AUSTRALIA'S FAMILY VIOLENCE PROVISIONS IN MIGRATION LAW: A COMPARATIVE STUDY

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Australia provides legal pathways to permanent residency for migrant partners of Australian nationals that separate due to family violence, through the Family Violence Provisions. These provisions have been shown to be insufficient to address the issues of safety and fairness for migrant partners. The implementation of these provisions can also further harm the same population the provisions were created to protect. This article provides an examination of partner visa laws in Australia, their history and current limitations. It also compares the Australian approach to equivalent laws in Canada, the United States and New Zealand. The article argues that these countries have a similar migration history and similar legal frameworks offering legal alternatives that could improve and strengthen Australian law.

I INTRODUCTION

Australia was constituted as a settler society with an Indigenous population and an active immigration policy.[1] The Australian government's policy until the early 20th century aimed at attracting young Anglo-Saxon families, believing they would bring social

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1 See Gareth Larsen, 'Family Migration to Australia' (Research Paper, Department of Parliamentary Services, 23 December 2013) 1–11 <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2931915/upload_binary/2931915.pdf;fileType=application/pdf≥; Michele Langfield, '"A Chance to Bloom": Female Migration and Salvationists in Australia and Canada, 1890s to 1939' (2002) 17(39) *Australian Feminist Studies* 287.

stability and settle in the colony better than single people.[2] The practice, however, was different, and while the policies did not discriminate by sex, assumptions about male and female social roles reinforced gender inequality and resulted in differential migration outcomes by sex.[3] In the early 1970s, the government progressively reduced the size of the migration program in response to the end of a long period of economic growth and increasing unemployment.[4] As institutional migration programs reduced their intakes, women kept migrating on dependent visas. The growth in partner/fiancée sponsorships was about 10 per cent per year during the 1980s, with progressive limitations on rights for these migrants, particularly regarding access to welfare.[5]

Former British colonies like Australia, Canada, New Zealand and the United States of America (US) have a long history of local men and migrant men searching for wives overseas.[6] Intercultural and intracultural transnational unions remained popular in these countries, for various reasons; the Australian Demographic and Social Research Institute[7] lists a number of ways in which an Australian local or recently established migrant may meet a partner that will later require a partner visa. The list includes couples that meet during someone's tourism or study abroad experience, soldiers based overseas,[8] migrants that later sponsor their family to migrate, 'arranged marriages'[9] and individuals visiting another country with the intention of finding a

2 See Hania Zlotnik, 'International Migration Policies and the Status of Female Migrants' (1990) 24(2) *International Migration Review* 372.

3 Larsen (n 1) 1–11; Langfield (n 1) 288.

4 Larsen (n 1) 1–11; Langfield (n 1) 287.

5 Zlotnik (n 2) 372.

6 See Masako Nakamura, 'Families Precede Nation and Race?: Marriage, Migration, and Integration of Japanese War Brides after World War II' (PhD Thesis, University of Minnesota, 2010); Patricia Grimshaw, 'Interracial Marriages and Colonial Regimes in Victoria and Aotearoa/New Zealand' (2002) 23(3) *Frontiers - A Journal of Women's Studies* 12, 18.

7 Larsen (n 1); Langfield (n 1) 287.

8 See Nakamura (n 6); Grimshaw (n 6).

9 Arranged marriages are traditional practices of family or community members matching a couple for marriage with the couple's consent. Often there is little time for the members of the couple to know each other before the marriage. As there is consent, it is different from 'forced marriage'. Arranged marriages are accepted and protected in the immigration laws of all the countries studied here.

partner.[10]

Globalisation and the Internet only intensified this situation everywhere, in turn increasing demands for visas and permanent migration of partners. In the 2017-18 period, 39,799 partner visas were issued in Australia, comprising 83.4 per cent of all family migration and almost 25 percent of the country's migration. In their overwhelming majority, these visa applicants were migrant females sponsored by their male partners. This number is over 5 percent smaller than the previous period; however, the number of applications had only increased until then. Furthermore, in 2018, the numbers of visas awaiting processing were 1.9 percent higher than the previous year, indicating an ongoing demand for such a visa.[11]

Even though migrant women are a very diverse group that contribute considerably to the society where they settle,[12] regardless of the visa they migrate under, they are often perceived by numerous sectors of society as passive and dependent on men.[13] That is partially the result of migrant policies set up that often pushed women to apply for dependent visas combined with the stereotyping of members of certain (mainly non-Western) cultures as submissive and eager to please.[14] Such stereotypes of migrant women have attracted males in Australia,[15] the US and elsewhere who want a relationship with a submissive woman.[16] Despite many couples being satisfied with their

[10] See Nakamura (n 6); Grimshaw (n 6).

[11] Department of Home Affairs, *2017 – 18 Migration Program* (Report, 2018).

[12] Larsen (n 1) 1–11; Langfield (n 1) 289.

[13] Sandra Eubel, "'Flying Fräuleins": The Construction of Single Migrant Women in Discourses on Migration in Australia and West Germany in the 1950s and 1960s' (2010) 17(6) *Gender, Place & Culture* 743.

[14] Larsen (n 1) 1–11; Langfield (n 1) 287.

[15] Cleonicki Saroca, 'The Absent and Silenced Voice in Media Representations of Filipina Victims of Homicide in Australia' (2013) 21(3) *South East Asia Research* 517 ('The Absent and Silenced'); Nicki Saroca, 'Woman in Danger or Dangerous Woman? Contesting Images of Filipina Victims of Domestic Homicide in Australia' (2006) 12(3) *Asian Journal of Women's Studies* 35 ('Woman in Danger or Dangerous Woman?').

[16] Kirsten M Lindee, 'Love, Honor or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry' (2007) 16(2) *Journal of Gender and Law* 551.

relationships, the possible desire for a stereotypically submissive wife, with the ever present dependence generated by the visa process, will result in a power imbalance (a hierarchical relationship)[17] that renders migrant women vulnerable to family violence and exploitation.[18]

Marie Segrave's report in Australia stresses how this vulnerability emerges from the fact that said migrant women are in a dependent migration status.[19] This vulnerability creates extra barriers for women on uncertain visa status to escape family violence, when it occurs.[20] A similar conclusion was also reached in a US research regarding the impact of migration status.[21]

Family violence is defined by many scholars as physical, psychological or material abuse that happens in the home,[22] frequently as an attempt of one partner (usually a man) to exert power and control over the other partner (usually a woman).[23] It is estimated that family violence occurs in one quarter or more of all intimate relationships in

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17 Chris Cunneen and Julie Stubbs, 'Violence Against Filipino Women in Australia: Race, Class and Gender' (1996) 4(1) *Waikato Law Review* 132.

18 Lauren Gray, Patricia Easteal and Lorana Bartels, 'Immigrant Women and Family Violence: Will the New Exceptions Help or Hinder Victims?' (2014) 39(3) *Alternative Law Journal* 167; Patricia Easteal, 'Broken Promises: Violence Against Immigrant Women in the Home' (1996) 21(2) *Alternative Law Journal* 53.

19 Marie Segrave, 'Temporary Migration and Family Violence: An Analysis of Victimisation, Vulnerability and Support' (Report, Monash University, 2017) 1–74.

20 See Elizabeth Zadnik, Chiara Sabina and Carlos A Cuevas, 'Violence against Latinas: The Effects of Undocumented Status on Rates of Victimization and Help-Seeking' (2016) 31(6) *Journal of Interpersonal Violence* 1141; Segrave (n 19) 1–74.

21 Masiya Ahmadzai, Catherine Carolyn Stewart and Bharati Sethi, 'Study on Visible Minority Immigrant Women's Experiences with Domestic Violence' (2016) 4 *Open Journal of Social Sciences* 269.

