MONASH University

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Centre for Evidence and Implementation

ACT EXTERNAL MERITS REVIEW OF CHILD PROTECTION DECISIONS

MODEL SELECTION AND IMPLEMENTATION FINAL REPORT

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EXECUTIVE SUMMARY

This report describes the next phase of development of the ACT Government's External Merits Review (EMR) model and associated processes for child protection decision-making. Internal and external merits review are essential features of a well-designed and run child protection system, but they pose challenges in terms of potential competing interests between government (which is charged with maintaining the safety of children and young people once informed of child protection issue), parents who have been reported for a concern, the Children's Court, and the many providers and advocates in the system. Achieving a balance that includes transparency and modern-day principles that lend legitimacy and accountability to the process is crucial, including redress and ongoing system change strategies when errors are made.

The ACT has made substantial progress toward establishing and articulating the key principles of the merits review model and associated processes and, similarly for the internal merits review (IMR), including wide consultation with key stakeholders across the sector. Initially, these consultations occurred during the height of the COVID pandemic in 2020. The establishment of internal and external merits review has now moved to the next phase -- selecting the external merits review governance model, establishing associated processes and aligning it with the internal merits review, and planning for implementation. The ACT commissioned a consortium from *Monash University*, *Curijo* and the *Centre for Evidence and Implementation* to re-engage the sector in this next phase of developing a unified external merits review that is acceptable, feasible, and usable. This phase, which began in January 2022, built on the foundational work to:

- recommend a preferred choice of governance body for a unified external merits review model;
- describe the strengths and limitations of the final models as they apply to the ACT context;
- consolidate and further refine the necessary core principles, features and processes; underpinning the proposed models, as well as their function and form;
- recommend effective ways to make the final model selection and begin its implementation.

This chapters in this report detail the four processes and analyses used for this phase of development. These include:

- a cross-jurisdictional desktop review of EMRs;
- a Legal background briefing on the theoretical foundation of the current child protection system in the ACT and the associated legal considerations for establishing a new EMR pathway;
- key stakeholder consultations including the ACT Civil and Administrative Tribunal (ACAT), ACT Children's Court, the Human Rights Commission, 'Our Booris, Our Way', Children's Services Division and a wide range of service providers; and
- an initial implementation plan that includes a continuous quality improvement process.

At the conclusion of the reviews and consultations, no obvious preference for a specific governing body emerged. While some parties had clear preferences, a consensus was not achieved. What became clear was that the two primary models for EMR -- the ACAT and the ACT Children's Court – could both be configured to incorporate the principles, but more detailed design work would first need to be undertaken and tested on the Internal Merits Review model and processes, and that more detailed planning for principle incorporation and legislative changes in each prospective governing body would need to be undertaken before the final selection can be made. What was consistently communicated by key stakeholders was a profound sense of frustration and mistrust towards the child protection system. This was based on the slow pace of reform, consultation fatigue, and past performance. Stakeholders often raised the issues of resourcing, funding, accessibility and accountability. Collectively, it is clear that these will need to be addressed not only in the EMR implementation but in the child protection services that operate around the EMR. Importantly, Aboriginal and Torres Strait Islander stakeholders did not show a preference for either body, but did emphasise the importance of a culturally appropriate model and processes, with substantial Aboriginal and Torres Strait Islander representation included in the decision making panel.

ACT EXTERNAL MERITS REVIEW OF CHILD PROTECTION DECISIONS: REVIEW OF CURRENT APPROACHES FOR THE ACT GOVERNMENT

CONTEXT

A consortium from Monash University, the Centre for Evidence and Implementation, and Curijo was commissioned by the ACT Government to assist in the development and implementation of an External Merits Review (EMR) process for the ACT child protection system. This report will inform the development phase of this work by:

- Providing an overview of EMR processes currently in use in Australia, New Zealand and the United Kingdom;
- Summarising the principles that inform the development and operation of these EMR processes.

REPORT STRUCTURE

This report is structured as follows:

- The first section details the results of a desktop review of EMR processes in select Australian and international jurisdictions. It includes: the scope of the review, the rationale for selecting these jurisdictions, the methods used to locate the information, and the results of the review.
- The second section highlights key insights from the desktop review, supplemented by insights from a workshop with the ACT Children and Youth Protection Services, to consider the implications of these approaches for the ACT.
- The third section includes an overview of the principles identified by stakeholders as important to underpin an EMR process in ACT, the extent to which these principles are present in these other jurisdictions, as well as the way they are articulated elsewhere.

REVIEW OF APPROACHES IN OTHER JURISDICTIONS

METHODOLOGY

SELECTION OF JURISDICTIONS

We proposed to conduct a desktop review of existing EMR processes currently in use in Australia, New Zealand and the United Kingdom. To best target jurisdictions within these countries, the consortium developed a set of inclusion criteria to further guide our selection of jurisdictions. These criteria include:

- The jurisdiction must have a documented EMR process,
- The EMR process must be fully developed and well-described,
- The EMR process must have attributes that have not been previously captured by another jurisdictions' EMR process included in this review, and
- The jurisdictions' child protection system must be comparable to the child protection system of the ACT.

By applying these inclusion criteria, we narrowed our scope to include the following jurisdictions: New South Wales, Victoria, Queensland, South Australia, Western Australia, New Zealand and England. We also include more limited information from Tasmania and the Northern Territory, which follow review processes similar to those of other jurisdictions captured in this review. NT provides alternative dispute resolution (ADR) processes similar to that of Victoria, whilst Tasmania's inclusion of family group conferences (FGC) mirrors that of New Zealand legislation.

The selected jurisdictions provide a cross-section of approaches to both the external review of child protection case plan decisions and legislated child protection problem-solving processes across Australia and internationally. These processes are well-developed and thoroughly described, yet vary in their approach.

Moreover, none of the jurisdictions selected included a court-based model. A review on child protection decisions in the ACT (Muir, 2019) stated that while court-based models can eliminate the risk that decisions reviews are held at the same time as proceedings before the court, it was outweighed by problems that could result in lengthy delays (e.g. potential formality, need for legal representation, resourcing issues). Combined with the little support available for court-based models, we have decided to exclude them in this review.

Scotland is excluded from this review as its legal approach to child protection matters differs significantly from the ACT and any EMR process is executed via the Sheriff's Court. Wales and Northern Ireland were also excluded as these jurisdictions are joined with England under the *Children Act 1989.*

Within these selected jurisdictions, we did not come across any systemic reviews on their child protection decisions. As such, none have been included in this desktop review.

The results of this process are summarised in **Error! Reference source not found.** below.

Criteria	NSW	VIC	QLD	WA	SA	TAS	NT	NZ	ENG	SCO	WAL	NI
Documented EMR process exists	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EMR process is fully developed and described	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EMR process has unique attributes not previously captured	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✗	✗
Legal system is comparable to the ACT	✓	✓	✓	✓	✓			✓	✓	✗		
Included in final selection of jurisdictions	✓	✓	✓	✓	✓	✗	✗	✓	✓	✗	✗	✗

SCOPE OF THE REVIEW

The desktop review is designed to describe the following:

1. The legal or statutory structure of child protection review systems used in other select jurisdictions
    a. What is the name of the review process?
    b. Is it written into legislation?
    c. Is it part of the statutory child protection authority?
    d. Is it an independent entity?
2. Processes followed by child protection review systems used in other select jurisdictions
    a. Who is involved in the process?
    b. Who manages it?
    c. What types of cases do they consider?
    d. Who does it?

e. What power do they have?

f. When do they get involved?

g. Is there a case management process?

h. Do they consult with independent experts?

i. How are other voices heard? e.g., child, family, parent, carers

j. How are decisions communicated?

k. Is there an accountability process?

l. What is its legal relationship with the Children's Court?

m. How does it interact with the Children's Court (if applicable)? i.e., are specific powers retained around case planning, medical care and family contact

n. Issues (or mitigating factors) arising from the review process and the Children's Court having a similar oversight function

3. Implementation considerations of child protection review systems used in select jurisdictions

   a. Has it been evaluated?

   b. How many cases does it review?

   c. What is its budget?

4. Specific provisions for Aboriginal and Torres Strait Islander applicants in Australian jurisdictions

   a. Do specific legislative conditions exist?

      i. If so, what are they?

   b. Do specific administrative provisions exist?

      i. If so, what are they?

SOURCES

This information was sourced through grey literature published by:

- Government Departments responsible for child protection in each jurisdiction,
- The Children's Court in each jurisdiction, and
- The entity overseeing the EMR process.

The grey literature sourced was further used to direct the team to the legislation enabling EMR processes. Legislation was reviewed to examine its relationship to child protection policies and EMR processes in place.

In addition, results sourced from the literature were cross checked with a discussion paper developed by the ACT Government (ACT Government, 2019).

DEFINITIONS

For the purposes of defining an EMR process, we have used the definition applied by ACT Government (2019) in its discussion paper:

"An external merits review is the fresh consideration of a primary decision by an external body. The external body can be, but is not limited to: a tribunal, a regulator or an independent officer from another agency. It is the external reviewer's task to make the correct and preferable decision using the same powers held by the original decision-maker"

RESULTS

The results of the desktop review are summarised in the tables below:

- **Error! Reference source not found.** contains information about the legal or statutory structure of child protection r eview systems used in select jurisdictions
- **Error! Reference source not found.** details the processes used by child protection review systems used in select j urisdictions
- **Error! Reference source not found.** outlines any implementation considerations of child protection review systems u sed in select jurisdictions**Error! Reference source not found.** specifies any specific provisions that exist for Aboriginal and Torres Strait Islander applicants in Australian jurisdictions

Table 2.2 Legal or statutory structure of child protection review systems used in select jurisdictions

Element	NSW	VIC	QLD	SA	WA	NZ	England
What is the name of the review process?	Review by the New South Wales Civil and Administrative Tribunal (NCAT)	Review of DHHS Child Protection Service decisions by the Victorian Civil and Administrative Review Tribunal (VCAT)	Review by the Queensland Civil and Administrative Tribunal (QCAT)	Review by the South Australian Civil and Administrative Tribunal (SACAT)	Review by the State Administrative Tribunal (SAT)	Review by the Chief Executive's Advisory Panel (CEAP)	Review by County Government Statutory Process & Social Care Ombudsman
Is it written into legislation?	Yes – Civil and Administrative Tribunal Act 2013	Yes – Victoria Civil and Administrative Tribunal Act 1998	Yes – Queensland Civil and Administrative Tribunal Act 2009	Yes – South Australia Administrative Tribunal Act 2013	Yes – State Administrative Tribunal Act 2004	Somewhat – Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017	Yes – Local Government Act 1974
Is it part of the statutory child protection authority?	Yes – Children and Young Persons (Care and Protection) Act 1998	Yes – Children, Youth and Families Act 2005	Yes – Child Protection Act 1999	Yes – Child and Young People (Safety) Act 2017	Yes – Children and Community Services Act 2004	Somewhat – Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017	Yes – The Children Act 1989 Representation Procedure (England)
Is it an independent entity?	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Sources: (Government of New South Wales, 1998, 2013; Government of Queensland, 1999, 2009; Government of South Australia, 2013; Government of Western Australia, 2004b, 2004a; New Zealand Government, 2017; Victorian Government, 1998, 2005)

Table 2.3 Processes followed by child protection review systems used in select jurisdictions

Element	NSW	VIC	QLD	SA	WA	NZ	England
Who is involved in the process?	An application can be made by anyone who is deemed by NCAT to have genuine concern in the subject matter of the decision being reviewed.	Parents and children can apply for external review by VCAT. A parent is defined as any of the following: • The mother or father of a child, • The spouse or domestic partner of the father or mother of a child, • A person who has parental responsibility for a child, • A person whose name is entered as the father of the child in the register of births, or • A person who is determined by the court as the father of the child.	The following people can apply for review by QCAT: • An aggrieved person[1] • The Public Guardian • In specific circumstances, the child's carer • Person granted permission by the president of QCAT[2] to make an application on behalf of the child involved	The following people can apply for external review: • The applicant for internal review; • Any other person who is aggrieved by the decision and, in the opinion of SACAT, has sufficient interest in the matter.	An application for the review of a care planning decision may be made by: • The child, • A parent of the child, • Any carer of the child, or • Any other person considered by the CEO have a direct and significant interest in the wellbeing of the child.	The following individuals can make a complaint: • The child or young person, • Family members, • Members of the public, • A professional working with Child, Youth and Family, • Caregivers	The following individuals can make a complaint to the Ombudsman: • A member of the public who has sustained injustice in consequence of the matter, or A person authorised in writing by such member of the public to act on their behalf.

