LEGAL ASPECTS OF HOSPITAL CLOSURE

by

Brian Capstick, M.A.

Capstick, Hamer & Co 1984

LEGAL ASPECTS OF HOSPITAL CLOSURE

CONSULTATION

1.0 Introduction

Many Health Authorities are faced in the present climate of financial restraint with the prospect of closing hospital facilities or, occasionally, the closure of entire units. This paper deals with the legal aspects of consultation, consideration of which is an essential element in the closure process. There is an appendix containing the relevant Departmental guidance, and a note of the cases will be available in May 1984.

Administrators should also bear in mind that there exists an excellent guide to the administrative processes involved in the form of Kings Fund Project Paper No. 26 of November 1980 "Closures and Change of Use of Health Facilities".

1.1 The statutory requirements

A number of recent cases have arisen out of the requirement for Health Authorities to consult with various interested parties. Chief amongst these are the Community Health Councils, with which there is a statutory duty to consult contained in the National Health Service (Community Health Council) Regulations 1973 (SI 1973 No. 2217). These regulations have since been amended, but for present purposes are unchanged.

Regulation 20 reads:-

"It shall be the duty of each relevant Area Authority to consult a Council on any proposals which the Authority may have under consideration for any substantial development of the Health Service in the Council's district and on any such proposals to make any substantial variation in the provision of such service;

Provided that this regulation shall not apply to any proposal on which the Area Authority is satisfied that, in the interests of the Health Service, a decision has to be taken without allowing time for consultation; but, in any such case, the Area Authority shall notify the Council immediately the decision is taken and the reason why no consultation has taken place."

1.2 "Substantial variation"

Consultation is thus necessary within the Regulations whenever the Authority has under consideration any proposal to make any "substantial variation" in the provision of services. The first question to be judicially considered

was whether a closure without a diminution in services could amount to a substantial variation. The court decided that the temporary closure of a small hospital was a "substantial variation" notwithstanding that its facilities were transferred elsewhere in the District and that there was no overall reduction in services. Evidently, there will be few instances in which the closure of facilities on a scale sufficient to save material amounts of money will not be a substantial variation, even if the closure is designated as temporary.

1.3 "Temporary" closure in cases of urgency

In recent years the practice has grown up in cases of urgency of embarking upon a two stage process of closure in the (mistaken) belief that the requirement to consult can be avoided, or at least deferred, by deciding upon immediate temporary closure to take effect without consultation, with consultation to follow the temporary closure on the question whether the temporary closure should become permanent.

Against this background, the lesson of some recent cases is that Regulation 20 makes no distinction between temporary and permanent closures, and the obligation to consult arises in both situations. It is therefore necessary for authorities to bear in mind that there will normally have to be two processes of consultation if the decision is for temporary closure now and a possible permanent closure later, the first consultation concerning the temporary closure and the second whether the temporary closure should be made permanent. The only exception to this general rule that there must be consultation at the stage of both temporary and permanent closure is if the Authority is satisfied that it can apply the proviso to Regulation 20.

The result is that, if there is to be a temporary closure (and whether or not it is to be followed by a period of consultation about permanent closure), the decision to make the temporary closure itself must be preceded by either:-

(a) proper consideration of and a decision by the Authority to apply the proviso to Regulation 20, or

(b) adequate consultation.

These alternatives are considered in more detail below.

Of course, legally it remains open to authorities to proceed direct to permanent closure, with or without consultation. However, to proceed direct to permanent closure without consultation is politically a perilous course and, administratively, not one which the Department is thought to favour.

2.0 Applying the proviso to Regulation 20 correctly.

The requirement to consult under Regulation 20 is mandatory, and any decision made without the necessary consultation will be void unless it can be brought within the dispensation contained in the proviso. There have been a number of cases concerning the scope of the proviso, and the lesson to be drawn from them is that Authorities should be wary of applying it too readily.

The proviso itself states

> "this regulation shall not apply to any proposal on which the Area Authority is satisfied that, in the interests of the Health Service, a decision has to be taken without allowing time for consultation ....."

These few words have been extensively litigated, and now have to be interpreted in the light of the various cases. The salient points are as follows:-

(i) Financial considerations have specifically been held to be a ground of such urgency as to justify the exclusion or limitation of consultation. The Court held that the requirement to save money in order to remain within financial limits is a ground on which a Health Authority could decide that it was in the interests of the Health Service for a closure to take place immediately and without the normal process of consultation with the Community Health Council.

(ii) it is the Health Authority which has to be satisfied that a decision must be taken without allowing time for consultation and not, for example, the court itself or some other administrative body. In order for an Authority to satisfy itself on this matter, something more than a mere act of introspection by the members is required. Authorities should ensure that they do in fact give consideration to the question of consultation. They will find it easier to prove (if challenged to do so) that they have given the necessary consideration to these matters if they formulate a resolution in accordance with the recommendations of Para. 6 of the de Peyer letter, although an omission to do so will not of itself render a decision invalid or otherwise unlawful.

