



Chapter 10

MAINTENANCE ENQUIRIES

Because such a high proportion of maintenance orders are consent orders (92.5% of all orders), there were few instances where orders were made after a maintenance enquiry (only 24 cases in our sample). Of course there may have been other cases where enquiries were held with no maintenance order being made at the conclusion of the enquiry, but it seems safe to conclude that enquiries are the exception rather than the rule. This section presents information which could be gleaned from the files in cases where enquiries were held.

10.1 Submission of written evidence

The Maintenance Act states that if written evidence is submitted, the party submitting the evidence must serve it on the other party using Form D at least 14 days before the document is to be produced.¹ The other party has the opportunity to object to the submission of this evidence, provided that this objection is made at least seven days before the commencement of the enquiry.² If an objection is made, the written evidence may not be produced, although the person who made the statement may give oral evidence.³ If the procedure for the submission of written evidence is not properly followed, the party against whom written evidence is to be submitted may still give permission for the evidence to be introduced before or during the enquiry.⁴

We did not find any cases where Form D had been used. It is possible that the courts do not commonly use written evidence as part of the enquiry. However, as discussed below, there were cases that involved paternity tests and we did find information such as a letter from a school principal in some files. Therefore it is possible that the courts are not following the requirements of the Act when utilising written evidence, or that affected parties are giving permission for the use of such evidence in person. It is not practical to expect a layperson to understand the consequences of written evidence without some explanation from the maintenance officer or the magistrate, and most parties who appear before the maintenance court are unrepresented. **Therefore, we recommend that the procedure for submitting advance notice of written evidence to a party 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 chance to cross-examine the person making the written statement or a postponement to prepare a response to the evidence in question. The affected party would be in a better position to know whether or not to object to written evidence after receiving some information on his or her options from the court.**

¹ Maintenance Act 9 of 2003, section 14(2) of the Act and Regulation 26(5).

² Id, section 14(3).

³ Id, section 14(4)(a).

⁴ Id, section 14(5).

10.2 Paternity disputes

As discussed in section 4.3.5, both the Maintenance Act and the Children’s Status Act 6 of 2006 contain procedures for dealing with disputes about parentage. The pros and cons of the two approaches are compared in section 4.3.5, which notes that the two laws could work tougher as they stand – although it appears a separate application would be required to utilise the proof of parentage proceedings in the Children’s Status Act, which seems unnecessarily cumbersome. That section **recommends that the Maintenance Act be amended to incorporate the proof of parentage proceedings contained in the Children’s Status Act (with certain clarifications), while retaining the flexible approach to orders for costs of scientific testing currently contained in the Maintenance Act.**

In most cases a paternity test is probably not needed. Therefore it is not surprising that **only a small percentage of the entire sample of files contained evidence of a paternity dispute (64/1 687; 3.8%).** However, the cost of a paternity test is probably a deterrent to people who may want a test to be performed. Paternity tests were recorded in files sampled from 14 of the 18 courts.⁵ This suggests that there is no location where paternity is particularly often in dispute or where defendants are unable to access this option. In all but one case, only one putative father was tested for paternity. In the only case in which two putative fathers were tested, the test results showed that the man cited by the complainant as the child’s father was indeed the father. In some of the cases in which a paternity test was conducted, the defendant requested testing of one but not all of the beneficiaries.

Another area where we see information about paternity is amongst the reasons for the postponement of cases. As shown in section 10.5, approximately 10% of the postponements recorded in the sample were due to paternity disputes (61/730; 8.4%). Analysis of the files containing a paternity test shows that only four of these cases did not involve a postponement.

Unfortunately data is missing for nearly two-thirds (64.1%) of the tests. For the 23 tests where a result is available, the defendant was the father in 56.5% of the cases. However the small sample size means that these results should not be extrapolated.

In some cases it appears that a paternity test was requested but not conducted. For example, in one case the complainant did not take the child to give a sample for testing, and did not attend the subsequent enquiry at court, so the case was struck from the roll. In another case the defendant was in police custody and the test was postponed until his release. In another case the test was postponed until the defendant had money, and it was not clear from the file whether the test was subsequently conducted. It should also be noted that in some cases the request for a paternity test was made *after* a maintenance order had already been made.

Chart 45: Does the file contain evidence of a paternity test? (n=1 687)

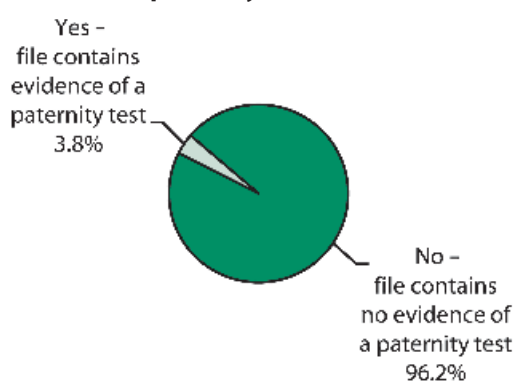


Table 82: Outcome of paternity tests

Outcome	Frequency	Percentage
Defendant is the biological father	13	56.5
Defendant is not the biological father	10	43.5
Total	23	100.0
Missing	41	64.1
Total	64	100.0

If the court orders a paternity test, it may order the mother, father or both to pay all or part of the costs, or it may order the State to pay all or part of the costs. The decision on the payment for the test will depend on the means of the mother, the alleged father and any other relevant circumstances.⁶

⁵ Paternity tests were not recorded at Bethanie, Karasburg, Okakarara and Khorixas – only a small proportion of the total files were sampled at each of these courts, which suggests that the sampling process may have influenced the fact that we did not identify evidence of paternity tests conducted at these courts.

⁶ Maintenance Act 9 of 2003, section 21.

Currently all paternity tests are conducted outside Namibia – the sample is taken in-country and then are sent to South Africa. This adds to the time and expense of the test. As of May 2013, depending on where the test is done, the cost was approximately N\$1 400, and the time needed to get results was approximately one month. Given that the median amount of maintenance ordered is N\$250 (see section 12.5), the cost of the test is equivalent to nearly four months of maintenance payments.

Samples can be taken at any of the Pathcare offices across Namibia. However, we struggled to get clarity from the courts, and even from some Pathcare staff, on where samples can be taken. Some people said that people have to travel to Windhoek to have the sample taken for a paternity test. The clerk of the Keetmanshoop court said that parents have to travel to Windhoek and that this is a barrier because they have to pay for travel-related costs in addition to the cost of the test. The clerk estimated that transport by bus plus meals may cost an additional N\$300 per person.

Information on who paid for the test is available for only seven of the cases. In five cases the defendant was ordered to pay all of the costs, in one case the State was ordered to pay all of the costs, and in another the defendant and the State shared the costs. In the case where the State paid all of the costs, the defendant was earning N\$950 per month and the mother was unemployed. As the cost of a paternity test was at that stage N\$900-N\$1 200 (excluding travel costs), the test would cost more than the defendant's monthly salary. Therefore it is not surprising that the court ordered the State to pay for the test. In the case where the costs were split between the defendant and the State, the defendant had first been ordered to pay all of the costs but had disputed this order.

The data suggests that although the Maintenance Act theoretically provides an accessible structure for paternity testing, the practical problems involved in terms of cost and time mean that paternity testing is not as accessible as it is intended to be. **We recommend that Namibia proceed with its plans to conduct DNA testing in-country.** This would reduce the cost and time associated with such tests.

The 1995 maintenance study did not assess the incidence of paternity disputes.⁷

Summary of information about paternity disputes

- Only a small percentage of files contained evidence of a paternity dispute.
- The outcome of the tests was recorded in fewer than half of the files where tests took place. Therefore we cannot make a meaningful assessment of the test outcomes.
- Paternity tests currently cost about N\$1 400, and it can take approximately one month to get the results.

10.3 Legal representation

The files show that the complainant and/or the defendant was represented by a lawyer in a very small minority of cases (42/1 687; 2.5%). In approximately half of the cases in which lawyers were involved, only the defendant had a lawyer (19/42; 45.2%). In approximately one-quarter of the cases both parties had a lawyer (12/42; 28.6%), and in one-quarter only the complainant had a lawyer (11/42; 26.2%). In some of the cases, lawyers were involved because the parties were getting divorced. In two cases the defendants were abroad and asked a lawyer to be present to represent their interests. Another case involved a dispute about the validity of the marriage between the complainant and defendant (the complainant was applying for maintenance for herself and her beneficiaries – see the summary of this file on page 148). In other cases it is not clear why the parties chose to have legal representation. Fourteen maintenance enquiries were postponed to allow the defendant or complainant to get legal representation (see section 10.5).

⁷ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

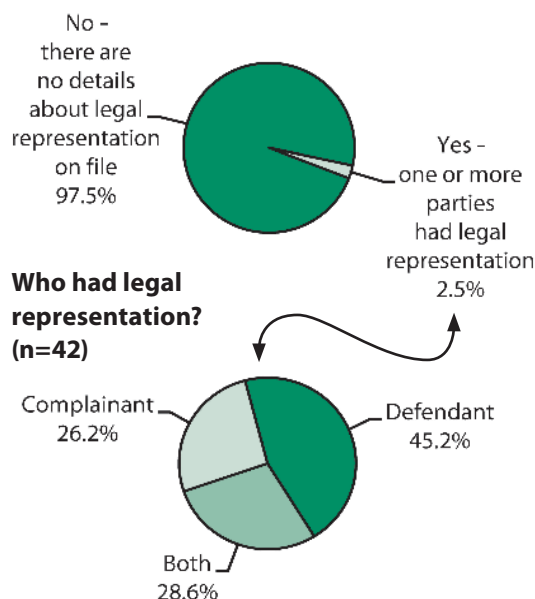
Table 83: Does the file contain evidence that parties to the case had legal representation?

Who had legal representation?	Frequency	Percentage
Defendant had a lawyer	19	45.2
Defendant and complainant had a lawyer	12	28.6
Complainant had a lawyer	11	26.2
Total	42	100.0

Because so few cases involved legal representation, we cannot assess whether representation affects the outcome of a case. While some people may think that a lawyer will help a defendant to reduce the amount of maintenance he must pay, one magistrate said that if a defendant has a lawyer, the court may make a higher maintenance order as it is clear that the defendant has money.

The 1995 maintenance study did not assess the incidence of legal representation.⁸

Chart 46: Does the file contain evidence that parties to the case had legal representation? (n=1 687)



Summary of information about legal representation

- The complainant and/or the defendant had legal representation in a very small minority of the files sampled.
- Where legal representation was engaged, the most common scenario was that only the defendant was represented by a lawyer.

10.4 Cases involving social workers

Only a handful of cases involved a social worker. Two files contained a memo from a social worker which gave background to the case and recommended that maintenance be ordered. In another case a letter from a social worker detailed the discussion process between the complainant and the defendant regarding the payment of maintenance. Details in the file show that the parents eventually resolved their dispute and agreed to monthly maintenance and access. One file contained a letter from the maintenance officer requesting a report from a social worker because the complainant and defendant were still living in the same house. The maintenance officer wanted information about their living conditions and the welfare of the children. However, the file did not contain a report from a social worker. In another case, the child was living with a foster family. The complainant (the foster mother) applied to the court for maintenance from the biological father. The file contained a record of a child protection hearing and noted that the child was under the supervision of a social worker. It is unusual (but commendable) that the foster parent applied for maintenance.⁹

Although only a very small number of files contained information showing social worker involvement, we believe that more families would benefit from such an intervention. The Rehoboth court reported that a social worker regularly visits the court, and this is a positive model that could be adopted by other courts. However, the greatest challenge is the small number of social workers in Namibia.

⁸ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

⁹ An alternative option could have been for the maintenance court to refer the complainant to the Ministry of Gender Equality and Child Welfare (MGE CW) to discuss whether the State would make a contribution order against the biological parents. See page 284 for a discussion on contribution orders.

The Government estimates that there is a ratio of one social worker to 13 519 people.¹⁰ Given that the country has a population density of two people per square kilometre, this ratio clearly does not allow social workers to adequately fulfil their mandate. There is a clear need for more social workers in Namibia. We recommend that the Ministry of Gender Equality and Child Welfare employ more social workers and assistants (as provided for under the Child Care and Protection Bill), and when feasible we recommend that the Ministry of Justice and Ministry of Gender Equality and Child Welfare develop a closer working relationship so that social workers may be more involved in maintenance enquiries.

10.5 Postponements

"Maintenance is 'the stepchild of justice' because criminal cases get priority."

