Working with children checks — time to step back?

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Abstract
Screening the criminal history of people seeking to work or volunteer in child-related organisations commenced in Australia in 2000, and since then ‘working with children check’ schemes have expanded, largely without question. Every jurisdiction now has a legislated or administrative scheme, routinely checking the criminal histories of thousands of people to determine if they pose a risk to children. But in any regulatory regime, questions of effectiveness and efficiency arise. The main features of working with children check schemes operating in Australia are examined in this paper. Problems related to effectiveness, equity, and costs are identified. A better balance is needed between routine criminal history checks and other mechanisms for identifying and monitoring the risks posed to children by people who work with them.

Keywords: child abuse, crime prevention, risk management, social welfare policy, child sexual abuse
Introduction

There have been societal concerns about the maltreatment of children throughout history, but the degree of concern and whether threats are perceived to arise from within the family or externally, have varied over time. Understandings of child abuse and neglect are bounded by normative assumptions about children and childrearing, the role of the family, and the role of the state (Fox Harding 1991). Consequently, definitions of child abuse, child protection laws, and criminal justice responses to child abuse vary according to social context. They reflect community opinion and values and expert opinion from child protection professionals, as well as research. These different views on child maltreatment influence how much policy attention is directed towards controlling individuals perceived to be deviant, or improving the conditions of family life. In most western democracies, government policy has tended to swing between these two, which is characterised in child protection literature as ‘child rescue’ versus ‘family support’ approaches to protecting children from abuse and neglect (Whittaker 1991).

Child-related criminal history screening is a relatively new mechanism aimed at protecting children. In Australia, each state and territory has legislation or an administrative regime for undertaking child-related criminal history checks. The checks are asserted as a means to prevent people who pose a risk to children’s safety from working or volunteering in child-related settings by making it ‘as difficult as possible for unsuitable people to gain access to children who come into contact with organisations’ (Irenyi et al. 2006: 16). These schemes provide guidelines for decisions about who or what constitutes a threat to children’s safety, and how those threats or risks should be managed. In general, they involve requiring every person who wishes to work or volunteer in a child-related organisation to authorise a government agency to check his or her criminal history and have an approval notice issued; for example, Commission for Children and Young People and Child Guardian Act 2000 (Qld); Children’s Protection Act 1993 (SA). If a person is assessed as a potential risk, approval to work or volunteer with children may be declined. In Australia, child-related criminal history checks were introduced from 2000 and since then have expanded largely without question.

There has been an increase in the formality, complexity, intensity and specialisation of regulation to improve government service delivery over the past two decades (Hood et al. 1998). Terms such as the ‘regulatory state’ (Hoggett 1996) and the ‘audit society’ (Power 1997) have been used to conceptualise this growth, which is linked to neoliberal forms of governance that have placed ‘the lessening of risk, not the meeting of need’ at the centre of social policy (Culpitt 1999: 35). Decreasing trust in government, business, and the professions has led to greater demands for accountability. The information-gathering, measuring, checking, and reporting processes of regulation are intended to provide assurance that government is properly managing risk. Regulation is taken to be good, regulators themselves are not exposed to systematic scrutiny, and the costs of regulation are assumed to be worthwhile (Hood et al. 1998). But it has been
argued that the institutionalisation of various forms of audit is mostly about producing reassurance, and diverts resources from practices that would yield useful organisational intelligence (Power 1997). Empirical research on regulatory regimes has revealed a set of common problems: ritualistic compliance, which can occur if formal audit practices are separated from substantive organisational processes, leading to mechanistic compliance—‘ticking the boxes’—that hides underlying problems of policy or administrative failure; regulatory capture, whereby regulators are unable or unwilling to take action if standards are not met; performance ambiguity, which arises when ‘good’ standards cannot be clearly established; and data problems, whereby there is difficulty in measuring compliance due to adequate data being unavailable, even when performance standards are clear (Ashworth et al. 2002).

