



THE CANADIAN
BAR ASSOCIATION
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Via email: JUST@parl.gc.ca

Lena Metlege Diab, M.P.
Chair, Justice and Human Rights Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A4

Dear Lena Metlege Diab:

Re: Bill C-332, An Act to amend the Criminal Code (controlling or coercive conduct)

We write on behalf of the Canadian Bar Association and its Criminal Justice and Family Law Sections (CBA Sections) about Bill C-332, *An Act to amend the Criminal Code (controlling or coercive conduct)*. The Bill seeks to amend the *Criminal Code* to create a new criminal offence of “engaging in controlling or coercive conduct” that has a significant impact on the person to whom the conduct is directed. In the view of the CBA Sections’ criminal practitioners, the criminal law currently properly supports the offence of controlling or coercive conduct. The CBA Sections’ family practitioners propose amendments to Bill C-332, as an alternative position, should the Bill and its proposed amendments to the Code become law. We believe these alternative positions demonstrate that the Bill is not ripe for approval. We welcome the opportunity to comment on the Bill and present our preliminary positions to the Committee.

The Canadian Bar Association is a national association of over 38,000 lawyers, law students, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA’s Criminal Justice Section consists of criminal law experts, including a balance of prosecutors and defence lawyers, from every part of the country. The Family Law Section addresses substantive and practice issues in family law and promotes the fair, effective and efficient resolution of family matters.

The CBA Sections’ review of Bill C-332 leads them to conclude that the Bill needs fine tuning before it becomes law and that it would benefit from wider consultation. At this juncture, we present preliminary issues in the hopes of making recommendations on further iterations of the Bill. Comments from both our Criminal Justice and Family Law Sections follow.

Criminal Law Practitioners’ Concerns

The CBA Sections’ criminal law practitioners first address concerns with the Bill as presently drafted. They acknowledge the pernicious harm of intimate partner violence and the laudable intentions of the Bill. However, they are concerned that the term “controlling or coercive conduct”, in the criminal law context, is vague and could capture a very broad range of conduct and questions the efficacy of

expanding that range to what is best addressed by family legislation. They also caution against importing concepts from family and child protection law into criminal law and conflating the objectives and fundamental principles of these areas of law.

1. Conduct already captured by the *Criminal Code*

Common examples of criminal offences that arise from intimate partner violence scenarios include:

assault, uttering threats, criminal harassment, forcible or unlawful confinement, sexual assault, and publication or distribution of intimate images without consent. Extortion and intimidation are also possible charges that could be laid in appropriate circumstances.

The offence of intimidation captures a range of conduct set out in section 423 of the *Criminal Code*, when the person engages in that conduct “for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing”. The conduct includes:

- (a) using violence or threats of violence to that person or their intimate partner or children, or injuring the person’s property;
- (b) intimidating or attempting to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;
- (c) persistently following that person;
- (d) hiding any tools, clothes or other property owned or used by that person, or depriving him or her of them or hindering him or her in the use of them;
- (e) with one or more other persons, following that person, in a disorderly manner, on a highway;
- (f) besetting or watching the place where that person resides, works, carries on business or happens to be; or
- (g) blocking or obstructing a highway.¹

“Violence” as used in s. 423(1)(a) is not limited to instances of actual physical contact with the complainant, but includes “forcibly interfering with personal freedom”, “undue restraint applied to some natural process, habit, etc. so as to prevent its free development or exercise”, and “force or strength of physical action.”²

The CBA Sections’ criminal practitioners question the need to create a new criminal offence that goes beyond the conduct already prohibited by statute.

- Hiding “tools, clothes or other property” (such as keys or a cell phone) owned or used by that person, or depriving the person of use of them, would be captured under the present criminal offence of “intimidation”.
- “Preventing” someone from seeing or communicating with another person or attempting to “restrict” one’s social activities is a type of behaviour where charges of uttering threats, intimidation, or forcible or unlawful confinement, could be laid, where the conduct is accompanied by an attendant threat of violence or a physical restraint.
- Choosing a partner’s clothing, while possibly a form of “control” or attempt at it in some extreme circumstances (and in other circumstances, arguably innocuous behaviour), is not conduct that

¹ S. 423(1), *Criminal Code*

² *R. v. Lenton (1947)*, 3 C.R. 41, 88 C.C.C. 1, 1947 CanLII 111 (ON CA), at para. 14

ordinarily rises to the level of criminality without an accompanying threat. Again, charges of uttering threats and/or intimidation could be laid in such circumstances.

