

BABIES WITHOUT BORDERS

Chief Judge of the Federal Circuit Court John Pascoe, and the Chief Justice of the Family Court Diana Bryant, are both calling for an inquiry into international surrogacy. For Judge Pascoe, this reflects a life-long concern for the protection of children and a deep engagement with human rights in Asia. **JULIE MCCROSSIN** reports on misgivings about the role of Australian lawyers in international surrogacy and why there is a lack of urgency in our legal response.

A newborn child has the right to be a citizen of the country in which he or she was born. They have a right to know their genetic make-up for health reasons. They need to know who their mum and dad are,” says Chief Judge Pascoe when we meet in his chambers in central Sydney.

His rooms are full of art, statues and photographs that reflect many years of travelling in Asia and a great interest in Theravada Buddhism, the forest monk tradition and meditation. Pascoe speaks Thai, and Thai vocabulary fills the whiteboard in his meeting room. His desk and computer are surrounded by Buddhist sayings, Thai vocabulary and photos of his wife, Jane, three adult children, Rod, Camilla and Cameron, and new grandson Benjamin.

Throughout our meeting, Pascoe speaks quietly and seriously with the deliberate and precise manner that is characteristic of

senior judges. Yet his depth of feeling for children at risk of trafficking is striking.

“We need to protect children because if they don’t have proper birth registration, they are vulnerable to trafficking,” he says in response to my question about the rights of the newborn.

“If they don’t know their health status, they are at a disadvantage in terms of their later development. We know that children and adults are desperate to know where they come from and who their parents are. It creates an aching loneliness in many situations where people don’t know these basic things. To me, they are fundamental rights.”

The depth of Pascoe’s concern is demonstrated by his speech at the 16th National Australia Family Law Conference in October 2014, State of the Nation – Federal Circuit Court of Australia. Three-quarters of the speech dealt with the long history of the international “commodification

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CHIEF JUDGE JOHN PASCOE

of newborn children” and the state of the law regarding surrogacy in Australia, including the current general prohibition on domestic commercial surrogacy arrangements in Australia.

He also explored the “legal and ethical conundrum” faced by family law courts when “commissioning parents” return from overseas and appear before the court with babies obtained through commercial surrogacy arrangements.

In his speech, Pascoe refers to a case heard by Justice Judith Ryan. “As Ryan J commented in *Ellison v Kamchanit*, ‘It’s probably too late ... to inquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them’. (*Ellison v Kamchanit* [2012] FamCA 602 [87])

“Australia is emerging as one of the highest per capita users of commercial surrogacy. Put bluntly, the question that must be answered is, ‘Are babies commodities to be planted and harvested?’” Pascoe says, drawing on

the work of New Zealander Claire Achmad. (“Contextualising a 21st century challenge: Part One Understanding of international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context” (2012) *New Zealand Family Law Journal* 190, 213)

This is strong language for a judicial officer. I ask why he has come out punching so hard on this particular issue?

“I feel very strongly about this and I am very concerned at the prominent role Australians seem to be playing in international surrogacy,” he explains. “It is not just as customers. We have Australians very much involved in facilitating surrogacy arrangements.”

The role of Australian lawyers is of particular concern, he says.

“My concern is where lawyers are involved in arranging surrogacy, it may well be that they are involved in assisting people in a criminal offence if surrogacy is illegal under state law,” he says. “My concern is also where they come into the court system and don’t make full disclosure to the court about the circumstances in which this child was conceived.

“In particular, I think it is deeply troubling if Australian lawyers are involved in situations where women don’t know their rights and don’t understand the nature of the agreement they are signing. The profession in Australia has much higher standards than that.”

How exactly may Australian lawyers be involved in such cases?

“There are circumstances where Australian lawyers have been involved in actually arranging surrogacy and putting agreements together,” Pascoe replies.

“This is clearly not an issue where the arrangements are legal and the rights of all parties are properly protected. In fact, in those situations, lawyers can and do

play a positive role. However, there are examples of agreements that women in poorer countries have signed, where the women may not even be literate but they have signed agreements where [she has] given up any control over her body for the period she is carrying the child. That troubles me greatly.

“It also worries me that there may be women entering into surrogacy arrangements who have not had a child. How does a woman who has never had a child know how she is going to feel when it comes to giving up a child? How does she know what the effect on her health is likely to be? What happens if the child is born with disabilities? Who is responsible?

“That is really why we need to have proper regulation. This is something which, in my view, if we’re going to allow it, should be allowed under proper control within Australia.

“I am not against surrogacy per se. I think all of us understand the aching desire of people to have a child. The real issue is: are these people suitable parents for a child? The problem with unregulated, international surrogacy is that we just don’t know. But, for example, in the Baby Gammy case, it is unlikely that that couple would have been allowed to adopt a child in Australia.

