B&NES LSAB MULTI-AGENCY CONSENT POLICY

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CONTENT:

Safeguarding Adults – Service User Consent

1. Introduction

'Safeguarding means protecting an adult's right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult's wellbeing is promoted, including where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action.' (Care Act 2014; Care and Support Statutory Guidance, S14.7)

Sharing information between organisations as part of day-to-day safeguarding practice is covered by the common law duty of confidentiality, the Data Protection Act 2018, the Human Rights Act 1998 and the Crime and Disorder Act 1998.

The guidance in this policy is provided to support and ensure good practice when seeking consent from Adults at Risk (hereafter referred to as AAR) to Safeguarding Procedures. All organisations across Bath and North East Somerset involved in safeguarding are asked to adopt this policy in respect of their relevant roles and functions, but may wish to add local practice guidance within their own organisations.

This guidance should also be read in conjunction with the B&NES Multi-Agency Safeguarding Adult Policy and Procedures - B&NES LSAB Multi Agency Policies and Procedures

2. Safeguarding and The Care Act

The Care Act, which came into force on 1 April 2015, places a duty on local authorities to carry out an enquiry (Section 42) and decide whether any action should be taken where there is reasonable cause to suspect abuse or neglect of an AAR. *It also places a duty to* promote individuals' wellbeing (Section 1) throughout the safeguarding process. The Care Act defines wellbeing for the individual as:

- personal dignity (including treatment of the individual with respect)
- physical and mental health and emotional wellbeing
- protection from abuse and neglect
- control by the individual over their day-to-day life (including over care and support provided and the way they are provided)
- participation in work, education, training or recreation
- social and economic wellbeing
- domestic, family and personal
- suitability of the individual's living accommodation
- the individual's contribution to society.

2.1 Advocacy

The Care Act also requires that a Local Authority must arrange, for an independent advocate to represent and support an adult who is the subject of a safeguarding enquiry or Safeguarding Adult Review (SAR), where the adult has 'substantial difficulty' in being involved in the process and where there is no other appropriate individual to help them (Section 68). If the person lacks mental capacity to engage in the safeguarding procedures, then an Independent Mental Capacity Advocate (IMCA) under the provisions of the Mental Capacity Act (2005) should be considered. Advocacy should also be considered where there appears to be a difference of opinion between the adult at risk and the family member/carer.

3. Making Safeguarding Personal

Good practice principles of supporting a person through the safeguarding process and promoting their well-being can be further understood through Making Safeguarding Personal (2014), which seeks to ensure that where possible, the individual is involved in their own safeguarding and that it is 'person-led', 'outcome focussed' and not process driven. To support this person-centred approach, AAR are encouraged to make their own decisions, identify what they need to make themselves feel "safe" and are provided with support and information to empower them to do this, recognising that adults have a general right to independence, choice and self-determination, including control over how information is shared about them.

4. Consent and ensuring that an informed decision is made

Consent, is defined by the Concise Oxford English Dictionary as *'permission for something to happen or agreement to do something'.* Informed consent is *'permission granted in the full knowledge of the possible consequences (sic) risks and benefits'.* Permissions given under any unfair or undue pressure is not consent.

When safeguarding procedures are being considered, the consent of the AAR believed to be at risk should always be sought. Consent should be obtained as early as possible and if appropriate, by the alerting agency so that the concerns can be progressed to ensure the safety of the adult at risk. Obtaining consent engages the person in a conversation about how best to respond to their safeguarding situation in a way that enhances their involvement, choice and control as well as improving their quality of life, wellbeing and safety. Consent can provide a process by which to establish the individuals views, wishes and outcomes, even if these appear to be ambivalent, unclear or unrealistic to their personal circumstances.

It is important to ensure that the AAR has accessible information to enable them to make informed choices about safeguarding: what it means, the risks and benefits and possible consequences. Staff will need to clearly define the various options to help support the person to make an informed decision about their safety. A record should be made of what information was provided to the AAR and their response where consent has been sought.

5. Mental Capacity

Issues of mental capacity and consent are often central to our understanding and exploration of adult abuse. Consent should always be sought unless to do so would place the person at risk. When safeguarding concerns arise, mental capacity should be considered when the person is expected to make decisions around safeguarding related matters.

