# LUKE'S PLACE SUPPORT AND RESOURCE CENTRE

## Criminalization of coercive control: Are we just putting another tool in the hands of abusers to use against their partners?

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***Who we are***

Luke's Place, an award-winning, community driven, non-profit organization, works with women who have been subjected to intimate partner abuse to support them and their children through the family law process. Located in Durham Region, we provide direct services to women across Ontario and are a provincial and national leader in systemic work such as law reform, advocacy, research, education and training on family violence and family law.

Our work has led us to a deep understanding of the many ways different legal systems intersect with and affect women's family law experiences. For this reason, we have conducted some research on the possible criminalization of coercive control[1] – in particular, its potential impact on women's family law cases – and been part of various discussions about this issue with other gender-based violence organizations over the past several years. We have also coauthored a brief on this issue with LEAF for the Canadian Women's Foundation.

Our position has been developed based on our frontline work and internal research as well as a review of the following:

- existing legislation in other jurisdictions
- Private Member's Bills C-202 and C-332
- Mass Casualty Commission Final Report
- CKW Inquest recommendations
- House of Commons Standing Committee on Justice and Human Rights study on controlling or coercive behaviour in intimate relationships
- Standing Committee on the Status of Women's study on intimate partner and domestic violence in Canada

[1] https://lukesplace.ca/wp-content/uploads/2022/03/Stopping-Coercive-Control-by-Criminalization-Lukes-Place.pdf

In July 2023, we brought together our staff team for a group discussion about whether or not we think coercive control should be criminalized, during which we heard the perspectives of those with lived experiences of coercive control as well as those whose daily work with survivors has shaped their thinking on this topic and those whose systemic work with the law has provided them with insights into past law reform successes and failures.

***What is coercive control?***

Coercive control is a term that describes a pattern of behaviours, including psychological abuse -- which itself can encompass such things as intimidation, demeaning and insulting treatment, verbal abuse, threats, gaslighting, surveilling and stalking -- as well as social isolation and financial abuse. Physical violence may or may not be present, but the threat of it is often part of the coercive control.

Over time, coercive control can result in the victim losing her autonomy and sense of self-worth, thinking she is crazy and becoming, essentially, a hostage of the abuser. Many of those subjected to coercive control live in a state of constant fear, always anticipating when the next abusive act is going to happen. It can have a profound impact on children who are exposed to it.

Coercive control is now included in the definition of family violence in the *Divorce Act* and Ontario's *Children's Law Reform Act,* but it does not yet appear in the *Criminal Code.* Some jurisdictions (most notably, England, Scotland, Wales, and New South Wales in Australia) have developed a criminal offence of coercive control, and other jurisdictions (New Zealand and some American states) are considering doing so.

The verdict from the CKW inquest held in Renfrew County in June 2022 as well as the final report of the Nova Scotia Mass Casualty Commission both include recommendations related to the criminalization of coercive control.

Among feminists, survivors and those providing frontline support to survivors, there are varying perspectives on whether or not criminalization is a good idea.

***Key issues***

There are a number of reasons to think that criminalizing coercive control could have positive outcomes, among them:

1. Creating a criminal offence of coercive control would empower some survivors by validating their experiences. Currently, with no criminal offence of coercive control, survivors can feel as though what has happened to them is not taken seriously by the criminal law and, by extension, by society at large.

   *A lot of the women we see ask "why won't they charge him?" or "why won't they help me?"*[2]

[2] All italicized comments come from the Luke's Place staff discussion about this issue.

*It was very hard for me to hear that what was happening to me wasn't real as far as the police were concerned.*

2. This could lead to survivors having greater confidence in the criminal system.

   *What are we saying to survivors if we don't criminalize it?*

3. Some evidence shows that coercive control is a strong red flag for future lethality. Criminalizing it could lead to earlier interventions that could save lives.

   *It could have been a game changer for my mum if it had been criminalized.*

4. If supported by appropriate public education, criminalizing coercive control could increase public awareness and understanding of this often hidden form of intimate partner violence.

