



# Recognising and responding to consumer vulnerability

A guide for legal services regulators

October 2014

## Consumer challenge



# About Consumer Challenge

Our Consumer Challenge series is designed to create a space for fresh thinking where the Legal Services Consumer Panel can stimulate debate, question the received wisdom and propose new solutions to old policy issues. These documents do not necessarily represent the Panel's final policy position, but instead allow us to test ideas and spark discussion.

Other publications in the series:

- Legal Education and Training Review
- Third party complaints
- Empowering consumers – Phase One report to the Legal Services Board
- Risk and responsibility
- Breaking the maze: Simplifying legal services regulation
- The consumer interest
- Remapping consumer redress

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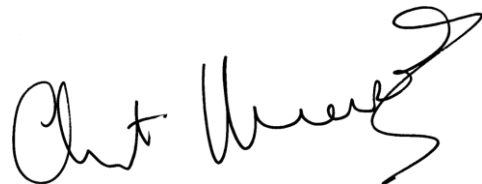
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# 1 Foreword

## Standards matter

- 1.1. A lot of effort goes into their creation but unless business and users take them on board consumers are no better off. For standards to have a real and positive impact not only should all stakeholders be involved in their creation, addressing all key consumer issues, but they must also be taken up, understood and used by all concerned.
- 1.2. BS 18477 matters to consumers because when dealing with service providers and regulators it offers protection to consumers who may be vulnerable due to a physical disability, mental health issue, loss of a job, bereavement or a relationship breakdown putting them at a disadvantage. This inclusive service standard helps organisations to identify consumers in vulnerable circumstances and to provide the appropriate service regardless of their health, age or personal circumstances.
- 1.3. If we lived in an ideal world all services would include the following principles from the standard:
  - Good quality customer service and complaints handling
  - Accessibility of services and fair treatment of all consumers regardless of age, disability or personal circumstances
  - Protection of personal information
- 1.4. But as chairman of the BSI Consumer and Public Interest Network I am aware that not all service providers follow these principles. Therefore I welcome the production of this guide to help legal services regulators identify, understand and respond effectively to consumer vulnerability.
- 1.5. It sets out very clearly a series of practical steps, case studies and check lists which will help those regulators incorporate best practice into their everyday work.

- 1.6. I am sure it will enable legal services regulators to identify, understand and respond to consumer vulnerability effectively and consistently. To enhance the support provided to staff and improve their well being and confidence when dealing with customers, thereby ensuring improved access to justice.

A handwritten signature in black ink, appearing to read 'Christine Heemskerk', with a stylized flourish at the end.

**Christine Heemskerk**  
**Chairman of the Consumer and Public Interest Network**  
**British Standards Institute**

## 2 Introduction

### Why consumer vulnerability matters

- 2.1. This document aims to provide a practical guide to help regulators identify, understand and respond effectively to consumer vulnerability. It is a companion piece to our recent consumer principles paper,<sup>1</sup> particularly expanding on the principles of access and fairness. It is based on the British Standard on Inclusive Service Provision (BS18477) which we have translated into a legal services setting.
- 2.2. Addressing vulnerability really matters in legal services. The very essence of civil society is that all citizens are protected from the illegal actions of others and/or the state and lawyers have a central role to play in securing accessibility of the law.<sup>2</sup> If citizens cannot access the law they will not be able to secure justice. Every time someone is not able to obtain legal advice because of cost or other barriers the rule of law is undermined.

*“[Taking legal advice]... has been ‘the only way we’ve been able to get any joy or any action.’”*

Norah Fry Research Centre, ‘What happens when people with learning disabilities need advice about the law’, July 2013

- 2.3. The rule of law may also be undermined if consumers cannot use legal services effectively. Using a lawyer is seen by consumers as a special case, often dealing with life-changing events. Our research shows consumers feel vulnerable and

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<sup>1</sup> Legal Services Consumer Panel, *The Consumer Interest*, January 2014, <http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/UsingConsumerPrinciples2014.pdf>.

<sup>2</sup> See <http://www.biicl.org/bingham-centre/about-us>.

recognise they have limited knowledge.<sup>3</sup> Getting a divorce, buying a house, writing a will, dealing with probate, making accident or injury claims, or trying to resolve housing or employment disputes are all important events in people's lives. Good advice can make a huge positive difference.

- 2.4. In short, people are often at their most vulnerable when needing legal support but also feel vulnerable when dealing with lawyers. However, it is possible to reduce consumer vulnerability and this objective is at the heart of the guide.

### Why this is a regulatory issue

- 2.5. Addressing consumer vulnerability is central to the regulatory framework and wider equalities and consumer protection laws.
- 2.6. One of the eight regulatory objectives of the Legal Services Act is improving access to justice. The regulatory objectives relating to promoting and protecting the consumer interest, increasing public understanding of the citizen's legal rights and duties, and a diverse workforce are also relevant. These objectives are framed in a way that seeks active improvement by the regulators. The Legal Services Board oversees this work through its programme of regulatory standards self-assessments. The criteria underpinning these include effective risk analysis that "focuses predominantly on consumer detriment, including those in vulnerable circumstances."
- 2.7. Another impetus is the Legal Education and Training Review which identified knowledge and skills gaps in terms of communication and equality and diversity. The report recommended integrating equality and diversity training into both initial and continuing education.

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<sup>3</sup> Vanilla Research for the Legal Services Consumer Panel, *Risk and the Role of Regulation*, January 2013, p. 17.

