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BOWRAVILLE: THE NEXT STEP

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The push for a murder retrial raises issues of double jeopardy

For the bereaved families of Bowraville, the struggle to achieve justice for their dead children might never have happened but for an equally shocking crime that galvanised an earlier generation of the nation's lawmakers.

That murder took place in Queensland in 1973 and it exposed a failure of the justice system that triggered the first serious recognition that the time had come for what had previously been unthinkable: a retreat from the principle of finality which embraces the idea that those acquitted of crimes should never be retried on the same charges.

The long struggle of the Bowraville families looks set to determine whether that retreat has gone far enough to ensure justice can be done in what will always be a handful of extraordinary cases. Three children from the Aboriginal community in that northern NSW town were killed in 1990 and 1991 and it was only this week, after a vigorous campaign by this newspaper, that state Attorney-General Gabrielle Upton referred the affair to the judges of the Court of Appeal to determine if a retrial of all three murders should go ahead.

There is now at least a chance that a man previously acquitted of two of the murders could face proceedings over the deaths of all three children - Colleen Walker, Clinton Speedy-Duroux and Evelyn Greenup.

If, after a quarter of a century, their families achieve the outcome they have sought for so long, there will inevitably be pressure for more changes to the rule against double jeopardy to ensure that nobody else has to endure a similarly agonising wait.

This was not the first time the Bowraville families approached the Attorney-General. Previous calls for a retrial were rejected by former attorneys-general Greg Smith and John Hatzistergos. Unlike Smith and Hatzistergos who took their time and adopted a methodical approach, Upton made her decision within hours of receiving a brief of evidence from the police.

Smith and Hatzistergos, who is now a judge the NSW District Court, had both separately concluded that the circumstances of the case did not come within NSW double jeopardy laws. Upton, however, made her decision in different circumstances. The clear shortcomings of the original police investigations, complete with what appears to be institutionalised racism, had been outlined in a series of articles by this newspaper's national crime reporter, Dan Box.

By sending this matter to the judges, Upton got it off her desk and has put the judiciary in the box seat. Their decision on whether a retrial is justified could determine the fate of double jeopardy laws in NSW and similar laws that are in force around the nation. If, after waiting a quarter of a century, the Bowraville families are

handed the outcome they seek, it will be difficult to resist the argument that the current laws are still too restrictive.

Those restrictions are part of an attempt to strike a balance between the principle of finality and another, equally important principle: that nobody should be denied justice. The very idea that such a balance was needed is relatively new and has frequently been criticised very senior lawyers. It has also drawn support from some of their nation's most experienced judges.

In 2007, when the NSW government proposed changes, it faced eloquent resistance from Michael Slattery QC, now a judge of the Supreme Court, who was then president of the Bar Association.

He told a Sydney radio audience that without the rule against double jeopardy, those who were acquitted on criminal charges would "forever have a kind of grey mark over them". They would always be liable to future trials for the same offence and would be unable to move on with their lives.

"The double jeopardy rule also serves as a very important discipline upon prosecuting authorities," he said. Without it, prosecutors would know that if they failed to achieve a conviction once, they could always try again, he warned.

Slattery's warning came mid-way through a reform process that had its genesis in 2002 when the inherent caution of many lawyers was swept away by the extraordinary chain of events that followed the murder in 1973 of Ipswich toddler Deidre Maree Kennedy. She had been sexually assaulted, strangled and left on the roof of a toilet block in a park.

Raymond Carroll, who has always proclaimed his innocence, was found guilty of her murder in 1985 but the conviction was overturned on appeal. Years later, new evidence emerged and he was charged with perjury and accused of lying at his murder trial. The double jeopardy rule prevented a retrial on the murder charge. The perjury proceedings finished up in the High Court where the nation's most senior judges ruled in 2002 that the perjury case was an abuse of process that undermined the rule against double jeopardy. The proceedings were stayed.

The uproar was immediate. Those seeking a review of the law included former prime minister John Howard, former High Court chief justices Harry Gibbs and -Anthony Mason as well as Nicholas Cowdery QC, who was then NSW director of public prosecutions. What happened to Deidre Kennedy in that Ipswich park proved beyond all doubt that a system that denies justice to victims of crime is just as abhorrent as one that ignores the principle of finality.

In 2003, when Bob Carr was NSW premier, he announced a plan to reform double jeopardy and referred explicitly to the outcome of the Carroll case. But there is a big difference between accepting the need for reform and enacting a law that strikes the appropriate balance. Since 2002, politicians and lawyers have been struggling to achieve that balance and in NSW they have embraced an approach that is far more restrictive than that found in Britain.

That country permits retrials for certain offences that carry life sentences whenever "new and compelling evidence" has emerged and one of the superior British courts is satisfied that it is in the public interest to set aside an acquittal.

But NSW and most other states have enacted laws with a slight change of wording that is intended to have the effect of imposing a much higher threshold for retrials.

Instead of "new" and compelling evidence, NSW retrials required "fresh" and compelling evidence. The implications of that change were examined in detail in 2014 by the law and justice committee of the NSW Upper House as part of an inquiry into "The family response to the murders in Bowraville".

The report from that inquiry says the British approach means retrials are available on the basis of evidence that was not presented at the original proceedings. But the NSW approach - "fresh" evidence - has an additional requirement. It must also be evidence that could not have been presented at the original proceedings despite competent work by police and prosecutors.

Despite the restrictive intention, the law in NSW might still be sufficiently liberal to permit a retrial based on mistakes that meant evidence was overlooked at the original Bowraville investigations.

In NSW the balance between the two contending principles - finality and preventing a denial of justice - is found in Part 8 of the Crimes (Appeal and Review) Act which was reviewed in 2012 by the Attorney-General's department. The report from that review says: "It is noted that these provisions are more restrictive than those found in the UK Act which requires only that evidence be 'new' rather than 'fresh'. Under this test evidence available but not presented in the original trial due to error may be sufficient." But that 2012 review also revealed significant unease within the legal profession about winding back the severity of the rule against double jeopardy. Justin Dowd, then president of the NSW Law Society, produced a submission that said the history and facts behind the High Court decision in the Carroll case "should have served as a definitive reminder as to why the rule against double jeopardy should have been retained rather than reformed".

The way forward - for the Bowraville families and the law - is now in the hands of the judges of the Court of Appeal and is full of uncertainty. There is no guarantee of a retrial and even if the judges approve of such a course, the families could still be disappointed if it does not cover all three murders.

But this affair has already produced one clear lesson. When Upton decided to send this matter to the judges, she set an unfortunate precedent. One of the recommendations from that 2014 Upper House inquiry proposed that whenever there is a push for a retrial the evidence should be considered by an independent assessor, such as a retired judge or senior prosecutor.The advantage of adopting such a course is that there would be no direct role for a politician in starting a chain of events aimed at overturning an acquittal. Upton's decision had the clear advantage of preventing further delays. But as first law officer of NSW it was unfortunate that she missed an opportunity to put some distance between the executive branch of government and a move to overturn the principle of finality.