carers, and the information on 'approved carers' in the Children and Young People (Safety) Act 2017 in Section 72 to 75, concentrates mainly on reviews, checks and balances – all of which cease on adoption.

And if these requirements are not going to be used, after the question of why not, then the next question is what are?

Are the criteria these 'approved carers' mentioned in 113D (1)(a) and (b) approved on significantly different to the criteria for potential adopters in the Adoption Act? Is this potentially a loosening of the criteria of just who should be allowed to take vulnerable children into their care - care which is then never monitored or followed up by the State? Weren't these criteria designed to provide some protection to these children?

If the requirements in the Adoption Act are not going to be used, why not? What threshold must be reached for the Department to trust the same carers to the extent that ALL of these reviews and safeguards fall away?

Are children from foster care less deserving of carers meeting a certain threshold to be considered able to adopt? Is there a "beggars can't be choosers" motivation behind this difference? Why can't the criteria for adopters from care be placed within the Adoption (General) Regulations 2018 as modifications there? Surely they cannot be so different when the adoptees end up bound by the same Act?

The fact that a child-then-adult came from care to adoption, rather than being supposedly freely given away to adoption should have nothing to do with the criteria used to assess the people that acquire them.

A comparison check of the NSW Adoption Regulation 2015 finds it covers criteria and requirements for both 'Selection of prospective adoptive parents other than step parents, relatives or authorised carers of a child in out-of-home care' and 'Selection of authorised carers as adoptive parents of a child in their care' in depth, and in the same statutory instrument – next to each other at Parts 3 & 4.

Surely it is less discriminatory to have the legally assigned families of children-then-adults assessed as far as possible on the same criteria and *within the same statutory instrument* and legislation if the outcome (adoption) is going to be the same? Especially as this has been shown to have already been done in another jurisdiction by a fellow Liberal government - as most stakeholders are aware, enforced adoption from care in NSW was initiated by Pru Goward, who was at the time a Liberal Minister like Minister Sanderson.

Having two different sets of criteria for people who are given a child with no requirement for that child's welfare to ever be followed up (one set being - probably – a lot less stringent) could be discrimination under:

Article 24, ICCPR
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Article 26, ICCPR
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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7. Possible unforeseen consequence of 113F

'Eligible carer need not be in a relationship'

The Children and Young People (Safety) (Miscellaneous) Amendment Bill 2020
113F—Eligible carer need not be in relationship
An adoption order contemplated by this Chapter may be made in favour of 1 person (who may, but need not, be in a qualifying relationship or a relationship of any kind).

Does 113F have the unintended consequence of a scenario where an adoption order is made in favour of one person who is in a qualifying relationship, but there is no legislated requirement that their partner be assessed or required to adopt? Section 12 of the Adoption Act 1988 avoided this with the requirement that:

> "where 2 persons are living together in a qualifying relationship, an adoption order will not be made except in favour of both or in the circumstances described in subsection (3)(a)." (3a specifies the qualifying relationship as being with the "birth" parent or someone who has already adopted the child).

There does not appear to be a replacement clause in the Bill, or in the existing information about 'approved carers' in the Children and Young People (Safety) Act 2017 which the Bill relies on. On the other hand, if the intention is that this is correct, have potential consequences for safety of the child been addressed? Nothing is mentioned in the Bill.

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8. Rights relating to culture and ethnic group

Vulnerable children who are Culturally and Linguistically Diverse (CALD) Australians are not specifically safeguarded by the Adoption Act 1988, whereas there are safeguards in the Children and Young People (Safety) Act 2017 where cultural maintenance plans (28(1)(b)) are included to protect cultural and identity rights.

This is a Bill which respects the cultural rights of Aboriginal and Torres Strait Islander peoples to the extent that they are exempted from the Bill, but ignores the existence of cultural groups other than Aboriginal and Torres Strait Islander peoples whose rights are also enshrined in Human Rights instruments.

The statement in the UNCRC Article 30 below includes "a child belonging to such a minority **or** who is indigenous". Potentially adoptable children-then-adults are not only denied protections that require recognition and involvement in their community and enjoyment of their cultural identity growing up, but they have their legal heritage "colonised" or usurped and replaced with the heritage of the adopters not only as children but also as adults, and for their future generations.

For adoptees, there are not even protections added requiring they be told what their cultural heritage is while they are growing up – let alone their names and parentage. The adoption order legally makes them the same ethnic and cultural group as the adopters, with no option in the Adoption Act for them to consent to this as adults (despite being classed as parties to the adoption 'contract').

Article 30 UNCRC
In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 27 ICCPR
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

9. Lack of equal protection under the law due to age.

In the Adoption Act 1988 at Section 4, (4) the definition of 'party' to an adoption includes the adopted child-then-adult, the persons who were the child's parents immediately before the adoption and the adopters.