“We know there are people of dubious reputation who have obtained care and control of a child through surrogacy. We also know there are decent couples who will care for children very well. But my concern is the rights of the child. People who are not suitable parents and will not act in the best interests of the child should not be allowed to go overseas and circumvent Australian law.”





Chief Judge John Pascoe in his Sydney office, the Queen honouring him for his work in the Duke of Edinburgh's Award scheme, and memorabilia from his many travels.

So what Pascoe is calling for, he says, is proper regulation around surrogacy. “We have people calling for regulation for breeders of dogs. Surely we think children deserve at least the same protection,” he says.

Pascoe is critical of media coverage on the international surrogacy issue when it ignores “the black side of the trade”.

“There has been a much more balanced approach recently, but it concerned me when the media focused on all these very nice couples who were having a child through surrogacy,” he says. “Australians need to see the balance.”

Does a kind of racism underpin stories where there is insufficient regard for the mother in the international context?

“It certainly looks like racism. I don't think you have to be around South East Asia too long to realise there is a certain type of Australian who hands his passport over at border control, when leaving

Australia, and leaves any sort of moral compass there as well,” Pascoe says grimly.

“If we believe it is reasonable for a woman in a third world country to rent her womb, why don't we believe it is appropriate in Australia? How can we say people are somehow different if they live in another country? To me, human rights are universal. We must work as assiduously to protect the rights of people in other countries as we would to protect the rights of people in our own country.”

Pascoe's interest in the human rights of women and children internationally, and in the people and culture of Asia in particular, goes back to his youth.

Now 66, he grew up as an only child in remote NSW, including Broken Hill and Menindee on the Darling River, the first European settlement in NSW, more than 1000 kilometres west of Sydney.

“My mother Mary's family has been involved in the mining industry for a very long period of time, and my father

Harry's family had been involved in rural pursuits – merino sheep – for a couple of generations,” he recalls.

Pascoe chose to study Asian language and philosophy at the Australian National University. He studied law as well to broaden his career opportunities.

“It was a great contrast between attending lectures about Chinese pottery and then going to a lecture on contract law,” he says smiling.

“I studied Lao Tzu at university. There is a great similarity between Daoism and Buddhism. I am also interested in Asian languages.”

He was in his twenties when something he read triggered his concern for children.

“I was reading about children in India involved in the carpet weaving industry,” he says.

“I was struck by the fact these children were going blind at an early age and there was no-one to protect them. I found it really shocking that there were no adults involved in protecting these children. In fact, there were adults involved in exploiting them. I was also shocked the law didn't protect them.

“I first got involved in the area of child trafficking where babies were literally being packed in fishing boxes and transported for sale.”

Pascoe's State of the Nation speech refers to a report by the UN Special Rapporteur on the Sale of Children in 2005 regarding an Indonesian fishing boat where it is alleged: “Eight babies were found on this boat, packed in Styrofoam fish boxes, punctured to allow the babies to breathe”.

“The trade then developed with pregnant women being moved across national boundaries to give birth to a child in another country,” he explains. “The child would then be sold to wealthy couples in Europe or elsewhere. What we're seeing now, with international

surrogacy, is traffickers using new technology, but the basic trade is the same.”

Pascoe's commitment to children has taken many forms, including a leadership role in the Duke of Edinburgh's Award scheme. He was appointed a Commander of the Royal Victorian Order (CVO) in 2010 for his services to the scheme, receiving his award from the Queen.

He is also a very active supporter of the Cambodian Children's Fund.

“I think I have seen and heard things that no-one should have to see or hear,” he says calmly, with a steady gaze.

“It is so easy for the strong to exploit the weak. And children, particularly newly-born children, are the most vulnerable of all.”

The Premier of Western Australia, Colin Barnett, has supported the call for a

national inquiry into surrogacy. Pascoe has also spoken to Federal Attorney-General George Brandis.

“I've had discussions around the issue of the Law Reform Commission looking at the surrogacy issue, but I don't think there is a lot of movement at the station, if I could put it that way,” Pascoe says.

Why is there not more urgency?

“I think, like many things we see in the courts in Australia, issues fall between the state and federal governments,” he says. “Surrogacy is essentially a state matter, but it can't be seen as just a state matter because the Federal Government is involved in issuing passports to children conceived through surrogacy.

“I've expressed many concerns about child protection within Australia where proceedings in family law and proceedings

in the state courts are conducted in isolation from each other. Therefore, there is a chance you are not making the best decisions in the interests of the child.”

The voices of babies cannot be heard, but the voices of now-adult surrogate children are emerging. Pascoe quoted one such adult child in his 2014 State of the Nation speech: “Because somewhere between [the] narcissistic, selfish and desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kid's needs. We, the children of surrogacy, become lost. That is the real tragedy” (Usha Smerdon, ‘Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India’ (2008) 39 Cumberland Law review 15, 60). **LSJ**



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