PROPOSALS FOR AMENDMENT OF THE MAINTENANCE ACT 3 OF 2003

Legal Assistance Centre
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A. RESPONSES TO QUESTIONS PUT FORWARD BY MINISTRY OF JUSTICE

PATERNITY TESTING

1. What should be done to biological fathers who tamper with their DNA tests and those who assist them?

1.1 **Any falsification of a test aimed at the establishment of parentage should be a criminal offence with a severe penalty** – including tampering with or falsifying test results, sending someone to impersonate the person being tested, impersonating the person supposed to be tested or assisting with any attempt at such falsification whether or not it was successful.[1]

1.2 Where the person who commits this offence is a registered health practitioner, the **criminal penalty should be explicitly made additional to any disciplinary proceedings which may be conducted by the relevant health professions council**.

1.3 Although this offence is most likely to arise in respect of paternity tests, it should be **gender-neutral**. (The identity of a child's mother could be at issue in a case of child abandonment, for example.)

1.4 We would also support requiring **government regulation and certification of institutions qualified to do tests aimed at establishing parentage**.

1.5 **The court should be empowered to order a re-test taken in conjunction with any reasonable steps necessary to ensure accuracy of the test results**, such as requiring that the test be conducted by a specific institution or - to ensure that there is no impersonation - requiring verification of the person's identity by means of fingerprints (to ensure that the fingerprints match those in the person's identification document) or by requiring the complainant or some other person to accompany the person being tested to the testing site.

[1] The existing common law on perjury covers sworn statements, and so may not be adequate to cover the act of falsifying DNA tests. The same is true of the offence in section 300(3) of the Criminal Procedure Ordinance 34 of 1963 and section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

1.6 More generally, there are provisions on scientific tests in the Maintenance Act (section 21) which overlap with more general provisions on proof of parentage in the Child Care and Protection Act 3 of 2015 (sections 93-95) – which are repeated with some improvements from the Children's Status Act 6 of 2006 (which will be repealed and incorporated within the Child Care and Protection Act, as soon as that Act is brought into force). These overlapping provisions are reproduced at the end of this submission for convenience. **The Maintenance Act should be amended to cross-reference the more general provisions in the Child Care and Protection Act, and those provisions then amended to incorporate the issues discussed here. This approach would ensure that the strengthened provisions would apply to any parentage test – whether for maintenance, to establish inheritance rights or for any other purpose.**

1.6.1 **Technical problems with the provision on proof of paternity in the Maintenance Act:**

a) **The statute covers only paternity tests.** Although maternity is less often in doubt, there could be instances where this is the case – such as where a child has been abandoned.

b) **The statute assumes that the maintenance proceedings will involve the two parents, in respect of both testing and the allocation of costs.** But there could be cases where questions of parentage arise when a primary caretaker other than a parent (such as a grandparent) is seeking maintenance contributions from one or both parents. They could also arise in a case brought by a child seeking maintenance for himself or herself.

c) **The statute requires that mother, father and child all be prepared to submit themselves to the taking of samples for the purposes of testing. However, for a DNA test, samples are needed only from the child and from the parent whose parentage is in dispute.** Samples from the other parent would not be required, unless the connection of both parents to the child was in doubt.

d) **The statute provides no remedy for the situation where a parent refuses to provide a sample of his or her own DNA or the DNA of the child in question.** It would be possible for the party seeking to prove parentage to make an application to the High Court to order that samples be provided for testing on the grounds that this was in the child's best interests (as part of the High Court's inherent jurisdiction as the upper guardian of all children), but this would be expensive and cumbersome.

e) **The statute allows a provisional order on costs to be finalised, set aside or adjusted only "*when the maintenance court subsequently makes any maintenance order*". It should be possible for the court to do this at the point when it makes a decision on the application for maintenance – even if that decision does not result in a maintenance order.** For example, suppose that a mother applies for maintenance from a man who is proven by the paternity test not to be the child's father. No maintenance order would result in such a case, but the court might still

want to finalise an appropriate order on the costs of the scientific tests for other purposes.

f) **The relationship between the overlapping provisions in the relevant laws** (the Children's Status Act / Child Care and Protection Act and the Maintenance Act) **is unclear**.

1.6.2 **Advantages of the provisions on proof of paternity in the Children's Status Act / Child Care and Protection Act:**

a) They are **gender-neutral**. Maternity is less often in question than paternity, but doubt could arise in the case of child abandonment. Given the problem of baby-dumping in Namibia, this is not just a theoretical issue.

b) **They allow a broad range of persons to initiate a proceeding to prove parentage**: the mother, the father, the person whose parentage is in doubt, the primary caretaker of that person or someone authorised by the Ministry responsible for child welfare to act on behalf of that person (such as a social worker). It could be in the child's best interests to establish paternity for reasons other than maintenance - such as to ascertain which persons should be listed as parents on the child's birth certificate (which could affect the child's citizenship), for establishing the child's right to inherit from a particular person, or for determining the child's right to request maintenance from a deceased estate.

c) **They codify and expand the pre-existing common law presumptions on paternity** to serve as a starting point.

d) **They discourage refusals to submit to testing by providing that such refusals will be presumed, unless the contrary is proved, to be aimed at concealing the truth about parentage**. This presumption would in many cases obviate the need to order that samples be taken.

e) **They authorise the High Court as the upper guardian of all children to order that a child, a parent, a putative parent or any potential blood relative of the child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that court in the best interests of the child**. The reference to any other blood relative could be applied, for example, when it was necessary to establish parentage after the death of one or both parents (for example, for purposes of establishing the child's right to inherit from a particular person, or for determining the child's right to request maintenance from a deceased estate).

f) **Section 93(5) of the Child Care and Protection Act provides measures which can be used to establish parentage after the death of the person whose parentage is in question**. While not relevant for maintenance orders, this could be relevant to seeking maintenance from a deceased estate.

MAINTENANCE ACT 9 OF 2003

Orders for scientific tests

21. (1) If a maintenance officer reasonably believes that -

(a) the paternity of any child is in dispute;

(b) the mother of that child as well as the person who is alleged to be the father are prepared to submit themselves as well as that child to the taking of blood or tissue samples in order to carry out scientific tests regarding the paternity of that child; and

(c) the mother or the alleged father or both the mother and the alleged father are unable to pay the costs involved in the carrying out of the scientific tests,

the maintenance officer may at any time during a maintenance enquiry, but before the maintenance court makes any order, request the court to hold an enquiry referred to in subsection (2).

(2) On receipt of a request made under subsection (1), the maintenance court may enquire into the-

(a) means of the mother as well as that of the alleged father; and

(b) other circumstances which the maintenance court reasonably believes should be taken into consideration.

(3) At the conclusion of the enquiry referred to in subsection (2), the maintenance court may -

(a) make a provisional order that both the mother and alleged father or that either of them pay or pays part or all of the costs to be incurred in the scientific tests;

(b) make a provisional order directing the State to pay the whole or any part of the costs of the scientific tests; or

(c) make no order.

(4) When the maintenance court subsequently makes any maintenance order, it may-

(a) make an order confirming the provisional order referred to in subsection (3)(a) or (b); or

(b) set aside any provisional order or substitute therefore any order which the court considers just relating to the payment of the costs incurred in the carrying out of the scientific tests in question.

CHILD CARE AND PROTECTION ACT 3 OF 2015

Procedure for proof of parentage

93. (1) For the purpose of this section-

"putative father" means a man who claims or is alleged to be the father of a person for whom paternity has not yet been established or acknowledged without dispute;

"putative mother" means a woman who claims or is alleged to be the mother of a person for whom maternity has not yet been established or acknowledged without dispute; and

"putative child" means a person, including an adult who claims or is alleged to be the child of an identified parent or parents.

