



Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families

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Integrated housing support for vulnerable families

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Acronyms and abbreviations used in this report

ABA	Acceptable behaviour agreement
ABH	Aboriginal Housing Office
ACT	Australian Capital Territory
ACT RTA	<i>Residential Tenancies Act 1997 (ACT)</i>
AHURI	Australian Housing and Urban Research Institute Limited
CH	Community housing
Cth	Commonwealth (of Australia)
DBMP	Disruptive behaviour management policy (WA)
DHCD	Department of Housing and Community Development (NT)
DHHS	Department of Housing and Human Services (Vic)
FACS	Family and Community Services (NSW)
LAHC	Land and Housing Corporation (NSW)
NCAT	NSW Civil and Administrative Tribunal
NHHA	National Housing and Homelessness Agreement (Cth)
NSW	New South Wales
NSW RTA	<i>Residential Tenancies Act 2010 (NSW)</i>
NT	Northern Territory
NTCAT	NT Civil and Administrative Tribunal
NT RTA	<i>Residential Tenancies Act (NT)</i>
PH	Public housing
Qld	Queensland
QLD RTRRA	<i>Residential Tenancies and Rooming Accommodation Act 2008 (Qld)</i>
SA	South Australia
SA RTA	<i>Residential Tenancies Act 1995 (SA)</i>
STEP	Support and Tenant Education Program (WA)
Tas	Tasmania
Tas RTA	<i>Residential Tenancy Act 1997 (Tas)</i>
TH	Tenancy Officer
VCAT	Victorian Civil and Administrative Tribunal

Vic	Victoria
Vic RTA	<i>Residential Tenancies Act 1998 (Vic)</i>
WA	Western Australia
WA RTA	<i>Residential Tenancies Act 1987 (WA)</i>
UN	United Nations

Glossary

A list of definitions for terms commonly used by AHURI is available on the AHURI website www.ahuri.edu.au/research/glossary.

Executive summary

Key points

- Housing policy in Australia has enlarged the role of social landlords in relation to crime and non-criminal anti-social behaviour ('misconduct'). Recent developments include 'three strikes' policies and legislative amendments intended to facilitate termination proceedings and evictions.
 - This research focused on social housing legal responses and termination proceedings in relation to four types of vulnerable persons and families:
 - women, particularly as affected by domestic violence and other male misconduct
 - children
 - Indigenous persons and families
 - persons who problematically use alcohol and other drugs.
 - We reviewed residential tenancies law and social housing policies in five jurisdictions—New South Wales, Tasmania, Victoria, Western Australia and the Northern Territory—and national policy principles and frameworks relating to the four vulnerable types.
 - We also reviewed 95 cases of social housing legal responses to misconduct, and interviewed stakeholders in social housing landlord and tenant organisations.
 - We found cases of:
 - women held to be in breach and evicted because of violence against them
 - children being evicted, and insufficient safeguards as to their interests
 - complicated circumstances and barriers to support for Indigenous tenants
 - alcohol and drug treatment disrupted by punitive termination proceedings.
 - Policy development options include moving offers of support out of the shadow of termination, tenancy law reform and closer integration of social housing policy with leading frameworks in other policy areas.
-

Key findings

Residential tenancies law in all Australian jurisdictions affords legal means for landlords to respond to crime and non-criminal anti-social behaviour ('misconduct') by tenants, other occupiers and visitors. The quantitative data, while patchy, indicate that social housing landlords are heavy users of termination proceedings, including in relation to misconduct.

Australian social housing landlords have developed distinctive policies and practices for responding to misconduct. For example, the public housing landlords in almost all Australian states and territories have adopted, at least for a time, 'three strikes' policies to guide their use

of termination proceedings. In some jurisdictions, special legislative provisions have been introduced to facilitate termination proceedings for misconduct. Drug offences are a particular target of these provisions, but a wide range of types of misconduct are also within the scope of the provisions and social landlords' legal proceedings.

At the same time, social housing policy has consolidated its longer-term trend towards targeting assistance to households with low incomes and complex support needs.

Responding to misconduct in social housing is plainly a very challenging area of practice. Many of the cases we reviewed, and discussed in interviews with stakeholders, involve highly conflictual, destructive and distressing behaviour. However, termination proceedings are not always taken as a matter of urgency, nor as a last resort when all other approaches to sustain the tenancy have failed.

It appears that in most cases a single substantial contact between the social housing landlord and the tenant is sufficient to address a minor problem. However, where problematic behaviour continues, the usual course of action—a combination of escalating threats to the tenancy and pushing the tenant to 'engage' with the landlord and support services—does not work for many. Escalating threats often drive 'engagement' that is last-minute and short-lived, and sometimes so unsatisfactory that it can drive an escalation in threats. In many cases, social housing landlords' legal responses frustrate other more ameliorative and preventative ways of addressing misconduct and related support needs, and result in the eviction and homelessness of vulnerable persons and families.

In particular, there are aspects of law, policy and practice that do not appropriately address vulnerable persons and families: women who have experienced domestic and family violence, children, Indigenous persons and families, and persons and families with members who problematically use alcohol or other drugs. These aspects of social housing law, policy and practice insufficiently reflect, or are contrary to, leading policy principles and frameworks regarding those vulnerable types of persons and families.

Women

The evidence shows a significant gender dimension to social housing legal responses to misconduct. Social housing landlords are generally strongly committed to assisting women affected by domestic violence into safe housing, but this commitment may falter during a social housing tenancy. Tenancy obligations and extended liability—and social housing landlords' use of them—impose hard expectations that women will control the misconduct of male partners and children. Even violence becomes framed as a 'nuisance' in tenancy legal proceedings, some women are evicted because of violence against them.

Children

Children are sometimes the instigators of misconduct, but more often are innocent bystanders to misconduct by others. Where termination proceedings would affect children, social housing landlords typically make additional efforts at alternatives, but the interests of children are a marginal consideration in the determination of proceedings.

Indigenous persons and families

There is strong Indigenous representation in the cases involving women and children. More specifically, Indigenous persons and families often present complex personal histories, institutional contacts and interpersonal relationships, shaped by past and present institutional racism and colonialism. This makes 'engagement' even more problematic.

Persons who problematically use alcohol and other drugs

Responses to misconduct relating to alcohol and other drug use are not expressly guided by harm minimisation. Criminal offences, especially, elicit punitive termination proceedings, with

social housing landlords, police, and sometimes courts and tribunals, operating in a condemnatory, exclusionary mode. Even where overt condemnation or punitiveness is absent, termination proceedings may be taken that disrupt treatment and rehabilitation, including where this has been sanctioned by the criminal justice system.

Policy development options

Policy development options to better integrate social housing policy with support for vulnerable persons and families include:

- moving support out of the shadow of tenancy termination
- giving tenants more certainty through commitments that no-one will be evicted into homelessness
- ensuring proper scrutiny is applied to termination decisions and proceedings, and to sector practice
- reforming the law regarding tenants' extended and vicarious liability for other persons.

More specific policy development options for each of our four types of vulnerable persons and families include:

- reviewing social housing policies and practice for gender impacts, and sponsoring the cultivation of respectful relationships
- adopting 'the best interests of the child' as the paramount factor in decisions about termination affecting children
- establishing specific Indigenous housing organisations, officers and advocates
- adopting harm minimisation as the guiding principle for responses to alcohol and other drug use, including where there is criminal offending.

The study

The study comprises a number of elements:

- a review of available quantitative data about social housing termination proceedings
- a review of high-level policy principles and frameworks regarding women affected by domestic violence, children, Indigenous persons and families, and alcohol and other drug users
- a review of residential tenancies law and social housing policies regarding misconduct by tenants and occupiers
- analysis of 95 cases of social housing legal proceedings in response to misconduct
- analysis of interviews with representatives of 11 stakeholder organisations.

The research makes a new contribution through the breadth of its review of Australian legal and policy settings regarding social housing terminations for misconduct, the depth of its examination of social housing termination practice, and its focus on problematic outcomes for specific categories of vulnerable persons and families living at the intersection of social housing and other areas of governmental practice.

1 Introduction

1.1 Why this research was conducted

Over the past two decades or so, housing policy in Australia has enlarged the role of social landlords in relation to crime and non-criminal anti-social behaviour (which together will hereafter be referred to as 'misconduct').

In some respects, this role has been conceived of with the aim of 'sustaining tenancies', through policies and practices for preventing misconduct and, where it occurs, ameliorating its effects (Habibis, Atkinson, et al. 2007). In other respects, however, social housing's role has been conceived of as disciplinary, even punitive: 'getting tough' and 'cracking down' on misconduct by excluding persons from social housing, particularly through legal proceedings for the termination of tenancies (Martin 2015; 2016). This aspect of social housing's role is reflected in the recent widespread adoption of 'three strikes' policies to guide responses to misconduct, and in amendments to residential tenancies legislation to facilitate termination proceedings by social housing landlords.

There is an obvious tension between these conceptualisations of social housing's role. There are also tensions between facilitating social housing termination proceedings and objectives in other areas of policy relating to family wellbeing, and in doing justice in individual cases. Termination proceedings may be brought in response to the misconduct of an individual person, but the outcome necessarily affects a household, which may include partners, children and other persons not involved in the misconduct. Indeed, it may be that the tenant is not the instigator of the misconduct, but is made liable for the misconduct of an occupier or visitor as a matter of vicarious liability and other forms of extended liability provided by residential tenancies law. The cases reviewed by Martin (2015; 2016) and in the United Kingdom by Hunter and Nixon (2001) indicate that female tenants are often subject to termination proceedings because of male misconduct.

As social housing policy consolidates its longer-term trend towards targeting assistance to households with low incomes and complex support needs, a similar question arises as to whether persons and families regarded in social policy as being vulnerable to harm or disadvantage, and subject to special consideration, may also be affected inequitably by the turn to legal responses to misconduct. Mental illness, in particular, is often highlighted as a challenge for social housing tenancy management, and as a factor in tenancy terminations (Jones, Phillips et al. 2014). This research investigates a different set of factors of 'vulnerability', while acknowledging that mental illness, disability and other dimensions of need and vulnerability intersect with those in our focus. We focus on four types of vulnerable persons and families:

- women, particularly as they are affected by domestic violence and male misconduct
- children
- Indigenous persons and families, and
- persons who use alcohol or other drugs problematically.

There is a need to understand how social landlords have put into practice the policy emphasis on legal responses to misconduct, and how it impacts on the wellbeing of these vulnerable types of persons and families. To this end, the research has sought to answer three research questions:

- 1 What laws and policies relate to social housing providers' use of tenancy legal proceedings in relation to tenant or occupier misconduct?

- 2 What do case law and other records show about social housing tenancy legal proceedings, in terms of types of misconduct proceeded against, tenant and occupier characteristics, and proceeding outcomes?
- 3 Do laws, policies and practices make appropriate provision regarding women, children, Indigenous families and families with alcohol and other drug issues?

In pursuing these questions, the research contributes to the AHURI Inquiry into Integrated Housing Support for Vulnerable Families. While other research conducted for the Inquiry investigates the housing support needs of families experiencing domestic violence—to which one response may be an offer of a social housing tenancy—the present research investigates what happens to vulnerable families in social housing tenancies when domestic violence and other forms of crime and anti-social behaviour occur.

1.2 Existing research

Despite the recurring policy interest in social housing's role regarding misconduct, the evidence base is relatively slender, particularly in relation to social housing legal proceedings.

State agencies have not, until very recently, contributed to the research evidence base. The New South Wales (NSW) public housing landlord, Family and Community Services (FACS) Housing, has conducted two evaluations of its anti-social behaviour policies (circa 2006 and 2016), but not published them. During the period of the present research, the state audit offices of NSW and Western Australia (WA) published performance audits of each state's public housing landlord's handling of anti-social behaviour. The NSW Auditor General focused on that state's new 'strikes' approach, and found that it imposed significant administrative burdens, with data management being difficult and inconsistently done, while FACS Housing offered only 'limited support to assist housing staff to support tenants with mental illnesses and other complex needs' (NSW Auditor General 2018: 24). The WA Auditor General found that that state's 'Disruptive Behaviour Management Policy' was 'well progressed' in terms of the implementation of policy procedures, but observed that the complaint-investigation approach was resource-intensive, and relatively little was done by way of early intervention and prevention. The audit also found that 'tenants with a history of mental illness and family violence had been issued with strikes or recommended for eviction', with 62 complaints, categorised as 'domestic violence', for which 12 'strikes' were issued (WA Auditor General, 2018: 20).

There is somewhat more academic research. AHURI has produced a body of research into Australian social housing tenancy management (e.g. Arthurson and Jacobs 2003; Habibis, Atkinson et al. 2007; Flatau, Coleman et al. 2009), which focuses on the provision of support for sustaining tenancies, including where there are problems of anti-social behaviour. It is less focused, however, on the legal relationship of landlord and tenant and the way that tenancy legal proceedings are used to respond to misconduct. There is a small body of research into Australian social housing legal responses to misconduct (Hunter Nixon et al. 2005; Jones, Phillip et al. 2014; Martin 2004; 2015; 2016), which indicate the distinctive and prominent legal practice of social housing landlords, and the highly legalised nature of relations within social housing. As characterised by Martin (2015), social housing buildings and neighbourhoods are 'communities of contract', with interpersonal relations underpinned by an infrastructure of tenancy agreements and a common landlord that knows an uncommon amount about its tenants. A major theme of these studies is the contradiction and tension around social housing's increasing targeting of need, and the reactionary, even punitive, character of recent developments in law and policy. The present research builds on these studies which focus on a particular jurisdiction, piece of legislation or reform, with most predating the recent 'three strikes' trend.

There is a substantial body of scholarship on social housing legal responses to misconduct in the United Kingdom (for example, Burney 1999 2005; Hunter, Nixon et al. 1999; Hunter and Nixon 2001; Flint 2006; Pawson and McKenzie 2006; Flint and Pawson 2009). These studies show a similar—and at certain points, greater—enlargement of the role of social housing landlords in responding to anti-social behaviour there, especially in the late 1990s and early 2000s, when social housing was the crucible for developments in law and practice, such as Anti-Social Behaviour Orders (Burney 2005). The literature also shows how these developments in social housing connect strongly with broader concerns about the sector's marginalisation and 'decline', the efficacy of traditional criminal justice, and rising inequality and division (Young 2000; Burney 2005; Cowan and McDermott 2006; Flint 2006; Karn 2007).

1.3 Conceptual frameworks

The research employs two conceptual frameworks to guide its analysis: governmentality and intersectionality.

1.3.1 Governmentality

Studies of governmentality proceed from the work of Michel Foucault on the historical development of distinctive forms of power and their articulation in rationalities of government—or 'governmentalities' (Foucault 2007; Donzelot 1979; Burchell, Gordon et al. 1991; Dean 1999; Garland 2001; O'Malley 2008; Miller and Rose 2010). Governmentality studies pay attention to the ideas and discourses in terms of which problems for government are conceived, and the technologies and practices that may be applied to their solution, with a particular focus on how individual persons are addressed as subjects with interests and capacities that can be engaged such that they participate in their own regulation. In Foucault's words, this is government as 'the conduct of conduct' (Gordon 1991: 2; Foucault 1983: 220–221).

Governmentality perspectives have been influential in criminology, decentring analysis from the formal, traditional figures of the police, criminal courts and prisons, and reconceiving of crime prevention and response as more generalised and dispersed practices, effected by diverse agencies and individuals within and outside of the state (Rose 2000; Garland 2001; O'Malley 2008). These perspectives have also decentred explanations of crime, prevention and response away from grand theories or narratives towards an account of governmental practice that is more contingent and situated. Hence, Garland describes the work of governing crime and disorder:

Socially situated, imperfectly knowledgeable actors stumble upon ways of doing things that seem to work, and seem to fit with their other concerns. Authorities patch together workable solutions to problems that they can see and get to grips with. Agencies struggle to cope with their workload, please their political masters, and do the best job they can in the circumstances. There is no omnipotent strategist, no abstract system, no all-seeing actor with perfect knowledge and unlimited powers. Every solution is based upon a situated perception of the problem it addresses, of the interests that are at stake and of the values that ought to guide action and distribute consequences. (Garland 2001: 26)

This description will, no doubt, sound familiar to social housing policy makers and practitioners. Also relevant to social housing is how Garland situates present governmental practice about crime historically from around the 1970s, as operating in the aftermath of a collapse in confidence as to the efficacy of characteristically 'social' programs—including mass social housing programs—to address the causes of crime. On this view, contemporary government is characterised, on the one hand, by 'strategies of adaption', which attempt to prevent crime by effecting new divisions of responsibility between organisations, communities and individuals,

including through reforms to welfare and other social provision that 'empowers' and engages the agency of the subject. On the other hand, we also see 'strategies of denial and acting out': punitive displays of legal power that invoke the moral authority of community values and individual blameworthiness (Garland 2001; Martin 2010). Between the two is the field in which contemporary practitioners of government—in criminal justice agencies, in social housing agencies, and in the community—try to navigate and problem-solve.

As well as offering a compelling perspective on how government happens, a governmentality approach offers guidance on how else it might happen. As O'Malley observes, a governmentality approach regards problems as invented, rather than predetermined, and government itself as something that is neither necessarily bad nor avoidable. This opens up the prospect of consciously experimenting with government, with an emphasis on what is feasible within given conditions of existence, and drawing upon elements in existing intellectual and material resources—such as existing governmental rationalities—that can be selectively valorised and assembled to new purposes (O'Malley, 2008: 455). The key thing, suggests O'Malley, is that experiments in government should proceed 'with the minimisation of domination [and] the maximal provision of contestation' (2008: 457). As well as using a governmentality perspective to investigate present social housing practice, we will return in the conclusion of the report to the idea of contestable experiments in governing misconduct in social housing.

1.3.2 Intersectionality

Our second conceptual framework is 'intersectionality'. Coined by Kimberlé Crenshaw and drawing on a longer line of Black feminist scholarship and activism (Crenshaw 1989; 1991; Cho, Crenshaw et al. 2013), intersectionality challenges the 'single axis' framing of race, gender and other categories of difference for ignoring differences *within* groups, and marginalising those who occupy multiple groups. Instead, intersectional studies centre attention where categories intersect—e.g. women of colour—and consider how intersectional experience is not merely additive, but qualitatively different. So, for women of colour, 'the intersectional experience is greater than the sum of racism and sexism' (Crenshaw 1989: 140).

Crenshaw's early work applied an intersectional perspective to anti-discrimination law and criminal law, particularly as regards violence against women of colour (1989; 1991). Since then, intersectional studies have opened up further complicating dimensions of inequality, such as class, sexuality, disability and age. As well as being taken up in other areas of research and activism, intersectionality has continued to develop as a compelling conceptual framework for criminological research and criminal justice reform (Creek and Dunn 2014; Stubbs 2015). Creek and Dunn (2014) citing Crenshaw (2005) set out what intersectionality, as a 'theoretical tool', brings to the investigation of problems of crime and disorder:

Intersectionality, as a means of 'mapping, context by context, what difference our difference' makes... is a theoretical tool to lay bare the ways in which men's and women's experiences of crime and victimization are complicated by their multiple, intersecting identities.

Creek and Dunn's description indicates the potential of applying intersectionality to governmentality-informed research. Intersectionality sharpens the analysis of the different contexts in which government takes place, and of the different subjectivities, qualities and interests they are assumed to have, through which government is affected. In the present research, we will see how attempts to govern social housing tenants works on them as both subjects of need and as contractual subjects—that is, as parties to residential tenancy agreements, under which they have voluntarily entered into obligations regarding their own and other household members' conduct. How the subject positions of 'social housing tenant' intersect with those other governmental regimes is a major theme of this research.

1.4 Research methods

We used a mix of methods and data sources for this research.

The reviews of high-level policy principles and frameworks (Chapter 2) and laws and policies relating to social housing legal proceedings and responses to misconduct (Chapter 3) were conducted as desk-top reviews of publicly available policy documents, legislation and case law. The reviews in Chapter 2 refer mostly to principles and frameworks formulated at the national and international levels, with relevance for all Australian governments. The reviews in Chapter 3 of social housing law and policy refer more specifically to five Australian jurisdictions:

- New South Wales
- Tasmania
- Victoria
- Western Australia
- Northern Territory.

Our analysis of social housing practice (Chapters 4 and 5, and below) also focuses on these five jurisdictions. For each we sought quantitative data as to proceedings by social housing landlords; cases of legal proceedings involving the four types of vulnerable persons and families indicated above (women, particularly those affected by domestic violence and male misconduct); children; Indigenous persons and families; and persons or families with a member who uses alcohol or other drugs problematically), and, through interviews, the perspectives of social housing landlords and tenant organisations on social housing practice regarding misconduct, particularly involving those types of persons and families.

Data collection was conducted in accordance with approvals of the UNSW Human Research Ethics Committee.¹

In a number of respects, data collection for this project was more difficult than for most AHURI projects in which the researchers have been involved. While courts and tribunals collect and generate masses of data as they administer applications and determine proceedings, what can readily be extracted about social housing termination proceedings varies, and the data that can be extracted is limited. All the social housing landlords we approached initially indicated their preparedness to participate in providing case studies and interviews, but by the end of the project most had not done so completely, with some not participating at all. Participation was weakest among the community housing landlords. However, it should be said that the few social housing landlords who did fully participate were enthusiastic and generous in the contribution they made to the research.

1.4.1 Data about social housing legal proceedings, termination applications and orders

The focus of this research is on four types of persons and families that are subject to social housing legal proceedings. This means focusing on one part of a wider field of proceedings—tenancy legal proceedings, terminations and evictions—that is largely hidden. Below we discuss the state of data about these proceedings, and some findings from the data that indicate the distinctive practices of social housing landlords.

