

4 RECORDKEEPING PARTICIPANTS: LEGAL AND ETHICAL RESPONSIBILITIES

In Chapter 3 it was established that legal relations are all about rights, claims, duties, immunities and liabilities of legal persons which arise from acts which trigger a set of processes which have a legal consequence and are 'caused' by social facts which may be external to law. When a business transaction has a legal consequence the parties to the transaction and possibly third parties have taken part in evidencing (creating, modifying or extinguishing) a legal relationship. The notion of a legal relationship in law is an atomic aspect of human activity and in its narrow juristic interpretation includes only two persons and excludes third parties, unless they are acting as an agent for the parties.¹ It eliminates the web of relationships that a transaction operates within, or in fact any communicative act (oral or captured in a material form). If we define legal persons as also moral persons, then socio-legal relations also include persons that have control over or responsibilities for acts that have a moral effect. The motives and intentions of these persons have to be taken into account if records are to have any degree of reliability. Can recordkeeping metadata capture legal persons and their compliance with legal and ethical responsibilities?

Circumstantial evidence of the facts, persons involved and their intentions, regardless of outcome, required by law and ethical systems to attribute responsibility, rely heavily on the recordkeeping metadata elements of delegation, mandates and authority, captured and retained in recordkeeping systems. To ensure the participants are legally and morally accountable, recordkeeping metadata needs to capture the elements of person identity, and relationships between persons in order to establish rights and obligations in relation to recordkeeping transactions.

¹ In common law, the 'law of agency' has developed special rules on the agent's role. See Simon Fisher, *Agency Law*, Butterworths, Sydney, 2000.

4.1 The act-circumstances-motivation-intentionality in law, ethics and recordkeeping

The ‘will to act’, that is ‘volition’, and the notion of ‘intention’, are components in law necessary for attributing complete or partial liability. In the exposition on diplomatics the notion of volition was a requirement for the creation of a record, that is, the intention to create a record is essential for a record to be created. Civil law systems attribute the fountain of obligations to the will of the individual which explains the requirement of the ‘will’ of the juridical person in diplomatics to give validity to the transaction. Paola Carucci notes that Italian law includes motivation as the manifestation of the will, but the motive itself cannot be expressed, only its result in the act.² Thus the effects of the act as captured in the record evidence the actual motive of the moral agent, which is relevant to many ethical theories. The record witnesses ethical and legal consequential action.

In diplomatics, the outcome of the act, as the manifestation of the intention of the participants, is also evidence of legal and social responsibilities for the act and its consequences. The distinction regarding voluntary and involuntary acts in the common and civil law systems were noted in Chapter 3, in particular the requirement for consent in obligations in the civil law system. However, even if the common law in civil cases (as opposed to criminal) does not always require intentionality for the liability of an act, it cannot be excluded in terms of ascertaining moral responsibility.

4.1.1 The act-circumstances-motivation-intentionality in common law systems

Jeremy Bentham defines an action as an act of the body or mind, and an act of the mind is an act of intellectual faculty or will. The will depends on motivation, which in turn leads to an action. Every act and therefore every offence will have different effects according to the nature of the motive which gave birth to it. He defines motive as anything which influences the will of a person to act or to refrain voluntarily from an act on an occasion.³

² Paola Carucci, *Le Fonti Archivistiche: Ordinamento e Conservazione*, Carocci, Rome, 1998 (1983), pp. 42-43.

³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *Jeremy Bentham, An Authoritative Edition by J.H. Burns and H.L.A. Hart; with*

English lawyers follow Bentham's doctrine regarding two forms of intention. Simple acts may in most cases be done either intentionally or unintentionally and may have consequences that are intentional or unintentional.⁴ The distinction is not used as a constituent of criminal offences or measures of seriousness of an offence. As a consequentialist theory, moral value and disvalue of actions depends wholly on their outcome, so no distinctions are made between harm that is brought about as a means to an end and the same harm brought about as a foreseen by-product or second effect of the action.⁵

An intention to do what the law forbids is generally a necessary condition of liability for punishment (excluding unintentional torts or cases of strict liability). Bentham argues that if the act is unintentional, to apply the law is simply inefficacious; an intentional offence creates a secondary evil, as a person is more likely to offend again.⁶ The distinctions in forms of intentionality are very important in the exposition of *mens rea* as a constituent of criminal responsibility. Therefore cognitive and volitional factors involved in the structure of intentional action are important in criminal law.

Bentham does not consider the 'goodness' or 'badness' of intention as relevant, only its effects or motives. Intentionality is only in part a matter of will; it is also a matter of the awareness of 'consciousness', the existence of those circumstances, which determine what consequences the act will have. These distinctions help illuminate the concepts of mistake, heedlessness and negligence which are important for the determination of legal responsibility. Consciousness of the circumstances is also relevant to the intentionality of the act, but is not included in Bentham's analysis.⁷

'The general tendency of an act is more or less pernicious, according to the sum total of its consequences.' Consequences have to be 'material' (an

a New Introduction by F. Rosen, and an Interpretive Essay by H.L.A. Hart, Clarendon Press, Oxford, 1996, pp. 96-97.

⁴ H.L.A., Hart, 'Bentham's Principle of Utility and the Theory of Penal Law', in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, p. xcix. Bentham adopts the terms 'intentional' and 'unintentional' to avoid the use of the terms 'voluntary' and 'involuntary' (used by Aristotle) due to what he considers as their ambiguity.

⁵ *Ibid.*, p. ciii. 'The doctrine of double effect' challenges an outcome approach.