[1] Dependent on which decision they are asking to be reviewed – this is outlined further in Schedule 2 of the Child Protection Act 1999

[2] In line with section 99P of the Child Protection Act 1999

Element	NSW	VIC	QLD	SA	WA	NZ	England
Who manages it?	New South Wales Civil and Administrative Tribunal (NCAT)	Victorian Civil and Administrative Tribunal (VCAT)	Queensland Civil and Administrative Tribunal (QCAT)	South Australian Civil and Administrative Tribunal (SACAT) - Administrative and Disciplinary Stream	State Administrative Tribunal (SAT)	The Chief Executive's Advisory Panel (CEAP)	Local Government & Social Care Ombudsman

What types of cases do they consider?	Reviewable decisions include: • Suspension, or imposition of conditions, on a person's carer authorisation[3], • Cancelation of a person's carer authorization[3], • Granting or removal of the responsibility of an authorised carer for the daily care and control of a CYP[3], • Refusal to disclose information concerning the placement of a CYP[3], • Disclosure of high-level identification information concerning the placement of a CYP, or • A decision of the Secretary or designated agency as to the suitability of a carer as a guardian.	Reviewable decisions include: • A decision in a case plan concerning a child, or • Any other decision made by the Secretary of DHHS or the principal officer of an Aboriginal agency concerning a child. The decision must be reviewed internally by DHHS before an external review can be completed.	Reviewable decisions include: • A refusal to conduct a review of a direction given to a parent under a supervision provision • Restrictions or conditions on contact between the child and his/her family • Deciding in whose care to place a child under a residence provision • A refusal to notify parents of where the child has been placed • Removing a child from a carer's care	Reviewable decisions include but are not limited to: • The approval of carers; • The placement, care, education and health of a child in care; • Directions that a person not communicate with, harbor or conceal a child in care; • The licensing of foster care agencies; • The licensing of children's residential facilities SACAT cannot review decisions concerning contact arrangements for a child in care. This is dealt with by the Contact Arrangements Review Panel.[4]	Reviewable decisions include: • Decisions about placement arrangements, • Decisions about secure care placements, duration, and extensions, • Decisions about contact between the child and a parent, sibling or other relative of the child or any other person who is significant in the child's life.	Reviewable cases include complaints on the following: • The service provided by staff when carrying out their functions, • Ongoing case-management and social work decision-making where discretion is exercised under delegated authority of the Chief Executive, and • Decisions made by social work staff when exercising their statutory powers and functions. If complaints are not resolved internally with Oranga Tamariki, an application to the Ministry for Vulnerable Children can be submitted to have the complaint reviewed by CEAP.	It is up to the Ombudsman which cases are to be reviewed. The complaint must have been reviewed internally by the local authority before proceeding to the Ombudsman.

Who does it?	This division of the tribunal must consist of three members including: • One who is an Australian lawyer, • One with a professional qualification, and • One with a community-based qualification.	The review process is overseen by between 1-5 member(s) of the VCAT. At least one member must be an Australian lawyer. The tribunal must also include a member who, in the opinion of the tribunal President, has knowledge of or experience in child welfare matters.	The tribunal must consist of three members, including at least one who is legally qualified. Members must also meet the following criteria: Be committed to the principles set out in sections 5a and 5c of the Child Protection Act 1999, including that the safety, wellbeing and best interests of the child are paramount • Has extensive professional knowledge and experience of children • Has demonstrated a knowledge of, and has experience in, one or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, indigenous affairs, law, psychology or social work.	The process is overseen by one member of the SACAT. On occasion, the review may be overseen by two or three members. In order to be a member of the tribunal an individual must meet the following criteria: • Be a legal practitioner of at least 5 years standing, or • has, in the Minister's opinion, extensive knowledge, expertise or experience relating to a class of matter for which functions may be exercised by the tribunal.	The review process is overseen by no more than three tribunal members unless more members are deemed necessary by the President of the tribunal. Members must either be legally qualified or have extensive or special experience in the field under review.	The review process is overseen by a Panel of 3 CEAP members. Members of the CEAP should meet the following criteria: • Be of standing in the social work or child and family support sector and/or • Be able to represent the interests of families and parents and/or with expertise in children's services and child development, and the family support system, and/or • Have knowledge of and the ability to apply Child Protection Acts. Members must also be independent of the Ministry and should be familiar with Maori and Pacific cultures in particular, and migrant cultures.	If a complaint is to be reviewed by the Ombudsman, the matter is forwarded to the Investigations Team for review. Members of the Investigations Team do not have to be a lawyer or have specific expertise in the topic being reviewed.

Element	NSW	VIC	QLD	SA	WA	NZ	England
What power do they have?	NCAT can: • Affirm the decision under review, • Vary the decision under review, • Set aside the decision and substitute its own decision, or • Return the matter to the decision-maker for reconsideration with recommendations set by the tribunal.	VCAT can: • Affirm the decision under review, • Vary the decision under review, • Set aside the decision under review and make another decision in substitution for it, • Set aside the decision under review and remit the matter for reconsideration by DHHS in accordance with any directions or recommendations made by VCAT, or • At any time of the proceeding, invite DHHS to reconsider the decision.	QCAT can: • Confirm or amend the decision, • Set aside the decision and substitute its own decision, or • Set aside the decision and return the matter to the decision-maker for reconsideration, with appropriate recommendations set by tribunal.	SACAT has the power to: • Affirm the DCP's decision, • Vary the decision, • Make its own decision, or • Send the matter back to the DCP for reconsideration.	SAT has the power to: • Affirm the decision that is being reviewed, • Vary the decision that is being reviewed, or • Set aside the decision and substitute its own decision or send it back to the decision-maker for reconsideration in accordance with any directions or recommendations that the tribunal considers appropriate.	The CEAP has the power to: • Uphold a complaint, • Uphold a complaint in part, or • Not uphold a complaint. If the CEAP upholds in the complaint in full or in part, the panel will provide recommendations to the Chief Executive of the Ministry of Children (Oranga Tamariki). The Chief Executive can then decide what actions (if any) should be taken.	The Local Government & Social Care Ombudsman has the power to: • Uphold a complaint and provide recommendations to the local authority on how to address it[5], or • Not uphold a complaint When providing recommendations, the Ombudsman may ask the local authority to: • Apologise, • Provide a service, • Make a decision it should have done before, • Reconsider the original decision, • Improve its procedures to prevent a repeat of the same issue, or • Make a payment

[5] The Ombudsman does not have legal powers to force organisations to follow their recommendations. However, in most cases, the recommendations are followed by local authorities.

When do they get involved?	An internal review must be conducted prior to applying for review by NCAT. Applications to NCAT must be filed within 28 days of receiving notice of the internal review decision.	After an internal review has been completed, an applicant can request an external review by VCAT. An application for review must be made within 28 days of the decision being made or, if requested, the day on which a statement of reasons is provided, or the person is notified that a statement of reasons will not be provided.	Once a decision has been made the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) must provide those entitled to a review a written notice of this entitlement.[6] If the entitled person wishes to request a review, they must notify DCYJMA in writing stating: • Why they are dissatisfied with DCYJMA's decision, • That the matter has not been resolved to their satisfaction, and • That they intend to apply to QCAT for review[7] QCAT will usually hold a compulsory conference before a hearing is held in an attempt to clarify the disagreement and find a solution without proceeding to a hearing. If a solution is not found, then the case proceeds to a full hearing.	Any review that proceeds to SACAT must first have been through the internal review process with the DCP. After internal review with DCP, an applicant can file for external review with SACAT within 28 days of receiving results from the DCP internal review.	If an application is placed for review of a care planning decision, it must first be reviewed by the Care Panel Review Panel. The Panel consists of at least 3 members who are appointed by the CEO to review the decision and provide a report on recommendations. The CEO can then confirm, vary or reverse the decision, substitute the decision with another decision, or refer back to the Panel for reconsideration and report. After this process has been completed and if the applicant is still not satisfied with the CEO's decision, they can then apply to the State Administrative Tribunal for review.	The CEAP can only review complaints after they have been through the internal complaints process by the Ministry. If the complainant is not satisfied with the response of the Ministry, the complaint can be reviewed by CEAP.	Local authorities must establish a process for reviewing representations (including complaints). This process must include three steps, the final of which involving review by an Independent Review Panel. The panel can make recommendations for the local authority to follow but cannot enforce these recommendations. If a complainant is not satisfied with the local authority's' decision after following the three-step process, they can complain to the Local Government & Social Care Ombudsman. The complaint must be filed within 12 months of the complainant becoming aware of the issue.

[6] Applications for review must be filed within 28 days of notice from DCYJMA, unless otherwise specified. A request to extend this deadline can be submitted.

Element	NSW	VIC	QLD	SA	WA	NZ	England
Is there a case management type process?	DCJ or the service provider (decision-maker) must provide the NCAT with the reasons why the decision was made and any supporting evidence. The decision-maker will also be a party to the proceeding and thus, is able to provide evidence at the hearing.	If a person is entitled to a review by VCAT, they can request a statement of reasons from DHHS. DHHS must provide the reason(s) for the decision and any material or evidence supporting this decision. DHHS must also submit this information to VCAT within 28 days of receiving notice of the VCAT application. DHHS must also submit any other documentation relevant to the review of the decision. Members from DHHS are invited to present evidence and examine or cross-examine witnesses during the hearing.	Once an application to QCAT has been filed, QCAT will ask Child Safety to provide a written statement of reasons for its decision and any other documents relevant to the review within 28 days. During hearings, the delegated decision maker from Child Safety and other Child Safety staff and witnesses can provide evidence to support the reviewable decision.	The decision-maker (DCP) must provide a written reason for its decision and any evidence used to support this decision. The decision-maker is also a party to the review and can provide evidence at the hearing. Furthermore, if a person has counseled, advised or aided the child previously, they can provide evidence at the tribunal hearing.	The decision-maker (CEO of the Department) must provide reasons for the decision-made and any evidence or materials on which this decision was based. The decision-maker is also a party to the review case and, as such, can and may be required to present evidence at the hearing.	Unclear. There is limited transparency.	Unclear, however, the Ombudsman does seek information from the local authority (the decision-maker), which may include information provided by case managers. The Ombudsman can also seek information from anyone he or she sees fit.

[7] Once an application is received by QCAT, the tribunal must notify the decision-maker.

Element	NSW	VIC	QLD	SA	WA	NZ	England
Do they consult with independent experts?	The tribunal can consult independent experts and expert witnesses as required.	The tribunal can appoint expert witnesses and/or special referees at the request of the parties involved or occasionally on its own accord.	The president of QCAT may appoint a person with relevant knowledge, expertise and experience to help the tribunal in relation to a proceeding. The tribunal may ask this person to provide advice or answer a question arising from the review. This may include an investigation and submitted report. The tribunal can then adopt the expert's decision or findings in whole or in part or reject the decision or findings.	SACAT can refer any question arising from the case to an expert in the relevant field. The tribunal member can accept in whole or in part or reject the report provided by the expert. SACAT can also consult with special referees to decide a question or provide his or her opinion on the question. The tribunal member can also accept or reject the decision or opinion of the special referee.	SAT can appoint a legal practitioner or any other person with relevant knowledge or experience to assist the tribunal by providing advice or professional services or by providing evidence. The tribunal may also refer any question arising in a proceeding to a special referee. The special referee can either decide the question or provide their opinion. The tribunal can adopt a special referee's decision or opinion in whole or in part or reject it.	Unclear. There is limited transparency.	Although the Ombudsman has the power to seek external advice, the Ombudsman does not routinely seek the advice of independent experts.