- 2.8. In relation to general law, firms have a legal duty to make reasonable adjustments to allow disabled people to access their services under the Equality Act 2010. There are all sorts of common sense adjustments which can be made to make access easier for different groups of people.
- 2.9. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), also address consumer vulnerability. These tackle unfair practices which distort the economic behaviour of consumers. Although the CPRs typically target the behaviour of the 'average' consumer, if the practice is directed towards a clearly identifiable group then the average consumer within this group is the target of the regulations. Another provision targets a clearly identifiable group of consumers who are particularly at risk due to 'mental or physical infirmity, age or credulity'. An example of this would be a product which seeks to target and exploit elderly consumers.
- 2.10. Lawyers' codes of conduct set out duties in respect of equality and diversity which underline their importance and supplement these basic legal requirements.

### What regulators can do

- 2.11. It is ultimately the responsibility of lawyers and law firms to adjust their practices to enable vulnerable consumers to use legal services effectively and to ensure they comply with the law. It is important to set out at the start that we recognise the environment in which lawyers operate can be challenging at times. It is precisely because the environment is challenging that lawyers and law firms must work harder than most to adapt. Sometimes a small change can make a big difference, for example checking with support staff in courts to see that a client will have someone to go to the courtroom with them or sending a short follow-up email summarising key points of a meeting.
- 2.12. Having said that, this guide focuses specifically on what regulators can do. We would like regulators to identify, understand and respond to consumer vulnerability effectively and consistently and to embed this throughout their regulatory approach. This in turn should reinforce the behaviours of those they regulate. We believe that



the legal regulators have a responsibility to do this, and we hope this guide will provide a framework which individual regulators can build upon in their individual areas. We would like to see:

- Regulatory policy making which takes account of the interests of vulnerable consumers and measures the likely impact of options on different groups. This can be achieved through direct and indirect consumer engagement, use of frameworks such as this guide and via equality impact assessments;
- Carrying out the core regulatory functions, including through training, codes of conduct, risk assessment, supervision and enforcement so that ultimately this will translate into law firms and lawyers acting in an inclusive and accessible manner;
- Providing services to the public by dealing sensitively and effectively with vulnerable customers with whom regulators have (or potentially have) direct contact, for example victims in misconduct cases.

2.13. The guide concludes with some examples of good practice from legal services, as well as from other sectors which could potentially be transferred to legal services, and checklists to help regulators incorporate good practices into their everyday work. It is illustrated throughout with quotes and statistics (many from the Panel's own research) which underline the key points.

# 3 Defining vulnerability

## Our approach

- 3.1. In 2012 the Panel adopted the British Standard on Inclusive Service Provision (BS18477) to help us to define consumer vulnerability. We have followed the British Standard in developing this guide and thinking about what it means to be a vulnerable consumer in legal services.
- 3.2. There are various definitions of consumer vulnerability and we have included some other examples used by regulators in different sectors in an annex. We think it would be helpful to have a shared language and approach around consumer vulnerability. One of the strengths of the British Standard is that many consumer organisations, disability organisations and charities contributed to its development. There is a momentum behind encouraging use of the British Standard across economic sectors and Citizens Advice recommended that the government should incentivise and encourage companies to adopt it.<sup>4</sup>
- 3.3. Key learning points in the British Standard include recognising vulnerability is dynamic, can be due to the characteristics of the market, the particular circumstances of the individual consumer, or a combination of the two. The actions of regulators and providers may also improve or worsen the consumer experience. As a report by Citizens Advice puts it:<sup>5</sup>

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<sup>4</sup> Jonathan Stearn in conjunction with Citizens Advice, *Tackling Consumer Vulnerability, an action plan for empowerment*, December 2012, p. 4.

<sup>5</sup> Citizens Advice, *Access for All*, March 2011, p. 5.

**“A shift in mindset is required...which requires service providers to ask not ‘What is wrong with this person?’ but ‘What is wrong with my service if this person cannot access it?’ ”**

Citizens Advice , ‘Tackling Consumer Vulnerability, an action plan for empowerment’, December 2012

- 3.4. It is also worth remembering that Peter Cartwright, who has written in depth on the topic of consumer vulnerability, reminds us that ‘vulnerable’ might not be the right label for the consumers in question “but it is a helpful shorthand to describe those consumers who are particularly susceptible to loss or harm”.<sup>6</sup>
- 3.5. The next two chapters follow the structure of the British Standard by describing the individual risk factors and market characteristics that are particularly relevant in the legal services setting.

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<sup>6</sup> Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation*, 2011.

## 4 Individual risk factors

- 4.1. At the heart of the British Standard is the concept of the 'risk factor'. Risk factors are defined as circumstances that could contribute towards making a consumer vulnerable. The presence of one or more risk factors could increase the likelihood of a consumer being at a disadvantage or suffering loss or detriment during a transaction or communication with an organisation.
- 4.2. In this section of the guide, we focus on factors relating to an individual's personal circumstances. The section after focuses on market characteristics and how these interact with the former. The table below expands on the list contained in the British Standard. In legal services individual risk factors may include:

**Table 1: Individual risk factors**

Age	Low income
Inexperience	Low literacy
Learning disabilities	Cultural barriers
Physical disabilities	Mental health issues
English as a second language	Health problems
Location	Being a carer
Lack of internet access	Leaving care
Lone parent	Bereavement
Loss of income	Relationship breakdown
Living alone	Release from prison

