Again this contravenes international maritime law and in effect condones acts of kidnapping and piracy by Australian vessels under the Minister's control. Rules of maritime law and natural justice are specifically excluded.

Overall the legislation confers powers on the Minister to deal with people's lives for which he is not accountable and the exercise of which is not challengeable in the courts.

The previous Minister for Immigration secured the passage of this legislation just before Christmas 2014 by effectively using the children held in detention on Christmas Island and Australian detention centres as hostages. As the High Court recently held, he was under a duty to either deport these children or grant them visas as genuine refugees that would lead to their permanent residence in Australia (*Plaintiff S4/2014 v Minister for Immigration and Border Protection 7 ANOR* [2014] HCA 34).

It had always been open to him to release these children into the community. His offer to do so as the price of passing the legislation was a serious abuse and it is a matter of regret that sufficient of the Senate independents gave in to this pressure.

Meanwhile those on Nauru, including families and children and the men in Papua New Guinea, are held in appalling conditions and left in limbo pending being sent to unsuitable destinations such as Cambodia, and the Minister largely responsible for these outrages has been promoted to oversee Australia's Social Security system.

This legislation must be repealed and a proper system introduced for refugees. The world is facing the greatest displacement of people since WW2 and Australia must return to the honourable position that it once held and play its part in dealing with this issue. Members of Parliament must start examining their consciences rather than information obtained from focus groups or the rabid sections of the media.

The Hon. Alastair Nicholson AO, RFD, QC is the Chair of Children's Rights International and former Justice of the Supreme Court of Victoria, Justice of the Federal Court of Australia and was Chief Justice of the Family Court of Australia for 16 years.

II

VICTIMS' RIGHTS

BY MARI VAGG AND LIZ SNELL

It has been 18 months since the NSW Government abolished the Victims Compensation Scheme replacing it with a new Victims Support Scheme that drastically reduced financial support available to victims of sexual assault and domestic violence.

At the time, lawyers working with victims of crime, including Women's Legal Services NSW, expressed alarm. One of our chief concerns was the retrospective application of the *Victims Rights and Support Act 2013*.

It is extremely unfair to reduce the amount of compensation payable after an applicant has lodged a claim, especially when the reductions are dramatic and the delays in determining matters have largely been out of the hands of applicants.

Applicants had a legitimate expectation their claims would be determined in accordance with the system under which they were lodged. Indeed, the government's own review of the old scheme made a clear statement acknowledging that it would be "unfair to change these goal posts midway".

Sexual assault survivor Katrina Keshishian vividly exposed the effects of the retrospective changes when she created an online petition and gathered more than 120,000 signatures in November 2014. Katrina shared her story of applying for victims compensation after being raped by three men in 2008.

She waited six years for her claim to be processed, during which time the compensation scheme was replaced, slashing her maximum entitlement from $50,000 to $15,000. Katrina is just one of many applicants devastated by the changes, many of whom perceive them as a clear message that society does not care.

For victims of sexual assault or domestic violence, speaking out is usually an enormous step, and applying for compensation is often part of a therapeutic journey.

Many victims say that no amount of money can ever compensate for their experiences. However, in Australia we do put dollar figures on injuries, including pain and suffering.

We do this in an attempt to redress the injustice suffered by victims of violence and show we care about them. We do this to show that society is opposed to violence and supports a safe, healthy community.

When victims compensation was slashed, the message sent to Katrina and so many others was the complete opposite. It was absolutely devastating. Many of our clients ended up requiring significant therapeutic intervention, including hospitalisation, to cope with the crisis.

But retrospectivity is not the only issue – the scheme also fails to adequately address the trauma suffered by victims of domestic violence.

There are four categories of recognition payments ranging from $1,500 to $15,000 available to victims of certain prescribed acts of violence, but there is no specific category of recognition payment for domestic violence.

It is not clear why there are recognition payments for a series of sexual and physical assaults perpetrated against a child, but no category for an adult victim of repeated other violence. Such ongoing violence against an adult is simply ignored, with repeated violent acts deemed a single assault. Some acts of violence here are very serious, including suffocation and strangulation, which are potentially fatal.

