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A Bill of Rights for Australia? – Part 2

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Rights ... or responsibilities? The rule of law and liberty

In the last issue of *Legal Eagle* I argued that it was not in the interests of the Australian people to have a constitutionally enshrined Bill of Rights. My argument was based on the proposition that our rights were perfectly well protected by the ancient common law, which has proven itself infinitely suitable to the needs of a free and democratic society, as it has been adapted by courts throughout the centuries, up until the present day.

Now I want to look at the relationship between *rights* and *responsibilities* – both in a legal sense, and in the broader sense of the interaction between the rights and responsibilities that provide us with freedom or liberty, and that in a very real way make us human. In fact, what I want to argue is that it is for this reason that it is much more important for a free and democratic society to consider the responsibilities of its citizens than it is to simply talk about their rights.

If we seek to serve the basic needs of our society with some kind of legislation, it may just be that a *Bill of Responsibilities* will 'fit the bill'.

What are responsibilities?

A responsibility can also be referred to as a 'duty.' But what makes a duty a duty? At law, duties carry liability – in other word, there are consequences for their breach, ranging from fines to imprisonment. These are the duties that our governments and the common law rate as so important that it is illegal or unlawful to breach them.

However, equating a responsibility with a duty is a relatively restricted definition. There are lots of duties that we have in our lives, but we're not breaking the law if we choose to neglect them. (Being nice to your mother, for example, would be seen as a duty by many people, but the law will not fine or imprison you if you are not.) If a responsibility in a broader sense is a duty that someone is bound to comply with, then the question arises: why, or by what, are they bound? In other words, what, other than the threat of punishment, makes a responsibility something we *should* comply with?

I would argue that ultimately the things that 'bind' all individuals to perform duties are in fact their rights. This sounds a little circular, but it makes perfect sense. If an individual expects to *receive* certain rights, they should recognise that they *must fulfil* certain responsibilities. This is not simply an issue of some sort of 'moral' obligation but, rather, a recognition that rights and responsibilities are so inextricably linked that it would be impossible for one to exist without the other.

These types of responsibilities – that is, responsibilities that are inextricably tied to rights – are usually referred to as 'correlative' responsibilities:

> 'In civil rights and human rights law, the most commonly recognised duties are correlative duties, referring to those legal duties that complement a specific right. Basically, a right is a legal advantage that entails a corresponding duty or disadvantage. For example, the right to free speech imposes a duty not to interfere with the free speech of others, since the right has no meaning if the correlative duty is not observed.
>
> One of the indispensable institutions of western society is the rule of law. That rule is central to democratic government, a vigorous economy and individual liberty. A functioning rule of law requires that law be understood to have force and moral weight of its own, independent of the political and cultural struggles of the moment. This is another way of saying that the rule of law, when it is observed, guarantees the supremacy of process in public affairs; self-government, stability and safety all depend on that supremacy.'[1]

Most people agree that certain human rights are fundamental. But if the rights are fundamental, then so are the responsibilities that go hand in hand with those rights.

Traditionally, the most fundamental of all human rights has been 'freedom' – that is, a person's right not to be deprived of liberty. But without accepting that people have certain responsibilities, it is impossible to conceive that they can have the right of liberty. What makes a person 'free' (possessed of liberty) is their capacity to, and moreover their ability to, make 'choices' – what to think, what to believe, and what to do.

By choosing to think, believe or do something, we are assigning a value to that thing (otherwise why would we bother to think it or believe it or do it?). If we are saying that a thought or a belief or an action is valuable to us, we must also be recognising its potential to be valuable to someone else. More importantly, we have to recognise that, at a basic level, the very act of choosing what to think, believe or do is itself valuable. This value extends not only to the process of choosing and the ability to choose, but also the intended outcome of that choice.

The essence of the value of this process is that it is fundamental to what it is to live life as a human being. In recognising individually this value, we cannot deny its universality to all humans, without devaluing its meaning for us.

