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The Deprivation of Liberty Safeguards

About this factsheet

This factsheet looks at the Deprivation of Liberty Safeguards. This is new legislation brought in to protect people who lack mental capacity to decide where and how they should be treated or cared for. The factsheet covers:

- what deprivation of liberty means;
- what you can do if you are concerned that someone is being unlawfully deprived of their liberty;
- the procedure for obtaining authorisation to deprive someone of their liberty;
- support for people who are deprived of their liberty.

The information in this factsheet is correct for the period April 2009 – March 2010. Capital limits and other figures are expected to increase again in April 2010 but rules and figures sometimes change during the year.

This factsheet describes the situation in England. There are differences in the rules for Northern Ireland, Scotland and Wales. Readers in these nations should contact their respective national Age Concern offices for information specific to where they live – see page 19 for details.

For details of how to order other Age Concern factsheets and information materials mentioned inside go to page 18.

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1 Recent developments

- The Deprivation of Liberty Safeguards came into force on 1 April 2009 under amendments to the Mental Capacity Act 2005.
- The safeguards were introduced following a decision of the European Court of Human Rights (in the 'Bournewood case') to ensure that people are not unlawfully deprived of their liberty.
- For applications made in April 2009 only, the timescale for standard authorisation assessments was extended from 21 days to 42 days, and for urgent applications from 7 days to 21 days.

2 What are the Deprivation of Liberty Safeguards?

When someone lacks mental capacity to consent to care or treatment, it is sometimes necessary to deprive them of their liberty in their best interests, to protect them from harm.

Having mental capacity means being able to understand and retain information and being able to make a decision based on that information. The safeguards are intended to protect people who lack mental capacity from being detained when this is not in their best interests; to prevent arbitrary detention; and to give people the right to challenge a decision.

The legislation sets out a procedure for care homes and hospitals to obtain authorisation to deprive someone of their liberty. Without that authorisation the deprivation of liberty will be unlawful. These safeguards are intended to protect individuals from being deprived of their liberty unless it is in their best interests to protect them from harm and there is no other less restrictive alternative.

More information about making decisions on behalf of people who may lack mental capacity and about the provisions of the Mental Capacity Act, can be found in Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

2.1 Who do the safeguards apply to?

The safeguards apply to:

- people in hospitals;
- people in care homes registered under the Care Standards Act 2000.

Both self-funded and publicly funded residents are covered by the safeguards.

For people being cared for somewhere other than a care home or hospital, deprivation of liberty will only be lawful with an order from the Court of Protection.

The Deprivation of Liberty Safeguards should not be used if a person meets the criteria for detention under the Mental Health Act 1983.

2.2 Who is responsible for applying the safeguards?

It is responsibility of the care home or hospital (known as the 'managing authority') to ensure that any deprivation of liberty is lawful. If someone is identified as being deprived of their liberty, or at risk of being deprived of their liberty, the managing authority (the hospital or care home managers) must consider whether:

- it is in the person's best interests and necessary to protect them from harm;
- there are alternative, less restrictive care regimes that do not amount to deprivation of liberty.

If it is believed to be in the person's best interests and a less restrictive regime is not possible, the hospital or care home managers must apply to the supervisory body for authorisation of the deprivation of liberty. The supervisory body is the local authority (for a person in a care home) or the primary care trust (for a person in a hospital).

If they are at all uncertain whether the care regime amounts to a deprivation of liberty, the managing authority should apply for authorisation. An assessment will be carried out as to whether or not the person is being deprived of their liberty (see section 4 'The assessment procedure').

Authorisation of deprivation of liberty should be seen as a last resort; less restrictive alternatives that do not amount to deprivation of liberty should be put in place wherever possible. Authorisation should never be used simply for the convenience of staff or carers.

2.3 When should an application be considered?

An application for authorisation should not only be considered when someone moves into a care home or hospital. The situation should be monitored so that if a change means a deprivation of liberty is taking place, an application is made. For example, if someone had capacity when they moved in but has since lost capacity to decide whether to remain there, and deprivation of liberty is taking place, an application for authorisation must be made.

