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Ethical misconduct by new Australian lawyers: prevalence and prevention

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ABSTRACT

This paper examines the ethical behaviour of new lawyers from two contrasting points of view. First, we review the prevalence and type of ethical misconduct by lawyers in the Australian state of Victoria during their first three years of practice. This examination is based upon data provided by the professional conduct oversight body, the Victorian Legal Services Board & Commissioner. An analysis of this data provides some understanding of how often and what kinds of misconduct occur, and how new lawyers differ from lawyers, however the data yields limited insight into how we might prevent ethical problems. Consequently, we turn to examine the findings from our empirical study into the ethical climate of legal workplaces. That study investigated the perceptions of new lawyers about the ethical climate of their workplaces and revealed that those perceptions influence new lawyers' understandings of professionalism and ethical conduct, as well as their job and career satisfaction and psychological wellbeing. By interrogating the developmental and situational context in which ordinary ethicality develops or is inhibited, a new opportunity becomes available to shape new lawyers' practice towards better ethical outcomes.

Introduction

This paper examines the ethical behaviour of new lawyers from two contrasting points of view. Firstly, after a brief discussion of empirical research into lawyer misconduct, we review the prevalence and type of misconduct by lawyers in the Australian state of Victoria during their first three years of practice. This examination is based upon data provided by the professional conduct oversight body, the Victorian Legal Services Board & Commissioner (VLSB+C). An analysis of the data provides some understanding of how often and what kinds of misconduct occur, and how new lawyers differ from lawyers generally. Such misconduct can cover behaviour which is professionally inappropriate (rude, discourteous, uncommunicative) as well as that which is unethical in terms of professional conduct rules, legislation or the general law.

However, the descriptive and after-the-fact nature of the information, together with the infrequency of misconduct, yields limited insight into how we might prevent ethical problems, while also promoting good ethical practices.

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As such, we turn to findings from our empirical study investigating the perceptions of new lawyers about the ethical climate of their workplaces. It is clear that these perceptions influence new lawyers' understandings of professionalism and ethical conduct, as well as their job and career satisfaction and psychological wellbeing. By examining the developmental and situational context in which ordinary ethicality develops or is inhibited, a new opportunity becomes available to shape lawyers' practice towards better ethical outcomes.

We conclude by suggesting that pre-emptive regulation, which is informed by psychological principles and organisational dynamics, can help improve the ethical climate of legal practices. This, in turn, would lead to not only fewer misconduct complaints (and less misconduct) but greater ethicality amongst lawyers.

Lawyer misconduct: empirical insights

Empirical research into lawyer misconduct and consequent disciplinary action is relatively thin on the ground (Piquero *et al.* 2016). Much of the existing literature addresses the vexed issues raised by professional misconduct from the perspective of case studies (Abel 2012, Regan 2009). Abel's (2008, 2011) seminal books (*Lawyers in the Dock* and *Lawyers on Trial*) provide detailed case studies of misconduct by 16 lawyers at the New York and Californian bars respectively and some "tentative hypotheses about patterns of misconduct" (Abel 2012, p. 189). Notably, his research into these case studies left Abel "quite sceptical about the efficacy of the disciplinary system" (p. 190).

Building on his earlier work, Abel and colleagues set up the Working Group for Comparative Study of the Legal Professions, one project of which was "to compare lawyer deviance and discipline across nations" (Abel 2012, p. 193). The first fruits of that project were in-depth case studies of individual lawyer deviance and the resulting disciplinary processes in England, Canada, Australia, New Zealand and the Netherlands (Abel 2012, Boon and Whyte 2012, Buckingham 2012, Doornbos and de Groot-van Leeuwen 2012, Haller 2012, Levin 2012, Woolley 2012). In discussing these case studies, Levin (2012) notes that "case studies have their limits: cases are often chosen because they are interesting or unusual, rather that because they are typical" (p. 358). Being "interesting", the lawyers studied generally did not respond to the usual disciplinary moves by regulators and became "repeat offenders" (p. 376).

By contrast, most disciplined lawyers do not reoffend as Levin, Zozula and Siegelman's study (2012) suggests[1] and it is these, more "usual" lawyers we are interested in, rather than the repeat serious offenders "likely to share 'psychological processes and personality traits that may help account for [their] problematic behaviour" (p. 358–359). It is the more "usual" lawyers, we suggest, who will derive the most benefit if more is done "at the front end" (p. 375) (that is, when they are "new lawyers") to prevent misconduct. Given that "lessons learned early in practice can continue to affect decision making

for many years" (p. 360), it is vital that new lawyers learn these lessons within a positive ethical culture, in which their role models make ethical decisions on the basis of accepted professional ethical norms and values. It goes without saying that new lawyers should be properly supervised (p. 359).

It appears that, when lawyers misbehave, disciplinary action is the exception, not the rule. Piquero and colleagues (2016), noting the dearth of methodologically rigorous empirical studies on lawyer malfeasance and discipline, studied the "legal and extra-legal factors" (p. 573) affecting disciplinary decisions about lawyers at the Florida Bar. They were interested in "why a professional organisation would sanction some professionals, but not others" (p. 581). They found that "a mixture of variables" influenced the decision to send a case to the Bar's grievance committee, but that only one variable (being a solo practitioner) was statistically related to whether the grievance committee recommended a sanction (p. 581). Their findings also confirmed the conclusions of "the few other existing studies on lawyer misconduct" (p. 581) that disciplinary action is by no means a common consequence of misconduct: it "is the exception, not the rule" (p. 581).

This again points to the need to do far more to prevent lawyer misconduct than simply relying on the disciplinary system as a deterrent. While Piquero and colleagues suggest that on-going ethics training (from Law School through professional life) "may limit lawyer misconduct and unethical practices" (p. 582); we conclude, after our discussion of the misconduct of new lawyers in Victoria, that heightened attention to the ethical climate of legal practices may yield more significant improvements in the professional practice of lawyers.

Lawyer complaints and misconduct: the Victorian perspective

Source of data

We obtained from the VLSB+C a summary of complaints and misconduct data in relation to Victorian lawyers over the ten-year period from 2005 to 2015.[2] The data specifically compares lawyers in their first three years of post-admission practice (who we refer to as "new lawyers"), with the total population of Victorian lawyers during this period.

