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# Vulnerability to legal misconduct: a profile of problem lawyers in Victoria, Australia

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## ABSTRACT

Public trust in the legal profession rests on regulators taking timely and effective action in response to misconduct. Usually, case-by-case analysis occurs after a claim or complaint is lodged with little attention on factors that may predispose a lawyer to misconduct. Vulnerability is a useful concept for understanding individuals' susceptibility to harm and for identifying safeguards to protect against that harm. This empirical study adds to the largely normative research on vulnerability with an analysis of 67 "problem lawyers" who were the subject of multiple complaints and at least one disciplinary hearing, a paid financial misconduct claim, or striking from the roll in Victoria, Australia between 2005 and 2015. We analysed determinations about these lawyers and identified a concatenation of factors associated with legal misconduct. Personal vulnerabilities included older age, male sex, poor health, and patterns of behaviour such as low conscientiousness. Situational vulnerabilities included working as a sole principal or in a small practice, excessive workload, and pressures from relationship breakdowns, death or illness in the family, or financial difficulties. These findings shed light on vulnerabilities to legal misconduct, and have implications for lawyer education and well-being, protection of clients, and efforts to reduce lapses in professionalism.

## 1. Introduction

The Respondent was a principal of a small law firm with a heavy client load. He was under stress from the breakdown of his marriage and the death of a close relative. Due to financial difficulties he was facing the need to sell the family home. A psychologist assessed him with depression. Other factors may have influenced his misconduct, including his personality as it developed from childhood, a 'psychological block' around handling certain tasks, and his anger and resentment at receiving complaints. Together, these matters all became too much for him and his work and his clients suffered as a result.

In an ideal world, lawyers would always act with the highest standards of professionalism and be worthy of the trust that their clients place in them. Such a world is not the world that we find ourselves in. While most lawyers practice with integrity and prudence, a small proportion cause harm through incompetent or

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unethical behaviour. As the above summary from a disciplinary tribunal decision illustrates, misconduct by lawyers does not occur in isolation but, rather, is situated within the context of their personal and professional lives. The aim of our study was to improve understanding of vulnerabilities that may predispose lawyers to serious or repeated lapses in professionalism. In turn, we hope that our findings will help the legal profession, and professional regulators, to identify practitioners at increased risk of misconduct and tailor interventions accordingly.

The public and the legal profession expect regulators to take timely and effective action in response to concerns about the conduct and performance of lawyers (Rutten *et al.* 2017). Historically, the focus of regulators, bar associations, courts, and indemnity insurers, has been on case-by-case analysis of misconduct allegations. In addition, most regulatory resources have been spent on enforcement and accountability for past events, rather than safeguarding lawyers and clients against the risk of future legal misconduct.

Three international trends are emerging that disrupt this retrospective approach to the regulation of lawyers. First, regulators have begun to embrace a more risk-based approach to regulation, which utilises routinely collected data to find important problems and fix them (Sparrow 2000). This proactive approach to regulation uses empirical evidence to help identify practitioners at risk of misconduct *before* further harm occurs (Moore *et al.* 2015; Bismark *et al.* 2015). Second, the public expect a more client-focused approach to legal regulation with stronger upfront protection against substandard providers (Melville *et al.* 2014). Third, an increasing body of evidence raises concerns about the mental health and well-being of lawyers, who have higher rates of psychological distress and substance use than the general population (ABA 2017; Langford 2004; Beyond Blue 2007; Peterson and Peterson 2009). Together, these three trends call for an improved understanding of vulnerabilities that may predispose a lawyer to misconduct. Such an approach would have the dual benefit of supporting practitioners while protecting clients from harm.

The regulator for the legal profession in Victoria, Australia, is the Victorian Legal Services Board and Commissioner (the LSBC). Earlier quantitative research by our team used ten years of LSBC data to analyse demographic risk factors for complaints and misconduct findings (Sklar *et al.* 2019). We found that the odds of incurring a complaint were higher among lawyers who were male, older, had trust account authority, and whose practices were smaller, in non-urban locations, and incorporated.

This paper expands on our previous research in two ways. First, we supplement administrative data with qualitative analysis of disciplinary decisions and investigation reports (“determinations”) to explore a wider range of personal and situational vulnerabilities. While quantitative methods offer useful information on *when*, *how much* and *how many*, qualitative research may provide detailed insights around *why*, *how*, and *what* to explain human behaviour (Neergaard *et al.* 2009). Second, rather than looking at all complaints, we focus on the subset of lawyers

who engaged in serious or repeated misconduct: those who were the subject of multiple complaints, at least one paid financial misconduct claim, and/or struck from the roll (permanently banned from legal practice). We term this group “problem lawyers” because of the adverse impact these lawyers have on themselves, their clients, the public, and the wider legal profession. Our analysis is informed by an emerging body of literature on vulnerability and the law (Herring 2016; Rogers *et al.* 2012). A focus on vulnerability recognises that a complex mix of underlying causes can set practitioners on the path towards careers of misconduct. Understanding who is at highest risk and what lies behind such behaviour is a crucial start for fashioning effective responses (Walker 2018).

## 2. Regulation of lawyers and vulnerability in the legal profession

### 2.1. Regulation of lawyers in Victoria, Australia

This study took place in Victoria, a state of Australia with nearly six million residents. We worked with the main regulator of the legal profession for the state, the LSBC, an entity that includes both the Legal Services Board (“the Board”) and the Legal Services Commissioner (“the Commissioner”). The Board and the Commissioner are independent statutory authorities, and their powers to regulate the profession are set out in the *Legal Profession Uniform Law Application Act 2014*.

