DÁIL ÉIREANN

ROGHCHOISTE UM SHLÁINTE

SELECT COMMITTEE ON HEALTH

Dé Céadaoin, 3 Iúil 2019

Wednesday, 3 July 2019

The Select Committee met at 11.10 a.m.

Comhaltaí a bhí i láthair / Members present:

Stephen Donnelly,	
Bernard J. Durkan,	
Simon Harris (Minister for Health),	
Alan Kelly,	
Margaret Murphy O'Mahony,	
Kate O'Connell,	
Louise O'Reilly.	

I láthair / In attendance: Deputy Bríd Smith.

Teachta / Deputy Michael Harty sa Chathaoir / in the Chair.

CervicalCheck Tribunal Bill 2019: Committee Stage

Chairman: This meeting has been convened to allow the select committee to consider the CervicalCheck Tribunal Bill 2019, the purpose of which is to provide for the establishment of an independent statutory tribunal to deal with claims related to the CervicalCheck screening programme process. I welcome the Minister and his officials. The Bill contains 40 sections.

Section 1 agreed to.

SECTION 2

Chairman: Amendments Nos. 1 to 3, inclusive, are related. Amendment No. 2 is a physical alternative to amendment No. 1. Amendments Nos. 1 to 3, inclusive, will be discussed together.

Minister for Health (Deputy Simon Harris): I move amendment No. 1:

In page 6, to delete lines 28 to 30 and substitute the following:

"(a) a woman—

(i) identified as part of the Review of Cervical Screening as having CervicalCheck cytology review findings that were discordant with those of the original cytology examination in relation to the woman concerned, or

(ii) whose cytology slides were sought, by the Review of Cervical Screening, to be re-examined as part of its review but where one or more of those slides could not be re-examined as part of that review by reason of circumstances beyond the control of the woman concerned, or".

I thank the Chairman for convening this meeting. Amendment No. 1 ensures that women who opted to participate in the review by the UK's Royal College of Obstetricians and Gynaecologists, RCOG, but whose slides had not been located by the laboratories ahead of the review's deadline have the opportunity to access the tribunal. This is a sensible and prudent amendment.

Amendments Nos. 2 and 3 are from Deputies Donnelly and Kelly, respectively. I understand what the Deputies are trying to do, but I have yet to find a way of achieving it. This is something that we may need to continue discussing and engaging on ahead of Report Stage. Originally, we all wanted to establish an alternative process to court for the 221 Plus group. We asked an eminent judge, Mr. Justice Charles Meenan, to do some work on designing that pathway. He reverted with the substance of what is effectively the legislation before us. In addition, we decided that it would be sensible to include those who had opted to participate in the RCOG review. For understandable reasons, Deputies Donnelly and Kelly are asking in these amendments that we broaden the Bill beyond that to other categories of women. Deputy Donnelly's amendment asks us to find a mechanism to include women who said they did not wish to participate in the RCOG review but who now wish to access the tribunal. The challenge facing me is that the RCOG review is independent in the first instance and the deadline for participation set by it has now passed. From memory, it was 7 June, but it was certainly in June. The review of this sensitive matter is due to report and is eagerly awaited by many women and their families. I have yet to find another mechanism whereby those who have not had an audit, be it the RCOG or CervicalCheck audit, could be audited. We all understand that, if we were to find another process, it would have to be of a quality and standard with which we would be satisfied.

My fear is that finding such a process would delay the passage of this much-needed legislation, which I would like to see passed by the summer recess so that the tribunal can begin its work in the autumn.

Like Mr. Justice Meenan, I view this tribunal as a potential template for examining clinical negligence issues in future. He is undertaking a body of work on tort reform in general. I do not imagine that this is the last time we will be legislating in this area. Perhaps it is something that we will be able to return to, but I cannot currently find a way to broaden the scope that would be acceptable.

Deputy Stephen Donnelly: Regarding the Minister's amendment, I am happy with the inclusion of those women. I will outline the purpose of amendment No. 2. The women who will be eligible to participate in the tribunal in the first instance are those in the 221 Plus group. There is a second group comprising the 2,000 or so women who were on the National Cancer Registry as having been diagnosed with cervical cancer but about whose diagnoses CervicalCheck was not told. Those women were offered an audit to be carried out by the RCOG in the UK. Approximately half said "Yes". Under the Bill, those 1,000 women have access to the tribunal, but what about the other 1,000 who said "No"? They said "No" without knowing that, in doing so, they were losing access to the tribunal. We do not know how many would have said "Yes" if they had been told that a tribunal was on the way and that, in order to access it, they would need to participate in the review, but it is reasonable to believe the number to be more than zero. If they had been told that the tribunal would be limited to a certain set of women, and knowing that the RCOG was the recognised independent body whose evidence the tribunal could use, a number of those 1,000 women would inevitably have liked to participate in its review. That is what my amendment seeks to allow.

I take the Minister's point that the RCOG review is independent and the deadline for involvement has passed. Will he and his officials find a way for this other group of women to be offered participation in a view, be it by the RCOG, CervicalCheck or an authority or expert group in France, Germany or wherever? Let us assume that, of the 50% who did not say "Yes", one in five would now do so in light of this new knowledge about the tribunal. Is there another body that could handle a few hundred reviews in a reasonably short time? Obviously, the reviews would, like the RCOG's, need to be of the highest quality and fully independent. Let us ensure that those women are made the offer. Maybe the body would be the French or German equivalent of the RCOG. It could be any international group that is deemed appropriate.

I am happy to move and withdraw my amendment, but does the Minister agree with its principle? Does he accept that the 1,000 women who said "No" should be made the offer if an RCOG-type review for them to undergo can be found? They said "No" not knowing about the tribunal. If he agrees with that principle, will he commit to tasking the Department with trying to find a mechanism to let that happen?

Deputy Alan Kelly: I will respond to one point. Otherwise, we would be doubling up. My amendment is similar to Deputy Donnelly's. It does the same thing, more or less, just written in a different way. I welcome the Minister's amendment. It is very good and was suggested by me and others, so I am glad that the Minister has taken it on board. I remember the day when he walked into the Dáil after a good bit of probing and we found out about the extra 1,000 or more women affected by the disconnect between CervicalCheck's records and those of the National Cancer Registry. We have gone through *ad nauseam* how in the name of God that happened.

The Bill is too restrictive in terms of which women can participate. As I said on Second

Stage, I have concerns about this legislation and I am not sure I would recommend that somebody use this tribunal as it is currently constituted. I say this having gained a lot of knowledge from discussions with patient representatives, who would also not necessarily advocate it at this time. In principle, we all want the tribunal to work and to be effective but we have to make sure that women and their families see it as the best route, and that it is as inclusive as possible.

My amendment states: "In page 6, lines 34 and 35, to delete "as part of the retrospective CervicalCheck cytology clinical audit" and substitute ", whether as part of the retrospective CervicalCheck cytology clinical audit or otherwise"." A cohort of women, as the previous speaker said, are outside this and have been almost blindsided by the fact that they could have been advised not to go through the RCOG review, for many different reasons. Because they did not go through it, they now do not have access. That cannot happen and we have to find a solution. They have to have the option.

The tribunal does not have to be held up because of this, though the Minister said what he said for the right reasons. Will it be held up in any case, on account of the appeal of the Ruth Morrissey judgment? I disagree with this and I have spoken at length on the matter. There is now a window to deal with this issue because it is likely that the judgment will not be made until the autumn. We can pass the legislation but we can do so with amendment, whether it is mine or Deputy Donnelly's or, indeed, something the Minister proposes with which we can agree. A mechanism will have to be found in the current vacuum, which has been created by the Ruth Morrissey case, to deal with the women who are outside the process. We do not have an option in this regard. This has to happen. We need a mechanism to put into the Bill and the women in question need to be written to and given the opportunity, with a deadline of course. We need to see how many women are affected and then deal with that.

Deputy Kate O'Connell: This is the group of women on the cancer registry list who chose not to engage. Is there any research as to why their decision was made? There must have been some reason for not engaging with the RCOG process. Perhaps I have missed something but I do not understand why one in five of the total number would go to another jurisdiction. That would seem to create inequality in terms of standards. If we got to the reason they did not engage, we might find out what we should do. We do not want people to slip through the net and not have the opportunity to engage. We want to sort people out in the least adversarial way possible and without forcing them to jump through too many hoops.