3 What is deprivation of liberty?

There is no definition of deprivation of liberty in the Mental Capacity Act 2005. Whether someone has been deprived of their liberty depends on the particular circumstances of each case.

The Code of Practice accompanying the safeguards states:

The difference between deprivation of liberty and restriction upon liberty is one of degree or intensity. It may therefore be helpful to envisage a scale, which moves from 'restraint' or 'restriction' to 'deprivation of liberty'.

The Code also includes a list of factors (see the list below) that have been taken into account by the European Court of Human Rights and UK courts when deciding what amounts to deprivation of liberty. Nothing on this list is conclusive that a deprivation is taking place, or that it is not. It will be a question of degree or intensity.

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant period.
- Staff exercise control over assessments, treatment, contacts and residence.

- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
- A request by carers for a person to be discharged to their care is refused.
- The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- The person loses autonomy because they are under continuous supervision and control.

Note

The fact that doors in a care home or hospital are locked, for example, would not necessarily be enough on its own to amount to a deprivation of liberty. The situation should be looked at as a whole, taking into account factors such as those in the above list.

When considering whether someone is being deprived of their liberty, the decision on whether the way someone is being treated amounts to a deprivation of liberty lies with the 'best interests assessor' (see section 4 below) during the assessment procedure.

If a care home or hospital is in doubt about whether someone's liberty is being deprived, they should make the application for authorisation.

3.1 What is restraint?

Restraint is the use, or threat, of force to enable something to be done which the person is resisting; or the restriction of the person's movement (whether or not they resist). This is different to deprivation of liberty. The Mental Capacity Act authorises someone providing care or treatment to someone lacking capacity to consent to it to use restraint if:

- they believe it is necessary to prevent harm to the person;
- it is proportionate to the likelihood and seriousness of the harm.

4 The assessment procedure

On receiving a request for authorisation the supervisory body must arrange a series of assessments.

● Age assessment

This is to confirm the person is over 18, as the safeguards only apply to people over 18.

● No refusals assessment

This is to establish whether the person, or someone with authority to decide on their behalf, has refused the deprivation of liberty. Authorisation cannot be given if it conflicts with:

- a valid and applicable advance decision refusing the particular care or treatment;
- the decision of an attorney under a Lasting Power of Attorney;
- the decision of a court-appointed deputy.

For information on advance decisions, Lasting Powers of Attorney, and deputies, see Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

● Mental capacity assessment

This is to establish whether the person lacks mental capacity to decide for themselves if they should be accommodated in the particular care home or hospital, for the purpose of the care or treatment. Authorisation cannot be given if they are able to make this decision themselves.

● Mental health assessment

Authorisation can only be given if the person is suffering from a mental disorder (within the meaning of the Mental Health Act 1983).

● **Eligibility assessment**

The person is not eligible for authorisation if they are:

- detained under the Mental Health Act 1983 (or they meet the criteria for detention);
- subject to a requirement under the Mental Health Act as to where they live; or
- subject to powers of recall under the Mental Health Act.

● **Best interests assessment**

The best interests assessor establishes whether deprivation of liberty is actually occurring, or is likely to occur. The best interests assessor also establishes if deprivation of liberty is in the person's best interests, necessary to keep them from harm, and a proportionate response to the likelihood and seriousness of that harm.

The best interests assessor must take into account the views of:

- anyone named by the person to be consulted;
- the person's carers;
- anyone interested in the person's welfare;
- an attorney (if there is one);
- a deputy (if there is one).

If the person has no family or friends to be involved in the assessment, an Independent Mental Capacity Advocate (IMCA) must be appointed to support and represent them (see section 4.7 below).

The best interests assessor can specify conditions that must be included in the authorisation, such as that the person must be allowed contact with certain people.

4.1 Who carries out the assessments?

There will be a minimum of two assessors because the mental health and best interests assessments must be carried out by different people. Ideally, the assessment procedure would not involve a series of different interviews by different assessors because that might cause unnecessary stress or disruption to the person being assessed.