- 4.3. Some people's ability to participate effectively in the legal services market may be affected by certain individual characteristics. These can be short-term or long-term, might fluctuate over time, and may not be obvious at first glance. It is also important to recognise that not all the risk factors will be relevant all of the time.
- 4.4. A good example to take here is age. Older people may typically be described as more likely to be at a disadvantage. In many situations this may be true. However, in others, such as having the time to search for a good provider, this might not be the case at all. Older people can be well educated, savvy and have enough time to spend on the search. On the other hand a working age consumer, employed full time may well be more vulnerable to making a poor choice as they may be extremely time poor. Recent research by the Trading Standards Institute explains how everyone, including those not normally considered to be vulnerable, can fall victim to the most catastrophic scams.<sup>7</sup>

### Permanent vulnerabilities

- 4.5. Permanent or long-term characteristics could include for example: people who have learning disabilities or other permanent or long-term disabilities, those on a low income, people with low literacy levels, or communities which have cultural barriers to market participation. These characteristics can affect large numbers of people. There are currently an estimated 800,000 people in the UK who are severely or profoundly deaf, while the number of people with learning disabilities in England is estimated at around 1.2 million.<sup>8</sup>

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<sup>7</sup> See <http://tradingstandardsinstitute.wordpress.com/2014/08/04/are-we-all-potential-scam-victims/>.

<sup>8</sup> Emerson, Hatton, Robertson, Baines, Evison and Glover, *People with Learning Disabilities in England 2011* and <http://www.actiononhearingloss.org.uk/your-hearing/about-deafness-and-hearing-loss/statistics.aspx>.

*“I decided to start my own business.... I was in contact with three or four. The first one I contacted replied; so the second time I explained that I was Deaf. No reply since then. So I contacted the solicitor’s receptionist and she said she needed to talk to them before getting back to me. I was being ignored.”*

Deaf Studies Trust, ‘Legal Choices, Silent Process’,  
March 2012

- 4.6. Some people may need legal advice due to their personal circumstances. People with learning disabilities are statistically more likely to come into contact with lawyers than the general population because they are more likely to suffer harassment or bullying or be victims of crime. Yet the Panel’s research has found that too often lawyers do not take even basic steps to improve access for these groups of consumers. Similarly deaf consumers in our research described feeling like they were in a battle to be understood by their own advisor. While there are some lawyers who specialise in helping specific client groups, it’s important that all lawyers can identify and understand consumer vulnerability and adapt their services to meet people’s varied needs.

The Panel’s research found everyday tasks that people with a learning disability might find difficult include filling in forms, concentrating for long periods and remembering or explaining things. Legal services providers can take simple steps such as allowing extra time for meetings, finding a quiet space to meet without noise or distractions, and explaining things using clear and simple language.

Legal Services Consumer Panel Fact Sheet,  
*Consumers with Learning Disabilities*, July 2013

## Fluctuating vulnerabilities

- 4.7. People can be made vulnerable by transitory situations which are not necessarily obvious at first glance. Fluctuating characteristics might include mental health issues, English as a second language, health problems, location, or lack of internet access. The Panel’s research on immigration and asylum services, for example,

identified asylum seekers as a particularly at-risk group. This is partly because of the complexity of the asylum system, but can be exacerbated by problems such as the fact that often asylum seekers may not speak English as their first language and may be isolated in poor living conditions, sometimes without reliable phone or internet access. All these factors combine to increase vulnerability both to not being able to access advice and to receiving poor advice if they do achieve access.

One in four people in the UK will experience a mental health issue in the course of a year. Importantly mental health issues can come and go – it is possible to improve or recover. People who are suffering from mental health issues however may make poor choices and feel unable to take decisions. In the legal services context, it is important that lawyers are able to recognise this and make adjustments to ensure such consumers are supported.

### Short-term vulnerabilities

- 4.8. Short-term characteristics causing vulnerability could be things related to sudden changes in circumstances like loss of employment or income, bereavement, relationship breakdown, or caring responsibilities. These situations are often strongly linked to the legal services market – for example people who are getting divorced may well be using a lawyer to do so. Likewise someone with an employment dispute may be using a legal service to try to resolve this. However, these stressful situations may cause people to make poorer decisions than normal or feel less empowered than usual.

# 5 Market factors

## Why the structure of the market may contribute to consumer detriment

- 5.1. The British Standard explains that: ‘The way modern markets, service sectors and organisations work can cause or contribute to consumer vulnerability and place consumers at a disadvantage in accessing and using products and services, and in seeking redress’.
- 5.2. The legal services market shares many of the characteristics of markets which cause significant consumer detriment, and the nature of legal services mean any consumer can feel vulnerable. Below, we analyse the market characteristics in more detail by using the seven consumer principles.<sup>9</sup>
- 5.3. Based on the consumer principles we ask the following questions:
  - Can consumers access services in a timely, affordable and accessible manner?
  - Do they receive the right advice?
  - Is there a choice of suppliers?
  - Do consumers have the right information to make choices?
  - Are some consumers unfairly discriminated against?
  - Can they access redress if something goes wrong?

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<sup>9</sup>Legal Services Consumer Panel, *The Consumer Interest*, January 2014, <http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/UsingConsumerPrinciples2014.pdf>.



- Do vulnerable consumers have a voice in shaping how legal services are delivered?

### Access – can consumers access services in a timely, affordable and accessible manner?

- 5.4. Consumers with complex needs may have difficulty in finding a lawyer who has expertise in the right areas and is able to take on their case. And legal advice may be suggested as a remedy to problems in other markets, making it particularly key that consumers can access advice and enforce their rights.

The Panel's research into people who need asylum advice found cases tend to be complex, with multiple, overlapping legal aspects. There is currently no single access point where asylum seekers can look for legal representation and be matched with an advisor who has capacity. While it may be possible to find advisors in certain parts of the UK or for certain types of advice (for example on initial applications), other areas of the UK appear to be less well served, as are other areas of advice (for example appeals).

