

RESTORATIVE LAWYER DISCIPLINE IN AUSTRALIA

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INTRODUCTION

Brown and Wolf have provided us with a thought-provoking analysis of why we should consider a restorative justice approach in lawyer discipline. The literature on restorative justice is voluminous. This Article does not engage with the ongoing debate as to what is and is not within the “restorative justice” umbrella. Reviews of the restorative justice literature by Menkel-Meadow,¹ Roche,² and others confirm the wide variety of understandings of restorative justice, the use of restorative processes, and the commitment to restorative values, though often described by another name. So, too, we will find this to be the experience in the disciplinary system for Australian lawyers.

I seek to avoid any direct engagement with the more normative critiques of restorative justice as a general theory of justice. Any consideration of whether lawyer disciplinary systems should and could move to a more restorative approach must take heed of empirical assessments of the contexts in which restorative justice appears to work most effectively. This Article does not claim to provide any comprehensive assessment of the likely level of “fit” between restorative justice and lawyer discipline. Instead, it merely seeks to highlight a few areas that are likely to require some further thought, consideration, and research in the future.

For the purposes of this Article, I have adopted Brown and Wolf’s understanding of a restorative justice model that distinguishes it from other forms of responding to complaints about lawyers. For instance, it will be assumed that, essentially, an ideal restorative justice model would involve multiple stakeholders, not just a lawyer and regulator, and not just a lawyer and the client complainant. Instead, ideally, it would involve a roundtable that at least included the affected client, the lawyer complained about, his or her colleagues, and other members of the profession concerned about the impact of the lawyer’s conduct, and in which no party dominated.³

This Article first provides a brief history and overview of lawyer⁴ discipline in Australia. Brown and Wolf believe enormous changes would be needed

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¹ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007).

² Declan Roche, *Dimensions of Restorative Justice*, 62 J. SOC. ISSUES 217 (2006).

³ JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 12 (2002).

⁴ The term ‘attorney’ is not commonly used in Australia. Hence, the term lawyer will be used, but the terms are interchangeable.

to introduce a consumer protection model of lawyer regulation in the United States.⁵ As will be seen, in Australia, legislative supports for consumer protection and restorative responses to complaints about lawyers are well established. However, the melding of these on top of a disciplinary system has proven problematic. Nor do these legislative supports necessarily reflect the current preferences of regulators. Rather, some regulators of lawyers in Australia appear to have shunned formal, structured processes (like mediation) and instead have fashioned less stable powers for themselves out of “public interest” discretions, which they hold under the relevant legislation.⁶

The Article then highlights steps in the journey of a complaint from dissatisfaction to formal discipline. The aim here is to identify particular points in the escalation of a complaint where a restorative approach could be particularly beneficial for complainants or lawyers complained about, more likely to achieve restorative outcomes or the approach more easily put into action. The Article will demonstrate the benefits of applying a restorative approach at the very earliest opportunity, when the complaint is received by a lawyer or law firm and before it escalates to a formal, external complaint.

The Article goes on to discuss the question of compensation in lawyer discipline. Disciplinary systems in Australia have had the power since the 1980s to award compensation while simultaneously disciplining lawyers in the same proceedings.⁷ A restorative approach might assume that compensatory and disciplinary outcomes could be on the table at the same time as part of a possible suite of outcomes from a restorative conference. However, the granting of compensatory powers to disciplinary tribunals has proven problematic for Australian tribunals. The Article explores these problems and considers their implications for restorative justice.

HISTORY OF LAWYER DISCIPLINE IN AUSTRALIA

Much of the impetus for Brown and Wolf’s Article is ongoing dissatisfaction with the way complaints against lawyers are handled in the United States.⁸ This too has been the experience in Australia.⁹

Australia is a federation of six states and two territories. The individual state supreme courts govern the legal profession but with a right of appeal to the High Court of Australia.¹⁰ The most vocal dissatisfaction with lawyer discipline and the most concerted efforts to initiate reform in the past have occurred

⁵ Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 1, 267–69 (2012).

⁶ See *Legal Profession Act 2007* (Qld) s 448; John Briton, Legal Servs. Comm’r, Complaints About Lawyers: Regulation, Representation and Restorative Justice, Address at the Bar Association of Queensland 2008 Annual Conference 17–20 (Feb. 17, 2008) (Austl.), http://www.lsc.qld.gov.au/data/assets/pdf_file/0011/106220/complaints-about-lawyers.pdf.

⁷ *Legal Profession Act 1987* (NSW) s 171D; *Legal Practice Act 1996* (Vic) s 133(1)(a).

⁸ Brown & Wolf, *supra* note 5, at 258–61.

⁹ Leslie Levin, *Building a Better Lawyer Discipline System: The Queensland Experience*, 9 LEGAL ETHICS 187, 187 (2006) [hereinafter Levin, *Queensland Experience*].

¹⁰ See *Judiciary Act 1903* (Cth) s 35(2); *Clyne v N.S.W. Bar Ass’n* (1960) 104 CLR 186, 198 (Austl.).

in the largest state—New South Wales.¹¹ There, lawyer discipline has been under scrutiny since the 1960s, largely because of perceptions that the self-regulating profession had taken inadequate account of consumer concerns.¹² Over time, a single gateway for complaints has developed in most Australian jurisdictions. Complaints are now more commonly received by an independent statutory regulator, not by professional bodies as in the past.¹³

When the profession was still self-regulating and receiving complaints about its members, it applied the traditional definition of the sort of conduct that made a lawyer liable to discipline—professional misconduct.¹⁴ This definition focuses more on the profession's sensibilities than on the impact of a lawyer's conduct on consumers as it defines professional misconduct as conduct "which would be reasonably regarded as disgraceful or dishonourable by . . . professional brethren of good repute and competency."¹⁵ In the late 1980s in New South Wales and early 1990s in Victoria, legislation sought to include more consumer-focused definitions of the sorts of conduct liable to discipline.¹⁶ A new lesser disciplinary offence was inserted—"unsatisfactory professional conduct."¹⁷ This was defined as conduct that fell short of the standards of competence and diligence that a member of the public was entitled to expect of a "reasonably competent legal practitioner."¹⁸ Legislative reforms have also encouraged disciplinary tribunals to consider a broad range of rehabilitative orders, including orders requiring education, supervision, inspections, or practice limitations.¹⁹ Since the late 1980s and early 1990s, Australian disciplinary tribunals have had legislative power to award compensation of up to \$15,000 to complainants.²⁰ They could also order lawyers to repay fees, to work for free, or to work for a stated amount.²¹ Statutory regulators in Australia have had powers to mediate client complaints about lawyers since the early 1990s.²²

In summary, the legal profession in Australia no longer self regulates. The organised bar now plays a more limited role, often just performing tasks that

¹¹ Christine Parker, *Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness*, 25 U.N.S.W.L.J. 676, 690 (2002) (Austl.).

