



Women's Legal Education and Action Fund (LEAF) Position Paper on the Criminalization of Coercive Control

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Coercive control is a concept used to describe a pattern of abusive behaviors in intimate partner relationships, based on tactics of intimidation, subordination, and control.¹ This can include, among others, behaviors such as isolation, stalking, threats, surveillance, psychological abuse, online harassment, and sexual violence. Coercive control is a highly gendered form of abuse, disproportionately experienced by women. Patterns of coercive control have been long documented by survivors and scholars as predictive of lethal violence.² Understanding this form of intimate partner violence is therefore essential to protecting survivors.

In recent years, there has been a move across jurisdictions to translate the realities of coercive control into criminal law (most notably in the United Kingdom, Wales and Scotland, and with emergent discussions in Australia, New Zealand and some US states). It is within this global context that the potential of criminalization is now being considered in Canada. Recommendations pertaining to the criminalization of coercive control were made in both the March 2023 Mass Casualty Commission and the CKW Inquest in Renfrew County.

This paper outlines LEAF's position regarding the potential criminalization of coercive control. LEAF's position is guided by a desire to amplify the voices of those experiencing gender discrimination³, understanding intimate partner violence as a form of gender-

¹ Alanna Haist, "Criminalizing Coercive Control in Canada: Implications for Family Law" (2021) Luke's Place at 12-13. The concept of coercive control, as popularized by sociologist Evan Stark, was developed within the framework of intimate partner violence to shed light on the forms of psychological violence and entrapment that can exist in these relationships. However, coercively controlling behaviour can also be experienced outside the context of intimate partner relationships, particularly by women with disabilities. These women are disproportionately vulnerable to such behaviour by caretakers and others who are in a position of trust relative to them (see for example, Isabel Ruiz-Pérez *et al.*, "Intimate partner violence in women with disabilities: perception of healthcare and attitudes of health professionals" (2018) *Disability and rehabilitation*, 40(9), 1059-1065). Without discounting the harmful experience of this behaviour, LEAF's position paper focuses on the experience of coercive control within intimate partner relationships given the framework in which the concept was initially developed and that its criminalization is currently being considered by government.

² Mass Casualty Commission Report, "Turning the Tide Together: Final Report of the Mass Casualty Commission" (2023) 3 at 383 ('MCC Report').

³ LEAF Strategic Plan 2021-2026, online: <<https://www.leaf.ca/wp-content/uploads/2022/05/LEAFs-Strategic-Plan-2021-2026-3.pdf>>.

based discrimination, while taking a critical approach towards compulsory criminalization and incarceration that continues to result in disparate impacts on Indigenous, Black, racialized, disabled, and 2SLGBTQIA+ populations. LEAF recognizes as well that these communities are more likely to experience violence and be victims of crime; 60% of Indigenous women⁴ and more than half of women with disabilities⁵ experience intimate partner violence in their lifetime. The intersections of these identities often lead to further marginalization by the state and heightened risk of harm.

It is therefore crucial to consider the unintended consequences of any expansion of the criminal law and to challenge the centering of the criminal legal system as the sole avenue to safety and justice, while simultaneously examining how best to protect survivors of gendered violence.

In the current context, LEAF does not support criminalizing coercive control. Focusing on the criminal law as the solution to intimate partner violence ignores its many documented failings and harms. LEAF urges governments to instead take a proactive approach in focusing on the prevention of intimate partner violence, and to also ensure that alternative avenues to justice and safety are made available to survivors. Furthermore, if any legislation is to be considered, it must only be after meaningful consultation with an expert advisory group, including with Indigenous, Black, and racialized survivors.

About the Women’s Legal Education and Action Fund (LEAF)

Since 1985, LEAF has worked to advance gender equality through litigation, law reform, and public education. LEAF has intervened in over 130 cases that have advanced substantive gender equality in Canada, including many which directly engage the criminal law. Our cases have resulted in landmark victories preventing violence against women and gender diverse people, eliminating discrimination in the workplace, allowing access to reproductive freedoms, and providing better maternity benefits, better spousal support, and the right to pay equity.

LEAF’s notable criminal law-related work has included intervening in cases like *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (which rejected the notion of “implied consent” in Canadian law), *R. v. Barton*, 2019 SCC 33 (which rejected stereotyping of Indigenous women and sex workers in sexual assault prosecutions), and *R. v. Kirkpatrick*, 2022 SCC 33 (which found that condom use falls within the scope of consent to the “sexual activity in question” under Canadian criminal law).

