



UNIVERSITY OF  
TECHNOLOGY SYDNEY

## UTSpeaks: Reproductive Minefields

Can we make laws to deal with the social and ethical complexities of surrogate pregnancies?

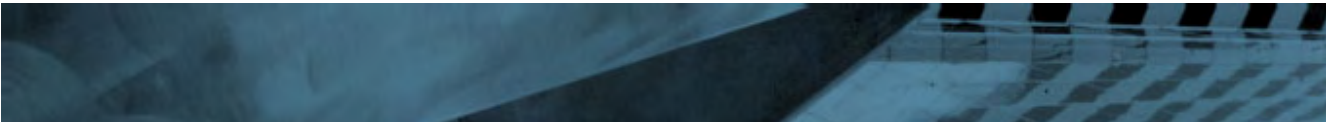
# UTS

THINK.CHANGE.DO

**UTS Speaks:** Can we make laws to deal with the social and ethical complexities of surrogate pregnancies?

Standing Committee of Attorneys-General:


- > commercial surrogacy remain illegal
- > altruistic surrogacy arrangements be legal but unenforceable
- > informed consent be required from all parties
- > there should be mandatory specialist counseling
- > court orders should enable the intended parents to be recognized as the legal parents if all legal prerequisites met and it is in the best interests of the child



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Prediction: Surrogacy will remain a recurring legal dilemma

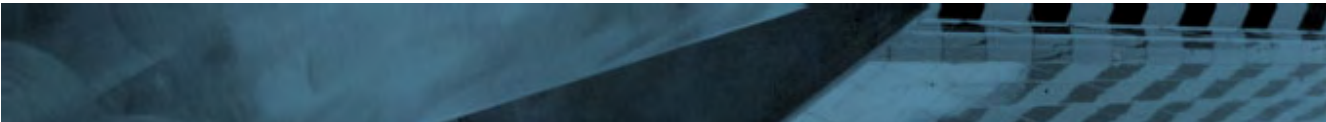
1. Legal reform imperative: should be holistic across all Australian jurisdictions and address all areas of law
2. Prediction: to succeed reform must tackle practical issues through giving priority to legal protection of the child



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Two parts to the talk tonight:


1. Why is surrogacy a current dilemma?
2. Why will it continue and be a recurring dilemma?



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### Current legal regulation

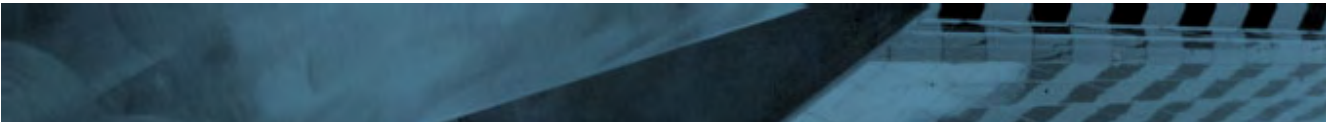
- > Legislation in every jurisdiction except NT, NSW & WA
  
- > Most extreme difference: criminal practice in Queensland to allowing transfer of parentage by court order for altruistic surrogacy in the ACT



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### Current similarities in legal regulation:


1. Disapproval of commercial arrangements
2. All legislation extends to pre-conception or post conception arrangements
3. All surrogacy contracts are void and unenforceable
4. Cultural homogeneity is assumed eg: Queensland
5. The birth mother and her male partner (if any) are regarded as the legal birth parents of the child



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Result of current regulation:

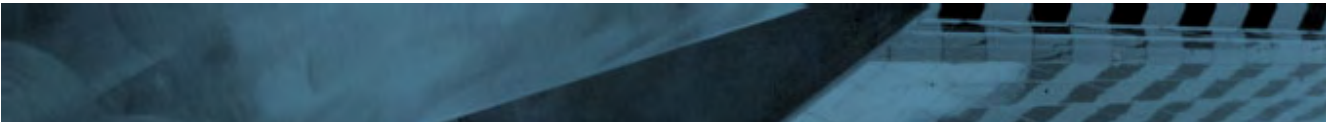
1. Jurisdiction shopping
2. Legal uncertainty as to parentage following birth
3. Interplay of Commonwealth and state laws



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Four case examples:


1. *Application of A and B* [2000] NSWSC 640
2. *Re Evelyn* (1998) 23 FamLR 53
3. *Re Mark: An application relating to parental responsibilities* [2003] Fam CA 822
4. *Buzzanca v. Buzzanca* 61 Cal. App. 4th 1410; 1998 Cal. App. Lexis 180; 72 Cal. Rptr. 2d 280,



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The assumption that:

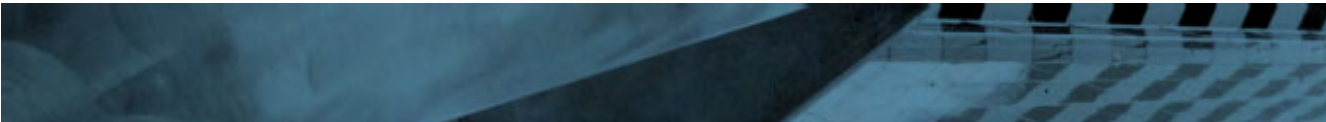
- \* a child has two parents
- \* a child should be biologically related
- \* heterosexual couples should create families
- \* nature should predetermine family formation
- \* motherhood and fatherhood should not be splintered.



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Lack of empirical research:


“Despite speculation that surrogacy arrangements exploit the surrogate mother and are potentially harmful to the child, the available empirical research does not support this position. Indeed, the relatively limited amount of research that has been conducted suggests that surrogacy arrangements are, on the whole, successful.”



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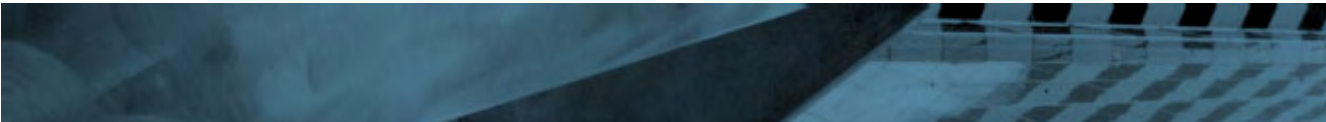
Why is this a current legal dilemma?

- \* A complex and politically controversial topic – the role of morality and ethics in regulating biomedical developments



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‘...the Committee has found that surrogacy is a fact of life in Tasmania’ (2008)



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Proposed reforms – positional ambivalence:

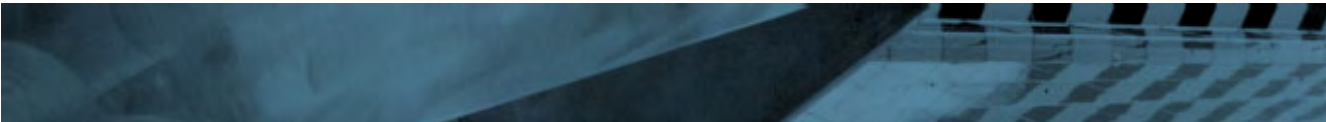
“you want quality assurance; you don’t want cowboys running it...we can simply say that we know something is going on. We know about things in the community that we don’t agree with but we still say it is better to regulate them.”



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Terminology


1. Birth Mother v Surrogate mother
2. Intending parents v Commissioning parents
3. Arrangement v Agreement
4. Gestational v Traditional
5. Altruistic v Commercial



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What is surrogacy?

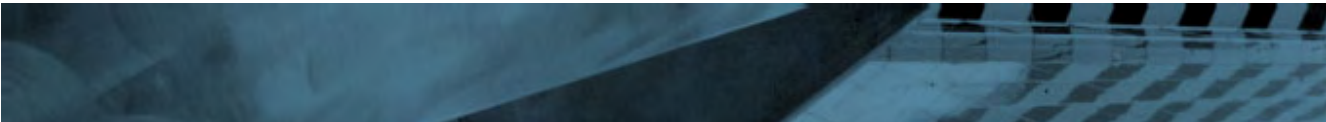
The practice of surrogacy is where a formal or informal agreement exists for a birth mother to bear a child for the intending parents and to permanently transfer the responsibility for the child's care and upbringing to them after the child's birth.



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**Altruistic versus Commercial**


- > **Maternity clothing**
- > **Legal fees**
- > **Counseling fees**
- > **Life and disability insurance**
- > **Travelling to and from hospital**
- > **Medical expenses**
- > **Ovulation and pregnancy test**
- > **Overnight accommodation**
- > **AI or IVF if required**
- > **Child care to attend hospital etc**
- > **Vitamins**
- > **Loss of earnings**



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Linda Kirkman (Australia's first IVF birthmother)

“Everyone is different. Some women are horrified by the idea of relinquishing a baby. Not all people want to become parents, yet for others it is a consuming passion.”



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**What needs to be done?**

- > a national coordinated approach
- > monitor, evaluate and research the impact of the practice
- > ensure rights of children protected:
  - without distinction between types of surrogacy
  - without distinction between persons who enter into surrogacy
- > some steps to be taken: national birth certificate; central donor register; commonwealth payments clarified.