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Senator A O Zakharov
Chairperson
Senate Standing Committee on Community Affairs
Parliament House
CANBERRA ACT 2600

Dear Olive

I am writing in response to the final report on the implementation of pharmacy restructuring measures, handed down on 7 May 1992 by the Senate Standing Committee on Community Affairs.

I note that the final report focussed on the administrative aspects of pharmacy restructuring rather than broader policy issues that arose during the course of the inquiry.

Administrative and Legislative Framework

The Senate Standing Committee found the legislation for pharmacy restructuring unnecessarily complex and identified problems with the initial administrative processes to implement the restructuring.

The Committee recommends the consolidation of legislation and subordinate legislation for pharmacy restructuring and the Pharmaceutical Benefits Scheme. This idea is a positive one which would streamline the legislation. I will ensure the suggestions made by the Committee are taken into account in the context of the review of major portfolio legislation which was announced in this year's Budget.

As I advised in the Government's response to your interim report, administrative procedures to implement restructuring measures, considered by the Committee, have been addressed.

The Government recognises that some pharmacists may maximise their financial gain by using two interrelated guidelines under the Agreement. This practice is difficult to prevent as the two guidelines are pivotal to restructuring. A small number of pharmacists are able to take advantage of an unusual and fortuitous situation with pharmacy location, where they can claim a closure package on one pharmacy and subsequently relocate another pharmacy they already own which is within 500 metres of the closure site to that site.

Administrative measures to implement pharmacy restructuring were, in the first instance, undertaken on the basis of my press release. The Government acknowledges that there were problems with the introduction of these administrative reforms but, given the need to implement the decision with respect to the new approved criteria quickly to prevent speculation amongst pharmacists and entrepreneurs, the use of press releases to implement the changes were necessary in this instance. There was no intention to either advantage or disadvantage pharmacists through the implementation of the new arrangements.

However, I would note that, except in circumstances when a very rapid response makes it impossible, it remains a major objective of the Government to implement all national programs by means of an effective and appropriately organised strategy.

Implementation of Pharmacy Restructuring

In accordance with the sub-section 98BAA(1) of the Act, the Government acted appropriately by negotiating with the Pharmacy Guild of Australia. With well over 90% of the owners of community pharmacy in Australia represented by the Pharmacy Guild, it is the most appropriate body to represent pharmacists in negotiations over restructuring of community pharmacy.

The more specialised pharmacists' organisations referred to in the Committee's report, such as the Extended Hours Pharmacy Association and the Isolated and Essential Pharmacy Association are generally members of the Guild. As such, they were aware of and are represented in the Government/Guild Agreement.

In the early stages of restructuring, there was a settling in period as the Health Insurance Commission and the Pharmacy Restructuring Authority's duties were defined and clarified. This may have resulted in some administrative duplication. However, the few cases in which duplication occurred have been addressed during the course of your review. Administrative procedures have been streamlined.

Nevertheless, both the Pharmacy Restructuring Authority and the Health Insurance Commission have roles in the administration of the arrangements. To avoid the potential for duplication in the future, the Department of Health, Housing and Community Services will continue to provide a secretariat service to assist the Pharmacy Restructuring Authority in its day-to-day functions and to undertake liaison with the Health Insurance Commission.

Following these initial administrative difficulties, the Government believes all officers involved in administering the legislation are adequately familiar with the legislation.

Evaluation of Pharmacy Restructuring Measures

In recognition of the importance of evaluation, the Pharmacy Restructuring Authority undertook a survey of industry in late 1991. Submissions on the effects of restructuring were invited, and those received from various pharmacy bodies, showed a favourable attitude to the initial phase of restructuring. As a result of this favourable response, it was not considered necessary to undertake any major reforms at that time. Departmental evaluation of the processes of restructuring is ongoing with the continued assistance of pharmacy bodies. The Government is also about to undertake a computer analysis, using geodemographic modelling, on the impact of restructuring.

Lack of Appeals Mechanisms

When the Pharmacy Restructuring Authority was set up, no internal appeal mechanism was developed as it was envisaged that usual appeal mechanisms would operate including:

- appeals to the Administrative Appeals Tribunal;
- review of decisions by the Federal Court of Australia;
- complaints to the Commonwealth Ombudsman; and
- complaints to the Minister.

These appeal mechanisms were found not to apply as a result of an appeal to the Administrative Appeals Tribunal.

The Administrative Appeals Tribunal ruled that, although it had jurisdiction under section 105 AB of the Act to review a decision of a Secretary of the Department, it had no greater power than the Secretary. Since the Secretary could not grant an approval in the absence of a favourable recommendation by the Pharmacy Restructuring Authority, the Administrative Appeals Tribunal could not do so either.

The absence of these normal appeal mechanisms was not intended.

Following this decision, the Government moved immediately to amend the National Health Act 1953 to allow aggrieved applicants access to the Administrative Appeals Tribunal. The amended legislation was granted Royal Assent on 24 December 1991 and was made retrospective to the date the Pharmacy Restructuring Authority commenced operations.

By late January 1992 all aggrieved applicants were advised in writing of the changes. They were also advised of their right of appeal to the Administrative Appeals Tribunal and of the right to obtain a statement of reasons for the rejection of their application from the Pharmacy Restructuring Authority.

More than forty applicants notified of the amended legislation exercised their right to obtain a statement of reasons from the Pharmacy Restructuring Authority and a significant number sought an Administrative Appeals Tribunal review.

Remedy for misleading advice

Any pharmacist who can establish that he/she has been financially disadvantaged through being given wrong advice by Commonwealth Officers has remedies at common law which have been available since 1981 and has also had a possible remedy under the Audit Act 1901 since 1979.

These remedies are:

1. Following the High Court decision in L. Shaddock & Associates v. Council of the City of Parramatta (1981) 150 CLR 225, a Court can award damages if it finds that a public servant or other person acting on behalf of the Commonwealth has given advice negligently and the claimant has relied on that advice to their detriment.
2. Where it is apparent that a claimant is likely to succeed against the Commonwealth, in a claim for damages arising from misleading advice, the matter can be settled without being determined by a Court.
3. Section 34A of the Audit Act 1901 enables the Minister for Finance to authorise the payment of moneys to a claimant where the Commonwealth is under a moral, as distinct from a legal, obligation to do so.

Duplication of remedies which have been available for many years and which are directly applicable to the situations envisaged by the Committee is unnecessary.

The Government also notes that complaints that certain pharmacists may have received incorrect advice have not been substantiated.

In conclusion, I would like to reiterate that pharmacy restructuring will achieve savings to the taxpayer and encourage a competitive, streamlined pharmaceutical industry. The initial administrative problems experienced with the introduction of pharmacy restructuring have been resolved and evaluation processes are in place to monitor the restructuring process. In addition, any significant policy issues which the committee identified in the inquiry have been promptly addressed.

Yours sincerely

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