22 Sometimes referred to as DV – domestic violence or IPV – intimate partner violence.

23 See Anthony Morgan and Hannah Chadwick, 'Key Issues in Domestic Violence' (Summary Report No 7, Australian Institute of Criminology, December 2009); Halliki Voolma, '"I Must be Silent Because of Residency": Barriers to Escaping Domestic Violence in the Context of Insecure Immigration Status in England and Sweden' (2018) 24(15) *Violence Against Women* 1830.

every country; it takes on different manifestations globally and attracts a variety of state interventions aimed at its elimination. [24] Consequently, when governments attempt to regulate migration through partner visas, in Australia or any of the aforementioned countries, these governments have to consider the potential occurrence of family violence and present responses to the issue. Despite the legal definition of family violence varying from country to country and sometimes between jurisdictions or areas of law in the same country,[25] it is still possible to engage in intra/intercountry legal comparison. Countries can learn from each other's experiences in regulating migration and attending to the needs of family violence survivors. The countries mentioned here have not only similar histories of colonisation and migration, but they also share legal traditions, having exchanged legal remedies in the past.[26]

This exchange is particularly important in Australia, as current laws on the issue of family violence against women on partner visas present numerous inadequacies. This article aims to analyse Australia's current Family Violence provisions (hereafter FV provisions) in partner visas under the *Migration Regulations 1994,* considering the law, the debates that have motivated legal reforms and the legal recommendations that have failed to inform legal changes.

Part II of this article presents the similarities among Australia, US, New Zealand and Canada concerning immigration. Part III exposes the similarities in partner visas specifically and Part IV explains the Australian system and the legal reform discussions around it for over two decades. Part V concentrates on the legal responses for similar questions in family violence and migration from New Zealand,

[24] See Cecilia Menjivar and Olivia Salcido, 'Immigrant Women and Domestic Violence: Common Experiences in Different Countries' (2002) 16(6) *Gender and Society* 898; Roberta Villalon, 'Violence against Immigrants in a Context of Crisis: A Critical Migration Feminist of Color Analysis' (2015) 24(3) *Journal of Social Distress and the Homeless* 116.

[25] Nafiseh Ghafournia, 'Battered at Home, Played Down in Policy: Migrant Women and Domestic Violence in Australia' (2006) 16(3) *Aggression and Violent Behaviour* 207.

[26] Ibid 208.

Canada and the US.[27] Part VI presents a discussion on the main issues with the current Australian legislation in partner visas and family violence alongside the legal responses from those other countries that could potentially be adapted to the Australian legal space. The conclusion (Part VII) explains how international legal experiences could help Australia to establish a way forward for the Australian legal landscape.

II IMMIGRANT SEEKING COUNTRIES AND RESPONSES TO FAMILY VIOLENCE AGAINST MIGRANT PARTNERS

Australia, New Zealand, Canada and the US have all been identified as immigrant-seeking countries beyond their history of partner migration.[28] Australia's overseas-born population (23.9 per cent) is the highest among all immigrant-seeking countries.[29] After Australia, New Zealand (22 per cent), Canada (19.8 per cent) and the US (11.1 per cent) rank second to fourth respectively.[30] Immigrant arrival rates (net of emigration rates) are the main contributors towards population growth in Canada and in Australia.[31] However, migration policy in all these countries has shifted away from family reunification (in the US to a lesser extent) to focus on migration based on marketable skills and economic considerations.[32]

Family migration can be controlled by governments, but it cannot be stopped as citizens have the right to marry a person of their choice. This right is enshrined in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (*ICCPR*), and

[27] Ana Borges Jelinic, '"*I Loved Him and He Scared Me*": Migrant Women, Partner Visas and Domestic Violence' (2019) 32 *Emotion, Space and Society* 1–7.

[28] See Ather H Akbari and Martha MacDonald, 'Immigration Policy in Australia, Canada, New Zealand, and the United States: An Overview of Recent Trends' (2014) 48(3) *International Migration Review* 801.

[29] See Ghafournia (n 25) 207.

[30] Akbari and MacDonald (n 28) 801.

[31] Ibid 802.

[32] Ibid 803.

the *Convention on the Elimination of All Forms of Discrimination Against Women*, which states that men and women have the same right to enter into marriage with their full and free consent.[33] Under articles 23(1) of the *ICCPR*, countries that are signatories of the covenant are obliged to assist and protect the family as the natural and fundamental group unit of society; while article 17(1) of the same document stresses that no one should be subjected to arbitrary or unlawful interference with their family.[34]

In the context of attempting to regulate partner visas, international obligations are an important consideration. At the same time, the narratives around migrant women are also powerful in setting the political agenda. Besides the stereotype of the submissive migrant woman mentioned in Part I, another popular stereotypical image of migrant women is the mischievous woman trying to take advantage of the migration system.[35]

Much of the research in Australia with migrant partners was done with women from the Philippines (a large group of migrants to Australia), demonstrating unique concerns for this group but also broader concerns regarding the vulnerability of migrant women. Cunneen and Stubbs, [36] for instance, studying the migration of Filipinas to Australia, identified how migration is a very gendered process, and the same could be said of family violence. They further describe in their research the process of how migrant women in those gendered processes are placed in a narrative that shifts their position

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[33] Samantha Lyneham and Kelly Richards, 'Human Trafficking Involving Marriage and Partner Migration to Australia' (Research and Public Policy Series No 124, 20 May 2014) ch 14 <http://www.aic.gov.au/publications/rpp/rpp124/partner-migration-australia-background>.

[34] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 16; *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 16.

[35] Nicki Saroca, 'Woman in Danger or Dangerous Woman?' (n 15) 35.

[36] Cunneen and Stubbs (n 17) 132.

from vulnerable to mischievous simply due to the practice of migrating,

> Filipino women who simply marry western men to leave the Philippines become re-invented as manipulative and self-seeking. In other words, the women are seen as complicit in the violence against them and the men are constructed as victims.[37]

More recent work with Filipinas in Australia and other migrant groups still identify many of the issues described by Cunneen and Stubbs in their research:[38] the hierarchy that is established in a relationship between first world males and third world racialised females, how these women will be perceived as vulnerable or as mischievous by segments of society, and how these perceptions will influence law.[39]

To a great extent, these perceptions of migrant women influenced the law reforms in the field that at times attempted to create protection for migrant women while at other times aimed at maintaining a system that is able to identify women pursuing 'fake' marriages to obtain a visa, in Australia and in the other aforementioned countries.[40] However, several scholars and some national immigration bodies have discounted those fears. Olivares and Athaide collected numerous examples of government reports in the US, Canada and Australia indicating how non-genuine marriages and false claims of family

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[37] Ibid 150.

[38] Nicki Saroca, 'Woman in Danger or Dangerous Woman?' (n 15) 35. See also Nicola Piper, 'Gendering the Politics of Migration' (2006) 40(1) *Asia Research Institute* 133.

[39] The department of immigration, particularly in Australia, has changed names numerous times. It is currently part of the Department of Home Affairs. To avoid confusion throughout the text, it will be mainly referred to as department of immigration and so will the departments that do the same work in other countries.

[40] See Sundari Anitha, 'Legislating Gender Inequalities: The Nature and Patterns of Domestic Violence Experienced by South Asian Women with Insecure Immigration Status in the United Kingdom' (2011) 17(10) *Violence Against Women* 1260; Ghafournia (n 25) 207; Segrave (n 19) 1–74; Borges Jelinic (n 27) 1–7.

violence for visa purposes are not widespread, pointing to the possibility of such concerns being overstated.[41]

III PARTNER VISAS IN ALL COUNTRIES

Despite uncertain visa status rendering all women in that condition vulnerable, and not only women on partner visa,[42] the possibility to apply for permanent residence after a relationship breaks down due to family violence is limited.[43] It is only available to partners of citizens or permanent residents who have applied for a partner visa with very few exceptions in Australia, New Zealand and Canada. Other categories of visas are excluded, such as student and tourist, resulting in many women remaining trapped in relationships with violent partners.[44] The US is the exception, accepting a broader range of applicants, which will be discussed later.