⁶ For Bentham an unintentional act should be excused from punishment, as it does not serve as a deterrent. Strict liability does not follow Benthamite reasoning. It does not take account of excuses and punishes equally those that have control over their acts as much as those that do not.

⁷ Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter VIII, Of Intentionality.

important term in common law), that is relevant to pleasure and pain, or have some evidentiary quality.⁸ The intention, with regard to the consequences of an act, depend upon two things: the state of the will or intention, with respect to the act itself, and, the state of the understanding, with regard to the circumstances which it is or may appear to be, accompanied with.

In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered. 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, unconsciousness and false consciousness, that accompanied it. The two other aspects that are relevant to the act and its punishment are: *motive* or motives which gave birth to it and the general *disposition* which it indicates. Acts may be negative and positive, e.g. to strike or not to strike is relevant to material differences with regard to consequences.⁹

The circumstances of an act may be explicitly stated as distinct from the act (for example, lying while on oath). The causal linkage Bentham makes is between a circumstance that is material (pain and pleasure from the act), a cause that brings about the consequences, and one that is immaterial if this causal relationship is missing. In the Benthamite framework the consequences of an act are events. Types of circumstances central to consequences are: criminative, exculpatory, extenuative and aggravative circumstances. Those that bear a material relation with the offence are evidentiary circumstances.¹⁰ It can be argued that circumstantial evidence may be found in a record's creation (metadata in the record) and includes evidence of the person's role as well as the act. This is the notion of competence, or duty to record found in law on documentary evidence (see Chapter 2).

Consent is necessary for certain acts, that is, one must have an intention to consent. Informed and express consent have been defined (in relation to the principles of privacy) as:

Free and informed agreement with what is being done or proposed. Consent can be either expressed or implied. Express consent is given explicitly, either orally or in writing. Express consent is unequivocal and does not require any inference on the part of the organisation seeking consent. Implied consent

⁸ Ibid., p. 74.

⁹ Ibid., pp. 75-76. There are three states of consciousness: consciousness, unconsciousness and false consciousness.

¹⁰ Ibid., pp. 80-83.

arises where consent may reasonably be inferred from the action or inaction of the individual.¹¹

Consent is relevant to acts that have contractual consequences, and must also be captured in recordkeeping metadata.¹²

4.1.2 Moral action and intention: the recordkeeping dimension

For Kant action is both the will and the act.

An action has to be an intelligent movement, that is guided by a conception of the environment and it has to make a change externally by way of making a change in the actor. It has to have *intentional content*, that is be subject to a norm of efficiency, which includes a standard of success or failure. In the sense of the norm of efficiency a computer system could be said to act *intentionally* but *not intelligently*.¹³

¹¹ Office of the Privacy Commissioner, Australia, *National Principles for the Fair Handling of Personal Information*, revised edn, January 1999, Human Rights and Equal Opportunity Commission, 1999.

¹² Australia, Senate, *Electronic Transactions Bill 1999*, Revised Explanatory Memorandum, 30 June 1999, p. 20, 'consent'.

¹³ [Emphasis added]. For Kant the will and the action are one, that is, if one wills an action one finds the means to carry it out. From Christine Korsgaard, Professor of Moral Philosophy, Harvard University, 'Human Action and Normative Standards', Guest Lecture, the Australian Catholic University, Christ Lecture Theatre, Melbourne, Friday, 14 July 2000.

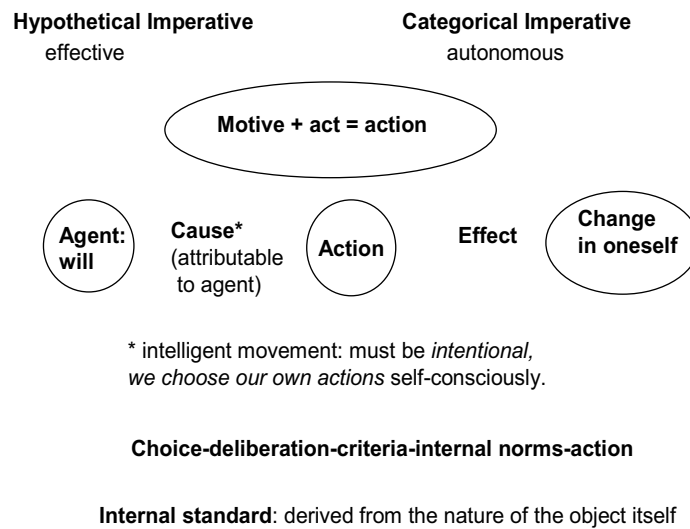
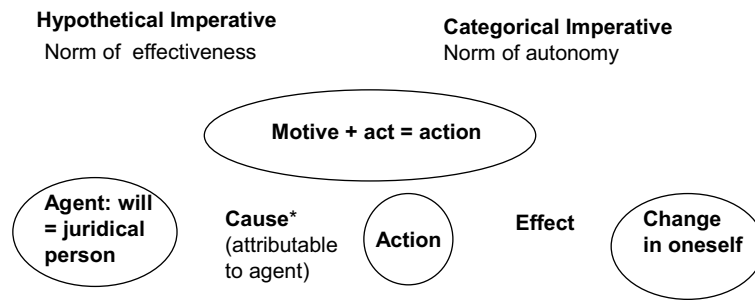


Fig. 5 Korsgaard's Kantian Model

The Kantian action involves conscious causality. Human action is the self-conscious causality or self-determination of a person. We do not act just from instinct, but rather we create our own forms of the world¹⁴ (see Fig. 5, Korsgaard's Kantian Model and Fig 5.A, Korsgaard's Kantian Model and Diplomats). Thus the document as the archival document or record requires the intentional action of the author to attribute to it 'recordness', that is, the author must know a record is being created. In diplomats will and volition are found in the identity metadata on the competent author. The record provides the evidence of the intention of the author as well as its results, that is, it is evidence of the action, in the Kantian sense.