There are specific requirements for the qualifications, experience and training of people carrying out each of the tests. For example, the best interests assessment must be carried out by an approved mental health professional, social worker, nurse, occupational therapist or psychologist, with the required training and experience. The full details of who can carry out each test are in the Code of Practice (see section 8).

The best interests assessor can be an employee of the supervisory body or the managing authority, but must not be involved in the care or treatment of the person. There will sometimes be situations where the managing authority and the supervisory body are the same organisation, for example when a care home is run by a local authority. In this case the best interests assessor must not be an employee of that authority; an independent assessor must be appointed.

4.2 What is the timescale for the assessments?

The assessment procedure for standard authorisation must be completed within 21 calendar days of the application being received by the supervisory body.

4.3 Urgent authorisations

An urgent authorisation can be issued by the hospital or care home itself if it is necessary to deprive the person of their liberty before standard authorisation can be obtained. They must simultaneously apply for standard authorisation (if not already done). The urgent authorisation can allow deprivation to take place while the assessment is carried out. An urgent authorisation can last up to seven days, but can be extended by the supervisory body for another seven days if the assessment procedure is not completed.

4.4 **Transitional arrangements during April 2009**

For applications made in April 2009 only, the timescale for standard authorisation assessments was extended from 21 days to 42 days, and for urgent applications from 7 days to 21 days.

4.5 **What happens if authorisation is granted?**

If authorisation is given it must state how long it will last, up to a maximum of 12 months. It is the person carrying out the best interests assessment who recommends the duration of the authorisation.

A copy of the authorisation must be given to:

- the relevant person;
- the managing authority;
- the Relevant Person's Representative (RPR, see section 5);
- every interested person consulted by the best interests assessor.

Authorisation does not authorise particular care or treatment, only the deprivation of liberty. The principles of the Mental Capacity Act must be applied to decisions on care and treatment; this includes the principle that decisions must be made in the person's best interests. For information on the principles of the Act, see Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

At the end of the authorised period, a new standard authorisation must be applied for if deprivation is still required and the assessment procedure must be repeated. Any continued deprivation of liberty without authorisation will be unlawful.

4.6 **What happens if authorisation is refused?**

If any of the criteria for the six assessments are not met, the supervisory body must refuse authorisation. Any continuing deprivation of liberty will be unlawful. See section 7.3 below for information on challenging an unauthorised deprivation at the Court of Protection.

If authorisation cannot be given, notice of this fact must be given to the same people as listed above.

The managing authority must ensure that the person's care is arranged in a way that does not amount to a deprivation of their liberty. The supervisory body, or a relative, or anyone else who is commissioning the care, has a responsibility to purchase a less restrictive care package to prevent deprivation of liberty.

4.7 The role of the Independent Mental Capacity Advocate

If there is no appropriate family or friend who can support the person during the assessment procedure, an Independent Mental Capacity Advocate must be appointed by the supervisory body. An IMCA is an independent person with relevant experience and training who can make submissions to the people carrying out the assessments and challenge decisions on behalf of the person they are representing. They should find out information about the person (such as their beliefs, values and previous behaviour) to help assess what is in their best interests. For more information about the role of IMCAs in supporting people who may lack mental capacity, see Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

If authorisation is given, someone must be appointed as the Relevant Person's Representative but the IMCA may still have a role in supporting that person (see below).

5 The Relevant Person's Representative

If authorisation is given, someone must be appointed to represent the interests of the person whose liberty is being deprived. The role of the Relevant Person's Representative is to keep in contact with the person and to make sure that decisions are being made in their best interests.

5.1 Who should be chosen as the RPR?

The RPR will usually be a relative or friend of the person whose liberty is being deprived. If there is no appropriate friend or relative, it will be someone appointed by the supervisory body (possibly a paid professional). It must be someone who can keep in regular contact with them. The RPR will be chosen by:

- the person whose liberty is being deprived, if they have capacity to choose; or
- their attorney or deputy if there is one with authority to make this decision; or
- the best interests assessor.

But the RPR must not be:

- financially interested in the managing authority (for example, the director of the care home) or related to someone who is;
- employed by (or providing services to) the care home (where the managing authority is a care home);
- employed by the hospital in a role related to their care (where the managing authority is a hospital);
- employed by the supervisory body in a role that is, or could be, related to the relevant person's case.