¹² DAVID WEISBROT, AUSTRALIAN LAWYERS 210 (1990).

¹³ See, e.g., *Legal Profession Act 2004* (NSW) s 505 (Austl.); *Legal Profession Act 2004* (Vic) s 4.2.5 (Austl.); *Legal Profession Act 2007* (Qld) s 429 (Austl.).

¹⁴ GINO DAL PONT, LAWYERS' PROFESSIONAL RESPONSIBILITY 522 (2010).

¹⁵ *Allinson v Gen. Council of Med. Educ. & Registration* (1894) 1 QB 750, 763 (England) (following the common law test applied to medical practitioners).

¹⁶ See *Legal Profession Act 1987* (NSW) s 127(2) (Austl.); *Legal Practice Act 1996* (Vic) s 137 (Austl.).

¹⁷ *Legal Profession Act 1987* (NSW) s 127(2), inserted by *Legal Profession Reform Act 1993* (NSW) sch 2; *Legal Practice Act 1996* (Vic) s 137.

¹⁸ *Legal Profession Act 1987* (NSW) s 127(2), inserted by *Legal Profession Reform Act 1993* (NSW) sch 2. This definition of unsatisfactory professional conduct has remained constant since being duplicated in the *Legal Profession Act 2004* (NSW) s 496 when that Act replaced the *Legal Profession Act 1987* (NSW). Parker, *supra* note 11, at 692; see also *Legal Practice Act 1996* (Vic) s 137.

¹⁹ *Legal Profession Act 1987* (NSW) s 149; *Legal Practice Act 1996* (Vic) s 159(1).

²⁰ *Legal Profession Act 1987* (NSW) s 171D; *Legal Practice Act 1996* (Vic) s 133(1)(a).

²¹ See, e.g., *Legal Practice Act 1996* (Vic) s 133(1).

²² See, e.g., *Legal Profession Act 1987* (NSW) s 143(1).

independent statutory regulators choose to delegate to it from time to time.²³ Almost continuous rounds of legislative reform have shifted powers away from the profession. Legislative reforms have also granted a broad range of dispute resolution powers to these independent statutory regulators. In particular, rehabilitative and restorative orders have been made available to disciplinary tribunals for over twenty years. This means that Australia is further down the path to a restorative justice approach to discipline than appears to be the case in the parts of the United States described by Brown and Wolf.

On the other hand, it could perhaps be said that professional discipline in Australia suffers from an even greater identity crisis than systems in the United States, because, at the same time that legislation encourages these more restorative orders, monetary fines continue to be part of the disciplinary landscape.²⁴ Fines are not used in the United States because of their punitive effect.²⁵ Hence, the path to embrace restorative justice in lawyer discipline might be clearer in the United States given this clearer renunciation of punitive intent in discipline.

There are other distinctive features of legal practice in Australia that are relevant to any discussion of a restorative approach in lawyer discipline. First, all Australian lawyers are required to carry professional indemnity insurance.²⁶ Fidelity Funds tend to cover client losses that are due to fraud and so are excluded from insurance coverage.²⁷ Hence, comparatively speaking, Australian clients are well indemnified against losses caused by their lawyers. Implicit in some of the discussion by Brown and Wolf is an assumption that more restorative justice within U.S. lawyer disciplinary systems would ensure more clients are compensated for their losses.²⁸ In Australia, it is arguable that insurers and fidelity funds already pick up more of this slack. Second, interest earned on client money in lawyers' general trust accounts in Australia is not paid to clients but is used to subsidise lawyer regulation as well as the fidelity fund.²⁹ This interest is not used by disciplinary agencies in the United States because this would be seen as a taking of clients' private property and so offend the Fifth Amendment.³⁰

²³ *Legal Profession*, DEP'T OF JUSTICE (Vic), <http://www.justice.vic.gov.au/home/the+justice+system/legal+profession/> (last visited Jan. 24, 2012) (Austl.).

²⁴ See Linda Haller, *Disciplinary Fines: Deterrence or Retribution?*, 5 *LEGAL ETHICS* 152, 152 (2002) [hereinafter Haller, *Disciplinary Fines*].

²⁵ See JOINT COMM. ON PROF'L DISCIPLINE, NAT'L CTR. FOR PROF'L RESPONSIBILITY & THE ABA, *PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES* 112 (1979) (fines are seen as tantamount to a criminal penalty).

²⁶ *Table 1: Professional Indemnity Insurance Requirements Around the World*, http://www.practicepro.ca/LawPROmag/ProfessionalIndemnity_AroundWorld.pdf (last visited Jan. 24, 2012).

²⁷ FIN. INDUS. COMPLAINTS SERV. LTD., *COMPENSATION AND INSURANCE ARRANGEMENTS FOR AFS LICENSEES* 6–7 (2007), [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/Consultation_paper_87_submission_FICS.pdf/\\$file/Consultation_paper_87_submission_FICS.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/Consultation_paper_87_submission_FICS.pdf/$file/Consultation_paper_87_submission_FICS.pdf) (Austl.).

²⁸ Brown & Wolf, *supra* note 5, at 268–69.

²⁹ Reid Mortensen, *Interest on Lawyers' Trust Accounts*, 27 *SYDNEY L. REV.* 289, 306 (2005).

³⁰ *Id.* at 312.

