



Statement on Austrian Laws Impacting People Living with HIV/AIDS (PLHIV)

Local and international organizers for the XVIII International AIDS Conference (AIDS 2010) look forward to welcoming delegates to Vienna this month.

As delegates plan their stay in Vienna, this short statement provides an overview of some Austrian laws that impact on people living with HIV/AIDS (PLHIV). The organizers of AIDS 2010 recommend that conference delegates read this statement to understand their legal position with respect to these areas of law. There are two key points in this statement:

- Intentional and negligent acts capable of transmission of HIV are criminal offences in Austria
- Legal risks can be minimized through safer sex and safer injecting practices

Intentional and negligent acts capable of transmission of HIV are criminal offences in Austria

The Austrian Penal Code provides that it is a criminal offence to commit an act which is capable of causing the danger of spreading an infectious disease. Under the law, the disease must be reportable or notifiable. HIV is considered such an infectious disease, along with Hepatitis C, tuberculosis and gonorrhoea. An 'act' capable of causing danger includes sexual activity such as vaginal or anal intercourse, oral intercourse or heavy kissing where there is biting or open wounds. An 'act' could also include the sharing of injecting equipment.

If the act is carried out with the intent of spreading the disease then the penalty is a maximum three years imprisonment or a financial penalty. If it is an act of negligence, then the penalty is a maximum of one-year imprisonment or a financial penalty.

Under Austrian law, the following factors are irrelevant in establishing a criminal offence:

- Whether the disease was actually transmitted. The key point is whether the act caused danger. This can be a real danger or an abstract (hypothetical) danger.
- Whether the person carrying out the act thought, 'without good cause' (negligently), that the other person already carried the disease. Note that if person who carried out the act thought 'with good cause' (not negligently) the other person was already infected, then the act is not a criminal offence.
- Whether the other person consented to the act.
- Whether the person who carried out the act disclosed his/her disease, although this may reduce the severity of the penalty.

The *Global Criminalisation Scan* prepared by GNP+ shows that there have been at least 40 prosecutions in Austria resulting in at least 30 convictions.¹ **It is important to note that a broad range of organizations now agree that laws that criminalize HIV transmission violate human rights and undermine public health interventions, including HIV prevention initiatives.**

Legal risks can be minimized through safer sex and safer injecting practices

There have been a number of developments in Austrian case law that provide greater legal clarity on how PLHIV can minimize their legal risks in relation to the transmission of HIV.² In the lead up to AIDS 2010, the Ministry of Justice has issued an opinion clarifying the law on HIV transmissions.

Whilst this opinion is a firm directive to the courts, it should be noted that it does not actually change the law and is not necessarily binding on the courts. As such, conference delegates are advised to always adopt safer sex practices to protect their health, minimize the risk of transmission and the associated legal risks.

For a PLHIV, sexual intercourse with a condom does not constitute a criminal offence.

The Supreme Court of Austria has issued a decision that sexual intercourse with a condom for a PLHIV does not constitute a criminal offence. Please note that the case law on sexual intercourse with a condom only concerns vaginal intercourse and not anal intercourse, however, the opinion of the Ministry of Justice provides that this applies to anal intercourse too.

Oral intercourse (PLHIV giving) without a condom does not constitute a criminal offence.

Austrian courts have found that oral intercourse from a PLHIV to another person without a condom does not constitute a criminal offence. However, there is no case law concerning oral intercourse from an HIV-negative person to a PLHIV, so the legal position in this case remains unclear. Such intercourse should not constitute a criminal offence if safer sex practices are observed and no ejaculation into the mouth takes place. However, an HIV positive person ejaculating into the mouth of someone who is HIV negative may constitute a criminal offence.³

If a PLHIV has an undetectable viral load, unprotected sexual intercourse does not constitute a criminal offence.

The Ministry of Justice has provided a firm opinion that if the PLHIV has an undetectable viral load and is consistently following an effective ART regimen then sexual intercourse without a condom does not constitute a criminal offence, given that such persons are not infectious. Please note that the opinion is not binding on the courts. As such, delegates are advised to adopt safer sex practices even if they have an undetectable viral load.

<p>The AIDS 2010 organizers recommend that all conference participants practice safer sex and safer injecting practices to protect their health, minimize the risk of transmission and the associated legal risks.</p>

There are no restrictions in Austria for PLHIV in accessing public spaces

The Vienna public transportation system (Wiener Linien) has no regulations denying PLHIV the right to use the system and there has never been a reported incident of denied service to a PLHIV. Further, regulations denying entry to those with contagious diseases to public swimming facilities in Vienna were removed recently.

Conference organizers are grateful to representatives of the Austrian Government, the City of Vienna and the Austrian Parliament for their efforts to work with us to clarify Austrian laws impacting PLHIV. We are also grateful to them for all the other support given to the conference to make it a success.

¹ Note that GNP+ has noted the lack of reliable data as a problem. For further information please see http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=12&Itemid=34

² This legal information has been kindly provided by Dr Helmut Graupner, an Attorney at Law specializing in sexuality and the law in Austria. For further information please see <http://www.graupner.at/e/index.html>.

³ An element of HIV transmission law in Austria is 'abstract' risk or hypothetical risk. Whilst there have been no cases concerning oral intercourse from an HIV-negative person to a PLHIV, due to the abstract risk element of the law, we have been advised to include this advice in the statement.