Recognising that there are costs to over-regulation, but cautioning that regulation has grown because less formal systems of control have failed or weakened, it has been argued that rather than decreasing regulation, regulatory mechanisms need to be more ‘responsive’, co-ordinated with other quality and accountability mechanisms, and tailored to context (Ayres & Braithwaite 1992; Hood et al. 1998). Regulation should be practical, and a diversity of regulatory strategies is required. This would involve less reliance on the ‘search every suitcase’ strategy, instead moving to more self-regulatory models, including random checking methods to decrease bureaucratic routines but maintain the overall regulatory effect. Regulation can be expensive, involving both the direct costs of funding and staffing regulatory bodies, and the indirect or compliance costs for the entities that must comply with standards and demonstrate they have complied (Hood et al. 1998). These theoretical understandings and empirical findings on government regulation provide a framework for a critical analysis of criminal history checking for child-related organisations in Australia.

**Background and scope of working with children checks**

Pre-employment criminal history checks were conducted by employers for certain categories of workers, such as teachers and child protection workers, before the current working with children check systems were introduced. But concerns about the sexual abuse of children provided the impetus for broad, legislatively-sanctioned working with children checks: ‘The political triggers in Australia for increased criminal record checking have primarily come from publicised cases of sex offenders working with children, and more generally the media staple of naming and shaming sex offenders’ (Naylor 2011: 87). In 1996, in the context of the Wood Royal Commission into the New South Wales Police Force, which inquired extensively into paedophilia, all state and territory community services ministers agreed to implement criminal record screening of paid or volunteer workers in children’s services (Budiselic et al. 2009). Perceived failings in the criminal justice system led government to seek to assure the public that safeguards would be implemented to protect children (FaHCSIA 2011). New South Wales was the first Australian jurisdiction to introduce a legislated scheme in 2000 (*Commission for Children and Young People Act 1998*),
followed by Queensland in 2001 (CCYPCGA 2000 s.154), Western Australia in 2004 (Working with Children (Criminal Record Checking) Act 2004), Victoria in 2005 (Working with Children Act 2005), the Northern Territory in 2007 (Care and Protection of Children Act 2007 s.184), South Australia (CPA 1993 s.8B) and the Australian Capital Territory in 2011 (Working with Vulnerable People (Background Checking) Act 2011). In Tasmania, where the scheme operates through administrative arrangements, there is no legislation.

Each jurisdiction’s regime specifies who is screened, what organisations are covered, and what criminal history is taken into account (Berlyn et al. 2011). Requirements apply for people to obtain clearance to work or volunteer in a wide array of organisations that provide services to, or activities for, children: schools and education programs; child care; health, counselling and support services; churches, clubs and associations; sport and recreation; emergency services; and child protection and residential care services. Clearance obtained in one jurisdiction does not apply in other jurisdictions. Currently, as part of the National Framework for Protecting Australia’s Children, jurisdictions are working towards a nationally consistent approach to child-related criminal history screening (Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) 2011).

Since commencement, some schemes have been reviewed, usually leading to expansion. Queensland reports that over 100,000 organisations are registered as being in scope of the system in that State (CCYPCG 2012a: 3). Changes to the NSW regime that extended the scheme’s depth and breadth are being enacted through the Child Protection (Working with Children) Act 2012, which began to take effect in 2013. Announcing the changes, the NSW Minister for Citizenship and Communities (Dominello 2012) stated that ‘these changes will ensure it [the working with children check] remains an internationally recognised safeguard for protecting children and young people’. Across jurisdictions, the rationale for working with children checks is generally stated as preventing those people who pose a risk to children’s safety and wellbeing, in settings where they have the opportunity to develop a trust relationship with a child, from being able to work or volunteer in those settings. It is as a means of preventing people known to have been associated with, charged, or found guilty of, certain offences from being employed or volunteering in a child-focused organisation (Irenyi et al. 2006). In 2009, the NSW Children’s Commissioner said that checks had become ‘firmly entrenched as [an] accepted—and expected—safety measure for kids’ (NSW CCYP 2009: 24).