Magistrate

Approximately one in five files contained at least one postponement (378/1 687; 22.4%). Approximately half of these files recorded only one postponement (206/378; 54.5%) and over 10% contained 4-11 postponements. Overall, 730 postponements were recorded in the sample from 378 files. However, not all of these postponements took place in the context of enquiries. Due to the lack of information in the files, we are not able to establish at what stage in the process the postponements occurred – for example in some cases the maintenance officer might have noted a postponement in the meetings that he/she held with the complainant and defendant, and in other cases the postponement may have been noted during the hearing before the magistrate.

The majority of postponements were associated with the initial maintenance application (619/730; 84.8%), and a small percentage were associated with applications for a change (substitution) to be made to an order (54/730; 7.4%) or with arrears proceedings (30/730; 4.1%). This finding is to be expected given that a very small minority of files contained a request to change an existing order (89/1 687; 5.2.0%; see chapter 13).

Chart 47: Number of postponements contained in the files (n=378)

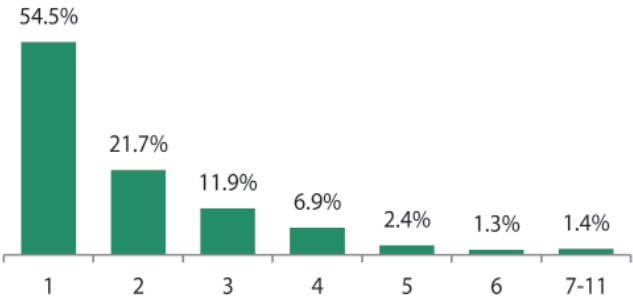


Table 84: Number of files containing postponements

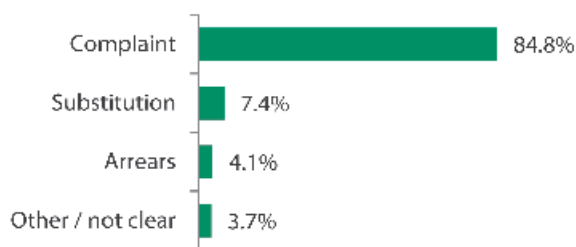
Number of postponements	Number of files	Percentage
1	206	54.5
2	82	21.7
3	45	11.9
4	26	6.9
5	9	2.4
6	5	1.3
7	1	0.3
8	1	0.3
9	1	0.3
11	2	0.5
Total	378	100.0

"Most mothers are unemployed, but they must maintain their children."

Participant in the female focus group discussion in Ondangwa

¹⁰ Republic of Namibia, *First, Second and Third Namibia Country Periodic Reports on the Implementation of the UN Convention on the Right of the Child (1997-2008)*, Windhoek: Ministry of Gender Equality and Child Welfare, 2009 at 15.

Chart 48: Stage of maintenance complaint when postponement recorded (n=730)



The files contained a range of reasons for the postponements. In total, approximately 40% of the postponements were attributable to the defendant alone (313/730; 42.9%; rows shaded green in Table 86). Approximately a fifth of the postponements occurred because the defendant did not appear in court, due to sickness or travelling for work purposes, or for an unspecified reason (159/730; 21.8%). Fifty-two postponements were due to the court being unable to trace the defendant (7.1%), and one was due to the defendant residing in another country. Defendants also caused delays due to paternity disputes (61/730; 8.4%; further discussed in section 10.2) or because they did not bring sufficient proof of their financial status (48/730; 6.6%). A small number of cases were postponed to allow the defendant to seek employment (49/730; 6.7%) or receive payment from the workplace (4/730; 0.5%). In a small number of cases the complainant (36/730; 4.9%) or both the defendant and the complainant (42/730; 5.8%) failed to attend court. Four cases were postponed because the complainant did not bring enough proof (4/730; 0.5%).

In some cases maintenance court personnel do not appear to have been proactive enough in addressing the delays. For example, there were 17 postponements because the parties could not reach an agreement. While it is important to allow the parties to attempt to reach agreement, the best interests of the child should be the paramount consideration, and repeated delays for this purpose may not be in the interests of the child. Maintenance officers should have more confidence in referring cases for enquiry if an agreement cannot be reached.

Table 85: Stage of maintenance complaint when postponement recorded

Stage of maintenance complaint	Frequency	Percentage
Complaint	619	84.8
Substitution	54	7.4
Arrears	30	4.1
Other / not clear	27	3.7
Total	730	100.0

Table 86: Reason for postponement

Reason	Frequency	Percentage
Defendant did not appear in court for a variety of reasons	159	21.8
For further enquiry	73	10.0
Blood tests needed / paternity disputed	61	8.4
Defendant could not be traced	52	7.1
Defendant not working / needs time to seek employment	49	6.7
Defendant to bring proof	48	6.6
Both parties failed to attend	42	5.8
Complainant did not appear in court for a variety of reasons	36	4.9
Parties could not reach an agreement	17	2.3
Problems with court administration (summons not served or served late, or limited capacity of the court)	16	2.2
Defendant/complainant to obtain legal representation	14	1.9
Progress regarding maintenance payments determined (making of a consent, default or attachment of wages order or defendant to pay arrears)	7	1.0
Criminal proceedings involved (defendant has been arrested or the case was referred to the public prosecutor)	4	0.5
Complainant requests postponement	4	0.5
Defendant waiting for payment from his workplace	4	0.5
Complainant to bring additional proof	4	0.5
Defendant and complainant agree to postponement	3	0.4
Defendant requests postponement as in another country	1	0.1
Unknown	136	18.6
Total	730	100.0

Time between postponements

For cases that were postponed on more than one occasion (172/378; 45.5%), the median time between postponements was 42 days (mean 63.8 days; range 1-952 days).¹¹ Although a timeline of 42 days is probably realistic, such delays are likely to present the complainant with challenges for caring for the child and are not in the best interests of the child. The Child Care and Protection Bill provides clear timelines for child protection hearings.¹² We recommend that the Maintenance Act include similar timelines to which courts should adhere wherever possible (i.e. the courts should be permitted to allow longer timelines if necessary, as some cases may require this).

The 1995 maintenance study did not record data on postponements.¹³

The court officials interviewed discussed the frequent delays associated with maintenance enquiries. One clerk said that cases are often postponed because the defendant will not bring his payslip when initially summoned. This comment is substantiated by the data in this section which shows that 6.6% of the postponements were due to the defendant not bringing enough proof to court. The clerk also said that postponements occur when the complainant asks for an increase in the maintenance order and the defendant asks for time to accumulate information to show why he cannot pay the increased amount.

Another clerk said that the defendant will ask for a postponement to introduce delays into the process. For example, the defendant will come to court just often enough to avoid having a warrant of arrest issued, and each time will ask for more time so that an order is not made. The court officials at another court said that enquiries can take up to a year if there are problems with the case. This suggests that although the 2003 Act introduced default orders to deal with a lack of response from the defendant, some people are still circumventing the system.

Summary of information about postponements of maintenance complaints

- Approximately one in five files contained at least one postponement.
- Approximately half of these files contained only one postponement, and over 10% contained 4-11 postponements.
- The majority of the postponements were associated with the initial maintenance application, and a small percentage were associated with applications for changes to be made to an order or with arrears proceedings.
- Postponements attributable to the defendant alone accounted for approximately 40% of the postponements.
- For the files that contained more than one postponement, the median time between postponements was 42 days.

10.6 Cases involving domestic violence

The Combating of Domestic Violence Act allows complainants to request an order for temporary maintenance for the complainant, or for children or other dependants of the respondent, for a maximum period of six months, on the theory that someone who is experiencing domestic violence is unlikely to be able to cope with a variety of simultaneous court procedures, and yet should not feel compelled to stay in a violent situation because of economic necessity. A request for temporary maintenance is possible only where the respondent has a legal liability to maintain the person in question.

¹¹ In the case where there is a postponement of 952 days, it is not clear why this delay occurred. A warrant of arrest was issued for the defendant in February 2007, and there is no further information in the file until October 2009 when there are notes from an enquiry.

¹² For example, the proceedings of a children's court may be adjourned only on good cause shown, taking into account the best interests of the child, and for a period of no more than 30 days at a time (see Child Care and Protection Bill, draft dated 12 January 2012, section 45).

¹³ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

The relevant provision in the Act reads as follows:

(2) A protection order may, at the request of the applicant or on the court’s own motion, include any of the following provisions –

(h) a provision temporarily directing the respondent to make periodic payments in respect of the maintenance of the complainant, and of any child of the complainant, if the respondent is legally liable to support the complainant or the child, as an emergency measure where no such maintenance order is already in force ...¹⁴

We identified four cases that made reference to domestic violence. Two files contained temporary maintenance orders made under the Combating of Domestic Violence Act. In the first case the defendant was ordered to pay N\$75 maintenance per child for four children (total N\$300). The complainant applied for this order to be made into a standard maintenance order for the same amount, and it was made into a consent order. In the second case the defendant was ordered to pay N\$1 500 per month for the complainant and N\$500 for one beneficiary. However, the file does not contain a final maintenance order. The third file contained a reference to the complainant (the grandmother) having made an appointment to apply for a protection order, but did not contain any other information about domestic violence. The fourth file contained details of a protection order in which the parties agreed not to commit acts of domestic violence against each other, but there are no further details because pages were missing from the order.

We can also find information on the relationship between maintenance complaints and protection orders in the LAC study report on the Combating of Domestic Violence Act.¹⁵ The study found that maintenance was requested by the complainant in about 38% of the cases where complainants completed the relevant section on the application form (395/1052; 37.5%). Overall, temporary monthly maintenance was granted in 34% of the cases where protection orders were issued (287/844; 34.0%). Some of the orders for maintenance were included at the behest of the magistrate rather than the complainant.

Table 87: Temporary maintenance orders within applications for protection orders

	Frequency	Percentage
Request for maintenance indicated	395	37.5
Request not indicated	657	62.5
Total	1 052	100.0
Maintenance included in interim protection order	287	34.0
Maintenance not included in interim protection order	557	66.0
Total	844	100.0

Chart 49: Temporary maintenance orders within applications for protection orders



Based on information where we can compare the request for maintenance within a protection order with the outcome of the interim protection order, a temporary maintenance order was requested and granted in 32.1% of the applications, requested but not granted in 7.6% of the applications, and not requested but granted in 2.6% of the applications. Over half of the temporary protection orders did not include an order for maintenance.

¹⁴ Combating of Domestic Violence Act 4 of 2003, section 14(2)(h).

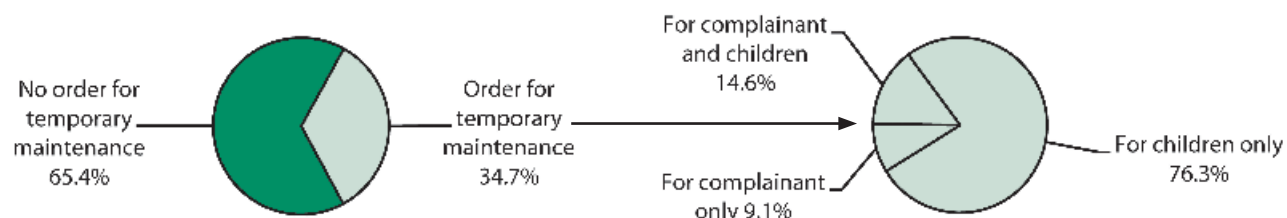
¹⁵ Legal Assistance Centre (LAC), *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*, Windhoek: LAC, 2012 at 369-372 and 433-438.

Table 88: Temporary maintenance in interim protection orders

Overview of all requests and outcomes		Number	Percentage
The respondent must pay temporary monthly maintenance (for the complainant or specified children)	Requested and granted	250	32.1
	Requested, but not granted	59	7.6
	Not requested, but granted	20	2.6
	Neither requested nor granted	450	57.8
	Total	779	100.0

This table is based on all 779 cases where the complainant's requests could be compared to the interim protection order outcomes, to give a more comprehensive picture of interim protection order outcomes on this point.

Chart 50: Temporary maintenance orders within interim protection orders



Most of the requests were for maintenance for children in the care of the complainant (291/395; 73.7%), followed by requests for maintenance for children and for the complainant (65/395; 16.5%). Very few of the maintenance requests were only for the complainant (39/395; 9.9%). The orders granted showed a similar distribution (maintenance for children 219/287 or 76.3%; children and complainants 42/287 or 14.6%; and complainant only 26/287 or 9.1%).

Table 89: Beneficiaries in applications for temporary maintenance in protection orders

	Request for a protection order	Percentage	Temporary protection order contains provision for maintenance	Percentage
Children only	291	73.7	219	76.3
Complainant and children	65	16.5	42	14.6
Complainant only	39	9.9	26	9.1
Total	395	100.0	287	100.0

The maintenance requests for children typically involved only one or two children, with a fairly even balance of boys and girls. This finding is in line with general requests for maintenance. Most of the requests for child maintenance involved children under the age of 15, again a finding that is in line with general requests for maintenance. There were 19 cases involving children older than 18. It is possible that some of these cases involved offspring who were still studying, or offspring with disabilities for whom the parental duty of support would extend beyond age 18 or 21. It could also be that some of the complainants who filled in the application form did not know that maintenance normally ceases at age 18.

