

Dealing with Vulnerable Individuals

Aide Memoire for IPs

Introduction

1. Vulnerability is a complex area. This document aims to summarise some of the key indicators of vulnerability. It also highlights some of the risks of working with vulnerable debtors or other individuals involved in an insolvency such as directors or creditors, and ways of supporting them effectively. For ease of reading the term 'client' is used in this document to refer to such individuals.
2. People with mental health problems are three times as likely to be in financial difficulty. It is, therefore, likely that a proportion of the clients with whom you are dealing will be experiencing such difficulties. Insolvency practitioners have the power to impact the financial and emotional wellbeing of clients by improving awareness of these issues amongst front line staff by introducing settings and processes that help and direct clients with mental health problems to appropriate sources of advice and assistance.

Defining vulnerability

3. A common misconception is that vulnerability is really only associated with the frailties that often occur with advanced age.

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'.

4. This 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.

5. This definition suggests vulnerability can affect anyone and can impact numerous people seeking (or in receipt of) insolvency advice or involved in an insolvency procedure. In many cases, there will be an element of subjectivity for whoever is attempting to make an assessment.
6. The IPA, therefore, considers that in order to demonstrate best practice, IPs and their staff need to have an awareness and understanding of the issues surrounding vulnerability. Now there is an increasing awareness of vulnerability, failure to correctly manage interactions with a vulnerable person can result in reputational damage and complaints.
7. There is no expectation that insolvency practitioners should act as medical professionals when dealing with clients. However an awareness of some of the indicators that may cause someone to be regarded as vulnerable and treated accordingly is required.

Identification of vulnerability

8. Many organisations (including the FCA and Citizens Advice) suggest vulnerability is identified by understanding risk factors. **Appendix A** sets out some risk factors which could point to vulnerability.
9. Clearly some of the risk indicators are easier to identify than others, for example, someone with an obvious physical/sensory disability. Other risk factors might be hidden and can only be identified following more in-depth personal interaction. (This could include identifying a long-term illness where asking appropriate questions allows a client to explain their medical background).
10. It is important that IPs and their staff feel confident about being able to openly and effectively discuss risk factors with a client as this will help make sure their needs can be met.

Mental capacity

An issue that IPs will often encounter is a concern about a client's mental capacity.

11. The framework for assessing mental capacity in England and Wales can be found in the Mental Capacity Act (MCA) 2005. This sets out 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. Further considerations are set out in **Appendix B**.

What do you need to do?

Policy considerations

12. Many vulnerabilities don't have an obvious legal framework to which you can refer. In these circumstances, you may wish to:
 - 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 information.

- 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.

Procedures

13. As this is a complex area it is difficult to provide a simple checklist of procedures to follow to address the issues raised. We hope that the factors outlined in this document will assist IPs with identifying circumstances where consideration of vulnerability may become an important factor in dealing with an insolvency case.
14. The key practice to adopt is to document the reasons for your decisions in conducting the insolvency and explain the factors you have taken into account. From a regulatory perspective this will go a long way to demonstrate that you have acted with due care and competence.

Communication tips

15. Be aware that when dealing with potentially vulnerable people you may need to change the means or style of your communications with them. Consider accessibility of documents or website information in terms of font size and design, and the contrast and clarity of any graphical elements. For telephone or spoken communication think about the volume, speed and pitch of what you say.

Written or printed communications

- Plain English
- Non English language versions
- Font design & size (at least 12 or 14 point and sans serif)
- Colour or black and white
- Contrast and clarity of graphics

Telephone tips

- Speak clearly
- Speed - neither too fast nor too slow
- Volume - neither too loud nor too quiet
- Plain English
- When you think you've finished don't put the 'phone down first

Other considerations

16. Many people with mental health problems rely on a trusted friend or carer to help them with their finances. But, without proper systems in place, they can put both parties at risk of abuse or harm.
17. During periods of poor mental health, many people struggle with certain forms of communication. Some clients need help face to face, while others find even phone contact too overwhelming, and prefer email or webchat. Let the clients tell you how they prefer to be

contacted and don't assume phone contact is possible when people are unwell. People with memory difficulties can also benefit from being sent a summary note of any phone calls with you or your staff.

18. During a mental health crisis - as in other emergencies - people may not be able to manage their affairs and may be hard for IPs to contact. If there are concerns that such circumstance might arise, IPs are recommended to take a systematic approach to collecting clients' emergency contact details. It may also be appropriate to seek authorisation to enable IPs to talk to NHS or social care professionals.

Conclusion

19. We have only highlighted some of the many ways vulnerability can present itself. It is a complex and wide-ranging topic that should be incorporated as part of the insolvency process to ensure an effective response to it when it arises.