- Removing or preventing a person’s access to money to which they have a legal interest is conduct that could be captured under the offences of theft, fraud, or even robbery in certain cases. In other cases, these are circumstances best addressed by family and civil courts. Alternatively, if there is a demonstrable gap in addressing economic or financial abuse and deprivation within the criminal law, this could be a subject of a specific amendment to the *Criminal Code*.
- It is unclear what conduct is meant to be captured by the references in the draft legislation to “absences from work or from education or training programs”, changes in routines or status in relation to employment or education, and changes of address. If there is conduct that amounts to unlawful confinement, or otherwise is violent conduct by way of physical assaults or threats, again, this conduct is already prohibited under the *Criminal Code*.

The CBA Sections’ criminal practitioners are unaware of any widespread problem in addressing criminal conduct that would be captured in these examples. Outside of these examples, it is difficult to conceive of a scenario of “controlling or coercive conduct”, which is not defined in the draft legislation, that does not involve threats or use of violence, and which also rises to the level of criminal conduct.

2. Difficulty in proving “significant impact”; other remedies available.

The CBA Sections criminal practitioners are also concerned that the “significant impact” as interpreted in the Bill is either not measurable or presents difficulty in proving to a criminal standard. For example, how does one prove that the impugned conduct “causes the person’s physical or mental health to decline”?

Where the conduct complained of causes the person to fear that violence may be used against them, there are already multiple tools available in both the criminal and non-criminal contexts. Peace bonds (both s. 810 and “common law”) are an example of a tool available to and widely used by criminal prosecutors, which prohibits unwanted contact between a complainant and an accused, even where the conduct complained of does not necessarily result in a criminal conviction. A breach of a peace bond is a criminal offence and may result in imprisonment or other criminal sanctions.³

Other tools available to a complainant outside of the criminal law context include protection orders under provincial legislation. Seeking redress for economic loss through the civil courts may also be an available option.

Family Law Practitioners’ Concerns

1. Amending Bill C-332

The CBA Sections’ family practitioners see problems in the criminal law’s current approach and find value in amending Bill C-332 to better reflect the problems they encounter in their practice.

Approximately 70% of domestic violence is never reported to police.⁴ The CBA Sections’ family practitioners spend most of their day developing plans to respond to family violence to keep clients and their children safe, and sometimes to help abusers stop their abuse. Implementation of the *Divorce Act*

³ See s. 811 of the *Criminal Code* for breach of a s. 810 peace bond, s. 127 of the Code for disobeying a court order (common law peace bond).

⁴ Gurm, B., Salgado, G., Marchbank, J., & Early, S. D. (2020). *Making Sense of a Global Pandemic: Relationship Violence & Working Together Towards a Violence Free Society*. Kwantlen Polytechnic University: Surrey, BC. Ebook ISBN 978-1-989864-14-2, [online](#) or Print ISBN 978-1-989864-13-5.

amendments in 2021 sparked a culture shift within the practice of family law, with a small but growing influence on discussions about family violence. Bill C-332 recognizes that until recently, family law did not have language to describe the violence experienced by victims from relatives. Given the stakes, the language proposed by the Bill in s. 264.01 of the *Criminal Code* to sanction controlling or coercive control violence must be understood by ordinary Canadians and operational for the police and prosecutors working to protect victims of violence.

What follows reflects amendments to improve the application of the new offence of controlling or coercive control to foster understanding, improve its application and outcomes.

A. Expand explanation of the interpretation of “significant impact” to set out meaning of controlling or coercive control and adopt a plain language approach to ensure ordinary Canadians appreciate the meaning of the offence.

The CBA Sections’ family practitioners believe that the *Criminal Code* offence of coercive and controlling behaviour must be clearly articulated. They suggest that the operational definition adopted by the New South Wales legislature is current and based on research and the lived in experience of legislation in the United Kingdom and Scotland. We recommend that Bill C-332 include a clearly defined set of behaviours that demonstrates coercive and controlling conduct.