The person chosen or recommended to be the RPR can refuse the role, in which case an alternative person must be identified.

5.2 **The role of the RPR**

The RPR is there to support and represent the person in any matter relating to the deprivation of liberty. They have a duty to act in the best interests of the person.

For more information about deciding what is in someone's best interests, see Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

The RPR must be given written notice of the authorisation including the purpose of the deprivation of liberty and the duration of the authorisation. They must also be provided with information on the person's care to enable them to check that decisions are being made in their best interests and that any conditions attached to the authorisation are being complied with.

The RPR can apply for a review of the deprivation of liberty. This could be necessary if there is a change of circumstances and the managing authority has not informed the supervisory body of this (see section 6 below on reviews).

The RPR can also apply to the Court of Protection on the person's behalf to challenge the authorisation. Non means-tested legal aid will be available for this.

Both the RPR and the relevant person have the right to be supported by an IMCA (see section 4.7), unless the RPR is a paid representative. An IMCA is an independent professional who can support the RPR by making sure they understand their role and can carry it out effectively.

5.3 Replacement of the RPR

If the RPR cannot keep up their duties, for example if they move away and can no longer visit the person regularly, they should be replaced. If the RPR feels they cannot carry out the role effectively any longer they should notify the supervisory body (the local authority or primary care trust). If the care home or hospital has concerns that the RPR is not carrying out the role properly, they should discuss this with the RPR and if still not satisfied they should notify the supervisory body.

The person whose liberty is being deprived can also object to the RPR (if they have the capacity to make this decision), in which case the supervisory body should replace the RPR.

The replacement RPR should be selected following the recommendation of someone qualified to be a best interests assessor (see section 4 above). An IMCA should be appointed while there is no RPR in place, if the person has no family or friends to support them.

6 Reviewing and monitoring a deprivation of liberty

Authorisation of a deprivation of liberty must be removed when it is no longer necessary. The duration specified in the authorisation is the maximum allowed without further authorisation but if there is a change in circumstances before the end of this period it means the criteria for authorisation no longer apply, the authorisation must be ended.

The managing authority should have systems for monitoring the deprivation of liberty so they can identify when a review by the supervisory body is required.

If there is a change in circumstances which could mean the deprivation of liberty is no longer necessary, or a condition to the authorisation should be added or amended, the managing authority should inform the supervisory body, which must arrange for a review to be carried out.

A review can also be requested at any time by the person deprived of their liberty, their RPR or an IMCA. There is a standard letter that can be used to request a review, which can be downloaded from the Department of Health website (see section 9 'Useful organisations' for details).

The supervisory body must decide whether any of the qualifying requirements need to be reassessed, ie whether the person still meets the age, no refusals, mental capacity, mental health, eligibility and best interests requirements – see section 4 above). It will not always be necessary for all the assessments to be carried out; it could be only the best interests assessment or the mental capacity assessment that is required.

The person deprived of their liberty, their RPR, the IMCA if one is involved, and the managing authority must be informed by the supervising authority that a review is going to be carried out, and of the outcome of the review.

The outcome of the review could be to end the authorisation, to change or add conditions to it, or change the reasons for which authorisation is given. If the authorisation is ended, any continued deprivation of liberty will be unlawful.

It is not necessary for a managing authority to wait for the authorisation to be removed before they end the deprivation of liberty. If the care home or hospital decides it is no longer necessary to protect the person from harm, steps must be taken to make sure the person is no longer deprived of their liberty. They can then apply for a review to have the authorisation formally ended.

6.1 Temporary changes in mental capacity

A person's mental capacity to make certain decisions will often fluctuate. If someone being deprived of their liberty regained capacity to decide themselves whether they should stay in the care home or hospital they would no longer meet the requirements for authorisation of the deprivation. However, if this was only on a temporary short-term basis, it could be impractical for a supervising authority to temporarily go through the review procedure, and remove the authorisation if it would be required again as the person's capacity fluctuates.