¹⁴ Ibid.



* An intentional intelligent movement

Internal standards: standards which a thing must meet in virtue of being the sort of thing that it is, derived from the nature of the object itself, eg the 'recordness' of the record.

Fig. 5.A Korsgaard's Kantian Model and Diplomats

The record must document an intentional act that results from a business-social process in which the participants, as moral and legal actors (physical or corporate) take part, and have specific rights and obligations arising from their act.

4.2 Moral actors, agents and legal persons

Actor is a term used in law not so much as a legal term but to describe the different roles a legal person may undertake, while an agent acts on behalf of other legal persons. In ethics, actors or persons are human beings who are either moral agents or moral patients. Kant extends the moral agent to corporate entities but it is still within the notion of individual moral action. The definitions of person and agent in law are therefore generally not the same as in ethics, but do at times overlap. In recordkeeping theory including diplomacy and the European tradition the term actor as the person who undertakes the act in which the record participates, and the terms author, creator, and agent have their own meanings tied to legal origins. Thus to incorporate moral agency and legal persons into

recordkeeping concepts of actor and agent, it is necessary to examine their meanings from the perspective of ethics and law.

4.2.1 Legal agents-persons

In the legal and social relationship model introduced in the previous chapter a legal person, unlike a moral agent, was not equated with a human being, but a human being could be a legal person. Depending on the legal system our capacity as a legal person is usually defined for us. Legal personality has been defined as the sum total of the legal relations of a person, that is all one's rights and obligations, and thus responsibilities within the legal system.

4.2.2 Moral agents

The concept of a moral agent in ethical theory and practice may be the person acting on behalf of another but is generally the individual responsible for an ethical action. 'Moral agents' are defined as autonomous persons who are aware of their own capacity to make ethical judgments and moral choices. 'Moral patients' are not fully autonomous persons, and can only be passive decision-makers. They may include young children, unconscious human beings, the mentally retarded and the senile.¹⁵ In the Kantian view, 'persons' are human beings, but with duties with regard to other beings, including animals, that are still duties to themselves.¹⁶

The notion of a moral agent can be extended to corporate bodies. For example, Kant describes states as 'moral persons', with the same obligations toward each other as any other persons.¹⁷ If everyone is a moral agent, a corporate entity, both as a legal entity and as a community of persons, has moral agency. From a legal and moral view the corporation is an autonomous entity or artificial person, responsible for its actions. It is also responsible for its own members. It is a community in its own right, as

¹⁵ Matti Häyry, *Liberal Utilitarianism and Applied Ethics*, Routledge, London, New York, 1994, pp. 109-110; p. 143.

¹⁶ Roger J. Sullivan, *An Introduction to Kant's Ethics*, Cambridge University Press, New York, 1994, pp. 62-63, footnote 6.

¹⁷ *Ibid.*, p. 20.

well as consisting of employees and shareholders who have rights and obligations within the corporate community.¹⁸

In classic utilitarianism the agent is neutral, as the welfare of each individual is given equal weight, but moral agents themselves do not have to be equally concerned with everyone's good; the obligation of each agent depends on achieving good consequences. In virtue ethics, on the other hand, what counts as virtue in the ordinary sense, embodies a concern for self and other, understood as applying to a class of persons.¹⁹

In specific legal and social relationships moral permissions that are based on deontology will be directed at favouring the other party, or parties, to whom one has a duty. For example, the doctor has a duty to ensure that the patient's treatment is of benefit to the patient, and to his/her family. On consequentialist grounds moral permission emanates from all parties affected by the action, that is, the doctor's treatment benefits society as a whole.

Rights-based ethics also incorporates the moral agent, firstly as a result of rights of one party arising from the duty of the other party, and secondly from pre-existing rights. In virtue ethics the nature of 'role' and the virtues that predicate the role, permit the moral agent to behave in a particular way.

Ethics involves making individual decisions as an autonomous moral agent, not merely accepting socially established conventions.²⁰ 'Deontic' person-appraisal is a method used to judge people for either acting or for refraining to act, thereby attributing blameworthiness or praiseworthiness. In this approach the moral worth of persons is defined in relation to specific acts. In 'aretaic' appraisals, physical persons are assessed, not in terms of how they act but their overall moral worth.²¹ This latter view has relevance to a person's overall trustworthiness, and in the online environment or when there is a need for the continuous certainty of trustworthiness in transactions, overall moral worth may be a preferable method to a duty-centred one. In recordkeeping activities trustworthiness is

¹⁸ Kenneth Goodpaster, 'Concepts of Corporate Responsibility' in *Just Business: New Introductory Essays in Business and Ethics*, ed. Tom Brogan, Random House, New York, 1984, pp. 292-322.

¹⁹ Michael Slote, 'From Morality to Virtue', in *Virtue Ethics, A Critical Reader*, ed. Daniel Statman, Georgetown University Press, Washington, D.C., 1997, pp. 128-144.

²⁰ Logstrup's position in, Knud Ejler Logstrup, *The Ethical Demand*, University of Notre Dame Press, Notre Dame and London, 1997, Chapter 2.

²¹ Philip Montague, 'Virtue Ethics: A Qualified Success Story', in *Virtue Ethics, A Critical Reader*, ed. Daniel Statman, Georgetown University Press, Washington, D.C., 1997, pp. 194-204.

captured in person metadata, that is, the attributes of the legal and moral authority of recordkeeping participants.