The Board administers annual practicing certificates and maintains a register of licensed lawyers. The Commissioner handles all complaints about registered lawyers in Victoria. Any person or body may lodge a complaint about a lawyer, and in some circumstances the Commissioner may self-initiate a complaint. The Commissioner maintains detailed records of complaints received, the issues raised, and their outcomes. Most complaints are resolved without a formal disciplinary hearing. However, in the more serious cases, the Commissioner may initiate disciplinary proceedings, which are usually heard before the Victorian Civil and Administrative Tribunal (VCAT) and can be appealed to the Supreme Court of Victoria. Decisions by VCAT, or the courts, are usually published on a publicly available website as described in the methods section below.

In addition to its role in resolving complaints, the LSBC oversees financial accounting by lawyers. Financial misconduct often occurs through the misuse of trust accounts, which lawyers establish to enable them to administer payments from clients. For this reason, lawyers who wish to hold funds in trust must apply to the Board for trust account authority. The Board also administers a fidelity fund, which provides a mechanism of redress for clients who suffer financial loss because of dishonest or fraudulent behaviour of a lawyer, law practice, or other legal professional. Lawyers are required to annually contribute to the fidelity fund as part of their certificate to practise. When a claim for compensation is received, it is investigated, and a determination is made by the Fidelity Fund Claims Advisory Committee.

In recent years, the LSBC has committed to a more evidence-based approach to understanding and reducing risk to the public. For example, a new policy on risk-based regulation of trust accounts re-focuses investigations towards those law practices identified to be at highest risk of causing consumer detriment (Victorian LSBC Annual Report 2018). This more pro-active and risk-based approach to legal regulation underpins the LSBC's support for the research reported here.

## **2.2. Vulnerabilities in the legal profession**

Our focus on vulnerability derives from a risk-prevention paradigm. The paradigm involves reducing harm by identifying key risk factors (or vulnerabilities) and intervening to address them (Sparrow 2000). Grounding our analysis in a paradigm of vulnerability and prevention, rather than punishment, has three potential benefits. First, it emphasises the harm caused to lawyers, as well as their clients, when their capacity to provide ethical and high-quality services fails. Second, it may engender curiosity, rather than defensiveness, about opportunities to avert wrongdoing. Third, it highlights the adaptive capacity of both lawyers and the wider system to bolster resilience against misconduct.

The concept of vulnerability derives from the Latin word *vulnus* (“wound”) and refers to a diminished capacity to stay safe from harm. Drawing from the legal scholarship, we conceptualise vulnerability as the quality or state of being susceptible or exposed, and where one's defences against a hazard or temptation are inadequate or ineffective (Moore *et al.* 2019; Herring 2016). In the context of misconduct by lawyers, the harm may take the form of financial, emotional, or professional loss. Vulnerability ebbs and flows (Fineman 2010; Smith *et al.* 2010): both lawyers and clients can move from a less to a more vulnerable status.

Importantly, vulnerability does not absolve individuals from accountability for their actions. It does, however, challenge us to consider structural responses to reduce susceptibility to harm. For the legal profession, this means creating an environment where lawyers are supported to act with integrity, and where those at risk of misconduct are identified early and “called in” (Tran 2013) to the values of the profession to protect the public from harm.

We applied a framework of personal and situational vulnerabilities to our empirical analysis. Personal vulnerability is influenced by factors such as age, occupation, gender, (Dunn *et al.* 2008), health, substance use, or disability (ASBHelp 2015). For example, research shows that people are more vulnerable to delinquency if they are male, use alcohol, or have low impulse control (Farrington *et al.* 2016). Personal vulnerabilities are more likely to produce adverse consequences when framed by situational vulnerabilities – such as major life stressors, and inadequate institutional support (Moore *et al.* 2019).

This study seeks to better understand how vulnerability manifests in cases involving lawyers with troublesome track records. Vulnerability scholars in

law and social policy have called for more critically informed use of the notion in policy, practice and research (Brown *et al.* 2017). Our study addresses this call and makes an empirical contribution to a literature, which largely focuses on theoretical debate, to help elucidate the relationship between professional misconduct and vulnerability in the legal profession.

### 3. Data and methods

#### 3.1. Sample

Our sample was taken from all lawyers registered to practice in Victoria over the ten-year period July 2004 to June 2015.<sup>1</sup> We defined “highly complaint-prone lawyers” as those who were the subject of 20 or more complaints and at least one disciplinary hearing during the study period. We defined “dishonest lawyers” as those who had engaged in dishonest or fraudulent behaviour which caused a client to lose money or property, resulting in the payment of a fidelity fund claim over that same time period. We defined “struck-off lawyers” as those who were registered during the study period before being permanently removed from the roll for serious misconduct. Together, we term these three groups of lawyers “problem lawyers”.

The Human Research Ethics Committee, University of Melbourne, approved the study and data were provided by the LSBC in de-identified form under a strict deed of confidentiality.

#### 3.2. Data sources

Our data came from three main sources. First, we extracted information on all registered lawyers from the register of lawyers held by the LSBC. Second, we used records held by the LSBC to identify all complaints, disciplinary decisions, and fidelity fund claims lodged about these lawyers during the study periods. We linked registration data with complaints and fidelity fund data using unique identification variables provided by the LSBC. Third, we gathered the written determinations associated with all sampled cases. For the highly complaint-prone and struck-off lawyers, we downloaded tribunal and court decisions from the Australasian Legal Information Institution website (2019). For the dishonest lawyers, we obtained electronic copies of reports on paid financial misconduct claims from the LSBC. These determinations typically contained detailed information about the case, including the nature of the charge, the evidence considered, the tribunal’s decision and the reasons for any penalties imposed.