Deputy Simon Harris: This has been a constructive engagement. In response to Deputy O'Connell, we need to be sure not to second-guess why women chose not to engage with the RCOG process. For a lot of people, their cancer journey may have ended a number of years ago and they may now be in very good health and not wish to have an independent review. The figure I have shows that 63% of women on the cancer registry consented to the RCOG review. That means 37% did not. The Deputy is correct that this was for a variety of reasons. Nobody chose to enter the RCOG process as a passport to the tribunal because nobody knew about the existence of the tribunal. They chose to do it to exercise the option of an independent external review of their screening history and a determination, if there was discordance. Some women decided they would like that while others decided they would not. I do not have the reasons for women making different decisions but we can, at a human level, guess them. Different people are at different stages in terms of health and well-being and their family life. The Deputy makes a fair point, however, and nobody wants to be unfair. I would guess that the number is relatively small because nobody in this room would be able to tell me how many of the 37% have changed their minds and would now like an independent review. Of those, only a proportion will have

a discordance and be able to enter the tribunal. Access to the tribunal is based on a finding of discordance from either RCOG or the retrospective CervicalCheck audit. I have not done the maths but I would imagine that the number of women involved is quite small. This heightens the argument to deal with it. I cannot deal with it on the floor of a committee meeting and members are not asking me to do that.

The RCOG review is independent and it is now closed. It is important that it moves on to reporting in the autumn because a lot of women are waiting for it and no one wants to delay it. I will reflect on the issue and engage further with the committee between now and Report Stage, which is a short window, to see if there is a way of dealing with it, either in this legislation or by way of a commitment to return with a proposal shortly. We need to be careful in terms of scope and not to create other inequities by trying to be fair. Today, a woman will go for a smear but there is no audit under way because one of the Scally recommendations was for a new audit. The tribunal cannot be an ongoing process that lasts forever. Patients said that they want it to be timely, time-limited and scope-limited. We should not broaden it too much and we have a broader Bill relating to clinical negligence, which is more extensive legislative work for us to do.

I am happy to work with members and colleagues to put forward amendments to deal with this. It cannot be done easily but I am willing to try and to ask my officials to work on it. I will report back to the committee and, at the very least, I will seek to update the Dáil on Report Stage as to where we are at.

Deputy Stephen Donnelly: When is Report Stage?

Deputy Simon Harris: I expect it to be next week, subject to passing this Stage.

Deputy Stephen Donnelly: Rather than our hearing the answer in the Dáil on Report Stage, can the Minister and his officials come back here ahead of time?

Deputy Simon Harris: Absolutely.

Deputy Stephen Donnelly: We are all agreed with the principle of finding a mechanism.

Deputy Simon Harris: Yes, but I wish to flag the fact that the finding of the mechanism will be tricky, though I am not saying it is beyond us. I do not want to mislead the committee into thinking I can find it within a couple of days. We know what we want to do.

Deputy Alan Kelly: We want to find a mechanism.

Deputy Simon Harris: We also want to find a way to provide assurance on the issue.

Deputy Alan Kelly: Based on all the analysis, I agree that this will be a small figure, but some women have been in touch with us, while others do not know. We need to ensure they are gathered together and put through another process. It can be dealt with as part of the Bill but I accept the Minister's bona fides on this and if it cannot, there needs to be another mechanism by which it can be done. As long as it is dealt with, I will not die in the ditch for my amendment.

Deputy Simon Harris: That is fair and I appreciate it.

Amendment agreed to.

Chairman: Amendment No. 2 cannot be moved as it is an alternative to amendment No. 1.

Deputy Stephen Donnelly: No, it is not. The amendments refer to two different groups of women and are not alternatives to each other. The Minister's amendment No. 1 is about cases where they cannot find the slides. Amendment No. 2 is about women who chose not to engage with the Royal College of Obstetricians and Gynaecologists.

Chairman: Is the Deputy moving amendment No. 2?

Deputy Stephen Donnelly: I will move it and withdraw it. I move amendment No. 2:

In page 6, line 30, after "concerned," to insert the following:

"where that woman agreed to participating in the Review of Cervical Screening up to 3 months after the commencement of this Bill, ".

Amendment, by leave, withdrawn.

Amendments Nos. 3 and 4 not moved.

Section 2, as amended, agreed to.

Sections 3 to 8, inclusive, agreed to.

Amendment No. 5 not moved.

Section 9 agreed to.

Section 10 agreed to.

SECTION 11

Deputy Alan Kelly: I move amendment No. 6:

In page 10, line 7, to delete "or" where it secondly occurs.

I met the officials, as the Minister is aware. I have read this many times and I believe it causes confusion. It is a drafting issue in section 11(1)(a). I seek the advice of the Minister on this. Section 11(1) reads:

Subject to *section 12* and *subsection (2)*, an appropriate person may, in the prescribed form and manner, make a claim for compensation to the Tribunal-

(a) seeking damages for negligence, breach of duty, breach of statutory duty or breach of contract arising from any act or omission concerning CervicalCheck, or

How stands that final "or"? For me, there can be different interpretations when one reads the Bill further. The Minister was to look at this.

Deputy Simon Harris: This amendment is due to the eagle eye of Deputy Kelly and his legislative scrutiny. He may have spotted a drafting error. While I do not believe it is a drafting error, I have sought the advice of the Attorney General. We read the "or" as an "and-or".

Deputy Alan Kelly: It does not say that.

Deputy Simon Harris: My legal advice suggests that is the meaning of the word. We all know what it is meant to mean. There may be a drafting issue. I have sought the Attorney General's advice on the impact of the deletion and I will come back on Report Stage. The Deputy may be right but we need to be sure.

Deputy Alan Kelly: "And-or" is "and-or". This is just "or".

Deputy Simon Harris: Let me await the Attorney General's advice. If there is a need to fix it, we will do that.

Deputy Alan Kelly: That is no problem.

Amendment, by leave, withdrawn.

Amendment No. 7 not moved.

Section 11 agreed to.

SECTION 12

Chairman: Amendments Nos. 8 and 9 are related and may be discussed together.

Deputy Bríd Smith: I move amendment No. 8:

In page 10, lines 22 to 26, to delete all words from and including "woman-" in line 22 down to and including line 26 and substitute the following:

"woman within the time of the Statute of Limitations,".

The reason for the amendment is that the Bill wants to put a limit on women accessing the tribunal of six months after they find out about their slides or within nine months of the establishment of the tribunal. We want to ensure their rights are no different from others. Will the Minister explain why these periods were chosen?

Deputy Alan Kelly: I have raised this issue because there is an inconsistency in the legislation compared with similar types of legislation. The Personal Injuries Assessment Board adds on six months so that people do not end up outside the Statute of Limitations. It is done with good reason. If somebody misses a notification, they could accidentally end up outside the time period. It is good practice to add on six months, and that has been validated and put through in other legislation in the past. I ask that this legislation would reflect that as well, as per the Personal Injuries Assessment Board Act.

Deputy Simon Harris: I see what Deputy Smith is trying to do in her amendment. The Statute of Limitations continues to apply in terms of access to the courts, so obviously it is the same Statute of Limitations as for anybody else and as for any other issue, which is two years from the cause of action. In regard to the tribunal, when we asked Mr. Justice Meenan to do his work, one of the things that came back from the report, and from his engagement with patients and others, was that this should be more timely, more efficient and more speedy than the court system. We have tried to time-limit this tribunal so women can get answers quicker and we have picked a figure of nine months. I am satisfied that is appropriate.

It is different from Deputy Kelly's point, and I think Deputy Kelly has a point that I will need to return to on Report Stage. If the tribunal says, for a variety of reasons it cannot help a woman involved or the tribunal says it cannot take the case, what the Deputy is suggesting is that there should be a period of extra time in addition to the Statute of Limitations to allow a woman to talk to her lawyer and her family and consider the issue. I think that is right. We might not agree on this entirely and the six months might be too long for different reasons. I need to engage with colleagues on that. While Deputy Kelly can resubmit his amendment in regard to a period of six months, I am committed to bringing my own amendment on Report

Stage that will provide for an additional period. It is likely to be less than six months but I have not landed on a figure yet.