**Legal Services Consumer Panel, *Research note: Immigration and Asylum Services, October 2012***

- 5.5. Barriers to access might be physical (geography, disability), cultural (language) or relate to service delivery (jargon). Further, legal advice is often expensive, or at least perceived as expensive by consumers. Sometimes the worry is that the cost could spiral out of control due to uncertainty about how long things will take. People may disengage from obtaining legal advice entirely – their fear over the final cost of the work leading to inertia in dealing with the legal need and meaning they do not access advice even if they need it.

When confronted with a legal need less than half of respondents (44%) took some form of professional advice. 27% handled the need without help and 14% did nothing at all about the legal need. Cost was a significant reason for both handling the legal need alone and doing nothing.

**BDRC Continental for the Legal Services Board, *Legal Services Benchmarking, June 2012***

- 5.6. Finally, people often purchase legal advice at times of stress. This on its own is enough to mean consumers may be vulnerable when trying to access and use legal advice. We know from our research that people often feel intimidated by the law, or by lawyers. It is important to help consumers overcome this sense of powerlessness and access legal services with confidence.

### Quality – do people receive the right advice?

- 5.7. It is vital that consumers receive advice which is technically correct as well as right for their needs. However, it can be very difficult for consumers themselves to judge whether they have received good quality advice. Legal services are often classified as a credence good, which means the consumer may never know whether they received a quality service or not. Writing a will is a classic example of this. Sometimes, as in the case of selling a house, problems may only surface a long time after the original legal advice was given.

*“How would you know whether they were incompetent? I don’t know where the law goes or where the law stops or how they begin or what to do, so if they do something how do you know if they’ve messed up? What they tell me, for me is gospel. I don’t know any different – and I’ve been in court on both sides of the law.”*

Vanilla Research, ‘Risk and the Role of Regulation’,  
January 2013 (low literacy group)

- 5.8. In other cases legal services may be an experience good, where the consumer becomes aware of the quality as it is being consumed. A good example could be that a defendant realises during a trial whether they have a good lawyer or not. Even so the damage caused may be difficult to remedy or even irreparable.
- 5.9. The credence nature of legal advice also means there is a risk that consumers, who often do not know exactly what it is they need, may be sold (and consequently charged for) a gold plated service which is far in excess of their actual needs. For example, a lawyer might write a bespoke contract from scratch when a standard contract with some minor amendments would suffice.

- 5.10. Someone might purchase a legal service, but due to its poor quality, actually end up worse off than they were before – for example being advised by a lawyer to go to court when they have a poor chance of winning, and then additionally becoming liable for the other side’s costs. Alternatively, a consumer might think they have been successful, but not realise they haven’t achieved what they might have done, for example under settling on a personal injury claim.
- 5.11. Because legal services are usually purchased infrequently, it is generally difficult for consumers to learn from their mistakes in order to inform future purchasing decisions. Some may be repeat purchasers of legal services and therefore better informed and able to make an assessment of quality before purchasing, but this is likely to be less frequent in the case of individual consumers, small businesses or small charities.<sup>10</sup>

Will-writing has the highest satisfaction levels of all legal services in the Panel’s Tracker Survey. However, mystery shopping research commissioned by the Legal Services Board, Solicitors Regulation Authority, the Office of Fair Trading and the Legal Services Consumer Panel found that one in every five wills was defective. Online wills were defective in one quarter of cases.

**Legal Services Consumer Panel,  
*Regulating Will-writing, July 2011***

### Choice - Is there a choice of suppliers?

- 5.12. Consumers can be vulnerable if they have limited or no choice. Although there may be lots of law firms offering services, middlemen such as estate agents, claims management companies, insurers and lenders can discourage consumers from exercising choice. This may be through setting rules that limit the right to choose or

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<sup>10</sup> See <https://research.legalservicesboard.org.uk/wp-content/media/Why-regulate-legal-services-RPI-report.pdf>, p. 27.

by applying pressure through sales techniques. In some situations, as when dealing with a lawyer who has been appointed as executor to a will, there is no choice but to use the lawyer allocated to the matter.

- 5.13. Where consumers do have a free choice, they can be vulnerable because it is difficult to compare providers and decide which one is best for their needs. Here intermediaries such as comparison websites, or accreditations such as quality marks, can help to overcome this. However, poor practices may mean it is still unclear how much choice consumers are actually getting: a comparison website may have a small number of members but fail to disclose this fact while questionable practices such as unclear links between website owners and service providers can also impact on choice. Weak quality marks might not be reliable indicators of a high quality lawyer.

In the Panel's Tracker Survey, 68% of recent users considered they had a great deal or fair amount of choice. Consumers felt they had little or no choice most often in conveyancing (21%), family matters (27%), probate (30%) and personal injury (43%), among others. This is important because our research indicates a link between feeling you have a choice and quality of service: 88% of consumers who felt they had good choice were satisfied with the service they received, but only 60% of those who felt there was poor choice were satisfied.

Legal Services Consumer Panel,  
Tracker Survey 2014

## Fairness – Are some consumers unfairly discriminated against?

- 5.14. The Panel's research with consumers who have learning disabilities, those who are deaf or hard of hearing, and people who need advice on asylum matters all showed that often these groups had problems either in getting access to advice or in the quality of the advice when they did find a lawyer. Some common themes emerged. These included a lack of consideration around communication needs: such groups may need some extra time for meetings, or want advice summarised in a way which is clear and does not include long words or jargon.