How does all of this relate to 'responsibility'? Well, if I understand that my choices – and my capacity to choose, as well as my actual choosing – are what makes me *me*, I have an expectation, or at least a hope, that others will not take that capacity away. To be deprived of my capacity to choose to do what I want or think or believe makes me less human.

Recognising this, I have a responsibility not to deliberately, and without a good reason, deprive others of that same capacity. If I do, I not only explicitly recognise their right to do the same to me but I also devalue them as human beings, thereby (as we saw above) devaluing myself. The responsibility to ensure that others' freedom is not taken away is the basis upon which I guarantee my own freedom, but it is the responsibility to act in a certain way that comes first. If there

was no pre-existing responsibility, there could be no later right.

Here is a very simple example. I decide I want some chocolate. So I get in my car to drive to the local shop. I have a responsibility when driving to not run over random pedestrians (even though I am in a hurry to get my chocolate and they are taking some time to cross the road!) because this would deprive them of their lives and therefore their freedom. Once I get to the shop I have a responsibility to pay for – and not to steal – the chocolate. If I were to steal it, this would deprive the shopkeeper of the livelihood they have chosen, and would probably deprive other people of the ability to eat chocolate because the shopkeeper would close their shop, having grown tired of being robbed and unable to make a living.

My freedom to choose what to do, and how to do it, brings – with each choice I make – a whole range of responsibilities. If I fail to meet those responsibilities, I diminish the freedom of others and ultimately destroy my own freedom.

So where does this leave us in relation to the connection between *rights* and *responsibilities*? And what is the role of the *rule of law* in all of this?

First, it shows that responsibilities are the 'bedrock' – the foundations – upon which any rights are built, and it is on responsibilities that rights rely for their continued existence.

Second, in democratic societies, it is the law that is the fundamental tool for moderating and regulating our responsibilities and rights. The rule of law guarantees the system by which we preserve our freedom and thereby our basic humanity.

What the law does and, as a consequence, what lawyers do, is to facilitate a network of agreed *responsibilities* for people, based upon their intentions in their relationships with each other. For example, if Electro Power Pty Ltd runs a power station and purchases coal from Blackacre Coal Pty Ltd, lawyers will help the two parties draw up a contract that dictates the responsibilities that each party has to the other in relation to the supply of coal. Blackacre Coal has the responsibility of supplying a thousand tonnes of coal every four months to Electro Power, and Electro Power has the responsibility of paying for that coal in a timely manner (along with dozens of other minor obligations and responsibilities on both sides, of course!).

If all goes according to plan (that is, if both parties comply with their responsibilities under the contract), both parties are happy and profitable because of the different responsibilities they have both undertaken. It is only when, for instance, Electro Power gets behind in its payments, that Blackacre Coal will get its lawyer to write a letter to Electro Power reminding Electro Power that under the contract Blackacre Coal has a *right* to payment. So, as you can see, rights are what we refer to, or resort to, when a party on the other side of the 'transaction' has failed to meet their pre-existing obligations. Any need to claim a right only becomes a necessity when a pre-existing responsibility has not been met.

To translate this back from the commercial sense to the human sense ... in every 'transaction' that we enter into in our lives – whether that be purchasing chocolate, driving down the street, or speaking to somebody – we have a set of responsibilities. These are not defined by a contract drafted by lawyers, as in our power station example, but arise out of the 'social contract'. That is, in order for everyone to live harmoniously to the fullest extent possible, there are certain things that we must do, and certain things that we must not do. Rather than seeing the law as some sort of process that guarantees people rights, it is better seen as a process, by which people agree to be bound, that assigns and regulates responsibilities between them – effectively codifying, to some extent, the social contract.