How are other voices heard? e.g. child, family, parent, carers	The tribunal Is to ensure all parties to the proceeding understand the nature of the proceeding and have the opportunity to be heard or otherwise have their submissions considered in the proceedings. Evidence may be submitted orally or in writing. The tribunal may appoint a person to act as guardian ad litem for a payment, appoint a person to represent a party, or order that a party be separately represented. In cases that directly or significantly affect a child who is not a party to the proceedings, the tribunal may also appoint a person to act as guardian ad litem for the child or order that the child be separately represented.	Parties to the review include: • The applicant, • The decision-maker, and • Any person joined as a party by the tribunal. A person can be joined as a party if the tribunal considers that: • The person ought to be bound by or have the benefit of an order of the tribunal, or • The person's interested is affected by the proceeding, or • For any other reason it is desirable. The tribunal must allow all parties a reasonable opportunity to give evidence (verbally or in writing), examine or cross-examine witnesses, and make submissions. Children can be represented by a	Once the decision-maker is notified of the application, the decision-maker has 7 days to provide QCAT the names of all people who are entitled to apply for review of the decision being reviewed. These individuals can then receive a notice including the following: • Details of the review application, • That they may elect to become a party to the review, and • How to elect to become a party. The applicant and any joined party can have their voices heard or provide evidence for the review. Children have the right to have their voices heard. This can either be by the child themselves or via a separate representative acting on behalf of the child.	The following people are able to give evidence at the hearing: • A member of the child or young person's family, • A person who has at any time had the care of the child, and • A person who has counselled, advised or aided the child or young person. In addition, under section 159 of the CYPS Act, children and young people must be given a reasonable opportunity to personally present their views to SACAT regarding their ongoing care and protection. If the child or young person is of a sufficient age to be able to speak for themselves, the Tribunal will arrange to hear their views in	Parties to the review include: • The applicant, • The decision-maker who made the decision, and • A person joined as a party by the tribunal.[8] The tribunal must ensure all parties have the opportunity to provide evidence, to examine or cross-examine witnesses, and to be heard or have their submissions considered (either verbally or in writing). The tribunal may appoint a litigation guardian for a person who is not of full legal capacity. Children must be allowed to participate in the decision-making processes that have a significant impact on their life. They must be given the opportunity to express their views and wishes and be provided information about the decision to	Unclear. There is limited transparency. Once the complaint is filed and accepted by CEAP, the complainant is notified and has the option to attend the meeting for review. If the complainant does not attend, the Panel will make its decision and recommendations based on the information provided in the complaint by the complainant and the Ministry. It is unclear if and how other individuals are involved in this process.	Both the complainant and the local authority have the right to express their thoughts on the matter. The Ombudsman has the power to collect information or evidence in the manner he or she sees fit. Children who submit a complaint are provided extra support by the Ombudsman. This includes prioritizing their case and ensuring they have the support they need, including the provision of an advocate as requested.

Element	NSW	VIC	QLD	SA	WA	NZ	England
		professional advocate or a litigation guardian.		advance of the hearing date.	be made and the reasons why.		
How are decisions communicated?	Decisions may be communicated verbally or in writing at the proceeding or at a later date. The tribunal must give each party to the review a written statement of reasons for any decision it makes in a proceeding.	The decision must be shared with all parties involved and reasons for this decision must be provided. These reasons may be provided verbally or written. If provided verbally and a party wishes to receive these reasons in writing, this must be requested.	The tribunal can provide their decision in writing or at the proceeding. The tribunal must provide reasons for its final decision either orally or in writing. If provided in writing, the tribunal member must provide this decision to all parties involved, the chief executive of the entity in which the reviewable decision was made, and any additional party the tribunal reasonably believes should be given the decision. If provided orally, parties can request a written reasons within 14 days of the decision taking effect.	The tribunal member overseeing the review can decide to announce their decision at the hearing or to deliver their decision in writing at a later date.	The tribunal can either provide the decision verbally or in writing either at the proceeding or at a later date. The final decision must be provided in writing to all parties. If requested, reasons for the decision must also be provided in writing.	The CEAP does not release its recommendations at the meeting. The Panel will send the recommendations directly to the Chief Executive. The Ministry of Children (Oranga Tamariki) then notifies the complainant with the decision of the Chief Executive.	The Ombudsman must provide a written report on the results of the investigation and send a copy to each of the persons concerned. The report must include any recommendations as required.

[8] This includes anyone who may be bound by or have the benefit of a decision made by the tribunal.

Element	NSW	VIC	QLD	SA	WA	NZ	England
Is there an accountability process?	NCAT requires the decision-maker to provide a statement of reasons for their decision and any evidence or materials used to support this decision. The decision-maker is also considered a party to the proceedings and, as such, can and may be required to present evidence at the proceeding.	VCAT requires the decision-maker to provide a statement of reasons for their decision and any evidence or materials used to support this decision. The decision-maker is also considered a party to the proceedings and, as such, can and may be required to present evidence at the proceeding.	QCAT requires the decision-maker to provide a statement of reasons for their decision. Any information or documents relevant to the decision must also be submitted for evidence. The decision-maker is also considered a party to the proceedings and, as such, can and may be required to present evidence at the proceeding.	SACAT requires the decision-maker to provide a statement of reasons for their decision and any evidence or materials used to support this decision. The decision-maker is also considered a party to the proceedings and, as such, can and may be required to present evidence at the proceeding.	SAT requires the decision-maker to provide a statement of reasons for their decision and any evidence or materials used to support this decision. The decision-maker is also considered a party to the proceedings and, as such, can and may be required to present evidence at the proceeding.	Unclear	Unclear
What is its legal relationship with the Children's Court?	NCAT can review decisions made by DCJ and service providers contracted out by DCJ to make decisions on their behalf. NCAT cannot review decisions directly made by the Children's Court.	In order to vary or revoke existing child protection orders, parties must apply to Children's Court. VCAT can only review case plans or other decisions made by the Secretary of DHHS or the principal officer of an Aboriginal agency.	QCAT can only review specific types of decisions made. This includes placement decisions and contact decisions (see above for more detail). QCAT cannot change existing child protection orders made by the Children's Court.	The SACAT has the power to review decisions made by the Chief Executive of the DCP (excluding contact orders – see above). Decisions made by the Youth Court can only be appealed at the Supreme Court.	SAT can only review decisions made by the CEO of the Department of Communities for a child who in the care of the CEO. Applications for the revocation and replacement of protection orders must go through the Court.	The CEAP does not review complaints that involve matters currently before the Court. It also does not review complaints about Court decisions or the judicial process or matters capable of review on the merits of the case by a Court or Tribunal.	The Local Government & Social Care Ombudsman is unable to investigate decisions that have been made in court and cannot overturn a decision to place a child on a Child Protection Plan. The Ombudsman must also not investigate a case in which the complainant has the right to raise this complaint in court.

Issues (or mitigating factors) arising from the review process and the Children's Court having a similar oversight function	It is somewhat unclear what issues may arise and how these issues are mitigated, other than as stated above.	It is somewhat unclear what issues may arise and how these issues are mitigated, other than as stated above.	If an application is made to QCAT and the reviewable decisions are also before the Children's Court (CC), the tribunal must suspend the review. If the reviewable decision is addressed in CC, the tribunal member must dismiss the application. If the reviewable decision is not addressed in CC, the tribunal can cancel the suspension and proceed. If an application to QCAT requests to review a reviewable decision about family contact, Court Services will check if the child is subject to current CC proceedings. If there is a current application in the CC, Court Services will notify QCAT to suspend the application. The applicant will be made aware of their ability to raise this concern in CC for review. CC can either rule on the decision or refer the decision to QCAT.	It is somewhat unclear what issues may arise and how these issues are mitigated, other than as stated above.	It is somewhat unclear what issues may arise and how these issues are mitigated, other than as stated above.	See above.	See above.

Table 2.4 Implementation considerations of child protection review systems used in select jurisdictions

Element	NSW	VIC	QLD	SA	WA	NZ	England
Has it been evaluated?	Unclear	Unclear	Yes – see 'Taking Responsibility: A Roadmap for Queensland Child Protection', Queensland Child Protection Commission of Inquiry	Yes – see 'Statutory Review of SACAT 2017'	Unclear	Unclear	Unclear
How many cases does it review?	Financial year 2020 – 2021: the case numbers are separated by 'division,' however, child protection falls over two divisions, so it is difficult to determine the number of cases reviewed.	Financial year 2020 – 2021: 1,039 total cases lodged to the review and regulation stream of VCAT (not distilled out further to include only child protection)	Financial year 2020 – 2021: 198 cases lodged related to child protection	Financial year 2020 – 2021: 22 cases related to child protection	Financial year 2020 – 2021: 6 cases lodged related to child protection	Unclear	Financial Year 2020 – 21: 800 detailed investigations completed on Education and Children's Services
What is its budget?	Total operational expenses for 2020 – 21: $56,161,000 Salary and related payments for 2020 – 21: $43,725,000	Average cost per case at VCAT: $1,413 (2020-21) Budget for 2020-21 Financial Year: $70 million	Total operational expenses for 2021: $21.135 million	Total expenses for SACAT in 2021 = $13,698 Total income for SACAT in 2021 = $4,042	Total budget for SAT for 2020 – 2021 Financial Year: $14,679,250	Unclear	Total comprehensive expenditure for 2020 – 21: £27,381,000

Table 2.5 Specific provisions for Aboriginal and Torres Strait Islander applicants in Australian jurisdictions

Element	NSW	VIC	QLD	SA	WA
Do specific legislative conditions exist?	Yes	Yes	Yes	Yes	Yes
If so, what are they?	There are a series of Aboriginal and Torres Strait Islander Principles presented in the Children and Young Persons (Care and Protection) Act 1998. These principles should be used to guide decisions made under this Act.	Division 4 of the Children, Youth and Families Act 2005 outlines a series of decision-making principles to be considered when making decisions involving Aboriginal children. This includes taking into consideration: • The views of relevant Aboriginal community members, • Consultation with an Aboriginal agency or organisation on matters concerning placement of a child, and • The Aboriginal Child Placement Principle.	Procedures for cases involving Aboriginal and Torres Strait Islander children are outlined in the Queensland Child Protection Act 1999. This includes the below required administrative provisions in effect.	The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) is included in the Child and Young People (Safety) Act 2017 to guide placement decisions of Aboriginal and Torres Strait Islander children.	A series of principles are presented in the Children and Community Services Act 2004 to guide child protection and placements involving Aboriginal and Torres Strait Islander children and families.
Do specific administrative provisions exist?	Unclear	Unclear	Yes	Unclear	Unclear
If so, what are they?	Despite the inclusion of these principles in the Children and Young Persons (Care and Protection) Act 1998, it is unclear if and how these principles inform the processes of NCAT when reviewing cases	Despite the inclusion of decision-making principles in the Children, Youth and Families Act 2005, it is unclear if and how these principles inform the processes of VCAT when reviewing cases involving	If a child identifies as Aboriginal or Torres Strait Islander, the tribunal hearing must include (if practicable) a tribunal member who is also Aboriginal or Torres Strait Islander.	Despite the inclusion of the ATSICPP in the Child and Young People (Safety) Act 2017, it is unclear if and how these principles inform the processes of the SACAT when reviewing cases involving Aboriginal and	Despite inclusion of the principles mentioned above in the Children and Community Services Act 2004, it is unclear if and how these principles inform the processes of SAT.

Element	NSW	VIC	QLD	SA	WA
	involving Aboriginal or Torres Strait Islander children and families.	Aboriginal or Torres Strait Islander children and families.		Torres Strait Islander children and families.	

KEY FINDINGS

This section highlights key findings from the desktop review that are supplemented by insights from content experts.

HOW HAS AN EMR PROCESS BEEN CONCEPTUALISED IN OTHER JURISDICTIONS?