No comprehensive comparison has been done of the workload, costs, and resourcing of disciplinary systems in the United States and Australia. However, the appropriation of this interest on money in trust accounts might mean there is more money to pursue restorative justice options in Australia. Even then, however, the fact that this money comes from clients, and not lawyers themselves, might raise ethical concerns: restorative justice initiatives promoted by the profession can perhaps be more readily pursued if it is lawyers themselves who are funding the initiatives. If instead it is to be funded by clients, then it becomes essential to show a direct benefit to clients.

LAWYER DISCIPLINE IN AUSTRALIA TODAY—AN OVERVIEW

The Australian lawyer disciplinary system has some important differences to the system that operates in the United States. Most importantly, and as noted previously, it involves far less self-regulation by the profession than the system described by Brown and Wolf.³¹ In Australia, most complaints about lawyers are received by an independent statutory body.³² The organised bar (by which I mean the professional body representing solicitors and the professional body representing barristers) today still play a role, but usually only when the statutory regulator chooses to delegate the investigation of a particular complaint or other regulatory function.³³ The reduced role played by the organised bar has a number of consequences for our current discussion of restorative justice. Any regulatory system must have legitimacy and moral authority. The restorative justice model envisioned by Brown and Wolf arguably has greater moral authority within a self-regulating system; lawyers may be more willing to participate in a scheme for which their own profession is responsible, rather than a scheme dreamt up by an external regulator or imposed by legislation.³⁴ Second, Brown and Wolf are concerned that any model of lawyer discipline too dominated by non-lawyers may shift its attention from conduct to consequences.³⁵ The experience of independent regulation in Australia should allay this particular concern.³⁶ However, it is true that the profession and independent regulators can have different priorities, and this may impact priorities in restorative justice processes and objectives.

The Article will describe the various stages of formal complaint handling in the Australian system and consider the opportunities for a restorative approach to be applied. Before doing so however, it is valuable to consider the opportunities for a restorative approach to be undertaken *before* a formal complaint is lodged.

³¹ Brown & Wolf, *supra* note 5, at 278–80.

³² See e.g., *Legal Profession Act 2004* (Vic) s 4.2.5; *Legal Profession Act 2004* (NSW) s 505; *Legal Profession Act 2007* (Qld) s 429(1). These are the three largest states.

³³ *Legal Profession*, *supra* note 23.

³⁴ Brown & Wolf, *supra* note 5, at 305–06.

³⁵ See *id.* at 267.

³⁶ See Levin, *Queensland Experience*, *supra* note 9, at 196–98, 207–08.

Internal Complaint Handling within a Firm

If we adopt a broad, inclusive understanding of restorative justice, then it is useful to consider the opportunities for such an approach to be applied when complaints are received by law firms, before they escalate to complaints that are taken to external, disciplinary bodies. Not a lot of work has been done as to how law firms handle complaints internally, but the general consensus appears to be that the legal profession is less sophisticated in its response to complaints than many other service industries.³⁷ There are a number of potential barriers to implementing a restorative justice approach in formal disciplinary proceedings. These include considerations of confidentiality, legislative constraints, and external accountability. However, none of these impediments apply when a complaint is received by the law firm. It may be useful to demonstrate this using the prototypical hypothetical case proposed by Brown and Wolf:

A sole practitioner, John Wilson, has a diverse practice, including everything from wills and trusts, to real estate matters, to plaintiffs' personal injury cases, but he is struggling to make ends meet. Tom Taylor retains Wilson to represent him in a small commercial case against a supplier who delivered defective goods to Taylor's small business. Wilson files the initial complaint, but then loses track of the case in the whirlwind of developing his practice and maintaining the many other matters he is handling. Wilson fails to return several calls from Taylor checking on the status of the case. Then the case is dismissed due to Wilson's failure to comply with the defendant's discovery request. Wilson never informs Taylor of the dismissal. From other sources, Taylor eventually learns of the status of his case. Since the statute of limitations has not run, Taylor retains a new lawyer to file a timely and successful motion to reopen the case. Still, Taylor is extremely upset with Wilson, and feels that Wilson should not be permitted to go on as he has in ways that could harm other clients.³⁸

Brown and Wolf's Tom Taylor goes immediately to the state's Attorney Registration and Disciplinary Commission to file a complaint against his lawyer, Wilson.³⁹ There might be many advantages for both Taylor and Wilson if Taylor first raised his concerns with the firm itself. But, in this scenario, Wilson is a sole practitioner.⁴⁰ In Australia, sole practitioners are heavily over-represented in disciplinary proceedings, just as they are in the United States.⁴¹ There are a multitude of reasons for this that are explored elsewhere.⁴² Suffice to say, Wilson's status as a sole practitioner may increase the likelihood of client complaints but also reduce the practical opportunities for a restorative justice

³⁷ Christine Parker & Linda Haller, *Inside Running: Internal Complaints Management Practice and Regulation in the Legal Profession*, 37 MONASH U. L. REV. ____ (forthcoming 2012).

³⁸ Brown & Wolf, *supra* note 5, at 261.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Linda Haller, *Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis*, 13 BOND L. REV. 1, 16 (2001).

⁴² Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 Hous. L. REV. 309, 310-18 (2004).

approach to Taylor's complaint at an early stage. In particular, what neutral party can act as facilitator?

It may be more useful to consider the situation if Wilson was a lawyer within a larger legal practice. This provides an opportunity to envision a setting in which a restorative justice approach could be adopted at a very early stage. It also recognises that restorative justice models should reflect the frequency of human interactions in organisational settings.⁴³ There may be good reason for Taylor to make the law firm aware of his dissatisfaction with one of its lawyers before he takes his complaint to an external regulator. In Australia, all lawyers must hold professional indemnity insurance.⁴⁴ This facilitates the opportunity for clients to receive some redress for neglect in a less formal and more summary and timely way than in parts of the United States without compulsory insurance.

Over and above any question of compensation, Taylor may be pleased to attend a meeting between himself, Wilson, and other members of Wilson's immediate community—the law firm. There, Taylor can fully tell the story of his frustration, can hear from Wilson and other members of the law firm how such neglect of Taylor's case was allowed to occur, and what systems the law firm has or intends to put in place to ensure that the firm as a whole—as well as Wilson—takes greater care of future clients.

