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# Pro Bono

## INFORMATION ABOUT NAMIBIA'S LAW

### The Combating of Immoral Practices Act

The Combating of Immoral Practices Act 21 of 1980 is a law that is much misunderstood. Many have called for it to be repealed, wrongly believing that it criminalises homosexuality in some way. But this is not the case.

So, what does this outdated “South West African” statute inherited by Namibia at independence actually cover?

Before reviewing the Act’s provisions, let us note at the outset that it uses a number of undefined terms that could cover homosexual acts (“sexual act”, “immoral act” and “proposals... for immoral purposes”). The Act defines only the term “unlawful carnal intercourse” which is “carnal [sexual] intercourse between persons who are not married”. As one High Court case has suggested, this phrase could cover all “sexual interaction” between persons who are not married to each other – but it is generally understood to refer primarily to sexual intercourse outside marriage.

However, the law does not forbid *any* sexual acts in general – it forbids certain sexual conduct *only in the context of sex work, public sexual displays, abuse of children under age 16 or various other kinds of exploitation*.

Most of the statute is concerned with various offences related to sex work. The statute does not criminalise the actual act of prostitution (engaging in sex for reward). Instead, it criminalises a number of surrounding activities. The acts which are criminalised by the statute are primarily public manifestations of sex work (such as public solicitation) or actions by third parties, particularly “pimps” and brothel-owners.

For instance, it is illegal under the Act to solicit or “make any proposals to any other person for immoral purposes” *in a public street or place* or to exhibit oneself in an indecent dress or manner *in public*. This law also makes it illegal to commit “any immoral act” with another person *in public* – but not in private.

This law makes it illegal to keep a brothel, to “procure” any female to have “unlawful carnal intercourse” with another person, to become a prostitute, or to join a brothel. It is also an offence to entice (bribe or persuade) a female to a brothel for the purpose of prostitution, to conceal (hide) a female who has been enticed to a brothel, to detain a female against her will in a brothel, or to otherwise detain a female for the purposes of unlawful carnal intercourse with a male. More directly, the law makes it illegal to assist in bringing about “the commission by any person of any immoral act with another person”, or to receive any money for the commission of such an act.

A brothel is defined as “any house or place kept or used for purposes of prostitution. (The definition was once wider, but it was narrowed by Namibia’s High Court in the 2002 *Hendricks* case.<sup>1</sup>)

The law also covers some even broader offences related to sex work. It is illegal to furnish information, or to perform any other act, aimed at assisting a male to have unlawful carnal intercourse with a female, or to knowingly live on the earnings of prostitution.

The provisions of the Act aimed at sex workers themselves are gender-neutral, with the sex of the sex worker and the client being legally irrelevant. On the other hand, some of its protective provisions safeguard females from being forced into sex work, without taking into account the fact that boys and men can also be sex workers and might also be coerced or mistreated in this context.

The statute has a few provisions which are not necessarily related to sex work at all. For instance, it forbids the commission of “a sexual act” with a child under the age of sixteen years by a person who is more than three years older. This supplements the Combating of Rape Act, where the age-related commission of rape applies only to persons below age fourteen.

The Combating of Immoral Practices Act also makes it a crime to have unlawful carnal intercourse or to commit any immoral or indecent act with a female “idiot or imbecile”. On top of the problem of the obviously offensive terminology in this provision, the statute fails to provide similar protection against sexual abuse for males with mental disabilities.

A third more general offence is the use of drugs, alcohol or any other substance to stupefy or overpower a female to enable anyone to engage in “sexual conduct” with that female. Here again, the law fails to provide corresponding protection for males who might be treated in the same way.

There was once a fourth general offence which criminalised the manufacture, sale or supply of articles intended to be used to perform unnatural sexual acts. However, this provision was struck down by the Namibian High Court back in 1998, on the grounds that it was so broad and vague that it did not constitute a reasonable limitation on the constitutional right to carry on a trade or business.<sup>2</sup>

This law is out-of-date, and sexually biased in the way that it protects girls and women against certain kinds of sexual abuse and exploitation without giving similar protection to boys and men. Namibia would benefit from a reconsideration of national policies on sex work – since the law currently appears to be used to intimidate or threaten sex workers, without actually being applied to prevent or restrain sex work. It simply keeps sex work of all kinds in the shadows.

So the law certainly has some problems, but its provisions do *not* specifically target members of the gay and lesbian community in any way.

The key law of concern for the gay community is not this statute, but the common law provisions that criminalise sodomy and so-called “unnatural sex acts” between consenting male adults. (Common law crimes are crimes that have developed through successive court cases instead of being defined by statutes enacted by Parliament. Many crimes – such as murder and assault – are common law crimes.)

There is no common law or statute law criminalising any sexual act that takes place between consenting adult women in private. Only sexual acts between men are criminalised, as sodomy or “unnatural sex acts”.

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<sup>1</sup> *Hendricks & Others v Attorney General, Namibia & Others* 2002 NR 353 (HC). This case also struck down some presumptions in the Act relating to brothels.

<sup>2</sup> *Fantasy Enterprises CC t/a Hustler The Shop v Minister of Home Affairs & Another; Nasilowski & Another v Minister of Justice & Others* 1998 NR 96 (HC)

The calls from gay and lesbian activists for the repeal of the Combating of Immoral Practices Act thus seem misplaced. The top priority for repeals should be the common-law crimes on sodomy and unnatural sexual acts.

Namibia's stance on sex work warrants reconsideration, but whatever general approach is decided on, Namibia will always need legal mechanisms to protect underage boys and girls and persons with mental disabilities against sexual abuse and coercion into sex work. Adult men and women will also need protection against exploitation by pimps, and against being drugged or detained for purposes of sex, no matter how sex work is regulated.

So calling for the repeal of the Combating of Immoral Practices Act is not a sensible way forward. If that statute were to be repealed, at least some of it would need to be replaced with more well-crafted and gender-neutral protections against various sexual abuses.

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