As noted in section 1, the ACT Government defines the EMR process with two key criteria:

1. It must be conducted by an external body, and
2. The external reviewer must make decisions using the same decision-making powers held by the original decision maker.

All Australian EMR processes included in this review meet these criteria, however, the entities operating in England and New Zealand do not retain the same decision-making powers as the original decision maker. It begs the question 'are these EMRs?' Despite this, from our research we believe that these processes are most closely aligned to EMR processes.

DISCREPANCIES FROM THE ACT GOVERNMENT DISCUSSION PAPER

The current review identified two discrepancies within the ACT Government discussion paper that are important to highlight. They relate to how the EMR process is described in South Australia and Western Australia. These processes described in the ACT Government discussion paper are perhaps better thought of as internal review processes.

SOUTH AUSTRALIA

The process involving the South Australian Civil and Administrative Tribunal (SACAT) differs from that described in the discussion paper. The discussion paper states the Contacts Arrangement Review Panel (CARP) is the EMR process in place in SA, however, CARP only reviews decisions about contact arrangements for children in care. All other matters go to SACAT. The CARP is somewhat independent, but not entirely as only one member of the panel must not be employed by the Department. This is important to highlight because per the discussion paper, the EMR process must be conducted by an external entity.

WESTERN AUSTRALIA

The process involving the WA State Administrative Tribunal (SAT) also differs from the discussion paper. The ACT Government paper classifies the Care Plan Review Panel as the EMR process. Although the panel consists of members who do not work for the statutory child welfare department, the panel is selected by the CEO of the Department and reports back their recommendations to the CEO. They do not retain the same powers as the Department and as such, do not meet the criteria of an EMR process as set out by the ACT Government. The panel presents recommendations to the CEO for their review, however, the CEO is not compelled to action these recommendations. If an applicant is still not happy with the response, they can then apply to the SAT.

HIGH LEVEL OVERVIEW OF EMR MODELS

The EMR processes in the included Australian jurisdictions — i.e., NSW, QLD, VIC, WA and SA — provide a cross section of approaches to external review of child protection decision making. While all EMR processes in these jurisdictions are operated by the state's tribunal, they vary in how they approach their remit, according to whom they select as panel members, the types of cases they can review, and timeframes for decisions.

In the United Kingdom, *The Children Act (1989)* covers review processes in England, Wales and Northern Ireland. Each has a suite of review processes which could be said to be internal but are statutory panels or committees with oversight of child protection decision making. They include formal case conferences at which all parties are in person or represented, area child protection committees which are very often chaired by paediatricians and child psychiatrists, offering a child health and development lens. They also have an Independent Reporter (guardian ad litem), who prepares a report on the child and the case plan, for the court and for social services.

What sets *The Children Act (1989)* and Child Protection authority apart from the Australian jurisdictions is they have a set of guidance which sets out the parameters of decision making, what is understood as child maltreatment, how it is assessed and places great importance on child development and health as the key focus of decision making. This forms what is known as the welfare checklist. The Australian systems do not provide these processes in legislation

WHAT PRINCIPLES UNDERPIN THE EXTERNAL REVIEW AND/OR DECISION-MAKING?

Why were these systems created?

Australian child protection legislation for each jurisdiction provides a list of key principles to guide decision-making. These principles also apply to the tribunals operating the EMR process in each state. Guiding principles are similar across Australian jurisdictions and can be summarised by the following:

- The safety, well-being and welfare of the child or young person is paramount and must be at the forefront of all decisions made,
- Decision-making must be fair, transparent and timely,
- Continuity and stability in a child's care is pivotal,
- Children must be placed in a safe, nurturing, and stable environment,
- Maintaining placement with the child's parents is preferred, however, if this is not possible, kith and kin placement should be prioritised,
- Plans for reunification should be prioritised where appropriate,
- Decision-making should be culturally responsible and inclusive,
- Carers, parents and children have the right to be involved in decision-making processes and should be provided the opportunity and assistance to have their voices and opinions heard, and
- Information and materials about the decision-making process and any decisions made must be presented in a way that is easily understandable.

Specific guiding principles for Aboriginal and Torres Strait Islander children and families prioritise maintaining the connection of Aboriginal and Torres Strait Islander children with their family and culture. These principles seek to enable Aboriginal and Torres Strait Islander people's participation and self-determination in the care and protection of children. The following summarises the principles shared across all Australian jurisdictions:

- If an Aboriginal or Torres Strait Islander child or young person is to be placed in care, the child should be placed in accordance with the Aboriginal and Torres Strait Islander Child Placement Principles;
- Decisions should be made with the goal of maintaining and building the child or young person's connection to their Aboriginal family and community in order to promote and promote cultural and spiritual identity; and
- In decision-making involving an Aboriginal or Torres Strait Islander child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views.

The EMR processes operating in NZ and England are also underpinned by similar principles outlined in their respective child protection legislation. These principles can be summarised as follows:

- The well-being and best interests of the child shall be the paramount consideration;
- Time is a crucial element in working with children;
- Continuity of relationships is important, and attachments should be respected, sustained and developed;
- Parents should be enabled to retain their responsibilities and remain closely involved in their child's welfare;
- The child or young person involved must be encouraged and assisted to participate in and express their views about any proceeding or decision affecting them and these wishes should be considered; and
- A holistic approach should be taken in which education, health, cultural identity, gender, sexual orientation, age, and presence of disability should be considered.

Child protection legislation in NZ also specifies that the child's or young person's family, whānau, hapū, iwi and family group should participate in decision-making. Relationships between these individuals and the child or young person should be maintained and strengthened where appropriate.

WHAT ARE THE PRE-CONDITIONS FOR SEEKING AN EXTERNAL REVIEW?

All jurisdictions except Queensland require decisions to undergo an internal review prior to proceeding to the EMR process. If the applicant is dissatisfied with the response of the decision-maker after the internal review has been completed, and believes there are facts and circumstances that have not been properly considered, the applicant may seek to have the matter heard by their designated EMR process. In Queensland however, the applicant does not have to undergo an internal review before requesting an EMR. Instead, the applicant is notified of their right to request external review with the QCAT upon receipt of the original decision.

Each jurisdiction has the power to review a specific set of child protection related decisions. The types of reviewable decisions vary between jurisdictions; however, some consistencies are present across Australian jurisdictions. For example, all state jurisdictions have the power to review decisions about placement arrangements and information sharing about a child in care. While most Australian jurisdictions can review decisions on contact arrangements for children in care, SACAT cannot. As previously mentioned, these decisions are overseen by a separate panel called the Contact Arrangements Review Panel. SACAT can also review decisions on the licensing of children's residential facilities and foster care agencies, whereas other jurisdictions do not retain this power.

In England, it up to the discretion of the Ombudsman as to which cases are reviewable. There are no criteria outlining which child protection decisions are reviewable by the Ombudsman. The CEAP in NZ can review any complaints about services provided and decisions made by Oranga Tamariki staff. As complaints received by the CEAP are required to first undergo internal review by the Ministry, the CEAP assumes the complaint received reflects the organisational view of Ministry and therefore, strictly assesses the complaint at an organisational level.

WHAT TYPES OF REVIEW MECHANISMS EXIST?

The EMR mechanisms included in this desktop review can be grouped into two categories – those conducted by tribunals and those conducted by review panels. All EMR mechanisms operating in Australian jurisdictions included in this review are overseen by the state's tribunal. This includes the NCAT in NSW, VCAT in Victoria, QCAT in Queensland, SACAT in SA, and SAT in WA. The tribunals are independent of the corresponding child protection department and of the Children's Court and maintain the same powers as the original decision-maker. As such, these tribunals meet the criteria set out in the aforementioned definition of EMR processes.

HOW ARE THEY CONSTRUCTED?

All EMR processes in Australian jurisdictions are operated by state tribunals. Tribunals are independent entities which operate separately from the court system. Each tribunal is overseen by a President who must be a Supreme Court judge. Members of each tribunal consist of both legally trained practitioners and individuals who have extensive knowledge, expertise or experience in a field relevant to the cases reviewed by the tribunal. The tribunal may sit anywhere within the state, with the exception of the SACAT which can sit within or outside of the state.

The CEAP in NZ is an advisory committee to the Chief Executive of the Ministry for Children (Oranga Tamariki). The panel consists of independent advisors who are not employed or involved with the Ministry. Panel members do not need legal training but must have experience in the social work or family support sector, demonstrate expertise in children's services or child protection, and have knowledge of child protection legislation. Although the CEAP is considered independent of the Ministry, the panel reports directly to and is established by the Chief Executive and all members of the panel are appointed by the Chief Executive.

In England, the Local Government and Social Care Ombudsman is responsible for conducting external reviews of child protection decisions. If a complaint is accepted for review by the Ombudsman, an investigations team is assembled to review the case. Members of the investigation team are not required to have legal qualifications or expertise in the child protection sector. The Ombudsman operates independently of the court system and is led by the Commission for Local Administration, who is sponsored by the Department for Levelling Up, Housing and Communities. Appointments to the office of the Commission for Local Administration are made by Her Majesty the Queen on the recommendation of the Secretary of State for Communities and Local Government.

HOW DO THEY INCLUDE ALTERNATIVE DISPUTE RESOLUTION MECHANISMS?

Australian jurisdictions under review offer several alternative dispute resolution (ADR) mechanisms embedded within the EMR processes.

SACAT, VCAT, SAT and QCAT have the power to require parties to attend a compulsory conference or mediation. The goal of these ADR processes is to encourage parties to talk about their disputes with the aim of reaching an agreement. Compulsory conferences are overseen by a member of the tribunal or the principal registrar. Mediation operates similarly to compulsory conferences but is overseen by an appointed mediator who may or may not be a member of the tribunal. If both parties agree in writing to settle their dispute after a compulsory conference or mediation, the presiding tribunal member can make an order to accept the terms of the settlement. If an agreement cannot be reached, the dispute will be considered by the tribunal at a formal hearing.

NCAT offers two ADR mechanisms – conciliation or mediation. These processes are similar to the compulsory conference or mediation offered by the other Australian jurisdictions, however, NCAT cannot force parties to attend conciliation. This is a voluntary process and parties may choose to opt out. Mediation, however, is compulsory if mandated by the tribunal.

Although NT is not extensively covered in this desktop review, it is important to note the state also offers mediation conferences ordered by the Children's Court. These conferences may be held to:

- Establish the circumstances leading to an application,
- Review an arrangement that has been made for the care of a child,
- Make recommendations about the arrangements for the care of a child, and
- Arrive at an agreement on the best means of safeguarding the wellbeing of the child.

The mediation conference is overseen by a convenor selected by the Court. The Court also determines when and where the conference will be held and who is required to attend.

The CEAP in NZ and the Local Government and Social Care Ombudsman for England do not offer ADR mechanisms at the EMR stage. NZ does, however, have an ADR mechanism which is invoked earlier on the child protection process. Family group conferencing (FGC) typically occurs before a case is presented at Family Court. It is an opportunity for families to come together with the Ministry for Children (Oranga Tamariki) to discuss any concerns about the care and protection of a child and create a plan to address these concerns. Oranga Tamariki adopts a holistic definition of 'family,' which involves extended whānau or family of the child or young person. The child or young person is also encouraged to take part in these conferences where appropriate.

Although Tasmania did not meet the criteria to be included in the formal desktop review, it is important to note this Australian jurisdiction applies similar FGCs to NZ. FGCs in Tasmania are overseen by a facilitator and involve the child, the guardians of the child, the child's advocate (if one has been appointed), and an employee of the Department. It is the facilitators responsibility to ensure a suitable representative or advocate has been appointed to represent the child where appropriate.

WHAT TRANSPARENCY FEATURES EXIST?

What are the qualifications of the decision makers?