Those who work with families and violence understand coercive and controlling behaviour as a common and shared experience by women and children perpetrated by their relatives.⁵ Intersectional considerations impact risk and outcome. A person may face differential risk (amplified forms of coercive and controlling) due to factors such as race, ethnicity, religion, faith or belief system, indigeneity, sexual orientation or identity, age, disability, health status, social class and education and lived experience. Coercive and controlling behaviour is an insidious form of violence that is appreciated cumulatively and rarely in isolation. The harm experienced is personal and transformative.⁶

Currently, the criminal law response to violence experienced by family violence is rooted in a "violent incident model" where violence is siloed into separate incidents, and seriousness is measured by the threat of injury or as experienced by the victim⁷. The CBA Sections’ family practitioners believe this approach misses the mark to assess the seriousness of abuse experienced by victims of family violence because their experience is measured by frequency and duration and not severity of one incident. In most cases, “tactics other than violence are the most salient and consequential” and are done to undermine the victim’s autonomy. (See Evan Stark, whose work informed the development of this offence, explain the nuanced complexity of what coercive and controlling is and why it often difficult to appreciate)⁸

Another feature of the concept of coercive and controlling behaviour is the cluster of behaviours that are often dismissed by characterizing the victim as overstating their experience or being too sensitive. In

⁵ Paul McGorrrery and Marilyn McMahon “Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence”. *Criminology & Criminal Justice* (2021) 21:4, 566-584

⁶ Department of Justice, HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers (2022), [online](#).

⁷ Evan Stark, "Looking Beyond Domestic Violence: Policing Coercive Control" (2012) 12:2 J Police Crisis Negot 199

⁸ “Until recently, coercive control was invisible in plain sight. In part, this is because many of the control tactics target activities already identified as women's default responsibilities (such as housework or cooking) or involve areas still viewed as male prerogatives, such as control over money or how women perform sexually. Taken separately, many of these behaviors seem to reflect individual biases, The full scope of coercive control as a form of abuse only becomes apparent when these behaviors are interwoven into a pattern over time and when obeying an abuser's demands is largely based on fear of what will happen to her if she disobeys, the "or else" proviso. Since violence may not be present or remain below police radar in these relationships, it is not always easy to distinguish coercive control from voluntary compliance with traditional gender roles”.

cases where the victim is responsive to their controller, the interactions are labelled as having a “high conflict” tension in the relationship, as opposed to calling it what it is – the perpetration of violence by one relative against another relative, including children⁹. The CBA Sections’ family practitioners suggest that oversimplifying violence as “high conflict” suggests the driver of the conflict is not understood; it falsely, and dangerously, assumes that the parties are on level playing field, and the absence of a *Criminal Code* offence in response is problematic. The use of euphemisms, as a choice to mislabel a set of facts, banalizes violence and is reminiscent of times when family violence was nobody’s business, but the household affected by it. When multiple acts of coercive and controlling behaviour are perpetrated, the risk of immediate and other lethal forms of violence is heightened¹⁰. Police must be attuned to the risk. A clear definition of coercive and controlling behaviour will help police do their work and improve the protection of victims and children in the view of family practitioners.

Finally, a plain language approach is consistent with Justice Canada’s Guide to Fostering the Readability of Legislative Texts¹¹, and a people-centered approach to justice, and will help everyone understand what the legislation says, and how to access its protection¹².

With respect to proposed s. 264.01 of the *Criminal Code*, the CBA Sections’ family practitioners recommend replacing proposed ss. (2)¹³ which defines “Interpretation — significant impact” with the expansive approach adopted in New South Wales, Australia (see footnote)¹⁴

⁹ On the differentiation between “high conflict” and “family violence” see, for example, Fidler, B.J., Bala, N., Birnbaum, R., & Kavassalis, K., *Challenging issues in child custody disputes: A resource guide for legal and mental health professionals*. (2008 Carswell Thomson Reuters Publishing).

¹⁰ Linda C. Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems* (Criminal, family, child protection) *A Family Law, Domestic Violence Perspective* (2013, 2nd edition), [online](#).

¹¹ Justice Canada, published 2021-08-06, [online](#).