#### 3.3. Variables

We developed an instrument for recording lawyer descriptors (age, sex, practice size and type, practice location, and period of registration), case descriptors (date

of claim or complaint, outcome), and potential vulnerabilities (personal and situational).

Age was coded into ten-year bands, based on the age of the lawyer at the end of study period. Practice location was coded as urban or non-urban based on a standard geographic coding system developed by the Australia Bureau of Statistics. Practice size and type was coded into eight categories, from sole practices through to large firms with a hundred or more lawyers, following methods used previously (Sklar *et al.* 2019). Practices with a sole principal are owned by a single lawyer, who may or may not employ other lawyers. Law firms are owned by lawyers who work as partners within the firm. Incorporated legal practices do not restrict who may own shares in the entity. To safeguard against potential commercial pressure that may adversely affect professionalism, they are subject to a higher level of regulatory oversight than traditional law firm practices (Sklar *et al.* 2019).

The remaining variables were coded through reviews of the determinations, focusing on comments by committees, tribunals, and courts on factors that may have contributed to the misconduct. We coded an event as a pressure if it ranked among the top 16 most stressful life events on the Social Readjustment Rating Scale (Holmes and Rahe 1967). These include the death of a spouse, divorce, a major change in the health of a family member, and a major change in financial state. Health concerns were coded as physical or mental illness. Patterns of behaviour were coded by applying the widely used *Five-Factor Model* of personality (Costa and McCrae 1995) to any patterns of behaviour described in determinations. The model includes five primary dimensions: (1) agreeableness, (2) conscientiousness, (3) emotionality (sometimes described as neuroticism), (4) extraversion, and (5) openness. This aspect of our work was explorative and hypothesis-generating, as full assessment of personality requires testing by a trained clinical psychologist.

### 3.4. Analysis

To determine the distribution of complaints across the legal workforce, we graphed the cumulative distribution of complaints as a percentage of all complaints and a percentage of all lawyers. We used counts and percentages to describe the characteristics of problem lawyers and of the legal workforce over the study period. We used a Chi-square test to identify significant differences in these characteristics between problem lawyers and other lawyers. We conducted multivariate logistic regression to examine characteristics associated with problem lawyers. We adjusted for covariates including age, sex, practice location, trust authority and type of practice. Analyses were conducted using Stata 14.2 (College Station, Texas).

For our qualitative analysis, all determinations were coded by at least two reviewers independently and discrepancies in coding were resolved by

consensus. To preserve the anonymity of parties in the determinations, extracts from Tribunal decisions have been paraphrased rather than quoted directly. Qualitative analysis was managed using NVivo V.11.

## 4. Results

The analytical sample consisted of 23,729 lawyers, aged 26–70 years, registered to practice in Victoria, July 2005 to June 2015. Over this period, the LSBC received 16,517 complaints against 4,428 (18.7%) of these lawyers. Within this group, we identified 32 highly complaint prone lawyers who were the subject of 20 or more complaints and at least one disciplinary hearing, indicating that the complaints were of a serious nature. We identified 37 dishonest lawyers with a paid fidelity fund claim. Together, these fidelity fund claims represented over US\$12 million in payments over the 2005–2015 study window. Finally, we identified five struck-off lawyers who were registered during the study period before being permanently removed from the roll for serious misconduct. Together these 67 lawyers form our group of “problem lawyers” (Figure 1). Five lawyers were both highly complaint prone and dishonest and two struck-off lawyers were also dishonest, which is why the subcategories add to 67 rather than 74.

We analysed a total of 283 determinations pertaining to the 67 problem lawyers. The determinations included 110 case reports of decisions taken in formal hearings from the VCAT and the Supreme Court of Victoria, and 173 investigation reports from the Fidelity Fund Claims Advisory Committee.