The tribunals operating in NSW, Queensland and Victoria require at least one member of the external review process to be legally qualified. These jurisdictions also require at least one panel member to have knowledge, experience or expertise in child protection. SA and WA require tribunal members to either be legally qualified or have extensive knowledge and experience in child welfare. Panel members in NZ must have experience in the social work or child and family support sector, have expertise in child development or family support, or have knowledge of child protection legalisation. Members do not need to be legally qualified. In England, investigation team members do not need to be legally qualified or have specific expertise in child welfare or related fields.

WHAT ACCOUNTABILITY FEATURES EXIST?

Who does the process report to and to whom is it accountable?

Tribunals operating in Australian jurisdictions report to the state's corresponding Attorney-General. These tribunals are independent of the jurisdiction's child protection authority. The Local Government and Social Care Ombudsman for England is overseen by the Commission for Local Administration, an independent body funded by the Ministry of Housing, Communities and Local Government. The entity operates independently of the child protection system. The CEAP in NZ, however, does not function independently of the child protection authority. Although CEAP members cannot work for the Ministry of Children, the CEAP acts as an advisory group and reports directly to the Chief Executive of the Ministry of Children.

WHAT TIMELINESS FEATURES ARE INCLUDED?

For all Australian jurisdictions, complainants must lodge their application within 28 days of being notified of a decision made. In certain circumstances, this timeframe may be extended. Once an application is lodged, there are no timelines specifying how long the tribunal has to finalise a decision.

Average time for finalisation of applications varies across Australian jurisdictions. In Queensland, the QCAT takes 35 weeks on average to finalise a review of a child protection decision. Median processing times for review by VCAT is 30 weeks, compared to 13 weeks for SAT to finalise cases in the Human Rights division. Respectively, 80 per cent of cases are finalised within 66 weeks in Victoria and 31 weeks in WA. It is important to note, however, that QCAT reports average time for finalising child protection matters separately, whereas VCAT and SAT report timeliness based on stream or division. These streams or divisions contain child protection cases as well as other application, thus these timelines may not accurately represent the time required to process child protection applications. The average processing times are unclear for NCAT and SACAT.

In England, the complainant has up to 12 months to file an application to the Local Government and Social Care Ombudsman. In 2020 – 2021, more than 65 per cent of all cases lodged were resolved within 13 weeks, 85 per cent were resolved in 26 weeks and 96 per cent were resolved in 52 weeks. There is limited transparency on timelines for processing child protection cases via the CEAP in NZ.

WHAT SUPPORT & ADVOCACY FEATURES ARE INCLUDED?

How do they connect, or not, to the statutory child welfare system?

The tribunals operating in NSW, Victoria, and Queensland, as well as the CEAP in NZ, require at least one member of the review panel to have knowledge of or experience in the child protection or child welfare sector. Members of the QCAT are also required to be committed to the principles set out in the Child Protection Act 1999. SA, WA and England do not require external review members to have this expertise, however, members can call upon independent experts for their opinion as required.

Across all Australian jurisdictions, tribunals require the decision-maker to provide a statement of reasons for their decision and any evidence or materials used to support this decision. QCAT takes this a step further and requires any relevant information or documents to be submitted to the tribunal as evidence. The decision-maker is also considered a party to the proceedings across all Australian jurisdictions and, as such, can and may be required to present evidence at the proceeding. Although not explicitly stated, evidence and materials required for submission likely includes case work notes and associated documents.

As outlined in supporting Australian state legislation, children and young people who are directly involved or impacted by the decision under review have the right to have their voices and opinions heard. It is the responsibility of the tribunal to ensure children understand the review process and have the opportunity to express their views and wishes. Where required, all tribunals excluding SACAT can appoint a guardian ad litem or a professional advocate to represent a child who is unable to represent themselves.

It is less clear how the EMR processes in NZ and England connect to statutory child welfare. Although the CEAP members in NZ are required to have a knowledge or experience in the child protection or family support sector, there is limited transparency on how case management is involved and how the voices of children and young people are heard. By comparison, the investigations team for the Ombudsman for England is not required to have any experience in child welfare, however, children who submit complaints themselves are required to be provided extra support. This includes prioritising their complaint and providing a youth advocate as required.

WHAT WELLBEING IMPACTS AND MEASUREMENTS ARE INCORPORATED?

What provisions for Indigenous children and families are included?

Although legislative conditions exist for cases involving Aboriginal and Torres Strait Islander children and families – see section 0 – Queensland is the only Australian state that transparently outlines the administrative provisions for conducting an EMR for decisions involving Aboriginal and Torres Strait Islanders.

In Queensland, if a child or family identifies as Aboriginal or Torres Strait Islander, the review panel must consist of a member who is also Aboriginal or Torres Strait Islander.

A series of guiding principles are outlined in the NSW, Victorian, SA, and WA Child Protection Acts, however there is limited transparency on how these guidelines are incorporated into EMR processes.

The New Zealand system places significant emphasis on ADR through FGC and utilises the same processes for Maori and non-Maori families. However, this mechanism only occurs early on in the decision-making process, not an the EMR stage.

KEY PRINCIPLES BEHIND EMR PROCESSES

PRINCIPLES IDENTIFIED THROUGH STAKEHOLDER ENGAGEMENT

The ACT Government is seeking to develop an EMR process to review decisions about child protection matters. This process is to be underpinned by a series of guiding principles to ensure the EMR process is child-focused, culturally sensitive and fit for purpose. The selected EMR model should be:

- Accountable and transparent,
- Easy to use with clear processes that are uncomplicated and unintimidating,
- Expeditious and efficient without compromising time to resolve issues internally or creating preserve incentives,
- Acting without added layers of, or additional, bureaucracy,
- User-centred with a degree of flexibility to allow for contextual adaptation,

- Collaborative, restorative and family-led,
- Designed with child safety and well-being at the forefront of all decisions,
- Developmentally and culturally sensitive and safe, particularly for Aboriginal and Torres Strait Islander children and families,
- Employing the use of culturally safe tools and a cultural representative or advocate,
- Designed in line with the principle: If it works for Aboriginal people, it will work for everyone else,
- Sustainable and able to withstand future changes to government and legal challenges, and
- Where possible, embedded within existing legal and administrative structures of the ACT.

PRINCIPLES FROM OUR BOORIS, OUR WAY

In addition to the principles outlined above, a series of recommendations were proposed in the Our Booris, Our Way report to enhance outcomes for Aboriginal and Torres Strait Islander children involved with child protection in the ACT. These recommendations were reviewed and principles relevant to the EMR process were extracted. These principles are outlined below and will help guide the selection of an EMR model for the ACT:

- Processes and services should be culturally intelligent and appropriate;
- The Aboriginal and Torres Strait Islander Child Placement Principle should be explicitly embedded within policy and practice;
- Place children in kinship care immediately upon removal and provide supports for kindship care;
- Alternative dispute resolution mechanisms, such as Family Group Conferencing, should be made available;
- Access to culturally appropriate advocacy services and legal representation should be made available;
- Increase Aboriginal and Torres Strait Islander led decision-making in child protection;
- Promote pathways to restoration;
- Ensure access to appropriate early support programs for rehabilitation, family violence, mental health and trauma; and
- Appoint an Aboriginal and Torres Strait Islander Children's Commissioner.

PRINCIPLES IDENTIFIED IN DESKTOP REVIEW

As previously mentioned, each EMR process included in this review is guided by a series of key principles outlined in the jurisdiction's corresponding child protection legislation. These guiding principles are summarised in section 0 and provide insight into why the EMR mechanisms operating in each jurisdiction are in place.

Table 0.1 summarises the principles extracted from the desktop review, the Our Booris, Our Way report, and through stakeholder engagement in the ACT. The table provides a visual representation of how these principles intersect across the various sources.

Table 0.1 Presence of overarching principles from different sources

Key principles	Desktop review	Our Booris, Our Way	Stakeholder engagement
Safety, well-being and welfare of the child is paramount	✓	✓	✓
Processes in place are accountable and transparent	✓	✓	✓
Process must be expeditious and efficient	✓	✗	✓
Not overly adversarial or bureaucratic	✗	✗	✓
Continuity and permanency in child's care is desirable	✓	✓	✗
Children must be placed in a safe, nurturing and stable environment	✓	✓	✓
Plans for reunification should be prioritised where appropriate	✓	✓	✓
Decision-making must be culturally responsible and inclusive	✓	✓	✓
Decision-making must be collaborative, participatory and family-led	✓	✓	✓
Increase Aboriginal and Torres Strait Islander led decision-making	✓	✓	✓
Employ the use of a cultural representative or advocate	✗	✓	✓
Provide additional assistance to children to ensure opinions are heard	✓	✗	✗
Information must be presented in a way that is easily understandable	✓	✗	✗
Ensure access to appropriate early support programs	✗	✓	✗
Process must be sustainable and able to withstand future changes to government or legal challenges	✗	✗	✓

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LEGAL BACKGROUND

To assist the consortium to understand the complexities of the child protection system in the ACT and the possible hurdles to the EMR implementation, an ACT Government legal officer contributed a legal background on the external merits review (the Legal Background) which can be found at Appendix 1. Fundamentally, the Legal Background defines the theoretical foundation the current child protection system in the ACT (and more broadly other Australian jurisdictions), and the specific legal considerations for establishing a new review avenue.

The Standing Committee on Health, Ageing, and Community Services recommended in its Report on Child and Youth Protection Services (Part 2) that the Government amend the Children and Young People Act 2008 to provide for an external review mechanism. The Legal Background reflects on reports, reviews, and cases that have put the ACT child protection under particular scrutiny. At its core, the reviews reflect concerns with transparency, accountability, and the quality of decision making of care and protection orders.

Further, the Legal Background interrogates the reviews and recommendations made for an avenue of external merits review, and provides analysis into the jurisdiction of care and protection orders, child protection systems, and the restrictions or consequences of reviews being conducted by certain bodies and how these operate in practice. The Legal Background more broadly considers the other state and territory jurisdictions, and their own mechanisms for reviewing (or not reviewing) care and protection decisions, whether the function is performed by the court or tribunal, and the types of decisions eligible for review.

STAKEHOLDER CONSULTATIONS

KEY POINTS

- The provider sector is deeply frustrated by the slow pace of reform and continues to be concerned with child protection decision-making
- There is general agreement on the revised set of principles underpinning the EMR
- Aboriginal and Torres Strait Islander stakeholders emphasised the need for a culturally appropriate model and substantial representation on the EMR panel
- There is no consensus on which governing body should be selected to run the EMR
- The implementation of whatever model is chosen is key to its success

BACKGROUND

The consortium from Monash University, Curijo and the Centre for Evidence and Implementation held consultations with key stakeholders through a series of focus groups, individual interviews and written submissions between August and September 2022. These were used to gather views about the development of an EMR model and associated processes, the adapted principles from prior consultations, and the selection of an independent body to have oversight of the EMR once established.

The purpose of these consultations was to re-engage the sector in the continued development of the EMR through a confirmation and further articulation of its core principles and the selection of a governing body. The consultation involved having participants review a newly developed set of draft principles which built on earlier reform efforts -- most notably, 'Our Booris, Our Way'[9] and the first set of EMR roundtable discussions co-facilitated by the ACT Human Rights Commission and the ACT Government on 22 July 22 2020 and 17 September 2020. The guiding prompts used to review the principles are presented below in the procedure section. The adaptations to the principles was informed by a desktop review conducted by the consortium (see Desktop Review section of this report), which provided an overview of existing EMR models and processes in similar jurisdictions in Australia, New Zealand and the United Kingdom, as well as information from initial consultations with CSD, ACAT and the ACT Children's Court.

PARTICIPANTS

Consultation participants were selected to represent the broad range of stakeholders in a diversity of sectors working in, or affected by, the ACT child protection system including advocacy groups, community-based service providers and government agencies. The consortium identified the stakeholders to reach out to from the prior workshops conducted in 2020, consultation with government, and knowledge of the sector within the consortium. Participants included providers of services to Aboriginal and Torres Strait Islander children and families but were not ACCO's or focused solely on this population. Monash and CEI consultations were conducted with:

- ACT Civil and Administrative Tribunal (ACAT)
- ACT Bar Association
- ACT Children's Court
- ACT Community Services Directorate
- ACTCOSS
- Act Together
- Advocacy for Inclusion
- Carers ACT
- Families ACT
- Human Rights Commission
- Legal Aid ACT Women's Legal Centre
- Red Cross Youth Coalition

[9] Our Booris, Our Way Final Report, December 2019 (avail at: https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0011/1457813/Our-Booris-Report-FINAL-REPORT.pdf).