Deputy Alan Kelly: I thank the Minister. I am glad he has reflected on my amendment. It is common sense if the determination has been made that they need a period to be able to decide what they are going to do next. I know the Minister is going to reflect on it. However, from a consistency point of view, it is six months in similar legislation and I do not see a reason to go outside that. I am glad the Minister is taking the amendment in the right spirit and we will see what he drafts. On that basis, I will not press my amendment No. 9.

Amendment, by leave, withdrawn.

Amendment No. 9 not moved.

Section 12 agreed to.

Amendment No. 10 not moved.

Section 13 agreed to.

Sections 14 and 15 agreed to.

SECTION 16

Question proposed: "That section 16 stand part of the Bill."

Chairman: I understand Deputy Smith is opposing the section.

Deputy Bríd Smith: The argument is that it should not have any impact on the award from the tribunal, which may be judging from a different category of injuries. Therefore, why should the *ex gratia* payment be subtracted?

Deputy Simon Harris: I understand the Deputy's point. There is a balance to be struck here. Obviously, if we have already made a payment for non-disclosure through the *ex gratia* scheme, and we have fixed that as a set payment of €20,000 - when I say "we", an independent assessment panel has done that and those payments of €20,000 will start issuing in the coming weeks - what we are saying is that the tribunal "shall take into account" the payment from an *ex gratia* scheme. We have worded that in such loose language, if I may call it that, for good reason. We are not saying that the tribunal must deduct it but that it shall take it into account.

I have spoken to some patient advocates on this and I know that some people might want to go to tribunal and say that, while they got the *ex gratia* payment, the manner of their non-disclosure was particularly horrific or had a particular impact and they want to argue that in a tribunal or, indeed, in court. We are only saying "shall take into account" and we are not saying the judge must deduct the €20,000. We need to be cognisant of the fact we have already made a decision to pay €20,000 for non-disclosure, but that does not take away from somebody's entitlement, when they go to a tribunal or to court, to argue that they should be entitled to a quantum larger than that, such was the impact of the non-disclosure on them. Therefore, I have not said "must be", "will be" or "should be". I have worded it in such a way that it gives the judge and the tribunal that discretion.

Question put and agreed to.

SECTION 17

Chairman: Amendments Nos. 11 and 14 are related and will be discussed together.

Deputy Alan Kelly: I move amendment No. 11:

In page 12, between lines 26 and 27, to insert the following:

"(3) (a) Notwithstanding *subsection (2)*, the Tribunal shall assess and make any award for general or special damages on the basis of a single lump sum award or a provisional award as chosen by a claimant under this subsection.

(b) Where the Tribunal is of the view that there is a possibility that a claimant, as a result of the wrong by reference to which an award falls to be made, may suffer particular serious consequences in the future, the Tribunal may make an award ("provisional award") calculated in accordance with *subsection (2)* but assessed on the assumption that such serious consequences will not occur, identifying those consequences and specifying the period within which the claimant may apply in the event of such occurring.

(c) Where the consequences referred to in *paragraph (b)* do occur, the claimant may apply for a further award, in accordance with the terms of the provisional award.

(d) A claimant shall choose, on making a claim to the Tribunal, whether she or he is seeking a single lump sum award or a provisional award. A claimant may, at the discretion of the Tribunal, alter her or his choice up to the commencement of the hearing of her or his claim.".

This is an important issue. The amendment relates to the fear that some women who will be diagnosed and treated face the risk of the cancer recurring. Cancer recurs and, unfortunately, statistically in many cases it recurs within a short period. The first five years are the biggest risk. It can happen later but within five years is common. If a woman takes her case to the courts, she knows there will be finality to the decision and if she suffers a recurrence later on, that will be it. That is the court system and she will not be compensated. That is unavoidable in court but it is not unavoidable at a tribunal and we have precedent for it. Statutory provision is being made for a new type of forum, that is, the tribunal operating to the practice and procedure of the High Court but free to make its own rules. It provides for cross-examining witnesses and a range of other measures. Why can it not provide, as the hepatitis C tribunal did, for all awards to be made as interim awards so if that if the cancer recurs, the woman can return? Unfortunately, in this scenario there will be cases where health outcomes will deteriorate significantly and those women will be locked out of seeking further damages at the tribunal.

Deputy Bríd Smith: I have tabled amendment No. 14. This issue is important because anybody who knows someone who has suffered from cancer knows the return of the cancer can be much more distressing and dangerous than the original condition. It would be punitive not to allow for this. There is a likelihood in certain cases that the cancer will return later on. What will women do if they find themselves in these circumstances without the financial and physical means and support mechanisms to deal with the stress, which would be double or treble what they originally felt? We have to allow them to return to the tribunal to receive its protection and support and, therefore, that of the State. To do otherwise would be punitive. As Deputy Kelly said, it was allowed in the case of the hepatitis C tribunal. All the Minister would have to do is copy and paste what was allowed for in that case and insert it here, which is what we have done.

Deputy Kate O'Connell: Perhaps someone could give us advice on this. I would have

thought it would be complicated to link a recurrence of cancer later in life specifically to an incident ten years previously. Where does the line get drawn? Otherwise the tribunal could go on for 60 or 100 years. The hepatitis C tribunal is slightly different because the infection and transmission was very much quantifiable and identifiable to the point of the infected blood. I am not an expert but I have a small amount of information. It would be very difficult to connect a cancer occurring ten years after the all clear had been given.

Deputy Bernard J. Durkan: This could be a difficult situation. It is readily recognisable that a person who has been diagnosed as having cancer and cured of the difficulty can have it come back subsequently at some stage. What is the extent to which it can be identified as a continuation of the previous condition? In the hepatitis C case, from memory, which is vague at this stage as it was a long time ago, everybody had the right to go through the tribunal first and if people were not satisfied, they had the right to go to court. Some conflict arose because advice was given to some of the patients that they should not go to the tribunal but directly to court. That caused a problem. The intent was to speed up processing the cases so the people directly affected could have some recognition of their condition and compensation for it. We must remember it was very similar in the sense that time was passing and there was constant worry. From memory, it did not work out exactly as was intended but it did resolve the most immediate problems, in the sense that it could not have been stated the cases were ignored; the first part of them was dealt with in any event. In some cases, the next part took on a longer life and was more difficult to resolve. I understand the case being made but there is a difficulty in determining whether we are dealing with continuation of the same condition or a new and totally different condition, which may be cancer and lead to the same problems but may not be directly linked. I am not certain.

Deputy Bríd Smith: Asking the women to sign a waiver against making future claims may be desirable from the women's point of view in respect of the recurrence of the same cancer, and I am not talking about getting cancer of the eye or the brain later. If, however, the Minister's intention is to get women to partake and participate in the tribunal, there is a danger that this will discourage them from participating. It would be a block. None of us, apart from the Chairman, is a doctor or scientist but in practical terms if we are trying to support and acknowledge the failures of the system, the State and CervicalCheck in dealing with women's health, and we are acknowledging it in a way that is real, then asking the women to sign a waiver in the case of their future health is very unreasonable. It will deter women from participating.

Deputy Alan Kelly: The bona fides here are absolutely 100%. The amendments tabled by Deputy Smith and me are more or less the same because they are taken from the hepatitis C tribunal. This tribunal can establish its own rules and procedures. I appreciate what other Deputies have said about linking and the difference between hepatitis C and cancer but it is undeniable that there are linkages when it comes to the recurrence of cancer. We all know this and we have seen it here.

From my perspective, I will push this amendment, although not today, if the matter is not resolved. I will be very happy to have discussions with the Minister on agreeing a joint amendment. I do not believe the legislation can go through without dealing with this because, as Deputy Smith said, this is one of the main reasons women may not go to the tribunal. It limits the ability of the tribunal to bring about finality. In some cases, unfortunately, the women do not know what their future is and this is the situation they have been left in. If the Minister cannot bring forward an amendment, I will certainly press mine on Report Stage. I believe in the spirit of the legislation, and the spirit in which the Minister is dealing with it, but he should reflect on

this matter and bring forward an amendment. By the way, a time limit could be applied in this regard, for example, a period of five years from commencement or from the point at which the case is settled. We can work on this but not dealing with it is not an option.

