27 August 2008

Dear Bridget,

Thank you for your letter of 10 August, responding to mine of 24 June. It was helpful to see your department's consultation paper on the options for action south of the border, following the House of Lords Judgement in Johnston v NEI International Combustion Ltd. These are clearly matters for you, but I was naturally interested to note that the document leaves open the possibility of the UK Government promoting legislation in this area.

As regards our own Bill, we are continuing to maintain a dialogue with stakeholders. In that context, the issue of ultimate financial liability has been raised. We are clear that the purpose and effect of our Bill is not to introduce any new obligations, but simply to confirm that in Scotland — notwithstanding the recent House of Lords Judgement — it remains the case, as it has been for some twenty years, that symptomless asbestos-related conditions such as pleural plaques are an actionable injury under the law of delict. On that basis, we are equally clear that ultimate financial liability for claims — whether settled out of court, or by judicial decision — will lay where it always has. In other words, it will be the negligent employer (or their successor, or their insurer) who bears the ultimate cost, whether that is a domestic or foreign private sector company, a local authority, the Scottish Government, or a department of the UK Government (with the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform being the departments likely to be most frequently involved): I note that departments with such liabilities would, of course, have made provision to cover such costs long before the House of Lords ruling. In our view, in principle and in law there will be no justification for any of these bodies, when they are responsible for
negligent acts or omissions that have led to exposure to asbestos and the consequent development of an asbestos-related condition, to attempt to change practice and pass on the ultimate financial costs to any other body.

We believe that this expectation, about which we have been clear from the outset, is the right and proper one. I welcome the fact that, whatever our other differences, this aspect has not been challenged by UK Ministers in the context of our dialogue about how to respond to last October’s House of Lords Judgement. I hope that we will be able to continue to liaise constructively as, in our respective ways, we attempt to take appropriate action to deal with the terrible legacy of asbestos. For example, I would be interested to be kept in touch with progress as regards the review of pleural plaques in relation to the GB-wide Industrial Injuries Benefit Scheme.

FERGUS EWING