Until April 2017, legislation in Australia, New Zealand, Canada and the US had similar systems regarding the operation of any partner visa application.[45] They included:

- The length of the relationship between migrant and resident partners — two years;
- Two step processes (one temporary visa being granted for entry/remaining in the country and later the permanent residence visa being granted);
- Payment of fees for the visa application;

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41 See Mariela Olivares, 'Battered by Law: The Political Subordination of Immigrant Women' (2014) 64(2) *American University Law Review* 231; Maryann Athaide, 'A Call for Justice Towards Immigrant Women: Amending Australia's Domestic/Family Violence Provisions' (2010) 23(10) *Parity* 56.

42 Segrave (n 19) 5–60.

43 This whole article addresses migrant women and sponsoring men in heterosexual relationships. However, the FV provisions in all countries discussed here are available to men and women in heterosexual or homosexual relationships. Even countries that openly frame their laws as a way to protect vulnerable women will have gender neutral language in their legal documents.

44 Anitha (n 40) 1260; Segrave (n 19) 5–60.

45 Canada removed the two-step process in 2017. See *Immigration and Refugee Protection Act,* SC 2001, c 27.

- Evidence of relationship 'genuineness' for married and co-habiting (de facto) couples.[46]

These countries' similarities extend to their legal exceptions regarding partner visas. All four countries include family violence as one of the very few reasons to suspend the waiting period for permanent residence.[47] Applying under these legal provisions is limited to women who can provide evidence that is accepted and reaches the definition of family violence in the migration law of that country. In order to prove the violence occurred, the evidence requirements vary among countries but in all of them there are provisions relating to both 'judicial' and 'non-judicial evidence'.[48]

Judicial evidence includes any final court orders or convictions directly related to the violence such as final domestic and family violence protection orders, restraining or apprehension of violence orders, or the sponsor/ husband being convicted of a crime against the migrant woman (or her visa dependents) such as rape or assault.[49] Non-judicial evidence usually includes statements written by a professional third party, such as police and hospital reports and professional declarations from health and welfare professionals

[46] In Australia, see *Migration Regulations 1994* (Cth) reg 1.09A ('*Migration Regulations*'). In New Zealand, see *Immigration Act 2009* (NZ) pt 2 ('*Immigration Act*'). In Canada, see *Immigration and Refugee Protection Regulations,* SOR/2002-227 div 2 ('*Immigration and Refugee Protection Regulations*'). In the US, see *Immigration and Nationality Act of 1952,* 8 USC § 1186a (2000) ('*Immigration and Nationality Act*').

[47] See *Migration Regulations* (n 46) reg 1.09A; *Immigration Act* (n 46) pt 2; *Immigration and Refugee Protection Regulations* (n 46) pt 7; *Immigration and Nationality Act* (n 46) § 208. Usually besides the death of the partner or care for a child from the relationship.

[48] See Australian Law Reform Commission, *Family Violence – Commonwealth Laws* (Discussion Paper No 76, August 2011) 655–728. See also Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (Fact Sheet No 38, 2017).

[49] See Australian Law Reform Commission (n 48) 655–728; Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (n 48). See also *Migration Regulations* (n 46) regs 1.24–1.27.

(called 'competent persons' in Australia) that clearly state family violence occurred, identifying the victim and the perpetrator.[50]

IV LAW REFORM IN AUSTRALIA

Before 1994, Australia granted migrant partners a permanent entry Class 100 visa under the Preferential Family category, in a much simpler process than the current one.[51] The additional criterion for this visa was that the relationship must be genuine and continuing.[52] In 1994/1995, these laws were replaced with a two-year waiting period for all partner applicants and the requirements mentioned above, which will be analysed in depth later in this article.

Just after the passage of the *Migration Regulations 1994* (Cth), the law was amended to include provisions (the FV provisions) to stop women from remaining in an abusive relationship due to fears of deportation.[53] Similar laws referring to migrant partners and provisions related to family violence were later developed in the US,[54] New Zealand[55] and Canada.[56] Again, these laws were often introduced in an effort to balance two interests: the safety of migrant partners (usually women) and border control through the identification of non-genuine relationships.[57] While Australia was the first in this group of

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50 See Australian Law Reform Commission (n 48) 655–728; Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (n 48). See also *Migration Regulations* (n 46) regs 1.24–1.27.

51 Lyneham and Richards (n 33).

52 Ibid.

53 Cleonicki Saroca, 'The Absent and Silenced' (n 15) 517. See Australian Law Reform Commission (n 48) 655-728; Department of Immigration and Citizenship, *Fact Sheet 38: Family Violence Provisions* (n 48). See also Robyn Iredale, 'Serial Sponsorship: Immigration Policy and Human Rights' (1995) 3 *Just Policy* 37; *Migration Regulations* (n 46) div 5.

54 *Violence against Women Reauthorization Act of 2013,* Pub L No 113-4, § 3 127 STAT 54, 56–64 ('*VAWA*'); Olivares (n 41) 231.

55 *Immigration Act* (n 46) ss 22(1), (8).

56 *Immigration and Refugee Protection Regulations* (n 46) div 2.

57 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 21 of 2016–17, 11 October 2016). See Adrienne Millbank, 'Sponsorship of Spouses and

countries to develop such policies, the most recent Australian attempts at law reform have been inadequate in addressing some of the community concerns regarding the limitations of the law, while the other three countries advanced their laws to overcome similar issues.

The Australian discussion about migrant women's rights in 1994 focused on the issue of serial sponsors, a small number of men, some with a history of violence against their sponsored partners, who had sponsored several women sequentially.[58] The Australian department of immigration at the time (DILGEA) was sufficiently concerned to commission the report, 'Serial Sponsorship: Immigration Policy and Human Rights' (the Iredale Report), from the Centre of Multicultural Studies at the University of Wollongong. In 1992, a Parliamentary Background Paper showed concern with the issue of serial sponsorship; however, the Iredale Report was the one that defined 'serial sponsors', and revealed that the prevalence of Australian men repeatedly sponsoring spouses from overseas had increased.[59] Since the Iredale report, sponsorship limitations (two in a lifetime) were introduced in Australia, later inspiring changes in other countries, such as the US. Yet, violent men sponsoring women to abuse or exploit is still a concern for Australian authorities and other foreign governments.[60]

The Iredale report was commissioned to not only identify the problem but suggest improvements. The report suggested: better counselling for applicants (overseas spouses/fiancées), staff training and research, better monitoring to identify serial sponsors by means of a database, imposition of specific legal requirements on serial sponsors including the payment of a bond and the formal disclosure of

Fiancees into Australia' (Background Paper No 25, Department of the Parliamentary Library, 1992); Leslye E Orloff, Kathryn C Isom and Edmundo Saballos, 'Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act's Immigration Protections and its "Any Credible Evidence" Rules – A Call for Consistency' (2015) 11(2) *Georgetown Journal of Gender and Law* 619.