Deputy Simon Harris: Deputy O'Connell hit on the key point.

Deputy Alan Kelly: That is twice today.

Deputy Simon Harris: In fairness, I gave Deputy Kelly credit the last time. Deputy O'Connell often does so on these matters as she is well informed. In fairness to Deputies Kelly and Smith, they both said very openly the intent of the amendments is to replicate the hepatitis C compensation tribunal. My starting point on this, which I believe we would all acknowledge, is that this matter is very different from hepatitis C. For hepatitis C, no adjudication was required with regard to the medical facts. We, as a State, infected women. We bought contaminated blood. As a State, we had a duty to mind and care for them throughout their lives and try to right the wrong done. As their needs, including their health needs, changed, the tribunal continued to be able to make various orders and payments. The proposed tribunal is of a kind we have never established before in the history of the State. It is an adjudicative tribunal. The hepatitis C compensation tribunal recognised that the actions of the State had made people ill. That is not the case in the current circumstances. In the current circumstances people were let down owing to non-disclosure in the first instance. In some instances there may be negligence but not in all. I have heard patient representatives and their solicitors publicly acknowledge that not every case will relate to negligence, that some will reflect the limitations of screening. In that sense, it is more complex. However, I accept fully the *bona fides* of Deputies Kelly and Bríd Smith in what they are endeavouring to do. It is an important issue, on which I have taken advice and I am happy to take more.

Deputy Kelly hit on something important in referring to the rules and procedures of the tribunal, on which I might touch. The advice I have been given - the legal advice and the advice from the tribunal - is that the judge can and will take into consideration the medical evidence related to the risk of recurrence, future health and well-being. The tribunal will not be considering only the impact on the person today, it will also be able to take into account medical evidence and have its own experts. That is another difference by comparison with the High Court. The judge will have her own experts, not just the experts for both sides in considering the risk of recurrence. That is important.

Deputy Kelly has stated there are rules and procedures set out for every tribunal that point to the general principles to be applied. I have to be very careful and state I do not write the rules. The tribunal is obviously independent, but perhaps the rules and procedures can make it very clear that the risk of recurrence and future health will be considered and assessed by the tribunal when it makes an award.

Deputy Kelly qualified it in his last intervention in talking about a time limit. If we were to accept the amendments as read today, or versions thereof, we would effectively be committing, as the Oireachtas, to the ongoing maintenance of a tribunal. If the Oireachtas wants to do that, it is very different from what we started out to do. We started out, through the Meenan report, with a time-limited and scope-limited and an efficient way for women to obtain answers, justice and, where there was wrongdoing, payment. We would be moving into a very different space if we were talking about the ongoing maintenance of a tribunal in the way the hepatitis C tribunal has been maintained for many years.

My final point is a key one and members might not welcome my making it. This is a voluntary process. We need both women and the laboratories to participate. Either side can decide it does not wish to participate. It would be very different if we were asking laboratories to participate in a process that would be ongoing forevermore. I do not want to pass legislation that looks like I am providing an alternative to the court to find out that it will not work in reality. We did not have that complication with the hepatitis C tribunal which just involved the State and its citizens. In this instance we have different parties, including some external to the State. They have a choice as to whether to participate. It is voluntary and legally has to be so. Trying to get both parties to participate is important.

I am happy to engage with Deputies Bríd Smith and Kelly between now and Report Stage. I understand they may well resubmit their amendments. I would like to provide further information on how I believe the issue can be dealt with, possibly by rules and procedures, in the tribunal. I suggest we engage further between now and Report Stage. Obviously, the Deputies have the right to resubmit their amendments.

Deputy Bríd Smith: I take the latter point about participation by all sides. It is obviously what we need to achieve. What is required, however, is the signing of a waiver by the woman. That is what we want to remove. Regardless of the five-year period mentioned by Deputy Kelly, if there is a recurrence of cervical cancer in ten or 15 years' time, the waiver might mean that the woman would have no redress or would not have the capacity to investigate or take a case to court.

The Minister said in his opening remarks in response to what we had proposed that this was quite different from the hepatitis C case because in the latter case people had been let down by the State and that that was not the case in this instance. Will he repeat what he said or elaborate on what he actually means?

Deputy Simon Harris: I am sure the Deputy would not misread what I said intentionally. I definitely did not say that. Let me be very clear-----

Deputy Bríd Smith: It was a version of it.

Deputy Simon Harris: A very different version. Words matter. As Minister for Health, I have been very clear from day one that women were let down by the State in the non-disclosure of a retrospective audit which was meant to be disclosed. I have apologised for it. AsI have spent many hours with many women and families, the Deputy should not in any way, accidentally or otherwise, misrepresent what I said about that matter. What I have said is-----

Deputy Alan Kelly: In fairness, I did not say that.

Deputy Simon Harris: The Deputy did not, for which I thank him. The record will show that it is not what I said.

Deputy Bríd Smith: It was not about non-disclosure but about the whole package, the CervicalCheck system.

Deputy Simon Harris: The Deputy suggested, accidentally or otherwise, that I had said women had not been let down by the State. They were absolutely let down by the State, 100%-----

Deputy Bríd Smith: In non-disclosure.

Deputy Simon Harris: In the CervicalCheck audit. The facts of the Scally report are evident for all to see and accepted. My bona fides are very clear and understood by those directly affected. That is what is most important to me in that regard.

What I have said - it is a statement of medical fact - is that the infection of people by contaminated blood by the State is very different from what occurred owing to the limitations of screening, whereby, in some cases, there are false positives and false negatives. This is all documented clearly in the Scally report. One can bring in any medical expert one wants to confirm that there are false negatives and false positives. In some cases, however, there is negligence, but there is a very big difference between a false negative and negligence. The reason the tribunal has to be adjudicative rather than compensatory is somebody needs to establish and adjudicate on whether there has been negligence or a false negative. That is the role of the judge, supported by experts. In his report Mr. Justice Meenan outlines seven or eight reasons he believes this is a more compassionate or better approach than that of the courts system. He does not use these words, but I do. He arrived at his point after meeting many people, including Dr. Scally and patient representatives. It is not a perfect model, but I do not believe there is one because of the complexities involved. I will not pretend it is a perfect model because it is not, but it is a better one or certainly an alternative to court. I do not believe this is a replica of the hepatitis C issue or that the tribunal replicates the hepatitis C tribunal. It is not the same legally. The hepatitis C tribunal was compensatory, while this one is adjudicative. It has to establish whether there was negligence. The hepatitis C tribunal never had to do that; it just had to decide on how to compensate and look after those affected.

Deputy Bríd Smith: I thank the Minister for the explanation, but may I finish my point? I am not trying to say the hepatitis C model is a direct copy-----

Deputy Simon Harris: I appreciate that.

Deputy Bríd Smith: -----but it is absolutely wrong and the Minister, as the representative of the Department of Health for the State, has not proved, despite the Scally reports, that the arrangement between the State and laboratories in America was not at the heart of the problem. That has not proved to be the case and the Minister is jumping the gun by saying the State does not have responsibility. In fact, his predecessor, Senator James Reilly, argued the opposite when in opposition, contending that the outsourcing arrangement between the State and laboratories in America was dodgy and could lead to genuine problems for women. It has not been proved-----

Deputy Simon Harris: Dr. Scally will be before the health committee tomorrow and-----

Deputy Bríd Smith: Let me finish my point.

Deputy Simon Harris: The Deputy is misrepresenting the Scally report. It is grossly irresponsible.

Deputy Bríd Smith: It is not fair to interrupt me. I did not interrupt the Minister.

Deputy Simon Harris: The Deputy did a few times. What she said was grossly irresponsible.

Deputy Bríd Smith: I did not interrupt the Minister.

Chairman: Let the Minister respond.