As a descriptive summary of results, the data supplied had already been cleaned and analysed by VLSB+C. We therefore re-analysed the data and interpreted the results to inquire about the extent to which such data might provide insights into the development of ethical behaviour and minimisation of ethical misbehaviour in new lawyers.

Lawyers in Victoria: a snapshot

Since July 2015 the *Legal Profession Uniform Law* (the *Uniform Law*) has been the governing legislation for lawyers in Victoria (and also in New South Wales).[3] The *Uniform Law* names the VLSB+C as the local regulator responsible for

regulating lawyers in that state. The *Uniform Law* was designed to harmonise regulation of the whole Australian legal profession and create a single system to govern legal practice, but this has not eventuated. Only two (the most populous, NSW and Victoria; but with Western Australia set to join in 2020) of the eight jurisdictions have adopted it. However, there is considerably more uniformity with respect to the actual standards to which solicitors must adhere with the widely adopted *Australian Solicitors' Conduct Rules* developed by the Law Council of Australia providing a uniform set of ethical and professional principles.[4] The *Australian Solicitors' Conduct Rules*, when adopted, become rules under the relevant state or territory's legal profession legislation and derive their binding force from this. A breach of a rule does not of itself amount to a contravention of the legislation so as to automatically attract a legislated penalty. Instead a breach of a rule is seen as conduct capable of constituting either "unsatisfactory professional conduct" (defined in section 296 of the *Uniform Law* in Victoria) or "professional misconduct" (defined in section 297) which may result in disciplinary sanction.[5]

Over the 10-year period covered by the VLSB data, 11,577 lawyers had been admitted to practice in Victoria, which has a population of approximately 6 million. By the end of the period (31 December 2015), there were a total of 19,726 lawyers registered in Victoria. However, 32,595 lawyers had been registered to practise in Victoria at some point over the decade. This discrepancy between the lawyers currently registered to practise and the substantially higher number of lawyers who had practised during the decade in question is consistent with the high levels of attrition from the profession which have been documented elsewhere (Law Council of Australia 2014), as well as the movement of lawyers between jurisdictions.

The majority of lawyers registered in Victoria are classified as solicitors (that is lawyers who mainly do direct client work). However, as at December 2015 approximately 2000 of the total number of registered lawyers were barristers (lawyers who mainly do court work).[6] The regulatory functions of VLSB+C covering Victorian lawyers are divided into two parts. The *Board* administers solicitors' practising certificates (including suspension and cancellation), but delegates these functions in relation to barristers to the Victorian Bar. The *Commissioner* is responsible for receiving and handling all complaints made against Victorian lawyers. In the case of barristers, part of that function (dealing with complaints about a barrister's legal costs), is delegated to the Victorian Bar.[7]

A sizeable majority of new lawyers (80%) in Victoria were employed lawyers, but a small proportion (9%) were already operating as sole practitioners within their first three years of practice. While Victoria has a mandated period of two years of *supervised practice* where lawyers must work under the supervision of a more experienced lawyer, this can be (and not infrequently is) reduced or waived, based on prior legal practice experience (for example, in positions such as paralegal or legal clerks) before admission.[8]

The VLSB+C data also described the type of legal entity in which new lawyers were working. Save for the smaller proportion in sole practice already described, recently-admitted lawyers were slightly more likely to work at law firms (27%), Incorporated Legal Practices (ILPs; 21%) and Community Legal Centres (CLCs; 10%) than were lawyers later in their career.[9] Apart from these small differences, the locale of new lawyers' practice was not dissimilar to the patterns for the overall profession.[10] A larger proportion of the new lawyers admitted to the profession in the period were female (60% female, 40% male).[11] As of 2015, there were still more men than women in the Victorian legal profession overall (52% male, 48% female), although female lawyers outnumbered male lawyers for the first time in March 2018 (Victorian Legal Services Board 2018).

Complaints and misconduct outcomes

Over the relevant period, 21,511 complaints against Victorian lawyers were recorded by VLSB+C. As multiple complaints can be made against one lawyer in relation to the same matter, this figure should not be interpreted as the number of lawyers who were subject to complaints. As shown in Figure 1, only 740 complaints, or 3.3% of total complaints, related to new lawyers. Of these complaints, only a similar proportion (3.5%) led to a misconduct outcome against a new lawyer. As discussed below, "misconduct outcomes" are outcomes where disciplinary action is taken against the lawyer based on established misconduct. In other words, only 0.1% of all complaints against lawyers resulted in a misconduct outcome against a new lawyer. This is indeed a tiny proportion, and one which raises preliminary issues of both psychological effect and methodological usefulness.

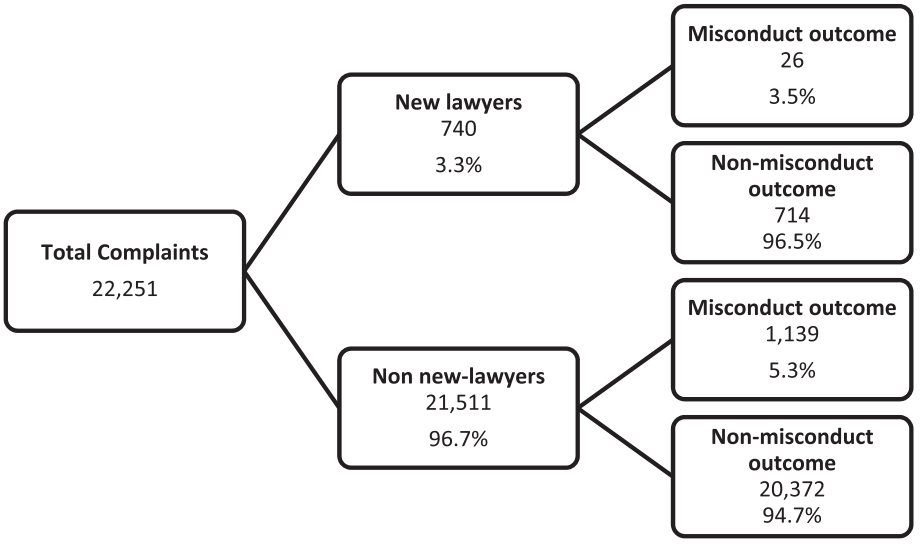

Figure 1. Summary of disposition of complaints against Victorian lawyers between 2005 and 2015.