(iii) The options which a court may expect an Authority to entertain are not confined to the choice whether to embark upon the full panoply of consultation described in HSC(IS)207 or to no consultation

at all. The courts may also expect an Authority to consider the further alternative of some more limited form of consultation, perhaps with a shortish time limit. Having given consideration to this third alternative, an Authority remains at liberty to conclude that the urgency is such as not to allow time for any consultation at all.

The Department's view is that, as a matter of good administrative practice, an Authority should always consider whether there is time for any shorter period of consultation other than the full procedure set out in the Circular and should do what it can by way of consultation in the time available.

Authorities should therefore consider the alternative of some limited form of consultation, and would be well advised to minute their deliberations in this regard mutatis mutandis with the de Peyer recommendations. In considering this alternative, regard should be had to what legally comprises consultation. In those exceptional cases where there is not time for anything which might properly be called consultation (as to which, see below), it may be safer to opt for no consultation at all on a temporary closure.

3.0 - Adequate consultation in situations of urgency

Legally, the essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. It is therefore necessary to avoid giving the appearance that a decision is a foregone conclusion before embarking upon consultation, and also to avoid giving the appearance of paying no attention to the advice received.

3.1 Limiting consultation

A practical consideration is often whether a limit either of time or subject matter can be imposed on the process of consultation with a Community Health Council. These matters were much considered in a case involving St Olave's hospital. The Court expressly approved the option of some period of consultation other than the somewhat leisurely pace contemplated by HSC (IS) 207, but did not favour limiting the subject matter of consultation in any way.

In connection with time limits, it is worth having regard to the following extract from the decision of Mr Justice Woolf:-

"Where however the circumstances are ones which require a prompt decision, although they do not fall within the proviso to Regulation 20 to which I referred, time limits

can be appropriate, and indeed, those time limits may in certain circumstances have to be relatively short.

I would stress that it would not be in the interests of the Council and therefore not in the interests of those whom the Council represent to take too stringent a view of the provisions as to time limits; because if the legislation has to be construed as requiring substantial periods of time for consultation, an extended meaning would have to be given to the proviso to Regulation 20 and this could result in Area Authorities frequently relying on the proviso to face a Council with a fait accompli. If, as I understand to be the position, the length of time allowed for consultation has to be judged according to the circumstances, the effect would be to reduce the need for the application of the proviso to circumstances where really there is no time for consultation and Area Authorities will not be encouraged to make use of the proviso in situations where this is not necessary."

3.2 However, the judge had less enthusiasm for placing restrictions on the content of the CHC's submissions. The Area Administrator had written to the CHC saying "If you wish to object to the proposal, then you must submit alternative proposals for achieving savings on the same scale, paying full regard to the other factors taken into account by the Commissioners in the paper."

Understandable though such a stipulation might be, the learned judge felt bound to say

"That it does seem to me that there was no justification for the Commissioners, having decided that this was a case in which there was to be consultation, to put limits on the nature of the proposals that the Council were invited to make. The statutory legislation does not provide for any such limitation, and if those limitations were meant as anything more than guidelines, then in my view they do not have any effect because they would be an attempt to limit the role of the Council which is not provided for by the regulations to which I have referred."

3.3 It is often of some importance to form a view whether discussions which take place outside a formally declared consultation procedure can be taken into account when the whole subject of consultation is considered.

Quite frequently it will happen that the CHC has been party to suggestions or proposals which fall short of firm proposals, and will have passed comment on them. The question as to whether such a dialogue can be called consultation was judicially considered in the case of Fletcher and Others v. The Minister of Town and Country

Planning, (1947) 2 ALL ER 500 and was cited with approval in the St Olave's case. The learned judge in Fletcher's case said:-

"If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of a particular case and to decide whether consultation was, in fact, held. Consultation may often be a somewhat continuous process and the happening at one meeting may form the background of a later one. In deciding whether consultation has taken place, regard must, in my judgment, be paid to the substance of the events and it cannot be conclusive either way according to whether the parties said in terms that a consultation ..... was taking place, or to take place, or was intended, or whether nothing relative to this was said at all."

4.0 Summary

In summary, the lesson of the recent cases is that a health authority must consult about temporary closures even if there is to be further consideration to be given with the usual consultation about a later permanent closure. Such consultation may be limited in time, and need not be the full procedure contemplated by HSC(IS)207, but there is no authority for limiting the subject matter of consultation.

The only exception to the requirement to consult arises where the Authority is able to bring itself within the proviso to Regulation 20, and this involves a consideration by the Authority whether it is satisfied that immediate closure is necessary in the interests of the Health Service as a matter of such urgency as to exclude the possibility even of a limited period of consultation. Such decisions may well be uncommon but, if they are necessary, Authorities should ensure that they minute their discussions appropriately.