Data about tenancy legal proceedings, terminations and evictions in Australia, including in relation to social housing, are patchy. In all Australian jurisdictions, landlords may seek to

¹ Courts and tribunals approval reference HC17180; social housing stakeholder approval reference HC17816.

terminate tenancies by giving a termination notice and, if the tenant moves out, the tenancy will terminate without further proceedings. There is no accounting for all the termination notices given by landlords, nor all the tenancies that end when a tenant moves out in response to a landlord's termination notice. Individual social housing landlords may record these data for themselves, but do not regularly report or publish them.

All jurisdictions also provide for landlords to apply for termination orders from a court or tribunal, either where a tenant has not moved out in response to a termination notice, or where direct application without a prior termination notice is allowed. The relevant courts and tribunals record all of these applications, but there is no comprehensive accounting for all the different types of application, or their outcomes. In all jurisdictions, the regularly published data (annual reports) account for little more than the total number of applications received.

For the present research, we asked the magistrates courts in Tasmania and Western Australia, and the tribunals in New South Wales, Victoria and the Northern Territory, for more detailed data. It appears that there is considerable inconsistency between jurisdictions as to what their information systems are capable of readily producing. Both the magistrates courts were unable to provide data specific to social housing applications. The New South Wales and Victorian tribunals provided some data; the Northern Territory Civil and Administrative Tribunal did not. We also proposed a small survey of tribunal members and magistrates, which would have collected, on a consistent time-limited basis, data about the number and type of social housing termination proceedings determined, and some information about cases determined—including whether the tenant is female, Indigenous, has children in the household, or whether vicarious liability is a factor. However, we could not secure the commitment of all the tribunals and courts to conducting such a survey within the time period of the project.

As it is, we have tribunal data about social housing landlord applications (public housing, and other social housing landlords) in New South Wales for two years (Table 1) and public housing landlord applications in Victoria for three years (Table 2), along with 'other landlord' applications in each state (note that the Victorian data count community housing landlords with 'other landlords'). The tables show only applications for termination (and not, for example, applications only for specific performance orders (NSW) or compliance orders (Victoria)), and a rationalisation of the diverse fields used by the tribunal to characterise types of termination proceedings.

The first point to make is that social housing landlords in both states apply to terminate thousands of tenancies each year. In particular, termination proceedings for rent arrears are by far the largest category of termination proceeding for each type of landlord. However, termination applications in other categories are still numerous: in New South Wales, the public housing landlord averaged 780 termination applications, and other social housing landlords averaged 631 for other than rent arrears each year; in Victoria, the public housing landlord averaged 1,226 termination applications for other than rent arrears.

Table 1: Applications for termination orders, New South Wales, 2016–18

	Public housing (LAHC)		Other social housing		Other landlords	
	2016–17	2017–18	2016–17	2017–18	2016–17	2017–18
No grounds	2	9	70	33	591	531
No grounds—end of fixed term	27	33	186	91	321	272
Breach—rent arrears	4,582	4,639	2,740	2,504	13,660	13,112
Breach—other	415	521	224	193	1,047	783
Use for illegal purpose	53	48	15	7	36	50
Serious damage or injury	28	28	11	6	71	84
Threat, abuse	16	25	17	20	142	93
Other	189	166	199	190	1,479	1,406
Total	5,312	5,469	3,462	3,044	17,347	16,331

Source: New South Wales Civil and Administrative Tribunal (NCAT) special data request.

Table 2: Applications for termination orders, Victoria, 2015–18

	Public housing (Director of Housing)			Other landlords (including CHPs)		
	2015–16	2016–17	2017–18	2015–16	2016–17	2017–18
No grounds	69	78	64	404	429	497
No grounds—end of fixed term	86	114	142	287	323	358
Breach—rent arrears	4,711	4,222	3,809	13,153	12,047	13,708
Breach—other	32	18	37	94	81	92
Use for illegal purpose	24	15	12	69	52	51
Damage	16	19	17	89	105	137
Danger	42	49	26	89	105	137
Other	1,082	972	765	3,445	3,250	3,266
Total	6,062	5,487	4,872	17,630	16,392	18,246

Source: Victorian Civil and Administrative Tribunal (VCAT) special data request

Table 3 below gives an additional perspective on social housing landlords' use of termination proceedings, by comparing the rate of termination applications to the number of public housing and other social housing tenancies in each state (per Australian Institute of Health and Welfare (AIHW) data), to the rate of 'other landlords' termination applications to 'other landlord'

tenancies (per the 2016 Census). Overall, in New South Wales the public housing landlord applies for termination at twice the rate, and other social housing landlords apply at four times the rate, of non-social housing landlords in that state; the Victorian public housing landlord applies at 2.7 times the rate of other landlords. More significantly, rates for 'breach—other' and 'use for illegal purpose', particularly in New South Wales, are much higher: NSW FACS Housing seeks 'use for illegal purpose' terminations at 7.7 times the rate of non-social housing landlords, with other social landlords applying at almost six times the rate. Also notable are the relative rates of 'no-grounds' proceedings: very little used by the New South Wales public housing landlord, but rather more used by the Victorian public housing landlord and by other social housing landlords in New South Wales. The non-use of 'no-grounds' proceedings in New South Wales public housing is explained by procedural fairness considerations (discussed at 3.2.1), while other social housing landlords' very high rate of use of 'no grounds—end of fixed term' applications may be explained by their participation in transitional housing programs. Otherwise, the higher rates of no-grounds applications are difficult to explain, and bear further monitoring.

Table 3: Average rate of termination applications per tenancy, relative to other landlords, New South Wales and Victoria

	NSW public housing (%)	NSW other social housing (%)	Vic public housing (%)
No grounds	0.06	1.92	1.39
No grounds—end of fixed term	0.65	9.69	3.03
Breach—rent arrears	2.18	4.11	2.84
Breach—other	3.37	4.81	2.78
Use for illegal purpose	7.70	5.96	2.51
Serious damage or injury (NSW)	2.31	2.41	-
Damage (Vic)	-	-	1.40
Threat, abuse (NSW)	1.21	3.47	-
Danger (Vic)	-	-	3.25
Other	0.78	2.83	2.44
Total	2.03	4.05	2.73

Source: NCAT and VCAT special data requests; AIHW 2016, 2018; ABS 2018.

Data as to the outcomes of proceedings—in particular, termination orders—are even more sparse. The VCAT data distinguish only between where orders (of whatever sort) are made, and where applications are withdrawn or transferred to another jurisdiction. The NCAT data, on the other hand, do record where termination orders are made, and by type of landlord, but they do not break down by types of application. These data show that for the two years 2016–18, the NSW public housing provider obtained on average 614 termination orders, and other social housing providers obtained on average a total of 492 terminations orders, across all types of termination application each year.

Individual social housing landlords may record their own termination applications and outcomes, but do not consistently report them. In particular, neither the Victorian public housing provider,

the Department of Health and Human Services (Vic DHHS), nor the Tasmanian public housing providers (Housing Tasmania), have published in recent annual reports any figures relating to termination and eviction proceedings. NSW FACS Housing has not published annual data, but has lately maintained an online ‘dashboard’ indicating that the agency, for the period February 2016–June 2018, took action to terminate 283 tenancies for ‘severe illegal misconduct, and 196*tenancies for ‘serious’ anti-social behaviour.² The dashboard also indicates that it issued 1,865 preliminary warnings, and 269 first strikes, in the period.

The WA Housing Authority and the NT Department of Housing and Community Development (DHCD) have published figures recently. The WA Housing Authority’s figures (Table 4) relate specifically to actions under its Disruptive Behaviour Management Policy, and include the number of complaints about misconduct received by the agency, the numbers of ‘strikes’ issued under the policy, and proceedings resulting in termination. The figures record a notable reduction in strikes issued over time; however, notwithstanding the reduction, it is remarkable how many more strikes are issued by the WA Housing Authority compared with NSW FACS Housing—a much larger landlord—per its dashboard. This points to potentially significant differences in practice between jurisdictions with ostensibly similar ‘three strikes’ policies, and indeed to the potential for significant differences in practice within jurisdictions over time.

Table 4: Complaints, strikes and tenancy terminations, WA Housing Authority, 2014–17

	2014–15	2015–16	2016–17
Disruptive behaviour complaints	12,593	12,761	11,573
First strikes	1,171	1,090	877
Second strikes	527	423	282
Third strikes	170	134	101
Terminated for disruptive behaviour (and illegal use)	60	94	73

Source: WA Department, special request.

This point is reiterated by the Northern Territory’s figures (Table 5 below). These give the numbers of tenancies terminated under different categories of proceedings, the most relevant of which for our purposes is ‘anti-social behaviour’. Even though the most recent years give fewer detailed breakdowns, it is apparent that the number of terminations generally, and for misconduct specifically, has declined significantly.

² ‘Severe illegal’ and ‘serious anti-social behaviour’ are terms used in FACS Housing’s anti-social behaviour policy, not the *Residential Tenancies Act 2010* (NSW). In terms of the categories used in Tables 1 and 3, ‘severe illegal misconduct’ would fall in any of ‘breach—other’, ‘use of premises for illegal purpose’, ‘serious damage or injury’ and ‘threats, abuse’; ‘serious anti-social behaviour’ would fall in any of ‘breach—other’, ‘serious damage or injury’, and ‘threats ,abuse’.

Table 5: Tenancy terminations, NT DHCD, 2013–17

	2013–14	2014–15	2015–16	2016–17
Abandonment	6	17	n.a.	n.a.
Anti-social behaviour	20	7	2	n.a.
Rent arrears	19	27	n.a.	n.a.
Failure to maintain	15	10	n.a.	n.a.
Over the means (ineligible)	6	8	n.a.	n.a.
Uninhabitable	0	2	n.a.	n.a.
Total	66	71	29	11

Note. n.a. = not available.

Source: DHCD Annual Reports 2014–17.

Limited as the quantitative data are, the analysis indicates that social housing landlords have distinctive practices regarding termination proceedings, and that their practices are susceptible to change. Investigating cases of social housing legal proceedings gives more insight into what makes them distinctive, and the personal and policy contexts in which they are taken.

1.4.2 Cases

Aside from the limited quantitative data, we collected cases of social housing legal proceedings for qualitative analysis. In two jurisdictions (New South Wales and Victoria), we collected cases from the published decisions of each jurisdiction's Civil and Administrative Tribunal (NCAT and VCAT, respectively); and in all five jurisdictions, we invited stakeholder organisations to provide case studies from their own files. Across both sources of cases, we collected a total of 95 cases of social housing legal proceedings against tenants, of which 77 fit one or more of our four types of vulnerable persons and households. Some more detail about the sources of cases follows.

Table 6: Cases from published tribunal decisions and stakeholders

	New South Wales	Tasmania	Victoria	Western Australia	Northern Territory	Total five jurisdictions
Tribunals—four types	31	-	18	-	-	49
Tribunals—not four types	9		9			18
Stakeholders—four types	9	6	2	8	3	28
Total	49	6	29	8	3	95

Source: authors.

Cases from written, published tribunal decisions

When a tribunal determines an application for orders, it may produce a written statement of the reasons for its decision. These statements often include detailed discussions of the applicable law and the facts of the case, including the grounds for the application, and the circumstances of the tenant and their household. As such they are a rich source of data about the types of

matters that attract the attention of social housing landlords, the types of households involved, reflections on the causes and consequences of misconduct, competing claims about justice and the impacts of tenancy termination.³

Written reasons are not produced in all, or even most, cases, but where they are, some—but again, not all—are then released for publication, including in the online databases of the Australian Legal Information Institute (Austlii). It should be noted that the process by which some proceedings generate written, published reasons is not random: parties may request written reasons where they are considering whether to appeal a decision, or the tribunal may produce written reasons where it has reserved its decision after a hearing, and lately it appears that at least NCAT has been selecting some written reasons for publication, while withholding others.

We searched the Austlii databases for the Civil and Administrative Tribunals of New South Wales, Victoria and the Northern Territory (NCAT), for cases where proceedings were brought by a social housing landlord against a tenant. To keep our focus on current and recent practice, we excluded cases from before 2013, and to keep our focus on ‘misconduct’, we excluded applications for termination and other orders on the ground of rent arrears—which, as Table 1 and Table 2 above suggest, comprise the majority of cases. It may be that some proceedings on the ground of rent arrears are substantially motivated by misconduct—and our stakeholder cases include some examples of this—but the written reasons in these cases generally do not disclose this or other relevant factors. We also excluded a few other types of application that were not about termination (e.g. orders for access to carry out repairs and inspections, and orders for compensation after a tenancy has ended), and cases involving termination where no or few factual details are given (these relatively few cases were either appeal cases decided on questions of law, or involved interim order or directions, rather than final determinations).

This left us with a total of 67 cases: 40 cases from New South Wales (36 public housing cases, and two each involving the Aboriginal Housing Office and Aboriginal community housing providers)—27 from Victoria (all public housing), and none from the Northern Territory. Of the 67 cases, 49 involve persons or households who can be characterised as one or more of the four types—31 from New South Wales, 18 from Victoria. The first stage of our search did not select for these types, so the fact that a large majority (73%) of the cases involve these households is notable. However, because written, published tribunal decisions are not a random sample of all social housing proceedings, we cannot say that it is statistically representative. At a number of points in the research we refer to the 67 tribunal cases (i.e. prior to selection for the four types) for a suggestion as to the prevalence of some groups, types of misconduct and outcomes among proceedings.

Cases from stakeholders

We collected a total of 28 case studies from stakeholders in five jurisdictions (Table 6)—17 from social housing landlords, 11 from tenant organisations. All the stakeholder cases were selected because they involved legal proceedings relating to misconduct taken against tenants who fit one of more of the four types: women affected by domestic violence or other misconduct by a male occupier; children; Indigenous persons and families; and persons or families with a member who uses alcohol or other drugs problematically.

³ All of the NCAT decisions, and many of the VCAT decisions, also included the name of the tenant. In some VCAT decisions, particularly where sensitive information is disclosed in evidence, the name of the tenant is suppressed by the Tribunal (under section 17 of the *Open Courts Act 2013* (Vic)) and a pseudonym is used instead. In this research, where we refer to a tribunal decision as a case (rather than as legal authority), we also use a pseudonym.

Unlike in our selection of the tribunal cases, we did not ask stakeholders to restrict from their selection particular types of legal proceedings. As a result, the stakeholder cases include some examples of 'lateral thinking' and other outcomes in legal proceedings that are not picked up in the tribunal cases—for example, two stakeholder cases do not go beyond the issuing of termination notices, two involve proceedings for rent arrears taken in contexts of other misconduct, and two involve termination proceedings where the tenant has been offered a social housing tenancy elsewhere.

1.4.3 Interviews with stakeholders

We also conducted interviews with representatives of stakeholder organisations. Ultimately, in each of the five jurisdictions, we interviewed a representative of a tenant organisation, and a representative of a social housing landlord (in three jurisdictions, the public housing landlord; in one, a community housing landlord; and in the one remaining, both the public housing landlord and a community housing landlord), for a total of 11 interviews. We have used the interview data to complement the data from our other research methods, illuminating some of the details of the processes and proceedings set out in our review of law and policy, and exploring some of the tensions in practice indicated by our analysis of the cases.

Table 7: Interviewees

Stakeholder organisation	Abbreviation
A NSW community housing landlord	NSW CH
A NSW tenant organisation	NSW TO
Housing Tasmania	Tas PH
A Tasmanian tenant organisation	Tas TO
Victorian Department of Health and Human Services	Vic PH
A Victorian community housing landlord	Vic CH
A Victorian tenant organisation	Vic TO
WA Housing Authority	WA PH
A WA tenant organisation	WA TO
NT Department of Housing and Community Development	NT PH
A NT tenant organisation	NT TO

Source: authors.

We did not interview tenants (or former tenants, or household members), because the additional efforts that would have been required for ethics approval, recruitment and analysis would have been beyond the scope of this project. The perspectives and experiences of tenants who have been threatened with, or undergone, termination proceedings for misconduct—particularly the vulnerable types of persons and families considered in this research would be a worthy subject for future research.

1.5 Summary

Social housing legal responses to misconduct are an under-researched area of law, policy and practice, especially in light of recurring announcements of 'crack downs' on crime and anti-social behaviour and the more enduring policy interest in developing social housing's role.

Quantitative data are patchy, but indicate that social housing landlords are heavy users of legal proceedings, particularly termination proceedings, although this varies by jurisdiction and the policies and priorities of housing agencies. These data do not, however, show who feels the impact of social housing legal proceedings. The present research draws on governmentality and intersectionality approaches to review laws, policies and practices, and analyse cases and interview data to investigate the impact on women (particularly as they are affected by male violence and misconduct), children, Indigenous persons and families, and persons who problematically use alcohol and other drugs. In the next chapter, we review overarching policy frameworks and principles regarding these vulnerable types of families, to begin to gauge how well social housing policy and practice supports them.

2 Vulnerable persons and families: policy review

Violence against women is an increasingly prominent issue and the subject of an expanding policy agenda. This encompasses criminal justice and support service responses, as well as changes in attitudes.

Children are considered bearers of rights, and their best interests are paramount in decision-making. Child protection policy is moving to a public health model, with greater emphasis on early prevention.

Self-determination is the guiding principle of Indigenous advocacy, and despite occasional reaction is strongly represented in agendas for policy and service delivery reform.

In drugs policy, harm minimisation is the leading principle, which aims to reduce drug-related risks by including users in self-government and de-emphasising moralistic or punitive interventions.

Social housing policy has directed housing assistance to households with complex needs, with a view to better supporting them—but it has also marginalised social housing provision.

In this chapter we review high-level policy principles and frameworks for governing with respect to each of the four types of vulnerable persons and families in focus in the research: women affected by domestic and family violence; children; Indigenous persons and families; and persons with alcohol and other drug use problems. We also review, at a similarly high level, social housing policy.

The review proceeds at the relatively high level of national policy documents and, where relevant, international human rights instruments, and the overarching principles and statements they set out. Our analysis regards them not so much as dictating to lower orders of policy and practice, but rather as frameworks that are used to contest established regimes of practice, and that may themselves be the product of contests that leave room for flexible application.

2.1 Women affected by domestic and family violence

Domestic and family violence is an increasingly prominent issue and the subject of an expansive policy agenda. Where earlier policies focused on helping women escape from violence, now there is more interest in approaches to allow women to be 'safe at home'. Similarly, earlier efforts to engage criminal justice agencies in responding to, and preventing, domestic and family violence, are in some ways surpassed by campaigns to make responding to domestic and family violence everyone's responsibility. Advocates and policy makers have expanded what is identified as domestic and family violence, to include 'physical, sexual, emotional and psychological abuse' (COAG 2010), and to locate domestic and family violence within a larger scheme of violence against women, or gendered violence, and a yet larger scheme of inequitable gender relations. In media campaigns and public discourse the assumption that women must be responsible for preventing male violence is increasingly emphatically rejected.

At the same time, researchers have advanced more nuanced understandings of domestic and family violence and gendered violence, including through intersectional analyses of victimisation and institutional responses, and analyses of typologies of violence (Stubbs 2015; Wangmann 2011). In particular, the typologies of violence research has differentiated coercive controlling violence from situational, conflict-initiated violence, and opened up the prospect of responses beyond criminalisation, such as in policy initiatives directed at more effectively working with male perpetrators to stop violence. Another strand of this research has highlighted the use of violence by women. This has shown how women's violence is different from male violence—i.e., it is less common, less likely to effect coercive control, more likely to come from resistance to male violence, or from situational stress and past victimisation (Wangmann 2011: 10)—and how it is intersectionally differentiated. In particular, Indigenous women are both much more likely to be victims of violence and also incarcerated for their own use of violence (Wilson, Jones et al. 2017).

These developments are reflected in Australia's current national-level policy document for domestic and family violence, the *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan), established by the Council of Australian Governments (COAG) in 2010. The National Plan expressly refers to domestic and family violence as gendered violence, and aligns itself with international human rights instruments regarding women (the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Declaration to End Violence Against Women, and the Beijing Declaration and Platform for Action). Six 'National Outcomes' are set out:

- Communities are safe and free from violence
- Relationships are respectful
- Indigenous communities are strengthened
- Services meet the needs of women and their children experiencing violence
- Justice responses are effective
- Perpetrators stop their violence and are held to account (COAG 2010).

The most striking feature of the National Plan is the extent to which it seeks to operate on the level of norms and knowledge. The Plan itself highlights that it is focused 'strongly on prevention' through 'building respectful relationships and working to increase gender equality to prevent violence from occurring in the first place' (2010: i). Accordingly, the first and most generally stated of the National Outcomes is expressed in terms of attitudes and beliefs:

Positive and respectful community attitudes are critical to Australian women and their children living free from violence in safe communities. Research shows that social norms, attitudes and beliefs contribute to all forms of violence against women, whether it is emotional, psychological, economic, physical or sexual violence. These beliefs can result in violence being justified, excused or hidden from view.

Similarly, the second Outcome is directed to the 'knowledge' and 'skills' of young persons regarding respectful relationships, and success against both outcomes is measured through surveys of attitudes and public opinion data. The theme of attitudinal and behaviour change is also signposted for the series of Action Plans initiated by the National Plan.

The National Plan also addresses the more conventional policy area of service provision, both in the specialist domestic and family violence and sexual assault sectors and in mainstream social services, including housing and homelessness. Consistent with the wider theme of community responsibility in addressing violence against women, the National Plan looks to mainstream services to 'improve early identification of violence against women', 'improve and expand cross-agency support for women and children to remain safely in their homes', and

'increase the numbers of families who maintain secure long-term safe and sustainable housing post-violence' (2010: 25).

