

KEY POINTS

What is the issue?

Practitioners must be able to distinguish vulnerability from decision-making ability.

What does it mean for me?

Advisors must respond to vulnerability as part of their professional engagement with clients.

What can I take away?

An Australian perspective on indicators of vulnerability when dealing with clients.



MICHAEL PERKINS GIVES AN AUSTRALIAN PERSPECTIVE ON THE DISTINCTION BETWEEN VULNERABILITY AND DECISION-MAKING ABILITIES

Australia is a federation that comprises eight legal jurisdictions in its operation. This article is written from the author's perspective as a lawyer, resident in New South Wales (NSW), practising in the private client sector. It is intended to be a high-level introduction to a selection of relevant themes around managing client vulnerability that, it is hoped, will be the start of more extensive conversations within STEP and elsewhere.

DEFINING OUR TERMS

Vulnerability is a term with fluid definitions. In this article, the following meaning has been adopted: 'an individual aged 18 years and above who is or may be unable to take care of themselves, or is unable to protect themselves against harm or exploitation by reason of age, illness, trauma or disability, or any other reason'.¹

Decision making is a human right. This is recognised in the Australian Law Reform Commission's (the ALRC's) National Decision-Making Principles.² The existence of vulnerability in a person does not diminish their right to make a decision but may limit their ability to make a decision. Supporting the decision-making resilience of a client is a key value we provide through our services.

AUSTRALIA'S HUMAN RIGHTS JURISDICTION

Human rights generally are summarised as comprising economic, social, cultural, civil and political rights.³

Australia's human rights heritage starts with the importation of English and Welsh

common law when it was colonised in 1788. The *Magna Carta* can, therefore, be rightfully seen as the genesis of human rights law in Australia. The operation of Indigenous Australian customary law, i.e., the *Native Title Act 1993*, is preserved in parallel with imported law following colonisation.⁴

More recently, Australia has become a member of the UN human rights system and established the Australian Human Rights Commission in 1986.⁵ When ratifying the 2008 UN *Convention on the Rights of Persons with Disabilities* (the Convention), Australia made the following statement:

'Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.'

'Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others...'

Australia's social compact is embedded in both Commonwealth and state laws. In NSW, the rights of people residing in NSW to participate in civil society have been summarised as a right to receive the following outcomes:⁶

- **Home:** All people in NSW are able to have a safe and affordable place to live.
- **Social and community:** All people in NSW are able to participate and feel culturally and socially connected.



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- **Education and skills:** All people in NSW are able to learn, contribute and achieve their best life. All people are given the best opportunities to achieve in life.
- **Empowerment:** All people and communities in NSW are able to contribute to decision making that affects them and live fulfilling lives.
- **Economic:** All people in NSW are able to contribute to, and benefit from, the economy.
- **Safety:** All people in NSW are able to be safe.
- **Health:** All people in NSW are able to live a healthy life.

There are counterpart frameworks in each state of Australia. In the Australian Capital Territory, Queensland and Victoria there is also human rights legislation specific to that jurisdiction. In Western Australia, the human rights accountability in that state is simply expressed as 'duties under international law to respect, to protect and to fulfil human rights'.⁷

DECISION-MAKING RIGHTS, CAPACITY AND VULNERABILITY

To be vulnerable is defined by the *Cambridge Dictionary* as 'able to be easily physically or mentally hurt, influenced, or attacked'.⁸

In this author's opinion, it is a step too far to say that to be vulnerable necessarily limits a person's decision-making ability. Instead, vulnerability may be seen to create the potential for a person to be less able to resist the influence of others. It may be seen as an indicator of special disadvantage requiring response.

The capacity to make decisions is generally not affected by any of the following factors: age, appearance, disability, behaviour, language skills or any other condition or characteristic.⁹ Capacity is decision-specific and assumptions about capacity need justification. Capacity remains a relevant concept.

It is a person's demonstrated ability to make decisions in a given situation that should guide the evaluation of decision-making ability. Vulnerability may be a trigger or alert that calls for more care in dealing with a person.