People in the Panel's report on deaf and hard of hearing consumers described not being able to get into the lawyer's physical building because they could not hear the entry-phone. They had to wait outside until someone eventually realised and came down to let them in. Others described sitting in court waiting rooms, unable to hear when their name was called.

Deaf Studies Trust, 'Legal Choices, Silent Process',  
March 2012

- 5.15. Often small adjustments, which could easily be made by all law firms and lawyers, can make a big difference. People described good practices such as advisors who spoke clearly, looked directly at the consumer and did not cover their mouths while talking, and others who added post-it notes next to legal phrases which explained what they meant in simpler terms. Other good practices include using hearing loops in meeting rooms or leaving extra time for a meeting. Encouragingly, our research did find examples of good practice where lawyers provided a high standard of care and advice.

*"Solicitors are a bit like doctors, they have so much time allotted to a client and they have quite a lot of clients and all I am saying is where they would normally give somebody say half an hour to three quarters of an hour they should give us an hour because sometimes it's very hard for us, we stammer over some of the words that we want to say."*

Norah Fry Research Centre, 'What happens when people with learning disabilities need advice about the law', July 2013

## Redress – Is there access to redress?

- 5.16. When things go wrong consumers need to be able to enforce their rights. If they cannot do so there is little incentive for providers to follow the rules. Consumers are especially vulnerable to abuse if no remedy is available to them, for example if they use an unregulated provider or their complaint falls outside the Legal Ombudsman's scheme rules. There will be some occasions when it will be

impossible for anyone to properly repair the damage, for example time in jail if poor advocacy leads to a miscarriage of justice.

- 5.17. Features of the legal services market mean that consumers may be reluctant to complain however. Our most recent survey data shows 44% of consumers who are dissatisfied with legal services do nothing. This compares to 27% in the services economy overall. Regulators in this sector have to work even harder to reduce vulnerability and facilitate complaints.

*“The more formal it gets with them, the less you’re likely to ever get anywhere, because they’ll win at that. They’ll always win at that. It’s what they do day in and day out.”*

YouGov, ‘Consumer Experience of First-Tier Complaints Handling’, August 2012

- 5.18. Research jointly commissioned by the Legal Ombudsman and the Panel<sup>11</sup> provided some insights into the barriers that prevent complaints. This found that people find the overall process confusing and often intimidating and there is a perception that the process is either stacked against them or that the law firm will do nothing about it. People also worry that complaining might disadvantage them, for example by leading to a delay in the resolution of their matter. There is also uncertainty about challenging a lawyer in a formal or official complaint process, which is perceived as akin to trying to beat lawyers at their own game.

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<sup>11</sup>Legal Ombudsman in conjunction with the Legal Services Consumer Panel and YouGov, *Consumer Experiences of Complaint Handling in the Legal Services Market – first-tier complaints*, October 2012. Available at [http://www.legalservicesconsumerpanel.org.uk/ourwork/complaints/documents/Part%20A\\_First%20Tier%20complaints\\_YouGov\\_180912\\_Final%20report.pdf](http://www.legalservicesconsumerpanel.org.uk/ourwork/complaints/documents/Part%20A_First%20Tier%20complaints_YouGov_180912_Final%20report.pdf)

***“I think if I’d had the money and that wasn’t what I was so stressed about I probably would’ve taken it further... but I think at the time I was worried that if I complained it would’ve held things up even more.”***

YouGov, ‘Consumer Experience of First-Tier Complaints Handling’, August 2012

## Representation – Do vulnerable consumers have a voice in shaping how legal services are delivered?

- 5.19. It is important that consumers have some influence on the way their own legal services are delivered. However, the complexity of the law and the legal landscape can inhibit this. Often consumers report feeling that they are not experts and need help to deal with a situation. They do not feel empowered enough to explain how they would like things to be done, or to ask for or demand a voice in how resolution of their problem is taken forward.

***“There’s a power sort of imbalance because solicitors have a knowledge base that most of us don’t have. It’s like going to your GP. Most of us don’t understand what our GPs do or medicine. We have to put our trust in people. That can be abused sometimes.”***

Vanilla Research, ‘Risk and the Role of Regulation’, January 2013

- 5.20. Consumers interviewed as part of the Panel’s research into both the experiences of deaf consumers and consumers with learning disabilities remarked on how they wanted lawyers to explain complex legal terms to them, and to go through the available options so they could understand and make informed choices. This would also help them to take ownership of decisions. Good lawyers already did this.

*“I’m a landlord...I do tenancy agreements with the people who’re in there as well...I’m a landlord of my own house and I got people in there, tenants and everything and they sign tenancy agreements as well...I overlook all the property with an agency as well...we work together, they draw up...they go through and make sure we understand.”*

Norah Fry Research Centre, ‘What happens when people with learning disabilities need advice about the law’, July 2013

5.21. In healthcare, there has been a shift over time towards empowered patients who are actively involved in the way their own treatment is designed and delivered. The Expert Patients Programme, for example, is a self-management programme for people who are living with a long-term condition. Many GPs who care for people with chronic conditions acknowledge that the patient understands the condition better than they do. This is not surprising since it is the patient who lives with the condition day to day. With proper support people can take the lead in managing their condition.<sup>12</sup> This shift towards recognising and utilising consumers’ own expertise is yet to occur in legal services however.

5.22. As we have said, we view consumer vulnerability as dynamic, and the diagram overleaf shows the individual risk factors and market factors, and illustrates how both of these have the potential to cause vulnerability.

