Amendments to the Embryo Protection Act: Laying the cards on the table

As Dean of the Faculty for Social Wellbeing I would like to call for reflection on this delicate matter by first and foremost advising for a non-partisan approach to such an important national debate.

This Press Release is intended to lay out the matters on the table and commend legislators, policy makers, experts, stakeholders and the general public to take in cognizance the following as we reflect on the proposed changes to the ACT to amend the Embryo Protection Act, Cap. 524. In this Press Release I will list the pros and cons to avoid simplistic entrenching and turf defending. Above all our discourse needs to be informed by rational, ethical and considerate argumentation.

My initial reactions are the following:
- that the proposed changes seriously dilute the focus on the dignity and protection of the human embryo;
- that the consultation period has been too brief and that the matter is being rushed through prematurely.

The three major bones of contention are; the ‘freezing of embryos’; ‘anonymous donation’; and ‘surrogacy’.
Freezing of embryos

Arguments have been made to the effect that the proposal to allow the ‘freezing’ of embryos will inevitably result in a surplus of embryos. While some will not survive the thawing process, others will simply continue to ‘exist’ as they may not necessarily get adopted or donated as indicated in the revisions. I think that the proposed Act does not cater for these surplus embryos, and fears have been expressed by various parties that these might simply be thrown away or given for experimental research (even though according to the current law and the amendments proposed, research on embryos is and will remain illegal). Furthermore, the very fact of selecting which embryos are to be implanted and which not also poses an ethical and social justice dilemma. I do not think that the number of fertilised cells should be used as a defining argument.

On the other hand, it has been argued by Deputy Prime Minister and Minister of Health Hon. Chris Fearne, that “the rate of success of embryos from the freezer have doubled the success rate [to current procedures where embryos are planted in the womb]” and that “none will be left in the freezer forever”. Dr Miriam Sciberras from Life Network Foundation Malta, states that “With the current law, we can do away with embryo freezing. The ova can be cultivated and only the ones that will be implanted will be fertilised. The remaining ova can then be frozen. During subsequent cycles, the ova can be thawed and then fertilised to be implanted. The national health system only gives you three cycles. If we really want to help these women, we should not introduce embryo freezing but more IVF cycles.” The Commissioner for Children, Pauline Miceli, said that “Cryo-preservation or freezing of human embryos has become a medically viable practice by virtue of the high rate of survival of cryo-preserved or frozen human embryos. The Bill provides a framework for the cryo-preservation of embryos to be conducted in a way that maximises the chances of the individual human embryo to survive throughout the freezing and thawing process and thus to eventually develop healthily.”

Anonymous donation

Another concern has been expressed about the anonymous donation of gametes, both in terms of a child’s right to know his/her biological parents, and also in view of the possibility of close relatives (unaware of being so) eventually entering into an intimate relationship with all that this implies medically for the health of the ensuing offspring.

Dr Mark Sant, Consultant Obstetrician and Gynaecologist, has stated that “research had extensively assessed the psychological adaptation of donor children, and found it to be comparable to that of children born naturally or through IVF.... He warned that banning anonymous donation would destroy any donation programme, as it meant that prospective donors would have to
reconcile themselves to the possibility of being sought out by their biological children against their own wishes.”

The counter-arguments are the following;

As to potential relationships between relatives, Minister Fearne said that “all individuals born through IVF procedures will have access from the authorities so people will know that they are not from the same donor" and Commissioner Miceli states that "the Bill safeguards the right of a child conceived through such means to his or her individual identity by giving children, when they turn sixteen, the right to know the identity of the donor through whose gamete they were conceived. The fact that the Bill proposes that gamete donation by the same donor can happen once only preserves the uniqueness of the child's biological identity.”

**Surrogacy**

A third issue that is being discussed is that of Surrogacy. Commercial surrogacy remains a criminal act in the proposed revisions, in recognition, perhaps, of the commodification of women and the maternal bond and responsibilities that surrogacy implies. However, it is proposed that it will be at the Minister’s discretion to regulate ‘altruistic surrogacy’ through a legal notice. Opening up the door to surrogacy, and the difficulties in ascertaining where this is truly altruistic, is a very big step and insufficient thought and debate appear to have gone into this proposal. Issues around psychological ramifications of such a procedure are to be placed on the agenda rather than choosing to view the ‘surrogate’ as being void of personhood or feeling.

Dr Miriam Sciberras says that the law states that “surrogacy, also known as altruistic surrogacy, between friends could be anyone. This law gives all the options of surrogacy even to two gay men. Both the donors of the sperm and ovum can be donated to be carried by someone else. This leads to an identity crisis for the child.”

The TMI Editorial on the other hand notes that, “There are arguments both for and against surrogacy. In some of the cited examples it might make sense, especially in cases where a woman might not be able to carry a child in her own womb. But some other examples are so highly convoluted that one might ask why these prospective parents do not opt to adopt a child instead. Which also begs the question: should the state not make it easier and more affordable to adopt? “

Where does all of this leave us?
I believe that there are ten points for reflection on this proposed Bill – a Bill that expedites the creation of a surplus of embryos, that facilitates the freezing of embryos, that enables IVF through donor gametes and that enables the de-criminalization of noncommercial surrogacy.