Restorative justice in this forum has many advantages over attempting a restorative justice approach at later, more formal and external stages. The duty of confidentiality is owed to the client, Taylor, by the law firm as a whole, so any roundtable discussion can take place in a highly protected and safe environment. This protects the reputation of the lawyer and law firm, and the privacy of the client, Taylor. Second, even if an external complaint is subsequently lodged, the fact that the firm has attempted to take “appropriate remedial action” may cause the regulator to decide that no further formal action is required.⁴⁵ Third, this discussion is not inhibited in any way by the many legislative requirements that may constrain the form that restorative justice can take once Taylor takes his complaint to an external regulator. Related to this, once Taylor's complaint is in the hands of an external regulator, that regulator is subject to demands for accountability in the handling of the complaint that do not constrain the law firm. These constraints on the regulator are considered later in the Article.

We turn now to consider complaints that are not resolved internally by the law firm and escalate to a formal complaint lodged with a regulator.

⁴³ BRAITHWAITE, *supra* note 3, at 243.

⁴⁴ See Table 1: *Professional Indemnity Insurance Requirements Around the World*, *supra* note 26.

⁴⁵ See *Legal Profession Act 2007* (Qld) s 117(4)(b) (Austl.).

STAGES IN FORMAL COMPLAINTS AND DISCIPLINE

Receipt of Complaint

All complaints about lawyers in most parts of Australia are received by an independent statutory body.⁴⁶ That body decides whether the complaint appears to be about a civil dispute or about a lawyer's conduct.⁴⁷ If about a lawyer's conduct, the statutory regulator then decides whether to investigate the complaint itself or to delegate this task to one of the professional bodies (the organised bar).⁴⁸ After investigation, the regulator needs to decide what to do with the complaint.⁴⁹ As is the experience in the United States and many other jurisdictions, only a very small proportion of matters proceed to a formal disciplinary hearing; a much greater proportion are summarily dismissed or dealt with informally.⁵⁰ To understand why this is the case, it is informative to look at the sorts of matters that Australian clients complain about. Here, the Australian experience tracks the experience in the United States. As many as thirty percent of complaints are about costs and lawyer's fees.⁵¹ Another eighteen percent allege neglect, and five percent allege poor communication.⁵²

These complaints are not the traditional sorts of matters with which lawyer disciplinary systems concerned themselves.⁵³ Complainants who raise issues of overcharging and negligence are usually told to pursue their remedy against lawyers in the general courts.⁵⁴ Instead, disciplinary systems in Australia have tended to focus on matters of dishonesty and on the regulatory failures of lawyers, for instance a failure to respond to a regulator's request for more information.

Empirical studies into restorative justice have suggested a curvilinear relationship between participation rates for victims and the seriousness of offenses: victims are less likely to participate if, in their eyes, the matter is too trivial to be bothered with or too traumatic.⁵⁵ Translated into the context of professional discipline, this might mean that participation rates are unlikely to increase simply because regulators or outsiders might think they should; the current disconnect between the matters about which clients complain and the matters about which regulators actually discipline would need to be addressed. For instance, clients are unlikely to attend a conference that relates to a lawyer's failure to file trust account audit documents on time. If disciplinary systems are to adopt

⁴⁶ See *supra* note 32.

⁴⁷ See *infra* p. 110 ("Civil and Disciplinary Pathways of Complaints").

⁴⁸ See, e.g., *Complaints*, LEGAL SERVS. COMM'N (Qld), <http://www.lsc.qld.gov.au/complaints#The%20Commission%27s%20role%20in%20relation%20to%20complaints> (last visited Jan. 24, 2012).

⁴⁹ See, e.g., *id.*

⁵⁰ Brown & Wolf, *supra* note 5, at 262.

⁵¹ LEGAL SERVS. COMM'R (Vic), 2010 ANN. REP. 79 fig.34, available at <http://lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=188>.

⁵² *Id.*

⁵³ Linda Haller, *Professional Discipline for Incompetent Lawyers? Developments in the UK and Australia*, 17 INT'L J. LEGAL PROF. 83, 84 (2010).

⁵⁴ *Id.*

⁵⁵ Menkel-Meadow, *supra* note 1, at 174.

a more restorative approach, as advocated by Brown and Wolf,⁵⁶ with the aim of improving the complainant's experience of the complaints process, the implementers should address this point. Careful thought needs to be given as to whether a restorative approach will be applied to the traditional type of disciplinary case, or whether in fact, disciplinary bodies will shift their attention to the types of cases that clients care most about, and, hence, those with which they are most likely to want to participate.⁵⁷

Role of the Complainant

Civil and Disciplinary Pathways of Complaints

Brown and Wolf have noted the limited role played by complainants in the U.S. grievance procedure.⁵⁸ In Australia, the degree of involvement by the complainant depends largely on how the complaint is categorised once received by the regulator.⁵⁹ It can be categorised as either a disciplinary complaint or a civil complaint about a civil dispute.⁶⁰ A complaint is categorised as a disciplinary complaint if the conduct would amount to unsatisfactory professional conduct or professional misconduct.⁶¹ A civil complaint about a civil dispute means a dispute or claim about costs, that the complainant has suffered loss or other genuine dispute between lawyer and client.⁶² This is far from a satisfactory distinction. There is very little case law to assist. In essence, civil disputes arise from a difference of opinion between lawyer and client about, for instance, what would have been a reasonable fee. They do not involve any broader ramifications for future clients. Where the complaint raises broader questions about a lawyer's fitness to practice and the need to protect future clients, then it is more likely to be categorised as a disciplinary complaint.⁶³

The complainant plays a very different role depending on how their complaint is categorised, as explained below.

Disciplinary Complaint

If a complaint is categorised as a disciplinary complaint, as in the United States, the complainant plays little or no role in the future handling of the discipline application. Complainants will remain aware of how the discipline application is proceeding if they are on "stand-by" to give evidence in a contested hearing.⁶⁴ However, only a very small percentage of disciplinary investigations proceed to a contested hearing in which the complainant is required to give evidence in person.⁶⁵ It is much more common for disciplinary complaints to

⁵⁶ Brown & Wolf, *supra* note 5, at 314.