(2) Proceedings to establish parentage may be brought by-

(a) the mother or putative mother of the person whose parentage is in question;

(b) the father or putative father of the person whose parentage is in question;

(c) the person whose parentage is in question;

(d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or

(e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.

(3) The mother or putative mother and the father or putative father or the person whose

parentage is in question are competent and compellable witnesses in any proceedings in which the issue of parentage is raised, but nothing in this section is to be construed as compelling a person to testify against his or her spouse.

(4) Proof on a balance of probabilities is required in order to establish parentage in proceedings brought under subsection (2).

(5) A person who wishes to establish parentage, where the putative mother, putative father or putative child of that person is deceased and who has a reasonable belief that the deceased person may be his or her biological parent or child, may petition a competent court to exhume the body of the deceased for the purpose of carrying out scientific tests relating to parentage, unless –

(a) no family member, other interested person or heir, if applicable, disputes the claim or parentage;

(b) proof of parentage is already available in the form of a conclusive scientific test, a court order based on parentage or any other form of conclusive proof; or

(c) it is possible to establish parentage by carrying out scientific tests on any living family member of the deceased person and such family member consents to the tests.

Presumption of paternity

94. (1) Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if -

(a) he was at the approximate time of the conception or at the time of the birth of the person in question or at any time between those two points in time married to the mother of such person;

(b) he cohabited with the mother of the person in question at the approximate time of conception of such person;

(c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963);

(d) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived; or

(e) both he and the mother acknowledge that he is the father of the person in question.

(2) Corroboration of evidence led to establish a presumption of paternity referred to in subsection (1) is not required and no special cautionary rules of evidence are applicable to such evidence.

Presumption on refusal to submit to scientific tests

95. (1) At any legal proceeding at which the parentage of any person has been placed in issue, the refusal by either party-

(a) to submit himself or herself; or

(b) to cause any child over whom he or she has parental authority to be submitted,

to any physical procedure which is required to carry out scientific tests relating to the parentage of the person in question, must be presumed, until the contrary is proved, to be aimed at concealing the truth concerning the parentage of that person.

(2) Despite subsection (1), the High Court as the upper guardian of all children has the power to order that a child, a parent, a putative parent or any potential blood relative of the child be submitted to a physical procedure referred to in subsection (1) if this is in the opinion of that court in the best interests of the child.

(3) To the extent that this section authorises the interference with any individual's rights to privacy or bodily integrity, it is justified by the right of children to know their parents in terms of Sub-Article (1) of Article 14 of the Namibian Constitution.

PARENTS WHO GO INTO HIDING

2. What should be done to fathers who go into hiding to avoid maintenance obligations?

2.1 **Section 19 of the Maintenance Act allows for default maintenance orders to be made against people who fail to appear at a maintenance enquiry after having been summoned to attend.** The purpose of this provision was to prevent people from stopping a maintenance order by going into hiding once they become aware that a maintenance order is being sought.

2.2 Section 19 is not useful if the person in question has not been located in the first place for service of the summons. In such a case, section 8 of the Act provides for **maintenance investigators** who have the following duties:

(a) locating the whereabouts of a person required to attend a maintenance enquiry under section 13 or of a person required to attend at a maintenance prosecution under this Act;
(b) serving of court process on the persons referred to in paragraph (a);
(c) tracing and evaluating of assets of responsible persons; and
(d) performance of other functions and duties which may be specified in his or her appointment.

Section 10(2) is even more specific:

(2) A maintenance investigator must, subject to the directions and control of a maintenance officer -
(a) locate the whereabouts of persons who are -
(i) required to appear before a maintenance court;
(ii) to be summoned or who have been summoned to appear at a maintenance enquiry;
(iii) to be summoned or who have been summoned to appear in a criminal trial for contravening this Act; or
(iv) accused of the failure to comply with this Act,
(b) serve or execute the process of any maintenance court;
(c) serve summons in respect of criminal proceedings instituted for the failure to comply with a maintenance order as if the maintenance investigator has been appointed as a person who is authorised to serve summons in criminal proceedings.

Section 8(4) states:

"The Minister must take all reasonable steps within the available resources of the Ministry of Justice to achieve the progressive realisation of the appointment of at least one maintenance investigator for each maintenance court."

However, it is our understanding that no maintenance investigators have yet been appointed.

The lack of maintenance investigators was questioned in Parliament in 2008; in response, the Deputy Minister of Justice claimed that "*practice has thus far not required or necessitated the appointment of fulltime maintenance investigators provided for in subsection 4 of the Act*".[2] **We recommend that the Ministry of Justice**

[2] Question 3 put by Hon Dienda, National Assembly, 5 June 2008 and reply of Hon Deputy Minister of Justice (Mr U Nujoma), National Assembly, 12 June 2008.

re-assess this need for maintenance investigators and give urgent consideration to the appointment of maintenance investigators, particularly in the busiest courts.

2.2.1 **The use of maintenance investigators is crucial as there is little that can be done in the case of a parent who cannot be located at all**.

2.2.2 **As an interim measure, the Ministry should encourage maintenance officers to utilise their existing powers of investigaton more robustly.** Section 9(2) gives a maintenance officer the duty to "investigate the complaint". Section 10(1)(c)(i) authorises a maintenance officer to "gather information concerning the identification or whereabouts of any person who is legally liable to maintain the person mentioned in such complaint or who is allegedly so liable". One simple option that is insufficiently utilised in practice is the maintenance officer's power to summon a relative to court, so that this relative can be required to give information about the whereabouts of the father.

CHILDREN IN CARE OF OTHERS

3. What should be done to mothers or fathers who dump their children with grandparents or other relatives, while neglecting to support the children with maintenance that they are receiving from partners?

3.1 There are already several tools in the Maintenance Act to address this problem:

3.1.1 **Failure to use child maintenance payments for the benefit of the child is already a criminal offence under section 40**:

> **Offences relating to misuse of maintenance money**
> **40.** Any person who receives payment of money or payment in kind on behalf of a beneficiary in terms of a maintenance order and misuses the said payment by failing to use it for the benefit of the beneficiary, commits an offence and is liable to a fine which does not exceed N$4 000 or imprisonment for a period which does not exceed 12 months.

3.1.2 **Any person who is looking after a child falls within the definiton of "complainant"** – which includes the "primary caretaker of a beneficiary" as well as "any other person who has an interest in the well-being of the beneficiary" (definition in section 1). A "primary caretaker" includes

> a person, other than a parent or other custodian of a child, whether or not related to the child, who… takes primary responsibility for the daily care of a child with or without the express or implied permission of the child's parent or other custodian.

Thus, a relative who was caring for a particular child could file a complaint under section 9(2) saying that *"(a) the person against whom the complaint is made is legally liable to maintain the beneficiary of the claim but that he or she fails to maintain that other person"* and that *"(b) sufficient cause exists for the suspension, substitution or discharge of an existing maintenance order"*. **Thus, in the example described, under the existing law a grandmother could approach a maintenance court to complain that the child's mother is under a legal duty to maintain the child, is receiving maintenance payments from**

the child's father and is failing to utilise these payments for the child's benefit. The grandmother could request that the order be substituted to allow her to receive the payments on behalf of the child.[3]

3.1.3 **Section 17(2) already gives the court broad discretion to name an appropriate recipient in respect of both original maintenance orders and substitutions of existing orders.** It does not require that maintenance payments must necessarily be made to the person who initiated the complaint. It says instead in paragraph (c) that the court "must specify the person to whom… the contributions may be made".

3.2 **An additional tool could be added to the Act to provide yet another option for redress of the problem described.** Where a person is found guilty of the offence of misuse of maintenance payments under section 40, **the court which makes this finding should be empowered to immediately substitute the order in question to ensure that the maintenance payments will be used for the benefit of the intended beneficiary**. This could mean making a relative who is caring for the child the recipient of the payments. In other situations, the court could direct that payments be made to a social worker who is tasked to monitor the child's well-being.

