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TECHNICAL
BULLETIN

HOW TO IDENTIFY VULNERABLE CLIENTS

Is a client vulnerable? At first glance this appears to be a fairly straight forward question to answer. And advisers should already have an existing approach in place for helping individuals they assess as vulnerable. But is it always so easy to spot a vulnerable person? This technical bulletin examines what defines vulnerability in clients. It may offer up a few surprises. It might also prompt a review of existing approaches towards client interaction and changes to advice processes.

Vulnerability is a complex area. This bulletin aims to summarise some of the key indicators of vulnerability. It also highlights some of the risks and benefits of working with vulnerable clients, and ways of supporting them effectively. We consider people seeking advice in retirement who might fall into this definition.

Defining vulnerability

A common misconception is that a vulnerable client is simply someone experiencing the frailties that often occur with advanced ageing.

The FCA define a vulnerable consumer as: 'Someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care'.

To add some context to this broad definition, it means vulnerability can:

- be either physical or mental;
- include a short-lived, longer term or permanent condition;
- cover an emotional or financial shock (for example, bereavement or a drop/loss of income); and
- include more than one element (be multi-layered) and can fluctuate over time.

This definition suggests vulnerability can affect anyone, and can impact numerous clients seeking (or in receipt of) financial advice. In many cases, there's an element of subjectivity for whoever is attempting to make an assessment.

There is no expectation that advisers must act as medical professionals when dealing with clients. However an awareness of some of the indicators that may cause someone to be treated as vulnerable is required.

Why an awareness of potential vulnerability matters

Potential vulnerability is more widespread than many imagine:

- Only one in seven adults has literacy skills expected of a child aged 11 or below.
- Just under half of UK adults have a numeracy attainment age of 11 or below.
- Almost half of adults don't have enough savings to cover an unexpected bill of £300.
- Dementia affects one in six people over 80.

It therefore makes sense and demonstrates best practice to have an awareness and understanding of the issues surrounding vulnerability. Indeed failure to correctly manage a vulnerable client can result in reputational damage and complaints.

Vulnerability is a topic the FCA are concentrated on. In the FCA's Decision Procedure and Penalties Manual (DEPP) under DEPP 6.5A.2 (calculation of enforcement fines), it states: 'In deciding which level is most appropriate to a case involving a firm, the FCA will take into account various factors, [including]...whether the breach had an effect on particularly vulnerable people, whether intentionally or otherwise...'

The FCA are not alone in their focus on this topic. For example, the Law Society of England and Wales, the Local Government Association, the NHS, and a number of charities are amongst a number of organisations who have a wide definition of a vulnerable person. They publish a range of policy and guidance notes in order to help them discharge their responsibilities.

Having recognised there is a need to be conscious of potential vulnerability, how can an adviser begin to identify it fully?

Identification of vulnerability

Many organisations (including the FCA and Citizens Advice) suggest vulnerability is identified by understanding risk factors. Below are some risk factors which could point to vulnerability.

Risk indicators (not an all-inclusive list)

These may include:

- low literacy, numeracy and financial capability skills;
- heavy reliance on others for support/care;
- communication difficulties (for example, English not being a first language or limited speech);
- physical disability/brain injury;
- severe or long-term illness (for example, cancer);
- mental health problems;
- dementia/loss of mental capacity;
- low income and/or debt;
- caring responsibilities (including operating a power of attorney);
- advanced age (can be associated with the onset of ill health, a deterioration in hearing and/or sight, a weakening in cognitive ability or reduced dexterity or not being comfortable with new technology);
- being young (associated with less experience); and
- change in circumstances (e.g. bereavement, divorce, job loss).

Any adviser who when working with other professionals is able to articulate their own comprehensive and coherent approach to dealing with the vulnerable will demonstrate integrity and potentially enhance their reputation. This can help build connections with solicitors specialising in divorce and ease interactions with a local authority when working with those needing long-term care. This could also increase the chance of referrals.

It's easier to spot potential vulnerability in some people than it is with others. For example, someone with a physical/sensory disability. Other risk factors might be hidden and can only be identified following more in-depth client interaction. (This could include identifying a long-term illness where asking appropriate questions allows a client to explain their medical background.)

It's important that advisers feel confident about being able to openly and effectively discuss risk factors with a client. Doing this will help make sure a client's needs can be met.

Before meeting a client it's worth thinking about the following:

- how long a meeting should last;
- which location a meeting should take place in;
- what time of day a client can be seen; or
- suggesting the inclusion of a third party to support them.
  - Care is needed here. An adviser should consider potential conflicts of interest. For example, a child coming along for a care meeting could also be a beneficiary under the will.

Mental capacity

An issue that later life planners will often encounter is that of a client's mental capacity.

The framework for assessing mental capacity in England and Wales can be found in the Mental Capacity Act (MCA) 2005. This makes clear that there should be an initial presumption that an adult has the capacity to make decisions. And that it has to be established that someone lacks mental capacity.

Section 2 MCA 2005 states:

1. For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
2. It does not matter whether the impairment or disturbance is permanent or temporary.

3. A lack of capacity cannot be established merely by reference to:
   a. a person's age or appearance, or
   b. a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

In this context, the ability to make decisions is to be treated as both 'decision' and 'time' specific. This means a client may be able to make a simple decision (for example, paying a bill). But they may not be able to make a complex one, or one that carries significant risk (for example, considering the implications presented in a drawdown review).