2.2 Children

Across a range of areas of law and policy, children are increasingly framed as the bearers of rights, including to special care and protection. This reflects a long-term shift, observed by Van Krieken, from 'seeing children as part of the family unit, and focusing on the family as a whole, towards 'disaggregating' the family and seeing children on their own in 'human capital' terms as an 'investment in the future' (2010: 242, citing Donzelot 1979). The result in policy terms is:

The responsibility for children's well-being is increasingly shifted from being primarily that of the parents, to being a concern for a range of actors, including various experts and institutions. (Van Krieken 2010: 242)

This concern is expressly stated in the title of Australia's national policy document for child protection, *Protecting children is everyone's business: National Framework for Protecting Australia's Children 2009–2020*. An initiative of COAG, the National Framework refers to Australia's international obligations under the United Nations Convention on the Rights of the Child (1990) (CROC), and sets out the following principles for federal, state and territory government policy:

- All children have a right to grow up in an environment free from neglect and abuse. Their best interests are paramount in all decisions affecting them.
- Children and their families have a right to participate in decisions affecting them.
- Improving the safety and wellbeing of children is a national priority.
- The safety and wellbeing of children is primarily the responsibility of their families, who should be supported by their communities and governments.
- Australian society values, supports and works in partnership with parents, families and others in fulfilling their caring responsibilities for children.
- Children's rights are upheld by systems and institutions.
- Policies and interventions are evidence based. (COAG 2009: 12)

One theme of the principles is that the best interests of a child are paramount in decisions affecting them. This reflects Article 3 of the CROC, as well as longer standing provisions of Australian domestic law, particularly the *Family Law Act 1975* (Cth) and state-level child protection legislation (e.g. the *Children and Young Persons (Care and Protection) Act 1998* (NSW)).⁴ Accordingly, the National Framework calls on governments, as its first strategy, to 'develop and implement effective mechanisms for involving children and young people in decisions affecting their lives', and to measure 'children's and young people's participation in administrative and judicial proceedings that affect them' (COAG 2009: 16).

In a wider policy sense, the National Framework endorses a 'public health approach' to child protection, emphasising generalised and preventative action:

⁴ On one view, it is also part of the common law; per Gaudron J in *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20: 'it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare': 304.

A public health model offers a different approach with a greater emphasis on assisting families early enough to prevent abuse and neglect occurring. It seeks to involve other professionals, families and the wider community—enhancing the variety of systems that can be used to protect children and recognising that protecting children is everyone’s responsibility.... Ultimately, the aim of a public health approach is to reduce the occurrence of child abuse and neglect and to provide the most appropriate response to vulnerable families and those in which abuse or neglect has already occurred. (COAG 2009: 8)

The National Framework expressly puts the public health approach forward to guide reform of present policy settings, in which too much is left to the statutory system of child protection, and not enough done at preceding levels of response. According to the National Framework:

Australia needs to move from seeing ‘protecting children’ merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children.... Under a public health model, priority is placed on having universal supports available for all families (for example, health and education). More intensive (secondary) prevention interventions are provided to those families that need additional assistance with a focus on early intervention. Tertiary child protection services are a last resort, and the least desirable option for families and governments. (COAG 2009: 7)

The Framework’s strategies for applying a preventative public health approach to risk factors for child abuse and neglect include increased social and affordable housing, and increased access to early intervention and prevention, particularly to maintain connections with family and education.

2.3 Indigenous families

The right of peoples to self-determination is the guiding principle of Indigenous advocacy in Australia and internationally (Davis 2008). Self-determination has also been adopted from time to time by governments and related agencies as a principle of policy and service reform, though some actions by governments—notably the 2005 abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Northern Territory Emergency Response (2007–2011)—have been antithetical to the principle. The current National Indigenous Reform Agreement (‘Closing the Gap’), initiated in 2009 by COAG, does not use the term ‘self-determination’, instead committing to ‘engagement and partnership’. Indigenous advocacy around the current ‘Closing the Gap Refresh’ has emphasised that it should embody ‘principles of empowerment and self-determination’ (Special Gathering 2018).

Affirmed in the first articles of both the Charter of the United Nations (1945) and the International Covenant on Civil and Political Rights (1966), and specifically affirmed as a right of Indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples (2007), the right of self-determination has, according to Davis, been adopted by Indigenous peoples as a framework for relating to historically colonial states:

The right to self-determination is used by Indigenous Australia to conceptualise for mainstream Australia the distinct cultural and structural claims that Aboriginal and Torres Strait Islander peoples are making of the Australian State. The purpose of articulating a framework based upon the right to self-determination is to recognise the distinctiveness of Aboriginal and Torres Strait Islander culture in Australia and is aimed at facilitating the achievement of full and effective participation of Aboriginal and Torres Strait Islander peoples in the decisions that affect them (Davis 2008: 217)

This use of the right to self-determination as a framework for engaging with the state is made in numerous documents of Indigenous advocacy, such as the land rights petitions of the 1960s and 1970s, the Barunga Statement (1998), which called for a national Indigenous representative body and recognition of Indigenous law, and most recently the Uluru Statement from the Heart (2017), which calls for a constitutionally-enshrined Indigenous Voice to Parliament, and processes for truth-telling and treaty-making.

As a principle of government policy, self-determination was expressly adopted by the Whitlam Government on the establishment of the federal Department of Aboriginal Affairs (1972), and by the Hawke Government on the establishment of ATSIC (1990) (Altman and Sanders 1991). The principle has also been endorsed in the reports of numerous government inquiries. These include the *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), where self-determination was considered a fundamental requirement for addressing the massive over-policing, criminalisation and incarceration of Indigenous persons. *Bringing Them Home*, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (HREOC 1997), similarly regarded self-determination as a foundational principle of policy generally, with sector-specific implications for the development of Indigenous governance structures, services and workforces, in this case in child protection.

Self-determination has also been adopted in state-level laws and institutions: for example, the NSW *Children and Young Persons (Care and Protection) Act 1998* expressly provides that it is a principle of the Act that Aboriginal and Torres Strait Islander people are to participate in care and protection of children with as much self-determination as is possible (section 11); and the *Aboriginal Housing Act 1998* (NSW) includes objectives to 'enhance the role of Aboriginal people and Torres Strait Islanders in determining, developing and delivering policies and programs relating to Aboriginal housing', and 'ensure that such housing is appropriate having regard to the social and cultural requirements, living patterns and preferences' of Indigenous people' (section 3(c) and (b)). More widely the principle has informed the establishment of specialist services for Indigenous persons and communities, with at least some degree of Indigenous governance, particularly in the legal and health sectors. There has been less progress in this regard in the housing sector. Since the turn of the century, Indigenous housing has been largely mainstreamed with substantial declines in state-owned and managed Indigenous housing and Indigenous community housing, although New South Wales and Victoria have relatively small but significant Indigenous housing providers and advocacy organisations (Habibis, Memmott et al. 2013; Milligan, Phillips et al. 2011). At the same time, in mainstream services, related principles of respect for cultural difference have led to modifications in entitlements: e.g. in social housing, special provisions around old age criteria in priority assessment, and additional bedrooms for the accommodation of extended family. Each of the other national policy frameworks discussed in this chapter also refers specifically to their application to Indigenous people in similar ways, ranging from strategies for Indigenous ownership and governance in policy and service development, to cultural competence and safety in mainstream service provision.

2.4 Families with alcohol and other drug use problems

Australia's National Drug Strategy 2017–2026 is the seventh in a continuous series of strategies going back to the mid-1980s. Like its predecessors, the current strategy's basic principle is 'harm minimisation'. According to the strategy, this principle imports 'the clear recognition that drug use carries substantial risks, and that drug-users require a range of supports to progressively reduce drug-related harm to themselves and the general community, including families' (Commonwealth Department of Health 2017: 6). The strategy applies this principle to alcohol, tobacco and other drugs—i.e. legal and illegal.

In the current strategy, harm minimisation is presented as being constituted by 'three pillars':

- Demand reduction—Preventing the uptake and/or delaying the onset of use of alcohol tobacco and other drugs; reducing the misuse of alcohol, tobacco and other drugs in the community; and supporting people to recover from dependence through evidence-informed treatment.
- Supply reduction—Preventing, stopping, disrupting or otherwise reducing the production and supply of illegal drugs; and controlling, managing and/or regulating the availability of legal drugs.
- Harm Reduction—Reducing the adverse health, social and economic consequences of the use of drugs, for the user, their families and the wider community. (Commonwealth Department of Health 2017: 1)

Harm minimisation is often characterised as a principle based on the ‘public health’ model (Webster 1995), although in the criminology literature it has attracted critical attention as a distinctive governmental project—that is, it involves thinking about, and acting on, drugs and drug users in particular ways. Reviewing the evolution of the national drugs strategy at what is now about its half-way point, O’Malley (1999) observes how it shifted the language of drugs policy away from ‘addiction’ and ‘abuse’ to ‘use’, and largely effaced the distinction of legal and illegal drugs, in order to countenance a range of drug-related behaviours and harms, and hence a more nuanced range of responses. Crucially, it also recasts users as participants in governing the harms associated with drug use, and accepts that they may effectively self-govern drug risks, and avoid excessive or inappropriate use, while remaining drug dependent. As O’Malley observes, harm minimisation retains a place for moralising interventions with harsh consequences, which are typical of conventional law and order responses to drugs, but it confines them to certain categories of inappropriate use (e.g. drink driving), and drug trafficking. In all these ways, harm minimisation contrasts with punitive, prohibitionist approaches, exemplified by the ‘War on Drugs’ in the United States, that demonise and exclude users generally (O’Malley 1999).

The current strategy qualifies the earlier elaborations of harm minimisation in significant ways: it expressly ‘does not condone drug use’ (Commonwealth Department of Health 2017: 6), frames dependence as a problem and highlights ‘abstinence-oriented strategies’, and gives a more prominent role to law enforcement and criminal justice agencies and institutions. However, over the course of the national strategies, those institutions and agencies have themselves become more oriented to harm minimisation and alternatives to criminalisation and punishment. Developments include diversionary strategies, such as the Magistrates’ Early Referral into Treatment (MERIT) program as it is known in New South Wales (there are equivalents in other jurisdictions), and specialist Drug Courts with a rehabilitative focus (all jurisdictions except Tasmania and the Territories).

2.5 Social housing

Australia’s highest level policy document for social housing is the National Housing and Homelessness Agreement (NHHA), successor to the National Affordable Housing Agreement and, before that, a series of Commonwealth-State Housing Agreements going back to 1945. The NHHA, like its predecessor agreements, is formally the instrument for the Commonwealth’s making of tied grants to the states and territories for their social housing operations, and is less expressly a strategic document than the other national-level plans, frameworks and strategies discussed above. The NHHA’s stated objective is ‘to contribute to improving access to affordable, safe and sustainable housing across the housing spectrum, including to prevent and address homelessness, and to support social and economic participation’ and, specifically regarding social housing, seeks the following ‘aspirational’ outcome: ‘a well-functioning social

housing system that operates efficiently, sustainably and is effective in assisting low-income households and priority homelessness cohorts to manage their needs' (NHHA 2018).

To the extent that NHHA and its recent predecessors have set a strategic direction for Australia's social housing sector, it has been to direct assistance to households with low incomes and, more particularly, complex needs. This consolidates a trend that commenced in the 1970s, when targets and income criteria were introduced to extend assistance to types of persons and households who had historically not been part of the working class family clientele of public housing (as all social housing then was). Since then, social housing's low-income, high-needs clientele has grown, through processes of deinstitutionalisation and private housing market change, and the targeting of assistance to them has become almost exclusive of other clienteles, reinforced by funding levels that have been inadequate to grow the social housing stock (Troy 2012; Lawson, Pawson, et al. 2018). At the same time, the organisational structure of the social housing sector has changed, reflecting the shift in its clientele and purpose. Provision of housing assistance has diversified through the development of the community housing sector, with links to other non-government social service providers; while most of the public housing landlords have become merged with larger government department of community services or health and human services.

Tight targeting has resulted in social housing neighbourhoods becoming concentrations of disadvantaged persons and families, with generally higher rates of crime and anti-social behaviour (Weatherburn, Lind and Ku 1999). This has been theorised in terms of social housing neighbourhoods being 'delinquent-prone communities' (Weatherburn and Lind 2001), lacking the individual or collective organisation necessary to prevent misconduct. A range of different policy responses have been taken to address perceived deficits: community development programs to build collective capacity; an interest in programs of 'wrap-around' support for identified individuals; and the use of social housing's legal infrastructure of tenancy agreements and law to respond to misconduct.

As well as changing social housing at the level of the neighbourhood, and of the individual client, tight targeting has arguably effected a further change, in the construction of the social housing tenant as a subject of government. Martin (2010) suggests that the intense administration of eligibility in a straightened system—involving close investigation of need, constant attention to fraudulent claims—combined with the conventional contractual tenancy relationship, constructs the subject of social housing as being variously a subject of need, who is prone to misconduct, and who is a self-seeking, culpable agent.

The support, therefore, that social housing policy has offered to other areas of policy regarding vulnerable persons and families, is ambiguous: it has targeted housing assistance to vulnerable groups, but the assistance extended is marginalised housing, sharpening notions of housing as 'a privilege not a right', and facilitating reactive 'crack downs' and 'get tough' approaches to misconduct.

2.6 Summary

All four of the vulnerable types of families in focus in the present research are the subject of high-level policy frameworks and principles that seek to improve on past and present practice. Violence against women is the subject of a prominent, expanding policy agenda encompassing criminal justice and support services and wider community attitudes. Children are regarded as bearers of rights, including paramount consideration of their best interests in decision-making, with child protection policy shifting emphasis to early prevention according to public health principles. Indigenous advocacy adopts self-determination as its guiding principle for engagement with governments and, with notable exceptions, governments have also sought to engage on these terms with Indigenous peoples in policy and service delivery reforms. In drugs

policy, the guiding principle is harm minimisation, which de-emphasises moralistic or punitive responses and enjoins users in self-government. Meanwhile, social housing policy has increasingly targeted vulnerable households with complex needs, ostensibly to better support them—but it has also marginalised social housing provision politically, exposing vulnerable households to sharp conditionality and reaction.

3 Social housing and misconduct law and policy

Social housing landlords' legal responses to misconduct are governed by states' and territories' residential tenancies laws.

Legislative provisions regarding prescribed terms, termination processes, tenants' liability for other persons, and the role of courts and tribunals, are most important.

Between each jurisdiction, there is variation in the details of legislative provisions, and in the policies that guide social housing landlords' use of them.

In this chapter we review the laws and policies that govern social housing landlords' legal responses to misconduct. First we consider the most relevant common features of states' and territories' residential tenancies laws in relation to terms of tenancy agreements, termination, tenants' liability for other persons, and the role of courts and tribunals. Then we consider each jurisdiction specifically, looking at variations in the law, and the principal policy statements for social housing landlords' use of legal proceedings and termination, focusing on policies of the public housing landlords.

3.1 Australian residential tenancies law

In Australia's federal system of government residential tenancies law is the responsibility of the states and territories. Each state and territory has its own residential tenancies legislation,⁵ with numerous differences between jurisdictions as to details, but all based on a broadly common model. Sometimes called the Bradbrook model, after the author of the influential report to the Commission of Inquiry into Poverty, *Poverty and the Residential Landlord-Tenant Relationship* (Bradbrook 1975), this model was implemented by states and territories from the late 1970s to the late 1990s. The model combines elements of consumer protection—through prescribed rights and obligations, and accessible dispute resolution—with light regulation of rents and ready but orderly termination of tenancies. Aspects of the model that are most relevant to occupier misconduct are discussed below.

In all states and territories, residential tenancies legislation covers social housing and private rental, mostly alike (it was a strong theme of the Poverty Inquiry report that public housing tenants should, as vulnerable consumers, have rights and remedies against government landlords). However, differences in legislative provisions between social housing and private tenancies have, over time, opened up in many jurisdictions, particularly through amendments expressly intended to address 'anti-social behaviour' in social housing. These are discussed further below, when we review social housing law and policy in each jurisdiction.

3.1.1 Prescribed terms, breach and other means for termination

The residential tenancies legislation of each state and territory prescribes certain rights and obligations as terms of every residential tenancy agreement. These include, for example, terms

⁵ *The Residential Tenancies Act 2010* (NSW) (NSW RTA); the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (Qld RTRAA); the *Residential Tenancies Act 1995* (SA) (SA RTA); the *Residential Tenancy Act 1997* (Tas) (Tas RTA); the *Residential Tenancies Act 1998* (Vic) (Vic RTA); the *Residential Tenancies Act 1987* (WA) (WA RTA); the *Residential Tenancies Act 1997* (ACT) (ACT RTA); the *Residential Tenancies Act* (NT) (NT RTA).

requiring tenants to pay rent and certain other charges, and terms requiring landlords to make repairs. Two terms are especially relevant to criminal offending and anti-social behaviour:

- the ‘illegal use’ term, which prohibits a tenant from using the premises for an illegal purpose,⁶ and
- the ‘nuisance’ term, which prohibits a tenant from causing a nuisance.⁷

Most jurisdictions also prescribe a term prohibiting the tenant from ‘interfering with the reasonable peace, comfort and privacy’ of neighbours.⁸ In practice, this term and the nuisance term are not strongly distinguished, and in this research references to proceedings on the ‘nuisance’ term include references to the ‘interference’ term too. Other prescribed terms that are somewhat less strongly relevant to responding to misconduct include terms obliging the tenant to keep the premises clean, and prohibiting the tenant from damaging the premises.

All states and territories allow landlords to take steps to terminate tenancies on the ground that a tenant has breached a prescribed term. In Victoria and Queensland, this process generally begins with a notice to remedy the breach, after which the landlord, if the breach continues, may give a notice to vacate; in all other jurisdictions, landlords may respond to breach with a notice of termination (equivalent to a notice to vacate; hereafter, we refer to both as ‘termination notices’).⁹ Then, if the tenant does not vacate, the landlord may apply to the court or tribunal for a termination order (discussed below).

Both the illegal use term and nuisance term encompass wide classes of misconduct. Published decisions on the illegal use term are dominated by cases involving drug offences, although offences relating to possession of stolen property, proceeds of crime and prohibited weapons also appear fairly frequently.¹⁰ Published decisions on the nuisance term disclose an even wider range of matters, from acts of serious criminal violence, to loud noises and personal disputes between neighbours. Significantly, many of the cases that test the scope of the terms are brought by social housing landlords: we discuss these in more detail in Chapter 4.

Aside from termination notices on grounds of breach, all jurisdictions also allow landlords to give termination notices without grounds. The most common position (i.e. all jurisdictions except Tasmania and, under amendments yet to commence, Victoria) is that ‘no grounds’ termination notices may be given as the fixed term of a tenancy comes to an end, and at any time during a tenancy that is without a fixed term or that has continued past a fixed term (a ‘continuing agreement’). In Tasmania, provision for no-grounds termination notices is limited to where tenancies are coming to the end of a fixed term (so a continuing agreement cannot be terminated without grounds); in Victoria, provision for termination notices without grounds will be limited to the end of a tenancy’s first fixed term only (so a continuing agreement, or a tenancy under a series of fixed terms, will not be able to be terminated without grounds). The periods of notice differ between jurisdictions—from 42 days in the Northern Territory, to 26 weeks in the

⁶ NSW RTA section 51(1)(a); Qld RTRAA section 184(a); SA RTA section 71(a); Tas RTA section 52(a); Vic RTA section 59; WA RTA section 39(a); ACT RTA Schedule 1 clause 70(a); NT RTA section 54(a)

⁷ NSW RTA section 51(1)(b); Qld RTRAA section 184(b); SA RTA section 71(b); Tas RTA section 52(b); Vic RTA section 60(1); WA RTA section 39(b); ACT RTA Schedule 1 clause 70(b); NT RTA section 54(b).

⁸ NSW RTA section 51(1)(c); Qld RTRAA section 184(c); SA RTA section 71(c); Vic RTA section 60(2); ACT RTA Schedule 1 clause 70 (c); NT RTA section 54(c)).

⁹ Queensland social housing providers are also permitted to give a termination notice for serious breach, without a prior notice to remedy (Qld RTRAA section 290A).

¹⁰ The illegal use term, like the nuisance term, predates legislation on the Bradbrook model. Clyne (1970) suggests that historically its primary target was use of premises as a brothel; this use, however, does not figure in the case law of the last 30 years or so.

Australian Capital Territory, for continuing agreements—but in each jurisdiction the periods are longer than those prescribed for termination with grounds (e.g. breach, sale of premises).

In certain circumstances all jurisdictions also allow landlords to apply immediately to the court or tribunal for a termination order. In most jurisdictions, this is a matter of applying directly to the court or tribunal, without first giving a termination notice; in Victoria, a termination notice is still required but the landlord may apply immediately. These circumstances are typically urgent or serious ones, such as where the tenant or occupier has injured or threatened the landlord or a neighbour, seriously damaged the premises, or used the premises for an illegal purpose. The definition of the circumstances, and the construction of the provisions, varies between jurisdictions.

3.1.2 Tenants' liability for others

The residential tenancies legislation of each state and territory provides not only that tenants' own acts and omissions may place them in breach of their obligations under their tenancy agreements and the law, but also that they may be liable for the acts and omissions of other persons (i.e. occupiers and visitors). The legislation provides for this in several ways.

In all jurisdictions (except Queensland), the prescribed terms prohibiting illegal use and nuisance (and, for that matter, the prescribed terms about cleanliness and damage) are constructed expressly to provide that the tenant shall not 'permit' the proscribed conduct. 'Permit' brings within the scope of the proscription acts and omissions by other persons, where the tenant can be said to have knowledge and some control of their acts and omissions.