Curijo undertook consultations with Aboriginal Groups and committees other than Our Booris Our Way, and with individual Aboriginal community members, including:

- The Aboriginal Co-Design Network (internal consultative group for CPD)
- Gugun Gulwan: ACT youth service
- Nannies Group: ACT
- Yerrabi Yurwang Child & Family Aboriginal Corporation, ACT
- Vicki Barton: previous manager for 12 years of AbSec's Carer and Child Protection support service.
- SNAICC: interview and participated in Ministerial Forum (national peak)

The consortium was not able to consult directly with children and families with lived experienced due to the impracticality of obtaining high-risk ethics on a very short timeline. The Child and Youth Protection Services case managers are another key stakeholder group that the consortium was not able to consult due to the time constraints they faced over the consultation period. These constitute important limitations to our approach, and we suggest that extensive consultation with these stakeholder groups is undertaken as part of the next phase of the ACT EMR design process.

METHODS

A series of stakeholder consultations was held to elicit their views on what the EMR process should include, and which oversight agency should be appointed. All participants were provided with materials explaining the purpose of the consultation, its voluntary nature, and some background materials on what had been done to date. Identified stakeholders could participate in one or more ways:

1. Focus group interviews
2. Individual interviews
3. Written submissions
4. Roundtable participation

Hybrid Interviews (both in-person and online) were conducted in August and September 2022, depending on stakeholder preference and availability.

The consortium consulted with the ACAT and the ACT Children's Court prior to consulting the other stakeholders so their perspective could be included in later consultations if appropriate. The Aboriginal stakeholders, ACT government, ACT Human Rights Commission and ACT Together were invited to participate in organisation-based focus group interviews (i.e., one focus group per organisation). The other stakeholders were invited to participate in cross-organisation focus groups comprised of similar child and family advocacy agency bodies or legal and justice agencies. A number of selected stakeholders could not attend scheduled focus groups or preferred to participate individually, and these were accommodated where possible. We also received a number of written contributions from participants and/or key stakeholders either as an adjunct to their interviews or as separate submissions. In addition, we participated in a Roundtable facilitated jointly by CSD and the Human Rights Commission, the purpose of which was to present findings from these consultations; ensure that focus group, individual and submitted responses had been included and interpreted correctly; and to obtain any further feedback from former or new participants on the EMR setup, principles of EMR, and the selection of an independent oversight agency. These have all been incorporated into the summarised findings in this chapter.

Focus groups were approximately 1-1.5 hours long and were facilitated by the Monash / CEI / Curijo consortium. Recordings of the groups were made, and these were used to supplement the notes. These notes were organised by scope, principle, and preference, and were then analysed for content and summarised. Similarly, individual interviews were recorded, where permission was granted, and were included in content analysis. Written submissions and roundtable responses were compared against the sentiments and preferences from the interviews, and were incorporated, where possible, or included independently.

The research was conducted in line with an approved Monash University Ethics Protocol (#32346), including informed consent for participation. Prior to the interviews, participants were provided with background material, including a definition of EMR and proposed eligibility criteria, a draft set of principles, and information about the legal context in the ACT and the two major options for independent oversight.

PROCEDURES

Focus group and individual interview participants were asked to express their opinions about: 1) the scope of the EMR; 2) the draft principles guiding it; and 3) their preference for an independent oversight body.

THE SCOPE OF EMR, DEFINITION AND ELIGIBILITY REQUIREMENTS

Participants were provided with, and asked to comment on, the following scope of EMR, its definition and proposed eligibility requirements for EMR. These were derived from our desktop review (see prior section) as well as our consultations with CSD, ACAT and ACT Children's Court. They were then asked to provide feedback on these inclusions and exclusions.

External Merits Review is defined as a re-consideration of a child protection case plan decision that is performed by an external party (i.e. independent from government agencies). The task of the EMR is to objectively review the decision made, including reconsidering the facts, law and policy aspects of the original decision, and either confirming the decision or making a new decision if required.

Only someone directly involved and impacted by a decision can apply for a decision review. This includes (but may not be limited to) a child, young person, birth parent or carer.

Grounds for an external merits review include:

- Error of law, fact or policy
- Incomplete information upon which the case plan was developed
- New information exists that could affect the case plan
- The information used to develop the case plan was incorrectly interpreted.

Eligible decisions include:

- Contact
- Placement
- Restoration planning
- Provision of supports
- A child or young person's health
- Culture, religion or education
- Assessment of suitability information
- Cultural planning
- Therapeutic assessment planning
- Safety planning

Ineligible decisions include:

- Care orders made by the ACT Children's Court
- Appraisal of harm or risk of harms
- Day to day decisions made by foster and kinship carers

GUIDING PRINCIPLES OF EMR

Participants were asked whether the draft principles underpinning EMR (see below) are a good fit for the ACT. The following prompts were used as needed:

1. Are there any principles missing? Do these cover all the basics?
2. Are there any principles you disagree with?
3. Are they articulated well enough? How can they be improved?
4. Does anything worry you about them?
5. How would you know if the principles were being followed?

PREFERENCE ON INDEPENDENT OVERSIGHT

Participants were asked their preference of independent EMR governing body / oversight agency. The following prompts were used as needed:

a. ACT Civil and Administrative Tribunal (ACAT)
b. ACT Children's Court (ACT CC)
c. Other suggestions

Participants in the interviews were invited to also submit written materials after the interviews if they wanted to add to what was said. We also received a number of submissions from stakeholder groups, both before and after the interviews and roundtable.

RESULTS

Data from interviews, submissions and the roundtable were reviewed and analysed and are presented in four categories:

- Overall sentiment
- Scope, definition, and eligibility requirements for EMR
- Principles for EMR
    - Universal
    - Aboriginal and Torres Strait Islander
- Preferences for EMR governing body

As indicated in the background and methods sections, Aboriginal and Torres Strait Islander stakeholders were interviewed and responses were analysed separately as a major stakeholder group by Curijo. Their input was integrated into each of these sections based on internal discussions, data sharing, and a report of results produced by Curijo. The consortium believe that it is informative and important that the original report of results is included in this larger report (appendix 2).

OVERALL SENTIMENT

Many stakeholders expressed frustration and mistrust towards the child protection system and how new review processes were being developed. This was based on:

- Past decisions
- Performance
- Power differentials
- Slow pace of reform
- Consultation fatigue

These sentiments highlighted participants perceived need for an impartial, independent governing body to run the external merits review process. As well, participants universally agreed that the Internal Merits Review (IMR) process was equally, if not more important, than the EMR process, and that it is critical for both processes to be aligned if they are to be successfully implemented. That is, the EMR cannot evaluate whether correct procedure was followed if correct procedure is not clearly and transparently specified in the same way both internally and externally. They should be unified in this respect. Building on this, a strong theme that emerged is that implementation is the key to the success of the entire EMR process. Good intentions, principles, processes and oversight are necessary but insufficient – they must be implemented well.

SCOPE, DEFINITION, AND ELIGIBILITY REQUIREMENTS

In general, there was broad agreement about the scope, definitions, and eligibility requirements with some exceptions:

- Some concerns were expressed, especially by Indigenous representatives, that family and extended kin should also have standing to apply for review as they are also affected by case plan decisions. Clarification on who has standing should be clearly provided. Additionally, consideration should be given to broadening the list of those who can be in the internal and external processes to include advocates and support people as needed
- There was some discussion both in the interviews and at the roundtable about whether appraisal decisions should be eligible for EMR. However, this may be more a function of wording than a push for an expansion in scope. Once the appraisal decision was defined (i.e . a decision about whether maltreatment or risk of harm had occurred) and contrasted with decisions made on the case plan that corresponds to that finding (which would be eligible).

However, participants identified a number of key components and implementation considerations that need to be put in place in order for the merits review process to work. These include:

- Ensuring that strong and effective case work, decision-making and communication between child protection staff and children, young people, parents, families and carers is crucial. There is a sense that these elements of child protection work occur with varying degrees of quality. A consistent, high level of quality would reduce the need for and reliance on both internal and external merits review processes. One way to work toward a higher standard would be to develop or adopt an existing decision-making

framework that would assist frontline staff to communicate the rationale for decisions to children, parents, families, carers and other involved parties

- Mechanisms within the merits review processes (both IMR and EMR) that regularly obtain representative feedback from advocates and community sector organisations as well as from children, young people, parents, families and carers.
- Families coming through the child protection system often have considerable involvement with other government departments, and there are frequently mandates / orders that could conflict or make it challenging to implement case plans (e.g. youth justice mandates like bail conditions and reasonable directions can impact placement). These linkages should be understood, explored and considered in developing the merits review process.
- Clear and timely communication of decisions on case plans must be made to all involved parties (children, parents, families, carers and other involved parties).
- Eligibility criteria for accessing merits reviews (internal and external) must be clear and consistently communicated in a timely manner to those impacted by case plan decisions. This includes clear guidance on how merits review processes work in practice – how they are triggered and what is required. In addition, extra costs (such as legal representation fees or applications) must be avoided or should not be prohibitive, and appropriate supports should be provided to families to assist with understanding, accessing and navigating the review processes.
- The governing legislation for IMR and EMR should stipulate timeframes and accountability mechanisms, and there must be clear recourse if those timeframes are not met. One suggestion was that, if an eligible IMR was not conducted within timelines after request, that the matter could proceed directly to EMR.
- Some participants expressed that it is critical to hear from foster carers in developing and implementing an EMR as one of the key stakeholder groups.

Table 4.1. Guiding principles for External Merits Review

Initial Principles	Revised Principles
Regardless of the model selected, the EMR approach must adhere to the following principles:	**An external merits review mechanism in the ACT must:**
1. Designed with child safety and developmental well-being at the forefront of all decisions	1. Focus on child safety and developmental well-being
2. Collaborative, restorative and family-led	2. Be collaborative, restorative, trauma-informed and family-led
3. Culturally sensitive and safe	3. Be culturally sensitive and safe
4. Accountable and transparent	4. Be accountable and transparent
5. Expeditious and efficient	5. Make decisions quickly and efficiently
6. User-centred with a degree of flexibility to allow for contextual adaptation	6. Adhere to universal design principles that make it inclusive, accessible, and adaptable to differing context
7. Where possible, embedded within existing legal and administrative structures of the ACT.	7. Where possible, be embedded within existing legal and administrative structures
8. Acting without additional administrative layers of bureaucracy	8. Not add unnecessary administrative layers
9. Sustainable and able to withstand future changes to government and legal challenges	*9. Be Human Rights centred*
10. Designed in line with the principle: If it works for Aboriginal people, it will work for everyone	10. Minimise the use of lawyers and legal representatives
	11. Address power imbalances and utilise a non-adversarial approach
	12. Withstand future changes to government and legal challenges
For Aboriginal and Torres Strait Islander peoples. The model design must include:	**To ensure it is culturally safe and fit for purpose for Aboriginal and Torres Strait Islander peoples, an external merits review model must also:**
1. Adherence to The Aboriginal and Torres Strait Islander Placement Principle	1. incorporate the Aboriginal and Torres Strait Islander Placement Principle
2. Self-determination as a foundation as agreed to in closing the gap	2. be founded on the principle of self-determination as agreed to in closing the gap
3. Cultural safety and cultural rights are upheld	3. include mechanisms that ensure cultural safety and that uphold cultural rights
4. Inclusion and the voice of Aboriginal and Torres Strait Islander people is respected, heard and implemented	4. prioritise genuine inclusion with the voice of Aboriginal and Torres Strait Islander people sought out, respected, heard and acted upon

5. Accountability and transparency to the Aboriginal and Torres Strait Islander peoples and community
6. Non-adversarial – Power balances addressed

7. Lawyers not to be part of the process unless deemed absolutely necessary

Full consideration needs to be given to ensure that Aboriginal and Torres Strait Islander children, young people, families and communities are culturally comfortable in engaging with the preferred chosen agency overseeing the model and its processes.