Deputy Simon Harris: The Deputy is misrepresenting Dr. Gabriel Scally's reports. She is presenting herself almost as a cytologist in pursuit of an ideological viewpoint on outsourcing. She is perfectly entitled to her ideological views on outsourcing. She might even be right that it would be better to do things in this country, but she is not right in making the suggestion she has made. She is applying a new test, based on not having proved that something did not occur. That is a bizarre test. Dr. Scally, despite the considerable deficiencies found in the screening programme in its audit, procurement and governance - I was not in office at the time of any of these events but let us park that issue - did not find safety issues.

Deputy Bríd Smith: May I finish my point?

Deputy Simon Harris: The Deputy will have a chance to ask Dr. Scally tomorrow.

Deputy Bríd Smith: May I finish my point?

Chairman: Yes.

Deputy Bríd Smith: It is not to question the cytology or the science behind it but to question what the Minister said, that it is quite different from the hepatitis C issue in so far as the State is not responsible for the outcomes. We have to question that. The dust has not settled on it and the jury is still out. Dr. Scally has carried out some fine research and produced fine reports, but there are still many questions and gaps. No matter how many times the Minister tells me that I am doing what I am doing for ideological reasons, I am being logical about this and there are many who agree with me who are not as ideological as I am in the same way. I am proud to be ideological when it comes to arguing with the Minister on this issue. I am proud to have a different ideology, which states the State should look after women properly-----

Deputy Simon Harris: I respect that.

Deputy Bríd Smith: -----instead of outsourcing their health services. Despite that, the Minister should not put words in my mouth. I am not trying to reinvent science that I do not understand, but I understand the difference between false negatives and false positives because I have gone to the trouble to understand it. That is not the point I am getting at. I am getting at the irresponsibility of this State to continue outsourcing Cervical Check samples to laboratories in America that were not up to scratch.

Chairman: The Deputy needs to speak to the amendment rather than the wider issue.

Deputy Bríd Smith: The Minister was speaking on the amendment when he said something that fundamentally I had to disagree with.

Chairman: I now invite the following speakers, Deputy O'Reilly to be followed by Deputy Kelly.

Deputy Louise O'Reilly: My intervention was on a practical procedural matter. As the Minister has indicated he will liaise with the Deputies who put forward those amendments, I ask that it would be shared with members in a timely manner to give those of us who will be voting an opportunity to study them. My intention is to support the amendments, in that the Minister has accepted the spirit of them, but the hope is that he will come back with an amendment that will be reassuring to those of us who seek to support them. Nobody wants to stand in the way of the legislation, but time will be tight as Report Stage will be taken next week. Nobody wants to be considering amendments and trying to make a decision on them at the very

last minute. We want to get this right.

There were references to previous tribunals, but they did not get it right and part of the reason is that they were rushed. Some members have expressed a view that this might be a little bit rushed but to do it right, we need the full set of information before we vote on Report Stage.

Chairman: I call Deputy Kelly to be followed by Deputy Donnelly.

Deputy Alan Kelly: I will stick to the amendment, even though I was very much taken by the Minister's final comments. I agree with 95% of it but there is -----

Deputy Simon Harris: That is progress.

Deputy Alan Kelly: There is 5% from the last report which proves that what the Minister just said is not exactly accurate, but I will come to that another day. I am chasing the same thing all the time.

The Minister is proposing to deal with this through the instigation of rules and procedures. That is not the same thing. If it was, and it was going to deal with the issues that Deputy Bríd Smith and I have raised, I would work with the Minister on it because I work with him on everything to do with this. What would be perceived is the Minister would be asking the tribunal to deal with this, whereby it would try to measure the instances in which there would be a likelihood of cancer returning and compensating women for that. That is absolutely impossible. I am working 100% with the Minister in this regard, as I have shown for a long time, but I cannot support that because it is impossible. In fact, I do not think it is even a good idea.

I have listened to the Minister's comments on the time period and have reflected on it. However, having a chat with members on telling the tribunal to deal with this matter in its rules and procedures is completely different and is a bad idea. I will not support that.

Should the Minister come back with an amended version of my amendment, and inserting a time period from the time each woman is told of the outcome, is something I will support, as long as the time period is five years, as science has shown. I take on board the Minister's point on this matter. Unless the Minister tables such an amendment, I will be pressing an amendment similar to amendment No. 11 on Report Stage. I believe it should be supported and hope it will be supported. Any fair minded public representative can see that there is an issue, and I accept the point on the way that it is worded. I strongly urge the Minister to work with the Opposition to come up with an amendment.

Deputy Stephen Donnelly: May I ask two clarifying questions in trying to understand whether to support the amendment?

My reading of the section essentially says that the rules of the High Court shall apply. My first question is whether it is the case that a judge of the High Court can say that he or she is awarding the person X amount for now and the judge is putting in a provisional sum, in case of adverse events happen in the future. If the rules of the High Court are being applied, could the High Court essentially do this now?

Second, if we do something like this, must we have a perpetual tribunal in order that one could come back to the tribunal X number of years later to say one has had a recurrence of cervical cancer that one believes it is linked to the first one and to ask the tribunal to judge on it and therefore make one an award if it believes there is a link? Would it not be possible to refer

such future judgments back to the High Court? If it is the case that the High Court can already make such provisional judgments, then my reading of the power of the tribunal is it could do so as well but we need some provision to say that by the way, if such a future judgment is needed, it will not happen at the tribunal because the tribunal will not be open forever, but that such a judgment would be made in the High Court.

Deputy Simon Harris: There are many things in Deputy Donnelly's second point that I could reflect on and seek clarity on. It sound pretty sensible to me, and that is something that we can usefully reflect on in advance of Report Stage.

On the first point, my understanding of the rules of the High Court now is not that it makes a provisional award but that in making the award, it can factor in risk of recurrence and a person's future health. That is what the High Court does now.

Deputy Alan Kelly: The High Court cannot do what the Minister suggests.

Deputy Simon Harris: No, it cannot.

Deputy Stephen Donnelly: Which is what the Minister is seeking.

Deputy Simon Harris: Yes.

Deputy Alan Kelly: In the High Court.

Deputy Simon Harris: As much as Deputy Kelly, with whom I rarely disagree, thinks that what I am proposing is difficult to do or perhaps not worth doing, I equally think back to the point made by Deputies O'Connell and Durkan. If somebody gets cancer five, ten or 15 years later, it is not necessarily the case that is linked back to a smear test and an audit many years ago, as the Chairman, as a doctor, will understand better than any of us. There can be interval cancers and cancers that come back. One can develop cancer later in life that has no link whatsoever with the past cancer. For those watching the proceedings, it is not as simple as saying I have cervical cancer now, and I had a discordance ten years ago, therefore this must be arising from that.

Deputy Stephen Donnelly: May I ask one question to clarify that last point?

Deputy Simon Harris: Yes.

Deputy Stephen Donnelly: On Deputy Bríd Smith's point on signing a waiver, I did not read anything about doing so. If the High Court awards an individual X amount, based on current observable damages to date and perhaps adding a risk-adjusted amount for a recurrence, is it implicit in accepting a judgment that the individual is saying that should she have a recurrence of cancer in three years' time, she will not be able to come back to court and make a case about the link if she wishes to come back to prove there is a link? Does the individual lose the ability to do that in a few years' time, once one accepts an award?

Deputy Simon Harris: We think that may be legally possible but whether it would be successful is a matter for the court to decide.

Deputy Stephen Donnelly: That is for the courts to decide. Does the Minister think the individual could come back to the court?

Deputy Simon Harris: It is my understanding that it would be a new case.

Deputy Stephen Donnelly: The individual does not have to sign away her rights to come back in the future.

Deputy Simon Harris: On a new case.

Deputy Bríd Smith: I tabled an amendment on this issue but it was ruled out of order.

Deputy Simon Harris: In fairness, Deputy Bríd Smith raised this point in the Dáil during statements on CervicalCheck and I get the point.

Deputy Bríd Smith: I tabled an amendment.

Deputy Simon Harris: Yes, absolutely. It is a case of whether it is seen as a new case by the High Court.

Rather than accidentally adding to the confusion, I think I can usefully seek clarification for committee members on the situation that Deputy Donnelly has illustrated well. If a cancer comes back, can the individual go to the High Court on that matter? I think that is a useful point on which we can find clarity and it seems logical as well.