The vast majority of the children involved in these requests were children born to both the complainant and the respondent. There were a handful of applications (19) where the complainant requested maintenance for a child of the complainant who was apparently not related by blood to the respondent (such as a child of the complainant or the complainant's spouse or partner) These applications appear to be based on a misunderstanding of the provisions of the current law, as there is no legal obligation on persons to provide maintenance for stepchildren.

Of the maintenance requests that were granted, the 261 orders which included maintenance for children covered a total of 528 children, with most orders covering either one or two children. Two of the orders covered children of the complainant's current spouse or partner – persons whom the respondent is extremely unlikely to have had a legal liability to maintain. One grandchild was covered by a maintenance order, which seems reasonable as responsibility for maintenance passes

to grandparents if parents are unable to maintain their children. Astonishingly, one maintenance order covered a pet – which should more properly have been incorporated into the household expenses covered by maintenance to the complainant. Because there were a few cases where the provisions on temporary maintenance seem to have been misapplied by the courts, future training needs to emphasise the fact that this option, as under the Maintenance Act, is available only where the respondent has a legal liability to maintain the person in question.

The amounts of temporary maintenance requested ranged from N\$100 to N\$10 000 per month for complainants, and from N\$50 to N\$8 000 per month per child. They were typically N\$500 per month for the complainant and N\$300 per month per child. This amount is within the range of general applications for maintenance. The total amount of maintenance requested per case, whether for the complainant or for children or for some combination of the two, was typically N\$600 per month. As would be expected, requests for child maintenance were slightly higher for older children than for younger children. Mirroring requests almost exactly, the amounts of maintenance granted ranged from N\$100 to N\$10 000 per month for complainants, and from N\$50 to N\$8 000 per month per child, and were typically N\$600 per month for the complainant and N\$300 per month per child. The total amount that any single respondent was ordered to pay for all beneficiaries together ranged from N\$150 to N\$12 500 per month. The amounts of maintenance ordered were consistent with the pattern of requested amounts, with minors over the age of 18 receiving slightly higher amounts than younger children. The average amount of maintenance granted is higher than for maintenance orders not associated with protection order applications (see section 12.5), but the sample sizes differ and so a direct comparison cannot be made.

Table 90: Amount of maintenance in applications for protection orders and temporary protection orders

Request for a protection order	Number	Mean (N\$)	Median (N\$)	Minimum (N\$)	Maximum (N\$)
Amount of maintenance requested					
Complainant	101	1 059	500	100	10 000
All children (per case)	338	879	600	100	9 500
Per child	678	443	300	50	8 000
Total amount for all beneficiaries (where information not subdivided)	376	1 075	600	150	12 500
Amount of maintenance ordered					
Complainant	66	1 357	600	100	10 000
All children (per case)	254	897	600	200	8 000
Per child	511	446	300	50	8 000
Total amount for all beneficiaries (where information not subdivided)	279	1 137	600	150	12 500

The *Seeking Safety* study assessed the final protection orders according to whether the final order provided for the same or more or less protection than the interim protection order because there were so many cases where interim protection orders did not lead to final orders.¹⁶ Therefore we cannot assess the number of final protection orders that resulted in a maintenance order.

The *Seeking Safety* report noted the problem that courts often set the period of maintenance payments for longer than the six-month maximum period set by the Act, with some courts contemplating orders with the same sorts of durations as ordinary maintenance orders issued in terms of the Maintenance Act (such as until the child turns 18 or becomes self-supporting). The report states that “issuing temporary maintenance orders as an adjunct to protection orders seems to be an area which has caused some confusion amongst magistrates and should be emphasised in future training”.¹⁷ The report also noted that delay in arranging for a temporary maintenance order can be a problem, as

¹⁶ Id at 483, 491.

¹⁷ Id at 437.

it was the opinion of one social worker that maintenance orders “take so long that it’s a risk for the family to even consider them”.¹⁸

We recommend that the Ministry of Justice send a circular to the courts explaining the differences between the procedure for granting maintenance as part of a protection order under the Combating of Domestic Violence Act and the procedure for granting maintenance under the Maintenance Act, and the fact that the enforcement mechanisms in the Maintenance Act can be applied to provisions for temporary maintenance embodied in protection orders (see section 4.10). It would also be useful if magistrates or other court officials ensure that people who obtain temporary maintenance as part of a protection order understand that it is a temporary emergency measure and not a substitute for an ordinary maintenance order issued in terms of the Maintenance Act.

CASE STUDY

Maintenance as part of a protection order

This case involved a protection order in terms of the Combating of Domestic Violence Act 4 of 2003. The parents of three children were divorced, with custody of the children having been awarded to the father. The mother brought an application for a protection order after she discovered that two of the children had been severely beaten by the father in the guise of discipline. The mother was granted an interim protection order but this interim order was discharged by the magistrate after holding an enquiry. The mother successfully appealed against the discharge of that interim protection order; the High Court overturned the magistrate’s decision and issued a final protection order awarding temporary custody of the minor children to the mother subject to reasonable access by the father, and directing the father not to commit any further acts of domestic violence against them. The final protection order also included a temporary order for maintenance to be paid by the father.

The question of maintenance could not be agreed upon. What was however agreed upon was that the respondent [the father] would continue to pay for the school fees of two of the children, namely J and P, and that the appellant [the mother] would continue pay the school fees of D and that all three children would remain on the respondent’s medical aid with the appellant to pay any excess in respect of medical treatment. The appellant had in the interim [protection] order proceedings claimed N\$500.00 as maintenance per child. The respondent has however tendered only N\$200.00 as maintenance per child. This aspect would need to be the subject of a further enquiry and determined then. The arrangement which I make below would only be of an interim nature, pending that further enquiry. I have determined that the sum of N\$400.00 in maintenance per child should be paid in that interim period.

FN v SM [2012] NAHC 226 (8 August 2012)

Summary of cases involving domestic violence

- We identified four cases that involved domestic violence. Further information on linkages between maintenance and domestic violence can be found in the LAC report *Seeking Safety*.
- In most cases where a victim of domestic violence requested that a protection order should include temporary maintenance, this request was granted.

¹⁸ Id at 496.

Seeking Safety

Increasing awareness of the **IMPACT OF DOMESTIC VIOLENCE** in Namibia



What is child abuse?

1. Child abuse is the mistreatment of a child. Children can be abused by people they know, such as family members, or by people in the community, or by strangers.
2. There are many different types of abuse. These include physical, sexual, economic and psychological acts of violence.
3. When a child is abused by family members, this is domestic violence. It is also domestic violence if a child is allowed to see physical, sexual or psychological abuse against a family member.

What to do if you are a child and you are being abused

1. Speak to a trusted adult or friend. This could be a family member, teacher or pastor.
2. Ask the adult or friend to help you contact a social worker, a Woman and Child Protection Unit or the police. You can also contact a social worker or police officer directly.
3. If you cannot find anyone to help you or if you are not sure what to do, you can call LifeLine/ChildLine free on 116. They can advise you.

What to do if you know that a child is being abused

Report the case to a social worker, a Woman and Child Protection Unit or the police.

Poster series produced by the **Legal Assistance Centre** with support from **UNICEF**



unicef 
unite for children

Photo by **Rachel Coomer**

Disclaimer:
The persons depicted in this series of posters are not actual victims.

ZERO TOLERANCE FOR DOMESTIC VIOLENCE!

One of the posters produced for the Legal Assistance Centre's campaign against domestic violence, initiated in 2012 at the launch of the LAC report entitled *Seeking Safety: Domestic Violence in Namibia and the Combating of the Domestic Violence Act 4 of 2003*.



Chapter 11

WITHDRAWALS OF MAINTENANCE COMPLAINTS

A small minority of files in the sample were withdrawn (138/1687; 8.2%). The 1995 maintenance study found a similar proportion of files withdrawn (9%).¹

The majority of withdrawals were made during the complaint process (91/138; 65.9%). Nearly a third were made after a maintenance order had been granted (39/138; 28.3%), and the remainder were withdrawn after the payments had gone into arrears (3), during an application for change (2), or at a point in time that was not clear (3).

The majority of withdrawals were made by the complainant (99/138; 71.7%), and just under 10% were made by the court. In nearly 20% of the withdrawals (26/138; 18.8%) it was unclear who made the request to withdraw. The proportion of cases removed by the court is lower than identified in the 1995 maintenance study which found that the court withdrew one-third of the complaints.² It is not clear why the number has dropped.

Interviews with court officials provide further insight into why some complainants withdraw their complaints. A number of the clerks of court stated that some complainants withdraw their applications because of pressure from the defendant or a family member. In one case described by a clerk, the defendant harassed the complainant in an attempt to intimidate her into withdrawing the application. In this instance the court advised the complainant to apply for a protection order, which the same court then granted.³

One clerk stated that sometimes the complainant's parents force her to withdraw because claiming maintenance is "a taboo in their culture" or because the family is concerned that the defendant's

Chart 51: Proportion of maintenance files withdrawn (n=1687)

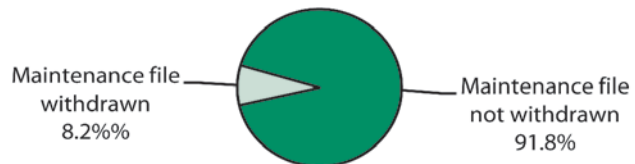


Table 91: At what stage was the maintenance file withdrawn?

Stage	Frequency	Percentage
Maintenance complaint	91	65.9
After a maintenance order was made	39	28.3
Payments were in arrears	3	2.2
Application of change	2	1.4
Time point unclear	3	2.2
Total	138	100.0

¹ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 124.

² Id at 124.

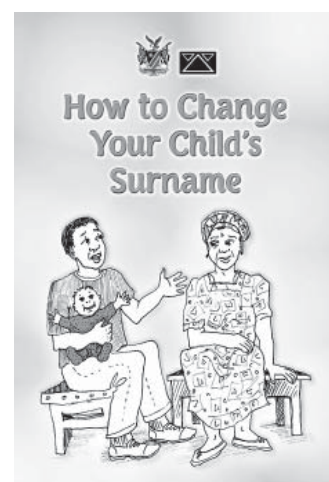
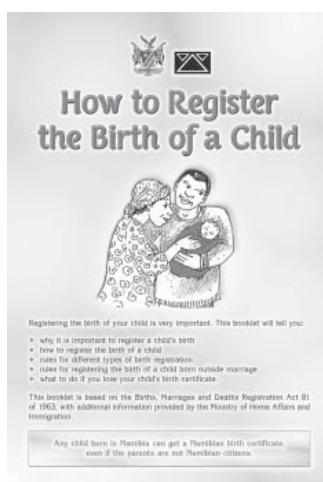
³ This advice was not the only option as the Maintenance Act makes it an offence to compel or induce a complainant not to file a maintenance complaint (Maintenance Act 9 of 2003, section 41).

family will go to a witchdoctor. The clerk said that while threats of witchcraft are not common, they do occur in the Owambo community. The magistrate of the Rundu court also cited a case of intimidation through witchcraft. The court reported the person making the threats to the police – an option that is provided for in the Maintenance Act.

The magistrate of the Karasburg court reported a similar story but with a different ending. In this case the complainant repeatedly made and withdrew maintenance complaints due to the defendant's violent behaviour. Although the complainant had been granted a protection order, it did not provide sufficient protection because the complainant did not want the punishment for failing to obey a protection order to be enforced (a prison sentence or fine) as this could stop the defendant from providing the maintenance.⁴ However, an option that was not utilised is the fact that the maintenance court is empowered to impose a term of periodic imprisonment. This could have provided a viable solution to cases such as this where intimidation is being used.⁵

The LAC is also sometimes informed of situations involving intimidation through witchcraft. For example, in a workshop held in the Okakarara area in 2006, one participant stated that “[T]he reports are true. They kill the children with witchcraft. Cases are happening. If you have a child, you are so afraid to go to the man, because he will kill the child. It happens a lot. The cause of death is witchcraft! The children get ill and die. Women are afraid to ask the men for money because of it.”