Depending on the jurisdiction, responsibility for administering the scheme and conducting the checks is held by the children’s commission, child guardian, or a government agency such as the police or child protection agency. Screening processes usually occur in two steps. The first stage is checking an individual’s criminal history for certain offences to identify the level of risk the person poses to children. The second involves excluding unsuitable people from child-related employment. Many types of criminal offences are taken into account, in addition to sexual offences against children—drink driving, domestic violence,
murder and manslaughter, assault including sexual assault, and drug offences may cause a negative notice to be issued. Offences considered relevant to the decision to prevent someone working with children vary between jurisdictions. Criminal convictions as a child or adult, including spent convictions and no conviction recorded charges, and pending charges may be taken into account. In Queensland, information from police investigations can be used, even if there was no charge (CCYPCGA 2000 s.305). ‘Disciplinary information’ is considered, for example, where it relates to concerns with the quality of care provided by a foster carer, or in the case of police and teachers, any ‘disciplinary action’ taken in relation to the performance of their professional duties (for example, CCYPCGA 2000 ss.283 & 284, WWVP(BC)A 2011 s.28(e)). When the check on an applicant shows relevant convictions or charges, an assessment is made by an officer of the administering agency about whether the applicant poses a risk to children. Legislation also contains disqualifying offences, which prohibit a person from applying for a check or which automatically mean the application is refused or a clearance revoked. These are generally sexual or violent offences, particularly, but not exclusively, against children (for example, CCYPCGA 2000 s.168, WWC(CRC)A 2004 s.12). Criminal records may be monitored over the period of the certificate, or only considered prior to employment commencing. The duration of a ‘clearance’ or ‘positive notice’ varies from two to five years before renewal applies. Where legislated, issuing a negative notice is a reviewable decision, and persons denied clearance may appeal: to the administrative appeals tribunal in Queensland (CCYPCGA 2000 s.354), New South Wales (CP(WWC)A 2012 s.27), ACT (WWVP(BC)A 2011 s.61), Victoria (WCA 2005 s.26) and Western Australia (WC(CRC)A 2004 s.26), or a local court in the Northern Territory (CPCA 2007 s.194).

The checks apply to all persons who want to work in designated child-related employment. This means that children aged under 18 years seeking to work or volunteer with other children are subject to checks in most jurisdictions. In the Northern Territory, checks apply to persons aged 15 years and over (CPCA 2007 s.203), and in the Australian Capital Territory, to persons aged 16 years and over (WWVP(BC)A 2011 s.12). Queensland and Western Australia distinguish between volunteering and working, such that child volunteers are not required to seek a check (CCYPCGA 2000 s.160, WC(CRC)A 2004 s.6(3)). Victoria is the only jurisdiction that does not subject children to seek clearance as to their criminal history. Foster carers, including carers who are relatives—for example, grandparents—and their adult household members require checks. In some jurisdictions, professional registration for certain categories of employees—for example, teachers, child care workers, police officers, and medical practitioners—embeds criminal history checks in the registration process (Berlyn et al. 2011: 2) and these professionals are therefore exempt from the working with children check regulatory regime. Most schemes focus specifically on protecting children, whereas the ACT scheme has a broader remit of screening to protect vulnerable persons, including children, people with disabilities, and
marginalised citizens such as homeless people or asylum seekers. These more generic checks consider the same or similar conviction and non-conviction histories and disciplinary information.

In summary, child-related criminal history screening schemes across Australia are broad in scope—in respect of the types of regulated employment, the number of people and organisations required to participate, and the range of information considered in the assessment. Drawing on available public data and information about the administration of working with children check regimes, the paper now turns to a critical discussion of the issues associated with the schemes. These relate to effectiveness, equity, and cost.

**Effectiveness**

The gap between the number of people who are screened and the number of people found unsuitable is very large. In Queensland, over 2.3 million applications, authorisations and renewals have been processed since the scheme’s inception in 2001, involving over 1.15 million applicants and over 2 million cards and renewals (CCYPCG 2012a). At June 2012 over 500,000 people held positive notices or exemptions permitting them to work with children (CCYPCG 2012b). This represents approximately 14 per cent of Queensland’s eligible population. A minority of people screened have a relevant criminal record. Since the scheme’s inception, over 5,800 ‘high risk individuals’ have been prevented from working with children, including 868 individuals out of 280,524 applications (0.3 per cent) in 2011/12 (CCYPCG 2012b: 84). This low rate of refusals is consistent with other jurisdictions (for example, Victoria Department of Justice 2012b; NSW CCYP 2012). In Queensland for 2011/12, the main reason for refusing applications related to violent offences against adults (43 per cent); seven per cent involved child violence and another seven per cent involved child sex offences (CCYPCG 2012a: 5).