Significantly, Harvard Law professor and diplomat Mary Ann Glendon has noted this about what lawyers do:

> 'The rank and file of the legal profession help their clients to plan and maintain relationships that depend on regular and reliable fulfilment of *responsibilities*. They know that the assertion of rights is usually a sign of a *breakdown* in a relationship.'[2]

As we saw above, the most recognised fundamental right is the right to liberty. The famous *Declaration of the Rights of Man and of the Citizen*[3] (a product of the French Revolution) says the following about 'liberty', 'freedom' and 'equality':

> 'Men are born and remain free and equal in rights ... Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.'

Thus the *Declaration* says that the natural rights of man have 'no limits *except* those which assure to the other members of the society the enjoyment of the same rights'. It also states that it is the *law* which is the natural process by which those limitations are set, explaining further that:

> 'Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation.'

But think for a moment about these 'rights'. In order that they have any 'reality' there must be some means of 'enforcing' them – of making them a reality. It is all well and good to say 'I am free!', but this means very little if half a minute later, five beefy thugs come and lock me up for no good reason! So the right to freedom is obviously reliant upon something else, or a number of other things ... what?

Clearly the first thing we need – in addition to the law that regulates our responsibilities – is a way to enforce that law. This means effectively that we need a court system, a police system to protect us from internal threats, and a defence system to protect us from external threats to our liberty.

In order to provide us with these things, we'll need to pay taxes – we need to pay for the police and army, after all (and we'll also need to pay the court officers and judges). In order to have an efficient and fair tax system, we'll need tax collectors and a few other bureaucrats to actually collect the taxes and make sure the system works.

If we have a bureaucracy and need a system of taxation, we'll want to have some say in how much and on what and how we're taxed, so we'll probably need some sort of representative parliament (as it would be unworkable for us all to meet together to decide on issues like tax levels!). In order to have a system of electing our representatives, we'll want free debate – thus freedom of speech is a requirement for our system to work.

Of course, it is possible that in the complex system that is evolving, all sorts of issues will have to be decided by our elected representatives – and not all of the outcomes will suit us. Some of the laws they pass will impose burdens or

responsibilities on us we don't particularly like. However, if we choose to follow only those laws we like and ignore or break those we don't, the whole system falls apart pretty quickly.

So you see, in order to preserve our liberty and freedom, we have the *responsibility* to do a number of things: we have the responsibility to obey the law, even when we don't like it (since we do have the opportunity to change it, through future elections); we have the responsibility to engage in civil society, by helping to choose our representatives (our parliamentarians); and we have the responsibility to pay taxes, to allow others free expression of political ideas, to adhere to bureaucratic regulations, to respect the police force, to serve on a jury if called to do so, and so on. These responsibilities are our guarantee of freedom.

Clearly, this freedom is not unbounded (I cannot run over random pedestrians on the way to get my chocolate, for instance). But the responsibilities I adopt are the guarantee of my personhood – my humanity. They are significantly more important to me as a human being than are whatever rights I have as a result of others fulfilling their responsibilities.

Culture of responsibility – not of rights

So to a very great extent it is *responsibilities* that underlie a workable democratic civil society. If everybody takes their responsibilities seriously, there is no need for any talk about rights at all. As noted above, 'rights talk' usually occurs when there has been a breakdown in relationships. Rights are what people fall back on when others have failed to keep their responsibilities.

Bills of Rights emphasise to citizens the things they are entitled to without reminding them of what they have to do to be entitled to those things. A culture that emphasises entitlements without reminding people of the 'obligations' associated with those responsibilities fails to protect the foundational and underlying factors – responsibilities – that guarantee the rights to which people are entitled. A *Bill of Responsibilities* would be a tool to remind people that their rights are something they earn in society with others, not simply things to which they are entitled without obligations.

References

1. Ben Saul, 'In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities' (2000-2001) 32 *Columbia Human Rights Law Review* 565, 585.
2. Mary Ann Glendon, *Rights Talk: The Impoverishment of Legal Discourse* (1991) 175 (emphasis added).
3. The text of the Declaration (1789) is available at http://www.hrcr.org/docs/frenchdec.html.

Class challenge:

Work in groups to prepare a list that matches rights with responsibilities. How long is your list?