According to section 3 of the MCA, someone is considered to be able to make the decision required of them if they can:

- understand the information relevant to the decision;
- retain this information;
- use or weigh up the information in the decision making process; and
- communicate their decision.

This can be a complex assessment and documenting how it's approached is crucial. Good practice might include developing separate client documentation (such as a specific questionnaire) to capture these considerations.

A decision on whether someone has the mental capacity to act or not can sometimes rest with an adviser. There are various techniques that can be used to check on (and aid) powers of recollection. For example, the adviser could ask about a client's family background or their career history. They could also ask questions about current or historical events. Recording the answers in the client's own words and reviewing them at subsequent meetings will help test this over time.

The complexity of a decision on whether a client has sufficient mental capacity can be very evident where an adviser is asked to provide estate and Inheritance Tax (IHT) planning that involves lifetime gifting.

A client may have sufficient mental capacity to make several small gifts to grandchildren, but a higher level of comprehension would be required to decide on something more complex, such as whether to use a discounted gift trust.

A related consideration is that of 'undue influence' in respect of any lifetime gift. This is where someone (who has capacity) is placed under such pressure to act in a certain way that their free will is compromised. A flag should be raised where a gift is being made to someone in a position of trust and this feels out of place. For example, an adviser receives a request to facilitate the payment of an uncrystallised fund pension lump sum to a client's doctor.

In some circumstances assessing mental capacity may involve the need to draw on other professionals such as a solicitor, medical practitioner, social worker or psychologist. Having indicators as to when such a referral might be needed as well as having existing professional connections to facilitate a referral will benefit both adviser and client.

Where it's been demonstrated that capacity is lost, the adviser should consider whether there is a Lasting Power of Attorney or Enduring Power of Attorney in place. Or whether the appointment of a deputy needs to be considered, the details of which are beyond the scope of this technical bulletin.

What do you need to do?

Unlike capacity, many vulnerabilities don't have an obvious legal base to draw from. In these circumstances, what can be done? Below are some suggestions:

- Consider setting out a written approach to vulnerability.
- Review existing policies and documentation to ensure they reflect that policy.
- Seek feedback from clients on how to improve the services offered.
- Consider the role of third parties (for example, relatives, carers, attorneys/deputies) and their ability to provide instructions.
- Consider the merits of undertaking additional training to enhance understanding. This will also have the benefit of contributing towards Continuous Professional Development (CPD).
- Seek to build connections with other professionals, if additional support is required.

Conclusion

We've only highlighted some of the many ways vulnerability can present itself. It's a complex and wide ranging topic that should be incorporated as part of the advice process to ensure an effective review of a client's needs.

On page 4 you will find a draft aide memoire to help advisers formulate their thoughts towards vulnerability. This can be considered against any existing guidance that advisers use. Vulnerability is a fluid state and affects everyone differently. This necessitates a flexible tailored response, something advisers are well placed to deliver.

You can find more information at:

- FCA (FCA.org.uk and search for 'occasional paper no.8 Consumer Vulnerability').
- Law Society of England and Wales (lawsociety.org.uk and search for 'Meeting the needs of vulnerable clients').
- Law Society of Scotland (lawscot.org.uk).
- Law Society of Northern Ireland (lawsoc-ni.org).
- Citizens Advice (citizensadvice.org.uk and search 'vulnerability').
- Alzheimer's Society – (alzheimers.org.uk and search for 'Dementia Friendly Financial Services Charter').
- Office of the Public Guardian (gov.uk and search for 'OPG').

Vulnerable client aide memoire	
Policy	• I have considered how I assess clients against my vulnerability policy. • I'll actively seek to encourage disclosure about potential vulnerability. • I've reflected my approach in an appropriate way in my documentation. • I've discussed my approach with colleagues/other professionals.
Client	New: • I've considered what, if any, additional information I should be gathering when providing advice in the first instance. • I've sought to understand any unusual aspects – for example why someone else is accompanying a client? I'm aware of the potential for any conflict of interest or undue influence. • I understand who my client is and the extent of the instructions I am able to act on (for example, under a power of attorney). Existing: • I've considered whether the client is acting differently/showing signs of a change of character. • I have a set of questions to check client memory recollection (if required). • If working with more than one person, I'm aware of the potential for any conflict of interest or undue influence. • I've confirmed any change in circumstances which might lead to vulnerability (for example, having to take on caring responsibilities).
Advice requirements	• Does the particular client need/objective align with what I'd expect to provide advice on? (For example, question why a client would be seeking to make gifts if there is an immediate debt due). • I've considered whether my normal advice process aligns to what this particular client needs. • I'm able to identify financial products that I believe are clear and easy to understand for those showing signs of vulnerability.
Presentation of information	• I've recognised whether there's a need to adjust the delivery and format (for example, provided a suitability report in large print). • I've sought to explain issues/solutions with a limited use of jargon.
Tailored approached	• I've taken the time to listen, to identify vulnerabilities, and will suggest that someone else forms part of the advice process and/or a referral to a specialist if appropriate. • I'm flexible around appointment locations (for example, at the client's home), times of the day and their duration. • I've considered the accessibility of my offices for those with health conditions/disabilities. • I've taken account of the complexity of the advice being delivered and made reasonable adjustments (for example, staggering the advice over several meetings and/or given greater time to reflect before execution).