The figures provided to us indicate that the overwhelming majority of complaints are not against new lawyers. This finding is simultaneous optimistic and potentially illusory. From a normative perspective, it is pleasing that new lawyers are not actively complained-against and are unlikely to be found to have breached their ethical responsibilities so early in their careers. However, this information is also limited in its value in promoting a positive ethical culture, and may even have unintentional adverse effects on lawyer behaviour.

The low base rate of established misconduct has its own normative effect. These figures are likely to confirm lay beliefs about the improbability of ethical sanction for (new) lawyers. Although the risk of being disciplined is remote, it is not zero. However, lawyers may be inclined to further downplay this already low probability, reducing the risk as it applies to them to zero (that is, to hold an over-confident belief that "this will never happen to me"). This is a cognitive bias known as probability neglect (Sunstein 2002), which is exacerbated by a general psychological tendency to believe – falsely – that we are more ethical than other people (Mazar *et al.* 2008, Hoorens 1993). Further empirical study on this topic would be worthwhile.

Moreover, the low rate of misconduct outcomes may also perversely set an inappropriately high internalised standard for what constitutes unethical behaviour. If only 0.1% of complaints lead to a misconduct outcome, then it is also easy to believe that ethical misconduct is only that which is so egregious and exceptional that high-level public sanction is unavoidable. Anything less than this may be considered to be ethically tolerable, or not even an ethical matter at all. Such a consequentialist view of legal ethics neglects the ever-present role of ethical considerations in everyday decision-making and actions, and the cumulative effect of such potentially poor habits and choices over time.

These statistics also can say nothing about the practice or enhancement of ideal ethical behaviour and principles by individual lawyers, their workplaces or the legal profession as a whole. It bears noting at the outset, therefore, that the reporting of lawyer disciplinary matters is not merely a rational and neutral communication of information and statistics. Care should be taken to ensure that ethical misconduct processes are firmly tied with expectations of ordinary ethicality and that messages about such processes and their outcomes include discussion of legal ethics more broadly.

Additionally, the very small number of misconduct outcomes means that it is difficult to discern any patterns at the individual lawyer level which might be useful for the prevention of ethical misconduct through regulatory reform. As such, there are inherent limits to the interpretability of the data, both in terms of what information is available, and in how the regulatory system implicitly shapes and potentially distorts how legal ethics is perceived by new lawyers. Nonetheless, with these caveats in mind, we turn to some findings which emerge from the VLSB+C data, first looking at complaints against lawyers, then addressing misconduct findings.

Complaints

For those lawyers who were subject to conduct complaints, new female lawyers were slightly under-represented as compared with males. While 60% of new lawyers were female, only 48% of complaints against lawyers were made against female new lawyers. This figure, however, is significantly higher than complaints against female lawyers across the profession generally (the proportions there were 22% against females, 78% against males). Female lawyers are therefore more likely to be subject to a complaint early in practice – at almost an equal rate to new male lawyers – but the balance as they gain experience has, at least in the past, shifted (Hatamyar and Simmons 2004).

New lawyers working in incorporated legal practices (ILPs) (44%) and sole practices (27%) were disproportionately overrepresented in total complaints against new lawyers.[12] Despite only just over one-third of new lawyers working in these environments, more than two-thirds of complaints were against lawyers in ILPs and sole practices. This finding would suggest that the failure of supervision in these practice environments may be exposing new lawyers to significantly higher risk of ethical misconduct, or at least a complaint.[13]

Complaint types recorded by the VLSB+C are, at the broadest level, categorised as either *consumer matters* or *disciplinary matters*. The former relates in the main to costs, poor service, poor communication, delay, and poor advice or information, the latter consist of more serious alleged ethical misconduct such as conflicts of interest, dishonest or misleading conduct, or acting without instructions. The statutory basis for this distinction comes from the *Uniform Law*. "Consumer matters" are defined as "so much of a complaint about a lawyer as relates to the provision of legal services to the complainant" (section 269) and include costs disputes. "Disciplinary matters" are defined as "so much of a complaint about a lawyer as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct" (section 270). Clearly conduct complained about may straddle these two categories and the legislation envisages such "mixed complaints" (section 271).[14] The outcomes for the two categories of complaint are also mixed. In the case of disciplinary matters, the Commissioner can make a determination that a lawyer has engaged in "unsatisfactory professional conduct" and impose orders to redo work, to apologise or undertake counselling, supervision or further training. The Commissioner may also issue the lawyer with a caution or a reprimand.[15] In matters that are more serious (either more egregious "unsatisfactory professional conduct" or "professional misconduct") the Commissioner may bring disciplinary charges against the lawyer before the Victorian Civil and Administrative Tribunal (VCAT). In the case of consumer matters, the Commissioner can also make determinations and orders, but without findings that the behaviour amounted to either of the two categories of professional misconduct. Thus, it is only the "disciplinary matters" category that

produces what are termed *misconduct actions* that can result in a series of disciplinary outcomes recorded by the VLSB+C. Consumer matters were the reason for 51% of complaints against new lawyers, compared with 42% for the total lawyer population. Complaints about more serious disciplinary matters were less common for new lawyers (49%) compared with all lawyers (58%).

At the next level of specificity, both consumer matters and disciplinary matters are categorised by the VLSB+C into a set of distinct issues, as shown in Figure 2. One immediate observation is that there was little difference between new lawyers and all Victorian lawyers in relation to the issues giving rise to a complaint. Complaints for both groups overwhelmingly related to overcharging, with a slightly higher proportion of new lawyers represented (41% of new lawyer complaints, 36% of all lawyer complaints). Professional conduct, specifically dishonest or misleading conduct (new lawyers: 7%; all lawyers: 5%), and poor service, specifically negligent or inadequate advice (new lawyers: 11%; all lawyers: 12%) were also complained about, but were much less frequent as underlying complaint issues. As discussed below, however, the issues giving rise to complaints did not necessarily result in a *misconduct outcome*.