58 Iredale (n 53) 37.

59 Ibid 5–20.

60 Lindee (n 16) 551; Australian Law Reform Commission (n 48) 495, 501.

family violence and assault records, and finally changes to onshore procedures to enable better community worker support in Australia.[61] The department did not act on most of the recommendations arguing the need to balance individual rights (the privacy of sponsoring partners) and individual protection (of migrant women).[62]

Concerns with the vulnerability of migrant partners continued, and in September 2009 a rule was implemented requiring sponsors of Child visa applicants and Partner or Prospective Marriage visa applicants that include a minor to undertake an Australian Federal Police (AFP), a National Police Check (NPC) and police certificates from each country in which they lived.[63] In March 2010, the *Migration Regulations* were amended to include 'mandatory refusal of sponsorships when a child is included in the visa application and the sponsor has a conviction or an outstanding charge for a registrable offence'.[64] These changes were aimed at the protection of vulnerable migrants but did not go far enough, only addressing the potential abuse of children. During the same period, Canada and the US had already implemented laws with more stringent control over potentially abusive partners and expanded the training in family violence for their assessment teams in immigration.[65]

In 2012 a consultation process on the FV provisions took place and aspects of the partner visa and FV provision laws in New Zealand, Canada and the US were considered as potential options for Australian law reform.[66] For instance, dialoguing with the ideas from numerous other submissions, the Australian Law Reform Commission (ALRC) proposed the creation of a specialised Family Violence Unit in the department of immigration, as it occurs in the other three countries.[67]

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61 Iredale (n 53) 37.
62 Nicki Saroca, 'Woman in Danger or Dangerous Woman?' (n 15) 35.
63 Lyneham and Richards (n 33).
64 A registrable offence is an offence against a child, most notably of a sexual or violent nature, which would lead to registration on the Australian National Child Offender Register. See also Lyneham and Richards (n 33).
65 Lyneham and Richards (n 33).
66 Ibid.
67 Australian Law Reform Commission (n 48) 655–728.

At the time, the department itself acknowledged the advantage of centralising these particular visa applications into one team. However, the department dismissed the recommendation saying there was a low volume of FV provisions applications.[68] Since then, waiting times have increased and the department of immigration no longer commits to any timelines,[69] resulting in a significant impact on these particular visa applicants' lives.[70]

The specialist team was not the only idea dismissed by the department. The ALRC had also expressed concerns in relation to the position of women entering Australia on a Prospective Marriage visa and their lack of access to the FV provisions. They recommended their inclusion in the provisions alongside new visas for secondary applicants that had to escape alone, when, for instance, the primary applicant decided to remain with the sponsor.[71] The ALRC also supported the delivery of more information to migrant women and training in family violence for all involved in the decision process. The ALRC, alongside other organisations, aimed for an expansion and an easier way to access the law on the understanding that Australia had legal and moral obligations to ensure the safety of those on temporary visas in the national territory.[72] Whereas, the department's focus was diametrically opposed, instead reinforcing its interest in robust assessment of claims and identification of non-genuine relationships.[73] Subsequently, the majority of proposals put forward by the ALRC were refused by the department with the exception of the suggestion to make information on family violence more readily available to migrants. At the same time, the department refused any further procedure that could restrict or penalise sponsors with previous

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68 Department of Parliamentary Services (Cth) (n 57); Australian Law Reform Commission (n 48) 655–728.

69 'Visa Processing Times', *Department of Home Affairs* (Web Page, 18 December 2019) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>.

70 Segrave (n 19) 5–60; Borges Jelinic (n 27) 1–7.

71 Australian Law Reform Commission (n 48) 655–700.

72 Ibid 655–95.

73 Department of Immigration and Citizenship, Submission No 121 to Australian Law Reform Commission, *Family Violence and Commonwealth Laws* (29 September 2011) 700.

criminal or abusive conduct who attempted to bring a new partner into the country.[74]

Further to the informative material about family violence,[75] the FV Provisions were amended in two ways. First, allowing a greater range of documentary evidence of family violence to be considered as non-judicial evidence, following other countries. Secondly, maintaining the role of Independent Experts (IE) but removing government welfare social workers (Centrelink employees) as a type of IE when there are disputes regarding the experience of family violence.[76]

The first change is a result of the implementation of the first part of the National Plan to reduce violence against women and children (2010–2013). This First Action Plan sought to streamline the non-judicial evidence of family violence.[77] The second change is less clear. While many submissions to the law reform process questioned the kind of professional performing the IE role,[78] its existence was not particularly discussed. IE is a professional (usually a psychologist or social worker) who is paid by the department to assess a case when the department is not satisfied that the evidence provided by the migrant partner is enough to prove family violence.[79] This professional is then responsible for interviewing the migrant partner, reading all the evidence provided to the department and making a decision as to whether there was 'relevant' family violence or not.

These two legal amendments, in many instances, can work in opposing ways. Accepting a broader range of non-judicial evidence means, for instance, that women do not need to re-tell their story to a professional to write a specific declaration when they can simply

74 Australian Law Reform Commission (n 48) 655–728.

75 'Family Safety Pack', *Department of Social Services* (Web Page, 18 December 2019) <https://www.dss.gov.au/family-safety-pack>.

76 *Migration Regulations* (n 46) div 1.5; Athaide (n 41) 56.

77 Segrave (n 19) 60.

78 Australian Law Reform Commission (n 48) 655–728.

79 Nicholas Casey, Courtney Pallot and Ryan Pieszko, 'Family Violence Assessments. Under the Migration Act. Issues of Procedural Fairness and Non-Transparency' (Brief, Refugee and Immigration Legal Service, June 2016) 1–34.

access the notes from the police or a support service. On the other hand, the IE is responsible for reading presented evidence and interviewing women when the department of immigration (Home Affairs) is not convinced by the evidence. Consequently, the expansion of acceptable non-judicial evidence does not necessarily simplify the process for many women who will be required to repeat their story of abuse, despite the legal changes. In 2013 a tender process took place and a contracted third party, a private psychology company, won the contract to act as IEs.[80]

In 2016, the Refugee and Immigration Legal Service Queensland (RAILS) commissioned a report on the issue of independent experts in FV provisions.[81] The report revealed that frontline organisations had no confidence in the IE interviewing process. They questioned if women applicants were being afforded their rights to know the case against them; to have an opportunity to comment on all credible information that is deemed adverse to their case, and organisations questioned if women were afforded procedural fairness and natural justice.[82] Furthermore, the report questioned if IEs were transparent and fulfilled their obligations.[83]

In the case of *Maman,*[84] the Federal Magistrates Court was of the opinion that IEs were bound to afford procedural fairness in the lead up to their decision, but in *Al-Momani*,[85] the Court was of the conflicting opinion that the procedural fairness to be afforded by the IE is minimal, while the Tribunal carries the burden of ensuring procedural fairness is afforded by providing opportunities to comment and ensuring new evidence is considered by the IE.[86]

The RAILS report also addressed merits review, highlighting that Flick J observed in *Gounder v Minister for Immigration and Border*

80 Ibid 1–34.
81 Ibid.
82 *Kioa v West* (1985) 159 CLR 550, 554 (Mason J).
83 Casey, Pallot and Pieszko (n 79) 1-34.
84 *Maman v Minister for Immigration* [2011] FMCA 426 (Raphael FM).
85 *Al-Momani v Minister for Immigration and Citizenship* [2011] FMCA 453.
86 Casey, Pallot and Pieszko (n 79) 1–34.

Protection (DIBP) that the grounds for the Tribunal to review the IE's decision directly is limited by the operation of regulation 1.23 of the *Migration Regulations*.[87] This regulation requires the decision-maker to accept the IE's opinion as correct.[88] This regulation means that some visa decisions are ultimately made by private contractors and not by the department, giving employees in a private company a mandate to make decisions on immigration and border protection that comes within the jurisdiction of the Australian federal government.[89] Furthermore, as IEs are not necessarily experts in family violence or immigration law, there is significant potential for error in their assessments.[90]

In September 2016 a Bill was introduced to the Australian Parliament proposing a police check for sponsors on family visa streams, including partner visas and possible sponsorship bans of people with 'relevant criminal history', an idea presented but dismissed during the 2012 consultation and in the early 1990s.[91] The 2016 Bill on this issue lapsed on prorogation of Parliament and it was later reintroduced.[92] Interestingly, the amendments were originally designed to '*firstly protect vulnerable Australian sponsors who are targeted by non-genuine visa applicants who simply want a permanent visa outcome'*.[93] Upon review of the matter, however, the department acknowledged the issue of sponsor abuse and emphasised the

87 Ibid; *Gounder v Minister for Immigration and Border Protection* [2015] FCA 1476, 20.

88 *Migration Regulations* (n 46) reg 1.21.