In a situation like this the Code of Practice advises that a suitably qualified person must make a clinical judgment on whether there is evidence of a longer term regaining of capacity. If the person is only likely to have capacity on a short-term basis, the authorisation should be kept in place.

7 Challenging a deprivation of liberty

You may want to challenge a deprivation of liberty if you think:

- someone is being unlawfully deprived of their liberty when there is no authorisation in place; or
- an authorisation is in place but the requirements are not met; for example, if the person has capacity to decide for themselves not to remain in the care home or hospital, or if deprivation of liberty is not in their best interests.

7.1 Challenging an unauthorised deprivation of liberty

Any third party (eg a member of staff, family member, friend or carer) who thinks someone is being deprived of their liberty without authorisation can:

- ask the care home or hospital to apply for authorisation, or to change the care regime so that the person is not being deprived of their liberty;
- if this is not done, apply to the supervisory body for an assessment of whether the person is being deprived of their liberty. This assessment must be carried out within seven calendar days.

If there is a deprivation of liberty the full assessment procedure will go ahead.

There are standard letters to send to the care home or hospital, and to the supervisory body to request an assessment. These can be downloaded from the Department of Health website (see section 9 'Useful organisations' for details) but they are not compulsory; you can use your own wording in a letter, or make a verbal request.

If you think an unauthorised deprivation of liberty is taking place and you raise this with the care home or hospital, you should expect them to deal with it urgently: the Code of Practice states that this would usually mean within 24 hours.

The person appointed to assess whether a deprivation of liberty is taking place should consult the person who raised the concern, the person themselves and any friends and family. If there is no family or friend to be consulted, an IMCA must be appointed.

An unauthorised deprivation of liberty can be challenged at the Court of Protection. See section 7.3 below.

7.2 Challenging an authorisation

The person being deprived of their liberty, their RPR or an IMCA can apply for an authorisation to be reviewed (see section 6 above).

If authorisation is given and you don't think it is in the person's best interests, you should ask the supervisory body and the managing authority for evidence of what alternatives to deprivation were considered, and why they were rejected.

An authorisation can be challenged at the Court of Protection.

7.3 Taking a case to the Court of Protection

A case should usually only be taken to the Court of Protection if it has not been possible to resolve the matter with the managing authority and supervising authority, either by asking for an assessment to be carried out or for a review of an existing authorisation. However, due to the serious nature of depriving someone of their liberty, you should not delay involving the Court if a managing authority or supervisory body is not dealing with a complaint as a matter of urgency.

The following people can bring a case to the Court of Protection:

- the person who is being deprived of liberty, or at risk of deprivation;
- an attorney under a Lasting Power of Attorney;
- a deputy;
- a person named in an existing Court Order related to the application;
- the RPR.

Other people, such as an IMCA or any other third party, can apply to the Court for permission to take a case relating to the deprivation of liberty. For more information on how to take a case to the Court of Protection, see Age Concern's Factsheet 22, *Arranging for others to make decisions about your finances or welfare*.

7.4 The role of the Care Quality Commission

The Care Quality Commission (CQC) will monitor the Deprivation of Liberty Safeguards. It will have the power to visit and interview parties, and access all relevant records. The visits will only be carried out as part of their normal visiting programme, rather than to investigate an individual case, and inspection by the CQC is not intended to be an additional review or appeal. Concerns about an individual case that cannot be resolved with the managing authority or supervisory body should be referred to the Court of Protection.

8 The Code of Practice

A new Code of Practice sets out guidance for care homes and hospitals on how to avoid unlawful deprivation of liberty. Anyone with responsibility for applying the rules should refer to the Code which is available to download from the Publications section of the Department of Health website at:

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

9 Useful organisations

● Action on Elder Abuse (AEA)

AEA works to protect, and prevent the abuse of, vulnerable older adults. It is available to people who are being abused, those who are concerned about possible abuse including carers and workers, and those who are interested in finding out more about elder abuse. The helpline is confidential and provides information and emotional support in English and Welsh.

Helpline tel: 0808 808 8141 (free call)

Website: www.elderabuse.org.uk.