Another problem reported by a clerk is that some men think that being asked to pay maintenance is an insult and a punishment. This clerk explained that a defendant will sometimes threaten to “take the kid off from [his] surname.” Legally the father cannot do this as the law allows for a child's surname to be changed in a limited number of circumstances, none of which would allow the father to apply for a surname change for this reason.⁶ However, the negative pressure from the father in this regard may be sufficient to intimidate the complainant to withdraw her complaint. In 2011 the Legal Assistance Centre produced public information pamphlets entitled *How to Register the Birth of a Child* and *How to Change Your Child's Surname*. This information may be useful for informing parties to a maintenance case as to how and when their child's surname can be changed. **We recommend that the Ministry of Justice collaborate with the Ministry of Home Affairs and Immigration to provide copies of the Legal Assistance Centre pamphlets on registering a birth and changing a surname to all maintenance courts in Namibia.**



⁴ A person who, without lawful justification, breaches a protection order commits an offence and is liable on conviction to a fine not exceeding N\$8000 or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment (Combating of Domestic Violence Act 4 of 2003, section 16(1)).

⁵ Criminal Procedure Act 51 of 1977, section 285.

⁶ According to the Births, Marriages and Deaths Registration Act 81 of 1963, a child's surname can be formally changed in the birth register and on the child's birth certificate if the child is a minor (under the age of 21) and is known by a surname other than the surname on the birth certificate, in any of the following circumstances:

- The child was born outside marriage and was registered with the father's surname but is known by the mother's surname.
- The child was born outside marriage and is known by the mother's surname or the surname of her husband (the child's stepfather), and not by the surname on the birth certificate.
- The child was born inside marriage and has been known by the mother's surname or the surname of her new husband (the child's stepfather) since the death of the child's father or the divorce of the child's biological parents.
- The child is known by the surname of his or her guardian (for example if both parents have died).

The Ministry of Home Affairs and Immigration will also sometimes allow changes to the birth certificate in other circumstances where a child is known by a surname other than the one on the birth certificate. It is also possible for a child born outside marriage and registered with the mother's surname to change his or her surname to the father's surname, if the father has acknowledged the child. The Ministry is currently in the process of revising the law on birth registration.

In the focus group discussions, community members confirmed that people experience intimidation. One woman stated the following:

“Intimidation and harassment discourage mothers from claiming maintenance. I received threats from the father of my child’s best friend. Also anonymous callers called me to say: ‘You will be embarrassed if you try to claim maintenance.’ But I attended workshops so I knew to report the harassment to the police. After I reported the incident to the police, it actually stopped. But the father never showed up to court on three hearing dates. Nothing has been done about this. The father of my child is a lecturer at a university. The child is at the university, but the father won’t pay school fees.”

Other participants said that if women claim maintenance, the fathers threaten to bewitch the child. Sometimes a child will die and this will discourage other women from applying for maintenance because they fear that their child’s father might threaten to bewitch the child or actually do something that appears to prove bewitchment. Some people also believe that marriage can only last with the parents’ blessing, and some families will not bless a marriage if the woman has claimed maintenance from the father for children that were born before the marriage takes place.

While many court officials were aware that complainants withdraw cases due to pressure or intimidation, it appears that in many cases the complainant does not tell the court that she is being intimidated. As one maintenance officer explained, *“If a woman wants to withdraw, I will ask her if she was intimidated. She’ll just say, ‘no we talked’. I know it’s more, in my gut.”* The clerk at another court made a similar statement, saying that the complainant will not tell him directly why she wants to withdraw a case, but *“Sometimes I hear from a relative that the complainant has been threatened. It is very common for the defendant to tell her that he will leave his job to avoid maintenance, or divorce her.”*

Only one clerk with whom we discussed this issue, who had served as a clerk for eight years, specifically stated that she was not aware of any cases where the complainant was pressurised to withdraw the case.⁷ It is possible that complainants had withdrawn cases at this court due to pressure or intimidation, but the actual reasons for withdrawals at this court were not known to this clerk.

One clerk of court said that when complainants ask to withdraw a case, she discourages them from doing so, because she knows from experience that even if the defendant promises to pay maintenance informally, in many cases the payments stop after a short time. This clerk stated that she also warns the complainant that he or she could be asked to pay some of the associated costs if he or she subsequently reapplies for a maintenance order – although the clerk added that the court does not apply this provision in practice. In any case this warning is not entirely valid because the court is only allowed to order the payment of costs of service or wasted costs due in the event of failure to attend a hearing, depending on the conduct and means of the persons involved in the enquiry, and it is not acceptable to misinform the complainant in this regard.⁸ The magistrate at another court similarly noted that complainants will return to court eventually: *“At times the defendants persuade the complainants not to show up, but in a month the complainants will be back because the defendant didn’t pay the promised maintenance.”*

Many of the court officials said that they require the complainants to make a sworn statement before they are permitted to apply for their maintenance order to be discharged. The court officials at one court stated that if the case is on the roll, the withdrawal process depends on the public prosecutor who requires both parties to give a statement to the police. If the reason for withdrawal is not valid, the prosecutor will not withdraw the case. These practices are a matter of concern as there is nothing in the Act that requires them. The Act does require a complainant to make a sworn statement when

⁷ Due to limitations on time, not all clerks of the court discussed this question with the researchers.

⁸ Maintenance Act 9 of 2003, section 20.

requesting the enforcement of an order,⁹ but it does not specify that the complainant must make a sworn statement to withdraw a complaint or initiate proceedings to discharge an order. It may be that some court officials are confusing the process for withdrawing a maintenance case with the process for withdrawing a criminal case, such as a rape case. Alternatively it may be that the court officials ask the complainants to make a sworn statement to ensure that the complainant is definitely serious about the withdrawal – the added step may make it less likely that the complainant opens and closes a case repeatedly. However, adding difficulties to the process is not a valid way to reduce the incidence of maintenance complaint withdrawals. Instead, greater public awareness of the importance of paying maintenance is needed to achieve long-term opinion change about maintenance. **We recommend that maintenance officers and clerks of court be provided with guidelines for the correct procedure to follow when a complainant seeks to withdraw a maintenance complaint.**

The maintenance officer at the Eenhana court discussed his plan to introduce a register of withdrawn files. He had also drafted a form to be filled in for each file withdrawn, which specifies all actions taken by the maintenance officer or the maintenance clerk with regard to the case. **We recommend amending the regulations of the Act to include such a withdrawal information form as it would be very useful for monitoring the management of maintenance cases.**

Summary of information about the withdrawal of maintenance cases

- A small minority of files were withdrawn.
- The majority of withdrawals were made during the complaint process.
- The majority of withdrawals were made by the complainant, and just over 10% were made by the court.

⁹ Id, section 28.



Chapter 12

MAINTENANCE ORDERS

The Maintenance Act states that three types of maintenance orders may be made:

1. a consent maintenance order;
2. a default maintenance order; or
3. a maintenance order following a hearing.¹

A **consent maintenance order** is made when the defendant consents to the proposed maintenance order summarised in the summons that he or she received. In this case the defendant does not have to attend an enquiry. Instead, the defendant can sign Part A of the order and return it to the court. Consent may also be an outcome of the initial meeting with the maintenance officer where the complainant and defendant have a chance to discuss the situation. Also, in practice many defendants speak to the maintenance officer in person when they return the forms, allowing for a mini-interview to be held. On the date of the hearing, the maintenance court may make a consent maintenance order without hearing or taking any further evidence. A copy of the consent order must be served on the defendant.

A **default maintenance order** is made when the defendant has been properly summoned to attend the maintenance enquiry but fails to appear. Default orders were an innovation of the 2003 Maintenance Act. They were included in an attempt to prevent situations where the defendant purposefully fails to attend a maintenance enquiry with the intention of prolonging the enquiry to avoid being required to pay maintenance. The 2003 Act says that if the defendant fails to attend the enquiry, the maintenance officer must request the magistrate to make a default maintenance order. The magistrate must then call on the complainant or any other person whose evidence might be relevant, to provide evidence which would assist the court in making an order. The maintenance court may then make a default maintenance order. The default order must be served on the defendant. Proof of service is sufficient evidence that the defendant is aware of the order.

A **maintenance order following a hearing** is made when both the complainant and defendant attend a maintenance enquiry in the presence of the magistrate.

All of the orders have equal force.

12.1 Total number of orders

The sample contained 1687 files and 1711 different applications for maintenance. It also contained a total of 1126 consent orders, default orders and orders following a hearing in respect of 1006 files. Some files contained one to three orders. No orders were found in 681 files. There are four scenarios that

¹ Maintenance Act 9 of 2003, sections 17-19.

could have occurred: (1) a complaint is made and an order is made; (2) a complaint is made and more than one order is contained in the file; (3) a complaint is made but no order is made; (4) no complaint is on file but an order is made. This explains why the number of files that do not contain an order (681) does not match the fact that 1711 complaints resulted in only 1126 orders (meaning that no orders were made in respect of 585 complaints). As some files contained multiple applications and multiple orders, we have compared both the number of files with the number of files containing at least one order, and the total number of complaints with the total number of orders.

Chart 52: Proportion of files in the sample containing a maintenance order (n=1 687)



The majority of files which contained a maintenance order contained a single order (898/1006; 89.3%). Approximately 10% of the files contained two orders (96/1006; 9.5%) and a small number (12) contained three orders. The files that contained more than one order were where changes had been made.

Chart 53: Number of orders in the files (n=1 006)

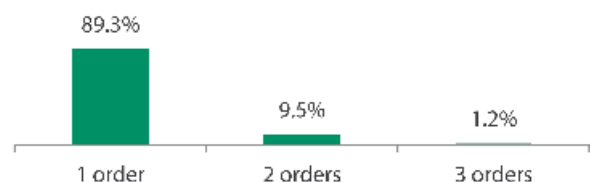


Table 92: Number of orders in the files

Number of orders in the file	Frequency	Percentage
1	898	89.3
2	96	9.5
3	12	1.2
Total	1 006	100.0

Total number of orders by type

The vast majority of orders were consent orders (1041/1126; 92.5%) with the remainder consisting of similarly small proportions of default orders (44/1126; 3.9%) and orders following a hearing (41/1126; 3.6%).

The 1995 study also found that the vast majority of orders were consent orders (426/618; 68.9%), with only 30 maintenance orders following a hearing being made (30/618; 4.9%). The remaining cases were removed from the roll. As default orders were an innovation of the 2003 Maintenance Act, this option was not available at the time of the 1995 study.²

Chart 54: Type of maintenance orders made (n=1 126)

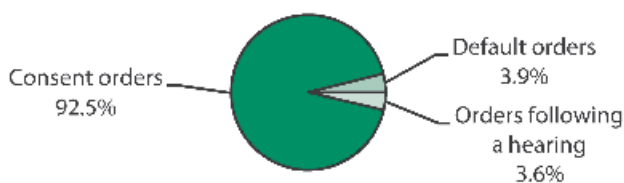


Table 93: Type of maintenance orders made

Type of order	Number of orders	Percentage of orders	Number of files	Percentage of files
Consent orders	1 041	92.5	964	57.1
Default orders	44	3.9	41	2.4
Orders following a hearing	41	3.6	38	2.3
Total	1 126	100.0	1 687	61.8

² D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 85.

Total number of consent orders

The majority of maintenance orders were consent orders (1041/1126; 92.5%). Consent orders were made at all of the courts in the study. As one magistrate explained, “most of the time, people arrive, the prosecutor calls names, they have a consultation. Most settle, this is the normal scenario.” He estimated that only one case per month leads to a hearing before the magistrate as “most of the time they agree”.

Table 94: Number of consent orders in files containing consent orders

Number of consent orders	Frequency	Percentage
1	891	92.4
2	69	7.2
3	4	0.4
Total	964	100.0

Consent orders were contained in 964 files. The majority of files that contained a consent order contained a single consent order (891/964; 92.4%), however some files contained two (69/964; 7.2%) or three (4/964; 0.4%) consent orders.

Total number of default orders

The sample contained a small proportion of default orders (44/1126; 3.9%). Default orders were contained in 42 files. The majority of files containing a default order contained one default order (39/41; 95.1%). One file contained two default orders and another contained three default orders.

Table 95: Number of default orders in files containing default orders

Number of default orders	Frequency	Percentage
1	39	95.1
2	1	2.4
3	1	2.4
Total	41	100.0

Although some courts appear not to use this option, a maintenance officer at one court estimated that three or four out of 10 maintenance complaints each week result in default orders. We did not sample any default orders from this court, suggesting that the clerk may be over-estimating the prevalence, although the magistrate at the same court also discussed the process of issuing a default order, indicating that this court does utilise the option: “The lady applies in chambers, and gives evidence about financials. I grant what is asked if he didn’t show even though summoned. He can come and apply for a rescission.”