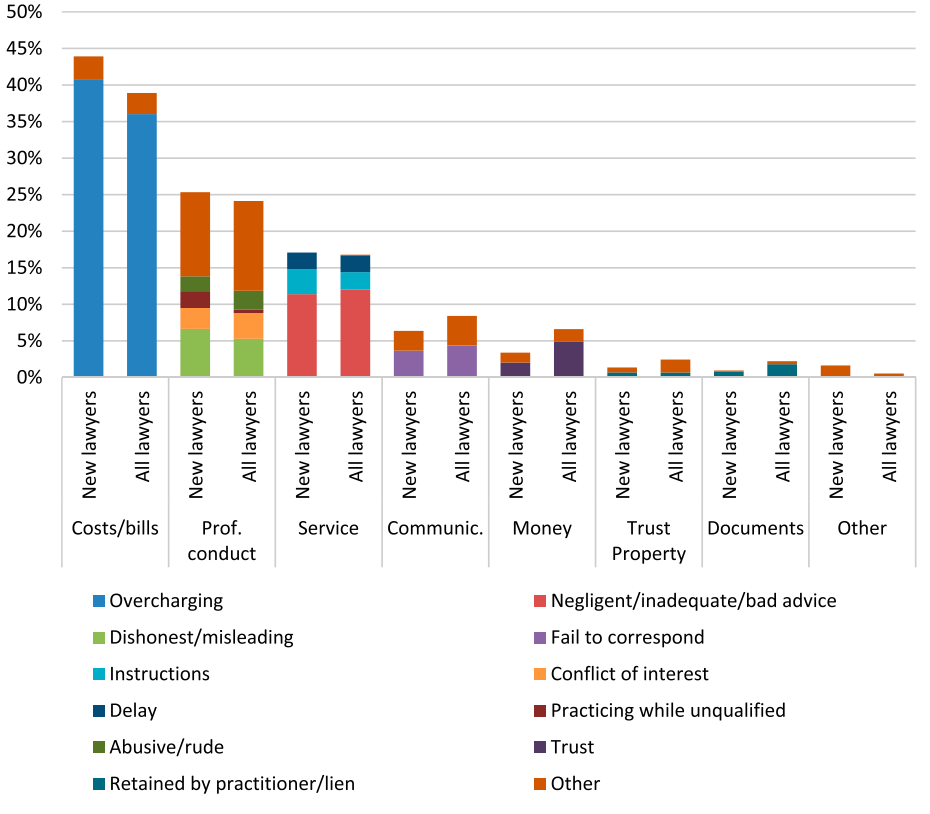

Figure 2. Complaints against Victorian lawyers between 2005 and 2015.

Complaint outcomes

A resolved complaint is coded by VLSB+C with an outcome that characterises the result of the complaint handling process. This can be either a *misconduct finding* or a *non-misconduct outcome*. A misconduct finding follows an external disciplinary proceeding instigated by the VLSB+C. There are three levels of misconduct findings: the lower level of unsatisfactory professional conduct (UPC),[16] the more serious level of professional misconduct,[17] and instances where strike-off (that is, removal from the Supreme Court's roll of practitioners) is warranted. In the case of conduct seen as serious enough to warrant strike off, these proceedings are in the Supreme Court of Victoria.[18] In the case of professional misconduct or UPC, these matters are dealt with by the Victorian Civil and Administrative Tribunal (VCAT).[19] The VLSB+C maintains a public register of the findings of all such proceedings.[20]

Where no misconduct finding has been made in relation to a complaint, a range of *non-misconduct outcomes* can result. These include the complaint being withdrawn, internally resolved, or summarily dismissed. As shown in Table 1, almost 95% complaints against all lawyers are resolved with a non-misconduct outcome.

Table 1 also compares the outcomes from complaints against new lawyers and all lawyers. Most significantly, they are also less likely to have a finding of misconduct made against them (new lawyers: 3.5%; all lawyers: 5.1%). The non-misconduct outcome data show that new lawyers are more likely to have a complaint withdrawn (new lawyers: 24%; all lawyers: 13%) or resolved (new lawyers: 22%; all lawyers: 10%). However, new lawyers are far less likely to have complaints summarily dismissed (new lawyers: 18%; all lawyers: 37%) when compared with the wider profession.

As noted above, there are very few conduct complaints (particularly for new lawyers) that result in a misconduct finding. One possible interpretation is that

Table 1. Summary of misconduct and non-misconduct outcomes for Victorian lawyers.

	New Lawyers	%	All Lawyers	%
Misconduct Outcome				
UPC	23	3.1%	821	3.7%
Professional Misconduct	2	0.3%	263	1.2%
Strike off	1	0.1%	55	0.2%
Total Misconduct Outcome	**26**	**3.5%**	**1,139**	**5.1%**
Non-Misconduct Outcome				
Withdrawn	180	24.3%	3,031	13.6%
Resolved	164	22.2%	2,328	10.5%
Summarily Dismissed	136	18.4%	8,237	37.0%
No Misconduct Disclosed	96	13.0%	3,730	16.8%
Not Resolved	49	6.6%	1,722	7.7%
No Further Investigation Required	34	4.6%	831	3.7%
Complaint Dismissed	33	4.5%	639	2.9%
Other	22	3.0%	594	2.7%
Total Non-Misconduct Outcome	**714**	**96.5%**	**21,112**	**94.9%**
Total	**740**	**100%**	**22,251**	**100%**

the VLSB+C and disciplinary decision-makers make some allowance for new lawyers' level of experience and the extent of the supervision provided to them as a mitigating or exculpatory factor. Alternatively, new lawyers as a whole may be involved in aspects of practice which were less likely to lead to a misconduct finding. For example, they are less likely to be involved with trust accounts or property transactions. Further exploration is needed beyond the available data: there is a significant opportunity here for both policy development and research to understand more about the resolution of complaints with a non-misconduct outcome, and how such resolution affects the ethical identity and behaviour of the lawyer involved.

It is noteworthy that the main issues leading to complaints against lawyers do not frequently result in a misconduct outcome. This can be seen in Figure 3. For instance, while overcharging accounted for 41% and 36% of complaints against new lawyers and all lawyers respectively, it was only an issue in 4% and 7% of misconduct outcomes. Similarly, allegedly negligent or bad advice gave rise to 11–12% of complaints, but was an issue in only 4% of misconduct outcomes.

As such, the interpretation of complaint data in terms of understanding lawyers' ethical behaviour must be approached with caution. The frequency and content of complaints – against any lawyer, new or otherwise – is not necessarily an indication of lawyers' ethical decision-making or development, and therefore should not be used as a strong predictive variable. However, complaint data may provide some insight into how others, particularly clients and other parties, perceive the ethical behaviour of lawyers, and reveals areas of potential discrepancy between expectation and reality.

