



# AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

## Bishops Commission for Family, Youth and Life

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Committee Secretary  
House of Representatives Standing Committee  
on Social Policy and Legal Affairs  
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Dear Committee Secretary

### **Inquiry into Surrogacy**

This submission is from the Australian Catholic Bishops Conference (ACBC) as prepared by the Bishops Commission for Family, Youth and Life (BCFYL).

The ACBC is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The BCFYL is one of a number of commissions established by the ACBC to address important issues both within the Church and in the broader Australian community. The BCFYL has responsibility for commenting on surrogacy.

The Catholic community is the largest religious group in Australia with 5.4 million Australians or more than one quarter of the population identifying as Catholic. The Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of healthcare services in Australia. It has over 1700 schools enrolling more than 750,000, or approximately one in five, Australian students. It provides community services to more than one million Australians every year.

The ACBC seeks to participate in public debate by making reasoned arguments that can be considered by all people of goodwill.

The ACBC appreciates the opportunity to make a submission to the *Inquiry into Surrogacy*.

## Overview

There is a natural and commendable desire to bear children. Many couples face great pain and sadness when they cannot have children because of infertility or the inability to carry a child to full term. Many of us know and love people who are in this position.

Turning to surrogacy as a response to this pain and sadness is not in the best interests of the child, the mother acting as surrogate, any gamete donors or the commissioning parents. Surrogacy raises issues affecting the dignity of each of the people involved.<sup>1</sup>

It is important to note that surrogacy only addresses one aspect of the pain of infertility, which is the lack of children, but does not address the infertility itself so couples still need to deal with this heartbreak.<sup>2</sup>

By addressing the lack of children, surrogacy can transfer sadness from the infertile couple to the surrogate mother. United States surrogate mother Elizabeth Kane wrote:

Surrogate motherhood is nothing more than the transference of pain from one woman to another. One woman is in anguish because she cannot become a mother, and another woman may suffer for the rest of her life because she cannot know the child she bore for someone else.<sup>3</sup>

Surrogacy also means the priority given to the adult desire for children is deliberately put ahead of children's rights to know their parents and to not be sold or trafficked.<sup>4</sup>

The ACBC will argue that surrogacy:

- Undermines human dignity, because it does not respect the way in which children are conceived and born
- Promotes the exploitation of women as surrogate mothers, particularly women from lower socioeconomic backgrounds
- Does not respect the right of a child to know and be raised by their natural parents
- Introduces market values into the realm of childbirth, breaking the natural bond between mother and child
- Is an act undertaken without sufficiently considering the interests of the child nor the surrogate mother

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<sup>1</sup> Congregation for the Doctrine of the Faith, *Donum Vitae: Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*. 22 February 1987, #5; Instruction *Dignitas Personae* on Certain Bioethical Questions, 20 June 2008, #16.

<sup>2</sup> Tonti-Filippini, N, The Contradictions of Baby Gammy: Disability, Discrimination and the True Cost of Surrogacy. *ABC Religion and Ethics*, 7 August 2014. See: <http://www.abc.net.au/religion/articles/2014/08/07/4062429.htm>

<sup>3</sup> Ekman, K E, Stop Surrogacy Before it is Too Late. Festival of Dangerous Ideas. 19 August 2014. See: <https://medium.com/festival-of-dangerous-ideas/stop-surrogacy-before-it-is-too-late-9910035a63f0#.ma2g0si1u>

<sup>4</sup> Bishop, L and Loff, B, Making surrogacy legal would violate children's rights. *The Conversation*, 21 August 2014.

- Can confuse children as to their origins, given they can have as many as five either genetic or commissioning parents, and
- Redefines the concept of parenthood from one based on a natural, interpersonal relationship to one based on a contractual, legal relationship.