5.1 Assessment of mental capacity

The Mental Capacity Act (2005) states that a person is assumed to have mental capacity unless there is clear evidence to the contrary. It also states that a person should not be deemed to lack mental capacity just because they make an 'unwise decision'. It is important that mental capacity assessments are carried out face to face where possible to minimise the risk of assumptions.

In deciding whether the AAR has the mental capacity to consent to safeguarding procedures, consideration should be given as to whether they are able to make informed decisions in relation to the following:

- Other people being informed
- Actions which may be taken under the multi-agency safeguarding policy and procedures
- Their own safety, including an understanding of longer-term harm as well as immediate effects, and
- How to take action to protect themselves from future harm.

If the adult at risk is considered to have mental capacity in relation to a decision about giving or withholding consent to safeguarding procedures, s/he retains that right to do so, except in specific circumstances (see Section 6).

Assessment of mental capacity should also consider whether there are any concerns about possible duress and whether the individual is being influenced or exploited by others who may not be acting in their best interests. Where the individual has mental capacity but is not able to exercise choice as a result of duress or exploitation, advocacy should be offered / provided and legal advice sought.

5.2 Protection from Liability

Under the Mental Capacity Act, where a person does an act in connection with the care or treatment of another person, he/she will not incur liability so long as he reasonably believes that:

- They have observed the Mental Capacity Act Principles;
- They can show that they have assessed capacity
- They 'reasonably believe' on the balance of probabilities that the person lacks mental capacity to make a decision
- They 'reasonably believe' the action is in the best interests of the person

5.3 People who lack mental capacity to consent to safeguarding procedures

Where an individual is unable to consent to safeguarding procedures because they are assessed as lacking mental capacity to make a specific decision, then the Best Interests process must be followed in line with the Mental Capacity Act.
In the event that another person has legal decision making powers in relation to welfare decisions (for example; under a Lasting Power of Attorney or Welfare Deputyship Order), then they will normally be the person to make the Best Interests Decision and should be party to any consultation process. However, if there are concerns that the person with such powers may be involved in the suspected abuse, legal advice should be sought at an early stage.

5.4 Interface between the Mental Health Act 1983 (amended 2007) and Mental Capacity Act 2005

When considering a person's consent to Safeguarding Procedures and potential protections, consideration must also be given to whether the Mental Health Act 2007 (MHA) or Mental Capacity Act (MCA) apply.

There are important differences between being treated under the MHA and the MCA. If adults are treated under the MCA, their lack of mental capacity to make decisions must be established and a clear Best Interests decision making process followed. Adults who have mental capacity and refuse treatment for mental illness should be treated under the MHA.

The MHA is used to ensure that people who need treatment for serious mental disorder receive this treatment, even against their wishes, if there are sufficient risks to their own health and safety or risks to the safety of others.

It is important to note that the MCA applies to people over the age of 16 years. There are no age limits applied to the MHA.

6. Where consent is not given

Adults may not give their consent to the sharing of safeguarding information for a number of reasons. They may, for example, feel that they have the necessary strengths and abilities to protect themselves without intervention from others, or they may be unduly influenced, coerced or intimidated by another person; frightened of reprisals; fearful that they will lose control; be untrusting of services or professionals or fear that their relationship with the alleged abuser will be damaged. Reassurance, information and appropriate support may help them further consider whether it is best to share their information. In these circumstances, staff should consider the following:

- Explore the reasons for the adult's objections – what are they worried about?
- Explain the concern and why you think it is important to share information
- Tell the adult with whom you will be sharing information and why
- Explain the benefits, to them and others, of sharing information – could they access better help and support?

- Discuss the consequences of not sharing information – could someone come to harm?
- Reassure them that the information will not be shared with anyone who does not need to know.
- Reassure them that they are not alone and that support is available to them.

7. Exceptions – raising a safeguarding concern without the consent of the adult at risk.

The Care Act Statutory Guidance states the following:

If the adult has the mental capacity to make informed decisions about their safety and they do not want any action to be taken, this does not preclude the sharing of information with relevant professional colleagues.

This enables professionals to check the safety and validity of decisions made.

It is good practice to inform the adult that this action is being taken – unless doing so would increase the risk of harm (Care Act Guidance p. 249)

In all cases where an AAR is withholding consent and there are concerns about their welfare, a senior manager's opinion or legal advice should be sought on the best way to proceed. Any actions taken without the adult's consent should be proportionate to the risk of harm if it is identified that there is no less intrusive way of ensuring their safety.