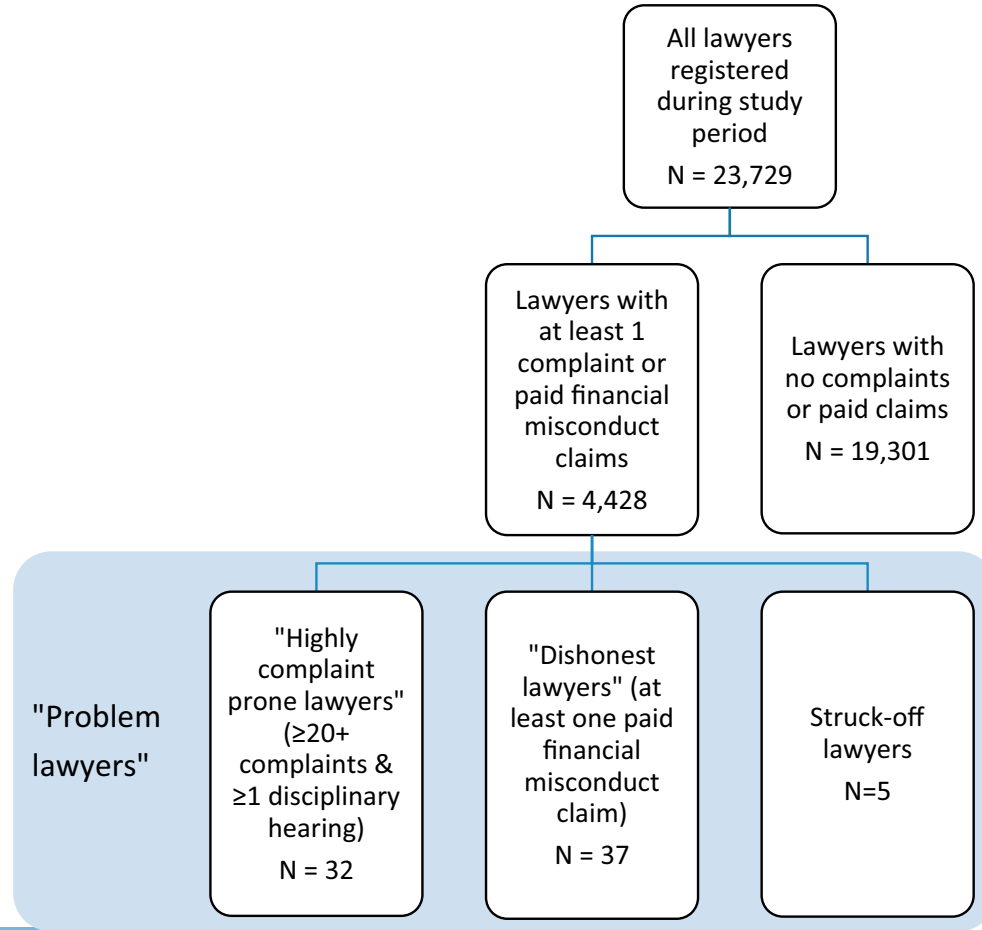
### 4.1. Distributional analysis

Complaints were highly clustered among a small group of lawyers. Less than 5% of lawyers received 5 or more complaints, and this group accounted for 62.6% of complaints. Less than 0.5% of lawyers received 20 or more complaints, and this group accounted for 17.5% of all complaints received by the LSBC (Figure 2).

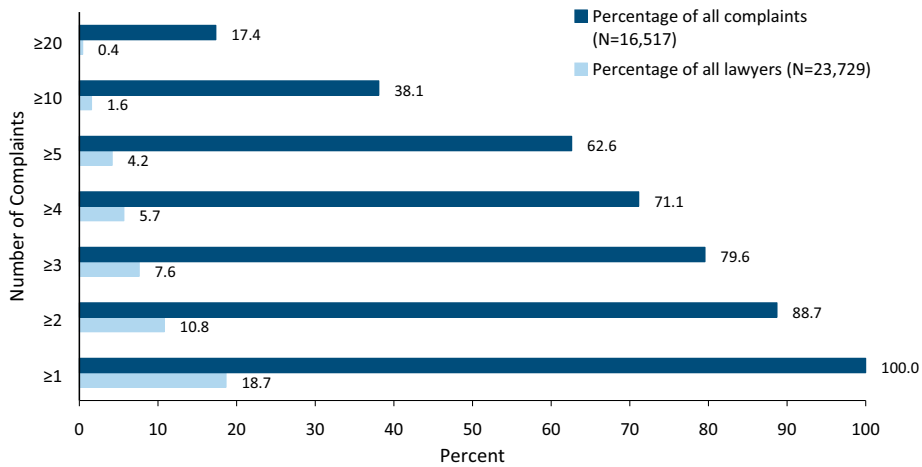
### 4.2. Characteristics of problem lawyers

Over 90% of the problem lawyers were male (Table 1), while the legal workforce during our study period had nearly equal proportions of male and female lawyers ( $p < 0.001$ ). Nearly one in five problem lawyers was over the age of 65, yet only 7% of the legal workforce as a whole was in this age bracket ( $p < 0.001$ ). As outlined above, we only considered complaints received within the ten-year study period, so this finding does not simply represent a longer time over which they could have accrued complaints. Within our subgroups, the mean ( $\pm$  standard deviation) age of highly complaint-prone and struck-off





**Figure 1.** Derivation of study sample “problem lawyers” from all lawyers registered to practice in Victoria, Australia, from 2005 to 2015. Note: Subcategories add to 67 rather than 74 because of overlap among five lawyers who were both highly complaint-prone and dishonest and two lawyers who were both dishonest and struck-off.



**Figure 2.** Distribution of complaints

**Table 1.** Characteristics of lawyers in Victoria and sample of problem lawyers, 2005–2015.

Characteristics	All Lawyers (N = 23,729)		Problem lawyers (N = 67)		p-value <sup>b</sup>
	N	Percent	N	Percent	
Sex					
Female	11,433	48.2	5	7.5	<0.001
Male	12,296	51.8	62	92.5	
Age					
25–44 years	14,816	62.4	6	9.0	
45–64 years	7,280	30.7	49	73.1	<0.001
≥ 65 years	1,633	6.9	12	17.9	
Location of practice					
Urban	22,274	93.9	56	83.6	<0.001
Non-Urban	1,455	6.1	11	16.4	
Trust Authority					
Yes	3,993	16.8	46	68.7	<0.001
No	19,736	83.2	21	31.3	
Size and Type of Practice <sup>a</sup>					
1 lawyer Sole Principal	5,466	23.0	29	44.6	
2–5 lawyers Sole Principal	1,384	5.8	15	23.1	
6+ lawyers Sole Principal	266	1.1	2	3.1	
1–5 lawyers Incorporated Legal	1,732	7.3	10	15.4	
6+ lawyers Incorporated Legal	2,354	9.9	4	6.2	
2–5 lawyers Law Firm	388	1.6	4	6.2	
6+ lawyers Law Firm	5,515	23.3	0	0.0	
Other (In-house, government, and community legal centre lawyers)	6,009	25.3	1	1.5	

Note: N = 615 (2.6%) missing data for size and type of law practice.