The nature of checking criminal history is that it relies on the person having already come to the attention of police and justice systems. However, research has consistently found that much abusive behaviour has historically gone unreported, and the majority of sexual abuse perpetrators detected do not have prior convictions for any form of child maltreatment (Smallbone & Wortley 2001; Irenyi et al. 2006). Therefore, false positive results are inevitable: some people approved to work with children will commit an offence in the future, and some approvals are issued to people who have avoided being reported, charged or convicted in the past. Criminal records checking has been described as simultaneously too broad and too narrow, because everyone is screened but checks only identify the small proportion of people whose problematic behaviour has previously been detected (Naylor et al. 2008: 197; Smallbone et al. 2008). However, it is acknowledged that to some extent the schemes are preventative, in that there are people who believe they are unlikely to be approved who do not apply, and others are prohibited from applying for an approval due to their serious offences.
Screening is not failsafe, and may give children, parents, employers and regulators a false sense of security about people who work with children. The Queensland CCYPCG reports that public confidence about the contribution to the scheme in creating ‘safer service environments for children’, as indicated by stakeholders surveyed in 2011/12, was at around 94 per cent, with 39 per cent rating the system as ‘excellent’ (CCYPCG 2012a: 3). Environments that protect children are achieved by organisations understanding and implementing sound recruitment strategies and having policies and procedures that provide ongoing supervision of employees and volunteers (Irenyi et al. 2006; Smallbone et al. 2008: 206). Government agencies administering working with children checks consistently acknowledge that screening should not be solely relied upon to protect children’s safety (for example, NSW CCYP 2009). They propose that criminal history screening should operate in conjunction with ongoing monitoring of a person’s criminal record as well as attention to organisational culture and functioning. Variously referred to as ‘child-safe’, ‘child-friendly’ and ‘risk management’ strategies, organisations whose business is working with children are encouraged, or required by law (as in Queensland), to implement policies and procedures addressing human resource management, reporting of suspected child abuse or neglect to the relevant authorities, listening to children’s views, and hearing children’s complaints (Irenyi et al. 2006: 17). But there is limited policy attention, oversight, or resources directed to these more proactive mechanisms. Some jurisdictions report on compliance checks and audits that occur within organisations, but the contribution that these policies and strategies make to keeping children safe is unclear. Although there were 100,000 organisations in scope in Queensland in 2011/12, there were fewer than 3000 downloads of the risk management kit (CCYPCG 2012a: 3) and only 257 organisations were subject to compliance checks (CCYPCG 2012a: 9). As well as ongoing supervision, education and training for staff would be desirable, so that when staff are concerned about colleagues, even if concerns are low-level, ‘not-quite-right’ activities—such as having after-hours contact with children, inviting children home, giving children gifts—they are encouraged to act and raise their concerns with management. Many people are disinclined to imply that a colleague is acting improperly when the person has been screened and approved. Organisations may believe that the checking regime keeps children safe because everyone has received clearance. The threat that is ‘out there’ has been prevented from getting into the organisation. However, because the checking process is separated from substantive organisational processes such as supervision and training, it can disguise risk and obviate organisations from using other measures to identify and manage risks to children.