⁴ Statistics Canada, “Intimate partner violence among diverse populations in Canada, 2018” online: < [⁵ Statistics Canada, “Intimate partner violence: Experiences of women with disabilities in Canada, 2018”, online: < <https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00006-eng.htm>>.](https://www150.statcan.gc.ca/n1/daily-quotidien/210519/dq210519c-eng.htm#:~:text=Among%20specific%20ethnocultural%20groups%2C%20Arab,a%20visible%20minority%20(29%25).>.”></p></div><div data-bbox=)

In recent years, LEAF's engagement with the criminal legal system has led to a deeper understanding of the ways in which harms can be perpetuated through the system, and an interest in challenging the system as the best place to seek justice for sexual violence. This advocacy has been explored in LEAF's recent report "Avenues to Justice: Restorative & Transformative Justice for Sexual Violence."⁶

Potential Benefits of Criminalization

I. Greater awareness of the dynamics of intimate partner violence

The establishment of a new criminal offence may compel greater awareness and understanding of the nuanced dynamics and forms of intimate partner abuse amongst law enforcement, the legal profession, and the general public.⁷ Domestic violence without a visible physical component is often not perceived to be as meaningful and serious as physical abuse.⁸ In looking at the experiences in the United Kingdom and Scotland, researchers have argued that criminalizing the experience of coercive control has assisted in a shift in the "narrative representation of male partner abuse", to include a broader encapsulation of a range of psychological harms.⁹ Greater recognition of this form of violence could enable justice system actors to make more informed decisions when approaching intimate partner violence.¹⁰ The expressive power of law may also send a message of condemnation of this form of violence to society.

II. Potential to provide validation for some survivors of violence

Similarly, some survivors argue that criminalization could provide a sense of validation for the harm they have experienced. The creation of a space within the criminal legal system to share the full extent of their abuse can bring to light a survivor's lived reality and may help them make greater sense of their experiences.¹¹

⁶ Women's Legal Education and Action Fund, "Avenues to Justice: Restorative and Transformative Justice for Sexual Violence" (2023), online: <<https://www.leaf.ca/wp-content/uploads/2023/10/Avenues-to-Justice-Report-LEAF.pdf>>.

⁷ Julia R Tolmie, "Coercive Control: To Criminalize or Not to Criminalize?" (2018) 18:1 Criminology & Criminal Justice 50 (Tolmie).

⁸ House of Commons Standing Committee on Justice and Human Rights: Study on Bill C-247, 43rd Parliament, 2nd session, Brief, February 2021 (Canadian Resource Center for Victims of Crime), online: <<https://www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11134761/br-external/CanadianResourceCentreForVictimsOfCrime-e.pdf>>.

⁹ Evan Stark & Marianne Hester, "Coercive Control: Update and Review" (2019) 25:1 Violence Against Women 81.

¹⁰ Sandra Walklate & Kate Fitz-Gibbon, "Why Criminalize Coercive Control? The Complicity of the Criminal Law in Punishing Women through Furthering the Power of the State" (2021) 10:4 Int J for Crime, Justice & Social Democracy 1, at 3.

¹¹ Ibid; Deborah Tuerkheimer, "Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence" (2004) 94:4 J. Crim. L. & Criminology 969.

However, it is important to acknowledge that not all survivors have equal access to the criminal legal system, nor do all survivors wish to engage with the system. It has been shown repeatedly that instead of validating their experience, the experience of going through the criminal system can often be re-traumatizing for survivors of violence and may not serve their desired justice interests.¹²

LEAF's position is that we must take an intersectional approach in considering the diversity of experiences of survivors of gender-based violence, and in doing so, challenge the claim that the criminal justice system will provide a site of healing or validation for all.

III. *Legal recognition of patterns of abuse*

Criminalizing coercive control would articulate notions of domestic violence that are ignored in the model of incident-based offences. The current offences that are used in cases of coercive control are not able to capture the specific dynamics of control in these relationships and are often focused on visible markers of physical violence.¹³ The establishment of a new offence that would embrace a pattern of controlling behavior could allow for making the broader context of the relationship relevant to courts, leading to more informed and effective decision making.¹⁴ This may also have beneficial impact in areas such as family court, where the existence of a criminalized act could provide more credibility to claims of abuse by women seeking custody.

Potential Risks of Criminalization

I. Systemic barriers to effective implementation will harm survivors

The creation of a new offence does not affect all survivors in the same way, nor does it provide the same level of access or protection. The criminal legal system is a site of colonialism and systemic discrimination against Black, Indigenous and racialized women, girls, trans and non-binary people. This fact must be held at the center of every discussion about a carceral response to intimate partner violence. The impact of a new criminal offence will be felt more deeply by members of marginalized groups, who are already disproportionately surveilled, targeted and punished.¹⁵

¹² See for example, Women's Legal Education and Action Fund, "Due Justice for All, Part One: A Survivor-Focused Analysis of Canada's Legal Responses to Sexual Violence" (2021) at 32-51, online: < <https://www.leaf.ca/wp-content/uploads/2021/09/Due-Justice-Report-Part-1-FINAL-September-2021.pdf>>.

