

Answer to question on notice – Professor Julia Tolmie

Associate Professor Kate Fitz-Gibbon and myself were asked to respond in writing to the question: *How might the challenges of creating an offence of coercive control be overcome?*

To answer this question we need to be clear about the challenges.

We know that enforcing an offence of coercive control will be extremely costly and resource intensive - including the ongoing costs of educating police, prosecutors, judges and juries (members of the public), as well as the costs of gathering evidence and policing a phenomenon that is potentially complex, subtle and spread over time. Resources are not unlimited and the costs that are incurred in the enforcement of this offence must be diverted from elsewhere.

We know that there are already difficulties with the criminal justice response to existing offences that take place in the intimate partner context and so it is difficult to see how creating a more complex offence is likely to get a better enforcement response. I am referring to the existing criminal offences involving a spectrum of physical and sexual violence including, at the lowest level, non-consensual touching. It is important to remember that most cases of coercive control will involve physical violence or the threat of physical violence, sometimes extreme brutality and sometimes low level repetitive violence that wears the victim down. This means that a criminal justice response in most cases is already available to victim survivors.

If an offence of coercive control is created but is not properly enforced then whatever costs must be invested in enforcement will be compounded by the dangers that an inadequate criminal justice response presents to those experiencing IPV – with whatever escalation of abuse, injury and loss of life that that entails. The symbolic power and value of the offence will also be greatly diminished if it is only successfully prosecuted in extreme cases and/or cases involving physical violence.

As we are in the complex space, creating an offence that requires sophisticated thinking to understand and apply (including sophisticated thinking about the operation of gender and of heterosexual sexual norms), as well as resource intensive and sophisticated policing to properly enforce, I would anticipate unintended negative consequences from the reform. These might include the watering down of the existing criminal justice response to victim/survivors, victim/survivors being charged under the provisions (systems abuse being an aspect of coercive control) and an escalation of criminalisation in relation to certain sectors of the community (I am thinking of Indigenous and other marginalised communities).

Given that the potential benefits of the offence (improved public and professional awareness about the seriousness of coercive control) can be achieved by other less costly and risky means (detailed next) it is not clear to me why we would embark on a course of action that is necessarily so expensive and risky. I need to be very clear – in response to the question posed – that some of the challenges/costs described here are risks, whilst others are inevitabilities that we will not be able to overcome. They are inherent in the task of

criminalising a phenomenon that is as difficult, fact specific and embedded in the minutia of everyday life and existing gendered norms as that of coercive control.

Failing to criminalise coercive control does not mean failing to respond to coercive control. We could instead legislate a definition of IPV as coercive control in the apprehended violence legislation, enact evidentiary provisions that make it clear that such patterns of behaviour may lie behind existing criminal offending in the family context and are relevant to both the proof and sentencing of existing offences in this setting, legislate victim safety as a mandatory and priority sentencing consideration for convicted family violence offenders (as opposed to sentences directed at providing “proportional” and “consistent” punishment for past behaviour) and roll out professional training for police, lawyers and judges on coercive control. I would add to this wish list, an expansion of the criminal defences for victims of family violence who commit offences other than homicide (for example, benefit fraud and other property offences, drug and driving offences etc) in order to recognise the role that IPV entrapment plays in their “decision” to offend.

My preference, as I indicated today, would be to put public resources into developing an effective multi-agency family violence safety response that matches the operation and harm of family violence and then to consider how we might adapt the criminal justice system to support that safety response. Plonking another offence into a fragmented system that is not designed to manage the ongoing risk and pattern of harm presented by family violence, but simply to provide a one off reaction to past behaviour, would not be my preference.

Thank you for the opportunity to appear before the Committee and to add these further remarks.

Warm regards,

Professor Julia Tolmie