3.3 **The law should allow for a maintenance proceeding to be converted into, or combined with, an application for custody** under the Children's Status Act (or the Child Care and Protection Act which is about to replace it). For example, it should be possible to convert a maintenance proceeding into a custody enquiry, or to combine the two, with the possibility of ordering temporary maintenance in the meantime whilst the question of a possible change in custody is pending. Applications for custody should not be misused by absent parents to avoid paying maintenance – but it might be appropriate to consider the issue of custody where the parent who currently has custody has been failing to use the money for the child's benefit. For example, a grandmother who is applying to have the maintenance order substituted to make her the recipient of the maintenance payments for the children in her care might want to apply at the same time to be the legal custodian of those children – and this might well be in the best interests of the children in question in a case where the parent who was receiving the maintenance payment was misusing them.

CHILD NEGLECT

4. What should be done to parents who neglect to maintain their children when they have the means to do so?

4.1 **This is *already* a criminal offence with a substantial penalty** (a fine of up to N$50 000, imprisonment for up to 10 years, or both) under section 257 of the Child Care and Protection Act 3 of 2015.

Offences relating to abuse, neglect, abandonment or maintenance

[3] This understanding of the current law is reinforced by section 9(3), which states that "*A complaint made under subsection (1) may be made by a complainant… who is **affected** by a maintenance order or any other order, directive or notice issued under this Act*" (emphasis added).

> **254.** (1) Subject to the provisions of section 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person –
>
> (a) abuses or deliberately neglects the child; or
>
> (b) abandons the child,
>
> and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.
>
> (2) **A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.**

This offence in the Child Care and Protection Act 3 of 2015 (which is not yet in force) will replace a similar offence in in section 18(2) of the Children's Act 33 of 1960, with a maximum fine of N$400, or imprisonment for up to two years, or both:

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> (2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence.

4.2 **It is also *already* possible under the common law for the child, or a parent who has been paying more than his or her fair share, to bring a civil action claiming past maintenance – even if no maintenance order was in place.** This theory is explained in a 1990 South African case: A child has a claim for maintenance against each of his or her parents based on their legal liability to maintain their child. This claim is not based on a court order setting a particular amount of contribution. The purpose of such a court order is not to establish the duty to maintain, but to apportion the maintenance obligation between the parents based on the needs of the child and the ability of each parent to contribute. Since maintenance is a joint liability between the parents, the general principles on joint liability are applicable; this means that a parent who has contributed more than his or her fair share towards a child's maintenance is entitled to recover the excess from the other parent.[4]

4.3 When a person is convicted of the criminal offence of failing to comply with a maintenance order, section 33 of the Maintenance Act authorises the recovery of arrear maintenance with interest. The order for recovery of arrear maintenance is treated as a civil judgement of the court, meaning that it can be satisfied by a warrant of execution against moveable or immovable property. **The Child Care and Protection Act and/or the Maintenance Act could be amended to similarly authorise the recovery of retrospective maintenance by a court which finds a person guilty of failing to maintain a child, even in the absence of a maintenance order.** The court could determine the amount of unpaid past maintenance and order the payment of such past maintenance - failing which, property of the person in question could be attached to satisfy the debt (as in the case of a civil judgment).

The only difference between the proposed procedure and the section 33 procedure would be that the proposed procedure would apply irrespective of whether or not a

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4 See *S v Frieslaar* 1990 (4) SA 437 (C).

maintenance order was in place, being based on the underlying common law liability to maintain. Drawing attention to this possibility, *which already exists under the common law*, would make it more accessible by making it enforceable in a magistrate's court. The possibility of losing substantial property to civil enforcement should also make parents less likely to try and evade their duties to pay maintenance.

ADULT OFFSPRING'S FAILURE TO MAINTAIN PARENTS

5. What should happen to adult children who fail to maintain their parents when they have the means to do so?

5.1 It must be remembered that a child's legal liability to maintain a parent is not entirely reciprocal to a parent's duty to maintain a minor child. Section 4(2) of the Maintenance Act states that the duty of a child to maintain a parent applies only where all of the following circumstances apply:

(a) the liability of the child arises where the parent is unable to maintain himself or herself due to circumstances beyond that parent's control;

(b) the child must, having regard to his or her own needs, be able to support the parent; and

(c) the right of a parent to be maintained arises only where that parent's spouse or other person who is legally liable to maintain that parent is unable to do so.

Some South African cases have held that the duty of a child to maintain a parent arises only where the parent would be otherwise indigent, in "*extreme need or want for the basic necessities of life*".[5] However, other cases have taken the view that what constitutes "necessities" depends on the parent's station in life.[6] The Maintenance Act seems to accord with the latter approach, seeing that it specifies that the "*lifestyle*" of each of the relevant persons must be taken into account as a factor in any maintenance order.[7]

The criteria are relevant because a criminal offence based on the child's failure to maintain the parent would require proof of more elements than a criminal offence of the parent's failure to maintain the child.

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5 *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C) at 632D-E. See also *Petersen v South British Insurance Co Ltd* 1967 (2) SA 235 (C), *Anthony and Another v Cape Town City Council* 1967 (4) SA 445 (A) and *Van Vuuren v Sam* 1972 (2) SA 633 (A).

6 *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE) at para 20, citing *Wigham v British Traders Insurance Co Ltd* 1963 (3) SA 151 (W) at 153H – 154A: "*[T]he authorities furthermore make it clear that in order to succeed a plaintiff is not required to show that she would be reduced to abject poverty or starvation and be a fit candidate for admission to a poor house unless she received a contribution. The Court must have regard to her status in life, to what she has been used to in the past and the comforts, conveniences and advantages to which she has been accustomed …*" and *Oosthuizen v Stanley* 1938 AD 322 at 327-328: "*Support* (alimenta) *includes not only food and clothing in accordance with the quality and condition of the persons to be supported, but also lodging and care in sickness … Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case … [T]he parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities*."

7 Section 16(2)(a).

5.2 **If a maintenance order directing a child to maintain a parent is in place, the civil and criminal enforcement procedures in the Act *already* apply** in the same way that they apply to other maintenance order issued in terms of the Act.

5.3 It would be possible to make it a criminal offence for a child to fail to pay maintenance to a parent in an instance where the cited criteria are present, similar to the criminal offence for parents in section 257 of the Child Care and Protection Act 3 of 2015. However, it would be more difficult to apply such a criminal offence to children's maintenance of parents because the child's liability to maintain a parent is not clear-cut, arising only in cases of extreme need where the parent lacks other means of support. It would not be possible to obtain a criminal conviction if the child in question did not realize that the circumstances had created a legal liability to maintain. This, we do not recommend this approach as it is unlikely to be fruitful. The existing mechanisms in the Maintenance Act should be adequate if properly applied in practice.

PENALTIES

6. Should the current penal provisions be revised upwards?

6.1 No. Fines generally take away money which could have been applied towards the child. Someone who is in prison is unlikely to be able to contribute to a child's maintenance. Imprisonment may also deprive the child of the Constitutional right to know and be cared for by the parent in question. **Therefore, we suggest that civil remedies (such as the attachment of property) and existing alternative criminal penalties (such as community service and weekend imprisonment) be promoted in preference to increased criminal sanctions.**[8]

6.2 Some have suggested that **"naming and shaming"** should be adopted as a penalty or an enforcement mechanism. Although tempting, this has the potential **to embarrass the child in question**. This is why section 42 of the Maintenance Act already prohibits the publication of any information which is likely to reveal the identity of a child who is a beneficiary of a maintenance order. Furthermore, "naming and shaming" is **unlikely to be very effective in a society where so many parents shirk their duty to support their children**. Therefore, **we do not support the use of this measure.**

[8] Periodical imprisonment or a sentence of community service may often be more appropriate than the usual form of imprisonment, which would prevent the defendant from working to get the money to pay maintenance. For example, the defendant could be given a sentence of imprisonment on weekends only. This is authorised for criminal offences in general by section 285 of the Criminal Procedure Act 51 of 1977.