Comparing new and all lawyers in terms of misconduct outcomes, a few identifiable differences were observed. Misconduct in new lawyers were much more likely to occur because the lawyer was practising while unqualified (new lawyers: 27%; all lawyers: 2% of misconduct outcomes), signalling the impatience of some new lawyers to practise before holding a practising certificate. This again indicates a failure of supervision or a proper preparation for the transition into practice. Also unsurprisingly, misconduct by new lawyers was less likely to revolve around trust account issues (new lawyers: 4%; all lawyers: 14%). There was, however, less specificity in the issues around misconduct outcomes for all lawyers, with more uncategorised ("other") complaints within the broader categories of professionalism (16% vs. 4%) and communication (13% vs. 0%), compared with new lawyers.

On the whole, 85% of misconduct findings against new lawyers related to professional conduct issues, whereas this figure was only 43% for all lawyers. Even taking into account the instances where new lawyers were practising while unqualified, this difference is still significant. As Figure 3 indicates, there are a wide range of professional (mis)conduct issues which form this cluster of misconduct, but all seem to relate to situations where the lawyer is required not only to understand the right thing to do, but to be able to carry it out as part

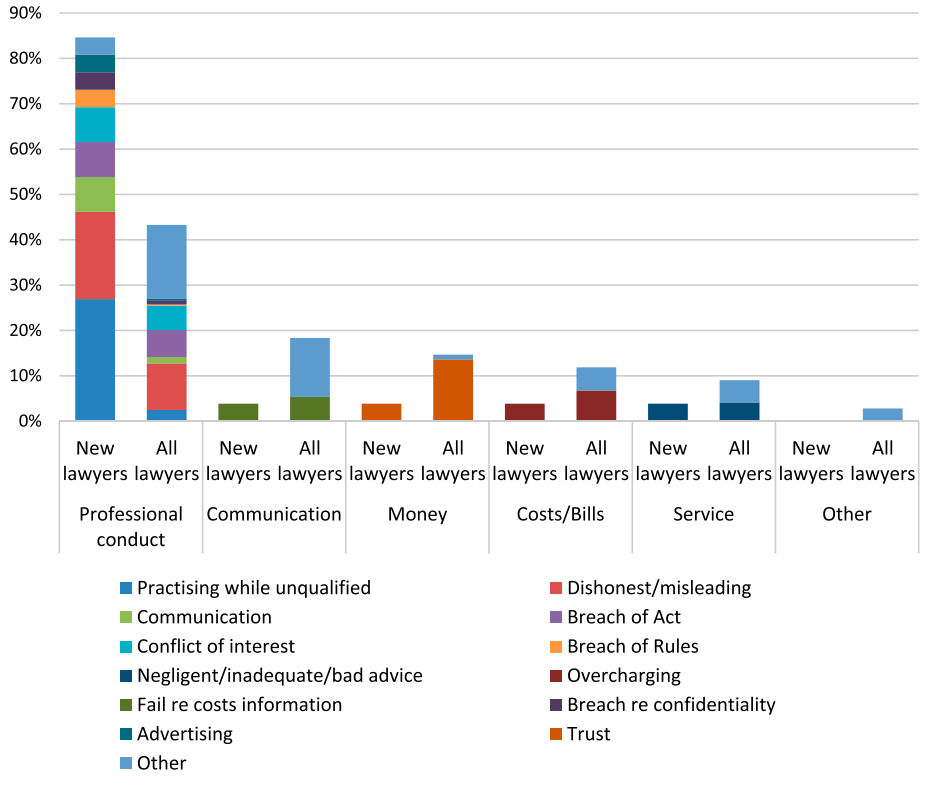

Figure 3. Misconduct outcomes against Victorian lawyers between 2005 and 2015.

of their everyday practice. That is, it may be that new lawyers are aware of the right course of conduct, but lack the skills to act accordingly (Holmes 2015). In addition to good supervisory practices, other proactive regulatory steps to help new lawyers develop ethical insight and awareness and to help firms and employers build a healthy ethical organisational culture may be warranted.

Misconduct cases

There were two professional misconduct outcomes and one strike-off decision for new lawyers between 2005 and 2015. Of course, this is an extremely small sample size from which no generalised findings could legitimately be made about new lawyers' ethical behaviour. An analysis of the reported decisions in these three cases, however, show an inclination of disciplinary bodies to recognise the status of a new lawyer in considering misconduct outcomes. The facts relating to the misconduct also provide some clues as to effective regulatory responses to prevent misconduct from occurring in the first place.

In the two instances where a new lawyer was found to have engaged in professional misconduct, the underlying issue was the same – falsifying documents. The first related to a false declaration in support of application to work as a lawyer unsupervised. This extract, drawn from a regulatory alert to the

profession and public, summarises the issue (Victorian Legal Services Board and Commissioner 2015):

> A new solicitor, Mr Quan Pham, submitted a statutory declaration seeking to have the supervised legal practice condition removed from his practising certificate. Like all newly admitted lawyers, Mr Pham was required to demonstrate that he had been doing legal work under supervision for two years before he could have the condition removed.
>
> Mr Pham had worked for a small law practice for a period of approximately 7 ½ months. However, he claimed to have worked as a solicitor for 17.5 h per day, seven days a week for the entirety of the seven and a half months he worked at the law firm, including the time before he held a practising certificate. These calculations were rejected and it was determined that he had made statements in his statutory declaration which he knew to be false.

The VCAT decision on penalty makes this comment (*Legal Services Commissioner v Pham (Legal Practice)* [2014] VCAT 1591, [33]), supporting an inference from the data that a new lawyer's inexperience and future career prospects are considered by disciplinary bodies:

> Having regard to the respondent's inexperience, it is my view that a period of suspension of the magnitude submitted by the Commissioner would be excessive to the point of being punitive. Of far greater value in the case of a practitioner at the very commencement of his legal career is a disposition which focuses upon conditions of supervision and a requirement to complete extra training.

This observation also supports the comment made previously that active and effective supervision, including in ethical professionalism, may be the most protective factor against misconduct. In this case, the attempt to remove such oversight was the new lawyer's undoing, indirectly stressing its importance. Mr Pham's appeal to the Victorian Supreme Court was dismissed (*Pham v Legal Services Commissioner* [2015] VSC 671). He later commenced defamation proceedings with respect to VLSB+C's regulatory alert, which were also dismissed (*Pham v Legal Services Commissioner* [2016] VSC 450).