4.3 Legal and moral accountability

4.3.1 Autonomy and character

Accountability, responsibility and blame are concepts relevant to both ethics and law. Blame and responsibility are component parts of accountability. Accountability for a deed means one is responsible for its cause, deserves blame, and is liable to compensate the person affected or harmed. To be responsible one has to be free to make a moral decision. The moral agent is one that is capable of reasoning and making choices intentionally.²² Autonomy and character are decisive factors for responsible moral action.

The social determinist view of autonomy is one that allows an individual to choose a set of values within a particular society, as a choice within a plurality of views. The relativist view argues that the right to choose within a liberal society is limited by the fundamental values of a specific society. An alternative view of autonomy is that of prudential rationality, that is, organising one's life to maximise the good in it, as summarised by John Charvet:

If we think of the autonomy of self-conscious reason-giving beings as a matter of the degree to which reasoned deliberation prior to choice occurs, then we must allow that autonomy is present even in the most elementary choices by an agent of one good over another, and is expanded as the agent develops its powers of reflection on the good-making properties of the natural and social worlds and builds this understanding into the characteristic responses to life's options.²³

In Kantian ethics the notion of a purely rational moral agent rests on the principle of the law of autonomy. The 'categorical imperative' that we act only on maxims which we are able to treat as universal has to be read with the requirement to treat other persons as rational autonomous beings.²⁴

²² Alasdair MacIntyre, *A Short History of Ethics: A History of Moral Philosophy from the Homeric Age to the Twentieth Century*, 2nd edn, University of Notre Dame Press, Notre Dame, Indiana, 1998, p. 85.

²³ John Charvet, *The Idea of an Ethical Community*, Cornell University Press, Ithaca New York and London, 1995, pp. 81-82.

²⁴ Sullivan, *An Introduction to Kant's Ethics*, Chapter 3.

Through the categorical imperative, maxims can be identified as right, independent of the consequences of following those maxims.²⁵

Today the term autonomy is used in psychology to designate the ‘self-actualising’ self-directed person. This is more how Kant used the term prudential.²⁶ It is also used today as an absolute right of persons to make their own decisions and to control their own lives without interference from others, and in the patient-doctor context has developed a special meaning (see Chapter 6). The contemporary uses have some relationship with Kant’s meaning of the term. The conviction that the autonomous person is responsible for individual moral actions rules out coercive interference from others. Outside of this, Kant’s reasoning is far more restrictive than contemporary notions of autonomy. For Kant ‘autonomy’ denoted our ability and responsibility to know what morality requires of us and to act accordingly. It is not a norm to satisfy our desires; in fact it is ‘the supreme limiting condition of all subjective trends’.²⁷ The obligations to others are not based on their rights but on our prior obligations. Autonomy is an obligation. For this reason Kantian deontology reinforces the notion of obligation as defined in legal relations.

4.3.2 Moral character and moral agency

In social sciences a person’s character consists of inherited qualities modified by acquired habits and other external influences such as family and education. From this perspective, a person’s character is explicable in terms of prior causal factors. For a free will proponent like Kant, inherited attributes can make the notion of moral character meaningless, as we would not be free to exercise our agency because it was causally determined. Kantianism places responsibility for our own character on individuals. Humans have an innate predisposition to a morally good character; thus human moral agents cannot be irrevocably evil. However, morally correct actions do not mean a morally good character, even though in acting dutifully we must have moral sentiments.²⁸ In virtue ethics the

²⁵ Ibid., pp. 125-126. According to Kant, when we deliberate and act, we are free from determination by any prior or concurrent causes outside of our reason. A free will is one that acts only on general maxims that can at the same time be laws for all other free wills.

²⁶ The prudent man, more or less refers to ‘practical intelligence’ from the medieval Latin ‘prudentialia’. Ibid., p. 79.

²⁷ Ibid., p. 128.

²⁸ Ibid., pp. 130-144.

character of the agent is decisive in moral action and will affect his/her choice of action and determine its value.

4.3.3 Voluntary and involuntary actions

Within a legal system the emphasis is on ascertaining the chain of responsibility for an action. Is it possible that all actions are determined by causes independent of the agent's deliberations and choices, so that no actions are voluntary? For virtue ethicists it is only voluntary actions that are praiseworthy or blameworthy.²⁹ What does emerge about voluntary action in ethics is a positive sense that choice and deliberation play a key role but not every human action is preceded by deliberation. Deontological ethics searches for rules for specific moral judgments.³⁰

In common law the distinction between voluntary and involuntary actions, or intentional and unintentional acts is found in the differences in responsibility in contract and tort law.³¹ While in the theory of contract law the intention of the parties is an element of contract formation, in practice a contract is inferred from conduct, as an expression of intention.³² The record also infers intention from the action recorded. The voluntary or intentional aspect is not always relevant to legal liability. A strict liability standard in product liability would mean that the vendor is liable for an injury caused by its product whether or not he or she is at fault. Negligence defence would require proof of reasonable conduct. Tort law compensates for harm, but someone has to be responsible for the harm. Where does foreseeable harm enter? Both law and ethics will hold a person responsible for events that are outside of their control. Taking control even of events that appear outside of one's control is essential to moral agency, as well as

²⁹ MacIntyre, *A Short History of Ethics*, pp. 68-71. For virtue ethicists 'involuntary' is contrasted with 'deliberate' rather than with 'voluntary'. An action is non-voluntary when it is done under compulsion or ignorance. Compulsion covers cases when an agent is really not a free agent. In law the theory of 'causation' is a jurisprudential discourse in its own right.

³⁰ Sullivan, *An Introduction to Kant's Ethics*, pp. 37-39.