Most jurisdictions also have a separate provision that makes tenants vicariously liable for the acts and omissions of other occupiers and visitors to the premises, as if the tenant themselves had done the act or omission.¹¹ This liability is strict: it does not depend on the tenant having knowledge or control.

The direct application provisions also allow termination proceedings against a tenant for the actions of other persons. The ways in which the provisions do this vary according to their particular construction, and may involve a mix of strict vicarious liability and questions of knowledge, intention and control. For example, the NSW *Residential Tenancies Act* (NSW RTA)'s direct application provision for use of the premises for an illegal purpose is available where an occupier has used the premises for an illegal purpose, so the tenant is strictly liable in that respect; but the provision is also available where an occupier has 'intentionally or recklessly caused or permitted' the use by another person, which introduces an element of knowledge and control in that respect.¹²

Notably, two jurisdictions have recently passed amendments regarding tenants' liability for others specifically in circumstances of domestic violence. In New South Wales, a newly-commenced amendment provides that a tenant is not liable for damage to the property caused by another person during a domestic violence offence against the tenant.¹³ However, other breaches (e.g. nuisance) caused by a perpetrator may still be grounds for termination, and it appears that direct application provision for damage may still be available. In Victoria, amendments recently enacted but yet to commence will provide that notices to vacate on

¹¹ NSW RTA section 54; SA RTA section 75; Tas RTA section 59; WA RTA section 50; ACT RTA Schedule 1 clause 73.

¹² A hypothetical illustration is given by Leeming J in *Cain v New South Wales Land and Housing Corporation* [2014] NSWCA 28. A tenant going into hospital allows a friend to stay in her flat while she is away; unknown to the tenant, the friend's spouse attends the premises, and commits a drug supply offence. Provided the friend 'permitted' the spouse's offence, the provision allows termination of the tenancy.

¹³ NSW RTA section 54(1A).

grounds of breach, illegal use, danger, threats and intimidation may be invalid where the misconduct is caused by the perpetrator of domestic violence against the tenant.¹⁴ This is a significant qualification on tenants' liability for others, but to avail themselves of it a tenant must apply to the Tribunal for the invalidation order within 30 days of receiving the notice to vacate.

Suffice it to say, tenants' liability for others can be extensive and onerous, and the law gets complex at the margins.

3.1.3 The role of courts and tribunals

A key feature of the Bradbrook model of legislation is that tenancy disputes, including about termination, are resolved through quick, orderly proceedings in an accessible dispute resolution forum—neither the formality of a court operating in its usual mode, nor the informal self-help of lockouts and evictions carried out by landlords themselves. In most jurisdictions, this forum is the state or territory's Civil and Administrative Tribunal; in Tasmania and Western Australia, the forum is each state's Magistrates' Court, but with less formality afforded through limits on legal representation and costs. Generally, landlords cannot themselves unilaterally terminate a tenancy: termination occurs only when the tenant also moves out, or the court or tribunal makes a termination order. South Australia and the Northern Territory are exceptions, because each provides that some types of termination notices given by landlords do terminate tenancies, but even so landlords must apply to the tribunal for orders to give effect to the termination. In all jurisdictions, evictions may be carried out only on orders or warrants issued by a court or tribunal, and in all but the Northern Territory it is public officers—variously the police, sheriff's officers or bailiffs—not landlords, who are authorised to carry out evictions.

In determining applications for termination orders, magistrates and tribunal members will determine whether the grounds, if any, for termination have been made out, and consider such other factors as may be provided by the jurisdiction's residential tenancies legislation. The factors for consideration in termination decisions, and the scope for declining to terminate a tenancy, varies substantially, both between jurisdictions and between provisions in each jurisdiction's own legislation. In some types of proceedings, where the legislated requirements are satisfied (e.g. the correct amount of notice is given, and grounds, if any are required, are proved), termination is mandatory; in others, the court or tribunal is afforded discretion as to whether to terminate, and this discretion may be structured by a legislated direction to consider certain factors, or left relatively open.

3.2 Review of law and policy by jurisdiction

3.2.1 New South Wales

Over the last two decades, state governments from both sides of politics in New South Wales have made numerous changes to law and policy regarding social housing legal proceedings for misconduct. Currently, FACS Housing's responses to misconduct are guided by its 'Anti-Social Behaviour Management Policy', which was introduced in 2016 following some associated amendments to the NSW RTA in 2015. The policy states that FACS Housing will not intervene in a neighbour dispute except where there is an allegation of a breach of a tenancy agreement. For breaches characterised under the policy as 'minor' or 'moderate anti-social behaviour', the policy provides a 'three strikes' regime, by which written strike notices are issued to tenants and, on the third strike being issued, termination proceedings are taken under the breach provisions of the NSW RTA. The policy also states that FACS Housing will generally take termination

¹⁴ RTA Vic, new section 91ZZU(1).

proceedings immediately in response to 'severe illegal behaviour' and 'serious anti-social behaviour', under the breach provisions or direct application provisions of the NSW RTA.

Unlike other jurisdictions with 'three strikes' regimes, New South Wales' strike notices have a specific legislative effect. Strike notices include a statement about the misconduct that has given rise to the strike, and tenants who receive a strike notice have 14 days in which to make a written submission refuting those matters; where they do not make such a statement, they cannot dispute the facts of the statement and the tribunal in any subsequent proceedings must take those facts as proven (Martin 2016). Otherwise, in breach proceedings FACS Housing must, like other landlords, satisfy the tribunal that the facts of the case represent a breach of the agreement. In doing so, social housing landlords may include in their evidence 'neighbourhood impact statements' (section 154F), which are an innovation of the 2015 amendments and allow information collected from neighbours by a social housing landlord to be tendered in evidence, without the identity of the neighbours being disclosed.

Where a breach has been proved, the tribunal has some discretion as to whether to decline termination: the NSW RTA provides that it 'may make a termination order if it is satisfied that... the breach is, in the circumstances of the case, sufficient to justify termination of the agreement' (section 87(4)(b)). The NSW RTA then provides a non-exhaustive list of 'circumstances' that the tribunal may consider (including 'the nature of the breach', 'any previous breaches' and 'the history of the tenancy': section 87(5)), and expressly provides that termination may be declined where the breach has been remedied (section 87(6)). It also provides, specifically for social housing termination proceedings, a list of factors that must be considered by the tribunal, including 'the effect the tenancy has had on neighbouring residents or other persons', 'the landlord's responsibility to its other tenants', and 'the history of the current tenancy and any prior tenancy arising under a social housing tenancy agreement with the same or a different landlord' (NSW RTA, section 154E).

FACS Housing's policy also contemplates use of the direct application provisions of the NSW RTA relating to serious damage or injury (section 90), use of premises for an illegal purpose (section 91), and threat, abuse, intimidation and harassment (section 92). Each of these provisions generally affords discretion to the tribunal; this was made clear by the NSW Court of Appeal in *Cain v New South Wales Land and Housing Corporation* [2014] NSWCA 28. However, the 2015 amendments changed this with respect to social housing, to make termination mandatory in certain circumstances. These include where the illegal purpose is:

- manufacture, sale, cultivation or supply of any prohibited drug within the meaning of the *Drug Misuse and Trafficking Act 1985* (the ground at s 91(1)(a))
- storage of a firearm without a licence, or
- a 'show cause offence' under the *Bail Act 2013* (NSW)

or where the application is for an injury, amounting to grievous bodily harm, to the landlord, agent or neighbour. The amendments also restrict the tribunal's discretion to 'exceptional circumstances' where the illegal purpose is:

- use as a brothel
- the production, dissemination or possession of child abuse material
- car or boat rebirthing, or
- any other use for unlawful purpose sufficient to justify termination

or where the application is for injury less than grievous bodily harm to the landlord, agent or neighbour, or serious damage to the property. The amendments also modify how the provisions operate with regard to tenant's liability for other persons, and then qualify the whole scheme by providing for discretion where termination would cause 'undue hardship' to a child, 'a person in

whose favour an apprehended violence order' could be made, or a person with a disability (Martin 2016).

The NSW RTA also provides for 'acceptable behaviour agreements' (ABAs), specifically in relation to public housing.¹⁵ Under these provisions, FACS Housing may, where it considers that a tenant, occupier or visitor is likely to engage in anti-social behaviour, request the tenant to enter into an ABA and undertake not to engage in the specified behaviour (section 138(1)). 'Anti-social behaviour' may include 'emission of excessive noise, littering, dumping of cars, vandalism and defacing of property' (section 138(6)), and so is not identical with conduct proscribed by the usual terms of tenancy agreements. Failure to enter into an ABA when requested, and breach of an ABA, are grounds for termination (section 153) and in these proceedings, the onus is reversed, so the tenant must satisfy the tribunal that they did not refuse or breach the ABA, as the case may be (section 154). These provisions, originally introduced in 2004 in connection with a previous anti-social behaviour strategy, have never found favour with FACS Housing, and have scarcely been used; they are not mentioned in the current policy.

FACS Housing also generally does not use 'no grounds' termination proceedings (this is reflected in the applications data in Table 1 above). Under sections 84 and 85 of the NSW RTA, no discretion is afforded the tribunal in these proceedings: provided the notice is valid and not retaliatory, the tribunal must terminate, and the only latitude given is in the amount of time the tribunal may give the tenant to vacate the premises. FACS Housing's policy of generally not using these proceedings dates from the early 1990s, following the NSW Supreme Court's decision in *Nicholson v NSW Land and Housing Corporation* [1992] NSW Supreme Court 30027 (unreported, Badgery-Parker J, 24 December 1991). In that case, the Supreme Court held that the Department of Housing's giving of a 'no grounds' termination notice, without also notifying the tenant as to its reasons and affording an opportunity to put their case for continuing their tenancy, contravened the department's obligation to afford procedural fairness. Consequently, the department adopted the policy of using only termination proceedings with grounds, and effectively using the tribunal process to comply with its procedural fairness obligations to notify and afford a hearing.

The current no-grounds provisions of the NSW RT are consistent with the rationale in *Nicholson*, and the policy generally continues to hold. However, there has been at least one case recently in which FACS Housing has taken no-grounds proceedings against a tenant (*Hobson v New South Wales Land and Housing Corporation* [2015] NSWCATAP 222), apparently for misconduct, and a termination order was made. It also appears that some community housing landlords use, albeit infrequently, no-grounds termination proceedings for misconduct, and the NSW Court of Appeal has recently affirmed that where social housing landlords take no-grounds proceedings, no discretion to decline termination is afforded the tribunal: *Coffs Harbour and District Local Aboriginal Land Council v Lynwood* [2017] NSWCA 317.

Apart from legislative amendments, the law relating to social housing misconduct proceedings has also been developed by recent NCAT Appeal Panel decisions. In particular, the Appeal Panel has established that the scope of the term 'use of premises for an illegal purpose', for the purposes of both breach and direct application proceedings, is relatively broad: it does not require the use to be exclusive 'drug premises', mere possession and use, and non-drug offences. The Appeal Panel has also established that the tribunal can make certain inferences

¹⁵ The ABA provisions apply to tenants under 'social housing tenancy agreements', which include community housing tenants, but also refer specifically to the NSW Land and Housing Corporation—the corporate aspect of FACS Housing—as the party that requests and enters into ABAs.

in relation to drug users and drug offences, reducing the need for evidence and submissions on these points. In *NSW Land and Housing Corporation v Raglione* [2015] NSWCATAP 75, the Panel stated, regarding the credibility of drug users, that ‘it is mindful that the courts have long recognised that people with a drug addiction, such as the Tenant, are notoriously unreliable witnesses’ (par 42). The Panel further held, regarding the requirement of the NSW RTA to consider any effects of the breach on neighbours, that ‘inferences can be drawn from legislative prohibitions making specified drugs unlawful’ (par 25), citing in support a passage from the NSW District Court in *R v Knight, Brian and Knight, Kevin* [2008] NSWDC 135:

Drug addicts are human beings whose capacity to function and to feel human is smothered to a greater or lesser extent by addiction and other effects of drugs.... Associated with drug addiction are other forms of crime such as robberies, break, enter and steals. ... At every level then, drug dealing is conduct that is corrosive on society and therefore anti-social.

Aside from its Anti-Social Behaviour Management Policy, other FACS Housing policies bear the marks of past initiatives in addressing anti-social behaviour, such as ‘banning notices’ (for the use of trespass powers under the *Inclosed Lands Protection Act 1901* (NSW) against non-tenants in common areas of public housing buildings) and ‘visitor sanctions’ (which purport to cancel rent rebates where sanctioned tenants have undisclosed visitors for more than three days). Like ABAs in the NSW RTA, these appear to have been scarcely used, if at all.

3.2.2 Tasmania

Housing Tasmania has a ‘three strikes’ policy for issuing to public housing tenants for behaviour that is in breach of a tenant’s agreement: this expressly includes nuisance, harassment, hoarding, excessive noise, and ‘all unlawful offences’. According to the policy, ‘annoying behaviour’ and ‘neighbour disputes’ are not regarded as breaches. Strikes under the policy are essentially warnings, without a special statutory effect. On the third strike, or where a ‘serious offence’ is committed, Housing Tasmania will generally commence proceedings to terminate the tenancy.

Housing Tasmania is unusual among its interstate counterparts in that it does not restrict its termination proceedings to breach or direct applications, and regularly takes ‘without grounds’ termination proceedings at the end of tenancies’ fixed term (as noted above, the Tas RTA does not permit no-grounds terminations of continuing agreements). To that end, public housing tenancies are maintained as a series of short fixed term agreements.

This distinctive practice follows two decisions of the Tasmanian Supreme Court. In the first, *Logan v Director of Housing* [2004] TASSC 153, the Supreme Court held that magistrates determining termination applications were afforded no discretion by the Tas RTA to decline to make a termination order where the landlord had served a valid notice and otherwise complied with the applicable provisions. (This was because, said the Supreme Court, the termination provisions were a code that supplanted the usual ability for the court to grant equitable relief from foreclosure.) This means, in particular, that where a landlord gives a valid ‘no grounds’ termination notice, the court must terminate the tenancy, and cannot consider the circumstances of the tenant or other factors—such as the actual reasons and motivations of the landlord for seeking termination.

The question of reasons for termination was considered in the second case, *King v Director of Housing* [2013] TASFC 9, in which Housing Tasmania had given a no-grounds termination notice, and offered no explanation of its reasons for doing so to the tenant. As in the New South Wales’ *Nicholson* case from 20 years previously, the tenant sought to stop the proceedings on the basis that Housing Tasmania’s decision to take them was not procedurally fair; however, unlike in *Nicholson*, the Tasmanian Supreme Court refused, holding that the decision was not open to judicial review and so would not be enjoined. (This was because, according to the

Supreme Court, the decision to proceed to termination did not derive its force from the *Homes Act* and any specific power granted there, but from the agreement between the parties as governed by the general law). However, in a very recent case, *Parsons v Director of Housing* [2018] TASSC 62, the Supreme Court has held, contrary to *Logan*, that the Tas RTA does in fact require the court to evaluate whether a landlord's reasons for seeking termination are genuine and just (section 45(3)(b)) and affords discretion to decline termination. It remains to be seen whether Housing Tasmania will change its policy to accord with *Parsons*, or else appeal or seek legislative change.

3.2.3 Victoria

Victoria's public housing landlord, the Department of Housing and Human Services (DHHS), addresses anti-social behaviour in two policy documents: its 'neighbourly behaviour support guidelines' and its 'tenancy breach operational guidelines'. The guidelines set out how the DHHS uses the breach provisions of the Vic RTA, with a 'zero tolerance' approach for malicious damage, serious threats to neighbours, use of premises for an illegal purpose and drug trafficking (using respectively the provisions for 'damage', 'danger', 'use of premises for an illegal purpose', and the public housing-specific provision for drug trafficking at section 250A), and a 'three strikes' approach for nuisance and property care breaches. DHHS will give a breach of duty notice as the first strike, seek a compliance order from the tribunal on the second, and then take breach termination proceedings on the third. For social housing and private tenancies alike, the Vic RTA has tightly structured the determination of breach termination proceedings, though this will be reduced somewhat under amendments recently passed but yet to commence. Currently, the tribunal must terminate where the termination notice is valid and the breach is made out (section 330); however, the tribunal must not terminate where there is a prior compliance order and it is satisfied that the breach is trivial or has been remedied, that there will be no further breach, and that the breach is not a recurrence of a previous breach (section 332). Under the new provisions, the tribunal will be required to terminate where it is 'reasonable and proportionate' to do so, having regard to a list of factors including the nature of the breach, whether it is trivial, whether it is caused by another person, whether the tenant has applied for a domestic violence order, effects on others, and whether the tenant is capable of remedying the breach (new section 330A).

Despite the terminology, the 'three strikes' and zero tolerance' aspects of the DHHS's policy appear to have a lower public profile than similar policies in other states. The guidelines expressly countenance arranging transfers to deal with anti-social behaviour, and direct housing officers considering termination proceedings to conduct a 'human rights impact assessment' before making their decision.

The express consideration of human rights is an outcome of Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic), which is one of only two such pieces of legislation in operation in Australia (the ACT also has a *Human Rights Act 2004* (ACT); Queensland's very recently enacted *Human Rights Act 2019* (Qld) has yet to commence). The Charter requires public authorities to act consistently with the rights enumerated in the Charter, and provides that inconsistent actions are generally unlawful (section 38). Of particular significance is the right at section 17 of the Charter, which reflects the UNCORC and provides:

(1) *Families are the fundamental group unit of society and are entitled to be protected by society and the State.*

(2) *Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.*

In *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648, which concerned illegal use termination proceedings against a public housing tenant and single mother who had been

convicted of drug offences, the Victorian Supreme Court held that a decision of the Victorian DHHS to give a termination notice (and, subsequent to the tribunal terminating the tenancy, the decision to seek a warrant of possession) were unlawful, because the DHHS had not considered the rights of the tenant or her child under section 17. The direction in the Victorian DHHS guidelines to conduct human rights impact assessments reflects the decision in *Burgess*. It should be noted, though, that the question of whether the DHHS's decision to seek termination is unlawful for breaching the Charter (or, for that matter, other requirements of administrative law) is not a question for the tribunal; in an earlier decision, *Director of Housing v Sudi* [2011] VSCA 266, the Victorian Court of Appeal held that only the Supreme Court, not VCAT, could perform judicial review of the lawfulness of a decision to seek termination. The *Burgess* decision, therefore, does not open up the tight structuring of the tribunal's determination of termination proceedings.

3.2.4 Western Australia

The WA Housing Authority's 'Disruptive Behaviour Management Policy (DBMP)' has a high public profile and includes a 'strikes' regime. Under the policy, the Housing Authority will take termination proceedings on the third instance in 12 months of 'disruptive behaviour', defined as nuisance or interference with a neighbour. It will also apply for termination on the second instance of 'serious disruptive behaviour' (activities that cause 'disturbance' or 'concern for the safety and security of a person or property'); or on a single instance of 'dangerous behaviour' (activities that pose a risk to the safety and security of persons and property, or an injury resulting in criminal charges). When the DBMP was introduced in 2011, the WA Government also amended the WA RTA to provide a new direct application provision for termination of a social housing tenancy on the ground of 'objectionable behaviour'—which encompasses the use of premises for an illegal purpose, nuisance, or interfere with a neighbour (section 75A)—and which is generally used on the final strike. Section 75A(1) gives the court some discretion as to whether to terminate: it may do so where the grounds are made out and 'the behaviour justifies terminating the agreement'.

Lately, however, WA Housing has also started using 'no grounds' termination proceedings in some cases. The DBMP provides that in some circumstances—including where it wants to avoid calling witnesses to give evidence—the Housing Authority will take no-grounds termination proceedings, rather than section 75A proceedings. In *Blanket v the Housing Authority* [2014] WASC 409, the WA Supreme Court held that the Housing Authority could do so, as the Housing Authority was not required to afford procedural fairness to the tenant (distinguishing *Nicholson*; however, the decision also distinguished *King*, in holding that Housing Authority decisions were amenable to judicial review); it further held that the WA RTA afforded no discretion in no-grounds termination applications. The WA Supreme Court has subsequently affirmed this decision in *Re Magistrate Steven Malley; ex parte the Housing Authority* [2017] WASC 193, where it further decided that the Housing Authority taking no-grounds termination proceedings after a tenant commenced a defence of proceedings on grounds of breach was not retaliatory (i.e. one of the limited grounds for declining no-grounds termination).

The Housing Authority maintains a Disruptive Behaviour Management Unit to conduct proceedings and otherwise support the policy. The Unit's other activities include referring tenants who are the subject of complaints to the Support and Tenant Education Program (STEP), 'an early intervention program for tenants who are having difficulties sustaining their tenancy [and] who may also be facing possible eviction' (WA Housing Authority 2018). STEP provides advice about living skills, such as budgeting and conflict resolution, delivered by social service NGOs and Aboriginal housing organisations. The Unit also liaises with police, where the Housing Authority maintains a liaison officer to facilitate a continuous exchange of information.

3.2.5 Northern Territory

In recent years, the Northern Territory Government has made numerous changes to law and policy regarding social housing misconduct, some of them unique to the Territory. The NT Department of Housing and Community Development (DHCD) has a 'red card' policy, under which it issues 'demerit points' to tenants for misconduct: one point for a 'minor incident' (including nuisance, excessive noise and offensive language), two points for a 'moderate incident' (including threatening behaviour or harassment, verbal abuse and moderate property damage), and three points for a 'serious incident' (including aggressive abuse, threats of injury and physical assaults). Where a tenant accumulates six points, the DHCD will generally take termination proceedings; it may also take proceedings on a single serious incident. The DHCD also has a policy of offering new tenants probationary tenancies of six months.