<sup>a</sup>Percentages calculated with the number of available observations used as the denominator.

<sup>b</sup>Chi-square test comparing characteristics of problem lawyers with characteristics of lawyers who are not problem lawyers.

lawyers ( $59.6 \pm 8.4$ ) was significantly older than that of the dishonest lawyers ( $54.0 \pm 9.1$  years).

Sixteen percent of the problem lawyers practiced law in non-urban areas, compared with 6% of all lawyers ( $p < 0.001$ ). Over two-thirds of problem

lawyers had trust authority compared to 17% of all lawyers ( $p < 0.001$ ). Over 70% of problem lawyers were the sole principal of a practice (with or without other lawyers employed in the practice). A further 15% worked in small incorporated legal practices with 5 or fewer lawyers. Across the broader legal workforce, around half of all lawyers worked in larger firms (6+ lawyers), in-house for companies or government agencies, or in community legal centres, yet only 1 lawyer working in these practice settings met our definition of problem lawyers.

### 4.3. Factors associated with being a problem lawyer in multivariable analysis

In multivariable analyses, all variables in the model, apart from practice location, were associated with the risk of being a problem lawyer (Table 2). The odds of a male lawyer being a problem lawyer was four times the odds for a female lawyer (OR = 4.06; CI 1.60–10.3). Those aged between 45–64 years and over 65 years had a 5-fold increase (OR = 5.12, CI 1.96–13.4) and a 4-fold increase (OR = 3.70, CI 1.23–11.1), respectively, in the odds of being a problem lawyer compared to lawyers aged less than 45 years. There was no significant difference in the odds of being a problem lawyer for non-urban practitioners compared with urban. Trust authority was associated with a 5-fold increase in the odds of being a problem lawyer (OR = 5.38, CI 3.07–9.42). Lawyers working in sole practices or incorporated legal practices had an 8-fold increase (OR = 7.69, CI 3.01, 19.6) and 4-fold increase (OR = 4.17, CI 1.49–11.7) in the odds of being a problem lawyer compared with those in other practice types. We excluded practice size from the main multivariate model due to co-linearity of small practice size and sole principal. A sensitivity analysis, looking at size rather than type of practice found that lawyers working in small firms with 5 or fewer lawyers had

**Table 2.** Multivariable logistic regression analysis for risk of problem lawyers.

Characteristics	Odds Ratio (OR)	95% CI	<i>p</i> -value
Sex			
Female	1.00	–	–
Male	4.06	1.60, 10.3	0.003
Age			
25–44 years	1.00	–	–
45–64 years	5.12	1.96, 13.4	0.001
≥65 years	3.70	1.23, 11.1	0.020
Location of practice			
Urban	1.00	–	–
Non-Urban	1.54	0.79, 2.99	0.201
Trust Authority			
No	1.00	–	–
Yes	5.38	3.07, 9.42	<0.001
Type of Practice			
Sole Principal	7.69	3.01, 19.6	<0.001
Incorporated Legal Practice	4.17	1.49, 11.7	0.007
Law firms and Other	1.00	–	–

a 6-fold increase in odds of being a problem lawyer compared to those working in larger practices (OR = 5.79, CI 2.46-13.6).

#### 4.4. Qualitative analysis of determinations

##### 4.4.1. Person

The age of the practitioner was raised in several determinations (Table 3). Some older lawyers were criticised for leaving all decisions to junior staff without supervising their conduct, while others had outdated approaches to file management and client communication. Older age was also raised as a mitigating factor, with several highly complaint-prone practitioners having made a valued contribution to the profession for many decades before the quality of services deteriorated in the final years of their career. Health problems were reported in half of the determinations usually in relation to mitigating factors or assessment of penalty. The most common mental health concern was depression, with other lawyers experiencing anxiety and post-traumatic stress disorder. Only one determination specifically identified substance use as a factor contributing to alleged misconduct.

##### 4.4.2. Patterns of behaviour

Determinations commonly described one of three patterns of unprofessional behaviour. The first was low conscientiousness which was noted among half

**Table 3.** Vulnerabilities of problem lawyers.

Domain	Vulnerability	Illustrative comments from determinations
Person	Older age (over 65 years)	<i>The lawyer described himself as an old-fashioned practitioner. He had never used a computer and relied on staff to print emails.</i>
	Poor health	<i>The lawyer suffered depression which severely impaired his concentration, memory and judgement. The lawyer had a serious medical illness requiring hospital care followed by a long recovery.</i>
Patterns of behaviour	Low conscientiousness	<i>The lawyer did not answer emails, put files in the wrong place, kept poor records, and forgot to close trust accounts.</i>
	Low agreeableness High emotionality	<i>The lawyer was bellicose, aggressive, abrupt, and rude. The lawyer felt a paralysing fear of complaints and letters from the regulator and avoided opening or responding to such correspondence.</i>
Practice	Professional isolation (sole principal and/or small firm)	<i>The lawyer's assertions of good work and character were not supported by any references and he appeared to be professionally isolated.</i>
	Regional location	<i>Working in a small town, the lawyer had both a personal and professional relationship with his client resulting in blurred professional boundaries.</i>
	Excessive workload	<i>The lawyer was overwhelmed as a result of the volume of work in his practise.</i>
Pressures	Relationship breakdown	<i>The lawyer showed a lack of focus after he embarked on an extra-marital affair and his wife initiated a divorce.</i>
	Death or serious illness in family	<i>The lawyer's child experienced a serious illness which in turn placed a heavy strain on her family.</i>
	Financial stress	<i>The collapse of a company the lawyer was involved in caused both emotional and financial stress.</i>