The fact that so few files contained a default order suggests that **this new option is not being well-utilised by the courts**. This is despite the fact that section 15.7 shows that approximately half of the warrants of arrest recorded in the sample (134/278; 48.2%) were issued for failure to respond to summonses to attend court. It is likely that in many of these cases it could have been appropriate for the court to issue a default maintenance order. The clerk at one court explained that default orders are not common because the defendant may not be able to pay, for reasons such as having financial commitments towards many children. By ensuring that the defendant attends court, the magistrate can examine the financial status of the defendant before making an order. Whilst such an arrangement is considerate of the needs of the defendant, it is not in the best interests of the child for whom maintenance has been requested. Furthermore the Act provides a special procedure for the defendant to apply for a default order to be substituted or set aside if need be.³ With such a measure in place, the courts should not be reluctant to issue a default order. Notes from the files also show that in some instances, even when a warrant of arrest might be issued for failure to respond to a summons, the police are told that it is sufficient to deliver a warning to the defendant rather than make the arrest. **We recommend that the Ministry of Justice should issue a circular with guidelines on when a default order should be made and include an explanation of the process a defendant can use to challenge such an order, to ensure the courts are aware of the practical purpose of this process.**

³ The defendant may apply within 10 days of being served with the order for it to be substituted or set aside (Maintenance Act 9 of 2003, section 19(4-9)).

Total number of maintenance orders following a hearing

The sample contained a small proportion of maintenance orders made following a hearing (41/1 126; 3.6%). Such orders were contained in 38 files. The majority of files containing a maintenance order following a hearing contained one order (35/38; 92.1%). Three of the files (3/38; 7.9%) contained two orders.

Table 96: Number of orders following a hearing in files containing orders following a hearing

Number of orders following a hearing	Frequency	Percentage
1	35	92.1
2	3	7.9
Total	38	100.0

Number of files containing multiple types of order

Some files contained multiple types of orders, such as a combination of a consent order and an order following a hearing. For example, a small proportion of files contained either a consent order and a default order (23) or a consent order and an order following a hearing (13). One file contained an order following a hearing and a default order. These files probably represent situations where there was, for example, an initial maintenance order followed by a request for substitution.

Chart 55: Orders contained in the file

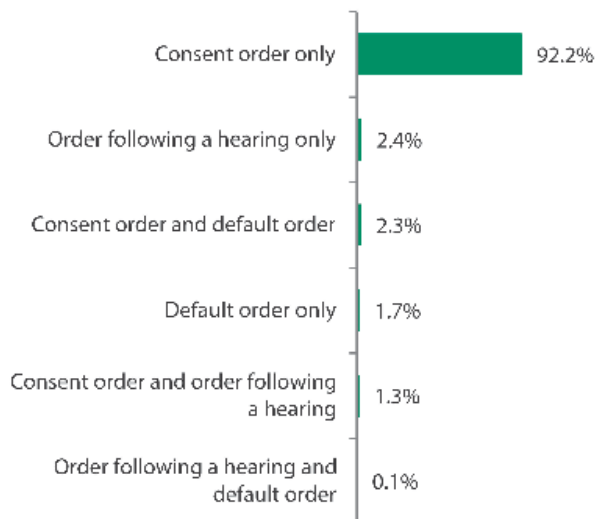


Table 97: Orders contained in the file

Orders contained in the file	Frequency	Percentage
Consent order only	928	92.2
Order following a hearing only	24	2.4
Consent order and default order	23	2.3
Default order only	17	1.7
Consent order and order following a hearing	13	1.3
Order following a hearing and default order	1	0.1
Total	1 006	100.0
<i>Files that did not contain an order</i>	<i>681</i>	<i>40.4</i>
Total	1 687	100.0

12.2 Reason the order was made

Information on why the maintenance order was made – for example as part of an original application or in response to a request to substitute/suspend/discharge – is recorded on the default orders and the orders following a hearing but not on the consent orders. Therefore information is available for only a small proportion of the total number of orders (85/1 126; 7.5%).

Analysis shows that the majority of default orders and orders following a hearing were made following the first application. Given the small sample size, no further patterns can be identified. No default orders were made for the discharge or suspension of an order – this is to be expected as in these cases it is likely that it is the defendant who requests this change.

Neither were default orders made for the payment of arrears. Again this is to be expected given that if the defendant has ignored the terms of the first order, simply issuing another order is not likely to result in the payment of the arrears.

Chart 56: Basis for default orders (n=44)

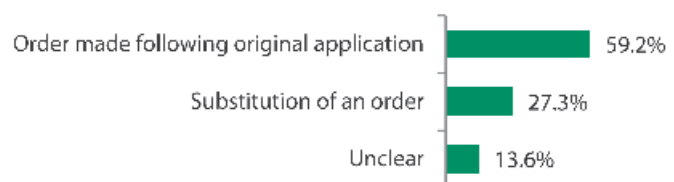
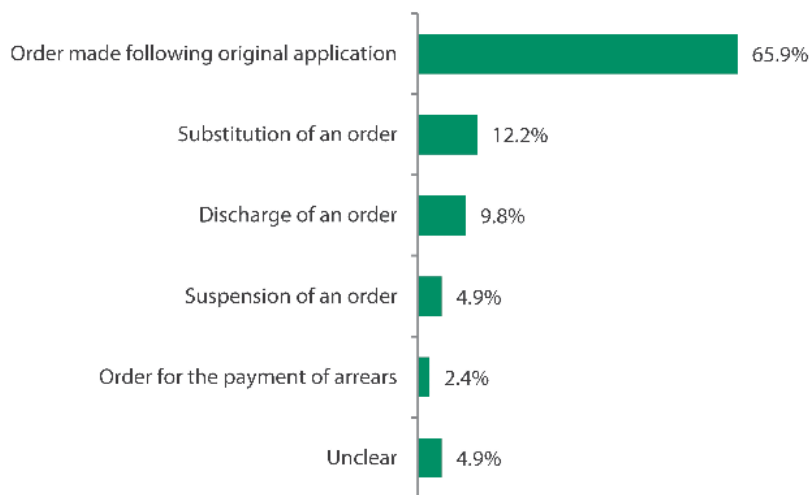


Table 98: Basis for default orders and orders following a hearing

Reason order made	Frequency				Total number
	Default order		Order following a hearing		
	Number	Percentage	Number	Percentage	
Order made following original application	26	59.1	27	65.9	53
Discharge of an order	0	0.0	5	12.2	5
Substitution of an order	12	27.3	4	9.8	16
Suspension of an order	0	0.0	2	4.9	2
Order for the payment of arrears	0	0.0	1	2.4	1
Unclear	6	13.6	2	4.9	8
Total	44	100.0	41	100.0	85

Chart 57: Basis for maintenance orders following a hearing (n=41)



This is an informal proceeding. I want you both to explain your situations. You can ask each other questions, and I will probably ask you both some questions too.



Should people make maintenance agreements outside of court?

The Maintenance Act states that both parents have a duty to maintain their child. This does not mean that parents who are not living together must always seek assistance from the maintenance court to formalise maintenance payments. It is simpler and faster for parents to come to an agreement by themselves. However, in cases where the parent who should be providing support fails to do so on a regular basis, the parent with custody of the child may wish to submit a maintenance complaint to the court.

The Child Care and Protection Bill will allow parents who have custody of a child to make parenting plans. Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses, about things like:

- where and with whom the child will live
- maintenance
- contact with various persons
- schooling and religious upbringing
- medical care, medical expenses and medical aid coverage.

Parenting plans are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement. Parenting plans can be registered with the children's court, which makes them enforceable in court.^a Parents who do not want to involve the court could still use the format of a parenting plan to make a private agreement on the payment of maintenance.

^a Child Care and Protection Bill, draft dated 12 January 2012, chapter 9.

12.3 Profile of complainants and defendants in cases where maintenance orders were issued

The profile information about the complainant and defendant is determined from the maintenance complaint form. We assessed this information for all complainants and defendants, as discussed in chapter 8. We then analysed this information if the complainant was successful in obtaining a maintenance order against the defendant and by the type of order as discussed below.

Age of complainant

The typical successful complainant was 31 years of age (mean 33; range 15-85). There is little difference between the age profile of the average applicant and successful complainant.

There is no notable difference in age of the complainant between the type of maintenance order made, particularly as the number of default and maintenance orders made was small.

Table 99: Age of complainant: application compared to outcome (years)

Outcome	Number	Median	Mean	Minimum	Maximum
All complainants (application)	1 382	31	32.8	12	85
All orders	918	33	31.0	15	85
Consent order	848	31	32.9	15	85
Default order	39	30	34.9	19	70
Order following a hearing	31	31	33.2	22	47

Age of defendant

The typical defendant in a successful maintenance order was 35 years of age (mean 37; range 18-65). There is little difference between the age profile of the average defendant and the defendant against whom an order was made.

There is no notable difference in age of the defendant between the type of maintenance order made, particularly as the number of default and maintenance orders made was small.

Table 100: Age of defendant: application compared to outcome (years)

Outcome	Number	Median	Mean	Minimum	Maximum
All defendants (application)	811	35	36.5	18	65
All orders	567	35	35.0	18	65
Consent order	519	35	36.1	18	65
Default order	25	31	32.8	22	54
Order following a hearing	23	34	37.9	23	59

Language group of complainant

The typical complainant in a successful maintenance order was Damara/Nama- or Oshiwambo-speaking. The representation of language groups varies slightly between application and order. Complainants from Damara/Nama and Silozi language groups appear slightly more likely to receive a maintenance order than those from Oshiwambo, German, English and Rukwangali language groups. The reason for this pattern is unclear.

Table 101: Language group of complainant: application compared to outcome

Maintenance complaint	Maintenance order
Oshiwambo	Damara/Nama
Damara/Nama	Oshiwambo
Afrikaans	Afrikaans
Otjiherero	Otjiherero
German	Silozi
Setswana	Setswana
English	German
Rukwangali	English
Silozi	Rukwangali
Other / language group unclear / information missing	Other / language group unclear / information missing

Table 102: Language group of complainant: application compared to type of outcome

Language group	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Damara/Nama	517	30.2	338	35.7	12	33.3	20	48.8	370	36.2
Oshiwambo	532	31.1	314	33.2	13	36.1	6	14.6	333	32.6
Afrikaans	256	15.0	152	16.1	4	11.1	10	24.4	166	16.2
Otjiherero	136	7.9	68	7.2	2	5.6	1	2.4	71	6.9
Silozi	4	0.2	5	0.5	0	0.0	0	0.0	5	0.5
Setswana	18	1.1	15	1.6	1	2.8	0	0.0	16	1.6
German	21	1.2	12	1.3	0	0.0	2	4.9	14	1.4
English	16	0.9	8	0.8	0	0.0	1	2.4	9	0.9
Rukwangali	7	0.4	2	0.2	0	0.0	0	0.0	2	0.2
Other / language group unclear / information missing	204	11.9	32	3.4	4	11.1	1	2.4	37	3.6
Total	1711	100.0	946	100.0	36	100.0	41	100.0	1023	100.0

Language group of defendant

The typical defendant in a successful maintenance order was Oshiwambo or Damara/Nama- speaking. There was only a minor variation in the representation of the defendant’s language group between complaint and order.

Table 103: Language group of defendant: application compared to outcome

Maintenance complaint	Maintenance order
Oshiwambo	Oshiwambo
Damara/Nama	Damara/Nama
Afrikaans	Afrikaans
Otjiherero	Otjiherero
German	Setswana
Setswana	German
English	Rukwangali
Rukwangali	English
Silozi	Silozi
Other / language group unclear / information missing	Other / language group unclear / information missing

Table 104: Language group of defendant: application compared to type of outcome

Language group	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	\$
Oshiwambo	597	34.9	347	36.3	14	38.9	16	39.0	377	36.5
Nama	458	26.8	306	32.0	14	38.9	15	36.6	335	32.5
Afrikaans	224	13.1	132	13.8	2	5.6	6	14.6	140	13.6
Otjiherero	145	8.5	72	7.5	2	5.6	0	0.0	74	7.2
German	21	1.2	10	1.0	0	0.0	1	2.4	11	1.1
Setswana	19	1.1	15	1.6	1	2.8	0	0.0	16	1.6
English	17	1.0	8	0.8	0	0.0	0	0.0	8	0.8
Rukwangali	14	0.8	8	0.8	2	5.6	0	0.0	10	1.0
Silozi	2	0.1	3	0.3	0	0.0	0	0.0	3	0.3
Other / language group unclear / information missing	214	12.5	54	5.7	1	2.8	3	7.3	58	5.6
Total	1 711	100.0	955	100.0	36	100.0	41	100.0	1 032	100.0

Residence of complainant

The typical complainant in a successful maintenance order lived in a larger urban area. There is no difference in the pattern of complainants' residence between maintenance complaints and maintenance orders.