5. include mechanisms for genuine accountability and transparency to Aboriginal and Torres Strait Islander peoples and community.
6. Provide an opportunity for legal, respected Aboriginal advocates or similar representation if requested

Full consideration needs to be given to ensure that Aboriginal and Torres Strait Islander children, young people, families and communities are culturally comfortable in engaging with the preferred chosen agency overseeing the model and its processes.

PRINCIPLES FOR EMR

UNIVERSAL PRINCIPLES

Broadly speaking, there was positive sentiment and agreement that these principles were acceptable (see initial and revised principles in Table 4.1). Beyond simple changes in wording, there were some notable cautions, exceptions and additions. A number of stakeholders cautioned that some of the principles could be interpreted differently and that there could be situations where these interpretations are in conflict with one another (e.g. best interest of the child vs collaborative, restorative and family-led). In addition, stakeholders stressed that, while they looked good, they may be difficult to implement.

Initial Principle Two was adjusted to include the term 'trauma-informed', which was expressed as being needed by a large number of participants.

Initial Principle Six was adjusted to reflect concern by those in the disability field that the term 'user-centred' did not go far enough to highlight the need for the EMR process to be equally accessible to all potential users. We substituted the term 'user centred' with 'universal' and included the terms 'inclusive' and 'accessible'. The term 'contextual adaptation' was confusing, so this was also simplified to be inclusive of a range of marginalised groups with differing needs.

Initial Principle Ten simply did not resonate with far too many participants, including Aboriginal and Torres Strait Islander participants. While the idea was well-intended – that if the process could be constructed in a way that managed to enfranchise this historically disenfranchised group that is overrepresented in the child protection system, it would likely work for everyone. Unfortunately, it was not interpreted that way by many participants and even managed to anger some of them. The Principle was deleted but the idea that the EMR process should work across all child protection-involved families is implicit across a number of the principles (e.g. Principle Four: 'inclusive, accessible, and adaptable'.

Revised Principle Ten was added to acknowledge participant responses that stressed the need for representation and stressed the need to establish more informal, less legalistic processes. At the end of the day, this was a compromise that allowed for the possibility of legal or other representation if sought.

Revised Principle Twelve was added in response to the Human Rights Commission submission that pointed out that the ACT is legally required to expressly acknowledge, both as a standalone Guiding Principle and as an overarching theme underpinning all of the Guiding Principles, the Human Rights Act of 2004.

Revised Principle Thirteen was added to reflect participant comments that families often felt disempowered – that they were not part of the decision-making process and were treated inequitably or dismissed.

ABORIGINAL AND TORRES STRAIT ISLANDER PRINCIPLES

The universal principles, while applying to and being informed by input from Aboriginal and Torres Strait Islander stakeholders, did not sufficiently capture all of the unique elements requested by this key stakeholder group. The original set of principles contained an additional seven principles that were then modified with input from the consultation process. Most of these modifications were simple rephrasing. Of note:

Principle Three now clarifies that mechanisms to ensure cultural safety and uphold cultural rights are put in place. **Principle Four** also clarifies that mechanisms for genuine accountability and transparency are put in place. Stakeholder feedback often reflected a concern that the words 'accountability' and 'transparency' are often spoken but are not always acted upon.

Principle Six was moved up and is now universal **Principle Thirteen**. This reflects feedback from the wider stakeholder group that indicated that power imbalances were experienced more broadly and should be part of the wider set of principles.

Principle Seven: Some participants indicated they did not want lawyers to be a part of the process at all, others indicated that they were required. In the end, most indicated that they would be comfortable having such representation if it was requested.

PREFERENCE OF GOVERNING BODY

A clear consensus about the governing body did not emerge from the consultation process. There were some strong opinions expressed that the governing body should be either ACAT or the Children's Court, and some suggested an entirely different (unspecified) body. For example, some indicated that ACAT was too focused on procedural matters while others indicated that it is set up to do exactly what is needed. Others expressed that they would find it difficult to overcome legacy issues involving the Children's Court and this was offset by others who pointed out that the ACT Magistrates Court has had recent success in taking a non-adversarial, community-based approach to alternative sentencing (i.e. the Warrumbul Circle Sentencing Court), and that a similar approach could be adopted for EMR in child protection.

- Some stakeholders viewed EMR as a legal process preferably placed in ACAT, with its structure of part-time members who could constitute child welfare panels. ACAT expressed a willingness to train

members in children's rights, for example. Some indicated that child welfare needs and interests would also need to be addressed.
- The Children's Court was viewed by others as allowing for more informal approaches. It has an established approach for engaging Aboriginal Elders. However, the court would have to differ in approach from a usual courtroom, including being less adversarial, more engaging, and culturally safe. There remain for some power imbalances which are more pronounced in a Court approach, and these would have to be addressed.
- The HRC was proposed as another review body to consider.

However, most participants were somewhat ambivalent about which governing body was chosen and were more interested in making sure that, whatever governing body was chosen, it would be done in alignment with the principles and that it met a number of key criteria. Universally, these included:

- Consideration should be given to how decision panels are selected. Any external merits review decision-making panel should be comprised of, or at least include, people with appropriate child development knowledge and qualifications (e.g. understanding of brain development, understanding of the impact of trauma).
- Any external merits review mechanism must be complemented by appropriate funding, resourcing, communications and training for the administering body, frontline staff, legal and community organisations and other advocates.
- The HRC (and others) underlined that the provision of EMR of care and protection case plan decisions made by both CYPS and outsourced service providers is necessary to uphold the human rights of children and young people, and their families.

Similar to the broader group of stakeholder participants, Aboriginal and Torres Strait Islander participants did not express any universal preference for the two providers being explored. Their emphasis was on the development of a culturally appropriate EMR and, in some ways, this echoed their input to both the universal and Aboriginal and Torres Strait Islander principles. To that end, they stressed that:

- A panel model of experienced Aboriginal and Torres Strait Islander people with cultural authority, child protection knowledge and experience, and the same decision-making powers as other panel members.
- Child safety and wellbeing is embedded in the model (including cultural wellbeing).
- A culturally safe, non-adversarial approach is developed in which Aboriginal and Torres Strait Islander people feel supported and heard. The model would take into consideration self-determination, Family Led Decision Making/Family Group Conferencing principles and acceptance of Aboriginal and Torres Strait Islander concepts of family, kinship and community wellbeing.
- The model/panel in EMR must include Aboriginal and Torres Strait Islander people with community cultural authority and child protection knowledge and experience.
- Non-Aboriginal and Torres Strait Islander staff of the EMR provider must undertake ongoing training in Aboriginal and Torres Strait Islander Cultural proficiency and work to overcome unconscious bias and lack of knowledge about Aboriginal and Torres Strait Islander Peoples.
- The model needs to be non-adversarial with Aboriginal and Torres Strait Islander families deciding whether lawyers should be involved and, in line with the principles of self-determination, Aboriginal and Torres Strait Islander families must have access to support from advocates of their choice.
- Whatever model is considered it needs to be accountable to Aboriginal and Torres Strait Islander People, and needs to be open and transparent.

SUMMARY AND CONCLUSION

The consultations provided an opportunity for key ACT stakeholders to re-engage in the process of designing an EMR system for child protection in the ACT. There was broad agreement with respect to the revised principles and, after input from the focus groups, these were presented to a fairly representative group of stakeholders at a third workshop held on 03 September 2022. Unfortunately, there was no broad agreement on the selection of the governing body for the EMR. That said, the focus groups, individual interviews, and submissions indicated that, perhaps, the selection of a governing body is less important than the successful incorporation of the core EMR principles, and many participants wanted assurance that the IMR process would be guided similarly. There was, however, a profound sense of frustration and mistrust towards the child protection system expressed in a number of the groups, and this appeared to be driven by the slow pace of reform, consultation fatigue, and past performance. Many historical examples were provided and, to the credit of the stakeholders, these were used to identify elements of the EMR that needed to be in place to prevent such occurrences in the future. In all, there was frustration but also hope that this process, and others that are under way, will improve the child protection system. This is a pre-requisite for continued engagement with stakeholders and even co-design.

The stakeholders were clear in their preferences for an EMR framework that is multidisciplinary and collaborative in its decision making, is not adversarial in structure, trauma informed, and is comprised of panels of members who have skills and expertise in child health, development, and family systems - balancing the primary 'Best interests of the child' legislative remit with a holistic consideration of family

context and functioning, culture and history. The EMR is perhaps best seen as a non-legalistic, problem-solving process that draws on family participation as much as on the voice of the child while, at the same time, observing required administrative, legal and human rights parameters. The EMR process is, on its own, insufficient for reforming the system, but it is an essential feature of a modern-day child protection system. Coupled with continued engagement, trust-building, and provision of responsive, high quality services, the ACT child protection system can be substantially improved.

EMR PROCESS IMPLEMENTATION DRAFT

INTRODUCTION

Effective implementation of innovations, such as new policies and processes, matters for positive outcomes in child and family services. Getting the implementation process right for the EMR process will be critical to ensure its acceptance, uptake and effectiveness in reviewing child protection decisions to make determinations in the best interests of the child and introduce a mechanism able to guide system level improvements. The ACT Government has not yet finalised the development of the EMR process to implement, and as part of next steps for this project, needs to find a way to bring together different stakeholders to operationalise the EMR key principles and agree on a process situated within the Children's Court or ACAT. For this reason, we present implementation guidance below focused on practical approaches and strategies to navigating the early phases of implementation – phases which involve facilitated stakeholder engagement, co-design, and implementation planning. This will assist the Community Services Directorate's continued EMR process development and implementation planning, including decisions about the required budget, resourcing, and legislative changes.

IMPLEMENTING THE EMR PROCESS IN A COMPLEX CONTEXT

Implementation science is the scientific study of methods to embed innovations, such as the EMR process, into business-as-usual service delivery. It can help us think about what will help and hinder the effective implementation and sustainability of an EMR process and comes with a set of practical and accessible strategies, tools and approaches that can be used to bring stakeholders together to undertake joint implementation planning.

Implementation is a process and not an event. The positive decision to implement an EMR process is not sufficient to create change – a number of additional steps (known as implementation stages or phases) need to be taken to fully embed the process in the system. The EPIS (Exploration, Preparation, Implementation and Sustainment) Framework[10], developed for use within public systems and built on a solid literature base, articulates four phases - and contextual factors at the level of system and organisation – that describe and guide the process of implementation. This implementation guidance for the EMR process is focused on the first phase, Exploration, which is covered in more detail in the next section.

The exploration phase is followed by the implementation preparation phase, which begins once the EMR process has been fully developed and communicated with stakeholders. This phase involves developing a detailed implementation plan which addresses all the implementation barriers identified and builds on the system's strengths and potential facilitators. We believe that the preparation phase should also be underpinned by a co-design approach (as described below) to ensure the implementation plan is informed by all the key stakeholders it relies on.

Implementation takes place in complex, adaptive systems, and these impact upon the ease and speed with which changes can be prepared, established, and sustained. We understand there are some tensions over how stakeholders across ACT's child protection system perceive the current context in which the EMR process is being considered (and will be implemented) and how it needs to change. These include:

- A need for alignment between an internal merits review and external merits review process for child protection
- A level of mistrust in the current child protection system, and its development of IMR and EMR processes, which is related to historical negative experiences
- The need for the EMR to be complemented by systemic improvements in child protection
- Inherent and sometimes opposing differences in the needs, experiences, and views of EMR stakeholders, and
- The transfer of the ongoing responsibility of the selected EMR process from the policy team to the operational teams who have responsibilities for EMR's applied design and implementation.

