

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

Criminal law functions & public health goals

Functions of criminal law

Incapacitation)

Rehabilitation)

Deterrence)

Retribution



Public health objective

HIV prevention
(directly or indirectly)

none

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

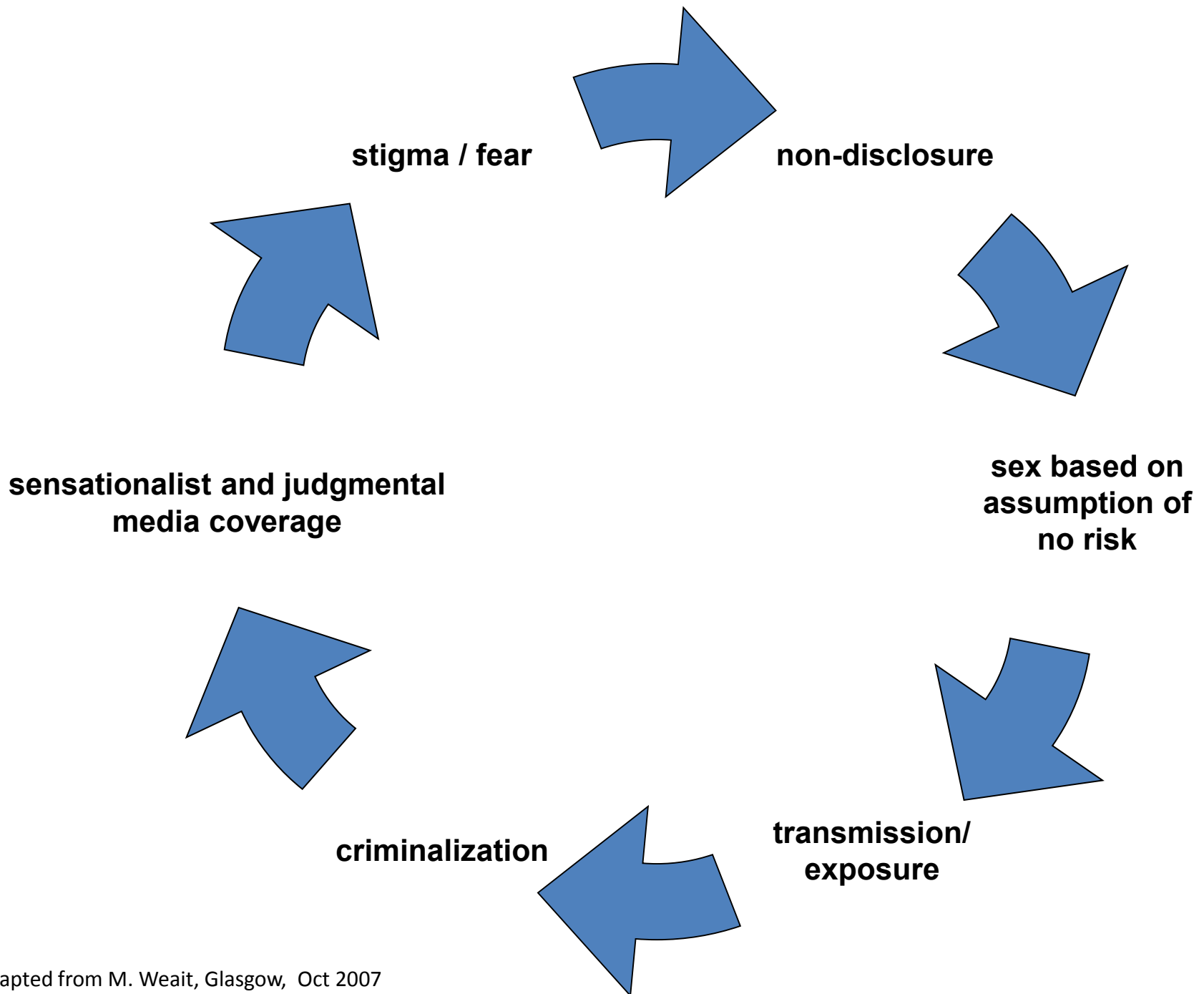
- Creating additional disincentive to testing (HIV and STIs)... and hence delays access to treatment where indicated
- Hinders access to PEP (e.g., in case of condom failure)
- Invasions of privacy (e.g., medical records)
 - undermines clinical/support relationship and hinders access to counselling, 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



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