See, for example, *S v Koopman*, 1998 (1) SACR 621 (C) where the Court held (under the Maintenance Act 23 of 1963) that it was a senseless punishment to impose a fine on an impoverished person for failure to pay maintenance, since such persons should be permitted to apply every cent available to their own and their children's maintenance, and *S v Mentoor* 1998 (2) SACR 659 (C), where the Court found (under the Maintenance Act 23 of 1963) that it would run counter to the best interests of the children in question to imprison an accused who has a prospect of permanent employment which he would probably lose if sentenced to imprisonment.

In one Namibian case, the High Court approved of the use of periodical imprisonment on weekends, but required that the sentence be re-considered after the magistrate's court ascertained whether the defendant's job required him to work on any part of the weekend. *Izack v The State* [2013] NAHCMD 207 (23 July 2013).

6.3 **The existing civil enforcement mechanisms in the Maintenance Act should be more frequently utilised.** Orders for attachment of wages or warrants of execution against property are more likely to serve the best interests of the child than criminal penalties against the parent. This was intended to be a key practical innovation in the Maintenance Act 9 of 2003 – and there are reports that parents who have failed to pay often manage to find money very quickly when faced with losing a car or a house. However, research by the Legal Assistance Centre suggests that the civil enforcement mechanisms are seldom applied in practice. We suggest that magistrates, maintenance officers and other court staff be encouraged to familiarise themselves with the civil enforcement procedures and encouraged to utilise them.

6.4 **Additional sanctions:** The possibility of revoking driving licences, and liquor and other business licences, or cancelling eligibility for tender awards, should be considered as additional enforcement techniques in Namibia – particularly for repeat offenders, and in cases where such a penalty would not undermine the defaulter's ability to pay.[9]

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B. OTHER RECOMMENDATIONS

The Legal Assistance Centre published a detailed study of the implementation of the Maintenance Act entitled *Maintenance Matters*, in 2013. That report was based on an examination of 1687 court files from 12 of the 13 regions in existence at the time of the study, 34 interviews with magistrates, maintenance officers and clerks from 11 regions, 6 focus group discussions with a total of 62 people and a survey of reported and unreported court cases on maintenance. The recommendations for amendment of the Maintenance Act and regulations below are based on the findings form that study.

CHILDREN'S BEST INTERESTS AND RIGHT TO PARTICIPATE

7. **Paramount consideration:** The LAC report recommended including a provision to recognise the best interests of a child as the paramount consideration when considering maintenance orders for child beneficiaries. However, this has been taken care of by section 5(2)(a) of the Child Care and Protection Act, which states:

> "All proceedings, actions or decisions in matters concerning a child must respect, protect, promote and fulfil the children's fundamental rights and freedoms set out in the Namibian Constitution, the best interests of the child standard set out in section 3 and the rights and principles set out in this Act, subject to any lawful limitation."

The overarching nature of the best interests principle should be communicated to magistrates.

8. **Duty of maintenance officer to represent child's best interests:** To focus attention on the child's best interests, we suggest inserting a provision into the Maintenance Act which places a specific duty on the maintenance officer to place information about the child's best interests before the court. This is important to help move away from the

[9] Different practices used across the world are discussed in the LAC research report *Maintenance Matters* (available at http://www.lac.org.na/projects/grap/grapmaintmattersreport.html).

idea that child maintenance is a battle between parents, by putting the child's needs at the centre of the enquiry.

9. **Legal representation for child if necessary:** The maintenance court should have discretion to order the parents to fund independent legal representation for the child (with the costs divided appropriately between them), or to order state-funded representation in cases where the child's interests are not being well-represented in the case and no private legal representation for the child is feasible. This should be done whenever necessary to protect the child's best interests. Section 58 of the Child Care and Protection Act could serve as a model on this issue.

10. **Child participation:** We suggest including a provision providing for child participation where appropriate in maintenance enquiries - keeping in mind that child participation in this context will not always be in the child's best interests. This is a key principle in the Convention on the Rights of the Child, to which Namibia is a party. Section 4 of the Child Care and Protection Act could serve as a model on this point.

PRINCIPLES ON LEGAL LIABILITY TO MAINTAIN

11. **Religious marriages:** The Maintenance Act makes it clear in section 3(2)(a) that husbands and wives are "*primarily responsible for each other's maintenance*, *regardless of any customary law to the contrary*". However, it leaves open the question of the duty of support in religious marriages which may not fit under the umbrella of either civil or customary marriage – such as Muslim or Hindu marriages. Although such marriages are uncommon in Namibia, they should be placed on the same footing as civil and customary marriage for the purposes of enforcing a mutual duty of support between spouses. The definition of marriage in the Child Care and Protection Act should be repeated in the Maintenance Act:

    > "marriage" means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, where such a marriage is recognised as a marriage under the laws of Namibia.

    As another point of comparison, the Labour Act 11 of 2007 in section 1 defines "*spouse*" as meaning "*a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom*".

12. **Clarify the common-law duty of support beyond parents and children**: The common law duty of support is not limited to maintenance of minor children by parents and maintenance of parents by adult children. There is also a mutual duty of support between certain blood relatives, starting with the family members who are closest to each other. The mutual duty of support that exists between parents and children can extend to other living ancestors and descendants – if the parents or children cannot fulfil their duty of maintenance for some reason. For example, if a child's parents are deceased or unable to maintain the child, the duty of support next passes to the grandparents (both paternal and maternal grandparents), then to the great-grandparents and so on. In the same way, the child's duty to support his or her parents would pass next to grandchildren, then great-grandchildren and so on.[10]

[10] See, for example, *Boberg's Law of Persons and the Family*, *Second Edition*, Juta & Co, 1999 at 252-253.

In the past, the common-law rules made a distinction between children born inside and outside marriage on this point: only the maternal grandparents had a duty to maintain a child born outside of marriage; the father's duty to maintain a child born outside marriage did not pass to the paternal grandparents. Furthermore, the reciprocal duty of support on the part of children born outside of marriage applied only to their blood relations on the mother's side. This situation was changed by the Children's Status Act 6 of 2006, which states that despite anything to the contrary contained in any law, no distinction may be made between persons born inside and outside in respect of the legal duty to maintain a child or any other person.[11] This means that the duty of support in respect of children born outside marriage applies reciprocally to family members on both the mother's side and the father's side of the family, in the same way as for children born inside marriage. This principle is re-enacted in section 106(1) of the Child Care and Protection Act which will soon replace the Children's Status Act:

> "Despite anything to the contrary contained in any law, a distinction may not be made between a person born outside marriage and a person born inside marriage in respect of the legal duty to maintain a child or any other person."

The duty of support can also extend to other blood relatives. For example, if the parents cannot provide maintenance, brothers and sisters (and half-brothers and half-sisters) also have a duty to maintain each other – but their duty is not as strong as that of parents and grandparents. For example, in a case where a parent might be expected to provide for university education for a child, this level of maintenance might not be expected from a brother or sister. The duty to provide maintenance spreads outward in the family. Nearer blood relatives are expected to help if they can, before the duty passes on to more distant blood relatives.[12] For example, a brother would be expected to help before the duty of support would pass to a half-brother. However, the common law duty of support amongst collateral relatives does not extend to uncles/aunts and nieces/nephews.[13]

These duties of support are not well-known. Therefore, it might be helpful to reference them in the Maintenance Act – at least with respect to some common relationships, such as between grandparents and grandchildren or between siblings, without limiting the common law rules on liability to maintain.