Australians face the very difficult situation in which there are around 250 citizenship applications each year for children born overseas as a result of a commercial surrogacy contract.<sup>5</sup> The claim is sometimes made that given overseas jurisdictions do not regulate surrogacy well and given Australian laws are not preventing Australians travelling overseas to use commercial surrogacy arrangements, then we should allow commercial surrogacy in Australia where it can be regulated properly.<sup>6</sup>

There are a number of harms and benefits from surrogacy which mean governments must consider whether regulation is appropriate or whether it is better to prohibit commercial surrogacy. The ACBC submits that surrogacy, both commercial and altruistic, is inherently flawed and offends human dignity. These flaws cannot be overcome by regulation.<sup>7</sup> Given the manifest offences of this practice against the wellbeing of women and children, it would be intolerable to argue harm minimisation to allow the development of a commercial surrogacy industry in Australia.

### **What is surrogacy?**

Surrogacy refers to a woman being commissioned to bear a child with the intention of handing that child to the care of a commissioning parent or parents once the child is born. The woman acting as surrogate may agree to this arrangement as an act of generosity (altruistic surrogacy), or for financial consideration (commercial surrogacy). The child may be conceived using the gametes of one or both the commissioning parents, or the child may have no genetic relationship with either of the commissioning parents.

Surrogacy redefines parenthood with laws completely divorced from biological reality. It confuses people who commission the production of a child with parents.<sup>8</sup> It redefines a mother giving birth to a child as a “gestational carrier”. It dehumanises one of the most profoundly human and personal parts of life – the conception, birth and upbringing of a child.

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<sup>5</sup> Committee Hansard, House of Representatives Standing Committee on Social Policy and Legal Affairs, Roundtable on Surrogacy. Thursday, 26 February 2015, page 12.

<sup>6</sup> Everingham, S, et al, Australians’ use of surrogacy. *Medical Journal of Australia*, 205(5), 2014, pages 1-4; Stafford-Bell, M, Outcomes of surrogacy undertaken by Australians overseas, *Medical Journal of Australia*, 201(6), 2014, pages 330-333; Parnell, S, Parliamentary inquiry to examine surrogacy arrangements. *The Australian*, 4 December 2015.

<sup>7</sup> McCormick, R, Surrogacy: A Catholic Perspective. *Creighton Law Review*, Vol. 25, 1992, page 1624.

<sup>8</sup> Campbell, R, Surrogacy disrespects a child’s dignity. *The Catholic Leader*, 8 September 2009.

The ACBC notes that, while each jurisdiction in Australia has different laws about surrogacy, broadly speaking altruistic surrogacy is allowed while commercial surrogacy is not permitted.<sup>9</sup>

### **Human dignity**

Respect for human dignity, that is the respect for the distinctive capacities and needs of human beings, is the basis of all human rights. It is possessed by each and every human being, irrespective of their age, sex, race, abilities, or any other quality. Since human life is continuous from conception to natural death, the inherent dignity and right to life of every person must be respected from the moment of conception (ie. the moment that the first cell of the human zygote is formed by whatever means it comes to be).<sup>10</sup>

Surrogacy may include the use of Assisted Reproductive Technology (ART), which involves the formation of an embryo by a laboratory procedure replacing the personal, life giving nature of the intimate expression of love through marital intercourse between husband and wife with a technical procedure. ART may also involve the discarding of human embryos.<sup>11</sup> Respect for persons conceived must be manifest in the manner by which they are conceived (i.e. by the process of conception itself). If respect is not inherent in the manner by which a person is conceived and if conception is treated merely as a mechanical means of production, then respect is denied to the child conceived at the very origin of their life, to the woman who is the child's mother who brings the child to birth, and to the commissioning parents.

In November last year the European Parliament published a human rights report which condemned the practice of surrogacy on the basis that it "...undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity ..." and considered "... the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries ... a matter of urgency in human rights instruments."<sup>12</sup>

The practice of using ART for surrogacy clearly tips the balance of respect away from people born as a result of ART and the surrogate mother and towards the commissioning parents by prioritising the desire of the commissioning parents over the rights of the child.

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<sup>9</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report of the Roundtable on Surrogacy*, March 2015, paragraph 1.5.