**Equity**

Because obtaining clearance to work with children involves many categories of offences, juvenile and adult charges, convictions, spent convictions, and police intelligence, an applicant’s criminal history can be taken into account many years after any offences occurred. As indicated above, working with children checks prohibit people with certain criminal histories from working or
volunteering in settings with children. However, the charge or conviction may have occurred many years ago and further penalty now can be disproportionate and irrelevant to the offence, or the applicant’s personal circumstances at the time of the charge or conviction may have significantly changed. Using criminal history as the basis for employing people has the effect of excluding and marginalising people who have already been punished at law. Consideration must be given to balancing a person’s right to move past an old or minor conviction and the protection of children (Naylor et al. 2008; Wells & MacKinnon 2001: 290). Two recently reported New South Wales cases highlight the problem of refusing approval for past sex offenders without regard to circumstances (Jacobsen 2012a; Jacobsen 2012b). In both cases, men now aged in their 60s were convicted of having sex with their underage girlfriends. One of the men had just reached adulthood—it was his 18th birthday—at the time of the offence and after serving four months in prison, he went on to work in the public and community sectors. Although subject to routine criminal history checks, the 1967 conviction only recently showed up. He was dismissed by his employer and effectively from the sector in which he had worked for many years. The second man went on to marry his girlfriend and operate a small business including trade work at schools. The result of a recent working with children check identified the 40-year old conviction, which prevented him from undertaking any work in that or similar settings. For both men, their long-spent criminal records were automatically disqualifying, with serious personal and economic consequences. Aiming to rebalance rights to privacy and civil liberties with risk management, the UK’s Vetting and Barring Scheme, which was introduced in 2007, was suspended in 2010 in response to widespread public concerns about breaches of civil liberties and invasion of privacy (FaHCSIA 2011: 3). In announcing the suspension, the Minister stated ‘The protection of children and vulnerable adults must be paramount. But we must also ensure that arrangements are proportionate and support a trusting, caring society where well-meaning people are encouraged rather than deterred’ (UK Home Office 2010). The scheme was subsequently scaled back to ‘common sense levels… We think that arrangements up until now over-emphasised protection by the state and did not sufficiently emphasise the vital role which you [employers] play’ (HM Government 2012: 3). Some people will continue to be barred from working in regulated activity with vulnerable people, including children, and organisations will be able to access criminal record information on individuals ‘when the role justifies it’ (HM Government 2012: 3). Registration, continuous monitoring, and a minimum age requirement of 16 years when submitting for a Criminal Records Bureau check are applicable. The changes were operationalised through the Protection of Freedoms Act 2012.

Sexual offences, particularly those committed by children, vary according to their level of seriousness. Those involving sexual exploration, consensual sex with peers, and ‘sexting’ do not necessarily predict sexual offending as adults, and are still being fully explored in respect to the appropriateness and adequacy of criminal laws (LRC 2013). Youth advocates (including the National Children’s Commissioner) have argued that taking juvenile charges into account,
including crimes against other children, is discriminatory and life-limiting (cited in Jacobsen 2012b). There are particular concerns about the rapid growth of ‘sexting’ and the electronic distribution of nude or provocative images of oneself or another person, taken with or without their consent (Crofts & Lee 2013). Young people involved face serious consequences if convicted and placed on sex offender registers, excluding them from working with children and a range of other adverse consequences in the future (ABC Radio National, Law Report 2012; Jacobsen 2012b).

Child sex offenders have been found to have diverse criminal histories. Most adult child sex offenders have prior convictions for offences including theft, personal violence, burglary, traffic, and drug offences (Smallbone et al. 2008). Therefore, careful consideration of criminal records, particularly violent offences is warranted. The context of the offence and current circumstances are also relevant. The person’s age and life circumstances, their relationship with the victim, and legal and moral constructs around particular crimes at different times in history must be considered. The assumption behind checking criminal history is that the applicant’s past behaviour indicates they are likely to pose a future risk to children. However, the accuracy of such risk assessment is limited. This leads to false negatives: people who will not reoffend being denied approval to work with children because of past offences; and people who have never harmed children being denied approval because of offences against adults. Each jurisdiction has its own risk assessment framework, which means interpretations of individuals’ histories and thresholds for decision-making about suitability for employment are different. Jurisdictions assert internal consistency in decision-making while reportedly working towards a ‘nationally consistent decision-making framework for applicants who have returned a criminal history to guide decisions about suitability for employment’ (FaHCSIA 2011: 2). However, an audit of cases in four NSW screening agencies using the Applicant and Workplace Risk Estimate tool to assess the level of risk a person poses to children found that there were inconsistencies in decision-making about the risks associated with relevant criminal history (NSW Audit Office 2010: 17–18). Likewise, there have been several cases in Queensland of applicants being denied approval and subsequently having these decisions overturned on appeal, demonstrating the variability and lack of agreement possible in such risk assessment (for example, Keim 2012).