Table 105: Residence of complainant: application compared to type of outcome⁴

Residence	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Larger urban areas	1 127	77.9	702	80.9	29	85.3	33	86.8	764	81.3
Smaller urban areas	108	7.5	51	5.9	3	8.8	5	13.2	59	6.3
Rural areas	211	14.6	115	13.2	2	5.9	0	0.0	117	12.4
Total	1 446	100	868	100.0	34	100.0	38	100.0	940	100.0

Residence of defendant

The typical defendant in a successful maintenance order lived in a larger urban area. There is no difference in the pattern of defendant's residence between maintenance complaints and maintenance orders.

Table 106: Residence of defendant: application compared to type of outcome⁵

Residence	Applications		Consent order		Order following a hearing		Default order		Total	
	N	%	N	%	N	%	N	%	N	%
Larger urban areas	1 143	81.4	725	84.4	29	85.3	31	81.6	785	84.3
Smaller urban areas	136	9.7	76	8.8	4	11.8	6	15.8	86	9.2
Rural areas	125	8.9	58	6.8	1	2.9	1	2.6	60	6.4
Total	1 404	100	859	100.0	34	100.0	38	100.0	931	100.0

⁴ Categorisation into larger urban, smaller urban or rural areas is based on the designation of urban centres as per the preliminary results for the 2011 census (National Planning Commission, *Namibia 2011 Population and Housing Census Preliminary Results*, Windhoek, Namibia: National Planning Commission, 2012 at 57).

⁵ Categorisation as in footnote 4 (ibid).

12.4 Profile of the beneficiaries

Number of beneficiaries

Maintenance orders were typically made for one beneficiary. The median number of beneficiaries in maintenance orders is similar to the median number of beneficiaries on the applications. This is true when all maintenance orders are analysed together or separately by type of order. **The fact that there is little difference between the number of beneficiaries applied for and the number of beneficiaries covered by the orders shows that complainants are not requesting maintenance inappropriately.**

The maximum number of beneficiaries applied for was 8. The maximum number of beneficiaries on an order was 7. As discussed on page 141, some applications were for beneficiaries over the age of 18 (which are not often appropriate) and not all applications were successful. The number of beneficiaries covered by consent orders ranged from 1-7. The number of beneficiaries covered by default orders ranged from 1-3. The number of beneficiaries covered by orders following a hearing ranged from 1-6. Although the range in the number of beneficiaries for consent orders is broader than for the other types of orders this is probably only because consent orders account for the majority of the orders made.

Table 107: Number of beneficiaries: application compared to type of outcome

Type of order	Number of beneficiaries				
	Number	Median	Mean	Minimum	Maximum
Application – including the complainant	1 565	1	1.5	1	8
Application – excluding the complainant		1	1.4	1	8
All orders – including the complainant	1 102	1	1.5	1	7
All orders – excluding the complainant		1	1.4	0	7
Consent orders – including the complainant	1 025	1	1.4	1	7
Consent orders – excluding the complainant		1	1.4	0	7
Default orders – including the complainant	42	1	1.3	1	3
Default orders – excluding the complainant		1	1.3	1	3
Order following a hearing – including the complainant	35	2	2.0*	1	6
Order following a hearing – excluding the complainant		2	1.8	0	6

* We applied an ANOVA test and a Levine's test to see whether a mean of 2 is statistically significant. The results of these tests suggest that it is not. Instead it is likely to be a result of the small sample size.

Age of beneficiaries

The typical beneficiary in a successful maintenance order was aged 0-12. There is no difference between the ages of beneficiaries mentioned in the applications and the ages of the beneficiaries who were covered by orders. The median age of beneficiaries in successful orders was 6 (mean 6.9; range 0-23). There is some difference in the median age of the beneficiaries for consent orders, default orders and orders following a hearing but the sample sizes differ substantially so we cannot draw conclusions from these differences.

The information about the age of the beneficiary is determined from the maintenance complaint; therefore the age of the beneficiary covered by the order is not necessarily the same as the age of the child at the time the order was made. This information is not recorded in the files and would be time-consuming and unnecessary to calculate. Instead the analysis assesses whether there are any age groups of beneficiaries that are more likely to be successful than others. The results show that this is not the case.

Table 108: Median age of beneficiaries in successful maintenance orders

Type of order	Number of beneficiaries				
	Number	Median	Mean	Minimum	Maximum
All orders	1 252	6	6.9	0	23
Consent orders	1 188	6	6.9	0	20
Default orders	47	3	5.3	0	17
Orders following a hearing	56	5	7.4	0	23

There were 12 cases where applications were made for beneficiaries over the age of 18. Details of the applications for and outcome of these cases are discussed on page 142.

The 1995 maintenance study found that the average age of the beneficiary for whom maintenance was sought was six years old.⁶ It did not assess the average age of beneficiaries covered by maintenance orders.

Table 109: Age of beneficiaries: application compared to type of outcome

Age	Application		All orders		Consent orders		Orders following a hearing		Default orders	
	N	%	N	%	N	%	N	%	N	%
0 to 5	982	45.0	574	45.8	546	46.0	30	53.6	28	59.6
6 to 12	780	35.8	454	36.3	434	36.5	13	23.2	14	29.8
13 to 17	342	15.7	198	15.8	187	15.7	8	14.3	5	10.6
18 to 20	58	2.7	24	1.9	21	1.8	3	5.4	–	
21 and over	18	0.8	2	0.6	–		2	3.6	–	
Total number of beneficiaries	2 180	100.0	1 252	100.0	1 188	100.0	56	100.0	47	100.0
<i>Missing</i>	209	8.7	236	15.9	223	15.8	8	12.5	8	14.5
Total	2 389	100.0	1 488	100.0	1 411	100.0	64	100.0	55	100.0

12.5 Average amount of maintenance ordered

Overall, the median amount of maintenance ordered for the first maintenance order on file was N\$250 (mean N\$315.71; range N\$50-N\$5 500). This is half the median amount that was requested (N\$500).

The total number of maintenance orders in the sample is 1 126, of which 994 were the first order made. Therefore there are only 132 orders in the sample which were made subsequent to the first order. There is no difference in the median value for all orders compared to the first order made, but this may be in part due to the small sample size of subsequent orders.

The Ministry of Gender Equality and Child Welfare provides a state maintenance grant,⁷ a special maintenance grant for children with disabilities⁸ and a foster care grant.⁹ Each of these grants pays N\$250 per child per month. Currently the grant amounts are set by administrative guidelines rather than regulations, although this is set to change with the passage of the Child Care and Protection Bill. Although no grant amounts have been finalised, the draft regulations for the bill propose an

⁶ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 66.

⁷ This grant is paid to a biological parent who earns less than N\$1 000 per month and supports a child under 18 years of age, where the other parent receives either an old-age pension or a disability grant, or is unemployed, or is in prison for six months or longer, or has died (Ministry of Gender Equality and Child Welfare, *Child Welfare Grants in Namibia* (pamphlet), 2010).

⁸ Children with a disability under age 16 are eligible for this grant (ibid).

⁹ This grant is paid to any person who undertakes the temporary care of a child found to be in need of care and placed in this person's custody by court order in terms of the Children's Act 33 of 1960 (ibid).

increase in the grant amounts, setting the state maintenance grant¹⁰ and the foster care grants¹¹ at N\$300 per child per month and the disability grant at N\$700 per child per month. The draft regulations also provide for a short-term emergency grant of N\$200 per child per month.¹² Therefore whilst the average amount of maintenance ordered in maintenance cases is equal to the current government grant amounts, the average amount of maintenance ordered will probably soon be less than the government grant amounts.

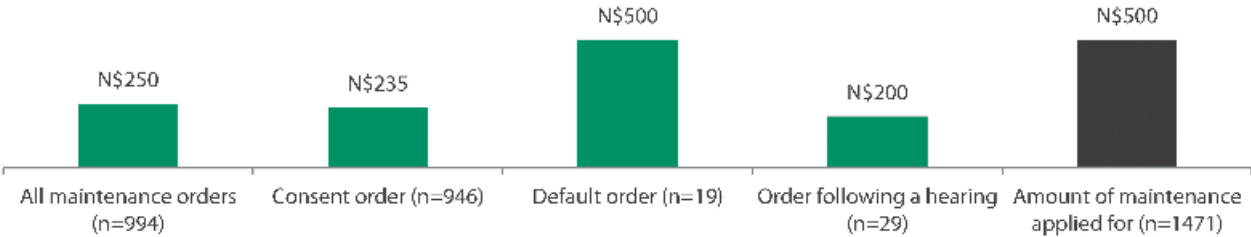
South Africa serves as another point of comparison. The 2004 study on the South African Maintenance Act found that on average, each child received an amount of R272 per month (range R20-R1 800; n=450).¹³ This is similar to the median amount of maintenance ordered in this study sample, even though one might have expected there to be a greater difference given the better economic status of South Africa.¹⁴

Table 110: Average amount of maintenance ordered for the first order made (N\$)

Beneficiary	Number	Median	Mean	Minimum	Maximum
Amount of maintenance applied for	1 471	500	632	50	10 000
All maintenance orders*	994	250	315	50	5 500
Consent order	946	235	305	50	5 500
Default order	19	500	555	150	2 655
Order following a hearing	29	200	490	50	3 900

* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of the separate orders.

Chart 58: Median amount of maintenance ordered



"My father stopped paying the N\$250 but he has a new car and he is adding and making his [house] bigger."

Text message sent to the Legal Assistance Centre

¹⁰ The Child Care and Protection Bill will improve access to the state maintenance grant as eligibility will be extended to two-parent families, children in child-headed households and children in informal "foster care" with extended family members, once they have registered documentation to prove they are caring for the child in question (Child Care and Protection Bill, draft dated 12 January 2012, chapters 8 and 12).

¹¹ Eligibility for this grant will be limited to children in court-ordered foster care. The Child Care and Protection Bill will define foster care as "care of a child by a person who is not the parent, guardian, family member or extended family member in terms of an order of the children's court". Family members or friends who were previously defined as foster parents will be termed kinship carers. The Act defines kinship care as "care of a child by a member of the child's family or extended family". Kinship carers may be eligible for the state maintenance grant once they have registered documentation to prove they are caring for the child in question. (Child Care and Protection Bill, draft dated 12 January 2012, section 1 (Definitions) and chapters 8 and 12)

¹² Draft regulations for the Child Care and Protection Bill, dated February 2012, regulation 131(1).

¹³ Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate's Courts*, Braamfontein: CASE, 2004 at 32.

¹⁴ According to the World Bank, South Africa is also an upper-middle-income country, although the per capita GNI (gross national income) is US\$7 610 compared to US\$5 670 for Namibia (<<http://data.worldbank.org/country/namibia>> and <<http://data.worldbank.org/country/south-africa>>, last accessed 23 September 2013).

What can N\$250/month buy?

The majority of beneficiaries were aged 0-12.

For a child under the age of 1 who has been weaned onto solid foods but is still breastfeeding, N\$250 per month could probably cover most of the monthly cost of disposable nappies but not the cost of fruit and vegetables for purees and would probably not cover any unexpected medical expenses.^a

For a child aged 4, if the child is living in Windhoek and attending a private day care centre, the average monthly cost to attend may be approximately N\$200-500. The maintenance provided may cover this cost but would not then leave any money for food, clothing or medical expenses.

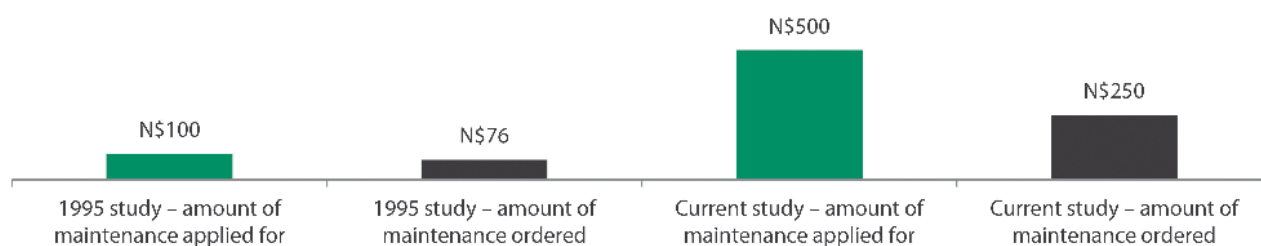
For a child aged 12, the maintenance will contribute to the cost of monthly groceries but will not be enough and will not leave any money for clothing, medical expenses, education-related costs or any other needs of the child.

^a It is harder to estimate the cost of using cloth nappies, and it appears that most people prefer to use disposables.