89 The IE decision can be challenged by the AAT and the Minister for Immigration. As the sponsored woman is invited to answer the IE's claims, she can also present a case to convince immigration to set the IE's decision aside and send her to be assessed by another IE. All IEs work for the same private company. See *Migration Regulations* (n 46) reg 1.21, 1.24b; Minister for Immigration and Citizenship (Cth), *Migration Regulations 1994 – Evidentiary Requirements (Paragraph 1.24(b))* (IMMI12/116, 24 November 2012). See also Minister for Immigration and Citizenship (Cth), *Migration Regulations 1994 – Specification of Organisations (Regulation 1.21)* (IMMI 13/023, 3 April 2013).

90 Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) 245.

91 Ibid.

92 Department of Parliamentary Services (Cth) (n 57).

93 Ibid.

importance of focusing on the protection of vulnerable migrants, admitting

> sponsors are often in a position of power with little accountability. It is the sponsor who has knowledge of Australia, its laws and environment. The undertaking to assist the visa applicant financially and in relation to accommodation can be used by manipulative sponsors to control vulnerable visa applicants [94]

On 1 September 2016, the same day the current Bill was introduced into Parliament, the Governor-General made *Migration Legislation Amendment 2016 Schedule 6*.[95] This Schedule amends Division 1.4B of Part 1 of the *Migration Regulations* relating to family violence and commenced on 18 November 2016. This change was made to implement part of the *National Plan to Reduce Violence against Women and their Children 2010–2022*. More explicitly, it implements action item 11 from the *Second Action Plan 2013–16*, which requires additional information disclosure by the Australian partner.[96] Segrave in her research explains how this legal change was actually against the recommendations of the ALRC.[97]

The Bill did not pass then, but a version of the same proposal was reintroduced to Parliament in 2018, and was approved in November 2018, as a sponsor application process. This meant sponsors would apply for their right to become sponsors before the partner visa application could be lodged. The *Migration Law Act 1958* was then amended on 10 December 2018.[98]

While it is impossible to know now how this sponsor application process will impact on the whole partner visa process, it is already a good example of how these issues raised in 2012, or even the early

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94 Ibid.

95 Minister for Immigration and Citizenship (Cth), *Migration Regulations 1994 – Specification of Organisations (Regulation 1.21)* (n 89).

96 Ibid.

97 Segrave (n 19) 5–60.

98 Minister for Immigration and Citizenship (Cth), *Migration Regulations 1994 – Specification of Organisations (Regulation 1.21)* (n 89). See also *Migration Act 1958* (Cth) div 3A sub-divs A, B, G.

1990s, remained unresolved and continue to be discussed in Australia in one legal reform process after the other. It is also possible to say that the Australian approach adds one entire bureaucratic process before the partner visa application, instead of being part of the same visa process. This means potentially adding to visa waiting times and increasing the chances of women being brought to Australia under alternative visas that would then not be covered by the FV provisions. Further, the Australian solution to the problem comes later than the US and Canadian solutions, is more expensive and time consuming to the visa applicant and potentially confers less protection than the other countries' solutions discussed below.

In Segrave's compelling 2017 report on temporary migration and family violence, she demonstrated how the number of women applying for the FV provisions in Australia is just a fraction of what would be expected considering the prevalence of family violence in the world.[99] In a study involving 300 victim-survivor service files, with women coming from over 30 different countries and speaking over 40 languages, Segrave identified important issues for migrant women and made recommendations directed at the department of immigration and Victoria's government. Many of these suggestions improve on or even reiterate recommendations from 2012 and early 1990s. Those are, for instance, recommendations on providing information on migrant partners' rights and the direct contacts to specialist family violence services through digital social media, community spaces and other communication vehicles to migrant women pre-departure and on arrival, and also target groups in Australia.[100] Even though information distribution to migrant women has been recommended and approved before, the report reiterates the need to expand on this practice.

The report also brings back concerns already presented in 2012, regarding the broadening of the definition of family violence in the *Migration Regulations 1994* to ensure consistency with state definitions. The definition used in the *Migration Regulations* refer to 'relevant' family violence, limiting the accessibility of the

[99] Segrave (n 19) 5–60.
[100] Ibid 60–74.

provisions.[101] The report also revisits recommendations regarding broadening the provisions to include a number of other visa holders who currently have no visa pathway in case of separation due to family violence.

Alongside a number of important recommendations to the government of Victoria on data management, the report presents innovative recommendations regarding the identification of cases that may be better approached legally as human trafficking and not family violence. It also suggests the criminal prosecution of sponsors who commit family violence, this way failing to meet their sponsors' obligations. Failing to meet those obligations is currently a civil and administrative offence, rarely prosecuted.[102]

Before proving that 'relevant' family violence occurred, migrant women applying for the FV provisions in Australia are required to prove genuineness of the relationship, even after they have separated. Migrant women must 'demonstrate that there is a commitment to a shared life to the exclusion of all others and a genuine and continuing relationship with the partner'.[103] Nevertheless, looking into the legal requirements to prove genuineness, namely, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the person's commitment to each other,[104] it is evident that migrant women would have difficulties gathering evidence after separation when escaping an abusive partner. This difficulty has been identified in more recent law reform submissions and academic research.[105] In her research, Segrave found 14 women whose visas were refused due to lack of evidence of a genuine relationship.[106] Borges Jelinic found the same issue with eight out of 20 participants in her research.[107] Segrave suggests *'the recognition that a genuine relationship can be difficult to prove in the context of family violence and clearer provisions need to be made*

[101] See Borges Jelinic (n 27) 1–7.
[102] Segrave (n 19) 60–74.
[103] *Migration Regulations* (n 46) reg 1.15A.
[104] Ibid sch 1 cl 1214C.
[105] Borges Jelinic (n 27) 1–7.
[106] Ibid.
[107] Ibid 1–6.

regarding evidentiary requirements.'[108] Finally, the report highlights the issue of time, as women waiting for a visa decision remain in a precarious condition due to this uncertain status and as observed previously, waiting times have increased.

The reports, recommendations and law reform papers discussed here cover a period of almost 30 years. In this period many changes were made to the *Migration Regulations 1994* and even the *Migration Act 1958*, however some concerns informed recommendations that have not yet been implemented, particularly in regard to the expansion of protection for other migrant women. Similar concerns have appeared in law reform processes in New Zealand, Canada and US with different engagements from these countries. The following segment of this article discusses how these other three countries approached the issues of:

1. Limitations of provisions to selected visa holders
2. Genuine relationship evidence/ procedural fairness/ specialised team
3. Processing times of visas
4. Dissemination of information to migrant partners
5. Family violence definition
6. Sponsorship ban and control

V COMPARING AUSTRALIA'S FV PROVISIONS TO CANADA, NEW ZEALAND AND THE US

A *The US Solution — Broadening the FV Provisions and Alternatives to Genuine Relationship Tests*

Among the countries analysed here, the US has the most comprehensive legislation addressing violence against women, including family violence. While all the other countries seem to follow a similar structure of family violence provisions on partner visas with

[108] Segrave (n 19) 7.

only a few visa exceptions, the US has expanded the possibility for any woman (either on a visa or undocumented) to remain in the country if she has experienced family violence from her partner. Even though a woman's visa status and that of her partner will have significant consequences in the process to acquire permanent residence in the US, the possibilities of acquiring that status are broader than in other countries and these possibilities are publicly framed within laws attempting to protect women from abuse, the *Violence Against Women Act (VAWA)*.[109]

Until 1994, abusers had sole responsibility for the immigration status of sponsored women.[110] The US then radically changed its laws through the enactment of the *VAWA*.[111] Initially, the *VAWA* stipulated that a woman in a family violence situation could obtain legal residence if she entered her marriage in good faith, resided in the US, and if she was the victim of battery or extreme cruelty during her marriage and would suffer extreme hardship if deported.[112] Therefore, *VAWA* protection was limited to those otherwise eligible immigrants who were married to their abusers and whose abusers were US citizens or Lawful Permanent Residents (LPRs), similar to current laws in Australia, Canada and New Zealand.[113]

The reauthorisation process of the *VAWA* in 2000 included provisions aimed at helping battered immigrants in all visa situations:

[109] Joanne Lin, Leslye Orloff and Ericka Echavarria, 'Immigration Relief for Survivors of Domestic Abuse, Sexual Assault, Human Trafficking and Other Crimes: A Violence against Women Act 2005 Update' (2007) 40(5) *Clearinghouse Review Journal of Poverty Law and Policy* 539.