¹³ House of Commons Standing Committee on Justice and Human Rights: Study on Bill C-247, 43rd Parliament, 2nd session, Brief, February 2021 (Carmen Gill and Mary Aspinall) at 4, online: < <https://www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11085796/br-external/Jointly1-e.pdf>> ('Gill and Aspinall').

¹⁴ Tolmie at 52.

¹⁵ MCC Report at 387.

Coercive control is a nuanced concept which captures a wide range of behaviors. Policing coercive control relies on law enforcement's recognition of the presence of these behaviors,¹⁶ which can appear in different forms and subtleties based on the specific context and dynamics of an interpersonal relationship. There is a risk that the particularities of this abuse may be misinterpreted, missed, or deemed visible when not present, when viewed by law enforcement through an existing lens of institutionalized stereotypes and racism.¹⁷ This could also present concerns for assessments of the forms of coercive control used against women with disabilities, which are often not captured in the frame of intimate partner violence (such as, for example, controlling access to disability accommodations). A lack of physical markers can allow for a wider range of interpretation, and as Courtney K Cross explains, the "crux of coercive control laws lies in criminalizing behavior that is hard to corroborate and thus ripe for bias" to creep into decision making by judges and juries¹⁸. Similarly, if police are granted additional discretionary powers to arrest, it is necessary to understand the systemic biases which may play into the recognition of these behaviors. A similar risk arises regarding bias inherent in prosecutorial discretion.

Fears around the potential misidentification of women as the primary aggressors by police officers have been raised by Indigenous and Black communities.¹⁹ The history of mandatory charging policies sheds light on the potential consequences of a new offence – these policies led to a significant increase of arrests of female survivors, particularly amongst racialized groups.²⁰ A new offence risks subjecting survivors to further violence through the law, and it is crucial to ensure that these consequences do not repeat themselves. Increased police training on the recognition of coercive controlling behaviors will be necessary in order to avoid the potential of increased criminalization of survivors.

Criminalization may also affect the willingness of marginalized survivors to seek legal recourse.²¹ A history of harm and systemic racism means that there is a lack of trust with the police and legal institutions, resulting in reticence to voluntarily engage with these systems and an exclusion from the mechanisms of protection that may be available.

¹⁶ Gill and Aspinall.

¹⁷ Sandra Walklate, Kate Fitz-Gibbon & Jude McCulloch, "Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories" (2018) 18:1 *Criminology & Criminal Justice* 115 (Walklate, Fitz-Gibbon & McCulloch).

¹⁸ Courtney K Cross, "Coercive Control and the Limits of Criminal Law" (2022) 56 *UC Davis Law Review* 195 at 239 (CK Cross).

¹⁹ CK Cross; Courtney Hobson, "The Contributions of First Nations Voices to the Australian Public Debate over the Criminalization of Coercive Control" (2023) *bcad140 British Journal of Social Work* (Hobson).

²⁰ CK Cross; Patrina Duhaney, "Criminalized Black women's experiences of intimate partner violence in Canada" (2021) 28(11) *Violence Against Women* 2765.

²¹ See House of Commons Standing Committee on Justice and Human Rights: Study on Bill C-247, 43rd Parliament, 2nd session, Brief, March 2021 (Les Femmes Michif Otipemisiwak / Women of the Métis Nation) online: < <https://www.ourcommons.ca/Content/Committee/432/JUST/Brief/BR11143869/br-external/WomenOfTheMetisNationLesFemmesMichifOtipemisiwak-e.pdf>>; MCC Report.

Engagement with the criminal law increases a risk of state intervention in other areas of life; this can include a heightened risk of involvement of child protective services, trigger contact with immigration and border services for non-status individuals, and create further opportunities for state interference. This interference can ripple into families and lead to a loss of primary care of children, housing and income supports, especially when experienced by communities who are already facing increased scrutiny.

II. Significant challenges to legal success

As researchers have argued, the concept of coercive control was developed in a clinical context and is difficult to translate clearly into actionable criminal law.²² Given the wide and growing list of behaviors that are covered under the concept of coercive control, any potential offence risks being subject to constitutional challenges due to overbreadth or vagueness. On the other hand, using a narrow and delineated approach risks leaving out the growing range of behaviors that abusers may use against their partners (for example, novel forms of virtual abuse).