Appendices

- A. Identification of vulnerability
- B. Mental Capacity
- C. Further information – Guidance and law

Vulnerable Individuals Guidance – Identification of Vulnerability

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 exhaustive 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;
- addiction problems
- low income and/or debt;
- caring responsibilities (including operating a power of attorney);
- being old (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 inexperience); and
- change in circumstances (e.g. bereavement, divorce, job loss)

Clearly some of the risk indicators are easier to identify than others, for example, someone with a physical/sensory disability. Other risk factors might be hidden and can only be identified following more in-depth personal interaction. (This could include identifying a long-term illness where asking appropriate questions allows a client to explain their medical background).

Potential vulnerability is more widespread than many imagine¹:

- One in seven adults has literacy skills expected of a child aged 11.
- Just under half of UK adults have a numeracy attainment age of 11.
- Almost half of adults don't have enough savings to cover an unexpected bill of £300.

¹ Source FCA Occasional Paper No 8 – *Consumer Vulnerability*

Vulnerable Individuals Guidance – Identification of Vulnerability

- Dementia affects one in six people over 80.

Signs that an individual may be in a 'Vulnerable Circumstance'

Is the individual:

- Asking irrelevant and unrelated questions, or displaying signs of forgetfulness?
- Unable to read and understand the information they are provided with, or asking for it to be continually repeated?
- Responding in an irrational way to simple questions?
- Saying 'yes' or 'no' at times showing that it is clear they haven't understood?
- Taking a long time or displaying difficulty in responding to simple questions or requests for information?
- Repeating simple questions such as 'who are you', and 'what do you want'?
- Wandering off the subject at hand and making incongruous statements?
- Saying that they are not well or not in the mood to continue?
- Displaying signs of ill-health like breathlessness or making signs of exasperation or discontent?
- Giving a statement such as 'I don't usually do things like this, my husband/wife/son/daughter takes care of it for me?'
- Indicating in any way that they are feeling rushed, flustered, or experiencing a stressful situation?

How to identify vulnerable clients

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 Individuals Guidance – Mental capacity

How can I know whether someone has ‘mental capacity’?

There is a two-tier test for assessing this.

Part 1:

- a) Does the person have an impairment of, or a disturbance in the functioning of, the mind or brain? – Have they told you this?
- b) Does the impairment or disturbance mean that the person is unable to make the specific decision at the time that it needs to be made?

Part 2:

Can the person:

- a) Understand the information relevant to the decision,
- b) Retain that information,
- c) Use or weigh up that information as part of the process of making the decision, or
- d) Communicate his or her decision (whether by talking, using sign language or any other means)

If someone cannot undertake any one of these four aspects of the decision-making process, then he or she is unable to make an informed decision.

These tests are underpinned by the legal framework set out in the Mental Capacity Act 2005 (MCA 2005)

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 an individual 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 discussion about realising an interest in the matrimonial home).

Vulnerable Individuals Guidance – Mental capacity

Under section 3 of the MCA, someone is considered to be unable to make the decision required of them if they cannot:

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

A person is not to be regarded as unable to understand the information relevant to a decision if they are able to understand an explanation of it given to them in a way that is appropriate to their circumstances (using simple language, visual aids or any other means).

The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent them from being regarded as able to make the decision.

The information relevant to a decision includes information about the reasonably foreseeable consequences of

- a) deciding one way or another, or
- b) failing to make the decision.

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

It may fall to the IP to make a decision on whether someone has the mental capacity to act or not. Using techniques such as asking questions about current affairs and historic events, discussing family background and a previous career can help assess recollection. Recording the answers in the client's own words and reviewing them at subsequent meetings will help test this over time.

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 the IP and the client.

Where it has been demonstrated that capacity is lost, the IP should consider whether there is a Lasting Power of Attorney or Enduring Power of Attorney in place. Or whether the appointment of a deputy under S16 MCA 2005 needs to be considered. These matters are beyond the scope of this document.

Vulnerable Individuals Guidance – Further information

Guidance and Law

- FCA Guidance – Consumer Vulnerability

<https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf>

- Mental Capacity Act (MCA) 2005: Code of Practice

www.gov.uk/government/publications/mental-capacity-code-of-practice

- Charities (Protection and Social Investment) Act 2016

www.gov.uk/government/news/charities-act-2016-new-fundraising-rules

- Equality Act 2010: Defining Disability

www.gov.uk/definition-of-disability-under-equality-act-2010

Training

- Samaritans – Conversations with vulnerable people

www.samaritans.org/for-business/workplace-training/communication-training-courses/course-vulnerablepeople