The 1995 maintenance study also found that the average maintenance ordered was lower than the average amount of maintenance requested. Overall the mean amount of maintenance ordered was N\$109 per month (range N\$15-N\$1 200), with a mean monthly per-child payment of N\$76. Maintenance was ordered for the complainant in only three cases. The median total amount of maintenance applied for was N\$150 (range of N\$20-N\$1 100). The median amount of maintenance requested per child was N\$100 (range of N\$8-N\$1 000).¹⁵

Therefore, since the 1995 maintenance study, the amount of maintenance has only increased by a multiple of three even though more than 10 years have passed. In 1995 there was also a much closer correlation between the amount of maintenance applied for and the amount of maintenance requested.

Chart 59: Amount of maintenance applied for and ordered: 1995 study and current study (N\$)



The 1995 maintenance study also found that in the majority of cases, maintenance payments ordered as a result of a hearing were smaller than those resulting from consent agreements, although this finding must be treated with caution due to the fact there were so many more maintenance orders resulting from consent agreements than from maintenance enquiries.¹⁶ In the current study there was also a difference in the median amount of maintenance ordered by type of order made, but the large difference in sample size (n=19 to n=946) means that a statistical comparison would not be valid.

Information about the amount of maintenance ordered can also be subdivided into the categories shown in Table 111. Given the small number of default orders and orders following a hearing, this information has been calculated for all orders combined.

¹⁵ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 69 and 92.

¹⁶ 72% of the files contained a consent order versus 5% of the files which contained an order following a hearing (D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 84 and 94).

Table 111: Comparison between application and first maintenance order by type of beneficiary (N\$)

Application or order	Beneficiary	Number	Median	Mean	Minimum	Maximum
Application	Complainant only	109	500	805	100	4 000
Order	Complainant only	55	250	329	100	1 000
Application	Beneficiary/ies excluding complainant	1 375	500	584	50	7 000
Order	Beneficiary/ies excluding complainant	949	200	304	50	5 500
Application	All beneficiaries*	1 471	500	632	50	10 000
Order	All beneficiaries*	994	250	316	50	5 500

* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

Table 112: Average amount of first maintenance ordered: consent orders (N\$)

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant	52	250	325	100	1 000
Maintenance for beneficiaries (excluding complainant)	903	200	295	50	5 500
Maintenance for all beneficiaries*	946	235	306	50	5 500

* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

Table 113: Average amount of first maintenance ordered: default orders (N\$)

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant only			NA		
Maintenance for beneficiaries (excluding complainant)	19	500	556	150	2 655

Table 114: Average amount of first maintenance ordered: orders made following a hearing (N\$)

Beneficiary	Number	Median	Mean	Minimum	Maximum
Maintenance for complainant only	3	300	400	100	800
Maintenance for beneficiaries (excluding complainant)	27	200	442	50	3 900
Maintenance for all beneficiaries	29	200	490	50	3 900

* In some cases only this information provided, therefore the average maintenance for all beneficiaries is not a sum of maintenance for the complainants and maintenance for the beneficiaries.

CASE STUDY

An example of negotiation towards an agreed amount of maintenance adapted from a transcript of a maintenance hearing before a magistrate

Both parties were present at the hearing. The complainant, who was the children's mother, requested N\$250 per child for two children aged three and six. The children's father offered to pay N\$250 for both children. The complainant did not accept this offer, explaining that the defendant earns N\$3 200 per month whilst she earns N\$700 per month. The complainant suggested N\$300 for both children. The mother presented details of some of the expenses she incurs for the children such as N\$170 for the School Development Fund and N\$70 for the 3-year-old to attend kindergarten (total N\$240). The magistrate ordered the defendant to pay N\$270 for both children (N\$135 per child).

This example illustrates how the amount ordered is often less than the amount initially requested by the complainant but is higher than the amount proposed by the defendant.

"I just want to find out, if the father of my baby gets N\$20,000 per month, how much maintenance can he give me?"

Text message sent to the Legal Assistance Centre

Median amount of maintenance ordered per beneficiary for the first maintenance order

Table 115 shows the median amount of maintenance ordered per beneficiary for the first maintenance order. It shows that the greater the number of beneficiaries, the lower the amount of maintenance ordered per child. However the findings must be treated with caution due to the small sample size.

Table 115: Median amount of maintenance ordered per beneficiary for the first maintenance order (N\$)

Information source	Beneficiary									
	Complainant (n=109)	Beneficiary 1 (n=1 340)	Beneficiary 2 (n=388)	Beneficiary 3 (n=111)	Beneficiary 4 (n=44)	Beneficiary 5 (n=19)	Beneficiary 6 (n=10)	Beneficiary 7 (n=3)	Beneficiary 8 (n=1)	Only total recorded (n=1 471)
Applied for	500 (100-4000)	400 (50-6500)	250 (50-3500)	200 (50-700)	200 (50-700)	200 (100-700)	237.50 (100-700)	150 (100-200)	100	500 (50-1000)
	Consent maintenance orders (n=52)	Beneficiary 1 (n=881)	Beneficiary 2 (n=232)	Beneficiary 3 (n=56)	Beneficiary 4 (n=22)	Beneficiary 5 (n=9)	Beneficiary 6 (n=2)	Beneficiary 7 (n=1)	Beneficiary 8	Only total recorded (n=25)
Default maintenance orders	250 (100-1000)	200 (25-2500)	150 (25-5000)	127.50 (33-400)	100 (50-300)	150 (50-300)	81.50 (80-83)	80.00	NA	400 (100-1500)
	Complainant (n=18)	Beneficiary 1 (n=16)	Beneficiary 2 (n=3)	Beneficiary 3 (n=3)	Beneficiary 4	Beneficiary 5	Beneficiary 6	Beneficiary 7	Beneficiary 8	Only total recorded
Maintenance orders following a hearing	N/A	300 (100-2655)	175 (100-300)	100 (100-200)	N/A	N/A	N/A	N/A	N/A	NA
	Complainant (n=3)	Beneficiary 1 (n=23)	Beneficiary 2 (n=13)	Beneficiary 3 (n=3)	Beneficiary 4 (n=1)	Beneficiary 5	Beneficiary 6	Beneficiary 7	Beneficiary 8	Only total recorded (n=4)
	300 (100-800)	150 (50-1300)	150 (25-1300)	200 (25-1300)	200	N/A	N/A	N/A	N/A	575 (120-2000)

Median amount of maintenance ordered per year for the first maintenance order

When analysed by year, the change in the amount of maintenance ordered is variable. Whilst there is no change between 2005 and 2006, there is a 25% increase between 2006 and 2007 and a 16.7% increase between 2007 and 2008. Data over a greater number of years is needed to see whether the increase over this three-year period is a persistent pattern. It is a positive finding that the increases by year are greater than inflation for two of the years, but difficult to assess whether this is a general trend over such a short time.

The 1995 study did not assess the amount of maintenance ordered by year, although the study did assess the amount of maintenance applied for each year as reported in section 8.7.¹⁷

Table 116: Median amount of maintenance ordered per year for the first maintenance order for beneficiaries under the age of 18 (N\$)*

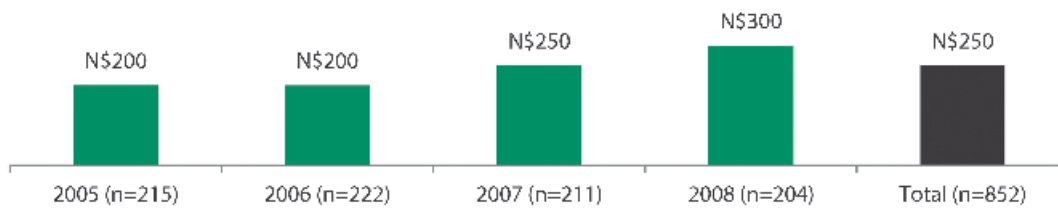
Year	Number	Median amount ordered	Percentage increase	National inflation**	Number	Median amount applied
2005	215	200	–	2.2	334	500
2006	222	200	0	5.1	375	500
2007	211	250	25	6.7	383	500
2008	204	300	16.7	10.3	379	500
Total	852	250	–	–	1 471	500

* The data set by different type of orders is too small to yield any meaningful results if split by year.

** Unpublished data, <NEPRU_inflation_Jan 1973_to June 2009.xls>, accessed 11 June 2009 (website no longer active; data on file).

¹⁷ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

Chart 60: Median amount of maintenance ordered per year for the first maintenance order for beneficiaries under the age of 18



Median amount of maintenance ordered for the first order by rural/urban residence of the complainant

As with the analysis of the amount of maintenance requested by rural/urban residence, there is little difference by residence for the amount of maintenance ordered. This is true for the residence of both the complainant and the defendant. Furthermore, as the proportion of people living in smaller urban or rural areas represents only one-fifth of the complainants and less than one-quarter of defendants, we cannot draw any firm conclusions from this information.

12.6 Maintenance orders containing special forms of maintenance

12.6.1 Orders for contributions in kind

The option of making a maintenance order for contributions in kind was an innovation of the 2003 Act. The purpose of this provision was to assist in instances where the defendant is able to provide support for the child but not as a financial contribution. For example a farmer may be able to provide food rather than financial support. The Act states that “a maintenance order may direct that payment be made in kind by specified goods or livestock, for all or some portion of the settlement of amounts already owing or the future payment of instalments”.¹⁸

A minority of orders contained an order for payments in kind (12/1 126; 1.0%) or for in-kind payments and specified financial payments (a further 17 files; 17/1 126; 1.5%). All were made in consent orders. Because in-kind payments are specific to the situation, the court is unlikely to make a default in-kind payment order without knowledge that the defendant will be able to fulfil the order. It is unclear why there are no in kind payments in orders following a hearing – although since the total number of orders following a hearing is small, this may just be a product of the small sample rather than a meaningful finding.

Chart 61: Orders for in-kind payments*

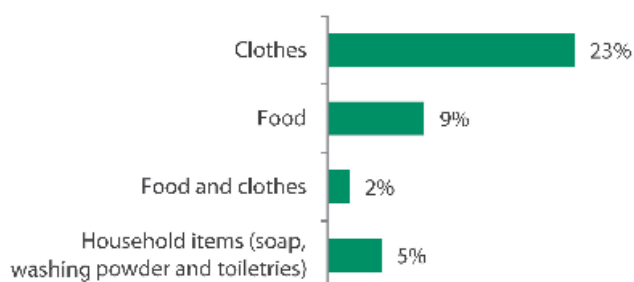


Table 117: Orders for in-kind payments*

Form of payment	Frequency – consent order
Clothes	23
Food	9
Food and clothes	2
Household items (soap, washing powder and toiletries)	5
Total	39

* Multiple payments were made in some orders

¹⁸ Maintenance Act 9 of 2003, section 17(4).

Insight into why there were so few instances of in-kind contributions overall was gained through interviews with the court officials. Two magistrates interviewed at one court explained that they always try to make a maintenance order for cash as “*maintenance grants should be for today*”, their meaning being that the complainant should receive the maintenance without delay. They explained that sometimes defendants offer sheep as payment instead of money; however, in reality the sheep are only very small lambs and it can take up to two years before the value of the animal can be realised. In the meanwhile, there is no financial support for the child. The maintenance officer at another court said that “*it is much harder to keep track of [these payments] and men default on those payments more, in fact always. For instance if they agree to give cattle, women don’t have anywhere to keep them or they go into her brother’s herd and the children don’t benefit.*” However, the maintenance officer at one court gave the example of where a defendant had two cars. The defendant agreed that one of the cars could be used to transport the child. This is a form of in-kind payment.

Contributions in kind were not permitted under the 1963 Act, so information on this variable is not reported in the 1995 study.

12.6.2 Orders for specified payments to third parties

The Maintenance Act also allows for all or part of a maintenance payment to be made to a specific person or institution for a purpose specified in the order. For example, the defendant may be asked to pay school-related costs directly to the school, or put a child on his or her medical aid scheme.¹⁹

Only a minority of orders contained an order for specified financial payments (49/1 126; 4.4%). Three orders following a hearing contained provisions for specified payments (sometimes for more than one type of specified payment). As expected, no specified payments were not made in default orders. Orders for the payment of School Development Fund contributions were most common, followed by payments for medical costs.