[110] Under the *Immigration Marriage Fraud Amendments of 1986* (IMFA), a US citizen or legal permanent resident partner was required to file a permanent residence application on behalf of his immigrant partner with the migrant partner holding a two-year conditional residence permit that would only be removed if the couple applied for it and passed an interview. See also Lori R Sitowski, 'Congress Giveth, Congress Taketh Away, Congress Fixeth Its Mistake? Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000' (2001) 19 *Law and Inequality* 259.

[111] Sitowski (n 110) 259.

[112] Ibid 260.

[113] Olivares (n 41) 231.

the *Battered Immigrant Women Protection Act (2000)* ('*BIWPA*').[114] The *BIWPA* consisted of migration law provisions intended to assist immigrant victims of family violence holding all visas and undocumented women to self-petition and file for cancellation of deportation while their cases were pending.[115] It also no longer required applicants to show proof of extreme hardship and included previous family violence inflicted by the abuser outside of the US.[116]

The *Violence Against Women Act (VAWA) Reauthorization Bill* 2005 passed with added protection to women that may be arriving in introduction agency arranged or mediated relationships. Another contribution of this reauthorisation was a criminal background check on the sponsoring partner rather than just on the migrant woman. This aimed to stop serious criminal offenders, particularly former abusers, murderers or sexual predators, from sponsoring someone to the US.[117] Self-petition applications under the *VAWA* are managed by a specialised unit within the government, trained to address issues of violence against women, the same as for Canada and New Zealand. This unit accepts a broad range of documents as proof of family violence (described as 'any credible evidence') and focuses on analysing claims fully within the unit in order to reduce women's trauma from re-telling their stories.[118] The Bill was reauthorised again in 2013[119] and in April 2019.[120]

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[114] Sitowski (n 110) 259.

[115] It included the 'U visa' for immigrant victims of crimes not in a partner visa pathway. The U visa is a non-immigrant visa, meaning, it does not lead to permanent residence in the country but it allows the family violence survivor (and victims of other crimes) to remain lawfully in the US in that status for up to four years. See Orloff, Isom and Saballos (n 57) 619.

[116] Menjivar and Salcido (n 24) 898.

[117] Lindee (n 16) 551.

[118] Orloff, Isom and Saballos (n 57) 619.

[119] *Violence against Women Reauthorization Act of 2012*, S 1925, 112th Congress (2012). See the discussion on the reauthorization of the Bill from the 112th Congress: 'S. 1925 (112th): Violence Against Women Reauthorization Act of 2012', *govtrack* (Web Page) <https://www.govtrack.us/congress/bills/112/s1925>.

[120] *Violence Against Women Reauthorization Act of 2019,* HR 1585, 119th Congress (2019).

1 *Improving Accessibility to the Provisions*

In Australia, multiple reports have recommended the expansion of the FV provisions.[121] For instance, the ALRC 2012 report, the Segrave 2017 report and numerous other scholars have agreed that expanding the family violence provisions to cover Prospective Marriage visas is consistent with the intention of this law; to ensure that visa applicants do not have to remain in a violent relationship for a migration outcome.[122] While the Australian immigration department has continuously refused this suggestion, the US has identified the same problem and responded by expanding its FV provisions (or at least in part) to women on visa categories beyond what has been called for in Australia.

The US has been the country that most expanded its FV provisions for all women survivors of violence by 2000. The *Battered Immigrant Women Protection Act (2000)*[123] presents (different) visa possibilities for women in all visas and undocumented women that experienced family violence.[124] Concerns regarding the expansion of the FV provisions, which continue to emerge during discussions of immigration law, were addressed almost 20 years ago in the US, indicating a possible pathway for Australia.

2 *Genuine Relationship*

In the US there is no genuine relationship requirement, as the focus is not on the intentions of both partners, but solely on the migrant women's intentions. The US' visa process assesses if the woman 'married in good faith'[125] regardless of the abuser's intentions in the relationship. That way, a woman does not need to justify the couple's actions, just her own. Considering that the application for the FV provisions automatically removes the sponsor from the visa process,

[121] See Gray, Easteal and Bartels (n 18) 167; Segrave (n 19) 5–10.
[122] Gray, Easteal and Bartels (n 18) 167.
[123] Sitowski (n 110) 260.
[124] Olivares (n 41) 231.
[125] *VAWA* (n 54) § 3.

it would be logical if Australia also engaged in a solution which investigates only women's commitment to the relationship and not ex-partners', like the American approach.

The 'good faith' question is supported in the US by the fact that cases using the FV provisions are analysed by specialised family violence teams, like in New Zealand and Canada and like the ones recommended, but not implemented, in Australia in 2012.[126] Clearly, a trained team can analyse the relationship as a whole, benefiting survivors of family violence that frequently struggle to prove the genuineness of their relationships.[127] These teams analyse the evidence of good faith and of family violence together. In the Australian law, the need to assess a relationship without the information about the violence can easily lead to an error of judgement, as relationships where there is family violence have a completely different dynamic from that of relationships without violence.[128]

Specialised teams in all three countries are also instrumental in sharing information with migrant women and helping them find support services while their cases are being processed, besides giving and receiving ongoing training in family violence. Reports regarding the Australian migration law have expressed concern to find solutions for all of these areas.[129]

B *Processing Times and Financial Burden — The Solutions from New Zealand and Canada*

New Zealand's FV provisions are very similar to that of Australia with an added condition, as in Canada, that a woman must prove that she will have difficulties resettling in her country of origin. After a legal

[126] Australian Law Reform Commission (n 48) 655–728.
[127] Ibid 700–28.
[128] Ramon Grosfoguel, Laura Oso and Anastasia Christou, '"Racism", Intersectionality and Migration Studies: Framing Some Theoretical Reflections' (2015) 22(6) *Identities: Global Studies in Culture and Power* 635; Segrave (n 19) 5–60.
[129] Orloff, Isom and Saballos (n 57) 619.

review in 2009, this rule acquired a less narrow scope, moving from a focus on women's fears of returning to their country of origin, to an assessment that includes those fears but also assesses women's ability to find work or the risk of experiencing social exclusion if forced to return to the country of origin.[130]

1 *Processing Times*

Like the US case discussed above, New Zealand and Canada have a family violence team processing cases within the immigration department.[131] New Zealand relies on this strategy of a family violence team to be able to understand and process such visas as priority cases. New Zealand is the only country considered here that identifies family violence applications as priority and commits to dealing with them in an expedited way.[132]

Canada does not expressly mention expedited visa processes in relation to family violence claims (discussed below), but the country was always committed to clear waiting times in relation to the partner visa process, with visas being issued without extended delays due to an automated system in place.[133] This automated system already has the potential of reducing the number of people in need of eventually using the FV provisions, simply by reducing waiting times. Both countries present solutions to the growing problem in Australia of extended delays in visa processing and their potential impact on migrant women's safety and mental health.[134]

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[130] *Immigration Act* (n 46) s 73; 'Visas for Partners & Children', *Government of New Zealand* (Web Page, 23 November 2018) <https://www.newzealandnow.govt.nz/move-to-nz/new-zealand-visa/partner-visas>. See also Australian Law Reform Commission (n 48) 655–95.