⁵⁷ Brown and Wolf seem to believe a supplementary use of restorative justice processes is most likely. *Id.* at 284.

⁵⁸ *Id.* at 262.

⁵⁹ See *Legal Profession Act 2004* (Vic) s 4.2.11.

⁶⁰ See *Id.* s 4.2.2-4.2.3

⁶¹ *Id.* s 4.2.3(1).

⁶² *Id.* s 4.2.2.

⁶³ See, e.g., *Id.* s 4.2.3 (Victoria's definition of "disciplinary complaint").

⁶⁴ Scott McLean, *Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers Paradigm*, 28 U.Q. L. J. 225, 240 (2010).

⁶⁵ Brown & Wolf, *supra* note 5, at 262.

be summarily dismissed, for the statutory regulator to exercise powers to deal with the complaint summarily, for the lawyer to admit the facts of the complaint and argue instead about whether these facts amount to misconduct, or for the lawyer to admit misconduct and argue instead how the disciplinary tribunal should dispose of the adverse findings.⁶⁶ All of these processes can take place without any input from, or notification to, the complainant.

Civil Dispute

Complainants can and must take a much more active role if the regulator classifies their complaint as one about a civil dispute rather than one about the conduct of their lawyer. The statutory regulator is required to attempt to resolve civil disputes,⁶⁷ but will not investigate the matters alleged in such complaints.⁶⁸ If attempts by the regulator to resolve the dispute break down, the regulator will not take any further action or assist the complainant in any other way; the onus is on the complainant to issue civil proceedings against the lawyer in the general courts.⁶⁹

INVESTIGATION OF DISCIPLINARY COMPLAINTS

The regulator will choose to investigate some complaints. If the complaint appears to raise issues of misconduct by the lawyer, the regulator must investigate.⁷⁰ This is done by the independent regulator or delegated to one of the professional bodies—the Law Society if the complaint is about a solicitor, or the Bar if the complaint is about a barrister. The complainant has no say as to what will happen after her complaint is investigated, although she is told what the regulator has decided to do in relation to the complaint following investigation, and why.⁷¹

Formal Disciplinary Hearings

The role played by the complainant in any formal disciplinary hearing will depend largely on the regulator. Disciplinary proceedings in Australia are open so any member of the public can attend.⁷² The complainant has no privileged status in that regard. This was well demonstrated in the recent Victorian disciplinary case of *Legal Services Commissioner v Elliott*.⁷³ The client, Parkin, had complained to the Legal Services Commissioner that his lawyer, Elliott, was guilty of delay in relation to proposed litigation.⁷⁴ Elliott failed to respond to the commissioner's requests for a response to Parkin's complaints, so disciplinary

⁶⁶ See, e.g., LEGAL SERVS. COMM'R (Vic), *supra* note 51, at Figure 39.

⁶⁷ *Legal Profession Act 2004* (Vic) s 4.3.5(1).

⁶⁸ See *id.* s 4.3.7.

⁶⁹ See *id.* s 4.3.5(5); *id.* s 4.3.15. The dispute may then be heard in the statutory tribunal established to hear simple civil disputes or in the general courts if the matter is more complex or involves more than \$25,000 in disputed costs. See *id.* s 4.3.15; *id.* s 4.3.17(1)(a).

⁷⁰ *Id.* s 4.4.7(1).

⁷¹ *Id.* s 4.4.14(1)(a).

⁷² Linda Haller, *Dirty Linen: The Public Shaming of Lawyers*, 10 INT'L J. LEGAL PROF. 281, 282 (2003).

⁷³ See *Legal Servs. Comm'r v Elliott* [2007] VCAT 2244.

⁷⁴ See *id.* ¶ 2.

charges in relation to these failures to respond were brought.⁷⁵ The client was clearly interested in what transpired at the disciplinary hearing and travelled from South Australia to attend the hearing.⁷⁶ However, there, he was told by the tribunal that he “was fully entitled to be present, although his attendance was not a necessary part of the hearing of these charges.”⁷⁷ Parkin played no part in the hearing as the lawyer’s refusal to respond had transformed the inquiry from whether Parkin’s complaint was substantiated into whether the respondent lawyer had failed to respond to the commissioner’s request for an explanation.⁷⁸ Parkin could only observe from the public gallery of the disciplinary tribunal, with no greater role to play than any other member of the public who chose to view the hearing on that day. The one concession made to Parkin was that the lawyer agreed to reimburse his costs of travelling to the hearing, and the tribunal took this into account when calculating the fine the lawyer was ordered to pay.⁷⁹ A more restorative model would acknowledge Parkin’s frustrations that his lawyer continued to ignore his complaints and would allow Parkin to voice these frustrations to the lawyer or tribunal.

The impotence of complainants continues beyond the hearing of the charges. Professional bodies have a power to appeal in those states of Australia where they still hold the power to prosecute a discipline application, but otherwise only the regulator or lawyer have a right of appeal.⁸⁰ The complainant has no power to appeal any disciplinary decision with which they are dissatisfied.⁸¹

Restorative Justice through Statutory Regulators

Statutory regulators in Australia have a statutory obligation to attempt to resolve civil disputes that are the subject of a civil complaint.⁸² They can attempt to resolve those disputes in a variety of ways. The most formal is through mediation.

Mediation

Regulators have had the power since the early 1990s to facilitate the mediation of complaints that they have categorised as civil disputes.⁸³ Legislative protections have sought to enhance the attractiveness of mediations to both lawyers and clients. For instance, mediators are subject to the strictest confidentiality obligations, much stricter than apply to the Legal Services Commis-

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 8(iv).

⁷⁸ *Id.* ¶ 2.

⁷⁹ *Id.* at ¶¶ 8(iv), 9. In Australia, unlike in the United States, fines are a common form of order in lawyer discipline. Haller, *Disciplinary Fines*, *supra* note 24, at 152.

⁸⁰ Linda Haller, *Imperfect Practice under the Legal Profession Act 2004* (Qld), 23 U. QUEENSL. L.J. 411, 428–29 (2004).

