

# A private function

Housing associations have an ambiguous role under the Human Rights Act.

Graham French looks at recent court rulings

Are housing associations public bodies? In the 18 months since the Human Rights Act came into force this question has exercised the courts: for the purposes of the Act, should registered social landlords be treated the same as public organisations? Despite recent court cases there are no absolute answers.

In any court proceedings, the court, as a public body, has to consider human rights arguments. In possession proceedings these would mainly be arguments relating to Article 6 of the European Convention on Human Rights (the right to a fair trial), or Article 8 (the right to respect for private and family life and home). However, if a landlord is a public authority for the purpose of the Act, this gives an individual additional scope to raise human rights arguments, for example in relation to allocation or transfer policies. In possession proceedings, if a landlord is a public authority human rights issues can be argued more widely, for example, to challenge a decision to start eviction proceedings.

The most recent judgement concludes that housing associations are unlikely to be deemed public bodies. In the Court of

Appeal case, *R-v- Leonard Cheshire Foundation (2002) EWCA 336 21 March 2002* the leading voluntary provider of care and support services for disabled people, which runs several residential care homes,

## Associations will have to make sure that all such decisions take account of the Act

was held not to be a public authority. The foundation receives public funds and is a charitable body providing accommodation for people to whom a local authority owes a duty under the 1948 National Assistance Act. These factors, while relevant, did not mean that the foundation must be a public body. While the foundation took nominations from

local authorities it was the local authority, not the foundation that exercised power under the National Assistance Act. Although there are obvious differences between the functions this foundation and those of most housing associations, the principles in this case are likely to be applicable.

This decision applies to the leading case on the issue. In *Donoghue -v- Poplar HARCA (2001) England and Wales Court of Appeal 595* the judge decided that whether a housing association, or any registered social landlord, was a public authority for the Act depended on its functions. For example, a housing association might be performing public functions in providing accommodation, and seeking possession, but also carry out private functions, for example raising finance. The London Borough of Tower Hamlets created Poplar HARCA, as a stock transfer company, to manage the local authority housing stock. It effectively does a job previously handled by the local authority. For those reasons the Court of Appeal decided it was a public authority when carrying out functions such as providing accommodation. A housing

association that is less closely tied to a local authority will not necessarily be a public body for the purposes of the Act.

enjoyed as secure tenants of the council. But attempts to reassure tenants that they will not lose out as a result of the change from secure to assured tenancy status are often in vain – tenants believe that an 'assured' tenancy is less safe than a 'secure' one.

The Chartered Institute of Housing's discussion paper *One for all – a single tenancy for social housing* cited tenants' perceptions of the difference between secure and assured tenancies in support of its argument for a single tenancy for social housing tenants. Last month the Law Commission took this further in its consultation paper *Renting homes 1: status and security*, advocating a single type of

What are the implications for tenants' advisors or housing association staff? It is necessary to look at both the type of housing association and the particular function it is carrying out. Associations taking local authority nominations and operating with Housing Corporation finance do not have such close ties with a public body. However, human rights arguments relating to any housing association would still carry some weight with the court because the court itself as a public body must consider them.

There is some hope that this confusing picture will be made clearer. The Law Commission consultation paper *Renting homes 1: status and security* is inviting views on whether housing associations should be deemed public authorities in relation to their not-for-profit housing activities. If this becomes law, Human Rights Act arguments will potentially arise in the context of most housing association activities. Associations will have to ensure that all such decisions take account of the Act. Tenants' advisors will also have to be alert to possible Human Rights Act arguments. But until that time it is unlikely that a housing association will be seen as a public body unless it is a stock transfer.

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# Hands off

Transfer tenants must guard their security of tenancy now the Housing Corporation has a lighter touch, warns Naomi Goode in the first of two articles on rights under stock transfer

When Labour came to power in 1997 it was widely thought that the new administration would reverse the Conservative government's policy of encouraging councils to transfer their stock

The loss of a secure tenancy has proved to be a hurdle in the stock transfer process. It is true that secure tenants enjoy a raft of rights not enjoyed by assured tenants, because assured tenancies are essentially

## Transferring tenants are potentially dependent on the goodwill of the council and the new landlord to secure rights

advisors to transferring tenants are for the first time unable to reassure tenants that the corporation requires the new housing