³¹ Aristotelian ethics distinguishes between voluntary and involuntary actions. Aristotle does not get into later riddles of philosophy on free will. MacIntyre, *A Short History of Ethics*, p. 70.

³² *Halsbury's Laws of Australia*, vol. 6, Butterworths, 1999, Part 3, 'Theories of Contract' and Part 7 'Intention to Create Legal Relations', pp. 196,043-196,051.

to legal liability.³³ Circumstantial evidence of the facts, persons involved and their intentions, regardless of outcome, required by law and ethical systems to attribute responsibility, rely heavily on the recordkeeping metadata elements of mandate, delegation and authority, captured and retained in recordkeeping systems.

4.4 Recordkeeping participants: legal persons and moral agents

Recordkeeping participants include moral and legal actors, that are also legal persons and moral agents, as defined above.

4.4.1 Recordkeeping professional responsibilities

Although business and recordkeeping processes have a number of participants, the recordkeeping professional has a special role as an independent third party.³⁴

A model for defining the exclusive expertise of the recordkeeping professional which supports legal and ethical rights and obligations can be defined with reference to the role of the recordkeeper as the trusted preserver of the memory of society, specifically responsible for:

- ensuring that organisations and individuals create and capture records of their actions, so that they can fulfil their obligations and enforce their rights or that of their descendants;
- determining how long records need to be kept for business, legal and cultural purposes;
- ensuring that organisations and individuals manage their records over time using appropriate preservation strategies;

³³ ‘Moral luck’ refers to the fact that many aspects of a person’s conduct and the circumstances in which that conduct occur may be out of their control. These are philosophic questions that tort lawyers, as well as ethicists, tackle. Peter Cane, ‘Retribution, Proportionality, and Moral Luck in Tort Law’, in *Law of Obligations: Essays in Celebration of John Fleming*, eds Peter Cane and Jane Stapleton, Clarendon Press, Oxford, 1998, p. 142.

³⁴ In the current environment this role may appear in new guises such as that of a trusted third party in electronic transactions, including that of a certification authority for issuing digital signatures, or as a ‘cybernotary’, a theme that is taken up in Chapters 7 and 8.

- providing appropriate access and security controls to prevent the inappropriate use of information;
- maintaining the corporate memory of organisations or persons; and
- contributing to collective identity and cultural continuity by carrying records through time and space.

These activities gave rise to the professional ethical and legal obligations of the recordkeeping professional.³⁵

4.4.2 'Business' participants' responsibilities

The recordkeeping participant is defined more broadly than recordkeeping professionals, and includes actors as moral agents and legal persons in business transactions, within a network of relationships. Although the recordkeeping professional has a professional responsibility to ensure that systems keep records, other business employees are also responsible for the records of their activities. In the *International Records Management Standard*, responsibilities are articulated as:

Records management responsibilities and authorities should be defined and assigned, and promulgated throughout the organization so that, where a specific need to create and capture records is identified, it should be clear who is responsible for taking the necessary action. These responsibilities should be assigned to all employees of the organization, including records managers, allied information professionals, executives, business unit managers, systems administrators and others who create records as part of their work, and should be reflected in job descriptions and similar statements. Specific leadership responsibility and accountability for records management should be assigned to a person with appropriate authority within the organization. Designations of the responsible individuals may be assigned by law.

Such responsibilities should include statements such as:

- (a) Records management professionals are responsible for all aspects of records management, including the design, implementation and maintenance of records systems and their operations, and for training users on records management and records systems operations as they affect individual practices.
- (b) Executives are responsible for supporting the application of records management policies throughout the organization.
- (c) Systems administrators are responsible for ensuring that all documentation is accurate, available and legible to personnel when required.

³⁵ See Livia Iacovino, *'Things in Action': Teaching Law to Recordkeeping Professionals*, Ancora Press, Melbourne, 1998, Chapter 4 on law as an integral part of the knowledge of the recordkeeping professional.

(d) All employees are responsible and accountable for keeping accurate and complete records of their activities.

Archival authorities may be involved in the process of planning and implementing records management policies and procedures.³⁶

Clearly there are many individuals in an organisation responsible for accurate recordkeeping in addition to recordkeeping professionals.

4.4.3 Business participants as legal persons and moral agents in recordkeeping processes

Business or personal actions should be captured as records and linked with metadata which characterize their specific business context when they commit an organization or individual to action, render an organization or individual accountable, or document an action, a decision or decision making process.³⁷

Recordkeeping responsibilities are not only attributable to the recordkeeping professional but also to all business participants involved in business processes that give rise to records. From a transactional and process perspective of recordkeeping there has to be a number of participants. Both diplomatics and the records continuum model provide approaches that are developed here for the purpose of attributing responsibility to business participants that depend on the data that captures their responsibilities and their actions.

4.5 Recordkeeping research projects: identifying the responsibilities of recordkeeping participants

In applying the legal and social relationship model to the rights and obligations of parties to a business transaction, the identity of the authors and recipients found in the 'intrinsic' elements of diplomatics adopted by the University of British Columbia's *International Research on Permanent Authentic Records in Electronic Systems 1* (InterPARES 1), and 'actors and agents' as defined in the Monash University's Recordkeeping Metadata Project (RKMS), and where and when their rights and obligations

³⁶ ISO 15489-1, *Information and Documentation - Records Management Standard*, ISO 2001, 6.3, 'Responsibilities'.

³⁷ Ibid., 9.1 'Determining documents to be captured into a records system.'

begin and end, depends on the recordkeeping model adopted by these research projects.³⁸

Both research models have been concerned with modelling conceptual requirements for the preservation of authentic electronic records over time, but within intellectual frameworks that arrive at different strategies for their creation and retention.

