

Consultation Response

Guidance on the fair treatment of vulnerable consumers

October 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Financial Conduct Authority's consultation on guidance for firms in the fair treatment of vulnerable consumers. Although the committee does not consider itself best placed to address many of the questions being asked in this consultation, we have the following comments to put forward for consideration.

Consultation questions

Q1: Do you have any comments on the aims of the draft Guidance?

We support the aims of achieving overall improvements to the treatment of vulnerable consumers and embedding good practice in the culture of firms.

Q2: Do you have any comments on the application of the Guidance or its status as non-Handbook guidance?

No comment.

Q3: Do you have any comments on the distinction between actual and potential vulnerability (Annex 1, Section 1)? (Please note we are not seeking views on the meaning of vulnerable consumer because we have consulted on that previously.)

We agree that the scope of vulnerability can be difficult to identify and define, and we support an approach that recognises that many, if not most, individuals may experience vulnerability at some stage in their lives and that vulnerability may change depending on circumstances.

Q4: Do you have any comments on our view of what firms should do to understand the needs of vulnerable consumers (Annex 1, Section 2)?

Q5: Do you have any comments on our view of what firms should do to ensure staff have the necessary skills and capabilities when engaging with vulnerable consumers (Annex 1, Section 3)?

We would address questions 4 and 5 together.

In addition to increasing awareness of vulnerability and improving the ability of staff to identify vulnerability when engaging with individuals, it is also important to ensure that this does not lead to discrimination, for example by refusing to transact. We note that the FCA's position is that it is approaching this issue from the perspective of consumer protection, not equalities and non-discrimination, but we suggest that it would be helpful to include the principles of non-discrimination in this guidance, as the issues do interrelate.

We suggest that it would be helpful for firms and their staff to be aware of the range of support mechanisms that may be in place for vulnerable individuals, including powers of attorney, guardians, and advocates, beyond the limited acknowledgement in the draft guidance that there may be mechanisms allowing third party access.

Q6: Do you have any comments on our view of what firms should do to translate their understanding of the needs of vulnerable consumers into practical action on product and service design, good customer service and communications (Annex 1, Section 4)?

No comment, beyond the general point that it would be good practice for all staff with any customer interface or involved in product and service design to receive training in relation to disabilities and other vulnerabilities, always inclusively orientated towards supporting and enabling customers and potential customers with difficulties of any kind resulting from disabilities or vulnerabilities, and never towards excluding them from full access to services 'on the same basis as others' (in the words of the United Nations Convention on the Rights of Persons with Disabilities, ratified by the United Kingdom). Training should include an understanding of relevant voluntary and involuntary measures to enable support to be provided to ensure full and appropriate access to relevant services.

Q7: Do you have any other comments on the draft Guidance?

The draft guidance does not currently adequately address the differences between the different jurisdictions of the UK. The draft guidance approaches things from the perspective of England & Wales, and merely acknowledges that there are 'variants' in third party access mechanisms in Scotland and Northern Ireland. There are some particularly significant and relevant differences in Scots law, including that in Scotland, a contract made by an individual without capacity is void, whereas in England & Wales it is voidable, and relevant techniques available in Scotland but not in England & Wales. An example is Scotland's adult support and protection legislation.

Q8: Do you have any comments on how firms are expected to use and apply the Guidance?

No comment.

Q9: Do you have any views on the extent to which the Guidance will enable firms to comply with their obligations under the Principles and achieve better outcomes for vulnerable consumers?

No comment.

Q10: To inform our cost-benefit analysis, do you have any comments on what costs firms may incur as a result of this Guidance?

No comment.

Q11: Do you have any examples of activities or processes that are in place, or could be established, to ensure the fair treatment of vulnerable consumers?

The Law Society of Scotland's own Vulnerable Clients Guidance was produced to support solicitors engaging with clients and prospective clients who may lack full capacity for the purpose of instructing a solicitor or carry through specific acts or transactions, or who may be subject to undue influence.¹ This

¹ Law Society of Scotland, [B1.5 Vulnerable Clients Guidance](#). Note that this guidance is currently being updated.

guidance has been referred to by other organisations and, for example, formed the basis of similar guidance subsequently prepared for England & Wales.

Q12: Do you have any analysis you could share with us of the positive outcomes for vulnerable customers resulting from the implementation of activities or processes in place aimed at achieving better outcomes for vulnerable consumers?

No comment.

Q13: Do you have any comments on the role of the Guidance in holding firms to account about how they comply with their obligations under the Principles in treating vulnerable consumers fairly?

No comment.

Q14: Do you have any comments on our intention to monitor the effectiveness of the Guidance?

We support the proposal to monitor the effectiveness of the guidance in order to provide an evidence base for any future development or adjustment of the guidance.

Q15: Do you have any comments on the potential additional policy options?

No comment.

Q16: Should we consider any further additional policy options?

No comment.



Q17: Do you agree that proposing to issue guidance is the most effective means of achieving our aim at this stage?

The issuing of guidance, and through it the encouragement of good practice, is generally an appropriate first step, and with monitoring and evaluation can help identify the potential need for, and value of, other measures.

Q18: What are your views on whether proposing new rules or guidance at this stage would add to the effectiveness of our intervention? Where possible, please provide supporting evidence for your answer.

No comment.

For further information, please contact:

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