   *Criminalizing coercive control would help family law lawyers understand how serious it is.*

5. If well implemented and enforced, it could offer police a new tool to use and provide a deterrent to abusers who engage in this behaviour and hold them accountable.

There are also a number of reasons to be concerned about the impacts of criminalizing coercive control:

1. The criminal law has largely failed survivors of gender-based violence, as we discuss in greater detail below.

2. Given that police reporting rates by survivors of intimate partner violence are generally low (approximately 30%), simply adding a new offence may affect only a small number of victims.

   *What tools and policies will be created for police to minimize retraumatization and make the process better and safer for the survivor?*

3. Abusers have been very successful in using other legal and policy responses to gender-based violence against their victims (eg mandatory charging). Criminalizing coercive control presents the same possibility; in particular, that abusers will manipulate the intent of the law to have their partner charged.

   *Criminalizing coercive control just puts another tool in the abuser's toolbox to manipulate the law.*

4. By its nature, coercive control is a somewhat vague kind of behaviour, which might be difficult for police to accurately assess, especially if the abuser is making counter-claims against the survivor.

   *How will police officers even be able to identify coercive control? There are so many nuances and cultural aspects to it.*

5. It may prove difficult to determine the elements of the offence. For example, if there has to be a "pattern of behaviours," what makes a pattern? Does it have to happen twice? Seven times? More?
   *Crowns need a standard procedure for prosecuting these cases.*

6. Likewise, establishing what evidence will be necessary to lead to a finding of guilty beyond a reasonable doubt may prove challenging.

   *Women will be retraumatized when they have to testify and be cross-examined.*

7. There is likely to be a differential impact of criminalization on women from marginalized communities (for example, women with criminal histories, Indigenous and racialized women, women with disabilities).

   *There is already fragmentation in the criminal system.*

8. Criminalization will have an impact on survivors' family law and child protection cases, as we explore in greater detail below.

   *We already see the family law not protecting women and children when other charges have been laid.*

   *Will it be used against her in family court if she doesn't report coercive control to the police? Or if she does but the police don't lay a charge?*

9. A carceral approach is expensive and does not offer either healing to survivors or a meaningful opportunity for abusers to take responsibility, heal and learn new behaviours for moving forward.

   *How will sentencing reflect the long-term impact on the survivor as well as the best interests of children in terms of parenting arrangements?*

### *A failed system to date*

Over the past 40 years, we have seen the many ways in which the criminal law has failed survivors of gender-based violence as well as those who cause the harm – particularly when those people come from marginalized communities. Despite a variety of criminal law interventions and initiatives – new laws, changes to old laws, new court processes and rules, education for those responsible for implementing and interpreting the law, different approaches to bail and to punishments for those found guilty – intimate partner violence, including lethal violence, remains a serious social problem in this country.

<u>Validating women's experiences</u>

The insidiousness and seriousness of coercively controlling behaviour needs to be recognized and understood by the legal systems to which women turn for help. Survivors need to be validated that what has been done to them is wrong.

Unfortunately, many women report that they feel dismissed when they tell their family law lawyer, the police and others they encounter, about their partner's coercive control of them. Our society is still programmed to think of intimate partner violence as physical, and this means we are ignoring the non-physical forms of abuse that, for some women, are far more serious.

As more than one of our clients has said: "I wish he just would have hit me. Then, people would have believed me."

The coercive control to which so many women are subjected needs to be validated. However, criminal law is not the best way to do this.

What if we create a criminal offence of coercive control but the police don't lay charges when women report it – maybe because they haven't been properly trained, maybe because the evidence to support a charge is hard to find, maybe because they don't take it seriously?

What if Crowns, who are under pressure to prosecute only cases with a very high likelihood of leading to a conviction, don't pursue the case because they believe it will be difficult to prove?

What if the case is prosecuted, but doesn't end in a finding of guilt?

Worst of all, what if it is the survivor who is, albeit inappropriately, charged?

Where's the validation in any of those outcomes? How would these outcomes lead survivors to have greater confidence in the criminal system or to be more likely to report abuse to the police?