CLAIMS FOR REIMBURSEMENT OF PAST CONTRIBUTIONS TO PAST MAINTENANCE

13. Currently the Act does not clearly allow retrospective claims for maintenance, although it is currently possible under the common law to claim reimbursement in respect of past maintenance – as discussed in paragraph 4.2 above. In light of this existing common-law principle, **we suggest an amendment to the Maintenance Act to provide that a maintenance order may include an amount to reimburse a complainant for excess contributions towards a child's maintenance from the date of the child's birth**.[14]

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[11] Children's Status Act 6 of 2003, section 2.

[12] *Boberg's Law of Persons and the Family*, *Second Edition*, Juta & Co, 1999 at 253.

[13] Schäfer, *Family Law Service*, *Issue 34,* Butterworth Publishers, 2000, "Division C-Maintenance", section C17, citing *Vaughan v SA National Trust and Assurance Co* 1954 (3) SA 667 (C) at 671.

MEANING OF COSTS OF "OTHER CARE" FOR PERSONS WITH DISABILITIES

14. **We suggest amending the Act to provide greater clarity on costs included under the heading of "other care" for a person with a disability in section 16(4).** The Act currently states that court should take into account the costs of medical and other care incurred by the beneficiary as a result of the disability. To give guidance to the courts on the meaning of this term, we suggest that the Act be clarified to indicate that such "other care" can include equipment, medication or services incurred by the beneficiary as a result of the disability.

CLAIMING CONTRIBUTIONS TO PREGNANCY-RELATED EXPENSES DURING PREGNANCY

15. **Currently it is not clear whether pregnancy-related expenses can be claimed before the birth of the child.** Section 17(3) states:

> **If the beneficiary of a maintenance order is a child**, the maintenance court may order that maintenance contributions be made **to the mother of the child for expenses incurred by the mother** in connection with the pregnancy and birth of the child, including but not limited to medical and hospital expenses, but **a claim under this subsection must be made within 12 months from the date of birth of the child** or within such other reasonable period as the court may allow on sufficient grounds shown by the mother. [emphasis added]

15.1 The phrases emphasised in the passage above could arguably be used to support either approach – and in practice, it appears that some courts allow claims during pregnancy whilst other courts do not.

15.2 The provision is conditioned on the fact that the beneficiary is *a child.* The ultimate beneficiary of contributions towards pregnancy and birth-related expenses is the child who is to be born, but in the eyes of the law, a foetus is not the same as a "child" since Namibian law considers personhood for legal purposes to begin only at birth.

Foetuses are protected by a legal concept called the *nasciturus* fiction, whereby the rights and interests of a foetus are "kept in abeyance" until after live birth, at which point the child is then able to exercise them; in other words, the foetus does not have legal rights, but after birth certain rights accrue to the child as if they dated from the time of his or her conception rather than the time of his or her birth. For example, if a pregnant woman is injured and these injuries result in injuries to the child subsequently

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[14] In South Africa, section 16(1)(a)(ii) of the Maintenance Act 99 of 1998 states:

> "After consideration of the evidence adduced at the enquiry, the maintenance court may… in the case where no maintenance order is in force… make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry."

It is not clear why the portion of this provision on care after the date of birth up until the date of the enquiry is not gender-neutral since a father could in theory play this role.

born, the child is entitled to compensation for the injuries originally obtained as a foetus.

This fiction could also be understood to apply in respect of pregnancy expenses which can affect the health and wellbeing of the child to be born – such as expenses associated with ante-natal clinic visits, nutritious food and vitamin supplements. However, applying the *nasciturus* fiction, the rights could not be claimed until there was a live birth resulting in a "child".

Whether or not this would bar a claim of pregnancy-related expenses before the birth would depend on whether the right to claim contributions was viewed as a right which must be asserted by or on behalf of *the child*, or a right which accrues to *the mother* as a co-parent. The provision suggests that the claim is for reimbursement to the mother, as a right accruing to the mother, when it refers to the provisions also refers to contributions being made "*to the mother"* for expenses "*incurred by the mother*" – suggesting that she could claim reimbursement at any time after the expenses have been incurred, regardless of whether or not the child has already been born.

15.3 Another problem lies in the statement that *"a claim under this subsection must be made within 12 months from the date of birth of the child or within such other reasonable period as the court may allow on sufficient grounds shown by the mother"*. A mother can clearly claim pregnancy-related expenses in the 12 months following the birth of the child, but the law does not clearly state that she can do so whilst she is pregnant. Indeed the use of the word "but" appears to have the effect of qualifying the right of a mother to claim pregnancy-related expenses to claims made within the limited period after giving birth prescribed by the Act.

Conversely, it can be argue that the provision in question refers only to the ***latest*** point in time that the claim can be made, without specifying a starting point. This is a sensible interpretation, as the starting point is obviously when the pregnancy is established as a fact. The clause is akin to prescription statutes which similarly focus on the deadline for making a claim and not the starting point (which is obviously when the claim arises).[15]

It would be detrimental to the best interests of the child to interpret it any other way, since the ideal approach to ensure the birth of a healthy child is for there to be sufficient funds for good nutrition, antenatal care, pregnancy vitamins, etc. If a claim is made before birth in a situation where paternity is disputed, the claim might have to be deferred until after the birth or there could be a provision requiring that the money be refunded if paternity is later disproved (s the mother would at that stage have an option to claim the same expenses from the actual father.

Furthermore, it can be questioned as to whether the reference to *"within such other reasonable period as the court may allow on sufficient grounds shown by the mother"* could be taken as allowing claims during pregnancy - for example in cases where the

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[15] See, for example, section 33(1) of the Public Service Act 13 of 1995 on "Limitation of legal proceedings":

> (1) No legal proceedings of whatever nature shall be brought in respect of anything done or omitted in terms of this Act unless such proceedings are brought within 12 calendar months from the date on which the claimant had knowledge or might reasonably have been expected to have knowledge of that which is alleged to have been done or omitted, whichever is the earlier date."

mother could show the father did not dispute paternity and that she was incurring expenses which she needed the father's assistance in paying.

15.4 **The Act should be amended to make it clear that contributions to pregnancy-related expenses may be claimed by the mother before the child is born, and to provide for a procedure for refunds should paternity be disproved at a later stage**. This is important for the well-being of the child, as contributions to expenses such as ante-natal care and vitamins could affect the health of the unborn child.

DURATION OF DUTY TO MAINTAIN

16. **Maintenance for major children**: At common law, the legal duty to maintain a child extends beyond the age of majority, as the need for support rather than the child's status as a minor is the determining factor.[16] The duty of support can extend indefinitely in the case of a child who is chronically ill or disabled, or in a case where there is simply a need for support. If the child is a major, the onus of providing that parental support is required lies with the child, and a major child is not entitled to support on such a generous scale as a minor child.[17]

The Maintenance Act provides that a maintenance order for the support of a child will normally remain in force until (1) the child dies or is adopted; (2) the parents divorce or annul the marriage (at which point a new order would likely be made between the parties); (3) the child marries; or (4) the child reaches the age of 18. However if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to support himself or herself, the maintenance order may be extended until the child reaches the age of 21. These are the usual circumstances, but the law also gives the court discretion to provide a different termination point; the guidelines on termination of an order for maintenance of a child apply "*unless the order otherwise provides*".[18]

We suggest amending the Act to state clearly that child maintenance can be claimed from a parent until a child is in a reasonable position to be self-supporting, even if the child is over the age of majority. This is already the position at common law, although the legal duty to maintain adult children generally comes into play only in cases of extreme indigence. We recommend that initial maintenance orders for minors should extend only up until age 18 – thus requiring the complainant or the beneficiary to return to court if necessary to demonstrate that some unusual circumstances exist which would warrant an order for maintenance beyond that stage. **The Act should also make it clear that maintenance may extend indefinitely for a child who is not in a position to be self-supporting, particularly a child with a chronic illness or disability.**

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16 See *Ex parte Jacobs* 1982 (3) SA 276 (O); *Bursey* v *Bursey* 1999 (3) SA 33 (SCA).