4.5.1 InterPARES 1 and recordkeeping responsibilities

InterPARES 1 in its early development adopted the diplomatics concept of the requirement of the 'intent to communicate' as necessary for a record to exist. Even when there is system to system communication, a juridical person is responsible for each system - there is an intent to communicate between the juridical persons responsible for the systems.³⁹ This element is central to the notion of ethical responsibility (see above).

Of relevance to recordkeeping responsibility in this project has been:

- the assignment of responsibility for record creation and record keeping to juridical persons, and
- control (legal and physical) of records over time.

In the life cycle approach that supports the InterPARES project there is a shift in responsibility for protecting the record's integrity from the creator to the preserver, that is, a neutral third party, usually an archival authority once the business purposes of the records have been exhausted, that ensure their authenticity over time. This view involves the physical transfer of records, whether paper or electronic, from the creator to the

³⁸ In the Monash Recordkeeping Metadata Project, *the people (agents) entity class* includes natural and legal persons, for example, individuals, work groups, corporate bodies, and social institutions: 'People or agents (as-actors, as-organisational units, as-corporate bodies/organisations, as-social institutions).' Sue McKemmish, 'Constantly Evolving, Ever Mutating': An Australian Contribution to the Archival Metatext, PhD Thesis, Monash University, 2001, p. 332, footnote 26. In the InterPARES 1 project the persons participating in a transaction are physical and legal persons who are identified through the intrinsic elements of documentary form and take part in the action of the record. They are not defined as metadata elements, as metadata is restricted to data outside the documentary form. See InterPARES 1 Project, Authenticity Task Force, *Template for Analysis*, 7 Nov. 2000.

³⁹ InterPARES 1 Project, Authenticity Task Force, *Template for Analysis*, 'Intellectual Form', 21 May 1999. This earlier version of the template is not on the public website.

preserver, and is referred to as the 'custodial model'. For example, different parties are accountable for different recordkeeping activities. 'The creator is accountable for its action *through* its records, the preserver is accountable *for those* records'.⁴⁰ However, this assumes some way of knowing when the creator is no longer responsible, or a statutory or administrative procedure that arranges for this to take place. Outside of the public sector private entities may come and go, and must be targeted to keep authentic records. It is a strategy that has become technologically difficult.

The transfer of records from a creator to a preserver is one strategy for preserving the elements of authenticity of the record over time.⁴¹ Evidence law has had rigorous requirements for a record's admissibility because of hearsay rules that considered a document had to have been in 'proper or unbroken custody' to be authentic. Archivaly this is termed as 'continuous custody' and has supported a preserver, such as an archival authority, who can take long-term custody of the record.⁴² Changes to evidence law in a number of countries have placed more responsibility onto the business creators to ensure that electronic systems have been operating correctly, and that they have been maintained, so that businesses have become 'preservers'.⁴³

The issue is that *someone* has to be responsible for the long-term preservation of records arising from legal and social relationships. *How* this is done will depend on recordkeeping good practice which takes into account the juridical system or systems in which it operates.⁴⁴

⁴⁰ Luciana Duranti and Heather MacNeil, 'The Protection of the Integrity of Electronic Records: An Overview of the UBC-MAS Research Project', *Archivaria*, vol. 42, Fall 1996, p. 62.

⁴¹ Australian recordkeeping research which operates within the continuum framework, considers a range of strategies for the long-term preservation of records. The advantage to the records continuum view is its greater flexibility in this regard, as it does not have to be read as a complete integration of all recordkeeping responsibilities by the creator, although this reading of the model is also possible. The fourth dimension can be read as the independent third party whether that is the archival authority or some other accountability mechanism. It is a question of the 'role' of a preserver, which can be taken by the same physical person but with different legal status.

⁴² Iacovino, *Things in Action*, pp. 95-96.

⁴³ See Chapter 2, 'Rules of evidence and trustworthy records'.

⁴⁴ The fact that the custodial model is followed in many North American national public archival institutions, but until recently has not been favoured in Australia, is an implementation issue that is not addressed in this book. In March 2000 the National Archives of Australia announced that it accepts

4.5.2 The Monash Recordkeeping Metadata Project: the concept of mandate and recordkeeping responsibilities

In the Recordkeeping Metadata Project developed by Monash University, the concept of a mandate in relation to an agent provides the main tool for identifying and capturing recordkeeping legal and ethical responsibilities.⁴⁵ Mandates are associated with the related business activity, which is linked to the people-agent doing the business. In the early development of the project, mandates were not all inclusive, and were differentiated from law, policies and business rules.

The elements defined in the Recordkeeping Metadata Scheme identify and describe significant features of the business contexts in which records are created, managed and used. They identify and describe the people or agents involved, and the records themselves. *They also link business contexts to the people or agents doing the business and the records that document it, and they reference the mandates, laws, policies and business rules that authorise and control business activity.* They enable description and management of recordkeeping actions, e.g. the processes which fix the content of records, enable their forms to be re-presented and rendered over time, manage their physical preservation, classify and index them. They enable the stringing together of related records, the administration of terms and conditions of access, use and disposal, and the tracking and documenting of the recordkeeping actions themselves, as well as the history of the use of the records.⁴⁶

However, the term agent is far more inclusive than authors and creators in diplomatics and archival science respectively, who operate at a specific

custodial responsibility for Commonwealth records, in all formats, that have been selected as national archives. National Archives of Australia, *Custody Policy for Commonwealth Records*, March 2000.