¹² Justice Canada, published 2021-09-01, [online](#).

¹³ (2) For the purposes of subsection (1), the conduct has a significant impact on the person if

- (a) it causes the person to fear, on reasonable grounds, on more than one occasion, that violence will be used against them;
- (b) it causes the person’s physical or mental health to decline; or
- (c) it causes the person alarm or distress that has a substantial adverse effect on their day-to-day activities, including
 - (i) limits on their ability to safeguard their well-being or that of their children,
 - (ii) changes in or restrictions on their social activities or their communication with others,
 - (iii) absences from work or from education or training programs or changes in their routines or status in relation to their employment or education, and
 - (iv) changes of address.

¹⁴ Adapted from New South Wales Australia coercive and control legislation as enacted under Amendment (Coercive Control) Act 2022 No 65 [NSW] and scheduled to come into force July 2024. [online](#).

(1) In this Act, significant impact means any of the following behaviours directed by one person (the first person) against another person (the second person) with whom the first person with whom they are connected:

- (a) violent or threatening behaviour,
- (b) behaviour that coerces or controls the second person,
- (c) behaviour that causes the second person to fear for the person’s safety or wellbeing or the safety and wellbeing of others.

(2) Without limiting subsection (1), engaging in, or threatening to engage in, the following behaviour may constitute controlling or coercive conduct:

- (a) behaviour that is physically abusive or violent,
- (b) behaviour that is sexually abusive, coercive or violent,

B. ‘Clarify the terms: “relatives”, “parental responsibilities” and “child” under proposed subsection 264.01 (3)¹⁵.

The CBA Sections’ family practitioners seek to clarify the following terms with a definition in the text of new section 264.01 to ensure there is certainty in its application. With respect to “**relatives**”, though they appreciate and support the impetus for the Bill is to address gender-based violence perpetrated by a former partner, practitioners acknowledge that coercive and controlling violence is also perpetrated by relatives of vulnerable Canadians who are not immediately considered as protected under this section. Clarifying who is considered a relative will ensure that all women and vulnerable people will be protected. For example, adults unable to discharge from the care of a parent due to control situations may then be subject to elder abuse. We propose a definition of **relatives** taken from similar 2015 legislation in the United Kingdom.

(c) behaviour that is economically or financially abusive,

Examples—

- withholding financial support necessary for meeting the reasonable living expenses of a person, or another person living with or dependent on the person, in circumstances in which the person is dependent on the financial support to meet the person’s living expenses
- preventing, or unreasonably restricting or regulating, a person seeking or keeping employment or having access to or control of the person’s income or financial assets, including financial assets held jointly with another person

(d) behaviour that is verbally abusive,

(e) behaviour that shames, degrades or humiliates,

(f) behaviour that is intimidation,

(g) behaviour that is stalking, or that directly or indirectly harasses a person, or monitors or tracks a person’s activities, communications or movements, whether by physically following the person, using technology or in another way,

(h) behaviour that damages or destroys property,

(i) behaviour that causes death or injury to an animal, or otherwise makes use of an animal to threaten a person,

(j) behaviour that prevents the second person from doing any of the following or otherwise isolates the person,

(i) making or keeping connections with the person’s family, friends or culture,

(ii) participating in cultural or spiritual ceremonies or practice,

(iii) expressing the person’s cultural identity,

(k) behaviour that deprives the second person of liberty, restricts the second person’s liberty or otherwise unreasonably controls or regulates a person’s day-to-day activities, Examples:

- making unreasonable demands about how a person exercises the person’s personal, social or sexual autonomy and making threats of negative consequences for failing to comply with the demands
- denying a person access to basic necessities including food, clothing or sleep
- withholding necessary medical or other care, support, aids, equipment or essential support services from a person or compelling the person to take medication or undertake medical procedures.

¹⁵ See (3). For the purposes of subsection (1), two persons are connected if

(a) they are current spouses, common-law partners or dating partners;

(b) they are members of the same household, and

(i) are former spouses, common-law partners or dating partners,

(ii) are relatives, or

(iii) carry out, or have carried out, parental responsibilities in respect of the same child, that child being under the age of 18 years; or

(c) a period of less than two years has passed since they ceased to be connected within the meaning of paragraph (a) or (b).