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<sup>12</sup> See <http://www.nhs.uk/NHSEngland/AboutNHSservices/doctors/Pages/expert-patients-programme.aspx>.



Diagram 1, Vulnerability in the legal services market:



# 6 How regulators can respond effectively

6.1. The first half of this guide set out the ways individual characteristics and the structure of the market can cause or exacerbate vulnerability. We would like regulators to identify, understand and respond to consumer vulnerability effectively and consistently. This means the needs of vulnerable consumers should be taken into account in policymaking, rules, supervision and enforcement. Ultimately this will translate into law firms and lawyers acting in an inclusive and accessible manner. The second part of this guide therefore identifies existing areas of good practice which can be built on and provides a framework which regulators could use to address vulnerability in their operating environments.

6.2. There are three key areas to address:

- Regulatory policy making
- Carrying out the core regulatory functions
- Providing services to the public

## Assessing impact

6.3. The dynamic way in which individual risk factors can interact with market factors means that specific groups of people may potentially be at heightened risk when buying legal services. For example vulnerable people may make up the majority of the group with whom advocates interact, since due to the stress and circumstances of the case, anyone can be in a vulnerable situation when they go to court. This is further underlined by the wide definition of a consumer under the Legal Services Act 2007, which includes those indirectly affected (such as victims and witnesses), and those who are contemplating using a regulated provider, as well as clients. Another situation relates to client confidentiality where market factors and individual

risk factors combine. While confidentiality is always important, when it involves young children, people who are estranged from one another, or those in witness protection programmes, there is an especially high risk to individuals.

- 6.4. Such concepts are well understood in other markets and learning here could be transferred to legal services. For example, Peter Cartwright refers to ‘impact vulnerability’<sup>13</sup> where some groups are more severely affected than others, for example poorer people can pay more or get less for services. Therefore as part of their strategy on vulnerability regulators may want to develop a framework to assess how to target their resources towards those vulnerabilities which have the highest impact on consumers.

## Regulatory policy making

- 6.5. Policy making targets the behaviour of regulated firms and individuals in order to encourage the right behaviours in the market place. Policy development should take account of the needs of vulnerable consumers, as well as taking into account the impact of options on different groups. This can be achieved through:

- Direct engagement with consumers
- Indirect engagement, with bodies such as consumer organisations or specialist charities
- Use of frameworks, such as this guide
- Equality impact assessments

- 6.6. Legal representation can change lives so it is vital that consumers have a say in how it is regulated and provided. Within the broader group of users it must be recognised that people are diverse and have different needs and capabilities.

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<sup>13</sup> Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation*, 2011, p. 48.

Regulators should allow consumers to have a voice by listening to their views directly, and by consulting with consumer groups. In some sectors, such as financial services and communications, as well as legal services, statutory consumer panels provide advice on consumer matters. Some regulators also engage directly with consumers in order to allow their experiences to inform policy.

6.7. There are existing good practice examples from the legal sector, and these include:

- The SRA risk outlook for the year ahead includes an assessment of vulnerability and identifies failure to provide a proper standard of service to vulnerable consumers as a key risk. The SRA will try to control this through focus on education and training requirements for solicitors and targeted research, as well as by taking standard of service into consideration in enforcement cases.<sup>14</sup>
- Last year the Bar Standards Board carried out a project which directly engaged with consumers who had received immigration advice from barristers.<sup>15</sup>

6.8. There are also examples of good practice from other areas:

- Ofgem implemented a new approach to protecting vulnerable consumers in 2013. It is based on how people interact with the energy market, as well as whether their circumstances make it harder for them to look after their own interests, and takes into account whether this could cause them to be more vulnerable. Ofgem is also setting up a Consumer Vulnerability Network to gather insight on consumer vulnerability and inform their future thinking.<sup>16</sup>

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<sup>14</sup> Solicitors Regulation Authority, *Risk Outlook 2014/2015*, July 2014.

<sup>15</sup> IFF Research for the Bar Standards Board, *Immigration Client Experience Research*, April 2013.

<sup>16</sup> Ofgem *Annual Report 2013-14*, see: <https://www.ofgem.gov.uk/ofgem-publications/88450/annualreport2606201314.pdf>.

- The Financial Conduct Authority has a team that manages relationships with consumer organisations. This ensures engagement activities are effective and efficient for resource-stretched consumer groups, but specialist expertise on specific consumer issues can be still accessed by FCA policy staff.<sup>17</sup>
- The Nursery and Midwifery Council (NMC) clarified the role of nurses and midwives in safeguarding adults by carrying out a range of activities to understand its registrants' awareness of such matters and engaging with specialist groups. The information obtained was used to shape the NMC's subsequent advice on recognising and effectively managing situations where a registrant suspects a person in their care may be at risk of harm.<sup>18</sup>

## Checklist

6.9. In order to recognise the needs of vulnerable consumers throughout their work regulators can ask the following questions as policy is developed.

- Are consumers at risk due to their individual characteristics?
- Have the consumer principles been applied? These are expanded upon in our Consumer Principles Toolkit.
- Has the impact of proposals on vulnerable consumers been considered, including through formal impact assessment where appropriate? Have policies been considered to ensure they do not create new vulnerabilities?
- Is there a framework in place to ensure these questions are addressed systematically when policy is being developed?

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<sup>17</sup> <http://www.ukrn.org.uk/wp-content/uploads/2014/07/Involving-consumers-in-the-development-of-policy.pdf>.

<sup>18</sup> The Council for Healthcare Regulatory Excellence, *Performance review report*, 2010/11. Available at <http://www.professionalstandards.org.uk/docs/scrutiny-quality/chre-performance-review-report-2010-11.pdf?sfvrsn=0>.