From a procedural point of view, taking Deputy O'Reilly's point, may I suggest that if the deadline for Report State amendments is Friday, 5 July, we could usefully schedule a meeting for member of this committee with my officials tomorrow to tease out these issues further?

Deputy Kate O'Connell: We are focusing on the reoccurrence of cancer. What if there is someone in this group who has not yet tried to have a family, who has stage 1 cancer, and who then decides to have a family? We are saying that the only bad thing that can happen is a reoccurrence of cancer where someone would not be able to have children or where there could be difficulties with births due to damage of the cervix. If we are to amend this and allow it to be reopened further in the High Court or elsewhere, we are not only looking at cancer but all the other things which might arise, which is very hard to quantify. We must look at more than cancer here.

Deputy Simon Harris: The rules of the High Court apply here on this. We are trying to find a better pathway than going to the High Court. Mr. Justice Meenan outlined how he believes this is better. It is heard in private, there are written statements, experts are available to the judges, there are case management protocols and so on, but we are still applying the fundamental rules of law which would apply in the High Court. These are issues which the High Court grapples with now every day. The Deputy is correct about taking in the whole impact of wrongdoing on a person.

Deputy Alan Kelly: I withdraw the amendment as the Minister says he will reflect on what I said. I say to him strongly, however, that he should draft his own amendment on this matter. Otherwise I will press the amendment and I will seek the support of the Houses.

Amendment, by leave, withdrawn.

Deputy Stephen Donnelly: I move amendment No. 12:

In page 12, between lines 26 and 27, to insert the following:

"(3) The Tribunal shall be entitled to award aggravated damages in circumstances where—

(a) the Tribunal determines that a claimant has been cross-examined in an unnecessarily aggressive and/or adversarial manner by a respondent, or

(b) the Tribunal determines that the respondent advanced a defence that it knew or ought reasonably to have known was not justified by the evidence available to that respondent.".

This is a separate issue to the one we just discussed. The purpose of this amendment is to provide protection to women as they are being cross-examined. Much of the genesis of this tribunal was a very real concern for the trauma which the women were going through in the High Court. The Taoiseach promised that no women would have to go to court again and there was a strong reaction among the public to how women were being treated in some cases. Maybe I am being unfair as I did not see the proceedings and am only going on reports, but I understand that women were being asked very personal questions about their past sex life, almost in a victim shaming line of questioning. By asking a woman who has cervical cancer about her sex life, presumably the implication is that it is partly her fault. The public reaction and the reaction in the Oireachtas to that was very strong. Women should not be subjected to this kind of questioning. One thing which the tribunal achieves is that it brings the matter into private session so that at least women who want to use the tribunal who do not wish to answer such questions in public may do so in private.

The second part is the process of questioning itself. In the High Court, a judge can make an award for aggravated damages based on how a witness is cross-examined. A judge might find in favour of the person being cross-examined on the basis that he or she believes there was negligence and the judge may award a certain sum. On top of that, the judge may make a second award based on how the witness was treated under cross-examination. It might be asked then why bother restating, to an extent, a power that is already there. It is to underscore one of the core principles of the tribunal. Negligence is being established and the labs and the State have the right to defend themselves, of course. By referencing aggravated damages for unnecessarily aggressive or adversarial cross-examination, however, as opposed to just saying that the rules of the High Court apply, a point is being made in the legislation that while parties may cross-examine and have the right to defend themselves in the case of negligence, they should be very aware that the treatment of these women is front and centre in the mind of the tribunal. That is why it is there rather than just accepting that it is part of the normal powers of a High Court judge. It is stated explicitly because while the tribunal, by definition, achieves one of the aims, which is to move from public to private session, another core aim is to provide a respectful way of making these cases, although it may still be robust. That is why it is there.

Deputy Simon Harris: I am fully aware of the substance of what Deputy Donnelly seeks to do with the amendment. It is something we all want to do. I would differentiate between the State's legal representatives and those of the laboratories in terms of questioning and cross-examining in what the Deputy referred to.

I have examined this already and taken advice. I have also seen some court cases and rulings where aggravated damages have been awarded based on the conduct of the wrongdoer or his or her representative in defence of the claim of the wronged plaintiff. I can see why the Deputy wishes to have it stated explicitly. Respecting the independence of the tribunal, my sense is that the rules and procedures which everyone can view might be the right place. I have liaised with the tribunal to ensure that it is satisfied that it has the power, and it does. I would like to explore it a little further with the Deputy before Report Stage tomorrow and share with him some of the information I have been given by the tribunal to assure the Deputy that it has

the power while also addressing the fair point that he makes. I suggest that women attending the tribunal, like the rest of us, are unlikely to read the legislation but would be more likely to read the rules and procedures of the tribunal. Let us have that discussion and see if we can find a way forward.

I could get into the technicalities of the wording of the amendment, which is somewhat problematic, but that is not the point today. I know what the Deputy is trying to do and I do not disagree with it. It is just a case of how best to achieve it and what way is most appropriate. I wish to provide an assurance to the committee and the House that the Office of the Attorney General and the tribunal itself are satisfied that the tribunal has the powers to do what the Deputy rightly wants them to be able to do on aggravated damages.

Deputy Stephen Donnelly: For clarity, my point is not necessarily that the women would read the Bill but that the lawyers operating on behalf of the labs would most certainly read it. It is a message to the lawyers rather than the women.

Deputy Simon Harris: That is a fair point.

Deputy Stephen Donnelly: If the Minister is satisfied that the power is definitely there and the conversations have been had, I accept that. I would welcome a document on rules and behaviour. It would be important. I will withdraw the amendment.

Amendment, by leave, withdrawn.

Amendment No. 13 not moved.

Deputy Bríd Smith: I move amendment No. 14:

In page 12, between lines 37 and 38, to insert the following:

"(6)(a) Where the Tribunal is of the view that there is a possibility, but no more than a possibility, that a claimant as a result of having contracted cancer may suffer particular serious consequences in the future, the Tribunal may make an award (''provisional award'') calculated in accordance with *subsections (1)* and *(2)* but assessed on the assumption that such serious consequences will not occur, identifying those consequences and specifying the period within which the claimant may apply in the event of such occurring.

(b) Subject to *paragraph (a)*, where the consequences referred to in this subsection do occur, the claimant may apply for an award of further compensation in accordance with the terms of the provisional award.

(c) A claimant shall choose, on making a claim to the Tribunal, whether she or he is seeking a single lump sum award or a provisional award. A claimant may, at the discretion of the Tribunal, alter her or his choice up to the commencement of the hearing of her or his claim.".

Deputy Alan Kelly: I will deal with my version of this amendment on Report Stage.

Amendment, by leave, withdrawn.

Section 17 agreed to.

Section 18 agreed to.

SECTION 19

Amendments Nos. 15 and 16 not moved.

Question proposed: "That section 19 stand part of the Bill."

Deputy Stephen Donnelly: I will speak to the section, but I am not challenging it. It deals with costs. My amendment was ruled out of order because it involved a potential charge on the State. In this case, there will be such a charge. I want to ensure that cost will not become a barrier to any woman or family who require access. I know that some of the legal teams are operating on a no award, no fee basis, but that may not always be the case and the volume of cases is likely to go up considerably. I tabled an amendment that would have amended the Civil Legal Aid Act 1995 and included in the appropriate section participants in this tribunal. That is all it sought to do. Does the Minister agree with the principle and mechanism? It would be reasonable for legal costs to be covered where they were a barrier to a woman or her family in accessing the tribunal. It is critical that the right level of legal representation be covered. We have sat in courtrooms in which the legal aid barrister has stood up to consult the client for the first time for approximately ten seconds before defending him or her before the judge. That is not the sort of free legal aid about which we are talking in this case. This process will require solicitors and may require senior or junior counsel. The level of legal representation should be appropriate to allow the women concerned have proper legal teams and legal cases made. It should not be the case that they have to reach into a pool of junior solicitors and barristers who come to do their best.