With respect to the term “**parental responsibilities**”, to avoid debate, we rely on the United Kingdom’s approach and suggest that reference to “**parental responsibilities**” have the same meaning as under the *Divorce Act*, that is decision making responsibility.

For the term **child**, we recommend increasing the age to 19 years because the intent of the coercive and control offence is to sanction behaviours directed against or in the presence of a child. In family situations, children remain at home and are considered dependent under parenting legislation until they reach the age of majority for the province or territory. We recommend extending the definition of a minor to include a person up to the age of 19 years which is the oldest age of majority for youth in British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut and Yukon (See footnote)¹⁶

C. Explain meaning of “two persons are connected” in ss. 264.01 (3) with the following edits.

The Bill in its present form is not clear because of the placement of ss. (c). The suggested changes below ensure that people who are living together and those who have separated for less than two years may, be considered “two persons who are connected”.

- (3) For the purposes of subsection (1), two persons are connected if
- (a) they are current spouses, common-law partners or dating partners; OR
 - (b) ~~they are members of the same household, and~~
 - (i) are former spouses, common-law partners or dating partners,
 - (ii) are relatives, or
 - (iii) carry out, or have carried out, parental responsibilities in respect of the same child, that child being under the age of 18 years; AND
 - ~~(c)~~—a period of less than two years has passed since they ceased to be connected within the meaning of paragraph (a) or (b).

D. Replace the current exception set out in s. 264.01 (5) based on the “best interests of the person” and in (6) “proof of facts”.

A ‘**best interests**’ approach to excuse coercive and controlling behaviour is concerning because perpetrators of coercion and control against a relative are often manipulative, especially against those who are vulnerable. Excuses to justify violent behaviours are particularly easy to make when the victim has cognitive or other health challenges.

¹⁶ “Putting Children’s Interest First - Federal-Provincial -Territorial Consultations on Custody and Access and Child Support” Justice Canada, 2022-12-28, [online](#).

Recommendation

Include the following definitions in ss. 264.01 (3):

- a. “relatives” in relation to a person means: the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person’s spouse, former spouse, civil partner or former civil partner, or the brother, sister, uncle, aunt, niece, nephew or first cousin (regardless of blood relation) by marriage or civil partnership of that person or of that person’s spouse, former spouse, civil partner or former civil partner, and includes, in relation to a person who is cohabiting or has cohabited with another person, any person who would fall within this definition if the parties were married to each other or were civil partners of each other;
- b. “parental responsibilities” has the same meaning as described under the *Divorce Act* as decision making responsibility;
- c. “child” means a person under the age of 19 years.

In a recent survey of 107 media reported convictions of controlling and coercive behaviour under the United Kingdom's 2015 Act, the accused plead guilty in 73% of cases¹⁷. While this study surveyed convictions and not the number of charges laid, it can be assumed that the clearer the legislation, the easier it will be for accused people to assess their possible defence and likelihood of conviction. This allows plea bargaining and sentencing to inform their discussions with the prosecutors, instead of focusing on evidence, the victim as a witness and the trial.

The New South Wales legislation which addresses controlling and coercive behaviour follows 9 years of operational practices in the United Kingdom and Scotland. We recommend revising the defence to controlling and coercive violence to mirror the New South Wales approach see footnote¹⁸.

The CBA Sections are eager to work with your Committee to share constructive feedback throughout the consultation process and comment further on the development of this Bill. We hope our preliminary positions can foster useful dialogue.

Best regards,

(original letter signed by Julie Terrien for Kyla Lee and Shelley Hounsell-Gray)

Kyla Lee
Chair, Criminal Justice Section

Shelley Hounsell-Gray, K.C.
Chair, Family Law Section

¹⁷ Supra, note 4.

¹⁸ Recommendation:
Defence

- (1) In proceedings for an offence under section s.264.01, it is a defence if the course of conduct was reasonable in all the circumstances.
- (2) For subsection (1), that the course of conduct was reasonable in all the circumstances is taken to be proven if:
 - (a) evidence adduced is capable of raising an issue as to whether the course of conduct is reasonable in all the circumstances, and
 - (b) the prosecution does not prove beyond reasonable doubt that the course of conduct is not reasonable in all the circumstances.