17 See *Gliksman v Talekinsky* 1955 (4) SA 468 (W); *Kemp v Kemp* 1958 (3) SA 736 (D); *Hoffmann v Herdan NO* 1982 (2) SA 274 (T); *Ex parte Jacobs* 1982 (2) SA 276 (O); *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk); *B v B* 1997 (4) SA 1018 (SE); *Bursey* v *Bursey* 1999 (3) SA 33 (SCA).

18 Maintenance Act 9 of 2003, section 26(1).

17. **Termination of duty to maintain a parent:** The Act states that a maintenance order for a child comes to an end if the child dies,[19] but is silent on automatic termination of an order to maintain a parent if the parent dies. It is perhaps rather obvious in both cases, but the fact that death is mentioned in one case but not the other could cause confusion. We suggest amending the Act on this point for clarity.

MAINTENANCE INVESTIGATIONS AND ENQUIRIES

18. **Directives versus summonses during investigations**: The distinctions between directives and summonses need to be re-examined. **There are currently several distinctions between the two, summarised in the table below. Some of these distinctions seem illogical and should be addressed.**

Summary of differences between directives and summonses	
Directive (section 10)	**Summons (section 11)**
issued by maintenance officer	issued by magistrate
method of communication not clear	formal service of process
can direct appearance before maintenance officer	can direct appearance for examination by maintenance officer or to give evidence in court
penalty for non-compliance	stiffer penalty for non-compliance
no exemption for complainant and defendant from criminal offence of failing to comply with directive to appear before a maintenance officer	complainant and defendant exempted from the criminal offence of failing to comply with a summons to attend a maintenance enquiry
no provision for providing information by some other means	appearance can be excused if information provided in advance
no reference to Criminal Procedure Act 51 of 1977; travel expenses may not be claimed	selected provisions of Criminal Procedure Act 51 of 1977 apply, including provision on travel expenses
no mechanism for consenting to requested maintenance	mechanism for consenting to requested maintenance

19. **Clarity on privacy of maintenance enquiries**: There are two somewhat conflicting provisions in the Maintenance Act on the privacy of maintenance enquiries. Section 13(9) of the Act states:

> A person whose presence is not necessary **must not be present** at a maintenance enquiry, except where that person has been given permission to be present by the maintenance court.

This implies that the default position is for the enquiry to be held in closed court, unless the presiding officer has given permission for someone whose presence in not necessary to be present.

In contrast, section 13(10) states:

> Where a maintenance court considers that it would be in the interests of justice or the interests of any persons who have an interest in the enquiry, **it may direct that a maintenance enquiry be held in private** at the maintenance court or at a place designated by the maintenance court.

This provision implies that the default position is for the enquiry to be held in open court, unless the presiding officer directs that it be held "in private" at the court or in some other more informal location. In practice, it appears to be standard procedure for maintenance enquiries to be held in closed court. Nonetheless, **we recommend that the provisions on privacy be clarified to avoid potential confusion.**

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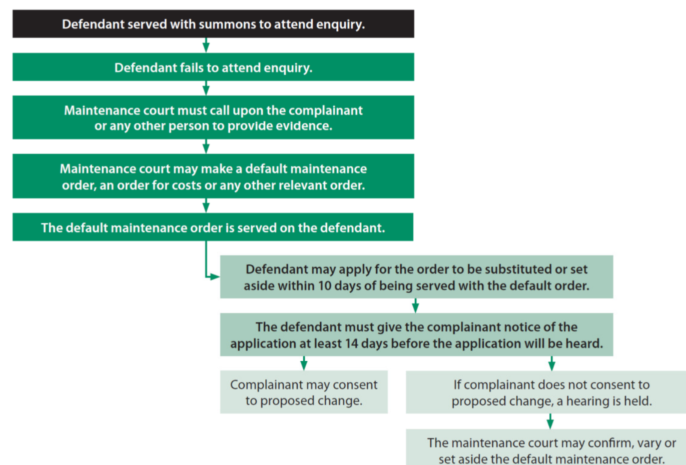
[19] Ibid.

20. **Procedure for submission of written evidence:** The Maintenance Act includes procedures for the use of written evidence to be submitted without accompanying oral evidence.[20] For example, this might be used to admit a written report on a paternity test without accompanying oral evidence by the lab technician, or a written confirmation of wages or assets without accompanying oral evidence from the employer or the bank**.** Currently when a party wishes to submit written evidence to the court, the person submitting the evidence must give advance notice to the other parties. **This procedure – which seems to be seldom if ever used in practice - should be abandoned in favour of a more practical alternative.**

Where a party would like to submit written evidence at a maintenance enquiry, the presiding officer should enquire as to whether the opposing party has any objections – and specifically whether that party would like a postponement in order to have the court summon the person making the written statement to give their information in person and be cross-examined.

CHALLENGES TO DEFAULT ORDERS

21. **Amend procedure for notice to complainant of challenge to default order:** A defendant who wants to challenge a default order has the responsibility to give notice of this challenge to the complainant.[21] We believe this is unwise given that most parties do not have legal representation and that maintenance disputes can be flashpoints that lead to incidents of domestic violence. We recommend that this procedure be adapted so as not to encourage personal contact between the complainant and the defendant in this context.



[20] Maintenance Regulations, regulations 6 and 26(5); Maintenance Act 9 of 2003, section 14-15(3).

[21] Maintenance Act 9 of 2003, section 19(4-7). The defendant applies to vary or set aside a default maintenance using Part A of Form I. The defendant is required to serve notice of this application on the complainant using Part B of Form I. This notice can be served on the complainant in any manner that is convenient to the defendant, but the defendant must keep proof of service. Maintenance Regulations, regulation 11 (4)-(6).

KEEPING PACE WITH INFLATION

22. **Automatic increases or decreases:** Most complainants do not return to court to seek an increase in the amount of maintenance ordered, even though the cost of living increases each year. **We propose amending the Act to allow the maintenance court to order automatic increases (or decreases) in maintenance orders on the basis of rises and falls in the consumer price index.** The courts could use the annual figure on this index published by the Namibia Statistics Agency. If such automatic changes were applied, the Maintenance Act or regulations would have to incorporate a clear procedure on the timeframe for calculating the change and the mechanism for communicating the change to all the affected parties.

ENFORCEMENT MEASURES – CIVIL ENFORCEMENT

23. **Attachment of wages before there is a breach:** Attachment of wages is one of the most efficient ways to ensure regular and timely maintenance contributions. The Act currently allows this option only where the defendant has consented to it, or where there has been a breach.[22] We suggest amending the Act to allow the court to make an order for attachment of the wages of the defendant at the time of making the initial maintenance order rather than only when a breach has occurred – even in the absence of the defendant's consent to this measure – as a means of ensuring compliance.

24. **Notice to complainant of opposition to civil enforcement measures**: The defendant may apply to have a warrant of execution set aside, if he or she acts within ten days of becoming aware of the warrant. The defendant may also apply at any time for the warrant to be substituted or suspended.[23]

    Where the defendant has applied to have the warrant of execution ***set aside***, he or she must serve notice of this on the complainant at least 14 days before the date on which the application is to be heard.[24] However, no form is provided and no specific directions for the manner of service are given.