<sup>10</sup> Instruction Dignitas Personae on Certain Bioethical Questions, 20 June 2008, #4, 6.

<sup>11</sup> Instruction Dignitas Personae on Certain Bioethical Questions, 20 June 2008, #16; Catholic Health Australia, *Code of Ethical Standards for Catholic Health and Aged Care Services in Australia*. Catholic Health Australia, 2001. #2.1.

<sup>12</sup> European Parliament, *Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter*. 30 November 2015.

## The rights of children

Surrogacy is not undertaken with the priorities and interests of the child in mind, but rather the interests of the adults who want a child. The act of surrogacy denies the child the right to be conceived, carried, born and brought up by his or her genetic parents.<sup>13</sup> It “sets up, to the detriment of families, a separation between the physical, psychological and moral elements that constitute those families.”<sup>14</sup>

As per article 3 of the *Convention on the Rights of the Child*,<sup>15</sup> to which Australia is signatory, there is an overarching obligation that the best interests of the child shall always be upheld. Under the convention, children also have the right to:

- An identity and family relations<sup>16</sup>
- As far as possible, know and be cared for by their parents<sup>17</sup>
- Not be separated from their parents against their will, except in certain specified circumstances,<sup>18</sup> and
- Maintain personal relations and direct contact with both parents, except if it is contrary to the child’s best interests.<sup>19</sup>

Surrogacy arrangements breach these universal rights in:

- Separating children from their natural parents and creating a distinction between genetic and social parenthood. Parenthood is a very serious moral responsibility and is not a responsibility that can be transferred to another person as is the case in ownership of physical or intellectual property. Surrogacy often requires a genetic parent to disregard his or her inherent responsibilities for a child,<sup>20</sup> a practice that would otherwise be condemned by society
- Encouraging women to avoid forming an attachment to the child they bear for nine months, and to give the child away, and
- Commodifying children. Whether traded for money or by altruistic agreement, surrogacy can make parental love conditional on the child meeting certain standards, such as not having a disability, or being of a specific sex or ethnicity.<sup>21</sup> This causes broader societal issues, the least of which is the promotion of eugenics.

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<sup>13</sup> Tonti-Filippini, N, *Motherhood, Embodied Love and Culture: About Bioethics Volume 4*. Connor Court, 2013. Pages 106-107.

<sup>14</sup> Tonti-Filippini, N, *Motherhood, Embodied Love and Culture: About Bioethics Volume 4*. Connor Court, 2013. Pages 107.

<sup>15</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

<sup>16</sup> Ibid Art 8

<sup>17</sup> Ibid Art 7

<sup>18</sup> Ibid Art 9

<sup>19</sup> Ibid Art 9

<sup>20</sup> McCormick, R, Surrogacy: A Catholic Perspective. *Creighton Law Review*, Vol. 25, page 1619.

<sup>21</sup> Anderson, E, Is Women’s Labor a Commodity? *Philosophy and Public Affairs*, 19(1), page 75-76.

Surrogacy is different to adoption. Where children are adopted by a mother and a father, this matches the model a child should expect of a mother and a father in marriage as a good alternative for when a child cannot be brought up by her or his natural parents. Adoption is a solution to a situation that has arisen. A child should never be produced for the purposes of adoption, for example through surrogacy. Adoption is an attempt to replace as closely as possible, in the interests of the child, what he or she has lost through the death, inability or unwillingness of natural parents.

Those most impacted by surrogacy arrangements - the children conceived - are unable to offer their consent to the process. The principle of anticipated consent requires that, when a person seriously affected by a decision cannot give consent, we question whether we can reasonably anticipate whether consent would be given, if that person was able to do so. If not, it is unethical to proceed.<sup>22</sup>

Surrogacy further complicates this issue, with up to five people involved in the conception of a child born to a surrogacy arrangement: the egg donor, the sperm donor, the birth mother, and the commissioning mother and father.<sup>23</sup> In Western Australia, there could be as many as eight people involved in consent provisions with the inclusion of the spouse or de facto partner of both the two gamete donors and the surrogate mother.<sup>24</sup>