**Reflection 1:**
All human life, presently alive, or who ever lived, started life as an embryo. Science confirms, as a fact, that at fertilisation a new life genetically distinct from the ovum (the mother) and the sperm (the father) that created it begins. This life is referred to by different terms through its different stages of development, from zygote to embryo to foetus to baby to child to youth to adult to older person. The genetically distinct new organism formed at fertilisation is the same human life until death.

**Reflection 2:**
The human natural desire to propagate and to have children can be a cause of immense pain for couples who cannot have children. If we can do something to alleviate this pain and longing, we should. The advancement of science that supports the creation of life is an amazing source of hope for many such couples and merits full support through legislation and resources. However, all such support for the creation of life cannot be done at the expense of dispensing some other life.

**Reflection 3:**
While recognising the deep human and natural desire for children, this desire does not constitute a right to have children.

**Reflection 4:**
All children have a right to know their full genetic identity and their genetic history. It is not enough for a child to know his or her inherited medical conditions through a file. One’s genetic identity includes the full knowledge and access to one’s roots. Professionally, we know the importance that human beings give to their roots. We all know stories of children, youth and adults who do not manage to come to terms with their past and find peace because of gaps in their roots which they never manage to fill. Children born through IVF should also have their genetic identity rights safeguarded. Parliament should safeguard and protect the biological heritage of all citizens rather than facilitate the process for the creation of a generation of citizens deprived of their biological heritage.

**Reflection 5:**
Gestational surrogacy is effectively the legalisation of a new market of human beings, with the possibility of creating another entry point to human trafficking. What also concerns me is the
fact that whoever opts for surrogacy to carry the child of others without having been pregnant before will suffer immense psychological harm. A surrogate mother who already has her own children already knows what pregnancy and bonding are like.

**Reflection 6:**
Gestational surrogacy places the creation of life in the realm of commerce and law. It may involve up to 5 separate individuals: egg donor, sperm donor, gestational carrier and one or more “commissioning parents.” (Theoretically, it can actually involve even more than 5 people in situations when an embryo is created from more than one egg donor because of possible “defects”.) As a consequence, the law decides who the legal parents of the child will be, highlighting the artificial nature of the whole process. The woman who carries the child for nine months and the egg and sperm donors (when none of these are the “commissioning parents”) are simple components in the commodification of the creation of a human being.

**Reflection 7:**
Another argument that has been made in regards to surrogacy is that it is known to be potentially economically exploitive, manipulating poor women for the benefits of the reproductive goals of the rich.

**Reflection 8:**
It is common practice in IVF for the doctor to implant multiple eggs with the hope that some of them will survive. It is common for surrogacy agreements to bind the surrogate to undertake a process of “selective reduction” (abortion) if more than the required number survive or if the foetus does not meet the specifications of the “commissioning parents”.

**Reflection 9:**
Surrogacy commodifies and objectifies the maternal identity of women. It uses a woman’s womb for gestation with no consideration for the post pregnancy period. Basically, the gestational mother has no right whatsoever to express any feelings or attachment to the child she would have carried for nine months. Once the baby is born, the gestational mother’s bond to the child is discarded. Naturally this might not be the case if the surrogate is a member of the same family.

**Reflection 10:**
Ultimately, we have no idea on the possible psychological impact of severing the infant’s attachment to the gestational mother. Yet, surrogacy assumes that the infant’s attachment to the surrogate is dispensable. So asking the question: “Is surrogacy in the child’s best interest?” is essential if the law is to be guided by the paramountcy principle. This question becomes even more pertinent in situations of legal limbo following the rejection of a
commissioned child by the commissioning parents due to the child not meeting the expectations of the commissioning parents (for instance when child has birth “defects”).

My appeal is once again that we should safeguard the best interests of children at all times. Whilst a point has been made about an increase in the number of people with infertility problems this does not preclude us from being cautious on decisions that will have a long-term impact. More time is required to discuss the implications of such a delicate piece of legislation.

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1 See page C 384: Except in cases of a direct donation, the prospective parents shall only be entitled to obtain such generic information as specified in the Protocol about the donor whose identity shall in all cases remain confidential: Provided that the anonymous medical records of the donor shall be accessible to the child conceived from the germ line cells of such donor either upon reaching sixteen (16) years of age or, subject to the consent of the Authority, at any earlier stage in exceptional circumstances in which the life or health of the child born from such germ line cells is in risk. - AN ACT to amend the Embryo Protection Act, Cap. 524

4 Deputy Prim Minister and Minister of Health Hon. Chris Fearne (TMI on-line, 15/4/18), Malta Independent Editorial (TMI on-line, 16/4/18), Dr Miriam Sciberras from Life Network Foundation Malta (TMI on-line, 21/4/18) and Commissioner for Children Pauline Miceli (TMI on-line, 23/4/18).