The 'red card' policy was introduced in 2015, replacing a 'three strikes' policy that had been in effect since 2012. Despite having a similar scale of escalation, there are notable differences between the policies: under 'three strikes', the DHCD frequently used on the third strike either breach proceedings or no-grounds termination proceedings (Dannatt 2014); whereas now the policy is to use breach termination proceedings. It is also the NT Government's policy to take termination proceedings less often: in 2014 it set an objective of reduced termination proceedings in public housing. Under the NT RTA, the tribunal (NTCAT) is afforded discretion to decline termination in breach proceeding: the NT Supreme Court has held that this is to avoid disproportionate and 'draconian' outcomes (*Williams v CEO Housing* [2013] NTSC 28).

When the earlier three strikes policy was introduced, the NT Government had also introduced amendments to the *Housing Act* (NT) and the NT RTA. These included provisions for 'acceptable behaviour agreements', apparently on the model of the New South Wales ABA provisions (sections 28A-C, *Housing Act* (NT)), but with some significant differences. Like the New South Wales provisions, the NT RTA provides that failure to enter into an ABA when requested, and breach of an ABA, are grounds for termination (section 99A, NT RTA). However, unlike the NSW RTA, the NT RTA keeps the usual onus of proof on the landlord, and expressly provides that the tribunal may determine there is no breach by the tenant where the action in breach is by another person and the tenant has taken all reasonable steps to prevent it (section 99A(3)(b)). Also unlike the situation in New South Wales, the DHCD uses ABAs, though the differences in the legislative provisions means they do not catch much more than the prescribed terms and breach provisions.

Another part of the 2015 amendments was the creation of a new class of statutory officers, 'public housing safety officers' (PHSOs), with a range of powers. These include the power to require persons suspected of engaging in anti-social behaviour on public housing premises to give their name, address and age; to direct persons to move on from public housing premises; and to confiscate or tip out alcohol (sections 28D-G, *Housing Act* (NT)). PHSOs conduct foot patrols, as well as 'joint operations' with NT police.

A final unusual feature of the NT RTA is that it provides for termination applications for 'unacceptable conduct' (section 100) to be made by 'interested persons', which is not limited to the landlord. It appears applications by third parties are uncommon, but there is a recent example involving a neighbour applying to terminate a public housing tenancy in *River v Buckley & Chief Executive Officer* (Housing) [2018] NTCAT 447. The tribunal declined to terminate.

3.2.6 Other Australian jurisdictions

For completeness, we very briefly review law and policy in the three remaining Australian jurisdictions.

Queensland

The Queensland Department of Housing and Works had a high-profile ‘three strikes’ policy, which was introduced in 2013 by the Newman Liberal National Government, along with amendments to the Qld *Residential Tenancies and Rooming Accommodation Act 2008* intended to constrain the tribunal’s discretion to decline termination. Following a change in government, however, the three strikes policy has been retrenched, although the amendments remain. Those amendments also introduced acceptable behaviour agreements (section 527), which adapt the New South Wales model in a similar way to the NT RTA’s provisions.

South Australia

Under its ‘Disruptive Behaviour Policy’, Housing SA uses the general provisions of the SA *Residential Tenancies Act 1995* (SA RTA) for termination on grounds of breach and direct applications. The policy adopts a ‘three strikes’ approach, but it has low-profile. The policy also provides for the use of ‘Acceptable Behaviour Contracts’, which do not have a statutory basis.

Like the NT RTA, the SA RTA provides for ‘interested persons’—not merely the landlord—to apply for termination of a tenancy on the ground of a tenant’s misconduct (section 90). It appears applications from third parties are unusual; one of the published cases, *Puchala v Young* [2011] SART10/2542, concerns an unsuccessful application by one social housing tenant against another, and indicates that each party had previously made section 90 applications against the other.

Australian Capital Territory

The ACT is the only Australian jurisdiction that does not have, nor has had, a three strikes policy for social housing misconduct. Housing ACT’s disruptive behaviour policy emphasises responses other than termination, but Housing ACT will, as a last resort, use breach and direct application proceedings. The ACT *Residential Tenancies Act 1997* gives the tribunal discretion to decline termination (*Commissioner for Housing for the Australian Capital Territory v Smith* [1995] ACTSC 17). Like Victoria, the ACT has human rights legislation (the *Human Rights Act 2004* (ACT)), and its jurisprudence is influenced by developments in Victoria.

3.3 Summary

Australian states’ and territories’ residential tenancies laws are broadly similar in their provision for prescribed terms—in particular, prohibitions against ‘illegal use’ and ‘nuisance’—ready but orderly termination processes, tenants’ liability for other persons, and oversight of disputes and termination proceedings by courts and tribunals. There is variation in the details of the law—particularly around the discretion of courts and tribunals—and in the policies that guide social housing landlords’ use of them.

4 Social housing and misconduct practice in overview

Social housing landlords respond to a wide spectrum of misconduct—from serious criminal offences to minor ones, and high-level interpersonal abuse to low-level disputes and incivilities.

Aside from cases involving drug offences, social housing landlords typically respond to complaints of misconduct with attempts to engage the tenant in support and intimations of threats to the tenancy.

In most cases a single substantial contact between the social housing landlord and the tenant appears to be sufficient to address a minor problem. Social housing landlords spend more time, however, responding to continuing problems, with unsatisfactory engagement and escalating threats, often resulting in termination proceedings.

In cases involving drug offences, social housing landlords typically take a ‘zero tolerance’ approach, seeking termination above all else.

Termination usually means eviction, without further housing assistance—at that stage, ‘engagement’ is lost.

In this chapter and the subsequent chapter, we investigate how laws and policies relating to misconduct in social housing translate into practice. We begin here with an overview of practice generally, informed by our reading of the cases and our interviews with stakeholder representatives. In the next chapter we focus on responses affecting women, children, Indigenous persons and families, and persons with problematic use of alcohol and other drugs, through a closer reading of the cases and interview comments.

4.1 The spectrum of misconduct and responses

A review of our 95 cases of recent social housing misconduct proceedings shows that social housing providers take legal proceedings in response to a very wide range of types of misconduct—from serious criminal offences to minor ones, and from highly abusive interpersonal conflict to low-level neighbour disputes and incivilities. Examples of cases involving alleged use of premises for an illegal purpose include:

- alleged possession of methamphetamine valued at \$100,000, for which the tenants’ partner and son faced trafficking charges
- possession of (in the tribunal’s words) ‘an Aladdin’s cave’ of stolen motorcycles, power tools and other goods, valued at \$50,000, and prohibited weapons, for which the tenant pleaded guilty and received a two-year good behaviour bond
- possession of identity documents with the intent to commit fraud, for which the tenant pleaded guilty and received a nine-month prison sentence
- use of illegal drugs by the tenant and visitors at the premises, for which the tenant pleaded guilty and received a 12-month good behaviour bond
- about 20 small (\$10–\$20) marijuana deals conducted at or near the premises by the tenant’s casual boyfriend, for which the tenant was not charged

- an alleged act of 'harbouring or concealing a child' in contravention of accommodation orders under child protection legislation, for which the tenant was facing charges.

Examples of 'nuisance' cases include:

- over a period of years, frequent incidents of the tenant and her adult and teenaged children yelling, screaming and swearing at neighbours, and at each other
- complaints from neighbours about the tenant swearing, blocking the driveway with her car and making 'the rude finger gesture' (the tribunal's words, describing photographic evidence)
- an alleged series of incidents of rock throwing and verbal abuse of a neighbour by the tenant's children.

And cases under the direct application provisions for threat, injury and danger include:

- an alleged threat against a neighbour by the tenant, while holding a knife, for which the tenant was charged with making threats
- the tenant swearing and throwing objects at a housing officer who had attended the premises without notice to photograph the yard
- an attack on a housing officer by a dog (subsequently destroyed) tied up in the front yard of the premises.

The cases also show the variation in social housing landlords' responses. Some misconduct may be met initially with only the logging of a complaint or other information. Where it is more pressing, or repeated, this may be followed by attempts by housing officers to 'modify' the behaviour, through a combination of referrals to support and threats that the tenancy may be at risk—backed by warning letters, strikes, and applications for orders to comply with the agreement, and for termination orders. This may be a protracted process, or may escalate rapidly through threats to formal proceedings. In a few of the cases provided by stakeholders, we see termination sought, but with the offer of another tenancy in prospect. Other misconduct—in particular, use of premises for an illegal purpose, but also some cases of threats, injury, damage and nuisance—is responded to with termination proceedings, with no objective other than the termination of the tenancy and the exclusion of the tenant and their household from social housing.

In interviews we asked representatives of social housing landlords and tenant organisations for their perspectives on how these processes unfold.

4.2 Support and threats

The social housing landlord representatives (PHs) to whom we spoke indicated a general commitment to sustaining tenancies and working to prevent or ameliorate misconduct.

Our focus is on sustaining tenancies, not kicking people out, and we don't work from a punitive framework. (Tas PH).

As a landlord, we want behaviour to modify. (WA PH)

To that end, housing officers respond to complaints and other information about misconduct with an investigation that has dual purposes: discerning whether the tenant or a household member has any unmet support needs, and establishing whether there is evidence of a breach of the tenancy agreement. The emphasis of the response—on encouraging engagement in support, or on treating the matter as a breach and threatening consequences to the tenancy—varies from case to case and, more generally, between landlords and jurisdictions.

NSW Community Housing (CH), indicated that it was much more inclined to deal with emerging problems through referrals to support, and had specialist front-line 'engagement' officers who are 'very connected and make the appropriate referrals to youth agencies and other organisations'. In the NT, it appears that Public Housing Safety Officers are doing some low-key interventions in disruptive behaviour—such as knocking on doors and asking tenants to turn music down—and referrals, without escalating into further proceedings. Generally speaking, the public housing landlords closely combine referrals to support with intimations of threats to the tenancy. WA PH considered this was important in making the process certain:

The policy is designed to be a certain process, that can escalate, and without behaviour being modified, there's obviously a point where there's a negative consequence. And in housing, eviction occurs, and the negative consequence is people become homeless. And that's children, that's partners, that's family members, that's parents—elderly parents—siblings, we acknowledge that. It's not great. We make them aware of services that can support them—that means the process before eviction needs to be very strong on offering support, so only a small number fall into eviction. (WA PH)

Vic PH also emphasised the importance of invoking the obligations of the tenancy contract, and the consequences of breach, in constructing agency in the tenant as an imperative for them to control the misconduct:

[They] have at least some kind of control, or whatever control they can exercise, over their own decision-making. Knowing that there is this [obligation] in place, and this might actually be the end result if they do A, B, C and D and persist in doing A, B, C and D. I think that that's actually a positive thing. (Vic PH)

It appears that in most cases a single substantial contact between the social housing landlord and the tenant is sufficient to address a minor problem. Both social housing landlord and tenant organisation interviewees pointed to the substantial difference between the numbers of first strikes and second strikes issued in New South Wales and Western Australia. This does not prove the necessity of a regime that affords another strike and then termination, let alone the specific legislated effects of strikes on tribunal proceedings, provided for by the NSW RTA. However, public housing landlord interviewees, felt that three strikes, specifically, provided certainty:

We were previously criticised because tenants were not clear on consequences and did not take it seriously enough. So our process is certain and drives expectations and behavioural change. (WA PH)

'Three strikes' is about saying, 'here are the different types of behaviour as they are categorised legally, in terms of nuisance, minor things that are a breach of the lease, things that are minor and things which are pretty major kinds of activities.'... That structure and consistency is actually a very good thing because you're working with a group of people who are inherently vulnerable and it's good that they know what to expect: 'this is where the boundaries are. This is what moves you towards those boundaries' (Tas PH).

NSW CH, on the other hand, said while that the organisation had a formal policy about the use of 'strikes', per the NSW RTA, it never issued them. WA Tenancy Officers (TO) felt that the three strikes policy had produced a sort of engagement between housing officers and tenants that was too much geared to making findings of breach, and missed unmet support needs:

The Housing Authority officers who run those meetings tend to take a punitive approach, whereas we take a supportive approach, in terms of trying to understand what's happening in that family, what pressures they're facing. They're very much:

your tenancy, your responsibility; your actions, your responsibility. It's very much: 'Did you do this? Yes? Done—strike.' People will have their words used against them.
(WA TO)

For all of our interviewees, it was the cases that did not resolve in the first instance that occupied more of their comments—and more of their colleagues' time and efforts at work. All spoke about the problem of tenants who would not 'engage', either with the support services to which they were referred, or with the landlord itself, as it investigated complaints and the circumstances of misconduct. Tas PH saw it as a matter of escalating the breach process, to increase 'leverage':

The [housing officer] will use the eviction process as leverage to make the tenant either re-engage with... their support provider, or to force the support provider to re-engage with the tenant...It works because you are actually putting the tenant under pressure... you want the panic to drive them back to the support provider. (Tas PH)

WA PH also considered that 'people will only engage when the consequence is high enough'. However, the interviewee also went on to reflect on the quality of engagement this produced:

Lots of people engage, and our three strikes numbers show that they change their behaviour along the journey. But lots of people, right at the death knell, will do and say anything, and engage in any way to try to save the situation. Any housing person across the country—ask how many people [services] offer support to get a person housed, and how many are still there three months later. Without a contract of service in place. Everyone's prepared to do it, but then support falls away, because they've solved the problem of lack of housing. Same at the other end: the person is very focused—'oh shit, I need to do something'. That's human nature. (WA PH)

Vic PH said specialist officers could help where engagement had been difficult—but sounded a pessimistic note:

If a tenancy is starting to fail and the people actually don't have a lot of insight into why it's failing, there's not a lot for us to work with. So in those circumstances we would see if they'd work with our Tenancy Intervention Officer for a while to see if they have any luck in developing some awareness or making appropriate linkages and referrals into those services. So it just affords a little bit more time to be able to work and engage intensively with the tenant. (Vic PH)

NSW TO attributed poor engagement precisely to it being encouraged or pushed in combination with escalating threats to the tenancy:

Support in the face of eviction: you'll get people engaging with no attention of continuing—just to get out of the current situation. Some percentage will stay, but... If there was a way of getting it out of the shadow of eviction. We need a range of points to engage, and keep trying, because there will be different times for different people.
(NSW TO)

NSW TO and WA TO both saw a further problem with poor take up of referrals unfolding in a process that also investigated tenancy breaches: the failure to take up referrals itself comes to look like a breach:

Referrals are made only by the Housing Authority after the first or second strike. And people don't take up referrals..... My concern is that it doesn't work when there's a breakdown in relations between Housing and the tenant and it doesn't work in the really punitive space housing staff come from, that isn't facilitative of support.

NSW TO gave an example:

They [the social housing landlord] put some referral numbers in their letters: 'we've had reports of anti-social behaviour, partying, here's a number for an alcohol counselling service'. And they call that a referral and leave it on the tenant to follow up, however ham-fisted it was, and then use their failure later.

Vic PH and Tas PH also indicated a degree of fatalism about tenants who do not engage with support, and where the escalation of threats means 'going down the legal path':

We reluctantly go down the legal path. And we do that because ultimately there's no engagement or cooperation in what we're trying to do. (Vic PH)

It's like talking to the hand... There are tenancies, to be quite honest, where people just don't have the capacity to engage. They're in the depths of their stuff. And in those circumstances—it's a bit sad, but we really just have to run the tenancy out. (Tas PH)

4.3 Proceedings and termination

After a process of informal contacts, referrals to support and strikes, social housing landlords may apply to the court or tribunal (depending on the jurisdiction) for orders that the tenant comply with the agreement; this is particularly a requirement in Victoria, but may happen in other jurisdictions. More often, however, the proceedings taken will be for termination. Tas PH and Vic PH observed that in many cases the tenancy will terminate even before the court or tribunal application, when the termination notice is served:

In Tasmania there aren't many cases that get to the magistrate, as once tenants receive warnings, and then termination notices, they will leave without going to the magistrate. (Tas PH)

Generally speaking, there is a real criminalisation through going through the tribunal. People perceive going through the tribunal as being bad. You occasionally get people who stick up... that's not the majority. (Vic PH)

A social housing landlord might, in some cases, apply for termination, even though it might be contemplating settling on a compliance order, because a termination application keeps that option open too, in the event of non-engagement, or breach of the compliance order:

With some people, it doesn't matter how many times you say your tenancy is at risk, it is not until the tribunal, or you're outside having conciliation, that they get it. And that's OK, we can stop it there. It's when they don't turn up for tribunal—and you've had so much contact with them prior, reminding them, encouraging them, we do things like send an SMS the day before, the morning of the hearing, to remind them that it's really important to attend. It's important for a couple of reasons. It can be the first time in a long time that you've got an opportunity to eyeball somebody. But two: it's their opportunity to have their say and say why they are not liable. (NSW CH)

There might also be circumstances in which the landlord is prepared to offer the tenant another tenancy elsewhere, and will seek to terminate the current tenancy as 'leverage' on the tenant to accept it. Mostly, though, as NSW CH put it:

By the time it gets to tribunal, it's pretty grim. (NSW CH)

As well as termination proceedings that follow from more or less protracted processes, there are also proceedings for termination taken as a rapid escalation of response—particularly to a

threat, injury or damage—or as the first and only response to apparent use of the premises for an illegal purpose.

Termination proceedings for illegal use are most often initiated after the receipt of information from police about a criminal charge being laid (although in a couple of cases we reviewed, landlords commenced proceedings after reading about an arrest in the local press). Most social housing landlords have information sharing arrangements with police that facilitate their taking termination proceedings without the need for making their own investigations or collection of evidence, such as in prior complaints or evidence from neighbours. Although they are commenced as a consequence of criminal proceedings, and rely on police information, these termination proceedings are taken according to social housing landlords' own agenda. These vary between jurisdictions and landlords—for example, in NSW, FACS Housing takes a hard line on drug offences and has taken proceedings not only against supply, but against high-level use; while NSW CH said that it decided on a case-by-case basis. WA PH described the Housing Authority's view of 'zero tolerance' applying to drug dealing, manufacture and related disturbances, but not drug use per se:

Zero tolerance is not about use—it's about dealing, manufacturing. We're ambivalent about use...Unless its spilling out—needles everywhere—we don't know about it. But if there's disruption, regular visitors, we'll deal with it. (WA PH)

Where illegal use termination proceedings run ahead of the criminal proceedings, as they often do, social housing landlords will usually press for termination ahead of sentencing or, for that matter, a verdict. In Tasmania and Western Australia, public housing landlords have lately, in some cases, been switching to no-grounds termination proceedings to avoid the need for proof and the prospect of discretion being exercised against termination:

We need to prove the offending, which is usually done in the criminal proceedings. But they can go on for years. So, in minor charges, we may wait. But for large scale offences, we may use no cause proceedings. That's based on public safety, and community expectations. (WA PH)

Where the criminal proceedings have been completed, social housing landlords will also generally press for termination, even if a non-custodial penalty has been imposed and, in some cases, where charges have been dropped or dismissed, where the criminal justice system has seen fit to allow the tenant or occupier to remain in their home:

When the court comes up with home detention or whatever, for us that's not an issue. The expectation there [on the part of the court] is that they [the offender] are managing. But, for us, we have an expectation that they are complying with their tenancy obligations and engage with support if necessary. (WA PH)

Whether a tenancy is terminated by the court depends, first, on whether the social housing landlord has proved the ground (if any) for termination. This is generally more contentious in nuisance and threat cases, which rely on a range of types of evidence, including neighbour complaints, than in illegal use cases, which rely on information from police and courts and for which courts and tribunals have taken an expansive interpretation of 'use'. Termination then depends on the exercise of discretion, if any is afforded by the Act—and, as discussed in the previous chapter, where it is afforded it is often structured or restricted. WA TO gave an example of the importance of discretion—which, in Western Australia, is part of breach termination proceedings, but not no-grounds proceedings:

In breach, you've got to show breach justifies termination, so that brings in domestic violence, mental health, kids' schooling, efforts to rectify or engage with support. In breach proceedings that's all considered, and we have a pretty good strike rate; we reckon advocates get about 40–50 per cent of cases settled before going to trial. But

in 'no-grounds', unless you're arguing retaliation, there's no real defence to run. (WA TO)

If a tenancy is terminated through tribunal proceedings, generally speaking, that is it—the tenant and their household is evicted. There are exceptions among the cases we reviewed, and a NSW TO also spoke about last ditch attempt to save tenancies:

Sometimes there is still capacity to save the tenancy. Depends how much time is given. Sometimes Housing will still enter into an agreement. More often they're evicted, and then it's about what classification [as a former tenant] they get. One resolution worth having in there is transfer, especially for lower level stuff. Having that on the table throughout: 'you can transfer, or we'll evict'. (NSW TO)

In most cases, however, eviction proceeds, without further assistance:

Bear in mind when it gets to that point your opportunity for contact with the tenant drops away—they don't answer phone calls, they don't respond to SMSs, it becomes more difficult to have conversations. But we provide info on temporary accommodation, ask if they have any plans. (NSW CH)

No, it [arranging alternative accommodation] is not our role.... Housing Connect is actually the front door and people need to go there to talk about alternative accommodation options. (Tas PH)

We've gone to eviction, remember, because they haven't engaged. So we don't really have that relationship with them. (Vic PH)

We don't have any responsibility to follow up. Once that legal relationship [is over], we don't have a responsibility for them. (Vic CH)

If you're evicted, you're on your own. You're on your own. (Vic TO)

4.4 Influences on responses to misconduct and termination proceedings

We asked stakeholders about factors, beyond the content of policies and legislation, that influence practices around responding to misconduct and taking termination proceedings

All of the stakeholders were conscious, first and foremost, of the historic change in social housing's clientele, and the increased prevalence of complex needs, particularly in relation to mental illness:

There is usually some very genuine and very real and difficult issue at the core. Clients with ongoing mental health issues who drift in and out of the mental health system... we see it in younger single people. We see it older single people. We see it in family units.... The complexities of family units and it doesn't take much for things to unravel. (Vic PH)

Stakeholders were also conscious of the material limits of the present social housing system to prevent things from unravelling and problems from escalating. Some social housing landlord interviewees pointed to high-density congregated social housing, built historically for a different clientele, as a particular problem in concentrating households with problems and making them more visible and audible. On the other hand, low-density estates were seen as contributing to problems too, by concentrating disadvantage and presenting property care challenges that brought households into conflict with each other and their landlord. To complete the conundrum, NSW TO observed potential problems with social housing distributed through neighbourhoods

of privately-owned properties, where owners resented the social housing and social housing landlords were sensitive to complaints. Similarly, WA PH acknowledged the sensitivity around placement and 'integration':

For every tenant who gets attention in the media, it is far harder to integrate the other 40,000 public housing tenants in the wider community. It disenfranchises them, because of negative perceptions of the small minority [of tenants]. We have to work 100 times harder, to integrate... and we still get from the community 'we don't want social housing in our area'.... If we don't get it right, they'll ostracise us further.
(WA PH)

Underlying these different specifications of the problem is the marginalisation of social housing as a tenure relative to the rest of the housing system. The general lack of social housing stock also inhibited transfers, which might otherwise be a more widely used response. Tasmanian interviewees suggested that the shift to a multiple-provider social housing sector—of more social housing landlords, each with smaller portfolios—further restricted against transfers.