    In contrast, where the defendant has applied to have the warrant of execution ***substituted or suspended***, he or she must serve notice of this on the complainant at least 14 days before the application for substitution or suspension is to be heard, in any manner convenient to the defendant – and there is a specific form for this purpose.[25] The regulations should prescribe procedures for notice to the complainant in the case of a challenge to a warrant of execution, attachment of wages or attachment of debts.

    It is likely that the distinction between the approaches to notice in respect of the two procedures is an oversight, since there do not seem to be any logical reasons for treating notice differently in these different forms of objection to a warrant of execution.

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[22] Maintenance Act 9 of 2003, section 30(1).

[23] Maintenance Act 9 of 2003, section 29(5) and (8).

[24] Id, section 29(6)(b).

[25] Maintenance Act 9 of 2003, section 29(9)(b).

Furthermore, in the context of maintenance, placing responsibility on the defendant (who will usually be unrepresented) to serve notice on the complainant (who will usually be unrepresented) seems a bad idea because of the context of possible domestic violence or acrimony. **We recommend that the regulations which prescribe procedures for notice to the complainant in the case of a challenge to a warrant of execution be re-examined.**

25. **Civil enforcement involving pension pay-outs**: There is a need to harmonise the Maintenance Act and the Pensions Funds Act on attachment of, or execution against, pension payments. The attachment of pensions and similar payments is authorised "notwithstanding anything to the contrary contained in any law".[26] This statement is clear. However, the Pensions Funds Act 24 of 1956 protects pensions and annuities from attachment or from being subjected to execution save to the extent permitted by (amongst other laws) the Maintenance Act 23 of 1963.[27] This provision, which was added in 1980, would present no bar to the attachment of pensions under the Maintenance Act 9 of 2003, as it would have to be read in light of the sweeping authorising provision in the 2003 Maintenance Act. Nevertheless, **it would be best to harmonise the Pensions Funds Act 24 of 1956 and the Maintenance Act 9 of 2003 on attachment of or execution against pension payments.**

ENFORCEMENT MEASURES – CRIMINAL ENFORCEMENT

26. **Burden of proof of lack of means:** In situations where failure to pay maintenance results in a criminal trial, we suggest an amendment to the Act to clarify who bears the onus of proving lack of means.[28] Where the defendant raises this defence, he or she should bear the burden of proving lack of means, with the prosecution then having the possibility of overcoming this defence by proving that the lack of means was due to unwillingness to work or misconduct. This would be fair because the defendant is the one who is in possession of complete information about his or her financial position.

27. **Stay of criminal proceedings upon payment of arrears:** We suggesting amending the Act to allow the court to stay criminal proceedings where the defendant and the complainant enter into a consent order for the payment of arrears which is made into an order of court. The criminal prosecution could then easily proceed if payment of arrears

[26] Id, section 30(5).

[27] Pension Funds Act 24 of 1956, section 37A(1).

[28] Section 39(2) of the Maintenance Act 9 of 2003 (which mirrors the South African Maintenance Act 99 of 1998) appears to place a burden on the accused only to *raise* the defence:

> *If the defence is raised in any prosecution for an offence under this section* [the offence of failing to make a particular payment in accordance with a maintenance order] *that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.*

Section 11(3) of the previous Maintenance Act 23 of 1963 provided more clarity on this issue:

> *Proof that any failure which is the subject of a charge under sub-section 1* [the offence of failing to make a particular payment in terms of a maintenance order] *was due to lack of means and that such lack of means was not due to unwillingness to work or misconduct on the part of the person charged, shall be a good defence to any such charge.*

Several South African cases, interpreting this provision, held that the court had a duty to assist an unrepresented accused with this burden of proof. See summary in *S v Magagula* 2001 (2) SACR 123 (TPD) at 161d-162b.

was not forthcoming as agreed. This would be similar to the stay of a criminal prosecution in respect of a young offender, conditional on participation in a diversion programme. It could help to resolve the problem of arrears, without giving the defendant a criminal record.

28. **Order to pay arrears upon criminal conviction**: At present, an order for payment of arrears may accompany a criminal conviction only on application by a public prosecutor.[29] We suggest amending the Act so that such an order can also be made on the court's own motion, or in response to a request by the complainant or the beneficiary. It does not seem necessary to be restrictive on this point when the primary purpose of a criminal prosecution should be to secure the payment of the outstanding maintenance.

POWER TO AMEND AND ENFORCE MAINTENANCE ORDERS MADE IN OTHER COURT PROCESSES, INCLUDING MAINTENANCE IN DIVORCE ORDERS

29. **Maintenance in divorce orders:** The Maintenance Act 23 of 1963 clearly gave the maintenance court jurisdiction to substitute or enforce orders for maintenance made by the High Court in divorce cases. It defined "maintenance order" as

> "any order for the periodical payment of sums of money towards the maintenance of any person **made by any court (including the Supreme Court of South Africa) in the Republic …**" [30].

The position remains the same under the Maintenance Act 9 of 2003, although the approach used to achieve this is somewhat circuitous. Section 1 of the 2003 Act defines a "maintenance order" as

> "a maintenance order made under section 17, a consent order made under section 18 and a default maintenance order made under section 19, or a maintenance order made by a maintenance court under any other law and includes any sentence suspended on condition that the convicted person makes payments of sums of money towards the maintenance of any other person;".

Section 1 defines "maintenance court" to include

> "any other court which is authorised by law to grant maintenance orders".

This would include the High Court acting in divorce proceedings or in any other context where maintenance was at issue.

This more cumbersome approach has caused some confusion in practice, as evidenced by enquiries made by clients and magistrates to the Legal Assistance Centre. **We recommend that the Act be amended to include a more straightforward statement**

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[29] Maintenance Act 9 of 2003, section 33(1). See *S v Gaweseb* [2006] NAHC 27 (26 July 2006), where an order for payment of arrears was invalidated on this basis.

A prosecutor who wishes to apply for an order for recovery of arrear maintenance should complete Form Q. Maintenance Regulations, regulation 24. The clerk of the criminal court which has convicted the defendant must submit a copy of the order for recovery of arrears to the clerk of the civil court, who should register the order and provide this information to the complainant and the clerk of the maintenance court where the underlying maintenance order was made. Id, regulation 25. These will often be the same magistrate's court.

[30] Maintenance Act 23 of 1963, section 1, emphasis added. See *Sher v Sher* 1978 (4) SA 728 (W) at 729; *Havenga v Havenga* 1988 (2) SA 438 (T) at 443A; *Rubenstein v Rubenstein* 1992 (2) SA 709 (T) (overruling *Jerrard v Jerrard* 1992 (1) SA 426 (T)).

of the maintenance court's jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court.[31]

One way to do this would to amend the definition of maintenance order, to read as follows:

> "maintenance order" or "order" means any order made in terms of sections 17, 18 or 19 of this Act or any order for the payment of any sum of money towards the maintenance of any person made under any other law **by any court in Namibia (including the High Court)** and, except for the purposes of sections 39 [criminal offences] and 47 [appeals], includes any sentence suspended on condition that the convicted person make payments of any sum of money towards the maintenance of any other person.

30. **Enforcement of maintenance provisions in protection orders:** It is possible under section 14(2)(h) of the Combating of Domestic Violence Act for a protection order to include a provision in protection orders ordering the respondent to pay maintenance. This temporary maintenance order can have a duration of up to six months.[32] Its purpose is to give the victim of the abuse time to utilise the normal procedures under the Maintenance Act. We suggest that the Maintenance Act should include an explicit provision for the enforcement of maintenance orders included in protection orders. This would enable the recipient to address arrears at the same time as seeking a new maintenance order under the Maintenance Act.