[131] Australian Law Reform Commission (n 48) 655–728.

[132] Ibid.

[133] 'Help for Spouses or Partners Who Are Victims of Abuse', *Government of Canada* (Web Page, 26 September 2019) <http://www.cic.gc.ca/english/resources/publications/family-sponsorship.asp>.

[134] Ibid.

2 *Financial Burden*

The ALRC identified in 2012 that many stakeholders raised concerns regarding the financial burden on women from the fees collected through the Administrative Appeals Tribunal (AAT)[135] appeals process after a visa refusal.[136] Nevertheless, the financial burden of this visa process is not limited to the fees, as migrant women's financial entitlements in Australia change depending on which visa they are holding.[137] For instance, if the woman separated after acquiring a temporary residence visa, she is often entitled to financial support through the welfare system, access to free English classes and support to look for full time work.[138] However, if she separated while holding a bridging visa because her first stage of the visa process had not been assessed yet,[139] regardless of the length of the relationship or the hardship she may experience, she is not entitled to financial or educational benefits from the usual government streams, and alternative sources are rarely available.[140] In Australia, the FV provisions process usually takes over one year and the original partner visa approval often takes more than the prescribed two years, pushing more women to need the FV provisions. Therefore, in Australia, processing times and financial burden are closely related.

New Zealand addresses both issues by committing to expedited processing but also aiming for fairness and equality between women applying for FV provisions by moving all visa applicants into the same visa category. Once women start the FV provisions process, they hold

135 An amalgamation of the former Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT).

136 *Migration Regulations* (n 46) div 5.

137 Natasha Cortis and Jane Bullen, *Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress: Key Findings and Future Directions* (Research to Policy and Practice Paper Issue No 6, ANROWS, October 2016).

138 Borges Jelinic (n 27) 1–7.

139 *Migration Regulations* (n 46) div 2.5.

140 Department of Immigration and Border Protection, *Partner Migration* (Booklet No 1127, December 2014) 58; Department of Immigration and Citizenship, *Fact Sheet 64: Community Assistance Support Program* (Fact Sheet No 64, 2011). The fact sheet can be requested from the department.

the same rights.[141] New Zealand's concern to expedite the process helps women avoid spending too long in a position of not being able to access ongoing work and government financial and educational benefits that can render women vulnerable over time.

In Canada, there is a three-year financial sponsorship signed by sponsoring partners and bond paid to the department of immigration that gives women guarantees that they will have access to income or social benefits while waiting for their visas to be processed.[142] This sponsorship rule means that while partners in other countries end their sponsoring obligations when they withdraw their sponsorships, in Canada, the financial obligations established by sponsoring will remain even after the end of the relationship if the migrant woman requires financial assistance, for a total of three years.

C *Definitions of Family Violence and Education in Family Violence to Migration Assessors and Migrant Women — The Canadian System*

Canadian options for partner visa applications have changed considerably in the last 15 years and so have the FV provisions associated with them.[143] Initially in the Canadian system all partner applications had to be made from outside Canada, but in 2005 Citizenship and Immigration Canada allowed for 'In Canada' partner applications. Requirements of co-habitation, genuine relationship and, from 2012, a two-year waiting period applied unless the couple could prove they were in a relationship over two years before applying for the visa or had a child in common.[144] This was already a unique feature of the Canadian law as all other countries considered here would count the relationship as starting from the day of the visa application, granting no special regard for the length of the relationship or the existence of children at the time of the visa application.

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[141] Australian Law Reform Commission (n 48) 695–728.

[142] 'Sponsor Your Spouse, Partner or Child: Check if You're Eligible', *Government of Canada* (Web Page, 16 May 2019) <http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp>.

[143] Akbari and MacDonald (n 28) 801. See also 'Sponsor Your Spouse, Partner or Child: Check if You're Eligible' (n 142).

[144] *Immigration and Refugee Protection Regulations* (n 46) pt 7.

1 *Definition of Family Violence*

Canada's definition of family violence is broader than the other countries, as it includes neglect. Neglect is defined as, '*the failure to provide the necessaries of life, such as food, clothing, medical care, shelter, and any other omission that results in a risk of serious harm'*.[145] Once an application for the FV provisions is made, a family violence team handles the migrant woman's visa process, as previously explained.[146]

At the time of the original partner visa application, the sponsoring partner must sign the above-mentioned undertaking with the Minister of Citizenship and Immigration promising to support the migrant partner financially for three years from when the visa process starts. This includes ensuring the availability of housing, care and financial resources.[147] If abusive sponsors refuse to comply, the migrant woman may be eligible for social assistance.[148]

In order to apply for a visa when there is a relationship breakdown due to family violence, the woman requires an extra assessment, similar to New Zealand. The woman will be required to have a humanitarian and compassionate assessment besides the assessment of family violence.[149] The former is an assessment of how the migrant woman will be received if she must return to her country of origin. While this demand restricts the availability of the FV provisions in those countries, the complete lack of regard for the impact of deportation on women after separation and violence means the

[145] 'ARCHIVED – Operational Bulletin 480 (Modified) – November 16, 2015', *Government of Canada* (Web Page, 16 November 2015) [3.4.1] <http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp>.

[146] 'Help for Spouses or Partners Who Are Victims of Abuse' (n 133).

[147] Ibid.

[148] Ibid.

[149] Those steps include considerations for the violence experienced as much as the negative consequences of deportation, such as how the family in the place of birth will receive the woman. See Immigration and Citizenship Canada, *IP 5: Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds* (1 April 2011) [12.7].

Australian immigration department does not acknowledge a well-known barrier for migrant women to report abuse: the discrimination they may experience in their country of origin or local community if they are separated/ divorced women.[150]

In April 2017, the Canadian government embraced a more radical measure and repealed the two-year waiting period for permanent residency, acknowledging that it negatively affected women experiencing family violence. Canada was the last country here to introduce the two-year waiting period and Canada became the first of the countries to abolish it, maintaining the FV provisions for women still waiting for approval for the partner visa under the initial application and women in some other less common visa categories.[151] Australian legal reviews have never proposed such a radical measure, but it is undeniably an effective way to streamline the process and reduce costs for all parties while protecting vulnerable migrants.

2 *Training and Education*

All of the law reform processes and reports mentioned in this article have highlighted the importance of education in family violence for decision makers and migrant women.[152] Part of the need of training and information sharing with decision makers is the fact that the family violence definitions in migration law in Australia are different from the ones in the *Family Law Act 1975* (Cth). The need for a consistent definition in the country has also been highlighted before.[153] Yet, there is no evidence that suggests an increase in training in the department of immigration on family violence and there were no requirements of experience assessing family violence for the contracted third-party company that successfully tendered to undertake the IE's assessments.[154]

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[150] Ibid.

[151] Ibid.

[152] Australian Law Reform Commission (n 48) 695–728; Segrave (n 19) 5–60; Iredale (n 53) 37.

[153] Segrave (n 19) 1–74.

[154] Minister for Immigration and Citizenship (Cth), *Migration Regulations 1994 – Specification of Organisations* (n 89); Department of Immigration and

While there is no evidence of training for migration officers and IEs in family violence, there was an expansion of educational material offered to migrant women by the department of immigration over the last seven years.[155] That is still far from the amount of fact sheets, research papers and service information offered by the Canadian immigration website and their specialised teams that offer information even to members of the public that do not yet have the intention to start the FV provisions process.[156]

D *Sponsorship Bans – Canada and US*

The Canadian background check and sponsorship ban goes even further than the American one, discussed above.[157] While the US bans perpetrators of violent crimes from sponsoring migrants, Canada stops people from becoming sponsors if they are in debt to the Child Support Agency or Immigration Department.[158] This means that if people are not paying child support to dependent children or they did not honor their financial sponsorship of a previous migrant partner, they are not considered fit to sponsor (financially and otherwise) migrant women into the country.