The second new lawyer, Ms Sharon Johal, deliberately forged a medical certificate and gave it to her employer. The VCAT decision made a similar statement about the solicitor's inexperience and its bearing on the seriousness of the misconduct (*Legal Services Commissioner v Johal (Legal Practice)* [2011] VCAT 1390, [20]):

> The plea that she has made at an early stage of the proceedings clearly stands strongly in her favour. There is other uncontradicted evidence that she was affected by illness or external stresses in the manner which I recited from the psychologist's report. She was admitted to practice in 2008. This incident occurred in 2009. On any view, at that time she was a practitioner of relatively little experience and what she has done therefore must be viewed as less serious for that reason.

In the one strike-off case, a graduate lawyer, Ms Cecilia Nguyen, had been found guilty of stealing more than $100,000 from her employer and was sentenced to

12 months imprisonment. The theft was apparently to support a gambling addiction which began just five months after her admission to practice. Details of the disciplinary outcome appear in the VLSB+C register and it was also the subject of a profession-wide regulatory alert, which outlines the circumstances (Victorian Legal Services Board and Commissioner 2011):

> Associate Justice Mukhtar of the Supreme Court of Victoria ordered on 21 June 2011 that Ms Cecilia Nguyen be struck off the roll of legal practitioners following an application by the Legal Services Board. Ms Nguyen consented to this application.
>
> The Board resolved to make the strike-off application on the basis that Ms Nguyen had been found guilty and sentenced to a term of imprisonment for a serious offence and was no longer a fit and proper person to engage in legal practice.

Such cases, where personal circumstances and motivations collide with the new lawyer's professional responsibilities and ethical duties, will always remain at the edges of lawyers' behaviour. Disciplinary actions in these cases are vital to safeguard the public and the profession, but the statistics, caselaw and extrinsic material offer limited insights into the ordinary ethicality or unethicality of new lawyers. The picture of new lawyers' ethical conduct and misconduct so far is therefore incomplete: the focus is on completed and investigated misconduct and ignores the good ethical practices of most lawyers. It also overlooks the "hidden" unethical practices which never lead to a complaint or investigation, but nonetheless affect lawyers' professional duties, client outcomes and the relationships with others. We therefore consider it important to complement these findings with a direct inquiry of the ethical perceptions of new lawyers and the influence of the culture of their workplace.

Ethical culture and positive ethicality: an empirical analysis

If we reflect on the snapshot of practice described in the data above, it is clear that the prevalence of reported professional misconduct or unprofessional conduct by new lawyers is relatively low. This is consistent with the expectation that new lawyers should not handle matters completely independently and that they are subject to close supervision. Nonetheless, there are conduct issues relating to a proportion of the cohort sufficient to give concern to not only regulators, but also legal educators, supervisors and the management of legal practices, and lawyers themselves. In particular, there is concern about how well new lawyers are being supervised, and the models of professional and ethical behaviour to which they are exposed (the concern expressed by Abel 2012 and Levin 2012). How might this concern be addressed? Our suggestion is that the quality of the ethical culture new lawyers experience can and does play an important role.

Chambliss (2010), for one, recognised the importance of ethical culture, but lamented that the research at that time into ethical culture in legal practices suffered from a normative bias and lacked an empirical foundation. This is

exacerbated in Australia by the limited research, particularly empirical research, on lawyer misconduct and disciplinary processes overall (Parker 2002). Responding to these concerns, we conducted separate empirical studies over much of the period of the VLSB+C data to examine ethical culture using quantitative and qualitative methods. Our latest study is a quantitative online survey focused on Australian lawyers who were within their first 12 months of practice, a period which we know from our previous research to be a critical and transformational for lawyers' professional development.

We were interested in how new lawyers perceived the *ethical climate* of their workplace. In other words, what were the perceptions of new lawyers about how people in their workplace typically make decisions concerning "events, practices, and procedures" (Cullen *et al.* 1993, p. 669) requiring ethical criteria? The study was intended to identify relationships between the ethical climate perceptions of these lawyers, the organisational and psychological characteristics of their workplaces, and how these patterns might explain the professional development, ethical behaviour and wellbeing of lawyers.

Method and participants

We obtained 336 valid responses to the survey.[21] All participants were lawyers within their first 12 months of practice. Participants from every jurisdiction in Australia responded to the survey. The median age of participants was 26 (mean: 20.5, standard deviation: 7.59). Female participants accounted for 62.2% of the sample, with 37.2% males and 0.6% who did not identify with a binary gender. The vast majority of participants (90.8%) were employed in a full-time capacity, working a median of 40 h per week (mean: 42.6 h, standard deviation: 9.2 h).

Participants worked across a diverse range of legal practice environments: well over half (64.4%) were in private practice; 22.8% in government practice, and 9.3% in community legal practice. Of the participants in private practice, over a third were working in small firms (32%), 12% in medium-sized firms and 13.8% in large law firms.[22] A smaller number of remaining participants (5.7%) worked in corporate in-house practices.

We used the 18-item short form version of Arnaud's (2010) Ethical Climate Index (ECI) to measure participants' perceptions of workplace ethical climate. To our knowledge, the ECI has not been previously applied to the legal profession. The ECI is a self-report questionnaire which measures perceptions of ethical climate across six dimensions (or factors), derived from Rest's (1986) four-component theory of moral development.

Dimensions of ethical climate

Given that the theoretical foundations of the dimensions of ethical climate in the ECI are not uncontested and can be difficult to interpret in practice, we sought

first to re-examine what the ECI purports to measure, and whether this can be simplified. We applied an Exploratory Factor Analysis (EFA) to the ECI as completed by our new lawyers, so as to identify components of ethical climate based on an empirical, rather than theoretical, approach. This resulted in a more manageable set of three factors. That is, we found that the ECI was able to measure three distinct aspects of how lawyers perceived the ethical climate of their workplace. We interpreted and labelled the three aspects of ethical climate measured by the ECI as follows:

(1) *Power and Self-Interest:* the extent to which power, control and instrumental outcomes are more important and valued in the workplace, with a corresponding preparedness to break rules to obtain personal benefit when necessary.
(2) *Integrity and Responsibility*: the extent to which there is a sensitivity to behaving ethically and adhering to formal ethical rules, and an inclination to be compliant, consciousness and accountable to not only prescriptive requirements but also ethical situations as they arise.
(3) *Ethic of Care:* the extent to which people in the workplace were perceived to express empathy and understanding for each other and strove to develop positive and respectful relationships with others as part of being an attentive professional. "Ethic of care" is a term borrowed from Gilligan's (1982) pivotal work, which has also had a significant influence in the legal ethics scholarship (Nicolson and Webb 1999, Gachenga 2011, Parker 2004). The concept was not used by Arnaud (2010) or in much of the other ethical climate literature (cf. Liedtka 1996), but the interpretation of the ECI items in this factor is consistent with Gilligan's definition and its explicit inclusion corrects an important omission in the empirical measurement of ethical culture.