(54%) of highly complaint-prone and struck-off lawyers. Low conscientiousness manifested in “disorganised” sometimes “chaotic” practice arrangements. Lawyers in this group struggled with lost files, sloppy record-keeping, and difficulty keeping track of financial transactions. Their clients complained of long delays in responding to phone calls or emails and failure to perform agreed tasks. The second pattern of behaviour was low agreeableness, identified in nearly half of the highly complaint-prone and struck-off lawyers. Tribunals observed a pattern of “rude”, “bellicose”, and “offensive” behaviour towards both clients and regulators. Lawyers in this group engaged in dishonest or threatening conduct, paid little attention to the distress caused to complainants, or looked for someone else to blame. The third pattern of behaviour was high emotionality. This pattern of behaviour was less common, appearing in one fifth of the lawyers who were highly complaint-prone or struck off. Some of these lawyers formed high emotional attachments to clients which led to overstepping of professional boundaries. Others did not want to think about stressful situations and coped with problems through “avoidance”.

#### **4.4.3. Practice**

Practice issues concentrated around isolation and workload. Regional location was not a significant risk-factor in our multivariable analysis, but several determinations emphasised the challenges associated with working in a small community. Specifically, the risk of blurred professional boundaries in rural areas where the lawyer had both personal and professional relationships with his or her clients. Excessive workload was also identified in one-fifth of the cases, often among sole practitioners. Several determinations noted the risks associated with professional isolation, with some lawyers in sole and small practices losing touch with how their behaviour departed from professional norms.

#### **4.4.4. Pressures**

Major life stressors faced by problem lawyers in the lead-up to the misconduct included marriage breakdowns, the death of a spouse or parent, serious illness of a child, and financial difficulties. In a subset of our sample, among the 37 highly complaint-prone and struck-off lawyers, most (25/37) had experienced major life stressors. Financial difficulties (14/37) were the most common, followed by illness or death of a family member (10/37), and relationship breakdown (4/37). As discussed below, we were unable to compare these rates of life stressors with lawyers who do not engage in such problem behaviours.

#### **4.4.5. Multiple vulnerabilities**

Multiple vulnerabilities were common. These typically occurred when personal vulnerabilities among lawyers, such as older age and poor health, intersected with situational vulnerabilities, such as professional isolation, to create a

downward spiral. In one case, a lawyer experienced depression, anxiety, and alcohol abuse on a background of marital difficulties, financial stressors, a busy and demanding legal practice, and the death of a child.

## 5. Discussion

Over the ten-year study period we identified 67 “problem lawyers” with troublesome track records. These lawyers had incurred multiple complaints resulting in at least one disciplinary hearing; engaged in dishonesty or fraud leading to a paid fidelity fund claim; and/or been permanently barred. The extent to which complaints were concentrated in a small group of lawyers was striking, consistent with studies of complaints and claims involving health practitioners. Through our quantitative analysis, we identified a range of characteristics associated with becoming a problem lawyer: male sex, older age, and small practice size. In addition, our qualitative analysis of determinations identified a range of personal and situational vulnerabilities commonly reported by regulators, Tribunals, and courts in cases involving problem lawyers. These included poor health, isolated practice, relationship and financial pressures, and patterns of unprofessional behaviour.

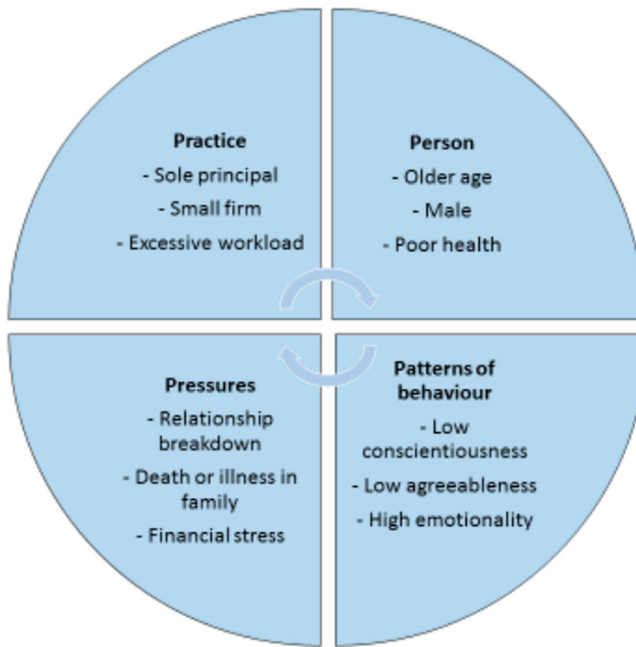
### 5.1. The profile of problem lawyers

As shown in [Figure 3](#), our study identified four inter-related domains of vulnerability among problem lawyers. Two of these – the person and their patterns of behaviour – are intrinsic to the lawyer, while the other two – practice context and pressures – are situational.