⁸¹ See, e.g., PROF’L STANDARDS DEP’T, LAW SOC’Y OF N.S.W., COMPLAINTS PROCESS INFORMATION 4 (2009), available at <http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/026150.pdf> (In NSW, complainants are only permitted to appeal a compensation order).

⁸² *Legal Profession Act 2004* (Vic) s 4.3.5(1).

⁸³ *Legal Profession Act 1987* (NSW) s 144, inserted by *Legal Profession Reform Act 1993* (NSW) sch 2.

sioner (the chief regulator) or any other person within the Commissioner's office. For instance, a mediator is prohibited from assisting police with investigations or from giving evidence in criminal proceedings.⁸⁴

Regulators can attempt to resolve civil disputes in ways apart from mediation. Some of these are recognised and facilitated by the legislative framework.⁸⁵ For instance, settlement agreements, whether reached through mediation⁸⁶ or otherwise,⁸⁷ can be easily registered and enforced through the courts. "[A]nything said or done in the course of attempting to resolve" any civil dispute is inadmissible in any tribunal or court proceedings relating to the same matter.⁸⁸

Mediations have the potential to develop into the more idealised restorative justice model advocated by Brown and Wolf.⁸⁹ In some cases, mediations are conducted over the telephone,⁹⁰ but in face-to-face meetings, the mediator has the power to allow additional stakeholders to attend the mediation.⁹¹ In some parts of Australia, mediations are handled by the professional bodies rather than by the independent statutory regulator.⁹² This means that the lawyer's community of peers plays a role. However, as a mediator in an independent, rather than self-regulated, system, appointed by a professional body pursuant to delegated statutory powers, professional colleagues here play a much more circumscribed role than the full, but equal, community-participant role envisioned by Brown and Wolf.⁹³

As explained earlier, complaints about Australian lawyers are bifurcated at a very early stage of their receipt by the regulatory body. There is no formal power to mediate complaints that have been categorised, not as civil disputes but, as raising questions of conduct that may lead to findings of professional misconduct or unsatisfactory professional conduct. Here, the analogy to the position in the United States is much closer. Regulators are required by the legislation to take much greater control over how a complaint about conduct will proceed and complainants usually play a negligible role. For instance, if the regulator forms the view that an investigation of the conduct shows that a disciplinary tribunal would find (the more serious) professional misconduct, in some jurisdictions the regulator *must* refer the matter to a formal disciplinary hearing.⁹⁴ There is no discretion to take a restorative approach as an alternative. So, generally speaking, in serious conduct investigations, complainants take only as much part in subsequent proceedings as decided by the regulator. That

⁸⁴ *Legal Profession Act 2004* (Vic) s 6.4.5(3).

⁸⁵ *Id.* s 4.3.5(2)(b).

⁸⁶ *Id.* s 4.3.12.

⁸⁷ *Id.* s 4.3.5A.

⁸⁸ *Id.* s 4.3.5(4).

⁸⁹ Brown & Wolf, *supra* note 5, at 255.

⁹⁰ *Complaints About Lawyers*, OFFICE OF LEGAL SERVS. COMM'R (NSW), http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_complaints (last visited Jan. 24, 2012).

⁹¹ *Fact Sheet on Mediation*, LEGAL SERVS. COMM'R (Vic), http://www.lsc.vic.gov.au/documents/LSC_Fact_Sheet_Mediations.pdf (last visited Jan. 24, 2012).

⁹² PROF'L STANDARDS DEP'T, LAW SOC'Y OF N.S.W., *supra* note 81, at 2.

⁹³ Brown & Wolf, *supra* note 5, at 255.

⁹⁴ *E.g.*, *Legal Profession Act 2004* (Vic) s 4.4.13(2).

role will also always be a very passive one, for instance, the giving of evidence in any formal disciplinary hearing that follows.

More discretion is given as to whether or not to bring formal disciplinary proceedings if the regulator believes a tribunal would only find the (less serious) unsatisfactory professional conduct. Here, there might seem more opportunity for restorative justice principles to come into play. However, while much thought has been given in the legislation to encourage settlement of civil disputes, this is not true in relation to conduct matters. Here, the legislation is predicated on an assumption that discipline will follow a certain path. The legislation gives the regulator none of the clear procedural protections it provides had the regulator categorised the complaint as a civil dispute.⁹⁵ Lawyers are not given the same procedural protections put in place for formal discipline. For instance, mediators can only engage with civil disputes, not conduct matters; only mediators can promise the highest duties of confidentiality to participating parties; only evidence of things said or done to resolve civil disputes and documents prepared for mediation are declared inadmissible in other proceedings; and only resolutions of civil disputes, not disciplinary complaints, can be registered for enforcement in the general courts.

This would appear to give the regulator fewer structural supports to adopt restorative processes in relation to a lawyer's conduct than if the regulator had categorised the complaint as a civil dispute between lawyer and client. Despite this, some regulators have taken a more expansive, creative view of their powers to deal with conduct matters without proceeding to a formal disciplinary hearing.

For instance, the Legal Services Commissioner in Queensland has discretion to dismiss a complaint or investigation if it is in the public interest to do so.⁹⁶ In 2007, the commissioner released a policy indicating the many factors he will take into account in deciding whether it is in the public interest to dismiss or proceed with a complaint.⁹⁷ This policy displays many of the hallmarks of restorative justice. Indeed, the commissioner himself has described it so.⁹⁸ Powerful factors that might cause the commissioner to dismiss a complaint in the public interest include evidence that the lawyer or law firm acknowledges error, has shown remorse, has apologised or made good any loss or harm the conduct has caused to others, has cooperated fully and frankly during the investigation, and whether the conduct is likely to be repeated.⁹⁹ Notably, the commissioner has applied this policy for the past four years without the added protections given had the matter progressed as a civil dispute.

Other Australian regulators have taken similar proactive, creative approaches to their statutory powers. Brown and Wolf have noted that the "mediation" label sometimes falls into disfavour.¹⁰⁰ The Victorian regulator

⁹⁵ See *supra* p. 111 ("Civil Dispute").