Another aspect of social housing system change, less obvious to the public eye than its built form, is its increasing organisational integration with community services. While one of the express purposes of this move is to better integrate the delivery of housing and other support to vulnerable households, some interviewees saw problems with too close an integration, such as conflicts of interest, lack of trust by tenants, and more barriers to 'engagement'. On the one hand, Vic PH suggested that many tenants would not trust their landlord to be a point of engagement for support:

A lot of people don't like to disclose to their landlord about their personal things. They see it as a very legal relationship, and all their support needs they see are just about separate to that. (Vic PH)

And on the other hand, Tas TO saw client trust in a support service provider impaired, because of its connection to their landlord:

Because the [support] service provider is funded by the housing provider and they have reporting obligations go them, this can cause a conflict of interest. They literally have to put into their housing system the work they're undertaking [with the tenant] and what's going on in the tenancy—for example, if a client is working with [a support worker] and thinking about going into rehab but may be also dealing with tenancy breaches. The provider might be assisting the person to do this [go into rehab] but if they decide not to do that, that goes onto the [housing] record. Housing will know that, and Housing can say, 'they're not interested in rehab'. [You] have to be careful what you say because it ends up on the housing system. (Tas TO)

Although interviewees saw misconduct, and their responses to it, as heavily influenced by structural or systemic factors, they also indicated that substantial changes to policy and practice could follow from the agenda of state executives, or leaders and workers within social housing agencies:

The state housing authority gets pushed around primarily by government in its overall role. So, 10 years or maybe 15 years ago in the ALP government that existed at that time, there was a lot of emphasis put on sustaining tenancies. So, that changed the culture at a higher level within the department for a little while. The government changes, they revert back to being a transactional landlord, that means the eviction processes speed up and they decide to get more punitive. (Vic TO)

The experience of both New South Wales and the Northern Territory over the last two decades shows, however, that policy and law changes to 'get tough' and facilitate terminations are not

the exclusive preserve of one side of politics. The Northern Territory provides a recent example of a government shifting course from a more disciplinary, exclusionary policy setting, through the adoption by the executive of an objective to reduce the use of strikes and termination proceedings, and the development of a more low-key approach by PHSOs. In interviews, both NT PH and NT TO indicated that the use of termination proceedings as a response to misconduct was reduced.

4.5 Summary

Social housing landlords respond to a wide range of criminal offending and antisocial behaviour, typically first with attempts to engage the tenant in support and intimations of threats to the tenancy. A single substantial contact between the social housing landlord and the tenant appears, in most cases, to be sufficient to address a minor problem. More time, however, is spent responding to continuing problems, where unsatisfactory engagement and escalating threats often result in termination proceedings. In cases involving drug offences, social housing landlords typically take a 'zero tolerance' approach and seek termination, without 'engagement'.

Where a tenancy is terminated, eviction usually follows. Typically, 'engagement' is by then lost, and so too is the prospect of further housing assistance.

5 Social housing misconduct practice: vulnerable persons and families

There is a significant gender dimension to social housing legal responses to misconduct.

Social housing landlords generally have a strong commitment to assist women affected by domestic violence into safe housing. However, this commitment may falter as violence becomes framed as ‘nuisance’ in tenancy legal proceedings. Some women are evicted because of violence against them.

Tenancy obligations and extended liability—and social housing landlords’ use of them—impose hard expectations that women will control the misconduct of male partners and children.

Social housing landlords typically make additional efforts where termination proceedings would affect children, but their interests are a marginal consideration in the determination of proceedings.

Indigenous persons and families often present complex personal histories, institutional contacts and interpersonal relationships, shaped by past and present institutional racism and colonialism. Specific Indigenous officers and advocates best navigate this complexity.

Responses to misconduct relating to alcohol and other drug use are not expressly guided by harm minimisation. Criminal offences, especially, elicit punitive termination proceedings.

This chapter focuses on the practices of social housing landlords in New South Wales, Tasmania, Victoria, Western Australia and the Northern Territory as they affect four types of vulnerable persons and families: women (particularly as they are affected by male misconduct and domestic violence); children, Indigenous families, and persons who problematically use alcohol and other drugs. It does so through a close reading of our 95 cases, of which 18 are summarised, and discussion of our interviews with social housing landlord and tenant organisation representatives.

5.1 Women

The cases suggest a significant gender dimension to social housing landlords’ responses to misconduct—while the misconduct to which social housing landlords respond arises mostly from males, the legal proceedings they take are often against women. Of our 95 cases, 59 involve a woman as the tenant. Of these, 20 cases involve a woman who has experienced, or is experiencing, domestic violence. In 10 cases, the domestic violence is part of the misconduct at issue in the proceedings. A larger number of cases—34 of the 59—involve misconduct (not specifically domestic violence) arising wholly or partly from the actions of a male occupier. To a significant extent, the misconduct and domestic violence cases overlap: 16 of the 34 cases involving male misconduct are also cases where the woman has experienced domestic violence.

As we discussed in Chapter 1, our sample of cases cannot be considered statistically representative, but it is suggestive, particularly if we look at the 67 tribunal cases (i.e. before we selected for our four vulnerable types). Twenty of the 67 cases involve proceedings against a female tenant for misconduct arising wholly or partly from a male occupier; none involve proceedings against a male tenant for misconduct wholly or partly by a woman.

As much as these cases are responses to misconduct, they are also responses to relationships between women and males—mostly partners, in a few cases adult male children. As such, they can be considered as attempts to require women to conduct their relationships to particular ends, and impose consequences on women where they do not. This raises troubling questions as to the assumptions made by social housing landlords, and the laws and policies under which they practice, about what women are expected to do to control male conduct, and the extent to which they will be regarded as culpable if misconduct occurs.

The female tenant cases also intersect significantly with other types of vulnerability—36 also involve children; 13 involve Indigenous families; 25 involve a household member problematically using alcohol and other drugs. Overall, all but six of the 59 cases fit one or more of our four types of vulnerable persons and families.

5.1.1 Domestic and family violence

The 20 domestic violence cases include cases where it is evident that a woman is currently experiencing violence (14), or has experienced violence in the past (6)—though in these past cases, there is often a strong sense that the experience has a persistent effect.

Where domestic violence is a present issue, most of the stakeholder cases show social housing landlords making sympathetic responses trying to link tenants with support services and offer safer alternative housing. These include DSA's case (Box 1), where the social housing landlord detected a situation of domestic violence and made available alternative housing that enabled the victim to leave.

Box 1: DSA's case

DSA lived in public housing in New South Wales with her male partner and three children—a daughter and son in their twenties, and a 15-year old daughter. FACS's Child Protection Unit alerted FACS Housing that it understood that DSA and her younger daughter were subject to domestic violence from her partner and the two older children.

At DSA's request, FACS Housing provided temporary accommodation and then a new tenancy to DSA and her younger daughter. FACS Housing also informed the now former partner and adult children that the first tenancy would be terminated, and offered them assistance in finding private rental housing. FACS Housing then applied for and received termination orders (NSW RTA section 95).

In CKD's case (Box 2), there were repeat instances of such assistance from a public housing landlord over a period of years.

Box 2: CKD's case

CKD had a public housing tenancy with her partner and infant daughter in the Northern Territory. CKD sought a transfer because of domestic violence, and a new tenancy was commenced. In the second tenancy, CKD's partner returned to the household, rent arrears began to accrue, and violence began again. The landlord arranged to change the locks, and then a transfer. In the third tenancy, neighbours made complaints about anti-social behaviour by CKD, rent arrears began to accrue and CKD abandoned the tenancy.

Six years later, CKD commenced a fourth public housing tenancy. Rent arrears accrued and, in response to complaints about anti-social behaviour, PHSOs attended, the landlord issued a 'strike', and a referral was made to a mental health crisis team. Subsequently, CKD's daughter was removed from her care, and CKD hospitalised. Over the next 12 months, the landlord recorded three episodes of call-outs by PHSOs and police, threats by CKD against neighbours and the landlords' contractors, further strikes and a second hospitalisation. Finally, after more neighbour complaints, and CKD allegedly attempting to assault the landlord's staff, the landlord sought termination for nuisance. The tribunal terminated the tenancy and CKD was evicted.

CKD's complex problems required a range of integrated supports, and it appears the lack of integration and effective assistance from other services was felt long before her last public housing tenancy was terminated. Similarly, DLP's case, (Box 3 below), shows a social housing landlord registering that violence may be occurring, and trying—unsuccessfully—to engage the tenant with other services for assistance.

DLP's case also shows, though, how the social housing landlord's position as DLP's landlord bears on its attempts to engage. This is an example of the difficulty, noted by interviewees in the previous chapter, of engaging in the shadow of tenancy legal proceedings, and especially as matters proceed through the tribunal. It is also notable that the proceedings, to begin with, are about property care and rent arrears, but ultimately the domestic violence itself figures in the circumstances for the landlord in seeking termination.

Box 3: DLP's case

DLP lived with her three young sons in community housing, and her file recorded that she was in contact with a domestic violence service regarding past domestic violence. At a property inspection, a housing officer observed that a male partner was now occupying with DLP, and he 'did all the talking' while she appeared distant. A number of property care problems were recorded. Over subsequent months, requests for maintenance indicated further property damage, and DLP asked for referral to support services because she was 'struggling'. The landlord made a referral but, on following up with the service, found that DLP had not engaged. The landlord subsequently gave a termination notice for breach (failure to keep premises clean and undamaged, and having an unauthorised occupant); the tribunal made a specific performance order regarding property care and access to do repairs.

Over the next 12 months, the landlord recorded that DLP had another baby, that her partner was gaoled, then bailed to return to the premises, and further property care problems occurred. The landlord made further referrals to support services, including one at DLP's request, but follow-up indicated that she did not engage. The landlord also reported concerns about DLP and her children's care to NSW FACS. Six months later, the landlord recorded numerous complaints from neighbours and the local Member of Parliament about nuisance, including property care, DLP and her partner screaming at each other, and the partner making threats to neighbours. Rent arrears began to accrue, and the landlord issued a termination on that ground and property care breaches. DLP advised two of her sons had been removed from her care, and she was also pregnant again.

The tribunal terminated the tenancy, with possession orders for three months hence. In that time, DLP's partner has attended the landlord's office and threatened staff and neighbours. DLP had also made verbal threats. Eviction is pending.

Reading DLP's case there is a suggestion that her not engaging with support services, after repeated referrals, represents a failure on her part—that she has not kept up her end of a bargain. This is not to suggest callousness on the part of the landlord in DLP's case, but to observe how the landlord-tenant relationship—as a contractual relationship, of agency, rationality and reciprocity, and with specific prescribed obligations—can structure thinking and responses to domestic violence.

It is not only housing officers who are implicated in this structuring or framing: in DLP's case, it is also the neighbours and the local MP who, in complaining to the landlord, have framed domestic violence as 'nuisance' and a breach. Court and tribunal members also frame domestic violence as nuisance and breach, and obscure violence, as in VWM's case (Box 4 below).

Box 4: VWM's case

The Victorian DHHS sought to terminate VWM's tenancy, having first sought and been granted a compliance order, for nuisance. The compliance order required that VWM and her visitors 'immediately stop... all yelling, screaming, making loud noises, fighting and using threatening and abusive language'. The termination proceedings documented not less than a further similar 19 incidents, including through police reports and CCTV footage. These incidents involved VWM, a man described as her partner (a visitor), and occasionally another male visitor, screaming at and fighting each other, and screaming at and threatening neighbours.

Across the two sets of proceedings, it was common ground that VWM had an acquired brain injury, a cognitive disorder, mental illness and a substance use disorder. The tribunal summarised VWM's testimony about her relationship with her partner: 'She said that a lot of the evidence presented related to her partner... over whom she had no control. There was a history of domestic violence, with [her partner] hitting her only two weeks previously.' VWM also testified that her partner had recently been assessed by a mental health team and was receiving support, and that she was receiving support through the NDIS. VWM's disability support worker confirmed this, but also indicated that VWM was at a 'contemplative stage' in discussions about her behaviour, and that 'any improvement was likely to take months, perhaps longer'.

The tribunal terminated the tenancy, holding that the breach was established and none of the criteria for declining termination were made out.

VWM's case is one of three tribunal cases that refer to 'screaming', 'swearing', and 'fighting' between female tenants and male occupiers and visitors; it is the only one of the three in which the tribunal refers expressly to 'domestic violence', but even then the reference is oblique. The decision acknowledges a 'history' of domestic violence—even though this 'history' is an event of just two weeks before—but nowhere in the lengthy description of incidents and findings of breach are these incidents called acts of domestic violence against VWM. The result of the proceedings is that VWM has been held liable for violence against her, and lost her tenancy because of it.¹⁶

In interviews we asked stakeholders about the framing of domestic violence (DV) as a housing problem and, specifically, as a tenancy breach. WA PH acknowledged that 'DV is a real challenge' and then, in reflecting on the challenge, gave a clear account of how domestic violence is framed as nuisance as a practical matter of receiving complaints, gathering information and operating as a landlord:

Fighting, arguing, violence and associated behaviours clearly have a negative impact on neighbours. If there's no intervention, who is to know or determine what is DV? If there's no police reports, if the partner is not putting their hand up to seek support—if all you're hearing is complaints from neighbours? It is difficult to extract that information, if people are not putting their hand up for support. There's not a lot we can do, as a government agency or as a property manager. (WA PH)

¹⁶ It should be noted that the recent amendments to the Vic RTA may produce a different result in cases like VWM's, because notices to vacate for breach and other grounds caused by perpetrators of domestic violence may be invalidated (new section 291ZZU). However, that different result would also depend on someone in VWM's position making a timely application to the Tribunal for an invalidation order—which may provide to be an unduly restrictive requirement.

There's other services, and we support them: refuges, counselling services. They can respond if eviction eventually does occur, and eviction might create the circumstances where separation is possible. (WA PH)

Vic CH indicated a conscious, even enthusiastic, framing of domestic violence as a breach of the victim's tenancy agreement:

Breaching is a really great way to try and get the person at the table who may be experiencing the violence.... As a landlord we have to, because if it's disturbing other tenants et cetera, they also have a right to peace and quiet and enjoyment of the property. (Vic CH)

They also admitted 'this is where it's complicated'. NSW CH, on the other hand, resisted this framing, but admitted that not all officers did so:

For me it's a no-brainer, but it's not a no-brainer for everybody. My position is really clear, and the majority within this organisation, but there are still some people who see it differently, in black and white: 'our contract is with the tenant, if she happens to be a victim, there you go'. But we're countering that constantly, and we're becoming better at it. (NSW CH)

NSW TO said that the public housing landlord in New South Wales had 'an overarching philosophy around not wanting to disadvantage victims of DV, but it doesn't always work in practice'. This was because of the problems of engaging in the context of threats to one's tenancy, and of lack of trust, heightened by the feeling of being unsafe:

One of the big barriers is that people have to bring it up: 'I've been accused of this behaviour, did you know it's actually coming from this guy'.... So that's a barrier to the implementation of that. The woman has to be willing and able—to feel safe, I suppose—to disclose, to get the benefit of FACS's more sympathetic response. (NSWTO)

WA TO made a stronger criticism, describing a 'victim-blaming approach' in the Housing Authority:

They have an expectation.... 'she should get a restraining order', or 'she should report it to the police, and if she's not, she's not really taking steps and she needs to be responsible for what's going on'. (WA TO)

In six cases there is evidence that the tenant is not currently experiencing domestic violence, but had in the past. In MGN's case(Box 5 below), the experience appears to be a factor in a series of traumas, and in her present misconduct—verbally abusing the public housing landlord's officers.

Box 5: MGN's case

FACS Housing applied to terminate MGN's tenancy for threatening and intimidating behaviour when its officers attended MGN's dwelling. This followed numerous complaints made by housing officers over the four years of MGN's tenancy about her abusive behaviour, such that it had become, according to the landlord's submissions to tribunal, 'a normalised pattern of expected behaviour by [MGN]'.

MGN is a single mother of three young children: one lives with his father; the other two had lived with MGN, but had been removed from her care by FACS 18 months previously. MGN had experienced domestic violence in her childhood, and as an adult from her ex-partner, and tendered medical evidence of post-traumatic stress disorder. MGN testified that she was 'really sorry [she] blew up' at the attending officers, and explained that their attendance recalled the removal of her children and was traumatic for her. She also testified that if evicted she would be homeless.

The tribunal terminated the tenancy in the first instance, but this was appealed on the ground that the tribunal had not considered prescribed factors. At the first hearing of the appeal the termination order was stayed, on account of MGN's PTSD and that she would otherwise be homeless, although the Appeal Panel also noted evidence from FACS Housing that MGN had made threats against a FACS officer in the initial proceedings. The determination of the appeal is pending.

Housing officers are entitled to safety in their own work and lives, and on MGN's admission she had behaved regrettably. This appears to be the sort of case described by interviewees in the previous chapter, where there is a last-minute engagement with support spurred by the tribunal hearing, with doubtful prospects of following through; however, it is also a case of trying to get engagement in the shadow of termination proceedings—and, in this particular case, of traumatic child protection proceedings as well—even as there are some small indicators of opportunities for extending assistance (MGN's diagnosis, her previous contact with counsellors) that might have been activated in a less pressured process.

There are also cases where past experiences of domestic violence come up not as a factor in the misconduct by the tenant herself, but misconduct by a male occupier. These and other male misconduct cases are discussed below.

5.1.2 Male misconduct

Aside from (and partly overlapping with) cases that frame a woman's experience of domestic violence as a breach of her tenancy agreement, there is a larger group of cases that involve women being held liable for other forms of misconduct by males. These cases raise similar questions about what women are assumed and obliged to do in relation to male misconduct. One is EQT's case (Box 6 below).

Box 6: EQT's case

FACS Housing took proceedings to terminate EQT's tenancy for use of the premises for an illegal purpose after her then-boyfriend, who did not live at the premises, was charged with drug offences. The boyfriend was detected by police after having conducted, over a period of two weeks, about 20 small (\$10–\$20) marijuana deals to friends in EQT's backyard and adjoining alley. EQT was not charged and cooperated with the police investigation. She ended her relationship with the boyfriend after his arrest.

EQT is an Aboriginal woman, a single mother to four children aged between four and 11 years, and has been a public housing tenant since the age of 17. A survivor of domestic violence in a previous relationship, EQT had had problems with depression. She described her relationship with the boyfriend as 'just seeing each other', and stated that she knew he sold marijuana to support his own habit, and that they had previously fought about his selling drugs. She also tendered a statement from the school about the improved engagement of her children there, and testified that she was a 'wreck' at the prospect of losing her tenancy.

The tribunal held that an illegal use of the premises was established: 'The tenant's culpability was that of a passive bystander. Although she was not actively involved in the drug transactions, she permitted [the boyfriend] to use the residential premises for this purpose.' The tribunal then terminated EQT's tenancy. It did so in accordance with a judgement of the District Court—overturned subsequent to the decision in EQT's case—which held that the NSW RTA provided no discretion in direct application of illegal use cases involving drug supply offences (section 91(1)(a)). The tribunal added that had it had discretion, it would have exercised it to decline termination.

This is a wretched case for numerous reasons—the minor nature of the offence; the absence of criminal culpability on the 'passive bystander' EQT; the worrying prospects for her children, and for EQT herself, on eviction; and the controversy in legal interpretation about the tribunal's discretion. For present purposes, we focus on the standard of behaviour and decision-making demanded by this application of the terms of a tenancy agreement and other provisions of the law. It appears that on becoming aware of her boyfriend's dealing, EQT ought to have immediately determined that she needed to act, that this must result in either his cessation of his dealing, or else his removal from the premises, and give effect to this course of action. And that neither her past experience of domestic violence, or depression, or her feelings for her boyfriend, should impair the immediate formation of this plan of action, or its execution. No-one outside of a social housing tenancy is expected to conduct their personal relationships in this way, or to assume such a level of responsibility for preventing other persons' misconduct.

AEL's case (Box 7 below) is another example of a female tenant being held liable for 'permitting' male criminal offending. In this case, the tribunal expressly indicated how the tenant should have conducted her relationship in order to comply with the terms of the tenancy agreement, and AEL gives some insight into the difficulty of living with an offender.