● Alzheimer's Society

Provides information about all types of dementia and supports people, their families and carers. The Society also produces a range of factsheets.

Helpline: 0845 300 0336

Website: www.alzheimers.org.uk.

● Care Quality Commission

The independent regulator of health and social care in England.

Tel: 0300 0616161

Website: www.cqc.org.uk

● Department of Health

Information and guidance on the safeguards can be downloaded from the DH website. The following standard letters are also available to download:

1: Letter to managing authority concerning unauthorised deprivation of liberty

2: Letter to supervisory body concerning unauthorised deprivation of liberty

3: Letter to a supervisory body from a person subject to a standard authorisation requesting a review

4: Letter to a supervisory body from a relevant person's representative requesting a review

All at www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

Website: www.dh.gov.uk

- **MIND**

The Information Unit of MIND (the National Association for Mental Health) offers support for people in mental distress and their families and referral to local associations that provide services such as counselling projects, self-help support groups and drop-in centres. Legal advice is also available.

Tel: 0845 766 0163

Website: www.mind.org.uk.

- **Office of the Public Guardian**

The role of the OPG is to protect people who may lack mental capacity. It publishes a range of guidance for professionals and the public.

Tel: 0845 330 2900

Website: www.publicguardian.gov.uk

- **Solicitors for the Elderly**

A national organisation of lawyers specialising in legal issues affecting older people, including issues relating to mental capacity.

Tel: 0870 067 0282.

Website: www.solicitorsfortheelderly.com

10 **Further information from Age Concern**

Visit the Age Concern website, www.ageconcern.org.uk, or call our national Information Line on 0800 00 99 66 (free call) if you would like:

- to order copies of any of the Age Concern information materials mentioned in this factsheet;
- to request information in large print;
- further information about our full range of information products;
- contact details for your nearest local Age Concern.

Books from Age Concern

Age Concern publishes a wide range of books for older people and those who care for and work with them. The following title may be of particular interest:

Your rights to money benefits 2009/10. All you need to know about the full range of benefits for the over 60s. £5.99 (available June 2009).

To order this book, or to view our full range of books, please visit our website www.ageconcern.org.uk/bookshop or call our book order line 0870 442 2120.

Age Concern and Help the Aged

Age Concern England and Help the Aged have joined together to form Age UK, a single charity dedicated to improving the lives of older people.

Age Concern and Help the Aged across the UK

To find out more about Age Concern and Help the Aged's work in Northern Ireland, Scotland and Wales, contact:

Age Concern Northern Ireland

Tel: 028 9032 5055

Website: www.ageconcernni.org

Scottish Helpline for Older People (Age Concern Scotland)

Tel: 0845 125 9732

Websites: www.olderpeoplescotland.org.uk

www.ageconcernscotland.org.uk

Age Concern Cymru & Help the Aged in Wales

Tel: 029 2043 1555

Website: www.accymru.org.uk

Support our work

Age Concern is the largest provider of services to older people in the UK after the NHS. We make a difference to the lives of thousands of older people through local resources such as our befriending schemes, day centres and lunch clubs; by distributing free information materials; and through our national freephone helpline – the Age Concern Information Line 0800 00 99 66.

If you would like to support our work by making a donation please call Supporter Services on 020 8765 7527 (Monday to Friday 9.15am–5pm) or visit www.ageconcern.org.uk

Legal statement

Age Concern England (charity number 261794) has merged with Help the Aged (charity number 272786) to form Age UK, a charitable company limited by guarantee and registered in England: registered office address 207-221 Pentonville Road, London, N1 9UZ, company number 6825798, registered charity number 1128267.

Age Concern and Help the Aged are brands of Age UK. The three national Age Concerns in Scotland, Northern Ireland and Wales have also merged with Help the Aged in these nations to form three registered charities: Age Scotland, Age Northern Ireland, Age Cymru.

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Please note that the inclusion of named agencies, companies, products, services or publications in this factsheet does not constitute a recommendation or endorsement by Age Concern and Help the Aged. While every effort is made to ensure accuracy, Age Concern and Help the Aged cannot be held responsible for errors or omissions.

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