#### 5.1.1. Person

Consistent with previous research (Davies 1999, Hatamyar and Simmons 2003), we found that problem lawyers are significantly older than the legal workforce overall. Reasons for practitioners continuing to work beyond the age of 65 may include personal fulfilment from work, lack of outside interests, financial pressures and poor retirement planning (Sherwood and Bismark 2019).

The finding that most problem lawyers are male is consistent with previous empirical studies about complaints against lawyers (Hatamyar and Simmons 2003; Curtis and Kaufman 2003; Bartlett 2008). There is an emerging body of literature on “masculinity as vulnerability” which explores the ways in which the performance of masculinity may be harmful to men (Clowes 2013). An illustration of this is when personal or professional problems arise, traditional masculine norms such as stoicism, self-reliance, and restrictive emotionality mean that men are generally less likely to confide in others and seek help (Yousaf *et al.* 2015). There is a well-documented reluctance of men, relative to women, to seek help at times of emotional difficulty (Collier 2016).



**Figure 3.** Profile of problem lawyers.

One in five of the highly complaint-prone lawyers in our study had a diagnosis of depression which predated the misconduct. While depression is a common illness, these rates are substantially higher than those among the general community (AIHW 2018). In recent years, the legal profession has begun to pay increasing attention to the health and well-being of lawyers, with increasing concern about high rates of depression, burn-out, and substance use. Given the high rates of substance use in the legal profession, it is surprising that only one determination identified substance use as a factor contributing to alleged misconduct (Levin 2012; Moore *et al.* 2015, Beyond Blue 2007; ABA 2017). Unlike health practitioners, lawyers in Australia do not have a clear “health pathway” for regulators to follow in cases where substance use contributed to misconduct. This may have contributed to lawyers choosing not to raise substance use as a possible explanatory factor, though other health impairments were commonly raised.

### 5.1.2. Practice

Almost without exception, the problem lawyers in our study worked in private practice rather than in in-house or community legal centre roles. The odds of becoming a problem lawyer were highest in practices with a sole principal and in incorporated legal practices. Our finding that almost all problem lawyers worked in small practices aligns with other studies that identified sole or small practice size as a risk factor for complaints and disciplinary action (Boon and Whyte 2019; Arnold and Hagan 1992; Levin 2004). Similarly, the

American Bar Association Standing Committee on Lawyers' Professional Liability found that firms of five or fewer lawyers accounted for two-thirds of all legal malpractice claims (MacGregor and Vail 2016). The literature offers competing explanations. Canadian researchers argued that the elevated risk for sole practitioners reflects regulatory surveillance, sanctioning, and enforcement behaviour (Arnold and Hagan 1992). In the United States, researchers highlighted sole practitioners' limited resources (Piquero *et al.* 2016) and differences in the propensity of clients of different sized practices to complain to an external regulator (Levin 2004; Kritzer and Vidmar 2018). Isolation from peers and the profession, and the emotional and psychological burden of dealing with multiple stressors alone may exacerbate other vulnerabilities (Baron 2015). It would be fruitful for future research to explore how effective mentoring and supervision is at reducing future lapses in professionalism among lawyers in sole or small practices.

### **5.1.3. Patterns of behaviour**

Consistent with previous research, we found that the behaviours most commonly mentioned in determinations were low agreeableness and low conscientiousness. Meta-analyses examining the link between personality traits and job performance have consistently identified conscientiousness as predicting superior performance in a range of occupations (Salgado 1997; Barrick and Mount 1991). Conversely, low conscientiousness is associated with counterproductive workplace behaviours (Farhadi *et al.* 2012). Agreeableness has been shown to be relevant to job performance where cooperation and collaboration are needed (Mount *et al.* 1998) and low agreeableness has been identified among white-collar criminals (Turner 2014). The determinations represent a snapshot of the practitioner's behaviour during a period of misconduct and subsequent regulatory proceedings so it is unclear whether these behaviours were transiently present during a period of stress or whether they reflect enduring personality traits.

**5.1.3.1. Pressures.** Stressful life events may impact on complaint risk by reducing performance on tasks that require divided attention, retrieval of information, and decision making. The effects of stress appear to be mediated by the individual's appraisal of the demands and resources of a situation, and factors such as coping styles, locus of control, and social supports. We found misconduct frequently arose during a "turbulent time" in a practitioner's life. Indeed, one Tribunal remarked on the ubiquity of these issues, noting that practice pressures and personal problems are present in nearly every case where a lawyer is charged with a disciplinary offence.

## **5.2. Strengths and limitations**

This study contributes to the scholarship on legal misconduct in three ways. First, the study identified lawyers with the worst track record with regulators



in the state of Victoria over the study period 2005–2015, among nearly 24,000 registered lawyers. Second, we supplemented routinely collected administrative data with the full text of determinations about these problem lawyers. The determinations include comments from the lawyer, client, regulator, and decision-maker on the case, providing a rich and multidimensional source of information. Third, rather than focus on the misconduct itself, our research sought to identify contextual factors that might help to explain why these lawyers were falling into trouble.

Our study has several limitations. First, some misconduct by lawyers does not reach the regulator. The extent of under-reporting is unknown, but previous research has shown that many clients who are harmed by professionals do not complain (Bismark *et al.* 2006; Briton 2015; Carney *et al.* 2016). Second, we relied on information documented in reports by the Fidelity Fund Claims Advisory Committee or by decisions from Tribunals and courts. The focus of these determinations was (appropriately) on whether a claim should be paid or whether misconduct occurred, and not on identifying causal or contributing factors. In addition, we lacked data on certain variables such as number of hours worked per week. Previous research with doctors showed that the risk of complaints about older doctors only becomes fully evident when analysis controls for their reduced hours of work compared with younger peers (Thomas *et al.* 2018). In addition, we had little information on organisational culture and norms. In the words of Palmer, some of the “bad apples” in this study may have been pickled in “bad barrels” (Palmer 2012).