IMPLEMENTATION PHASE - EXPLORATION

The ACT Government and the ACT Human Rights Commission's work is aligned to the Exploration phase in EPIS. An issue and solution have been identified (i.e., an EMR process) and some contextual factors explored through the focus groups and stakeholder sessions. However, this information is not yet joined up in a way that can further the EMR process. For example, while there is broad consensus on the principles that should guide an EMR process, we do not yet know how these principles should be embedded in the process or what this means for implementation of an EMR process within the Children's Court or ACAT. There is a risk that tensions in the current system context (as described above and in the consultation section) will slow down the process of determining an appropriate EMR process altogether.

There is an urgent need to bring together key stakeholders in a way that works toward identifying an optimal EMR process and establishing the building blocks of an implementation process. This can be achieved by the ACT

[10] EPIS framework reference: Moullin, J.C., Dickson, K.S., Stadnick, N.A. et al. Systematic review of the Exploration, Preparation, Implementation, Sustainment (EPIS) framework. Implementation Sci 14, 1 (2019). https://doi.org/10.1186/s13012-018-0842-6

Government facilitating the co-design of an EMR process with key stakeholders, including families who will use the process. These components are described further below.

CO-DESIGN OF AN EMR PROCESS

Co-design is an active collaboration between key stakeholders (usually service users, those involved in implementation and those responsible for procuring the work) in designing solutions that enables equal and reciprocal relationships and values lived experience. It is critical that co-design sessions are professionally facilitated (for example by implementation specialists) in hotly contested, complex social interventions such as the design and implementation of EMR. Specifically specialists are best equipped to promote communication about the EMR process where potential divisions exist, and alignment is needed to progress implementation. For example, divisions may exist in power differentials between a service provider and service user or along hierarchical lines between frontline staff and the upper echelons of the service system. By working closely together on the EMR process, there will be a closer alignment of goals, contribution of different expertise, greater trust and a more focused purpose. Co-design, though, is time and resource intensive and requires commitment from all stakeholders in the development and implementation of the process.

INVOLVING FAMILIES IN EMR DESIGN

It is not possible to design an effective EMR process – that is, one that is accessible, appropriate, acceptable, and equitable -- without involving families. Involving families should be a purposeful and active practice, oriented towards not only consultative but also participative, collaborative forms of involvement. This can be achieved by:

- Defining a clear purpose for the involvement of families and continuously communicating this purpose across all stakeholders
- Engaging families as early as possible in the process and nurturing and maintaining this engagement over time
- Developing a plan for families' involvement, describing roles, responsibilities and expectations for families and other stakeholders, and
- Ensuring that the co-design process and structures allow leaders to actively use the contributions made by families, avoiding tokenism.

PUTTING IT INTO PRACTICE: EMR PROCESS EXPLORATION

The goal of the Exploration phase is to collaboratively determine:

- whether the Children's Court or the ACAT is the best fit for an EMR process in the ACT, and
- whether the EMR process is feasible and can be implemented.

We suggest four phases for this work.

PHASE 1: ESTABLISH AN IMPLEMENTATION TEAM/WORKING GROUP

An implementation team or working group should be established from the diverse range of stakeholders already involved in consultations for the EMR process. At a minimum this group should involve members who can represent the perspectives of the ACT Government (i.e., child protection policy and program areas; health, justice, or related areas), ACT Human Rights Commission, Aboriginal peak organisations, Aboriginal service providers, community service providers, advocacy organisations, legal representatives, people with lived experience and an implementation specialist who acts as the implementation team facilitator. This team would be accountable for implementation progress and can be built at all levels of a service system (e.g., the governance structure, in time, might also include a Central Implementation Team of decision makers focused on policy, funding and regulation).

We suggest keeping an active implementation team/working group to guide and drive each of the implementation phases described. The implementation team representatives should change during the course of the implementation to ensure the implementation team includes the right expertise delivered at the right time, represents the people who are closely involved with the implementation and is well-equipped to effectively support implementation.

PHASE 2: CO-DESIGN – DETAILED EMR PROCESS

In this phase the implementation specialist facilitates structured workshops with the implementation team/working group to co-design the EMR process in detail including:

- undertaking a needs assessment to gain an in-depth understanding of the needs of stakeholders (especially families),
- designing a detailed end-to-end EMR process (including how it connected with external processes) aligned with the EMR principles using user-centered design approach
- developing detailed process documentation including a description of what the process 'looks and feels' like for the people using it, clear guidelines and rules, and a complete description of the roles, responsibilities and decision rules involved

PHASE 3: CO-DESIGN – ASSESS FEASIBILITY

In this phase the implementation specialist facilitates structured workshops with the implementation team/working group to co-design a feasibility assessment of the selected EMR process including:

- assessing readiness of the selected EMR process (i.e., Children's Court or ACAT) to implement the model
- identifying the realistic resources required to deliver EMR, developing cost estimates and sourcing funding
- understanding barriers to EMR access for families (including marginalized and/or disadvantaged groups), and
- identifying what challenges and opportunities exist in the policy and service context and the EMR process including levers that can be used to facilitate change.

PHASE 4: DEVELOP A COMMUNICATION PLAN

Communication is a central factor in supporting implementation of the EMR process because it can help stakeholders outside the implementation team/working group to create shared understandings of priorities and goals, challenges, and the best strategies to enable change. Unfortunately, the Covid pandemic delayed the original work on EMR and contributed to existing stakeholder mistrust and frustration. A communication plan can help to provide clarity and assist in determining key messages and communication processes, particularly if some of the key stakeholders are involved in its development and delivery of information.

CONCLUSION

Quality implementation is time, person, and resource intensive. Yet it pays off – effective implementation of well-designed, evidence-informed processes ensures children and families receive the care they need within child protection systems to improve their wellbeing. This implementation guidance outlines just the first phase of four, in implementing an EMR process – Exploration. It is critical to get this work right from the start by investing in effective implementation support that facilitates meaningful stakeholder engagement. This will foster stakeholder buy-in across ACT Government, the ACT Human Rights Commission and community stakeholders to build the foundations of success for an ACT EMR process.

APPENDIX 1: LEGAL BACKGROUND TO THE QUESTION OF EXTERNAL MERITS REVIEW

ANALYSIS OF THE LEGAL ISSUES CONDUCTED BY CSD

THIS MATERIAL IS SUBJECT TO LEGAL PRIVELEDGE AND HAS BEEN REMOVED FROM THIS PUBLIC VERSION OF THE REPORT

APPENDIX 2 – ADDITIONAL FINDINGS FROM THE ABORIGINAL AND TORRES STRAIT ISLANDER STAKEHOLDER CONSULTATIONS

SUMMARY OF FINDINGS FROM CONSULTATION WITH ABORIGINAL AND TORRES STRAIT ISLANDER ORGANISATIONS AND INDIVIDUAL CONSULTATIONS.

Overall recommendations for improving the child protection system for Aboriginal and Torres Strait Islander children and families were put forward in the Our Booris, Our Way (2019) report (see below). These recommendations were reviewed and those relevant to EMR were extracted and built on through the consultations to create an EMR-specific list of recommendations both with respect to the principles and selection of a governing body.

OUR BOORIS OUR WAY (2019)

- Processes and services should be culturally intelligent and appropriate.
- The Aboriginal and Torres Strait Islander Child Placement Principle should be explicitly embedded within policy and practice.
- Place children in kinship care immediately upon removal and provide supports for kindship care.
- Alternative dispute resolution mechanisms, such as Family Group Conferencing, should be made available.
- Access to culturally appropriate advocacy services and legal representation should be made available.
- Increase Aboriginal and Torres Strait Islander Family led Decision Making in child protection.
- Promote pathways to restoration.
- Ensure access to appropriate early support programs for rehabilitation, family violence, mental health and trauma.
- Appoint an Aboriginal and Torres Strait Islander Children's Commissioner.

EMR CONSULTATION PARTICIPANTS

Curijo undertook a series of further consultations with other Aboriginal and Torres Strait Islander Groups other than Our Booris Our Way and individual Aboriginal and Torres Strait Islander community members – these included:

- The Aboriginal and Torres Strait Islander Co-Design Network (internal consultative group for CSD)
- Gugun Gulwan Aboriginal Corporation – ACT youth service
- Nannies Group – ACT
- Yerrabi Yurwang Child & Family Aboriginal and Torres Strait Islander Corporation – ACT
- Vicki Barton – previous manager for 12 years of AbSec's Carer and Child Protection support service.
- SNAICC – interview and participated in Ministerial Forum (national peak)

SYNOPSIS OF EMR RECOMMENDATIONS FROM CONSULTATIONS

The recommendations and issues identified were gathered from consultations and were paraphrased. These were:

- Informal process with a culturally appropriate panel rather than a structured process.
- Best interest of the child (Aboriginal and Torres Strait Islander lens not western lens)/children's principles are adhered to.
- Given the unique Kinship structures of Aboriginal and Torres Strait Islander Families - considerations must be made to allow more diverse participation than the accepted western definition of family which includes kin.
- Whatever model is chosen it needs to be culturally appropriate, with skilled Aboriginal and Torres Strait Islander staff involved.
- There needs to be culturally therapeutic supports available to Aboriginal and Torres Strait Islander people before, during and after the process and a therapeutic model must be considered.
- The chosen venue needs to be culturally safe and appropriate.
- The model needs to be non-adversarial with Aboriginal and Torres Strait Islander families deciding whether lawyers should be involved and, in line with the principles of self-determination, Aboriginal and Torres Strait Islander families must have access to support from advocates of their choice.
- Family Group Conferencing and/or Aboriginal and Torres Strait Islander Family Led Decision Making must be part of the process.
- Must align with SNAICC OOHC placement principles.
- Must facilitate a broader change of culture in CSD that is accountable.

- Must consider Aboriginal and Torres Strait Islander Panels or a model linked to the principles of the Aboriginal care circles in NSW.
- Whatever model is considered it needs to be accountable to Aboriginal and Torres Strait Islander people and needs to be open and transparent.
- Model must include Aboriginal and Torres Strait Islander people with both child protection experience and community authority.
- Understanding that the western concept of wellbeing is located at an individual level whereas Aboriginal and Torres Strait Islander wellbeing can extend to the broader community.
- Once a preferred provider is chosen, have further consultations about the model and how it will and be set up. This must include consultations involving all of the Aboriginal and Torres Strait Islander community, not just token representation.
- Training for Aboriginal and Torres Strait Islander workers, support people including NGO staff, and EMR provider staff (especially Cultural safety training for non-Aboriginal and Torres Strait Islander staff of the chosen provider).

WHAT AN ABORIGINAL AND TORRES STRAIT ISLANDER CULTURALLY APPROPRIATE EMR MODEL WOULD LOOK LIKE AND PREFERENCE OF PROVIDER OF EMR SERVICE PROVIDER – ACAT V ACTCC

Aboriginal and Torres Strait Islander participants did not express any universal preference to the two providers being explored - with more emphasis being placed on the development of a culturally appropriate model.

The preferred model being:

- A panel model with experienced Aboriginal and Torres Strait Islander people with cultural authority and decision-making powers.
- Child safety and wellbeing is ingrained in the model (including cultural wellbeing).
- A culturally safe, non-adversarial model where Aboriginal and Torres Strait Islander people feel supported and heard. The model would take into consideration self-determination, Family Led Decision Making/Family Group Conferencing principles and acceptance of Aboriginal and Torres Strait Islander concepts of family, kinship and community wellbeing.
- Aboriginal and Torres Strait Islander people must have the choice of whether either or both parties are legally represented.
- Aboriginal and Torres Strait Islander people must be involved in the design of the model after a decision on the provider has been made and then further broad community consultations should be undertaken.
- The model/panel must include Aboriginal and Torres Strait Islander people with community cultural authority and child protection knowledge and experience.
- Non-Aboriginal and Torres Strait Islander staff of the EMR provider must undertake ongoing training in Aboriginal and Torres Strait Islander Cultural proficiency and work to overcome unconscious bias and lack of knowledge about Aboriginal and Torres Strait Islander Peoples.

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