⁹⁶ *Legal Profession Act 2007* (Queensl.) s 448(1)(b).

⁹⁷ Briton, *supra* note 6.

⁹⁸ *Id.*

⁹⁹ *Prosecution Guidelines: Unsatisfactory Professional Conduct and Professional Misconduct*, LEGAL SERVS. COMM'N (Qld) 8, http://www.lsc.qld.gov.au/__data/assets/pdf_file/0018/106335/prosecution-guidelines.pdf (last visited Jan. 24, 2012).

¹⁰⁰ Brown & Wolf, *supra* note 5, at 290.

rarely utilises mediation¹⁰¹ despite the legislative supports provided for it. It is beyond the purposes of this Article to explore the reasons for this. However, further research would be extremely valuable, especially if it is proposed to introduce more structured, legislative supports to facilitate a restorative approach. Such research may find that, instead, local regulators prefer broad discretion to fashion a form of restorative justice best suited to local and changing conditions and even personal preferences of the regulator. This is consistent with Brown and Wolf's observation that the form of diversionary programs used in various parts of the United States depends substantially on the orientation and philosophy of the chief disciplinary counsel in that jurisdiction.¹⁰²

Whatever the reasons for the declining use of mediation in Victoria, this may be viewed with relief by those proponents of restorative justice who see mediation as having the potential to undermine some of its values.¹⁰³ Instead of mediation, the Victorian regulator appears to have fashioned forms of dispute resolution out of broad discretions contained in the Act, in a similar way to the commissioner in Queensland. For instance, in April 2010, the Victorian regulator introduced a "Rapid Resolution Team" charged with resolving complaints through informal dispute resolution processes, including by suggesting to respondent lawyers that they apologise to the complainant.¹⁰⁴

However, at present, Australian legislation does not explicitly deal with initiatives such as the Rapid Resolution Team: while issues of confidentiality and enforcement have been anticipated and dealt with in relation to steps to resolve civil disputes, the legislation remains silent in relation to conduct disputes. Australian regulators have fashioned de facto powers to deal with complaints, but this is always at some risk of legal challenge. Hence, they have asked for greater and clearer power to deal with complaints in flexible and summary ways as they see fit rather than proceed to a formal hearing.¹⁰⁵ They appear to have been successful in that.¹⁰⁶

COMPENSATION

The Relevance of Compensation

Given that the primary aim of discipline is to protect the public, and the public is protected by the payment of compensation, it may seem logical that a

¹⁰¹ LEGAL SERVS. COMM'R (Vic), *supra* note 51, at 10. The manager of complaints resolution and investigations has said this is because formal mediation is usually only appropriate in complex matters where a lot of money is at stake. See Jennifer Pakula, *ADR in Complaints Handling*, LEGAL SERVS. COMM'R (Vic) 6, <http://www.lsc.vic.gov.au/cms.php?user=legal-servicesvic;doc=Home;page=;pageID=188> (under "Speeches and Conference Papers" select "Alternative dispute resolution in complaint handling") (last visited Jan. 24, 2012).

¹⁰² Brown & Wolf, *supra* note 5, at 266.

¹⁰³ See BRAITHWAITE, *supra* note 3, at 249; Roche, *supra* note 2, at 226.

¹⁰⁴ LEGAL SERVS. COMM'R (Vic), *supra* note 51, at 11.

¹⁰⁵ John Briton, Legal Servs. Comm'r (Qld), National Legal Profession Reform and the Regulation of the Future, St Vincents' 48th Annual Queensland Law Society Symposium, 17 (Mar. 27, 2010) (Austl.), http://www.lsc.qld.gov.au/_data/assets/pdf_file/0015/106080/national-legal-profession-reform-and-the-regulation-of-the-future.pdf.

¹⁰⁶ Francesca Bartlett, *The Role of Apologies in Lawyers' Professional Discipline*, 14 LEGAL ETHICS 49, 69 (2011).

disciplinary tribunal facilitate compensation. The risk of such an approach is that it draws “the public” too narrowly and prefers the interests of past clients over the potential risk that may remain for future clients. However, courts and tribunals have regularly taken compensation into account when determining the appropriate disciplinary order. For instance, in *Re Roche*,¹⁰⁷ the Supreme Court of the Australian Capital Territory acknowledged that the practitioners’ offer of a \$150,000 compensation fund was a “significant mitigatory factor” as it indicated recognition of their “disgraceful” misconduct in grossly overcharging clients.¹⁰⁸ The Law Society of the Australian Capital Territory immediately applauded the court’s decision in a press release and claimed that, had the offer of compensation not been made, it was “highly likely” that the two solicitors would have been struck off rather than suspended for eighteen months.¹⁰⁹ The society also claimed that the decision was a “break through” for consumers of legal services as clients would have not been reimbursed if the solicitors had been struck off.¹¹⁰ Such comments highlight a tension within the disciplinary system between a desire to protect past clients and potential clients. The same tension was apparent in the Queensland tribunal decision of *Re Practitioner X*,¹¹¹ where the practitioner was fined \$25,000 rather than suspended so as to ensure that past clients were repaid amounts which had been overcharged.

It could be argued that the ACT Supreme Court gave too much weight to the compensation fund in *Re Roche*, especially as the court had otherwise found that the client agreements were “extortionate” and that the two solicitors “cheated and, effectively, defrauded their clients,”¹¹² not in an isolated incident, but in a habitual practice,¹¹³ which was “an exercise in calculated greed [which] depriv[ed] vulnerable injured persons of many thousands of dollars.”¹¹⁴ It could be argued that the protection of future clients was compromised by an effort to achieve a compensatory outcome. Compensation for overcharging could have been more appropriately addressed by the clients in separate civil proceedings.

Compensation Orders

Over twenty years ago, powers in relation to compensation of complainants were grafted onto pre-existing powers of disciplinary tribunals.¹¹⁵ This has proven to be problematic. Tribunals have been unsure as to how this power interacts with the complainant’s rights to take civil action against the subject lawyer. The test of what is being compensated and why has also been problematic. Prosecution bodies have felt uncomfortable playing the dual role of seek-

¹⁰⁷ *Re Law Soc’y of the Austl. Cap. Terr. & Roche* (2002) 171 FLR 138, 149.