MAINTENANCE PROCEEDINGS IN TRADITIONAL COURTS

31. **The possibility of empowering traditional courts to deal with maintenance questions in terms of the Maintenance Act should be considered, provided that their decisions are ratified by a magistrate's court.** The viability of this option would probably be dependent on the future of Namibia's community courts.

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[31] As a point of comparison, consider sections 97-98 of the Child Care and Protection Act:

Procedures for certain orders apply to children of divorced or estranged parents

97. The procedures for orders pertaining to custody in section 100, orders pertaining to guardianship in section 101(3) to (7), orders restricting or denying access to a parent not having custody of a child in section 102(5) to (8), orders for other access in section 103 and orders dealing with the unreasonable denial or restriction of access in section 102(12) and (13) apply with necessary changes to children of divorced or estranged parents.

Powers of children's court in respect of certain High Court orders

98. (1) Despite anything to the contrary contained in any law, a children's court may alter an order of the High Court pertaining to custody, guardianship or access made in connection with a divorce or in any other proceedings if circumstances have changed or in order to ensure compliance with such order.

(2) An order which is altered by a children's court in terms of subsection (1) is subject to automatic review by a judge of the High Court in chambers.

(3) Review proceedings contemplated in this section must be instituted and conducted in the form and manner prescribed and within the prescribed periods.

(4) In review proceedings instituted in terms of subsection (3), the High Court or a judge of the High Court must consider the record of the proceedings together with any other documents submitted in accordance with subsection (3) and any further information or evidence which may at the request of the judge be supplied or taken by the children's court in question and the High Court or judge of the High Court may -

(a) confirm, alter or set aside the decision of the children's court;

(b) make any order which the High Court or judge of the High Court believes ought to have been made by the children's court in terms of this Part; or

(c) remit the case to the children's court with instructions to deal with the matter in such manner as the High Court or judge of the High Court may consider appropriate.

[32] Combating of Domestic Violence Act 3 of 2003, section 15(e).

APPLICATIONS BY CHILDREN

32. The law allows child beneficiaries to apply for maintenance for themselves, and this does occasionally happen in practice. **We suggest that the clerk of the court or the maintenance officer should be given a specific statutory duty to assist children to complete the application form.**

OTHER TECHNICAL ISSUES

33. **Timeline for postponements:** We suggest amending the Act to include specific timelines for postponements (unless special circumstances exist). Section 50 of the Child Care and Protection Act provides a model:

> **Adjournments**
>
> **50.** (1) The proceedings of a children's court may be adjourned only-
>
> (a) on good cause shown, taking into account the best interests of the child; and
>
> (b) for a period of not more than 30 days at a time.
>
> (2) A children's commissioner may excuse any person from appearing at adjournment proceedings.

34. **Change of address by complainant**: Section 24(1) states:

> Where a complainant in whose favour a maintenance order or any other order under this Act was made or given changes his or her place of residence he or she must, within the prescribed period and in the prescribed manner, notify the maintenance officer of the maintenance court which has jurisdiction in the area where the complainant now resides.

This notification triggers a file transfer to the new court in terms of regulation 14. The wording of section 24(1) suggests that notice is required only if the complainant's new residence is in a different magisterial district from the one where the order was initially made. However, complainants cannot be expected to know the boundaries of magisterial districts. It might be obvious in some cases that a complainant has moved from one magisterial district to another (such as a move from Windhoek to Keetmanshoop), but in other cases (such as a move from one village to another), this might not be clear. It would be helpful to amend this provision to require the complainant to notify the court where the maintenance order was initially registered of *any* change of address. This would be helpful if the complainant needs to be located in respect of a subsequent application by the defendant for a substitution or discharge, or for purposes of an investigation into alleged misuse of maintenance money. The clerk of the original court could then have a duty to effect a transfer of the file if the change of address results in a change of jurisdiction. We suggest amending this provision to require the complainant to notify the court of *any* change of address.

REVISIONS TO FORMS

35. **Simplified forms for information on financial position**: We suggest simplifying the method for collecting information on income, assets and expenditure of both the complainant and the defendant. The current forms provided for this purpose (Form A, Form B and Form C 1-Part B) are too complicated.

36. **Contributions in kind and payments to third parties (such as school hostels and medical aid schemes):** Form A, which is used for applications for maintenance, mixes these contributions which are covered by separate provisions of the Act.[33] As a result, complainants may not be aware of what kinds of contributions they may request aside from periodic cash payments towards monthly maintenance. Form A should separate the different categories of possible "other contributions" and explain more clearly what can be requested. This innovation in the law is seldom-utilised at present, but could be practically useful if it was better-understood.

37. **New case management form:** We recommend that a new form is introduced to assist maintenance court personnel to monitor the management of cases. Such a form could be attached to each maintenance file, summarising all actions in the case (application, enquiry, withdrawals, request for substitution, reports of breach, enforcement measures, etc. A form of this nature would be of great assistance in tracking changes and enforcement measures in individual cases, and could facilitate monitoring by control magistrates and other supervisory personnel. It would also be of great assistance in future research.

INTERNATIONAL ENFORCEMENT

38. **International conventions on maintenance:** We recommend that Namibia become a party to the relevant international conventions on maintenance, in order to secure the widest possible mechanisms for recovery of maintenance across national borders:
    - Hague Convention on the International Recovery of Child Support (already appended to the Child Care and Protection Act in Schedule 8);
    - 1956 UN Convention on the Recovery Abroad of Maintenance;
    - 1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to
    - Maintenance Obligations Towards Children;
    - 1973 Convention on the Law Applicable to Maintenance Obligations; and
    - 1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations.

39. **Reciprocal agreements with a wider range of countries:** Under the Reciprocal Enforcement of Maintenance Orders Act 3 of 1995, Namibia can also make agreements for the enforcement of maintenance with individual countries. However, very few other countries are covered by such agreements at present.[34] Namibia could make agreements

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[33] Contribution in kind are covered by section 17(4). The purpose of this provision is to provide a remedy in instances where the defendant is able to provide support for the child but cannot provide this support as a financial contribution. Payments in kind can also be used to supplement a financial order. For example, a farmer may be able to provide food rather than financial support. Form A does not clearly provide a space for suggesting in-kind payments, so complainants may not understand that this option is available.

Payments to third parties are covered by section 17(2)(e). Form A focuses primarily on this possibility in the section on "other contributions", giving examples of medical and dental costs, school fees, fees to tertiary institutions, school clothes and expenses for sport and/or cultural activities. The option of direct payment is useful because if the money is paid as part of the maintenance order, the complainant may have competing uses for the money.

[34] South Africa is the only country that was designated under the 1963 Act by an independent Namibian government (GN 124/1993, GG 727). However, some of the designations made prior to

with countries where requests for the enforcement of maintenance across borders are most commonly made. This would be particularly useful as in interim measure whilst the processes for signing the above international conventions are put in place, or to provide a means of enforcement in respect of a country which is not party to any of the multilateral agreements.

Namibian independence by the State President of South Africa were applicable to "South West Africa" and thus survive in independent Namibia:

- North-West Territories, Canada (Proclamation No. R. 160 of 1970 of 19 June 1970)
- State of California, USA (Proclamation No. R. 1 of 1971 of 8 January 1971)
- Province of Alberta, Canada (Proclamation No. R. 175 of 1971 of 13 August 1971)
- United Kingdom (Proclamation No. R. 9 of 1976)

(This list excludes references to the South African "homelands" which existed as semi-autonomous political units under apartheid but are now part of a unitary South Africa, as declarations in respect of these "homelands" are of no ongoing relevance.)

Several secondary sources list RSA Government Notice 68 of 1968 as designating Germany under the Act. However, it has not been possible to locate this Government Notice, and it seems impossible that it could have been a valid designation under the Act because in 1968 such a designation could only have been made by means of a Proclamation of the State President. Therefore, Germany is not included in the list of designated countries.