To be clear, these dimensions are not separate ethical types or categories, but separate ethical attributes that we were able to measure using the ECI.[23] These three dimensions weave together to give each workplace a distinct ethical climate. Conversely, we can deconstruct each new lawyers' ECI responses into a separate perception of the extent to which their workplace had a culture of integrity and responsibility, a culture of an ethic of care, and a culture of power and self-interest. These perceptions can then be compared to how other participants in the survey assessed their workplaces.

The three ethical climate dimensions captured in our study are similar in many respects to those found to be predictive of (un)ethical behaviour. In a meta-analysis of research into sources of unethical decisions at work, Kish-Gephart and colleagues (2010) found that the most significant dimensions of ethical work climate for predicting (un)ethical behaviour could be distilled to workplace environments where:

- there is a focus on following rules that protect the company and others (the "Principled" climate),
- employees' attention was focused on the well-being of multiple stakeholders, such as employees, customers and the community (the "Benevolent" climate), and
- there is a focus which promoted "an 'everyone for himself [or herself]' atmosphere" (the "Egoistic" climate).

According to Kish-Gephart and colleagues (2010), the stronger the principled and benevolent dimensions, together with the clearer the communication of "the range of acceptable and unacceptable behaviours", the "fewer unethical decisions [occur] in the workplace" (p. 21). Conversely, the stronger the egoistic dimension and the less clearly the communication of acceptable and unacceptable behaviours, the greater the likelihood of unethical behaviour. We similarly characterised the "integrity and responsibility" and "ethic of care" dimensions as essentially positive, and the "power and self-interest" dimension as potentially negative and harmful.

Ethical climate types

To examine the impact of the three independent ECI dimensions, we sought to identify whether there were common patterns in how these perceptions of integrity and responsibility, power and self-interest, and an ethic of care were related. In other words, we categorised new lawyers' workplaces based on their perceptions on each of the ECI dimensions into one of three *ethical climate types*. We also approached this empirically, using statistical methods to identify clusters in the data.[24] These ethical climate types are summarised in Table 2, which describes the characteristics of the typical workplace of that type, as perceived by our participants.

The first ethical climate type describes participants who perceived their workplace as significantly lower than average on integrity and responsibility, but around average for both power and self-interest and ethic of care dimensions of ethical climate. This ethical climate can be described as one of *ethical apathy*, with low ethical awareness and motivation, and typical levels of self-interest and relational engagement. There was no strong desire in these workplaces to build positive relationships or to strive to do the right thing, but there was also a strong disinclination to direct energy towards self-interested instrumental outcomes at the expense of ethical norms. Just under one-quarter (23%) of our participants' workplaces were classified into this type.

The second ethical climate type describes an individualistic and instrumental workplace environment, with high perceptions of power and self-interest and low ratings of an ethic of care. Perceptions of ethical integrity and responsibility were about average. We termed this ethical climate *getting ahead*, based on the

Table 2. Summary of ethical climate types.

	Average Perception on ECI dimension		
Ethical Climate Type	Power & Self-Interest	Integrity & Responsibility	Ethic of Care
1: Ethical Apathy	Average	Low	Average
2: Getting Ahead	High	Average	Moderately low
3: Positive Balance	Moderately low	Moderately high	Moderately high

strong emphasis on personal and instrumental goals, even at the expense of relationships and ethical norms. Similar to the first ethical climate type, 22% of participants' workplaces were classified into this type.

While the first two ethical climate types are less than ideal, the third type depicts a more *positively balanced* ethical climate. Participants in this category perceived their workplace as moderately lower than average in the power and self-interest of ethical climate, but moderately higher than average on the integrity and responsibility dimension, and slightly higher than average on perceptions of the extent of an ethic of care. Just over half of participants' workplaces (55%) belonged to this ethical climate type.

The analysis shows that just under half of participants were in workplaces with a less-than-ideal ethical climates, but for two very different reasons. Approximately half of these participants were in workplaces with low ethical consciousness and motivation, whereas the other half were in climate clearly marked by instrumental interests, at the expense of relationships and ethical rules.

While it is encouraging that over half of our participants were in a more balanced ethical climate, it would not be possible to say that this "positive balance" category represents an ideal or optimal ethical type. Typical perceptions of the extent of an ethic of care culture by lawyers in this type were not very much above the average across all participants in the study. Moreover, the extent to these workplaces were being inclined towards ethical integrity and disinclined towards Machiavellian power was somewhat muted. An ideal ethical climate might be found in a subset of these participants' workplaces, especially those with very high integrity and responsibility ratings, very high ethic of care and low power and self-interest perceptions. Further refinement and research will be needed to obtain these insights empirically.

Implications of ethical climate types

We then explored whether participants in each of these three ethical climate categories differed in terms of job and career satisfaction, organisational learning, psychological wellbeing and professionalism. A clear pattern became evident. Participants who were working in an environment which had a positive balance ethical climate type had significantly higher levels of job and career satisfaction, and lower levels of psychological distress compared with participants in the other two less-ideal ethical climate types ("ethical apathy" and "getting

ahead"). Moreover, although these two less-ideal ethical climate types are functionally very different, they have similar effects on most of the measures reported. Where there was a difference, the "getting ahead" type was slightly worse for new lawyers than the "ethical apathy" type, but both are detrimental to the development of positive ethical professionalism and wellbeing.

This leads us to the question of whether there is an optimal mix of the components of ethical climate for legal workplaces. That is, is there an ethical climate type that is optimal in terms of its effect on new lawyers' professional conduct? Should achieving a climate akin to the balanced ethical climate be an aim of practice managers and regulators? The analysis discussed above and our own earlier research shows how crucial it is to meet new lawyers' psychological needs for autonomy, competence and relatedness (Foley *et al.* 2015). It is clear that an optimal ethical climate to achieve this is one exhibiting a balance of the integrity and ethic of care components. Not surprisingly, also according to Kish-Gephart *et al.* (2010), the same type of ethical climate facilitates ethical behaviour.