Box 7: AEL's case

FACS Housing took proceedings to terminate AEL's tenancy for use of the premises for an illegal purpose after she and her partner were charged with drug supply offences. At her arrest, while police conducted a search of her premises, AEL was recorded saying to police: 'I have nothing to do with my husband's business' and 'if I show you where it all is you'll make my life easier and just go away after youse find it all'. At the time of the proceedings AEL had been acquitted, and the charges against her partner were still proceeding.

The tribunal terminated the tenancy, holding that the ground was established twice over—by the partner's act of storing drugs at the premises for sale elsewhere, and by AEL in 'permitting' such an act. An appeal against the order was dismissed, with the Appeal Panel upholding that use of the premises was made out and observing that 'the terms of the statute... may be said to operate harshly where the drug-related illegal use of the premises on the tenant's part is relatively minor'. It then suggested 'if [AEL] can establish to the satisfaction of [the landlord] that hereafter she will occupy the premises as a single woman in accordance with the terms of the tenancy, [the landlord] might be minded to reconsider its position in respect of enforcing the order for possession'. It is unknown whether AEL or FACS Housing took up the suggestion.

Both cases show the social housing landlord, and the tribunal, using termination proceedings to give effect to an assumption that women should immediately and decisively use their relationships to stop male offending.

As well as illustrating assumptions about women, the cases prompt a further question about male misconduct itself. While policy frameworks to address violence against women properly encompass physical violence, verbal abuse and behaviours that isolate, control and coerce women, they appear not to speak directly to the sort of indifference to risk that is evident in cases like EQT and AEL—indifference by males to the risks their behaviour poses to women, particularly in circumstances where there is such highly charged attention to rules as in social housing. We are not suggesting that this sort of behaviour is equivalent to violence, although it may be considered oppressive and, as the cases show, may result in substantial harm or detriment.

5.1.3 Women as mothers and carers

There is a final group of cases involving women tenants that should be mentioned, because they suggest another gendered impact of social housing misconduct proceedings—on women as carers. As noted above, in 34 of the cases of proceedings against a woman—i.e. more than half—the woman is also a mother with the care of dependent children.¹⁷ In three cases, the woman is carer to an adult with a disability. In a large minority of these cases (14), the misconduct is attributable to the tenant herself, not a male. For these women, caring obligations magnify the impact of termination, in terms of the onerousness of the task of finding alternative accommodation and, in a personal sense, a sense of failure to properly care. PCA's case (Box 8 below) is an example of this.

¹⁷ By contrast, of the 35 tribunal cases involving male tenants, only two involve children living full-time with the tenant.

Box 8: PCA's case

FACS Housing took proceedings to terminate PCA's tenancy for use of the premises for an illegal purpose, after PCA pleaded guilty to offences relating to the supply of cannabis (about 70 grams) and dealing with the proceeds of crime. PCA had received a four-month suspended sentence and a three-month good behaviour bond.

PCA is a 79-year old woman, and had been a public housing tenant for 30 years. She is also the carer of a 59-year daughter who has cerebral palsy, and had cared for a second daughter who had recently died. In the months before her death the daughter used cannabis to relieve her pain, and PCA testified that it was her daughter's unused drugs that she had sold. She testified that termination of the tenancy would place at risk her surviving daughter's employment placement, and they had no alternative accommodation. She also testified as to her regret and humiliation, not only as a result of her sentence, but from media reporting of her case.

The tribunal terminated the tenancy.

Some of the stakeholder cases show rather more consideration given by social housing landlords themselves to women's caring responsibilities, particularly where young children are involved, in additional efforts to engage other support services and make further offers of housing assistance after termination. However, as we discuss below, the cases involving children also show problems in law, policy and practice.

5.2 Children

Forty-five of our cases (25 tribunal cases; 20 stakeholder cases) involve households that contain dependent children (under the age of 18). Perhaps the most striking thing about the cases is how often they culminate in termination of the tenancy: 22 of the 45 cases—15 of the 25 tribunal cases—end in termination orders.

5.2.1 How children are considered in termination proceedings

Children are considered in termination proceedings in different ways. In some, it is a child's misconduct that gives rise to the proceedings, as in TRB's case (Box 9 below).

Box 9: TRB's case

The Victorian DHHS sought to terminate TRB's tenancy for nuisance arising from the behaviour of her 13-year old son. Under a previous compliance order, the son was required not to abuse neighbours or damage the property of neighbours or their landlord, and TRB was required to make 'every reasonable attempt...to supervise [her son] whilst he is outside the rented premises'. The son was subsequently placed in out of home care, with arrangements to occasionally stay with TRB; on several occasions he also absconded to return home, and on these occasions stole cars in the neighbourhood.

TRB testified that she did not know about the absconding or, until interviewed by police, the stolen cars. The tribunal held that this did not indicate reasonable supervision by TRB. 'Whilst the Tribunal acknowledges the strong desire and commitment of the tenant to support her son, and recognises the profound sadness that accompanies her son's placement into Residential Care—the evidence before me is that neither she nor [the son] has remedied the breach. The breaches have continued despite the severe steps imposed to restrain [the son's] actions.' The tribunal terminated the tenancy.

In these cases, parental responsibilities for children's care and supervision become overlaid with tenants' extended and vicarious liability under tenancy law. In so doing, difficult relationships between parents and children become burdened with contractual assumptions about agency and voluntarily-adopted obligations. This does not admit that some children are not so easily controlled or excluded; even in the unusual circumstances of TRB's son being placed in care elsewhere, his misconduct was still held to be a breach of TRB's contractual duty to supervise. As with women whose partners engage in misconduct, tenancy law can be used by social housing landlords to impose tough demands on parents, and especially mothers.

In other cases, children's behaviour is not very notable, other than as an additional stressor in a household that is struggling across a number of fronts. One case, for example, has the Victorian tribunal summarising the evidence of nuisance and noise at the premises as 'variously, due to the tenant's old car, the steep hill on which the premises were located, marital issues, children's exuberance, grief and stress'. More often, children appear in the cases as bystanders, who have not contributed to the cause of the proceedings, but whose housing is at stake. These cases include EQT's, already discussed (Box 6), and HHT's (Box 10) below.

Box 10: HHT's case

FACS Housing sought to terminate HHT's tenancy after he and a friend were charged with drug manufacture offences. At the time of the termination proceedings HHT was defending the criminal charges. HHT testified that he had allowed the friend, a fellow veteran who was otherwise homeless, to stay temporarily in the garage; that he did not know about the friend's clandestine manufacture of methamphetamine; and that when he became suspicious of the friend's activities he asked the friend to leave. The arrests came shortly after.

HHT lives with his wife and their three daughters, aged 19, 10 and eight years. In the first instance, the tribunal terminated HHT's tenancy, stating that 'the Tribunal accepts that any move from the residential premises may cause hardship to the three children. The Tribunal accepts that they go to school close by to where they live. However, there is no evidence before the Tribunal that the termination of the tenancy would result in undue hardship to the children'. This decision was appealed and remitted to be decided again, but the appeal did not turn on the consideration given to the children.

The tribunal's consideration, according to the legislatively prescribed criteria, as to whether the hardship of eviction is 'undue'—or, by implication, 'due'—falls well short of the principle of the best interests of children. This theme runs across all the cases involving children—the tribunal sometimes hears evidence about children's schooling and other connections to their neighbourhood, but it is a marginal consideration.

Generally, our interviewees indicated that particular consideration was given by social housing landlords to children in decisions around responses to misconduct, but the degree of consideration varied between jurisdictions and between types of misconduct. Victorian interviewees highlighted the Human Rights Charter as an influence, though it did not stop terminations involving children absolutely:

It's incredibly rare that we proceed with an eviction with children, unless it's arrears... or some particularly egregious disturbance to the neighbourhood. However [in those circumstances] we will go ahead, despite awareness of human rights legislation. (Vic CH)

In other jurisdictions, social housing landlords suggested that additional, but not unlimited, consideration and effort regarding children was part of their ethos:

It [presence of children] does impact—it is part of the assessment. And if we're terminating a tenancy, you can almost guarantee that we're exiting a family into homelessness. So that's why we do it the way we do it, and it's not until we feel we cannot do anything else that we do it. And it's awful. It's an awful position to be in. (NSW CH)

When a huge effort has not resulted in any response, that [eviction] will happen. (NT PH)

In NSW TO's experience, social housing landlords were unlikely to treat as a breach misconduct by young children, but did respond to teenagers' misconduct as a breach. NSW TO also felt that children receded from view when FACS Housing was taking proceedings against parents and carers:

No, in terms of holding people responsible or evicting people, I don't think they take that [the presence of children in the household] into account. It feels like FACS, bizarrely, and the Tribunal, less bizarrely but they should know better, tend to think of [private] tenancies as things that are easy to get.... They appear very nonchalant about the impact of eviction. (NSW TO)

5.2.2 The child protection connection

In a few cases there is an express reference to child protection concerns or actual proceedings. As indicated in the previous chapter, one case—the only one of its kind—involved illegal use termination proceedings being taken against a tenant for allegedly harbouring a child in contravention of a protection order that would have placed the child in the custody of a child protection officer; the termination proceedings were dismissed because it appeared the order had yet to formally take effect at the time of the 'harbouring'. In a number of cases, such as those of MGN and TRB, children are currently absent from the household, and what is at stake is a home to which they might return, and hence the reunification of the family. In another case, a social housing landlord appears to have waited until children were removed before taking termination proceedings on grounds of damage; in that case the tribunal declined to terminate, primarily because the damage was historic and not continuing, but also with a view to the tenant regaining custody of her children in the home.

In interviews two social housing landlord representatives reflected on child protection in the context of termination proceedings. What they describe is consistent with the established policy settings criticised in the National Framework, with an over-stretched statutory sector struggling to deal with the very worst cases:

It is a real challenging one. We're now in a human services agency with child protection. We've always had referral arrangements to ensure children at risk of eviction are referred to appropriate agencies. Whenever we issue a strike or escalate a termination process, there's always a referral process to a child protection agency where children are involved. However, the dilemma often is, in the tension in government policies and resource allocation, the risk doesn't happen until the child becomes homeless, after eviction. (WA PH)

We'll make a mandatory report to FACS. I don't know [that that does anything]. Maybe if the family is on their radar. That's what we do. (NSW CH)

In the National Framework's 'public health' model of child protection, housing is one of the universal needs that forms the primary line of prevention of abuse and neglect, with social housing landlords also positioned in the secondary line of preventative responses to families and children who require additional assistance. Social housing landlords are generally committed to this role, but where problems arise, responding as a landlord can impose hard

expectations as to what tenants can do to control children, or to adequately provide for them when evicted as a consequence of their own misconduct.

5.3 Indigenous persons and families

Seventeen of our 95 cases involve Indigenous tenants. All but five involve female tenants, and most of those (7 of 12) disclose an experience of domestic violence. All but four of the 17 Indigenous tenant cases also involve children.

The misconduct in the cases ranges from the most minor—in particular, EQT’s case (Box 6 above)—to some of the most urgent, alarming and violent. CKD’s case (Box 2 above), is one example; SWJ’s case (Box 11 below), is another. Across the range, the cases about Indigenous persons and families often involve strikingly complex personal histories, institutional contacts and interpersonal relations, shaped by past and present institutionalised racism and colonialism.

5.3.1 Extensive relations and complex cases

Box 11: SWJ’s case

The WA Housing Authority sought to terminate SWJ’s tenancy after a series of violent incidents at or near her premises. SWJ is an Aboriginal woman who lives with her two children, and their father also stays from time to time. According to police, persons leaving prison often stay at the premises upon release, and they have found up to 18 persons residing there at a time. The police have also issued several temporary restraining orders against SWJ’s partner for domestic violence, and have information indicating drug use at the premises. Over a period of about six months, police attended four incidents of fighting among numerous persons at the premises and in the street, including with knives, axes and bats, which prompted calls for assistance from the public and an emergency ‘lock down’ at the local school. The police information indicates that SWJ herself made calls to the police, but did not assist as requested with their investigation. Previous Housing Authority referrals to support agencies also resulted in no engagement.

The Housing Authority gave SWJ a no-grounds termination notice and the court subsequently terminated the tenancy. Throughout the proceedings, however, SWJ participated in tenancy support and training programs run by NGOs, and her advocates negotiated adjournments with the Authority to demonstrate continued engagement. Pending repossession of the premises, the Housing Authority is considering offering SWJ a smaller property away from the school, subject to a fixed term and close monitoring, or the prospect of an offer of a community housing tenancy.

One of the numerous complicating factors in the misconduct in SWJ’s case is the larger number of visitors and temporary occupiers at her premises. Another four of the 17 cases also involve misconduct arising from large numbers of visitors, and in interviews social housing landlords highlighted it as the most distinguishing feature of their tenancy management work with Indigenous tenants:

Kinship—that’s quite a vexed subject, when you discuss it with Indigenous communities and leaders. The feeling is very strong. Some take a broad view, and say yes they’ve got an obligation, and others say yes, they’re obliged to give safe harbour but not put housing at risk. (WA PH)

We understand it’s hard to turn people away, particularly if they are your family who are in need. However, the tenancy’s your responsibility. (Vic CH)

These landlords acknowledged cultural obligations to extended family, and indicated that they give ‘consideration’ to this in determining how to respond, but insisted that Indigenous tenants would be held liable for their visitors as usual:

Our efforts go to the sorts of support that are offered to Indigenous families, rather than a different standard of tenancy performance. That’s not to say we don’t give consideration to cultural issues when we decide to escalate a situation. (WA PH)

The Northern Territory presents a partial exception to this, with the management of remote public housing seen as being more tolerant of visiting—and wear and tear on properties (NT TO). However, in New South Wales, NSW TO considered that social housing policy made only certain concessions to Indigenous cultural obligations—entitlement to an extra bedroom to accommodate visitors, special provisions around succession of tenancies—but gave no other consideration in practice. This apparent equality of treatment could lead to inequitable outcomes in responses to misconduct:

I don’t think there’s any allowance. It may not be intentional, but Indigenous people are more likely to be complained about by neighbours, and policed—unjustifiably. (NSW TO)

Reflecting on the tenant organisation’s casework, NSW TO observed that cases brought in response to private owners’ complaints about nuisance and illegal use often involved Indigenous tenants:

In my experience, this is almost always Indigenous people. I remember a case where it was clear that both sides of the street were equally culpable, but only one side had the dog squad called on them.

Among the 17 Indigenous tenant cases, two disclose campaigns of complaints about tenants that have a strongly racist subtext. One of them is RPI’s case (Box 12 below).

Box 12: RPI’s case

A NSW Aboriginal community housing provider, through a real estate agent engaged to manage its properties, sought to terminate RPI’s tenancy for nuisance. The agent tendered in evidence letters from other residents in the complex of dwellings, complaining about RPI’s dog, guests, loud noise, traffic in the driveway and damage to the curb, and ‘gatherings of criminals’. The letters asserted that RPI was ‘ruining [the complex’s] reputation and market value’ and that RPI was ‘mismatched’ to the neighbourhood.

The tribunal terminated the tenancy in the first instance; however, on appeal, the decision was held to be made in error and remitted to be determined again. The Appeal Panel held that the tribunal had wrongly interpreted RPI’s advocate’s submissions, accepted dubious evidence and not considered evidence that there was ‘a discriminatory aspect to the complaints’.

Returning to SWJ’s case, racism does not appear as an overt factor in the response to the alarming, violent incidents at her premises. However, it is arguably in the background, in the personal and family experience that is behind her and her partner’s accommodation of so many persons leaving prison, and their frequent drug and alcohol use and violence. It is also arguably part of the difficulty of ‘engaging’ with police and other supports to which SWJ was referred while threats to her tenancy escalated. This is another complicating factor across the Indigenous tenant cases. WA TO observed it too:

Particularly for Indigenous families, they don’t take up the referrals, don’t trust them. (WA TO)

As we discussed in the previous chapter, unsatisfactory 'engagement' can drive escalating threats to a tenancy; this is especially a problem in responses to Indigenous cases.

5.3.2 The role of Indigenous organisations, officers and advocates

A strong theme of the cases about Indigenous families is the role of Indigenous organisations, housing officers and advocates in sustaining tenancies—precisely because they can negotiate the complex circumstances and barriers to engagement that Indigenous tenants experience.

These cases include SWJ's case (Box 11) and RPI's case (Box 12), in an unusual way—RPI's landlord was an Indigenous community housing landlord, but the property manager who acted on the racist complaints was a non-Indigenous real estate agent. AVY's case (Box 13) is another (and so, in the next section, is LCE's case (Box 17)).

Box 13: AVY's case

The WA Housing Authority sought to terminate AVY's tenancy for use of the premises for an illegal purpose, after police conducted a search and found marijuana and smoking instruments. AVY and her adult son were charged with permitting use of the premises for use of a drug.

AVY was an Aboriginal woman and her household included her son, her partner, and four grandchildren. Her son pleaded guilty to his charge and received a good behaviour bond, while the Aboriginal Legal Service negotiated for AVY's charge to be dropped. AVY's tenant advocate then negotiated with the Housing Authority to withdraw the termination proceedings.

In the interviews, WA PH stated that the Housing Authority valued specialist officers and support organisations:

We work with dedicated customer support officers and Indigenous tenancy support organisations, to engage in a culturally sensitive way, and apply a cultural lens. (WA PH)

WA TO also spoke highly of Indigenous organisations working with tenants, both in and out, with the STEP. In the Northern Territory, too, both NT PH and NT TO considered that the cultural responsiveness of the social housing sector had recently been lifted through greater engagement of Indigenous officers and support agencies.

In New South Wales, FACS Housing performs tenancy management both for mainstream public housing and for much of the portfolio of the Aboriginal Housing Office NSW, subject, in the latter case, to specific delegations and procedures around terminations. NSW TO observed the difference made by Indigenous oversight, and Indigenous advocacy:

This makes a difference. Within AHO [Aboriginal Housing Office], there is more capacity for Aboriginal advocates to get into the bureaucracy and have a conversation about other solutions—not necessarily 'you should drop this', but 'what else can we do?'. And the check of having to go to the top does seem to work, because it slows down the process.... Aboriginal community housing and Land Councils are also more open to intervention.... And it makes a difference that its Aboriginal advocates that make the intervention: they are known in the community, not seen as a rabble rouser coming in and making life difficult. They have a legitimate stake, and better relationships, they know who to call. (NSW TO)

5.4 Alcohol and other drugs

Of our 95 cases, almost half (44) involve a person—the tenant, an occupier or visitor—who is disclosed to problematically use alcohol and other drugs. A significant portion of these cases appear distinct from our other cases, in that they involve lone person households (21), most of them men (16). Those cases are, however, still a minority, and there are significant numbers of households with female tenants (25) and children (16) among the cases.

5.4.1 Punitive responses

Twenty-one of the 44 cases where problematic use of alcohol and other drugs is disclosed are proceedings on the ground of use of the premises for an illegal purpose—in all 21 cases, a drug offence. These cases represent the large majority of cases (28) involving illegal use proceedings for drug offences; that is to say, most, perhaps even all, of the larger category of illegal use drug offence cases involve persons who are themselves users of drugs.¹⁸

As many of the cases already sketched in this chapter indicate, public housing landlords have adopted a particularly active and uncompromising attitude to drug offences, typically taking illegal use termination proceedings wherever charges are laid against an occupier. Table 8 below shows the various outcomes, where known, of the criminal proceedings in illegal use drug offence cases. Only two had, at the determination of the tenancy proceedings, resulted in imprisonment, and in fact in both cases the sentence was less than one year and had been served by that time. However, 16 of the proceedings resulted in termination of the tenancy. In particular, in cases where the criminal justice system had seen fit to deal with an offence through a suspended sentence, good behaviour bond or a community service order that allowed a person to remain in the community, the tenancy legal system ordered the household to leave their housing.

Table 8: Outcomes of criminal and termination proceedings for illegal use drug offences

Criminal proceedings outcome	Number of cases (total)	Of which terminated	Number involving a user	Of which terminated
Imprisonment (1 year or less)	2	0	2	0
Suspended sentence	1	1	0	0
Good behaviour bond	4	4	4	4
Community service	3	2	2	2
Fine	2	0	1	0
Yet to be determined	9	4	7	3
Not stated	7	5	5	5
Total	28	16	21	14

Source: authors.

¹⁸ The seven other cases are tribunal cases in which no information is disclosed as to whether the tenant or another occupier is a drug user; none positively state that the person is a non-user. It is possible, therefore, that all 28 of the cases in fact involve drug users.

Of the cases summarised here, those of EQT and PCA above, are perhaps the strongest illustrations of termination with a punitive intention. The case of OJE (Box 14 below), is another, where the court expressly countenanced the potential harms that would result from termination, and decided that the seriousness of the breach itself justified termination.

Box 14: OJE's case

The WA Housing Authority took proceedings to terminate OJE's tenancy for use of the premises for an illegal purpose after OJE pleaded guilty to cultivation and possession of cannabis with intent to sell. OJE was already subject to a suspended sentence for similar offences.

OJE testified as to his history of mental health problems, experience of physical and sexual abuse, and amphetamine addiction which he had resolved. OJE indicated that he would likely be gaoled for breach of his suspended sentence, but sought to continue the tenancy for his teenage son, who lived with him, and his own housing on release. Two other children also regularly visited OJE at the premises.

The court terminated the tenancy. It accepted that OJE had provided a stable home and positive influence for his son, and that terminating the tenancy would put at risk the son's employment and OJE's health on release. However, OJE's continued dealing in drugs justified termination.