Third, this was a retrospective study and is therefore susceptible to hindsight bias. For example, a lawyer may have tried to rationalise their offending in ways that did not reflect their thinking at the time. Finally, we only had a comparator group for basic demographics, such as age, sex, practice location and practice size. We did not have a comparator group for personal and situational vulnerabilities such as poor health or patterns of behaviour.

## 6. Conclusions and recommendations

Our findings underscore the importance of understanding the context in which misconduct occurs. As expressed by the Tribunal: “the fact that there have been complaints which, after investigation, resulted in regulatory action, may indicate that something was amiss in the practitioner’s life or practice.” Given the stressful realities of legal practice, we propose three avenues for reducing, or mitigating, personal and situational vulnerability among lawyers.

First, we recommend greater attention to the link between professionalism and well-being in the profession (Albert and Krill 2015). A three-tiered approach is recommended: first, promote improved health and well-being amongst lawyers; second, encourage greater support for those who face difficulties; and third, reconsider the nature of legal working cultures and conditions deemed

deleterious to lawyer health. Jurisdictions in different parts of the world have established health and counselling programs tailored to lawyers, such as LawCare in the United Kingdom and the American Bar Association Commission on Lawyer Assistance Programs (ABA 2017). A “health pathway” – similar to that in place for health professionals in Australia – could be considered (Moore *et al.* 2015). A health pathway would identify lawyers with physical or mental health issues, or substance use dependence, which may have contributed to their misconduct. Rather than subject these lawyers to an adversarial disciplinary process, they would receive support for recovery and rehabilitation. Similar to health practitioners, disciplining impaired lawyers may not further the goal of protecting the public and the integrity of the profession, if the public is better served by allowing a lawyer to recover (Beeler 2017).

Second, our findings on unprofessional patterns of behaviours have important implications for lawyers. Disagreeable behaviour, such as rudeness, disrespect, bullying, and belligerence, should not be tolerated and could be addressed through an initiative similar to the Royal Australasian College of Surgeons “Operate with Respect” course (Royal Australasian College of Surgeons 2019). Also, high levels of conscientiousness are crucial in legal practice. Educators, regulators, and employers all have a role to play in emphasising the importance of keeping accurate file notes, responding to correspondence in a timely way, having robust systems for storing files and monitoring trust accounts. Finally, lawyers need to regulate their emotions in the face of stress, and to respond proactively to complaints, rather than hoping the problem will go away. As expressed by the Tribunal, there are certain steps that lawyers should follow in a disciplinary matter (Legal Services Commissioner v Macgregor 2013):

They must think about it, give their attention to it, and take steps to address it and respond appropriately. They should seek help and advice at an early stage, despite any embarrassment. They would be wise to appoint someone to act for them in relation to any disciplinary proceedings. They should notify any claim to their professional indemnity insurer ... It is all too common in cases before the Tribunal for charges of professional misconduct to arise from a failure to deal effectively with the disciplinary complaint and the investigation process, rather than the subject matter of the complaint itself.

Third, it is important to keep in mind that the problem lawyers in our sample represent a small fraction of the lawyers with multiple vulnerabilities. Many older, male lawyers working in sole practices experience depression and stressful life events without engaging in misconduct or financial fraud. Indeed, personal disruptions affect most professionals and do not constitute exceptional circumstances to excuse misconduct. Nonetheless, both regulators and the profession would benefit from a better understanding of protective factors that bolster the capacity of lawyers with vulnerabilities to keep practicing with the highest standards of ethics and legal practice.

Finally, consideration of vulnerabilities would be incomplete without acknowledging the privilege and power held by some problem lawyers, as a result of sex, ethnicity, knowledge asymmetry, and social status.

While not the focus of our study, client vulnerabilities such as poor health, cognitive impairment, unfamiliarity with the legal system, and non-English speaking backgrounds were commonly noted in the determinations. Previous research suggests that such vulnerabilities may be exploited by unscrupulous lawyers (Moore *et al.* 2019). The relationship between client vulnerability and lawyer misconduct matters, because disadvantaged or socially excluded groups are more likely to experience substantial or multiple legal problems (Coumarelos *et al.* 2012). The intersection between lawyer misconduct and client vulnerability is an important area for further research. Particularly, in exploring ways to safeguard vulnerable clients during their interactions with the legal system and support them to engage with regulatory process when things go wrong.

Lawyers work in a profession that is dedicated to client service; and therefore, dependent on public trust and confidence. Professional misconduct challenges these notions. A complaint about a lawyer may reflect an isolated instance of dissatisfaction with services provided, or herald more serious problems that present an ongoing risk to the public. Our empirical analysis offers insights into personal and situational vulnerabilities which may contribute to a trajectory of becoming a problem lawyer. In turn, our findings may lead to opportunities for legal educators, regulators, and employers to help guard against forms of misconduct and thereby protect consumers of legal services.

## Note

1. We excluded lawyers who were younger than aged 26 years, were barristers, or practiced interstate or overseas. The age and barrister restrictions were imposed because the nature of work and exposure to complaint risk was not directly comparable to the larger legal workforce. Lawyers aged 25 years and younger are often still in supervised legal practices and barristers cannot be instructed directly by clients.

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