- When a decision is made, regulators should ask the question ‘What implications does that decision have for our vulnerable consumers?’
- Do regulators monitor and evaluate their strategy for recognising and responding to consumer vulnerability?

## Carrying out the core regulatory functions

- 6.10. These include making rules, authorising and supervising firms, incentivising good behaviour and taking enforcement action. Regulators can take the lead in directing their communities to use good practices, as well as following up with targeted supervision and enforcement action to make sure efforts are carried through into practical action.
- 6.11. It may be that practitioners are not aware of consumer vulnerability, or do not know how to address it. Therefore it is also important that awareness is raised through education and training, and by ensuring practitioners have opportunities to encounter and work with different groups of people. Regulators may also be able to provide tools for the regulated community, such as a risk assessment framework, as a way for individuals or firms to respond to vulnerable consumers.
- 6.12. Existing good practice examples from the legal sector include:
- The SRA are developing a competence statement which sets out what the baseline for being a competent solicitor is. This includes a reference to identifying and taking reasonable steps to meet the particular service needs of consumers in vulnerable circumstances, and to using clear, succinct and accurate language, avoiding unnecessary technical terms.
  - In setting the level of fine for regulatory breaches “vulnerable persons were taken advantage of” is one of the aggravating factors that ILEX Professional Standards will take into account.
  - The Intellectual Property Regulation Board’s code includes this guidance on vulnerable consumers: ‘Extra care should be taken when dealing with

potentially vulnerable clients such as private individuals and in particular where there may be risk factors related to a person's circumstances (e.g. bereavement, illness or disability, etc.) which increase the likelihood of the client being at a disadvantage or suffering detriment'.<sup>19</sup> This is in the spirit of the British Standard.

6.13. There are also examples of good practice from other areas:

- The Care Quality Commission (CQC) runs a programme called Experts by Experience, which utilises the experiences of people who have used care services. There is currently a panel of around 500 people who take part in inspections of health and social care services. During inspections they talk to people who use the services and observe the environment. Their own experience means they are well placed to ask questions and get as much information from the visit as possible. The experts by experience also attend consultations and staff training events. The CQC is now looking at how to involve children and young people in their inspections.<sup>20</sup>
- The Office of Fair Trading has produced guidance on mental capacity for creditors. The guidance aims to provide clarity for creditors on the approach they should take when borrowers are known or suspected to have some form of mental capacity limitation.<sup>21</sup>
- In December 2013 Ofgem imposed a penalty of £8.5 million on Scottish Power Energy Retail Ltd in the form of compensation and payments to vulnerable customers, for breaches of obligations relating to telephone and

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<sup>19</sup> Intellectual Property Regulation Board, *Rules of Conduct for Patent Attorneys and Trade Mark Attorneys and Other Regulation Persons*, Guidance to Rule 6.

<sup>20</sup> See: <http://www.cqc.org.uk/content/involving-people-who-use-services>.

<sup>21</sup> Office of Fair Trading, *Mental capacity – OFT guidance for creditors*, September 2011.

face-to-face sales activities.<sup>22</sup> Ofgem has also, in the past, rewarded companies who have exceeded their obligations towards vulnerable consumers. Ofgem worked with a range of organisations such as Age Concern to identify and reward energy companies with up to £300,000 each.<sup>23</sup>

## Checklist

6.14. In order to recognise the needs of vulnerable consumers throughout the core work with their regulated community, regulators can ask the following questions:

- Do rules and codes of conduct make clear how to recognise and treat vulnerable consumers?
- Are there incentives to treat vulnerable consumers fairly (for example by setting higher penalties where a vulnerable person is involved in cases of poor conduct)?
- Are staff within the regulator aware of how to recognise vulnerability so they are able to monitor effectively?
- Is recognising and dealing with vulnerability highlighted at the education and training stage?
- Is recognising and dealing with vulnerability incorporated into aspects like authorisation and supervision?
- Is supporting guidance and/or training on good practices available?
- Is there a process which regulators use to check that consumer vulnerability has been addressed by lawyers or law firms?

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<sup>22</sup> Ofgem *Annual Report 2013-14*, available at: <https://www.ofgem.gov.uk/ofgem-publications/88450/annualreport2606201314.pdf>.

<sup>23</sup> See: <https://www.ofgem.gov.uk/ofgem-publications/76546/15084-ofgem42.pdf>.



## Providing services to the public

6.15. Regulators also provide services directly to members of the public. This includes:

- When consumers make a complaint about the conduct of a regulated individual or firm;
- When consumers need to interact with the regulator because the regulator has intervened into a firm (for example the consumer needs to get their documents back);
- When consumers need to claim money, for example from a regulators' compensation fund.

6.16. There should be policies in place to make sure vulnerable consumers are dealt with fairly, and staff should be trained to recognise and respond to people in vulnerable circumstances. It is important to note that anyone making a complaint about possible misconduct by a legal provider is likely to be in a vulnerable position – they may feel confused, intimidated, or fear jeopardising their case if it is still ongoing. However, intelligence 'from the ground' is an important source of information. Therefore the way an individual is treated by the regulator is vitally important. Standard documents should carefully reflect this, and staff should be trained on how to communicate with consumers.

6.17. Some existing good practice examples from the legal sector include:

- The Ministry of Justice has announced plans to ensure that by 2015 all publicly funded solicitors and barristers will have undertaken specialist

training on working with vulnerable victims and witnesses in serious sexual cases.<sup>24</sup>

- The Legal Ombudsman have an accessible website with their complaints leaflet in various languages. They provide a Minicom service, and have information in various formats including Easy Read and Braille. They also support Browse Aloud on their website, which allows consumers to hear website content spoken aloud.