Government is, as a matter of public policy, concerned with fostering a civil society that maximises the opportunity for citizens to participate fully. This policy focus is summarised by the human service outcome criteria set out above. The right to decide enables participation in civil society and can, therefore, be seen as a fundamental human right in Australia.

The vulnerability of a person should, in the author's opinion, be viewed as an attribute of a person that can limit or affect their ability to 'decide'. Whether a person's free will is overborne by another is a

matter of fact that has to be looked at on a case-by-case basis and the consequences of that action evaluated.

VULNERABILITY AND SPECIAL DISADVANTAGE

Competition and consumer law in Australia provides a guide to dealing with vulnerable people in trade or commerce.¹⁰ The Australian Competition and Consumer Commission (ACCC), in its publication, *Don't Take Advantage of Disadvantage*, states:

'Some consumers may be disadvantaged or vulnerable in some marketplace situations if they:

- *have a low income*
- *are from a non-English speaking background*
- *have a disability—intellectual, psychiatric, physical, sensory, neurological or a learning disability*
- *have a serious or chronic illness*
- *have poor reading, writing and numerical skills*
- *are homeless*
- *are very young*
- *are old*
- *come from a remote area*
- *have an Indigenous background.*

'Of course, not all consumers with these characteristics are more at risk of making poor business decisions. But be aware that your marketing message and conduct may affect some consumers differently... Make sure consumers understand everything you say. If you are unsure, give them the opportunity to think about it or talk it over with someone else.'

The ACCC also stated that a consumer with a 'special disadvantage' is defined as having 'a condition or is in a circumstance that seriously affects their ability to judge what is in their best interests'.

From this guidance, it may be concluded that vulnerability is a trigger for concern that requires, in a commercial transaction, for a business to take further steps so that the client or customer can give informed consent to a proposed course of action. Vulnerability can also then be seen as an attribute of the client or customer for evaluation, not a state that automatically imposes further legal liability or obligations.

Responding to vulnerability applies as much to private client practitioners as to those involved in trade or commerce.

VULNERABILITY, DISABILITY AND DECISION MAKING

In responding to the Convention, Australia has a straightforward task, as summarised by the ALRC:¹¹

'The [Convention] does not contain a particular capacity standard. Rather, it requires State Parties to ensure that people with disability "enjoy legal capacity on an equal basis with others in all aspects of life".'

Current state-based human rights legislation can be seen as a response to this obligation. Responding to a person's vulnerability (including the level of their available cognition) must, therefore, be focused on optimising a person's decision-making ability, not compensating for a person's deficits. This approach has resulted in the formulation of the National Decision-Making Principles, which are four general principles that reflect the key ideas and values upon which the ALRC's approach in relation to legal capacity is based. These are:¹²

- the right to make decisions;
- the right for support to make decisions;
- respect for a person's will, preferences and rights; and
- use of safeguards for decision making where appropriate.

The use of substitute decision-making is viewed as a last resort through this lens. As a federation, Australia is currently faced with a conflict in approach between the Commonwealth-law level and the particular law of individual states. This challenge can be characterised as a conflict between 'best-interests duty first' and 'a person's will and preference first'. A resolution remains a work in progress in Australia and complicates the role of professionals and the management of the affairs of those who are vulnerable.

The assumption of a person's decision-making capacity must be seen as simply a starting point in understanding a person's decision-making ability. A recognition of vulnerability is a trigger for a more critical enquiry about a person's decision-making ability.

WE ARE ABLE

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WE ARE VULNERABLE



#AUSTRALIA #MENTAL CAPACITY
#VULNERABLE CLIENT

1 According to the Australian Government Department of Social Services. 2 bit.ly/3YyRiWV 3 For the Queensland law, see bit.ly/3Hys5KG 4 Indigenous Australian customary law refers to the legal systems and practices uniquely belonging to Indigenous Australians of Australia, that is, Aboriginal and Torres Strait Islander people. 5 bit.ly/3DhkJJ8 6 bit.ly/404elic 7 bit.ly/3JhXC4Z 8 Following bit.ly/4033ZPF 9 Following bit.ly/3R8xs6x 10 bit.ly/3HdTYX6 11 bit.ly/3WA6rTW 12 bit.ly/3j86EqA