The lack of empirical information on the significance of biological and cultural heritage to personal identity presents further reason to proceed with caution when severing these connections. In her article '*Dispossessed and Forgotten: The New Class of Genetic Orphans*', Professor Margaret Somerville observes:

... genetic relationship goes to our deepest roots of who we are and to whom we bond. One only has to look at one of the primary uses of the internet – genealogical research – to see how important it is to most of us to know who we come from. And those bonds are not just to parents, but also to brothers and sisters and other genetic relatives. We have ethical obligations to heed these sentiments.<sup>25</sup>

Further, Professor Nicholas Tonti-Filippini states:

Psychologists often refer to the issue of genealogical bewilderment as children, perhaps later in life, seek to discover their origins and to identify their own identity in circumstances in which the genetic parents may be completely unknown to them or become known to them at a later stage. The relationship between a child and his or her parents is complex. So much of our sense of identity is based upon that relationship. When it is fragmented, that can be hurtful and confusing.<sup>26</sup>

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<sup>22</sup> Tobin, B, Donor-conceived people: are they entitled to identifying information about their biological parents? *Bioethics Outlook*, 24(1) 2013: 6.

<sup>23</sup> Tobin, B, Surrogacy laws may be a bridge too far for Australia. *The Sydney Morning Herald*, 20 April 2015.

<sup>24</sup> *Surrogacy Act 2008* (WA) s 17(b)(iii).

<sup>25</sup> Somerville, M, Dispossessed and forgotten: the new class of genetic orphans. *Mercatornet*, 18 September 2007.

<sup>26</sup> Associate Professor Nicholas Tonti-Filippini, Submission No.2 to the NSW Parliamentary Inquiry into Inclusion of Donor Details on the Register of Births, 18 November 2011.

On the same basis, the relationship between a parent and a child requires an awareness that it has a life-long character, and that each parent – just like the child – has a right and responsibility to know, as far as possible, her or his child or children. Such rights and responsibilities cannot be discretely put aside with the promise of anonymity or for the purposes of economic or social expediency.

We do not know what significance an individual person might place on their biological connections, but that is precisely why we should be careful not to sever those connections for persons generally.

### **Exploitation of women**

Surrogacy allows for the exploitation of the women who act as surrogate mothers, again prioritising the commissioning parents.<sup>27</sup> It requires a woman to deny many of the significant, integral parts of the experience of pregnancy,<sup>28</sup> which could have a long standing psychological impact on the surrogate mother. It gives priority to the childless woman, man or commissioning parents over the woman who is the surrogate mother by objectifying her as a womb.<sup>29</sup>

The extent to which women can give full consent in a surrogacy arrangement is limited by factors including:

- a) In the case of commercial surrogacy, the fact that women who act as surrogates might be exploited given the likely difference in income between the commissioning parents and the woman<sup>30</sup>
- b) In the case of altruistic surrogacy, emotional blackmail is possible,<sup>31</sup> especially where women are related to or know the commissioning couple, and
- c) Lack of knowledge, based on limited empirical information, as to the long-term psychological impact of bearing a child for the nine months that is to be given up. Surrogate mothers are forced to conceal their emotional connection with the resulting child – a suppression of emotion that has proven to not be possible for some.<sup>32</sup>

Valid consent is a difficult concept that is about more than obtaining a signature on a form.<sup>33</sup> It must also consider that people may be acting out of feelings of obligation or

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<sup>27</sup> Tieu, MM, Altruistic surrogacy: the necessary objectification of surrogate mothers. *J Med Ethics* 2009; 35: 173.

<sup>28</sup> Byrne, M, Surrogacy: some ethical issues. *Bioethics Outlook*, 9(1) 1998: 16.

<sup>29</sup> Tieu, MM, Altruistic surrogacy: the necessary objectification of surrogate mothers. *J Med Ethics* 2009; 35: 173.

<sup>30</sup> Tieu, MM, Altruistic surrogacy: the necessary objectification of surrogate mothers. *J Med Ethics* 2009; 35: 174.