Working with children checks have a disproportionate effect on Aboriginal and Torres Strait Islander people because of their disproportionate involvement in the criminal justice system. In 2010, Aboriginal and Torres Strait Islander Australians were imprisoned at 14 times the rate for non-Indigenous Australians, and Aboriginal and Torres Strait Islander young people were detained at 23 times the rate of their non-Indigenous counterparts (SCRGSP 2011: 24). This may have the downstream effect of discouraging applications and making many ineligible to work or volunteer in certain areas, including as foster carers. A submission to the Queensland Child Protection Commission of Inquiry argued for more flexibility in interpreting history about past alcohol and violence-related offences in now dry (alcohol-free) communities in remote
Queensland, because such offences—not necessarily involving a child victim—can lead to people being excluded from approval as kinship carers for children in their extended family (Bravehearts 2012). Research on promising practices in out-of-home care for Indigenous children across Australia found that ‘[o]ne of the most significant deterrents in relation to assessment for Aboriginal and Torres Strait Islanders’ willingness to become foster carers was the need to undergo a police check’ (Bromfield et al. 2007: 4). Ensuring connections to family, community and culture is central to meeting the needs of Aboriginal and Torres Strait Islander children in contact with child protection agencies today (SNAICC 2013). Placing children with kin and extended family in accordance with the Aboriginal and Torres Strait Islander Child Placement Principle is fundamental to these connections, so careful consideration and contextualised interpretation of criminal histories is required.

**Costs**

The costs of administering working with children checks are not reported, but must be considerable. First, there are budget allocations to administering agencies. Tens of thousands of people apply for initial checks, renewals or exemptions each year, and in some jurisdictions, resources are also directed to monitoring card holders’ eligibility. Second, there are costs to organisations that must comply with the schemes. For example, every semester Australian universities offering professional degrees in teaching, nursing, social work and many other disciplines are processing hundreds of applications for working with children checks. And while the checks regulate particular categories of employment, there are many workers and volunteers who are very unlikely to have direct contact or be alone with child service users, particularly a child presenting without a family member. Examples include board members, management and administrative staff of child-related organisations. Third, there are cost duplications involved in state and territory-based schemes. Currently a person denied clearance in one state can apply in another. The ongoing monitoring of the status of these histories and associated transaction costs between authorities also adds to the overall cost of regimes. Reducing costs is part of the impetus to developing a national approach. There are also time and financial costs to individuals and their employers of initial applications and renewals, with workers across jurisdictional boundaries subject to multiple schemes. Moreover, costs associated with working with children checks include screening people beyond legal requirements. Organisations seek to demonstrate their child safety credentials and require persons to obtain clearance, even where this is not required by law. This imposes direct and indirect costs for those organisations as well as for taxpayers. The NSW Auditor-General’s review found that over 22 per cent of applications were from people who did not actually work or volunteer in regulated child-related employment and that there were no mechanisms in place to identify whether a check was required (NSW Audit Office 2010: 11). If an application is received, it is processed. Despite community education by scheme administrators, misunderstandings remain,
particularly about volunteers—including parents, for activities at a child’s school—and whether and under what circumstances they are legally obligated to hold a clearance.

**Conclusion**

The scope of the screening regimes—screening everyone undertaking any work with children, both voluntary and paid, as well as others who are not required to be screened—is too big and too expensive to be sensible. The original driver of child sexual abuse has been surpassed by a broader notion of the risks to children. The strike rate is low, and organisations cannot rely on the checks as a safety measure. There is a personal toll for an individual unfairly restricted in employment, and financial costs to the community. There are equity concerns that relate to (a) civil liberties and the rehabilitation of offenders; (b) taking charges and convictions as a juvenile into account; and (c) the disproportionate effect on Aboriginal and Torres Strait Islander people. These can be considered an indirect social cost of the schemes. Moreover, the lack of consistency and transparency in decision making highlights the problem of performance ambiguity. It is not straightforward that those who are denied clearance are a threat to children, or that the checks achieve their stated goal of making children safer. A better balance is needed between routine criminal history checks and other mechanisms for identifying and monitoring the risks posed to children by employees and volunteers in organisational settings. First, the scope of screening should be restricted: for example, giving employers discretion to decide which roles require people to be screened; excluding children from screening requirements; excluding people who do not work unsupervised with children from screening requirements; and processing applications only from people who are within the legislated scope of screening regimes. Second, the types of offences taken into account should be reviewed, because the more categories of offences deemed relevant, the greater the likelihood of predictive error. Third, there should be additional mechanisms and resources for organisations to manage risks, such as information and training for service providers about how to monitor employees’ work with children, and guidance regarding what action to take when they are concerned about the behaviour of an employee or volunteer. Organisations could also be assisted to evaluate their risk policies and procedures to ensure they are adhered to. Finally, the assessment practices of the regulators should be audited to ensure prudent, fair and consistent decision-making.

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