6.18. There are also examples of good practice from other areas:

- Ofcom provided training to staff in their customer-facing service teams around the country to make sure they could communicate appropriately with disabled consumers. The training was designed to exceed minimum legal compliance and deliver an excellent level of customer service. Surveys showed the training improved the service provided to disabled consumers by around 36%.<sup>25</sup>
- In 2013, the Health and Professions Care Council (HCPC) provided additional training for their staff in the fitness to practise department to facilitate communications with complainants who experienced difficulty in articulating their concerns. This was useful because over half of the complaints received by the HCPC in 2013/14 involved potentially vulnerable service users.<sup>26</sup>
- The General Medical Council run a vulnerable witnesses support scheme which has given witnesses more confidence in giving evidence and better awareness of how to access support. Staff feel that witnesses are now

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<sup>24</sup> See: <http://www.lawgazette.co.uk/law/advocates-to-have-specialist-training-for-sex-cases/5043098.article>.

<sup>25</sup> See: <http://www.wideaware.co.uk/e-learning/custom-e-learning-case-studies>.

<sup>26</sup> Professional Standards Authority for Health and Social Care, *Performance Review Report 2013/14*. Available at <http://www.professionalstandards.org.uk/docs/default-source/scrutiny-quality/performance-review-report-2013-2014---print-ready-black.pdf?sfvrsn=0>.

more willing to cooperate with the fitness to practise procedures. The project pilot identified learning points such as a need to ensure a high number of female volunteers, to ensure that there were a sufficient number of volunteers overall, and a need to ensure the impartiality of the witness support.<sup>27</sup>

## Checklist

6.19. In order to recognise the needs of vulnerable consumers when providing services directly to members of the public regulators can ask:

- Have staff been trained to recognise and respond to the needs of vulnerable consumers?
- Have staff been trained to recognise and respond when carers want to deal with a problem in place of the vulnerable individual?
- Are staff aware of legal requirements such as the Data Protection Act 1998 when processing and recording information about individuals, and are they able to comply with those requirements?
- Are websites and other consumer facing communications accessible?
- Are standard communications sent to consumers appropriate?
- Are feedback mechanisms in place to check whether the needs of vulnerable consumers are being met?
- Is there a process for assessing how effectively the needs of vulnerable consumers are addressed when providing services to the public?

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<sup>27</sup> The Council for Healthcare Regulatory Excellence, *Performance review report*, 2010/11. See <http://www.professionalstandards.org.uk/docs/scrutiny-quality/chre-performance-review-report-2010-11.pdf?sfvrsn=0>.

## Evaluation and reporting

6.20. The final step is to make sure there is a process to evaluate, monitor and report on how the needs of vulnerable consumers have been recognised and responded to. Regulators should keep a close watch to make sure they are doing enough in this area, and to ensure what is being done is effective. This may be in the form of a standalone report or in the context of other reporting and monitoring activities. However, it is vital that consumer vulnerability is included throughout the scope of each regulators' work and that efforts in this area are visible, evaluated, and where needed, improved upon.

# Annex 1

## Definitions of consumer vulnerability

6.21. There are many different definitions of consumer vulnerability. Some of these come from other regulators or consumer organisations, or from similar regulated markets.

6.22. Peter Cartwright provides a helpful taxonomy of vulnerability<sup>28</sup> which classifies the elements as:

- Information vulnerability: some people may face greater difficulties in obtaining and processing the information needed to make informed decisions.
- Pressure vulnerability: people may not act fully voluntarily but can be subject to various pressures. These can stem from inequality of bargaining power, individual characteristics of the consumer, or the behaviour of the seller.
- Supply vulnerability: this relates to lack of choice, where a consumer may need a service and have few options in terms of choosing a provider.
- Redress vulnerability: sometimes consumers may be vulnerable because they face greater difficulties in obtaining redress.
- Impact vulnerability: this relates to amplified effects on certain consumers. In many cases this means the poorest are those least able to afford the consequences of bad decisions.

6.23. Ofgem define consumer vulnerability as:

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<sup>28</sup> Peter Cartwright, *The Vulnerable Consumer of Financial Services: Law, Policy and Regulation*, 2011.

*“When a consumer’s personal circumstances and characteristics combine with aspects of the market to create situations where he or she is:*

- *Significantly less able than a typical consumer to protect or represent his or her interests in the energy market and/or*
- *Significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.*<sup>29</sup>

6.24. Similarly, Ofcom focus on people’s circumstances, which they note can change over time, and on the negative consequences which can arise from vulnerability.<sup>30</sup>

6.25. The Financial Services Consumer Panel approach the issue slightly differently, not seeking to develop a single definition of vulnerability but rather developing a framework to apply in the context of financial services regulation. This recognises three concepts which describe the risk of consumer detriment: ‘vulnerability’, ‘at a disadvantage’, and ‘consumer disadvantage’.<sup>31</sup>

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<sup>29</sup> Ofgem, *Consumer Vulnerability Strategy*, July 2013.

<sup>30</sup> See: <http://consumers.ofcom.org.uk/2014/05/consumer-vulnerability/>

<sup>31</sup> Financial Services Consumer Panel, *Defining consumer vulnerability and disadvantage*, December 2012.

**The Legal Services Consumer Panel was established under the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of consumers of legal services in England and Wales. We investigate issues that affect consumers and use this information to influence decisions about the regulation of legal services.**

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