Deputy Alan Kelly: My amendment which was in the same spirit as Deputy Donnelly's was also ruled out of order. Deputy Donnelly's amendment was very good in that it thought outside the box. This issue should not be dealt with through legal aid in the way it might be perceived from listening to the Joe Duffy show or something like it. It is not the same. My amendment was ruled out of order because it involved a potential charge on the Exchequer. It indicated that there should be no doubt about costs and that a worry about costs should not be a barrier or perceived as such for women in coming before the tribunal. Neither Deputy Donnelly, anybody else on this side of the House nor I can propose an amendment that would involve a cost on the State. I am not too hung up on how he does it, but an amendment must be introduced by the Minister to bring certainty to this issue. We spoke about how anything that might be perceived as a barrier to women in going before the tribunal in the first place would be a negative. The current wording is negative and should be revised. I would like the Minister to bring forward an amendment to deal with this issue.

Deputy Louise O'Reilly: I indicated my concerns when we discussed this issue previously. This was one such concern. I also said it was not about being the one to propose the amendment or "winning" when it came to chalking up amendments. It is about getting it right. Access is key. We must deal with anything that will act as a barrier to access. We all know that if we want to ensure something will go on for a very long time and it will cost a lot money, more lawyers should be involved. That must be balanced against the need women will have for advice. We might regard this as a non-adversarial process, but it certainly will not be for the

women involved. It will be extremely traumatising for many people who will have to go back over what was a very traumatic time in their life in an environment with people who are legally trained. They should not have to go into that arena without receiving sufficient advice, support and representation, as required. The amendments have been ruled out of order, but I hope the Minister understands the spirit behind them. I am disappointed that there is no amendment to cover the issue, but I hope the Minister will return with an amendment, bearing in mind, as I mentioned, that time is extremely tight. There is nobody in the room who would object to women having access to this process. That is what we want. However, there are barriers that must be acknowledged and addressed.

Deputy Kate O'Connell: The people at the centre of this process are the women involved. We must be on their side. We do not want to be in a position where the laboratories will have extensive legal teams, with no issues of cost, leading to a David versus Goliath scenario with women who have already been through an awful lot and who will have to discuss very personal matters being met by a wall of very experienced people and not being able to compete. I want to ensure our focus will remain on the women involved and bringing about a process that is the least adversarial possible. There should be no barrier because of an inequality in legal representation.

Deputy Bernard J. Durkan: Deputy Kelly's amendment would result in a cost on the State. There is also the question of the liabilities on other private entities such as laboratories that have defended cases. There is obviously a case to answer or otherwise they would not have been to court. Our job is not to defend them or deflect attention away from them. That is outside our remit and the issue needs careful examination. As Deputy O'Connell noted, we must recognise that we must think first about the patients and the manner in which individual cases were dealt with. We must consider how we can in some way alleviate the serious trauma caused for the women involved in many of the cases.

Deputy Simon Harris: To balance my partisan persuasions, Deputy Donnelly made the key point in this round of exchanges. We need to address it. Deputy Kelly acknowledged that Deputy Donnelly's amendment would go a long way towards doing so, but I have two options to achieve what I see as the same aim. My preferred option is to come back with a version of Deputy Donnelly's amendment. There will be a variation, as the word "shall" will be changed to "may". I must get legal advice on the matter. Nonetheless, I will bring forward an amendment that ultimately will try to do the same thing as Deputy Donnelly's amendment.

It is already legally possible to add the tribunal to a list of prescribed bodies in providing access to legal advice through a ministerial order made by the Minister for Justice and Equality who already has the power to say certain prescribed bodies have access to legal advice. It is another avenue. It may be a case of doing both or just one of them. My preference is to bring forward a version of the amendment on Report Stage. That is my intention, unless in the next 24 hours I can come up with a compelling reason the other option is better, but the ultimate aim is to achieve the same thing. I thank the Deputies and will revert to them on Report Stage.

Question put and agreed to.

SECTION 20

Deputy Bríd Smith: I move amendment No. 17:

In page 13, between lines 21 and 22, to insert the following:

"(3) No hearing shall be conducted in public without the express consent of the claimant.".

I get that the Minister might have the same intention but I want to be sure that no hearing will be conducted in public without the expressed wishes of the claimant. I know it would fly in the face of everything the Minister stands for but should stronger wording be inserted to make sure no public hearing takes place without the expressed consent of the person involved?

Deputy Simon Harris: I want the same thing. The legislation as drafted states that where a claimant requests the tribunal to hold a hearing or part of a hearing in public and the tribunal agrees it would be appropriate to do so, the tribunal shall conduct the hearing, or part of the hearing, concerned in public. The Deputy is asking, understandably, whether this is strong enough and whether we need to be stronger. The idea is that if a woman chooses, she can have her hearing and personal health and life story heard in private rather than in public or she can opt to have parts of the hearing held in public. She might decide she wants some of it to be public and some of the more personal stuff to be dealt with privately. My understanding and legal advice is the legislation deals with this and allows for it. I have checked with the tribunal that this is its understanding. I will take the day to reflect further on what the Deputy said because it is absolutely the intention of the legislation and, it is fair to say, the intention of the Oireachtas that if a woman does not want a hearing in public or part of a hearing in public that it should not be in public. I will revert to the tribunal and the Office of the Attorney General, and if there is a need to strengthen the language on Report Stage, I will do so because we all want to achieve the same thing.

Deputy Louise O'Reilly: Am I correct that the hearing will be in public if that is what the woman wants and the tribunal will not be able to exercise a veto? Perhaps I am phrasing it the wrong way.

Deputy Simon Harris: No, the Deputy is correct.

Deputy Louise O'Reilly: Will evidence be given at the tribunal that the tribunal will insist be given in private even in a scenario where the woman might want it in public?

Deputy Simon Harris: The default position is that all of the hearings will take place in private unless the woman says she wants it to be in public or part of it to be in public.

Deputy Louise O'Reilly: Okay.

Deputy Simon Harris: The tribunal does need to agree to that; the tribunal needs to agree it is appropriate to be heard in public bit but there is no part where the tribunal can say it will be in public. It is the reverse.

Deputy Louise O'Reilly: My concern is the opposite way around. I have to say that given what they will be speaking about I suspect the number will be small, if any. A woman may wish to have the hearing held in public but the tribunal may refuse. Is there a form of adjudication for this?

Deputy Simon Harris: This is the bit on which I will seek clarity because I cannot see how it will happen. The default position of our Judiciary and courts is that everything is in public so judges are used to holding hearings in public. I cannot imagine such a situation but we are right to probe it. I will come back to the Deputy on Report Stage on it if there is a need to tighten the language, but I do not believe there is. Deputy Smith's amendment is different.

Deputy Louise O'Reilly: I know.

Deputy Simon Harris: A hearing definitely will not be held in public without the woman's consent.

Deputy Bríd Smith: Is the wording robust enough?

Deputy Simon Harris: In my view it is. The question Deputy O'Reilly asked is the reverse, with regard to whether the wording is robust enough where a woman states she does want something heard in public. I will need to check whether the wording is robust enough for this.

Deputy Louise O'Reilly: It would only be if there is an appeal mechanism or with regard to how it is determined. To be straight with the Minister, I do not envisage there will be very many in this scenario-----

Deputy Simon Harris: No.

Deputy Louise O'Reilly: -----but it is a concern that was raised with me. We know what we are talking about and we know what was done to these women. It is a question of stating that if this is their choice, nobody should exercise a veto over it.

Deputy Simon Harris: Let me check both positions with the tribunal and revert.

Deputy Bríd Smith: I will withdraw the amendment based on what the Minister comes back with.

Amendment, by leave, withdrawn.

Section 20 agreed to.

Sections 21 to 26, inclusive, agreed to.

SECTION 27

Deputy Simon Harris: I move amendment No. 18:

In page 17, to delete lines 4 and 5 and substitute the following:

"**27.** (1) An appeal shall lie from a determination of the Tribunal to the High Court.".

This is a technical amendment coming from my engagement with the tribunal. The amendment clarifies that partial appeals can be heard. The wording was a bit ambiguous.

Amendment agreed to.

Section 27, as amended, agreed to.