Australia was reluctant for years to introduce a similar system because, '[there was] risk that Australian sponsors could be disadvantaged by previous conduct that occurred a long time ago',[159] however sponsor control was increased in 2018 in the format of a sponsor application. The Australian approach differs from the one in Canada and US because while those countries focus on submitting sanctions to some sponsors, the Australian system is focused on registering all sponsors without a clear guideline on what would result

Citizenship (Cth), *Procedures Advice Manual 3* (2003) [76]. PAM is the Department of Immigration guidelines for decision-makers.

155 Australian Law Reform Commission (n 48) 695–728.

156 'Help for Spouses or Partners Who Are Victims of Abuse' (n 133).

157 Lindee (n 16) 551.

158 Help for Spouses or Partners Who Are Victims of Abuse' (n 133).

159 Australian Law Reform Commission (n 48) 700–28.

in a sponsorship ban.[160] While the Australian system will certainly increase the waiting times for partner visas and the costs, it is less clear if it will be effective in protecting vulnerable migrants from violence.

VI DISCUSSING THE MAIN LEGAL ISSUES

Partner visa application processes and FV provisions in the four countries discussed in this article have many similarities which can be partially explained by these countries' similar cultural history and experience with immigration. They have also researched each other's migration laws when considering law reform and openly adopted each other's policies at times.[161]

While this article aims to learn from international experiences in order to improve Australian laws, there is no illusion that other legal responses are perfect. The FV provisions are ultimately a mechanism to protect and not penalise migrant women who leave violent relationships. Nevertheless, all discussed countries have concerns about a potential abuse of these provisions. The FV provisions include regulations aimed at ensuring both women's safety and immigration control. While women's safety is the stated reason for the existence of FV provisions in the law of all these countries, immigration control concerns can often impede prioritising women's safety.[162] These barriers result from assumptions about migrant women's character and fear that they may abuse the visa system.[163] Such general suspicion over migrant women raises questions regarding exactly why this suspicion has developed. Is it a suspicion of women joining 'fake' marriages and then 'pushing' their partners into being violent in order to access their visas earlier? Or could it be an expression of the old myth of women making false allegations of violence? Stereotypes of

[160] Ibid 695–728.
[161] Ibid.
[162] See, eg, Department of Parliamentary Services (Cth) (n 57); Millbank (n 57); Orloff, Isom and Saballos (n 57) 619.
[163] See Zadnik, Sabina and Cuevas (n 20) 1141; Segrave (n 19) 1–74; Ahmadzai, Stewart and Sethi (n 21) 269.

migrant women as 'vulnerable' or 'mischievous' seem to continuously influence the visa process.

At the same time, all four of these countries are aware that family violence is both familiar, and endemic, instead of a foreign issue.[164] These countries recognise through their policies and general legislation that family violence affects a large number of women within and outside their borders, and they potentially envision spiking numbers of visa applications if any claim of family violence was accepted because of how much family violence is inflicted on women daily.[165] This way, the visa control through strict family violence rules appears to exist both because women could be lying and because so many women are likely to experience family violence. Fears of increasing demands for visas combined with the myth of false claims seem to have influenced the final drafting of these laws in the past and still appear to influence in the present.

It is important to note that family violence is well known to be an underreported crime and the phenomenon of underreporting domestic abuse stems directly from its historical context where such violence has been normalised and accepted as a part of husbands' rights to control women in patriarchal cultures.[166] It was once part of the British common law on which these countries' laws are based.[167] Furthermore, many women remain trapped in abusive relationships and are simply unaware of their rights, and are therefore unlikely to apply for any legal protection regarding their visa status.[168] Probably, any law made for protecting survivors of gendered violence, including family violence, will be underutilised for these social and historical reasons.

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[164] Siobhan Mullally, 'Domestic Violence, Asylum Claims and Recent Developments in International Human Rights Law: A Progressive Narrative?' (2011) 60(2) *International and Comparative Law Quarterly* 459.

[165] Sitowski (n 110) 259.

[166] Jessica Kennedy and Patricia Easteal, 'Shades of Grey: Indeterminacy and Sexual Assault Law Reform' (2011) 13(2) *Flinders Law Journal* 49.

[167] Sitowski (n 110) 259; Kennedy and Easteal (n 166) 49.

[168] Anitha (n 40) 1260.

Nevertheless, the US, Canada and New Zealand have engaged with issues of how to manage the challenges regarding FV provisions in partner visas and they have developed solutions that could potentially respond to the similar needs and concerns faced in Australia. Some of the legal approaches that enhance women's safety involve rethinking the FV provisions, while others, such as sponsorship bans, are part of updating the original rules around partner visa applications, meaning, some will result in changes to the *Migration Regulations 1994* and others changes to the *Migration Act 1958.*

While Australia has embraced other countries' legal remedies, like accepting a broad range of evidence of violence, informing migrant partners on their rights in cases of family violence and more recently, sponsorship control, Australian regulations fail to address some important recommendations that frequently emerge from law reform commissions and reports. Those can be broadly described as: genuine relationship evidence, limitations of provisions to just some visa holders, processing times of visas, dissemination of information, family violence definition and sponsorship control.

Expanding the accessibility of the FV provisions would demand considering the experience of the US with the *VAWA* and an increased focus on victim protection beyond visa status. It could also start from the inclusion of visa categories such as Prospective Marriage into the FV provisions. Considering the lack of evidence of training and of immigration assessors specialised in family violence and the increasing waiting times for these visa applications, engaging specialised teams inside the department to process these visa applications, as the other three countries discussed here have done, is an idea worth considering. It would guarantee the quality of the assessment, removing the need for IEs, with the added advantages of avoiding women re-telling their story. This team would acknowledge the dynamics of family violence when considering the genuineness of the relationship, while informing migrant women about support services.

The definition of family violence could also be expanded to include neglect, like in Canada, or even to include violence committed outside the territory or against others, like in the US. Finally, the financial burden of the visa process can be addressed in numerous ways. One is the implementation of similar rules to New Zealand, having expedited visa processing times for family violence cases and granting all women under the FV provisions the same legal rights (not necessarily by granting them a special temporary visa), or maybe considering the Canadian experience where financial sponsorships give all women the right to financial independence if separated before residency. Further, the removal of the two-year waiting period for all partner visas in Canada is an effective way to tackle many of these issues by reducing the number of women that would need to access FV provisions, addressing a core vulnerability for this group, the visa uncertainty.[169]

VII CONCLUSION

In this article, legal responses to family violence and immigration in four immigrant-seeking countries, Canada, New Zealand, the US and Australia were considered. The aim was to understand how recent developments in the first three countries could assist in amending the Australian FV provisions, by attending to the demands that have been highlighted in numerous law reviews in the last 30 years. This way, women's safety could be enhanced while not discarding the concern for migration control, a balance always considered in the other countries in this research. In her report, Segrave says:

> Recognising and responding to this, and reducing the level of control perpetrators have, is further complicated by an immigration system that on the one hand seeks to recognise and offer some protections to avoid such abuse and exploitation, but which is also striving to ensure that the system is not easily 'abused' for the purpose of 'false' migration applications (be it, false in relation to the nature of the relationship or false in relation to the claim of family violence). These tensions require careful consideration, weighing up where Australia's priorities lay. As we move towards grappling with the complexity of family violence, it

[169] *Immigration and Refugee Protection Act,* SC 2001, c 27 (n 45) div 1.

> must be family violence that is prioritised over and above migration status.[170]

This article in an attempt to demonstrate the need, importance and possibility for Australian FV provisions and partner visa regulations to move towards a real focus on addressing family violence and provide safety.

[170] Segrave (n 19) 74.