There is also concern that even if found to be constitutionally sound, the offence will face difficulties in appropriate evidentiary collection and successful prosecution. Many coercively controlling situations lack physical evidence to corroborate the violence, thus heightening the role of survivor in providing evidence.²³ Providing compelling evidence of psychological harm that rises to meet the high burden of proof required in a criminal proceeding is likely to be very difficult.²⁴ A comparison can be made to the challenges faced in successfully prosecuting offences like criminal harassment.²⁵ Evidentiary requirements have also been identified as having the potential to contribute negatively to the experience of women seeking legal assistance through the criminal court system, especially as myths and stereotypes about their credibility persist.²⁶

Recommendations

Coercive control is a persistent and insidious form of violence that must be recognized. However, given the significant challenges presented, criminalization of the concept will not facilitate tangible access to justice or safety without systemic change.

²² Walklate, Fitz-Gibbon & McCulloch.

²³ CK Cross at 238.

²⁴ Walklate, Fitz-Gibbon & McCulloch.

²⁵ House of Commons, "The Shadow Pandemic: Stopping Coercive and Controlling Behavior in Intimate Relationships" (April 2021) 43rd Parliament, 2nd session, online: <<https://www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11257780/justrp09/justrp09-e.pdf>> ('The Shadow Pandemic').

²⁶ See House of Commons Standing Committee on Justice and Human Rights: Study on Bill C-247, 43rd Parliament, 2nd session, Testimony, February 4, 2021 (Jennifer Koshan).

LEAF has engaged in discussions with other feminist organizations about the potential risks and benefits of criminalization. There is no single consensus. Even among those who are wary of criminalization, positions range from being strongly against the establishment of any new criminal law, to allowing for the possibility of exploring the development of a law after other supports have been provided.

In the current context, LEAF does not support criminalizing coercive control. Rather, LEAF makes the following recommendations:

1. Federal, provincial and territorial governments should take a proactive approach in focusing on the prevention of intimate partner violence.

This includes funding housing, social support and community service programs to ensure that women have the infrastructure to seek safety, as well as funding preventive programs for aggressors.

2. Explore restorative and transformative justice models as a response to intimate partner violence

The criminal legal system continues to fail survivors of gender-based violence. LEAF strongly supports on the Federal, provincial, and territorial governments to ensure that alternate avenues to justice, such as restorative and transformative justice, are made available to survivors. This recommendation echoes those of the CKW Renfrew County Inquest²⁷ and Women's Shelters Canada's *Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence*.²⁸

These models may lend themselves to providing survivors with the validation they seek. This includes facilitating public education and awareness about the models which currently exist, as well as facilitating the development and funding of new programs.

3. Provide mandatory and ongoing training to law enforcement, crowns, and judges on coercive control and systemic bias. Establish accountability measures to ensure regular follow-up and evaluation on whether training is being meaningfully applied.

LEAF recommends the creation of a mechanism to monitor implementation of any new offence, and to identify how race may be playing a role in policing and charging rates in situations of intimate partner violence. This could include keeping disaggregated data on who is being charged and who the victims are.

²⁷ CKW Inquest, Jury Recommendations (2022) at 12, online: < https://lukesplace.ca/wp-content/uploads/2022/06/CKW-Inquest-Verdict-Recommendations-SIGNED_Redacted.pdf>.

²⁸ Amanda Dale, Krys Maki & Rotbah Nitia, "A Report to Guide the Implementation of a National Action Plan on Violence Against Women and Gender-Based Violence" (2021) online: <<https://nationalactionplan.ca/wp-content/uploads/2021/06/NAP-Final-Report.pdf>>.

4. Adopt the Mass Casualty Commission’s Recommendation to Strike an Expert Advisory Group

Should the federal, provincial, and territorial governments wish to further explore the criminalization of coercive control, LEAF urges them to adopt the March 30, 2023 Mass Casualty Commission’s Final Report recommendation 12(a), which states:

“Federal, provincial, and territorial governments establish an expert advisory group, drawing on the gender-based violence advocacy and support sector, to examine whether and how criminal law could better address the context of persistent patterns of controlling behaviour at the core of gender based, intimate partner, and family violence.”²⁹

This would include examining existing *Criminal Code* provisions, including the scope of their application. Any potential legislation should only be considered *after* such a committee has been established and provided sufficient time and resources to fulfill its mandate.

As part of its work, any such committee must also meaningfully consult with Indigenous, Black, racialized, disabled and 2SLGBTQIA+ survivors of gender-based violence about the laws that may impact their lives. It is crucial to ensure that a diversity of knowledge, representing those who may be disproportionately impacted by criminal laws, is included in any discussion and development of legislation.

²⁹ Mass Casualty Commission Report, “Turning the Tide Together: Final Report of the Mass Casualty Commission” (2023) List of Recommendations at 12, online: <<https://masscasualtycommission.ca/files/documents/Turning-the-Tide-Together-List-of-Recommendations.pdf>>.