Despite being a 'party' to the adoption, there is no requirement for the adoptee to be advised that they are adopted. There is a version of consent offered only if the potential adoptee is a certain age when the adoption is taken to court. Although the adoptee is defined as a party to the contract, and that contract does not cease when they reach adulthood, the adoptee is never given the opportunity as an adult to consent, or have their views considered.

In the case of adoption, because *age* is a status relevant to the activity, and is the cause of a person who is legally considered a party to the adoption not being able to consent (if their consent is not dispensed with by this Bill), and also is the reason they may not be told the adoption occurred, then measures should be taken for the purpose of assisting or advancing this right. As these measures have not been taken in this Bill, then the right to recognition and equality before the law is limited by this Bill.

Article 26 ICCPR
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 UNCRC
1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also ***requires appropriate proactive measures*** *taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality. (General Comment No 14, (2013) para 41).*

10. The right to information: 'inhuman and degrading treatment' and lack of review rights

In South Australia, adopted children-then-adults legally do not have the right to their identity information and details of their origins in their developmental years, and beyond. As soon as the adoption order is made – even if they consent to it as a child - their birth certificates are sealed and a new one is issued which cannot be distinguished from the birth certificate of someone who is not adopted.

At 18 years old adoptees can request permission to access their birth certificate (if they are aware they are adopted), but this may be denied by the Chief Executive. There is no avenue of appeal or review of this decision in the Adoption Act 1988 if the Chief Executive makes this decision. There is also no timeframe for processing these requests for information and there have been delays for up to two years at a time – whereas information from Foster Care records are required to be provided under similar 30 to 60 day time constraints as other Freedom of Information requests.

These procedures are known to cause mental suffering, humiliation, and distress to adopted people. Lack of identity information can have severe impacts on identity formation growing up, on the health and mental health of the adoptee and later their children's health (with lack of awareness of genetic issues and family medical history as well as the psychological effect), plus the stress and cost of tracing and – if possible - developing relationships with siblings, parents – if alive - and extended family as adults. The Queensland Human Rights Commission defines 'inhuman and degrading treatment' as being not necessarily intentional, or physical, and including acts that cause mental suffering, humiliation, anguish or a sense of inferiority.

Article 7 ICCPR
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 14 (in part) ICCPR
All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

11. The right to impart information and ideas of all kinds

- limited

The equal right to freedom of expression for an adoptee is limited in South Australia as it is a criminal offence to publish anything that identifies someone as an adult adoptee, if this would identify, or be likely to lead to the identity of a party to the adoption. An adopted person telling their story in a magazine or newspaper could be prosecuted.

It is not a criminal offence in South Australia to identify before the public as an adult who has been under Guardianship orders – no matter if it would identify any parties to those orders.
But an adopted adult's freedom to talk about their own life in the same way every other citizen can is limited by the fact that they are bound by adoption legislation. Whether or not these offences are prosecuted, this legislation exists.

The existence of this legislation without outcry (or proactive measures to fix it by those forcing adoption on children-then-adults in the care system) also highlights the overarching foundation of secrecy and lack of recognition of adoptee rights compared to the supposed rights of those who adopt.

Adoption Act Section 31 - Publication of names etc of persons involved in proceedings
Maximum penalty: $40 000 or imprisonment for 4 years.

Article 19 (in part) ICCPR
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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12. The right of children in care to follow up welfare checks

- is ignored in this Bill.

The right to periodic review under Article 25 of the UNCRC is limited by this Bill. The requirement for welfare checks referred to in Article 25, UNCRC for children in care (and 'care' includes adoption as per the definition at Article 20, part 3 of the UNCRC) has been ignored. If long-term care orders are used instead, then follow up checks (and a care plan) are required, and the state remains accountable even if the carers are given the majority of the decision-making power.

There are numerous and explicit safeguards built into the Children and Young People (Safety) Act 2017 for children and young people under orders in that Act including regular reviews of Carers (Section 72 to 75) and the Children's Charter of Rights in Care. There are a contrasting lack of safeguards for the child in the Adoption Act 1988 itself. This is because the original intention of the Adoption Act was for it to be a means of creating the legal fiction that the child was born to the adopters. All of the warranted and added protections that recognise that a child has been in the care

of the State, has a different family of origin, and is not (in non-kinship adoption) a biological member of the caring family group disappear when the final adoption order is made.

An abused or murdered adopted child is not recognised in data collection as they are indistinguishable from children who have never been in the care system. Despite many adopted people who could have told their horror stories to the Royal Commission into Institutional Responses to Child Abuse, adoptees were excluded. This is because of the convenient interpretation of the legal fiction that adoption creates a parent-child relationship - rather than being a form of care as defined in the UNCRC Article 20.

> *"You see I understand what it is to be beaten, abused, suffocated, set alight, and tortured as a child. Both of my adoptive parents inflicted and or exposed all of us to physical, mental, and sexual abuse. No one stepped in to stop it."*

(from adopted person, Kerri Saint's submission to the Queensland Child Protection and Other Legislation Amendment Bill 2020 Submission 11).

Article 20 UNCRC
1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 25 UNCRC
States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

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