Action may still need to be taken however, without the AAR's consent, where it is essential to share information, especially where an adult at risk makes a decision or intends to act in a way that is unlawful or where their care needs to be addressed under the Mental Health Act 1983. The following are examples of when a decision to raise a safeguarding concern without consent will be required:

- It is in the public interest; for example.
  - There is a risk to other adults or children', or
  - The concern is about organisational abuse, or
  - The concern or allegation of abuse relates to the conduct of an employee or volunteer within an organisation providing services to adults at risk, or
  - The abuse or neglect has occurred on property owned or managed by a regulated organisation with a responsibility to provide care
- The person lacks mental capacity to consent and decision is made to raise a 'concern' (alert) in the person's best interests
- A person is being unduly influenced or intimidated, to the extent that they are unable to give consent
- It is in the person's vital interest (to prevent serious harm or distress or in life-threatening situations). This may for example include a referral for a multi-agency risk assessment conference (MARAC)
- It is necessary to prevent a crime.
- A serious crime has been committed.
- There is a court order or other legal authority for taking action without consent.

It is important that the risk of sharing information is also considered. In some cases, such as domestic violence or hate crime, it is possible that sharing information could increase the risk to the adult. Safeguarding partners need to work jointly to provide advice, support and protection to the adult in order to minimise the possibility of worsening the relationship or triggering retribution from the abuser.

If the decision is taken to share information without the adult's consent, then unless it is unsafe to do so, the adult should be informed that this is being done and why.

8. Safeguarding Children

Wherever there are any concerns about the welfare of children, these will always override the issues of consent as described in this Policy. In the event that a child or young person is suspected of being at risk, the B&NES Multi-Agency Safeguarding Children's Procedures (add in hyperlink) must be followed in order that immediate action can be taken to safeguard the child or young person.

9. Domestic Violence and Abuse

In cases of Domestic Violence, staff should refer to the B&NES Multi-Agency Risk Assessment Conference Partnership Information and Operating Protocol (MARAC).

In 2013, the Home Office announced changes to the definition of domestic abuse:

- Incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse….by someone who is or has been an intimate partner or family member regardless of gender or sexuality;
- Includes psychological, physical, sexual, financial, emotional abuse; honour based violence, female genital mutilation or forced marriage
- From 16 years of age

Family members are defined as: mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family.

Many (but not all), of the data protection issues surrounding a disclosure can be avoided if the consent of the individual has been sought and obtained. The first consideration should be whether the individual has consented to the disclosure. In the main, disclosure to voluntary sector agencies should be made only with direct consent. Details of victims, witnesses and complainants should not be disclosed without their written consent.

If consent has been withheld or could not be obtained, a risk assessment to determine threshold for MARAC should be undertaken. For high risk cases of domestic abuse, a referral to MARAC can be made even without consent.

Considerations must be given as to whether the personal information is held under a duty of confidence, whether there is an overriding **public interest** or justification for disclosing the information (*Schedule 1, Part 2, para. 18*, DPA 2018), and whether the individual was informed that their information would be disclosed to the recipient.

10. Mitigating Risks

If all reasonable efforts have been made to obtain the persons consent, but they continue to withhold consent and the above provisions do not apply, then the following action should be taken:

- Support the adult to weigh up the risks and benefits of different options
- Ensure they are aware of the level of risk and possible outcomes. Look at possible ways of mitigating risks that the adult might agree to. Agree on and record the level of risk the adult is taking
- Offer to arrange for them to have an advocate or other peer supporter
- Offer support for them to build confidence and self-esteem if necessary
- Determine whether any other support can be offered through case management and assessment. This might include regularly reviewing the situation
- Record the reasons for not intervening or sharing information
- Try to build up trust to enable the adult to better protect themselves.

11. Consent withdrawn at a later stage of the safeguarding procedures

It is important to note that initial consent can be withdrawn **at any time** and that the AAR is made aware of this. In the event that consent is given initially but later withdrawn, the same guidance should apply as described in points 6 and 7 of this Policy.

12. Record Keeping

All actions and decisions must be fully recorded. It is possible that records may be required as part of a Section 42 Enquiry and must always include:

- The nature of the safeguarding concern
- The wishes of the adult at risk
- The support and information provided to enable the adult at risk to make an informed decision
- Assessment of mental capacity, where required
- The decision of the organisation to raise or not raise a safeguarding concern (alert)