In a relative few cases, we see a punitive response held off— these include AVY's case, and some cases discussed below regarding the consideration given to treatment and rehabilitation. In some of these cases it is the social housing landlord itself that has decided, or been persuaded, to hold off; in others it is the tribunal or court. More often, though, both the social housing landlord and the tribunal or court take an approach to illegal use cases that is about 'sending a message', or 'acting out', as Garland might put it (2001). In an interview, WA PH spoke to this approach and the way it presumes to invoke the moral authority of the community:

With disruptive behaviour, I think we all accept there's a desire to see behaviour modification. Illegal use, I think, society clearly does not tolerate, particularly from a government-funded, subsidised property—it's something totally unacceptable to the community. (WA PH)

In New South Wales, recent tribunal decisions have bolstered the high-handed approach of FACS Housing, with decisions about the inferences that may be drawn regarding drug users and drug offences. TLR's case (Box 15 below), references a number of 'law and order' themes as the police, the public housing landlord and the tribunal develop a strong condemnation of the tenant.

Box 15: TLR's case

FACS Housing took proceedings to terminate TLR's tenancy for use of the premises for an illegal purpose. TLR's partner had been arrested and charged with a drug supply offence and, after a search of the premises, TLR was charged with possession of goods suspected of being stolen. TLR pleaded guilty, was discharged without conviction, and received a nine-month good behaviour bond.

In the termination proceedings, a substantial amount of evidence provided by police was tendered, including details of charges brought against other persons occupying the premises (including, in the words of the police evidence, 'a number of Middle Eastern males'), and incident reports about a non-fatal overdose by another occupant at the premises and a fatal overdose near the premises.

The tribunal terminated the tenancy, holding that 'the evidence, taken in totality, paints a picture of the premises being used on a regular basis as a "drug house" by persons with drug habits to administer illegal drugs to themselves'. The tribunal went on: 'offences breaching the drug laws are offences which the community abhors. Facilitating illegal drug use is to be condemned at every level. This is more so in this case as the tenant and her occupant... have allowed a publicly-owned building to be used for illegal purposes'.

It may be that the termination of TLR's tenancy could be justified as an application of harm minimisation principles—i.e. in order to disrupt an established pattern of harmful drugs in an area, by removing a known site for dealing and using; and to remove TLR herself from that pattern, to give her a better chance at complying with her bond. But that is not the rationale in TLR's case, nor most of the illegal use cases, and harm minimisation is not an express principle in social housing policies regarding misconduct proceedings, nor the legislative provisions regarding termination.

5.4.2 Impacts on treatment

Aside from proceedings for use of premises for an illegal purpose, persons with alcohol and drug use problems also figure in proceedings for nuisance, and the direct application grounds: threats, danger and damage. In almost half the tribunal cases involving these other types of proceedings, there is evidence that indicates that the tenant or another occupier has a problem with alcohol or drugs.

Across all the cases involving problematic alcohol and drug use, more than half (26 of 44 cases) indicate that the person is undergoing medical treatment, psychological counselling or social support in connection with their alcohol or drug use problem. Of the 26 cases, 14 end in termination.

These cases include VWM's case, discussed above. Another is JDU's case (Box 16), in which the Victorian tribunal offered a reflection on a tenant's 'self-medication' and the presumed futility of providing alternative accommodation in social housing.

Box 16: JDU's case

The Victorian DHHS sought to terminate JDU's tenancy for nuisance, after receiving, over a period of four years, numerous complaints from neighbours about JDU's behaviour, including verbal abuse, rock throwing and theft of their garden plants. The tribunal had previously made a compliance order to restrain JDU's behaviour, and at one time criminal charges for theft had been laid against JDU. JDU tendered medical evidence that she had been diagnosed with post-traumatic stress disorder and indicated that she self-medicated with alcohol.

The tribunal terminated the tenancy, observing that JDU 'has limited or indeed no capacity to self-regulate or adequately control her behaviour.... Her tendency to "self-medicate" with alcohol and drugs no doubt fuels her problematic behaviour. As regrettable as this situation is, a relocation of this tenant would not solve her issues, but would just transfer a difficult problem elsewhere.'

It goes unstated that eviction necessarily 'transfers a difficult problem elsewhere', to circumstances more adverse to treatment than a tenancy.

There are, on the other hand, cases in which a court or tribunal has declined to terminate because of the risk otherwise posed to treatment. One is LCE's case (Box 17), though it appears to have been a close call.

Box 17: LCE's case

FACS Housing sought to terminate LCE's tenancy following an incident of alleged threatening and intimidating behaviour (section 92). The incident occurred when a housing officer attended LCE's premises without prior notice and took photographs of motor vehicles and parts in the front yard. LCE saw the officer, and said: 'What are you doing, cunt? You're fucking dead' and threw objects from the yard in the direction of the officer and his car.

LCE was a 50-year old Aboriginal man with several serious health problems: schizo-affective disorder, depression, anxiety, diabetes and alcohol addiction. He was also illiterate, and had an arrangement for a social service NGO to receive notices and other information. He lived at the premises 'in a fairly reclusive way' with a number of dogs.

The tribunal terminated the tenancy in the first instance, but on appeal overturned the order because LCE had not been notified of the proceedings per his arrangements. At the fresh hearing, LCE's advocate tendered evidence about LCE's medical conditions and supports, including an opinion from his doctor that eviction would risk 'significant risk of physical and psychological harm'. The tribunal then declined to terminate, holding that LCE had seriously threatened the housing officer, but 'the weight of the discretionary factors is slightly in the tenant's favour'.

The housing officers made a number of avoidable mistakes in LCE's case (Box 18) that contributed both to the incident in question and to further damage to relations in the proceedings. However, the case also shows, like JDU's case above (Box 16), a social housing landlord trying to deal over a period of years with difficult, alarming behaviour by a tenant, whose drug dependency strains the voluntarist assumptions that usually go with contracts such as a tenancy agreement.

Unlike the illegal use cases, these cases do not disclose social housing landlords taking termination proceedings as a moralising, condemnatory intervention. In interviews, social housing landlords were realistic about alcohol and drug use by their clientele. Having been firm about the importance of 'zero tolerance' for drug dealing and drug-related nuisance, WA PH admitted that mere use did not exercise the Housing Authority:

Below the line: if you're a tenant, and it's your property, and you choose to smoke it, and there's no police, no disruption to neighbours, not impacting on community, you can broadly do what you like. (WA PH)

In a different way, NSW CH indicated that organisation's interest in developing a measured, evidence-based response to drug-related problems, having identified a rising problem with methamphetamine use, and establishing a work group to collect evidence and keep a register of incidents.

This suggests a disposition towards a harm minimisation agenda, which if made explicit might help to better guide responses to related misconduct. Doing so would mean challenging what has become a major theme of social housing responses to misconduct—punitive exclusion of drug offenders—but harm minimisation, as an established policy principle, may have the intellectual and political capital to make this happen.

5.5 Summary

Social housing legal responses to misconduct have significant and troubling impacts on each of our four types of vulnerable persons and families. While social housing landlords are generally strongly committed to assisting women affected by domestic violence to access safe housing, this commitment may falter in the course of a social housing tenancy, with violence becoming framed as 'nuisance'. Tenancy obligations and extended liability impose hard expectations that women will control male partners and children. Some women are evicted because of conduct that oppresses and victimises them—including violence against them. Where children are involved, social housing landlords typically make additional efforts to avoid termination, but in the determination of proceedings, children's interests are a marginal consideration.

Indigenous persons and families are strongly represented among the cases involving woman and children, as well as often presenting complex personal histories, institutional contacts and interpersonal relationships, shaped by past and ongoing institutional racism and colonialism. This makes the emphasis on 'engagement' especially problematic. Specific Indigenous officers and advocates are best placed to navigate the complexity of these cases and find alternative solutions.

Cases involving misconduct associated with alcohol and other drug use are not expressly guided by harm minimisation. This is especially so where drug cultivation and supply offences are alleged, social housing landlords respond with overtly punitive termination proceedings. Even where the proceedings are not overtly punitive, termination is pursued to the disruption of treatment and rehabilitation.

6 The social housing—vulnerable families intersection: policy development options

Tenancy termination is a blunt, heavy instrument that impacts on tenants, family members and other persons.

Aspects of current law, policy and practice regarding social housing legal responses to misconduct conflict with support for vulnerable persons and families in sustaining their tenancies.

Policy development options to better integrate social housing policy with support for vulnerable persons and families include:

- moving support out of the shadow of tenancy termination
- giving tenants more certainty through commitments that no-one will be evicted into homelessness
- ensuring proper scrutiny is applied to termination decisions and proceedings, and to sector practice
- reforming the law regarding tenants' extended and vicarious liability for other persons.

More specific policy development options for each of our four types of vulnerable persons and families include:

- reviewing social housing policies and practice for gender impacts, and sponsoring the cultivation of respectful relationships
 - adopting 'the best interests of the child' as the paramount factor in decisions about termination affecting children
 - establishing specific Indigenous housing organisations, officers and advocates
 - adopting harm minimisation as the guiding principle for responses to alcohol and other drug use, including where there is criminal offending.
-

Responding to misconduct in social housing is plainly a very challenging area of practice. Many of the cases we reviewed, and discussed in interviews with stakeholders, involve highly conflictual, destructive and distressing behaviour. However, termination proceedings are not always taken as a matter of urgency, nor as a last resort when all other approaches to sustain the tenancy have failed. In many cases, social housing landlords' legal responses frustrate other more ameliorative and preventative ways of addressing misconduct and related support needs, and result in the eviction and homelessness of vulnerable persons and families.

In particular, there are aspects of law, policy and practice that do not appropriately address women who have experienced domestic and family violence, children, Indigenous persons and families, and persons and families with members who problematically use alcohol or other drugs. These aspects of social housing law, policy and practice insufficiently reflect, or are

contrary to, leading policy principles and frameworks regarding those vulnerable types of persons and families.

In this concluding chapter, we put forward policy development options to better support vulnerable families where problems of misconduct arise. We do so in the spirit of encouraging experiments in government (O'Malley 2008), elaborating on present intellectual and material resources, and conducted with minimal domination and maximal opportunities for contestation. Without pressing the point much further, we should say too that a broader social housing policy reform to reverse the marginalisation of the sector, enhancing its material resources and easing targeting—and the suspicion and cynicism that comes with it—would better support vulnerable families and their neighbours.

6.1 How can law, policy and practice be changed to better address misconduct in social housing?

Move support out from the shadow of termination

Tenancy termination is a blunt instrument with a heavy impact. It appears that in many cases, a contact by the landlord with the tenant about problematic behaviour does result in alleviation of the problem and no further action by the landlord. However, for those cases in which problematic behaviour continues, a course of action that combines escalating threats to the tenancy and pushes towards 'engaging' with the landlord and support services does not work for many. Social housing landlords themselves acknowledge that escalating threats often drive 'engagement' that is last-minute and short-lived, and sometimes so unsatisfactory that it can drive an escalation in threats.

This suggests that encouragement to seek support should move out of the shadow of termination. In particular, referrals should be made more freely, and earlier in a tenancy, and support delivered by services at arm's length from the landlord. The services provided should range from individual casework to community development, to build capacity in individuals and communities to head off conflict and inform police of misconduct. It may be that in some circumstances, a more authoritative policing presence is warranted, but it should operate with broad consent and input of the community. The example of the Northern Territory's Public Safety Housing Officers and their evolving way of working, which we touched on only briefly in this research, is intriguing and should be investigated further.

Offer different kinds of 'certainty'

'Three strikes' and 'zero tolerance' approaches have appealed to a perceived need among social housing policy makers and, it should be admitted, members of the community, for 'certainty' of processes and consequences in response to misconduct. As discussed above, it is not clear that having a certain scale of escalation of responses is the factor that works in those cases where misconduct desists, and it appears it may increase unsatisfactory engagement and the risk of termination where misconduct continues. The pursuit of 'certainty' in outcomes has also led some social housing landlords to take 'no-grounds' termination proceedings, and some governments to legislatively remove or restrict the discretion of courts and tribunals. Both prevent justice being done according to the particular circumstances of the case.

A different kind of certainty should be considered to reduce the shadow cast by termination and give greater assurance to tenants as they reflect on difficult circumstances and the prospects of improving them. Victoria's Human Rights Charter does this to a degree, by assuring that the right to protection of families and children will be considered in decisions about termination proceedings. Aside from other governments legislating for similar human rights charters, more specific commitments could be made in legislation or policy by governments, or by social housing landlords in their own operational policies. A powerful commitment would be that no

one will be evicted into homelessness. This commitment is consistent with international human rights instruments, and would need to be backed by a greater preparedness and capacity to offer transfers to alternative premises. Alternatively, governments could commit, in legislation or social housing policy, to no child being evicted into homelessness; or alternatively again, no eviction into homelessness for use of premises for an illegal purpose when the sentence is less than a reasonably short threshold length.

At a minimum, governments should commit in legislation, and social housing landlords in their policies, to ensure that social housing tenants always know the reason for any proceedings against them, and have an opportunity to make a case against the proceedings.

Reform for better scrutiny and review of tenancy terminations

Proceedings to terminate a social housing tenancy can have grave consequences, and should be open to scrutiny and review. Australian residential tenancies legislation allocates this role to courts and tribunals, and the cases show that the scrutiny they apply to the grounds for termination, and factors affecting discretion, can prevent injustice. However, the legislation also prevents this scrutiny being applied in certain types of proceedings.

'No-grounds' termination proceedings are used by landlords to avoid scrutiny as to their reasons for seeking termination and other circumstances of the case, including factors of vulnerability on the part of the tenant and their family. Social housing landlords should not use 'no-grounds' proceedings as a matter of policy; more than that, residential tenancies legislation should not provide for them, for social housing and private landlords.

In all termination proceedings by landlords, courts and tribunals should have discretion to decline termination. In affording discretion, residential tenancies legislation could also include lists of factors that must be considered, building on those already in some provisions (e.g. section 154E of the NSW RTA) with factors such as:

- the relative capabilities and powers of the tenant and other persons
- the best interests of any children related to the tenant
- the cultural obligations of Indigenous persons
- the minimisation of harms relating to drug use, including the facilitation of treatment.

Lists of discretionary factors should be non-exhaustive, to allow other unspecified factors to be considered, depending on each case.

Our analysis of the law and cases also raises a question about the review of social housing landlords' decisions as a matter of administrative law, as distinct from residential tenancies law, and to date the superior courts have answered this question differently. Improving the scrutiny and review of termination applications by courts and tribunals under residential tenancies law may mean that the question is avoided in those sorts of cases, but it will keep arising otherwise, particularly if more jurisdictions implement human rights legislation. Further consideration should be given by social housing policy makers and legal sector stakeholders to the development of appropriate principles and procedures for review of social housing administrative decisions.

Beyond the level of individual cases, there should be greater scrutiny of practice around termination proceedings, at organisational and sector levels, through the better collection and publication of data. Social housing landlords and courts and tribunals could publish in their annual reports data about termination notices, applications, orders and evictions, and should consider collaborating to produce consistent fields for data collection and presentation. More written reasons for court and tribunal reasons could be published—using pseudonyms, as appropriate—to develop residential tenancies jurisprudence and open the courts' and tribunals' own decision-making to scrutiny.

Reform tenants' liability

Tenants' liability for other occupiers and visitors is largely a taken-for-granted aspect of residential tenancy law, but is actually highly problematic. As a practical matter, the provisions for extended and vicarious liability result especially in female tenants losing their tenancies because of the misconduct of male partners, adult children and visitors. More than that, though, the extended liability of tenants fosters the attribution of blame to women who have 'turned a blind eye' or otherwise 'failed' to prevent misconduct.

The risk of injustice posed by extended and vicarious liability can, to a degree, be addressed through the court or tribunal exercising discretion in termination determinations—but only to a degree. As discussed, too many of the current provisions of states' and territories' residential tenancies legislation regarding termination afford no discretion, or restrict or structure it in ways that do not allow the particular injustices that can arise from vicarious liability to be considered. The one-strike provisions of the NSW RTA are an example of undue restrictions on discretion. Even the yet-to-commence provisions restructuring discretion under the Vic RTA, while an improvement on the current provisions, may be unduly restrictive if interpreted to require consideration of domestic violence only where the tenant has applied for a family violence order. In all jurisdictions, the provisions around discretion could be amended to require the court or tribunal to consider whether it is just and reasonable to hold the tenant liable for the actions of an occupier or visitors, considering all the circumstances, including the relative capacities and powers of the persons.

Even that would not be sufficient, however, to address the problems that vicarious and extended liability cause well before proceedings are determined in a court or tribunal; that is, in the ways they frame and accommodate dubious assumptions about interpersonal relations, particularly between women and men. Qualifications on vicarious and extended liability should be incorporated into the provisions themselves, not just the provisions for discretion around termination. It is worth noting again the recent amendments in New South Wales and Victoria, discussed in 3.1.2, which go some way in this direction, but which could go further. Specifically, the New South Wales qualification on liability ought to apply not only to property damage, but other grounds for termination too. The Victoria qualification, on the other hand, would be appropriately broad, but is restricted by the requirement of a timely application by the tenant to the tribunal.

6.2 How can law, policy and practice be changed to better address vulnerable persons and families?

Social housing policy needs to better integrate with other policy frameworks and principles, specifically the National Plan to Reduce Violence Against Women and their Children 2010–2022, the National Framework for Protecting Australia's Children 2009–2020, principles of Indigenous peoples' self-determination, and the principle of harm minimisation in the National Drug Strategy 2017–2026.

The best and highest sort of integration, it might be said, would be a social housing policy that ensured assistance for these groups in a non-marginalised social housing sector of diverse providers, built forms and connections with community development and other support agencies. The suggested general changes to law, policy and practice above would also improve the way in which social housing landlords relate to vulnerable persons and families. Below we discuss the specific application of these changes, and some further policy development options for better integration.

Women

Social housing landlords generally have a strong commitment to assisting women affected by domestic violence into safe housing. Our research finds, however, that this commitment can falter where women appear to fail to engage, and violence becomes obscured by its framing as 'nuisance' to others. The gendered nature of responses to male misconduct short of violence is also not expressly acknowledged in social housing policy. Social housing landlords should review their policies and practice for gender impact, to critically challenge the framing that tenancy management work and law tends to place on questions of personal agency, responsibility and interpersonal relations.

Within the National Plan's vision for broad attitudinal change and cultivation of respectful relationships and gender equity, there should be space for work on respectful relationships specifically in the context of systems of benefit provision—i.e. social housing, social security—where relationships matter and can put benefits at risk. Social housing landlords could sponsor, but not lead, community development work to this end.

Children

The paramountcy of 'the best interests of the child' should be reflected in decision-making about the termination of tenancies, both by social housing landlords as they consider commencing and continuing proceedings, and courts and tribunals as they determine proceedings. Both social housing operational policies, and the provisions of residential tenancies legislation regarding the discretion of the court or tribunal, should be amended accordingly. Both social housing landlords and courts and tribunals should also consider developing processes and specialist capacity to sensitively gather from children their own views about their housing and other circumstances.

Indigenous persons and families

Cases about Indigenous persons and families often involve complex personal histories, institutional contacts and interpersonal relations, shaped by past and present institutionalised racism and colonialism. In the jurisdictions where they are already established, specific Indigenous landlord organisations, housing officers in mainstream providers, support workers and tenant advocates are often able to collaborate and negotiate this complexity. Establishing and building the capacity of these organisations and workers should be a priority in all jurisdictions. As well as being applied to individual casework, the experience and knowledge of these organisations and workers should also be turned to helping communities determine broader questions about appropriately adjusting tenancy law's imposition of responsibility and liability on tenants individually to reconcile with cultural obligations and extended family responsibilities.

Persons and families with members who use alcohol and other drugs

Social housing landlords' responses to problematic alcohol and other drug use should be guided by the principle of harm minimisation, not 'zero tolerance'. This includes where drug use by a tenant or occupier gives rise to drug offences and hence to use of the premises for an illegal purpose. In these circumstances, the social housing landlord's response should, according to the principle, weigh the risks of homelessness, disrupted treatment and more dangerous use posed to the drug user and their household member, against a realistic assessment—not an assumption—of the continuing risks posed to others if the tenancy continues in the present premises. If the risks weigh against continuing the tenancy, and the criminal justice system has seen fit to allow the person to live in the community, another social housing tenancy elsewhere should be offered.

As a principle, harm minimisation also countenances the harms that may be done to neighbours and housing officers from abusive behaviour arising from alcohol and other drug use. In these

cases, too, the risks may weigh against continuing in the present premises, but there should be no evictions into homelessness. To put the principle into practice, the social housing sector will need to develop specialist knowledge and resources.

6.3 Summary

In their responses to crime and anti-social behaviour, social housing landlords are afforded by residential tenancies law with a remedy—tenancy termination—that is a blunt, heavy instrument with impacts on tenants, family members and other persons. Laws and policies regarding its use are, in significant respects, in conflict with the objective of sustaining tenancies for vulnerable persons and families.

To better integrate social housing policy with wider policy frameworks and principles for the support of vulnerable persons and families, policy makers should consider:

- moving support out of the shadow of tenancy termination
- giving tenants more certainty through commitments that no-one will be evicted into homelessness
- ensuring proper scrutiny is applied to termination decisions and proceedings, and to sector practice
- law reform regarding tenants' extended and vicarious liability for other persons.
- With regard to each of our four types of vulnerable persons and families, policy makers should consider:
 - conducting a gender impact review of social housing policies and practice, and sponsoring the cultivation of respectful relationships
 - adopting 'the best interests of the child' as the paramount factor in termination decisions affecting children
 - establishing specific Indigenous housing organisations, officers and advocates
 - adopting 'harm minimisation' as the principle for responses to alcohol and other drug use, including in cases of criminal offending.

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