⁴⁵ The relationship of 'mandate' with agents and business used in the models developed by the Recordkeeping Metadata Project drew on the work of the University of Pittsburgh, 'Functional Requirements for Evidence in Recordkeeping Project', in particular on the warrants for recordkeeping in organisational contexts, and on Sue McKemmish's exploration of the broad social mandates for personal recordkeeping found in sociology, creative writing and reflective narratives. See also Chapter 1 on the warrant and regulatory model for recordkeeping which noted that the notion of the mandate does not appear to conflict with the notion of a juridical community or communities of common interest.

⁴⁶ Sue McKemmish and Glenda Acland, 'Appendix 4, Recordkeeping Metadata (RKM) Elements Draft Version 2.0: Briefing Notes, 4 March 1999', in Proceedings (unpublished), Budapest, Hungary, 8-12 March 1999. [Emphasis added].

level only, and in which the differentiation is closer to formal 'legal' actors, for example the author is the legal or physical person who has the authority to issue the record.⁴⁷

Agents may be social entities (e.g. organisational bodies or other social drivers such as motherhood), persons, legal and other such instruments. They may operate at any level in a hierarchy and may be responsible for creating, controlling and managing records, or they may be engaged in their use. Examples include intelligent agents (such as in electronic systems which undertake discretionary decisions), organisational positions, organisational units or work groups, organisations, social institutions (including social constructs such as motherhood or friendship), persons or families. The layers defined in this entity are Persons or Actors (who carry out the transactions), Organisational Units or Work Groups (responsible for the activity), Organisations or Corporate Bodies (mandated to carry out the function), and Social Institutions (associated with ambient functions in the sense of high level societal purposes).⁴⁸

In the final iteration of the project, mandates were differentiated by their 'external' and 'internal' nature; they establish responsibilities and provide the motive for their execution.

People do business in social and organizational contexts that are governed by external mandates (e.g., social mores and conditioning, laws, regulations, standards, best practice codes, professional ethics) and internal mandates (e.g., corporate culture, policies, administrative instructions, delegations, authorities). Mandates establish in both formal and informal ways who is responsible for what, and govern social and organisational activity and recordkeeping behaviours. Authentic records of social and organisational activity provide evidence of that activity and function as corporate and collective memory. They also provide authoritative sources of value added information as they capture not only the content, but also the context of the interactions they document. And they account for the execution of the mandate - internally and externally, currently and over time.⁴⁹

The Recordkeeping Metadata Project clearly links agent behaviour to rules, whether these are legal, business or social, and places less emphasis on the character traits of personal agents, their intentions which may not be definable in terms of acts based on rules alone. Mandates have limitations

⁴⁷ InterPARES 1 Project, Authenticity Task Force, *Template for Analysis*, 7 Nov. 2000, pp. 1-6.

⁴⁸ McKemmish and Acland, 'Appendix 4, Recordkeeping Metadata (RKM) Elements Draft Version 2.0: Briefing Notes'.

⁴⁹ Sue McKemmish, Glenda Acland, Nigel Ward and Barbara Reed, 'Describing Records in Context in the Continuum: the Australian Recordkeeping Metadata Schema', *Archivaria*, vol. 48, Fall 1999, p. 13.

in terms of ethics, where ethics is defined as separate from social mores, and each action has a unique ethical aspect. Many ethical theories do not consider rules or social mores as ethical drivers as they are subject to change, while ethical action is specific to the demands of each individual action. However, motivation for action can be identified by rules only within a deontological model of ethics, that is, it is one's duty to follow a legal rule.

The notion of rules and standards that control the behaviour of agents is a 'neopositivist' deontological model, in this respect no different from rules that govern actors in diplomatics. Rules are predictable and more suited to routines in systems, and for modelling purposes. However, humans are not (as yet) machines. Can any metadata capture the individual act and its intention anyway? The courts surmise intention from circumstantial evidence. If metadata captures the changed relationship between the actors evident in and through transactions, to some extent this evidences intention, if intention is construed by outcome.

At the first dimension in the records continuum there is room to interpret an actor-rule-intention-act; while at the systems level there is a series of acts over time that may or may not be consistent with the actor-rule-intention-act. External mandates for acting virtuously or motivating the act (for example, professional ethics) are one acceptable position in virtue ethics.⁵⁰ It could be argued that the 'external mandates' are internalised into business-social-legal rules, rather than being separate from the rules; that is, they can be traced to external mandates, but as motives for action the individual at the transaction level must choose to apply them. Thus choice, essential for ethical behaviour, must be available for recordkeeping action. Mandates alone do not adequately take account of the notion of a reciprocal right-duty evidenced by the record.

4.6 The records continuum, diplomatics and recordkeeping participants: an extended regulatory model

Within the records continuum model the identity of recordkeeping participants for the purpose of attributing responsibility is found in the identity axis, at all four dimensions.⁵¹ The actor in the records continuum

⁵⁰ John McDowell, 'Virtue and Reason', in *Virtue Ethics*, eds Roger Crisp and Michael Slote, Oxford University Press, Oxford, New York, 1997, pp. 141-162.

⁵¹ The relevance of identity to trustworthy records is covered in Chapter 2.

model is linked to authorities and responsibilities that support an act, and is an ‘instrument’ in a transaction.⁵² This is also reflected in the Monash Recordkeeping Metadata Project’s ‘agent’ and its relationship with mandated responsibilities. Diplomatics distinguishes between author, writer, originator,⁵³ and addressee/recipient at the document level and archival science adds the ‘creator’, the archival ‘fonds’ or the entity (‘structural’ provenance). The record as an instrument for attributing responsibility for action is also essential to the Kantian and the jurisprudential-diplomatics differentiation of event and act (see 4.1.2 above, ‘Moral action and intention: the recordkeeping dimension’). Recordkeeping metadata needs to capture the elements of person identity and relationships between persons in order to establish rights and obligations in relation to recordkeeping transactions. The record is both evidence of rights and obligations and is itself ‘a thing as relationship’.