***Impact on a survivor's family law case***

Although our mandate is to provide support and services to women through the family law process, many of the women we support are also involved in the criminal system either as the complainant or the accused. Our anecdotal experience with women can be confirmed through past research showing the number of people who have concurrent family law and criminal law cases.[3]

When it comes to cases involving family violence, the intersection between family law and criminal law is so deep that it is simply not possible to make changes to one system without impacting the other.

<u>Intersections between courts</u>

[3] For example, one study found that approximately 10.7% of active family law cases in the Ontario Court of Justice between 2003 to 2010 involved an active criminal proceeding related to issues of IPV. Approximately 38% of family law lawyers surveyed in 2010 reported that in situations of family violence, their clients are often involved with the criminal court at the same time as family court.

The intersection between criminal law and family law is often challenging for women to navigate. Trying to reconcile the different legal standards, processes, procedures and rights afforded in each system can be extremely confusing. Women are often frustrated by the lack of coordination and communication between the two courts. Although a woman is a party in the family case, she may be a complainant in the criminal case, lacking any agency or authority over the process and outcome. Even getting updated information about the status of criminal charges against the abuser may be complicated and time-consuming. Women are forced to retell their story over and over again to different sets of lawyers and judges and are at risk of having the abuser try to coerce them into not testifying in the criminal case in exchange for a particular family court outcome. Abusers may also use the concurrent proceedings as a way to delay and derail the family court case.

Adding another criminal offence does nothing to address these problems. Instead, it has the potential to simply increase the number of women who are forced to navigate concurrent proceedings.

Impact on credibility

A criminal charge or conviction and, importantly, the lack of criminal charge and conviction can have an enormous impact on the outcome of a family law case.

In cases involving allegations of IPV, the lack of criminal charges and convictions often becomes a focal point of the evidence in family court. It is relied on extensively by abusers to support their claim that the violence did not occur. If a woman has not reported abuse to the police or the police have not laid charges or the abuser was not found guilty at trial, her claim of abuse in family court is subject to increased scrutiny and she is at risk of not being believed.

The same is true for women who return to the abuser or stay in a relationship in which they are being abused. There are many reasons why a woman may not leave or report abuse to police, including but not limited to financial dependency on the abuser, distrust of police, fear of losing the children, fear of increased violence, shame and isolation. This is particularly true for women from marginalized communities and gender-diverse survivors who may not want to have any involvement with the criminal process because of systemic oppression and racism. Unfortunately, not all legal system stakeholders in family court understand and appreciate this. Instead, a woman's claim of abuse is viewed with distrust and increased skepticism.

We already anticipate challenges for police when it comes to properly identifying and charging cases of coercive control. Will family law judges and lawyers understand these challenges? Or will they instead view a lack of criminal charge or conviction as evidence that the violence alleged in the family court case did not occur?

Adding another criminal offence will not address these concerns but may result in judges and others making negative credibility assessments about women who raise

coercive control in their family law cases without having immediately left the relationship or reporting the violence to police.

Impact on child protection involvement

When police are called in situations involving IPV, they report their involvement with the family to the local child protection authorities. Adding a new criminal offence that applies in situations of IPV is simply adding another potential avenue for the children's aid society (CAS) to get involved in the life of a family. This can be extremely problematic for women, particularly women from marginalized communities who face increased scrutiny and oppression when engaged with this system.[4]

Involvement with CAS can have a detrimental impact on a woman's family law case. Family courts often rely heavily on the outcome of CAS investigations when making decisions about parenting arrangements for children.[5] Like the concerns about police not being able to properly identify and charge, there are similar concerns when it comes to CAS workers' ability to properly identify coercive control and its impact on a child. If they cannot properly identify the violence, they are unlikely to be able to verify protection concerns. This will then get used by the abuser in family court to discredit a woman's claim of abuse.

Risk of women being charged

We are also concerned that this new offence could increase the number of women we are supporting who are facing criminal charges themselves.

We have seen the impact of mandatory charging policies on women, with a number of women being criminalized after being mislabelled as the primary aggressor in a domestic dispute. Abusers know how to manipulate the system and present themselves as the victim as opposed to the aggressor when police are called. Adding a new criminal offence without first re-evaluating these policies can have a disastrous effect on women in family court.