¹⁰⁸ *Id.* at 152.

¹⁰⁹ Press Release, Law Soc’y of the Austl. Cap. Terr., Landmark Decision Protects Lawyers’ Clients (Oct. 21, 2002).

¹¹⁰ *Id.*

¹¹¹ *In re Practitioner X* (1999) 5 Disciplinary Action Report 23, 25–26. The overcharging amounted to \$46,420. Haller, *Disciplinary Fines*, *supra* note 24, at 175 n.167.

¹¹² *Roche* 171 FLR at 149.

¹¹³ *Id.* at 150.

¹¹⁴ *Id.* at 153.

¹¹⁵ See *Legal Profession Act 1987* (NSW) s 149(3)(d).

ing discipline and arguing for compensation. Complainants who seek compensation have had a voice in proceedings, but have been left unsure as to their rights of standing and the degree to which the prosecuting body will act on their behalf.¹¹⁶ Examples such as these require serious thought by those who advocate restorative justice in lawyer discipline.

In the next section, we consider a particular challenge that restorative justice may face in the context of lawyer discipline.

LAWYERS AS THE SUBJECT GROUP

Lawyers and judges have been among the most vocal cynics of restorative justice. Braithwaite has been moved to suggest that lawyers (when representing clients or acting as facilitators) may need to be removed from restorative processes to give those processes the highest chance of success.¹¹⁷ This does not auger well if it is to be lawyers themselves who take part in a restorative conference, not as representative of a client or expert mediator, but as a principal participant whose own conduct lies under a cloud. The heartland of success for restorative justice has been in relation to juvenile offenders. The juvenile offender is worlds apart from a practising lawyer. Will lawyers be able and willing to shed their professional mystique to take part in the restorative process as an equal?

There are implications for complainants, too. In the most successful setting for restorative justice—juvenile offending—the victim is likely to be more mature, experienced, confident, and articulate than the juvenile perpetrator. Sophisticated clients tend not to take their complaints to a statutory regulator; they usually have more effective ways to demonstrate their dissatisfaction and to extract apologies and other more material forms of restorative justice from their lawyers than to take their complaint to a statutory regulator.¹¹⁸ By taking their complaint there, they run the risk of their legal issue and cause for complaint eventually being aired in a public disciplinary hearing. This leaves those clients who *do* complain about their lawyer to the statutory regulator. These are more vulnerable clients. In this interaction, it is likely that the lawyer will be more confident and articulate than the client. Clients are likely to be the disempowered party in a restorative process that by its nature builds on skills of dialogue and narrative that are so familiar to lawyers.¹¹⁹

Restorative justice may also have been particularly successful in relation to juvenile offenders because victims and other members of the community believe in their great redemptive potential. Those who complain about lawyers, a privileged group within society who are often labeled arrogant and egotistical, may feel less inclined to cooperate in a process where they have less confidence in lawyers' redemptive capacity. Victims of crime may be encouraged to participate by reports of reduced anger and fear of victimisation experienced by

¹¹⁶ See, e.g., *Legal Servs. Comm'r v Elliott* [2007] VCAT 2244.

¹¹⁷ BRAITHWAITE, *supra* note 3, at 249.

¹¹⁸ Parker & Haller, *supra* note 37, at 40–41.

¹¹⁹ Menkel-Meadow, *supra* note 1, at 172.

previous victims who participated in restorative justice conferences.¹²⁰ “Victims” of lawyers may feel they have less need to resolve these issues and can best avoid future harm by not engaging lawyers to act for them again in the future.

CONCLUSION

The preceding discussion has sought to highlight some distinctive features of Australian lawyer discipline and the ways in which lawyer complaints and disciplinary systems in Australia already use restorative processes. It has also highlighted the need for us to keep clearly in view *why* we might want to shift to a more restorative model. The assumption in Brown and Wolf’s Article appears to be that the primary advantage would be to improve the experience of the disciplinary system for complainants. But, as Brown and Wolf themselves acknowledge, this could be at the expense of other stakeholders such as future clients and ethical standards more broadly.¹²¹

The evidence also remains unclear as to whether restorative justice in other contexts reduces rates of recidivism. A restorative approach may prove cathartic for some lawyers, but many lawyers are subject to complaints and discipline because of mental ill-health. I would argue a roundtable conference is not appropriate in those cases,¹²² although elements of a restorative approach can be used, and are already in use, by Australian regulators.

One of the greatest challenges for restorative justice in any setting is to balance it against the need for transparency and accountability. This is something of which Brown and Wolf are clearly aware.¹²³ The recent experience in Australia has been that formal discipline can be unsatisfactory for a broad range of reasons: it is slow, unresponsive, and expensive.¹²⁴ But, in its favour, it is highly public and transparent. The general community and other stakeholders need to decide what degree of discretion they are willing to give regulators to deal with complaints about lawyers behind closed doors—to condone greater use of a regulatory pyramid.¹²⁵ Is more transparency and accountability required in relation to lawyers than in relation to other regulated entities, given lawyers’ commitment to traditional, procedural justice? Are lawyers a special case? This Article has argued that they may be. John Braithwaite might tend to agree. It is interesting to note that as champion of both regulatory pyramids and restorative justice, he has also been highly skeptical of the ability of lawyers to embrace the values of restorative justice.¹²⁶ Hence, it will be interesting to see his views in this current debate spawned by Brown and Wolf’s Article.

¹²⁰ Michael S. King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096, 1106 (2008) (Austl.).

¹²¹ Brown & Wolf, *supra* note 5, at 281.

¹²² While Brown and Wolf acknowledge the high rates of mental ill-health among lawyers who face discipline, they do not discuss this question explicitly. *Id.* at 259.

¹²³ *Id.* at 300–01.

¹²⁴ Parker, *supra* note 11, at 700; Levin, *Queensland Experience*, *supra* note 9, at 195.

¹²⁵ IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 44 (1992).

¹²⁶ BRAITHWAITE, *supra* note 3, at 249.