If we return to the conceptual aspects of both recordkeeping research models, we can in fact extend them in ways that provide methods for analysing legal and ethical responsibilities, that are particularly suited to legal and social relationships.

4.6.1 ‘Identity’ elements in recordkeeping and related legal rights and duties

The assignment of legal responsibilities to ‘persons’, is an indication of their property rights in records, or to the data or intellectual content in records, or what they can do with the information. If we add third parties, who have an interest in legal relationships, we can come up with a useful matrix to identify recordkeeping participants in any legal system.⁵⁴ In

⁵² The identity axis at the first dimension of the records continuum is particularly significant as this is where the actors in the initial communication are identified, and their responsibilities begin. Their responsibilities continue across all dimensions. Frank Upward, ‘Structuring the Records Continuum, Part One: Postcustodial Principles and Properties’, *Archives and Manuscripts*, vol. 24, no. 2, Nov. 1996, endnote 31.

⁵³ Maria Guercio, in *Archivistica Informatica: I Documenti in Ambiente Digitale*, Carocci, Rome 2002, p. 33 notes that ‘originator’: name of the person assigned the electronic address in which the record has been generated and/or sent was a new element added to diplomatics by the University of British Columbia, *The Preservation of the Integrity of Electronic Records Project* and adopted by InterPARES 1. See Template for Analysis, 7 November 2000.

⁵⁴ The first three terms are from diplomatics, which considers legal actors involved in the creation of records as fact, as well as from the terms actor and agent

ethics all the categories would also be moral agents as defined above. The model is summarised below:

* <i>Writer/actor/physical person</i> : human person at the desk/work station acting in his/her own right in relation to other persons; witness to the facts; relevant to reliability of facts in a record.
* <i>Author/record creator/agent</i> : legal actor/juridical 'person' or position having the capacity/authority to act legally in his/her own right; the will to act (the juridical act); the actor who undertakes an act which creates, modifies or maintains a situation; an entity/corporate body capable of acting legally. The author can only be established by knowing the legal system; juridical agency/agent with mandated functions must be known. Note: author and creator are separate entities in diplomatics and archival science respectively.
* <i>Recipient or addressee</i> : the person for whom the record is intended/directed; may, or may not be the recipient of the action.
* <i>Third party</i> : A person who is not part of the original transaction and thus an independent outsider who may authenticate the record, seek access to, or use the record or data therein either for themselves or on behalf of another third party. ⁵⁵ This party may be vicariously liable for the transaction. The author and the addressee are the first and second party if they are the actors of the action. The relationship of the third party with other parties in the transaction may be removed by varying degrees, for example a regulatory watchdog; an archival authority, or a signature certification authority. A distinction between trusted third parties and other third parties needs to be made.
* <i>Record or data subject</i> : the person(s) who is (are) the subject of or referenced in a record or document; in the subject matter of the document. May have no involvement in the action of the record. In some cases may have provided the data, or be the same person as the recipient.

'Authorship' as authority is important to both the reliability and the ownership of the record. Authorship can also be defined by the moral permission given by a community. It is linked to authority and

found in the records continuum model and RKMS, and the remainder have been developed by the author.

⁵⁵ 'One who is a stranger to a transaction or proceeding', from *Osborn's Concise Law Dictionary*, 8th edn, eds Leslie Rutherford and Sheila Bone, Sweet and Maxwell, London, 1993, p. 323.

competence, the sphere of functional responsibility entrusted to an office or an officer within the juridical system; the legal person responsible for the action. Authorship is also relevant to ownership; that is, records created or received by an organisation or a legal entity are owned by the organisation or entity; a record sent to someone is in the 'possession' of the recipient, which may or may not equate with ownership.⁵⁶ This may however be different from the ownership of intellectual property of the record. Copyright law may stipulate who is an author for copyright purposes, and owners of moral rights may be the authors of the work as opposed to the owners of the economic rights.⁵⁷ Ownership also affects control over access to the information in the record, although this could be overridden by statute. Thus the author, for legal purposes, may be different from the author identified from the analysis in diplomatics or archival science.

4.6.2 Third parties and legal relationships

Third parties are not part of the jurisprudential legal relationship model. The exception is where a contract exists for the benefit of third parties.⁵⁸ Trusted third parties have always existed, such as the notaries and trustees. Rights of the recipients of the action or data subjects have also impinged on the one-to-one notion of a legal relationship.

The legal actors that have been added to the matrix (third parties and record subjects) reflect changed business and legal realities, such as the accretion of individual human rights in the last decades of the twentieth century. In the web environment they may operate as intermediaries or trusted third parties. These relationships will determine rights and liabilities of the legal persons participating in the action of the record. In turn these records support the rights and obligations of the persons involved in the action.

⁵⁶ The data subject, that is, the person referenced in the document is not the owner of the record (unless the author was writing about himself) but could under certain circumstances exercise access rights to the content in the document either via statute or common law. These distinctions are relevant to the ownership of data and records. See 5.1, 'Property as a legal and social relationship'.

⁵⁷ See *Copyright Amendment (Moral Rights) Act 2000* (Cth).

⁵⁸ Simon Fisher, 'General Principles of Obligations', in *The Law of Commercial and Professional Relationships*, ed. Simon Fisher, F.T. Law & Tax, South Melbourne, 1996, p. 15.