SECTION 28

Deputy Alan Kelly: I move amendment No. 19:

In page 17, to delete lines 26 to 30 and substitute the following:

"28. (1) Where—

(a) a claimant in respect of whom an award has been made accepts the award, and

(b) no other party to that claim, within the period specified in *section 27(2)(a)*, appeals to the High Court from the determination of the Tribunal,

the Tribunal shall, as soon as practicable after the expiration of that period, by motion on notice to the parties to the claim, make an application in a summary manner to the High Court for confirmation of the determination.".

This amendment seeks clarification. As drafted, where a party accepts an award and it is not rejected by the parties, it is then referred to the High Court for the appropriate order to be made. As it is written, even rejection of a tribunal award must go to the High Court. Why is it drafted in such a way?

Deputy Simon Harris: I have asked the Attorney General to come back to me on this before Report Stage and I will provide clarity to the Deputy.

Deputy Alan Kelly: It is odd. It is not necessary and it looks like a drafting error.

Deputy Simon Harris: I was looking for an opportunity to get the Deputy's input on this. His argument is that it should not be necessary to go to the High Court if the tribunal cannot assist-----

Deputy Alan Kelly: If it is rejected.

Deputy Simon Harris: We have asked the Attorney General to interpret the Deputy's amendment and I will bring it back for Report Stage.

Deputy Alan Kelly: It is common sense.

Amendment, by leave, withdrawn.

Section 28 agreed to.

Sections 29 to 38, inclusive, agreed to.

SECTION 39

Deputy Simon Harris: I move amendment No. 20:

In page 23, between lines 13 and 14, to insert the following:

"(2) The Tribunal shall establish procedures providing for the restriction of the Data Protection Regulation to the extent necessary and proportionate to enable the Tribunal to carry out its functions under *Part 2* and shall publish the procedures in such manner as it considers appropriate.".

This amendment was drafted following consultation with the Data Protection Commission, which we have engaged to work with the tribunal on the drafting of rules on data protection.

Amendment agreed to.

Section 39, as amended, agreed to.

SECTION 40

Question proposed: "That section 40 stand part of the Bill."

Deputy Stephen Donnelly: The Bill requires the voluntary co-operation of all parties,

including the women and their families, the laboratories and the State. I presume we have the State on board. The indication is the women affected are satisfied with the parameters, notwithstanding aspects of the debate. Have the laboratories indicated yet whether they will co-operate with the legislation as drafted?

Deputy Simon Harris: The short answer is I do not have a definitive answer. I know Mr. Justice Meenan engaged with the laboratories as part of the process. The content of the legislation will not be a surprise to any of the parties. Until this gets up and running, it will be hard to tell. After we pass the legislation through the Oireachtas, that will be the appropriate time to engage further with the laboratories. Of course, I encourage all parties to avail of this as an alternative to court but I have not had formal engagement on it. I am advised by my officials that we will check further with the laboratories later this week on their viewpoint so far.

Deputy Stephen Donnelly: None of them has opted out at this stage.

Deputy Simon Harris: Not that I am aware of. To the best of my knowledge, all of them had an opportunity to discuss with Mr. Justice Meenan their views on alternatives and obviously he took all of this into consideration.

Deputy Bríd Smith: What happens if we pass the legislation and the laboratories decide they do not want to opt in?

Deputy Simon Harris: I am no spokesperson for the laboratories but this links to some of the important points I have been making on aligning the tribunal with the rules of the High Court. It makes it likely that all parties will participate because the legal rules will be the same. The format and protocols might be different and, as we have been discussing, the compassionate way we engage is different but the legal rules will be the same. It is absolutely true that it is a voluntary process. A woman could decide not to go there and opt instead to go to the High Court, as is her constitutional right, and laboratories can do so as well. We have been grappling with this for many months. There is no legal avenue that I can find in terms of an adjudicative tribunal whereby one could or would wish to remove the right of someone to go to the High Court.

Deputy Kate O'Connell: Following on from Deputy Bríd Smith's question, is it possible for a lab to turn up at the tribunal for my hearing, let us say, but not for Bríd's hearing? Can they be *à la carte* with their clients? It might suit lab A to turn up for my hearing but it might not want anything to do with another woman's case. Can the labs pick and choose the cases for which they turn up?

Deputy Simon Harris: They can, and different women can make different decisions as well.

Deputy Kate O'Connell: With the women it is different.

Deputy Simon Harris: Absolutely, I am very well aware of that. Each case is different as well. We are not legislating to say that this is how all cases will be dealt with, nor are we asking the labs, support groups or patient advocates to agree that everyone goes this route. It will be individual cases.

Deputy Bríd Smith: There is a difference. The patients request to be dealt with by the tribunal. Surely there should be a compunction on the labs, as there would be on the HSE, to meet that request from a woman, rather than the other way around. They are implicated.

Deputy Simon Harris: Yes. These are not ideas I have come up with; we have brought in some of the most learned minds and a judge who specialises in clinical negligence, Mr. Justice Charles Meenan, to come up with a model. There does not seem to be any legal avenue available to compel external agencies to attend. That is not welcome news but it is the truth. If this was a matter of just the State, it would be a very different case. The fact is that neither I nor the Oireachtas has the legal authority to make the labs attend.

Deputy Kate O'Connell: That is in terms of compellability if they are outside the jurisdiction. There are limitations in that regard.

Deputy Simon Harris: Yes, and people have the right. We cannot trump our court system and its place in our Constitution.

Deputy Kate O'Connell: If lab A decides it will turn up for my hearing but not for another person's hearing, and it has a contract still in existence and perhaps we have got extra capacity from it, how does that stand in terms of our dealing with it as a company?

Deputy Simon Harris: That is an ethical question with which we all have been grappling. As a great supporter of our screening programme, I know the Deputy remembers that, as Minister for Health, my first priority had to be the continuance of screening. I hope Deputy Bríd Smith believes me on this. It would have been great to be in a position to have the capacity here in our own country. As Dr. Scally has noted in his report and as I am sure he will note when he comes before the joint committee, there was not another option in terms of keeping our screening programme going.

Deputy Alan Kelly: I refer to Ms Justice Mary Irvine. Has a decision been made not to host this tribunal until after the Morrissey judgment appeal outcome has been delivered? I understand such a decision has been made but I want the Minister to confirm this. I have asked about the matter on many occasions and been told that it is happening. We will not reopen the debate but I think it is important to confirm the position.

On compellability, in respect of some of the more complex cases, there may be a requirement for representatives from the HSE to be witnesses at hearings. Is it the Minister's intention to require State employees such as the HSE to attend the tribunal?

Deputy Simon Harris: Responding to the second question first, absolutely, 100%. Anybody who works for this State and works for our health service will be expected to co-operate fully. That is not just my expectation; in fairness to the new director general of the HSE, I know it is one he shares as well.

In response to the first question, it is a matter for the tribunal to decide when to commence its hearing. My understanding is that the Deputy's information is correct but I would like to confirm that in a more formal way. Nor would I like to say anything in the Oireachtas that would second-guess our courts and their decision.

Deputy Alan Kelly: That is okay.

Deputy Simon Harris: It is important as to whether our courts decide to hear an appeal, which is a matter for them, and, when they do decide to hear it, whether they decide to hear it quickly.

Deputy Alan Kelly: I understand.

Deputy Simon Harris: I am not suggesting that the Deputy is doing this but, for people watching, I would not like it to be interpreted as a delay in the establishment of the tribunal. That may not be the case.

Deputy Alan Kelly: The purpose of the question was to seek clarity because many people are asking me.

Deputy Simon Harris: I am happy to provide that.

Chairman: If there are two laboratories involved in a case and one is willing to come to the tribunal but the other is not, what is the position?

Deputy Simon Harris: It would be a matter for the tribunal to determine whether to proceed, depending on the individual case.

Chairman: The tribunal would make the decision.

Question put and agreed to.

Title agreed to.

Bill reported with amendments.

Message to Dáil

Chairman: In accordance with Standing Order 90, the following message will be sent to the Dáil:

> The Select Committee on Health has completed its consideration of the CervicalCheck Tribunal Bill 2019 and has made amendments thereto.

I thank the Minister and his officials for their time.

The select committee adjourned at 12.50 p.m. *sine die*.