<sup>31</sup> Byrne, M, Surrogacy: some ethical issues. *Bioethics Outlook*, 9(1) 1998: 16.

<sup>32</sup> Tieu, MM, Altruistic surrogacy: the necessary objectification of surrogate mothers. *J Med Ethics* 2009; 35: 172. Byrne, M, Surrogacy: some ethical issues. *Bioethics Outlook*, 9(1) 1998: 15.

<sup>33</sup> See National Health and Medical Research Council, 'National Statement on Ethical Conduct in Human Research' (2007) Chapter 2.2.

because they are in difficult social and economic circumstances.<sup>34</sup> The ACBC endorses the argument put by Emeritus Professor Donna Dickenson, who states “the language of choice and consent ... is insufficient, and even misleading. Instead... we must also consider the possibility that disadvantaged economic or social circumstances lie behind women’s ostensible consent.”<sup>35</sup>

In those nations where commercial surrogacy is legal, there is clear evidence that surrogate mothers are financially disadvantaged and exploited for the benefit of the booming ‘reproductive tourism’ industry. These women are “... eliminated from the children’s history, treated as nothing more than disposable uteruses. The physical, emotional, spiritual bonds between mother and child that develop during a pregnancy are rendered null and void by a monetary transaction.”<sup>36</sup> In India, “the poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money.”<sup>37</sup>

Women’s Legal Services NSW principal solicitor, Janet Loughman, reflecting on the possibility of commercial surrogacy in Australia, said:

In a commercialised fertility market it would likely be the most vulnerable women who would become surrogates. We have seen the gender pay gap widen in the past several years in Australia, and in NSW we have seen an increase in domestic violence causing serious physical injuries. How will we protect against coercion to enter surrogacy agreements? Will a woman, left without income support ... be vulnerable to pressure to enter a commercial surrogacy arrangement?<sup>38</sup>

Allowing surrogacy, especially allowing the introduction of commercial surrogacy into Australia, would allow the exploitation of women who act as surrogate mothers.

### **The commodification of reproduction**

Children are not commodities and should not be bought.<sup>39</sup> Legalising commercial surrogacy would allow the introduction of market values into the intimate and loving role that women have of carrying and giving birth to their child. Treating this vital and cherished role as a commodity in the labour market is an offence to the dignity of those women contracted to do this work,<sup>40</sup> and to the process of reproduction itself.

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<sup>34</sup> Dickenson, DL, Regulating (or not) reproductive medicine: an alternative to letting the market decide. *Indian Journal of Medical Ethics*, VIII(3) 2011: 178.

<sup>35</sup> Dickenson, DL, Regulating (or not) reproductive medicine: an alternative to letting the market decide. *Indian Journal of Medical Ethics*, VIII(3) 2011: 178.

<sup>36</sup> Reist, MT, Overseas Surrogacy: Wombs for rent but no room for birth mothers. *The Age*, 16 February 2014.

<sup>37</sup> Saxena, P et al, Surrogacy: Ethical and Legal Issues. *Indian Journal of Community Medicine*, Vol.37(4), Oct-Dec 2012, pp211-213.

<sup>38</sup> Bita, N, Surrogate women ‘may fall prey’ to birth pay. *The Australian*, 25 August 2014. Page 5.

<sup>39</sup> Anderson, E, Is Women’s Labor a Commodity? *Philosophy and Public Affairs*, 19(1), page 84.

<sup>40</sup> Anderson, E, Is Women’s Labor a Commodity? *Philosophy and Public Affairs*, 19(1), page 75.