Victims who could have received $30,000 to $50,000 for chronic and severely disabling psychological injuries sustained as a result of domestic violence can now only receive $1,500.

Given that part of the purpose of providing a recognition payment is symbolic, telling a victim of horrendous violence that they are only eligible to receive $1,500 speaks volumes.

Another concern is the introduction of strict documentary evidence requirements, which require a report from police or a government agency, as well as medical evidence and evidence of loss such as receipts or invoices.

It is well established that there can be significant barriers to reporting to such agencies. It should not be necessary for a victim to provide prescribed forms of evidence. If a person is able to establish an act of violence and an injury on the civil standard of proof, that should be sufficient.

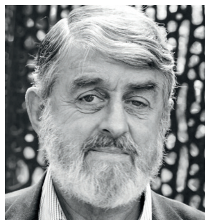
Applicants had a legitimate expectation their claims would be determined in accordance with the system under which they were lodged. Indeed, the government's own review of the old scheme acknowledg[ed] it would be "unfair to change the goalposts midway".

The new scheme is a huge step backwards at a time when there seems to be more awareness of the need to address violence against women than ever before. Victims of crime deserve our support, our recognition of their suffering, and our help to live safely.

Mari Vagg is a solicitor at Women's Legal Services NSW.

Liz Snell is the Law Reform and Policy Co-ordinator at Women's Legal Services NSW, a state-wide community legal centre for women.

MANDATORY SENTENCING



BY NICHOLAS COWDERY AM QC

The sentencing of serious criminal offenders is probably the most difficult task judicial officers face. That is because they attempt to do justice – to impose penalties that are appropriate at the time to both the offence and the offender, weighing up all the objective and subjective circumstances bearing on the decision and applying the law. Justice must be done to the offender and the community. That process is frustrated if parliament takes away from the courts part of the role of sentencing – by mandating specific penalties or minimum penalties in legislation – before any offence has been committed and before the relevant circumstances in the case can be foreshadowed. While it may be easier for parliament to confine judicial discretion than it is for judges to exercise it, that is no justification.

In NSW we already have mandatory minimum sentences in:

- section 19B of the *Crimes Act* 1900 for the murder of a police officer in certain circumstances;
- section 61 of the *Crimes (Sentencing Procedure) Act 1999* for murder with certain features and for serious heroin and cocaine trafficking in certain circumstances; and
- (since 2014) section 25B of the *Crimes Act 1900* for hitting causing death while intoxicated (the misnamed "one punch" death offence).

Other Australian jurisdictions have ventured into the field in limited ways.

These laws should all be done away with and we should firmly set our faces against the creation of any more such penalties. A bill introducing half a dozen of them that lapsed in the last NSW Parliament should not be resurrected.

No judge sentencing for these offences wishes to be an instrument of injustice. In NSW we had precisely this occur in 1883-84 when mandatory minimum sentences were prescribed for five categories of maximum sentences. The results were unjust and the legislation lasted only one year and three weeks before sense prevailed. As George Santayana famously said, "Those who cannot remember the past are condemned to repeat it".

One way of testing the justice of these penalties is as follows. Suppose there is a mandatory minimum sentence prescribed? If a judge (having received all relevant information and in accordance with the law) considers that a minimum sentence above that is appropriate, there is no need for it. If a judge considers that a lesser minimum sentence is appropriate, then the judge will be forced to act unjustly. That is already occurring in Australia and judges do not like it. Moves in the mandatory sentencing direction make plain the legislature's lack of confidence in the judiciary, and that is a serious signal to the community. We are fortunate that in NSW (and Australia generally) there is no basis for such qualms – so parliament must leave it to the judiciary to do its important work according to proper professional standards.

If a single judge gets it wrong, an appeal court is available to correct it. There is no need for parliament to try to second guess, in advance, where justice may lie. The rule of law as we apply it and that we hold dear (and for very good reasons) requires the separation of legislative, executive and judicial powers. Mandatory sentences of any kind weaken that separation – by the legislature taking part of a task that belongs properly to the judiciary.

Former NSW Chief Justice Spigelman has said: "The preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders." (*R v Jurisic* (1998) 45 NSWLR 209 at 221C)