So how might such a legal practice workplace be created? One approach would be to use the ECI as a diagnostic tool across the workplace to uncover strengths and weaknesses of the workplace, and to measure progress towards positive change. Use of the questionnaire, with appropriately-communicated sensitive feedback based on appropriate norms and contextual information, could promote dialogue between people at various levels in the organisation about the ethical climate and how to address areas of concern. Dialogue is key to a positive organisational learning culture, which our research shows to be one antecedent of positive ethical climate dimensions. Such a culture is characterised by a high sense of trust, by high regard for initiative, by reward and encouragement for participation in learning, by flexibility and adaptability to challenge and change (Marsick and Watkins 2003). An organisational learning culture is, by its very nature, relational. It allows for the appropriate critical questioning and discussion at all levels of the organisation that Parker and Aitken (2011) noted as vital to a healthy ethical infrastructure. It provides a safe place for new lawyers to learn (including learning from failure and learning about what they do not know), which is crucial to them developing competence and professional judgement in the midst of uncertainty (Holmes *et al.* 2012, Tang and Foley 2014).

Another tool to help create optimal ethical climate may be targeted regulation. Evaluation of the "light touch" approach to lawyer regulation in the Australian state of New South Wales during its brief implementation showed that it had significant impacts on the ethical infrastructure of legal practices (Parker *et al.* 2010). Its self-assessment requirement opened up discussion about ethical matters and positively affected firm management and supervision (Fortney and Gordon 2012). It seems from Aulakh and Loughrey's (2017) research that the new regulatory scheme in the UK may have similar results

with Compliance Officers for Legal Practice (COLPs) supporting individual lawyers in their ethical deliberation and reinforcing professional values in their firms. In sum, we endorse the use of proactive regulatory tools as a means to healthy ethical climates.

Conclusion

On the basis of the VLSB+C data, it is safe to say that new lawyers in Australia are not often the subject of complaint or a misconduct finding. This is perhaps as expected, since most new lawyers work under supervision. However, the data does reveal some concern about the quality of supervision of some new lawyers and the models of professional and ethical behaviour to which they are exposed. These concerns are borne out by our research into the ethical climate of Australian legal workplaces. Around half of the new lawyers we surveyed were working in organisations where the ethical climate (as perceived by them) was detrimental to their ethical professional development and wellbeing (the two things being closely connected). This should be of concern to regulators and the profession as a whole. While more research needs to be done on the how to improve ethical climate, we know enough to make a start. Individual organisations can interrogate their culture and address problem areas. More broadly, targeted regulation, informed by research in behavioural ethics (Feldman 2018), can help improve the ethical environment in which new lawyers learn what it means to be an ethical professional.

Notes

1. See Leslie C Levin, Christine Zozula and Peter Siegelman, LSAC Report, The Relationship Between Bar Admissions Data and Subsequent Lawyer Discipline (2012) (on file with authors).
2. Australia is a federation, and Victoria is one of the six states and two territories in that federation.
3. In Victoria the enacting legislation is the *Legal Profession Uniform Law Application Act 2014* (Vic).
4. South Australia, New South Wales, Victoria, Queensland and the Australian Capital Territory have adopted the Rules through legislation. Tasmania, Western Australia and the Northern Territory have conduct rules but conduct rules but these are not based on the Australian Solicitors' Conduct Rules.
5. These aspects are well-explained in the Law Council of Australia's *Review of the Australian Solicitors' Conduct Rules* (2018) available at https://www.lawcouncil.asn.au/files/web-pdf/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf.
6. Current data are available from VLSB+C at http://lsbc.vic.gov.au/?page_id=287.
7. See the VLSB+C's summary on regulatory arrangements in Victoria: http://lsbc.vic.gov.au/?page_id=21.
8. Advice from the LSB+C suggests such applications are usually granted.

9. Incorporated Legal Practices are law practices structured as corporations as permitted under a state or territory's legal profession legislation. In Victoria, ILPs are permitted under the *Uniform Law*, see http://lsbc.vic.gov.au/?page_id=230. ILP's cover the breadth of private legal practice including small, medium and large law firms, Community Legal Centres are not for profit, community-based organisations providing free legal and related services, often to people experiencing discrimination and disadvantage. The peak national body is the National Association of Community Legal Centres (NACLC): http://www.naclc.org.au/about_clcs.php
10. Data for the overall profession shows a distribution of law firms (25%), sole practice (24%), incorporated legal practices (17%), non-legal employers (12%), government departments or agencies (8%), community legal centres (7%) and multidisciplinary practices (6%).
11. This analysis was based on data where the gender of the lawyers was recorded by the VLSB+C.
12. Removing from the dataset the substantial number of entries where the entity location was not recorded at the time of complaint.
13. Some scholars argue that large corporate clients keep their own check on lawyers' ethics and take complaints to senior management, not the regulator. Whether or not this promotes more ethical behaviour is a moot point (Whelan and Ziv 2012).
14. Information about complaints on the VLSB+C draws a more practical distinction between a complain about conduct and behaviour, a complain about quality of service or a complain about legal costs and bills, see http://lsbc.vic.gov.au/?s=complaints.
15. Determinations made by the Commissioner are available online at: http://lsbc.vic.gov.au/?page_id=5046.
16. *Legal Profession Uniform Law* s 296.
17. *Legal Profession Uniform Law* s 297.
18. *Legal Profession Uniform Law* s 23.
19. VCAT decisions are published on AustLII: http://www.austlii.edu.au/
20. The VLSB+C's Register of Disciplinary Action (RODA) is available here: http://lsbc.vic.gov.au/?page_id=285.
21. Ethical aspects of this research were reviewed and approved by the Australian National University Human Research Ethics Committee.
22. The Australian Bureau of Statistics makes a distinction between solicitor practices with 1–2 working principals, 3–5 working principals, and 10 or more working principals, though it does not refer to these specifically as small/medium/large firms: Australian Bureau of Statistics, '8667.0—Legal Practices, Australia, 2001–02' (2003), www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features12001–02. The commonplace understanding is that small firms have 1–10 lawyers; medium 10–20 and large 20 and substantially above.
23. Of course, there would necessarily be other aspects of ethical climate which the ECI is not able to measure. Further developments in the quantitative and qualitative measurement of ethical climate may reveal these aspects.
24. We conducted a hierarchical cluster analysis to identify the number of clusters to extract, followed by a *k*-means cluster analysis to classify participants.

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