What is the impact of HIV criminalisation?

Lawyers for HIV & TB Justice:
Strategic Litigation, Legal Defence & Advocacy Training

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Intended & claimed effects of HIV criminalization
### Functions of criminal law & public health goals

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<th>Functions of criminal law</th>
<th>Public health objective</th>
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<td>Rehabilitation</td>
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<td><strong>Deterrence</strong></td>
<td>(directly or indirectly)</td>
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<td>Retribution</td>
<td>none</td>
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</table>
1) Incapacitation?

- Premise: restriction of liberty (e.g., incarceration) prevents person from transmitting HIV during sentence.

- but...
  - time-limited benefit, if any
  - risk in prison (often higher)
  - prisoner health = community health
2) Rehabilitation?

- Premise: Criminal penalty and/or its implementation has rehabilitative effect by producing change in consciousness and hence future behaviour (i.e., less risky conduct)

- but...

  - which conduct seen as requiring “rehabilitation” because reflects moral defect or lack of control?

  - what evidence that criminal penalties for acts posing risk of HIV/STI transmission serve rehabilitative function?
3) Deterrence?

- Premise: Criminal penalty will prompt rational actor to refrain from prohibited behaviour, thereby reducing future risk of HIV transmission. (May be specific or general)

- but...
  - theoretically possible, but little reason and little evidence to expect much deterrent effect
  - requires knowledge of HIV+ status and of what conduct is legally prohibited, plus sufficient weight accorded to risk of prosecution and conviction
4) Retribution?

- Premise: Criminal penalty is imposed because conduct is deemed so morally blameworthy as to deserve such treatment.

- but...

  - no HIV/STI prevention or other public health objective.

  - justification for *at most* a limited application of criminal law, where:
    - accused has knowledge of HIV/STI
    - accused has requisite degree of mental culpability
    - circumstances do not mitigate culpability
Harmful effects of HIV criminalization
HIV criminalization: harms

- Creating false sense of security and assumptions; encouraging abnegation of self-responsibility and undermining message of shared responsibility

- Spreading misinformation about HIV and its transmission

- Reinforcing stigma and fear (of disclosing, of being prosecuted, of abuse), through prosecutions & media coverage
HIV criminalization: harms

- Creating additional disincentive to testing (HIV and STIs)... and hence delays access to treatment where indicated

- Hinders access to PEP (e.g., in case of condom failure)

- Invasions of privacy (e.g., medical records)
  - undermines clinical/support relationship and hinders access to counselling, care and support
  - undermines public health practice

- Invasions of bodily integrity (e.g., forced testing)
HIV criminalization: harms

- Selective prosecution, often discriminatory (varying by context – e.g., racialized people, sex workers, sexual minorities)

- Disproportionate impact on women living with HIV – double burden of gender inequality (including risk of violence, economic harm) and criminalization
HIV criminalization: harms

• Unjust, disproportionate sentencing
  - consequences of imprisonment... for health, human rights
  - sex offender designation... and long-term consequences
  - deportation... and consequences following

• Ostracization and discrimination (e.g., loss of housing, work, relationships)

• Hinders sexual health research
stigma / fear non-disclosure

sensationalist and judgmental media coverage sex based on assumption of no risk

criminalization transmission/exposure

Adapted from M. Weait, Glasgow, Oct 2007
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