Women who are criminally charged are automatically at a disadvantage in family court when it comes to their credibility and the strength of their case. Abusers will use the existence of a charge or the involvement of police to gain a tactical advantage in family court – alleging for example that they are the victims and claiming that the woman's parenting time with her children should be limited. It gives the abuser another way to exert power and control and makes a woman less likely to reach out to police in the future, even if she is at serious risk of harm. If there are children, they are still in an unsafe situation, risk of further trauma and extremely scary and confusing for them.

[4] See for example the Ontario Human Rights Commission Report, "Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare" which highlights the disproportionate rates of Indigenous and Black children in care, online: <https://www.ohrc.on.ca/en/interrupted-childhoods#4.Research%20on%20racial%20disproportionality%20in%20child%20welfare>.

[5] Wanda Wiegers, "The Intersection of Child Protection and Family Law Systems in Cases of Domestic Violence", 35 Can J Fam L 183.

They may be denied contact with someone who was previously their primary caregiver. Women in these situations are at risk of pleading guilty to just get the criminal charges dealt with as quickly as possible or as a result of pressure from the abuser.

We are concerned that adding another criminal offence, particularly one that may pose challenges for police in terms of proper identification, is rife for manipulation by abusers.

***Position on criminalization***

Our position on how we believe government should move ahead on the issue of whether or not to criminalize coercive controlling behaviours can best be summed up in the words of one member of our team:

> *It seems to me that the pros are best case scenarios that we hope for, but the cons are what is most likely to happen.*

**We recommend that government build the infrastructure needed to support survivors of IPV to engage meaningfully with the criminal system BEFORE committing to the creation of a new criminal law.**

We need to look at system changes that focus on prevention rather than continuing to tinker with those that respond after the abuse has happened. In other words, we need to be looking beyond the criminal law at other approaches, as has been recommended in the Final Report of the Nova Scotia Mass Casualty Commission, which calls for, among other things:

- A society-wide response (V14)
- Frameworks for structured decision-making by police with a focus on violence prevention (V10)
- A national, collaborative process bringing together all stakeholders "to develop a national framework for a women-centred approach to responding to intimate partner violence" (rec. V10)

Rather than creating new criminal laws, we should be reviewing those that exist as well as policies such as mandatory charging to determine their effectiveness, as recommended by both the CKW inquest and the Mass Casualty Commission.

Too often, when there is political enthusiasm to create new law or policy, promises are made that contextual pieces will be put in place later.

It's time to do it the other way around: put the infrastructure in place first, see how that works, and then decide whether or not we need a new law.

Figuring out the best ways to respond to and, ultimately, prevent coercive control will take an all of society approach, which needs to include all levels of government, survivors, community-based experts and other stakeholders.

Here's how we propose that could happen:

1. Follow the Mass Casualty Commission's recommendation V-12 to 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.
2. Examine existing laws that could be used to respond to some forms of coercively controlling behaviours.
3. Provide NEW and MANDATORY training for all police to ensure they understand:
   - the prevalence of intimate partner violence and the many forms it can take, including coercive control
   - what charges are already available that could be used in response to coercive control
4. Create real accountability measures so police officers are evaluated regularly on whether they are applying the training in a meaningful way. These could include:
   - Establishing a standard of practice for responding to IPV calls across all police forces
   - Making assessment of officers' responses to IPV part of their regular performance reviews
   - Conducting spot reviews of IPV files, in collaboration with community partners
   - Applying consequences for officers who do not meet the standard of practice
5. Develop NEW and MANDATORY education for Crowns and judges, with accountability measures as above.
6. Fund access to free independent legal advice for survivors of gender-based violence who are considering accessing the criminal system (modeled on Ontario's ILA for sexual assault survivors program).
7. Create a Criminal Court Support Worker Program similar to Ontario's Family Court Support Worker Program to work in collaboration with existing criminal court victim/witness assistance programs.
8. Fund national stakeholder consultations and discussions about the appropriate use of transformative justice models as a response to GBV in addition to the existing criminal system.

Then, and only then, consider how the criminal law might need adaptation to respond effectively to coercive control, using a collaborative consultation process with all stakeholders.