Professor Elizabeth Anderson argues that:

The fundamental problem with commercial surrogacy is that commercial norms are inherently manipulative when they are applied to the sphere of parental love. Manipulation occurs wherever norms are deployed to psychologically coerce others into a position where they cannot defend their own interests or articulate their own perspective without being charged with irresponsibility or immorality for doing so. A surrogate contract is inherently manipulative since the very form of the contract invokes commercial norms which, whether upheld by the law or by social custom only, imply that the mother should feel guilty and irresponsible for loving her own child.<sup>41</sup>

Anderson further explains that "... both pregnancy contracts and slave contracts wrongly treat someone's inalienable rights as if they were freely alienable. Pregnancy contracts treat the mother's inalienable right to love her child, and to express that love by asserting a claim to custody in its own best interests, as if it were alienable in a market transaction."<sup>42</sup>

In a similar vein, Professor Michael Sandel states that:

... even a truly voluntary, fully informed agreement to sell a baby lacks moral force because certain things should not be bought and sold...Treating children as commodities degrades them by using them as instruments of profit rather than cherishing them as person's worthy of love and care. Contract pregnancy also degrades women by treating their bodies as factories and by paying them not to bond with the children they bear.<sup>43</sup>

While the language of 'selling babies' can be viewed as inflammatory in some contexts, the parallels between human trafficking and commercial surrogacy are alarmingly strong and have been increasingly highlighted in academia.<sup>44</sup>

Feminist Kajsa Ekis Ekman makes the point that "in commercial surrogacy, the child is de facto turned into a product. A few thousand dollars are paid to the mother when she delivers the newborn baby. This, by all definitions, constitutes baby trade. It is the buying and selling of children. But even in altruistic surrogacy, there is a drastic change in the way we look at children: as products to be exchanged through contracts."<sup>45</sup>

Commercial surrogacy introduces market norms into an area of life normally associated with generosity and love. Children are not commodities and should not be bought.<sup>46</sup>

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<sup>41</sup> Anderson, E, *Is Women's Labor a Commodity? Philosophy and Public Affairs*, 19(1), page 89.

<sup>42</sup> Anderson, E, *Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales. Health Care Analysis*, 8, page 23.

<sup>43</sup> Sandel, M, *What Money Shouldn't Buy. The Hedgehog Review*, 5(2), page 82.

<sup>44</sup> Jeffreys, S, "Reject Commercial Surrogacy as Another Form of Human Trafficking, in *The Conversation*, 11 Aug 2014: <http://theconversation.com/reject-commercial-surrogacy-as-another-form-of-human-trafficking-30314>.

<sup>45</sup> Ekman, K E, *Stop Surrogacy Before it is Too Late. Festival of Dangerous Ideas*. 19 August 2014. See: <https://medium.com/festival-of-dangerous-ideas/stop-surrogacy-before-it-is-too-late-9910035a63f0#.ma2g0si1u>

<sup>46</sup> Anderson, E, *Is Women's Labor a Commodity? Philosophy and Public Affairs*, 19(1), page 84.

## Conclusion

Moral philosopher Gerald Gleeson is right to argue that "... we should refrain from generating these dilemmas in the first place. Once the conception of a child is removed from the sexual embrace of husband and wife, once third parties and technologies dominate the context of conception, we are bound to encounter competing claims which cannot all be met."<sup>47</sup>

Surrogacy is an act that creates a series of moral dilemmas and fosters competing claims that we are unable to meet with effective legal regulation. Rather than cultivating the conditions in which children are displaced from their natural family and from their natural and legally recognised rights, the law is better disposed to cultivating conditions of protection to children and those same rights.

The ACBC submits that surrogacy, both commercial and altruistic, is inherently flawed and offends human dignity. Given the manifest offences of this practice against the wellbeing of women and children, it would be intolerable to argue harm minimisation to allow the development of a commercial surrogacy industry in Australia.

I would be happy to answer any questions the Committee may have. I can be contacted via Mr Jeremy Stuparich, Public Policy Director at the ACBC on \_\_\_\_\_ or at \_\_\_\_\_

Yours faithfully

**Most Rev Peter A Comensoli**

Bishop of Broken Bay

For the Bishops Commission for Family, Youth and Life

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<sup>47</sup> Gleeson, G, Ethical issues in reproductive technology: some Catholic insights. *Bioethics Outlook*, 9(1) 1998: 11.