Chart 62: Orders for specified financial payments*

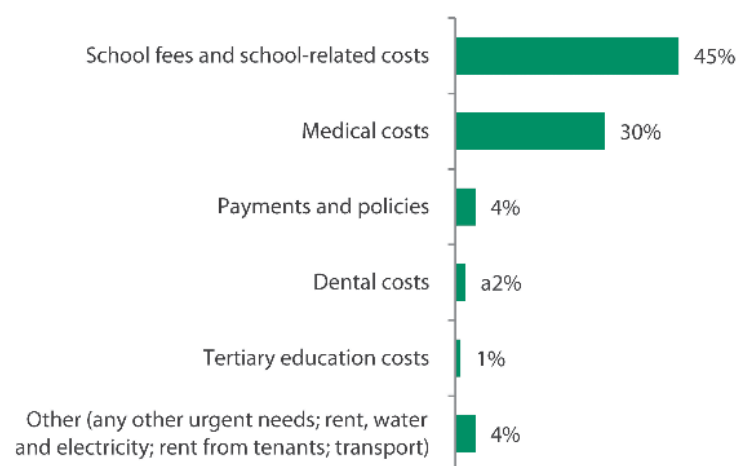


Table 118: Orders for specified financial payments*

Form of payment	Frequency – consent order
School fees and school-related costs	45
Medical costs	30
Payments and policies	4
Dental costs	2
Tertiary education costs	1
Other (any other urgent needs; rent, water and electricity; rent from tenants; transport)	4

* Multiple payments were made in some orders

12.6.3 Orders for the payment of pregnancy- and birth-related expenses

We identified nine applications for pregnancy and birth-related expenses (see page 170). Two applications were discontinued (one was withdrawn, the complainant and defendant absent in the second). In the remaining seven cases, **no pregnancy- and birth-related expenses were ordered.** In some cases the court may have decided that the amount of maintenance ordered was sufficient to cover these costs, although this was not specified and the amount of maintenance ordered in each case was lower than the amount of maintenance requested.

¹⁹ Maintenance Act 9 of 2003, section 17(2)(e).

12.7 Frequency of payments (weekly/monthly)

The vast majority of orders were for payments to be made on a monthly basis (845/1126; 75.0%; data missing from 275 orders). Orders for weekly payments were made in only 0.5% of the sample (6/1126). All of the weekly orders were consent orders. This is to be expected given that the majority of orders were consent orders (92.5%). Orders for monthly maintenance payments are logical given that most people are paid on a monthly basis and items such as rent and bulk food shopping are also often paid or purchased on a monthly basis.

The frequency of the payments in the orders is similar to that applied for, as in all but one of the applications, the applicant requested monthly payments (information missing in 616 of the applications).

The 1995 study did not report the frequency of payments.²⁰

Chart 63: Frequency of payment for maintenance orders (n=1 126)

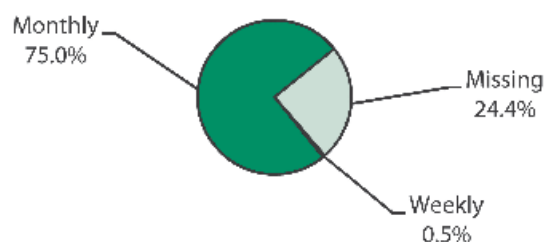


Table 119: Frequency of payments for maintenance orders

Type of order	Weekly	Percentage of total number of orders (n=1 126)	Monthly	Percentage of total number of orders	Data missing
Consent orders	6	0.5	779	69.2	256
Default orders	0	0	33	2.9	11
Orders following a hearing	0	0	33	2.9	8
Total	6	0.5	845	75.0	275

12.8 Where and to whom the payments are made

The Maintenance Act states that a maintenance order “*must specify the person to whom or organisation, financial institution or other institution to which the contributions may be made*” and “*must, subject to rules or regulations made under this Act, specify the manner in which the contributions may be made*”.²¹ The regulations do not contain any further details. The payment options under the Act are broader than in the 1963 Act which did not allow payments to be made directly to the beneficiary. Under the 1963 Act payments had to be made directly to the court and collected by the appropriate person.

Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, the majority of payments were still made directly to the court.

The order also provides a space for naming whom the payment is to be in favour of. In the majority of cases the order stated that the payment was either in favour of the beneficiary (544/1054; 51.6%) or the complainant (465/1054; 44.1%). Given that so few orders contained the complainant as one of the beneficiaries, it appears that magistrates complete this form differently according to their understanding – in many cases the payments made to the complainant to use for the beneficiary.

²⁰ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995.

²¹ Maintenance Act 9 of 2003, section 17(2)(b)-(c).

Table 120: Person to whom the payment must be made

Person to whom the payment must be made	All orders		Consent orders		Default orders		Maintenance orders following a hearing	
	N	%	N	%	N	%	N	%
Clerk of the Court	898	89.3	831	89.0	37	90.2	30	96.8
Complainant	84	8.3	80	8.6	4	9.8	0	0.0
Financial institution	12	1.2	11	1.2	0	0.0	1	3.2
Other person	6	0.6	6	0.6	0	0.0	0	0.0
Beneficiary	4	0.4	4	0.4	0	0.0	0	0.0
Organisation	2	0.2	2	0.2	0	0.0	0	0.0
Total	1 006	100.0	934	100.0	41	100.0	31	100.0
<i>Missing</i>	120	10.7	107	10.3	3	6.8	10	24.4
Total	1 126	100.0	1 041	100.0	44	100.0	41	100.0

12.9 How long it takes to obtain a maintenance order

Time between maintenance complaint and date the magistrate signs the order

Overall, the median time between the date the maintenance complaint was made and the date the magistrate signed the order was 56 days (mean 88.8 days; range 0-1 602 days). There is little difference between the timelines for signing consent orders, default orders and orders following a hearing. This suggests that there is no particular type of order which produces a faster resolution than the others.

Table 121: Time between date maintenance complaint was made and date the magistrate signed the order

Type of order	Number	Median	Mean	Minimum	Maximum
All orders	664	56	88.8	0	1 602
Consent order	628	56	88.7	0	1 602
Default order	16	53	114.3	16	994
Order following a hearing	20	47	71.5	0	266

Time between date the magistrate signs the order and date the payments start

The median time between the date the magistrate signed the order and the date the first payment was to start was 23 days (mean 24.2 days; range 0-84 days). There is only a small difference between the timelines for the first payment for consent orders, default orders and orders following a hearing. The timeline is shortest for orders following a hearing although there is a big difference between the sample size for orders following a hearing compared with consent orders. It is possible that during the hearing, the magistrates discuss with the parties when the payments can start.

Table 122: Time between date magistrate signs the order and date the payments start

Type of order	Number	Median	Mean	Minimum	Maximum
All orders	652	23	24.2	0	84
Consent order	616	23	24.4	0	84
Default order	16	26	25.4	0	42
Order following a hearing	20	16	16.9	0	38

“Where the interests of minor children are at stake and where every delay in the finalisation of an ... enquiry prejudices those interests, the maintenance officer should make every effort to ensure that the enquiry is expeditiously proceeded with.”

Nguza v Nguza 1995 (2) SA 954 (Tk GD)

Considering these two timelines in combination, the typical successful maintenance complainant will receive her first maintenance payment 79 days after making an application at the court – in other words, after a wait of 2-3 months.

Timeline for service of consent orders and default orders to the defendant

When a consent order or a default order has been made, it must be served on the defendant. **The vast majority of consent orders were signed by the defendant, signed by the magistrate and re-served on the defendant on the same day (656/666; 98.5%).** For the 31 orders that were not signed by the defendant and magistrate on the same day, 19 were signed within 10 days, three with 11-20 days, three within 21-30 days and six within 31-91 days.

Unfortunately, for over half of the default orders made there is no return of service. For the orders that were served, 12 were served within 1-30 days. Five were served either within 31-51 days and three were served over 52 days later – the longest to be served taking 447 days.

In both of these scenarios, in the extreme cases where service takes an unusually long time, maintenance payments may not actually start on the date indicated in the order. However, these problematic cases involving long delays in service of the consent order or default order appear to be rare.



Table 123: Time between the date the defendant signs the consent order and the date the magistrate signs the consent order (days)

Interval	Frequency	Percentage
0 days	828	96.4
1-10 days	19	2.2
11-20 days	3	0.3
21-30 days	3	0.3
31-91 days	6	0.7
Total	859	100.00
Missing	182	17.5
Total	1 041	100.0

Table 124: Time between the date the defendant signs the consent order and the date the final consent order is served on the defendant (days)

Interval	Frequency	Percentage
0 days	656	98.5
1-10 days	7	1.1
11-20 days	2	0.3
21-30 days	1	0.2
Total	666	100.00
Missing	375	36.0
Total	1 041	100.0

Table 125: Time between the date the magistrate signs the default order and the date the order was served (days)

Interval	Frequency	Percentage
1-10 days	6	30.0
11-20 days	2	10.0
21-30 days	4	20.0
31-51 days	5	25.0
More than 52 days	3	15.0
Total	20	100.00
Missing	24	54.5
Total	44	100.0

12.10 Application for substituting or setting aside a default maintenance order

A special procedure applies if a defendant wishes to oppose a default order. The defendant may apply within 10 days of being served with the order for it to be substituted or set aside. The court may consider such an application after the expiry of 10 days if there is good reason to do so.

When the defendant opposes the default order, the defendant must give notice to the complainant at least 14 days before the day on which the application will be heard.²² The complainant may, before or at the hearing, consent in writing to the application to vary or set aside the order and submit this consent to the maintenance officer.²³

If a hearing is held (where the defendant opposes the default order and the complainant does not consent) the court may call upon the defendant and complainant to provide evidence in support and rebuttal of the application. The court must then consider the evidence and decide whether to confirm, vary or set aside the default order. Alternatively the court may order that a maintenance enquiry be held.²⁴

A total of five files contained an application to vary or set aside a default order. Although this is a small number of applications, given that there were only 44 default orders on file, this means **one in 10 recipients of a default order opposed the order** (5/44; 11.4%). This rate is probably realistic given that the defendant has not previously given his or her information to the court and may now wish to do so.

Three of the applications were for the order to be set aside, while two were for the order to be varied.

- In the three cases where the request was for the order to be set aside, one was because the beneficiary was over the age of 18, and another because the defendant was disputing paternity. The third case contains no details. In the case of the child over the age of 18, the complainant was requesting maintenance because the child was still studying. Although the defendant initially disputed the order, he eventually agreed to pay maintenance. We do not know the outcome of the case with the disputed paternity test because there is no further information on file. The file was transferred between courts approximately one year later.
- In the two cases where a variation was requested, each request was for the amount of maintenance to be lowered. The defendants asked to pay a lower amount of maintenance on the grounds that they could not afford the amount of maintenance ordered. In both cases the defendants asked for the amount of maintenance paid to be halved; in one case the defendant requested a decrease of the total from N\$400 to N\$200, and in the other to pay N\$400 for both children instead of N\$400 per child. In each case the changes requested by the defendant were made.

Although the Act states that the defendant must inform the complainant of the application,²⁵ only two of the four files contained reference to this. In these two files, a copy of the notice that should be given to the complainant was filed. However this still does not confirm whether or not the complainant received the notice. Given the small sample size, we cannot determine the process is working in practice.

There is no comparable data from the 1995 study because default orders were an innovation of the 2003 Act.

²² Maintenance Act 9 of 2003, section 19(4-7).

²³ Id, section 19(10).

²⁴ Id, section 19(8-9).

²⁵ Id, section 19(4-7).

Summary of information about maintenance orders

- Approximately two-thirds of complaints result in an order.
- The majority of files which contained a maintenance order contained a single order. Other files contained a series of orders, probably in respect of requests for changes to the original order.
- The vast majority of orders were consent orders, with the remainder consisting of similarly small proportions of default orders and orders following a hearing.
- The typical successful complainant was 31 years of age. The typical defendant covered by a successful maintenance order was 35 years of age.
- The typical complainant and defendant in a successful maintenance order were Damara>Nama- or Oshiwambo-speaking, and lived in a larger urban area.
- Maintenance orders were typically made for one beneficiary.
- The typical beneficiary covered by a successful maintenance order was aged 0-12.
- The median amount of maintenance ordered for the first maintenance order on file was N\$250 per child.
- A minority of orders contained an order for contributions in kind or payments directly to third parties for a specific purpose. No pregnancy and birth-related expenses were ordered.
- The vast majority of orders were for payments to be made on a monthly basis.
- Although the 2003 Act allows payments to be made directly to the beneficiary, or paid to an organisation or institution such as a bank or a post offices savings account, the majority of payments were still made directly to the court.
- The median time between the date the maintenance complaint was made and the date the magistrate signed the order was 56 days. The median time between the date the magistrate signed the order and the date the first payment was to start was 23 days. This suggests that the typical maintenance complainant will receive her first payment some 2-3 months after making the application.
- Only one in 10 recipients of a default order applied for it to be varied or set aside.

12.11 Identifying information on file with maintenance orders

Photographs and identification documents

A maintenance officer may request the court to order that photographs or a copy of the identification document of the defendant are attached to the order.²⁶ The maintenance officer must endorse or copy the personal particulars of the defendant onto the back of the photographs. One copy of the photograph should be kept in the maintenance file, the other attached to the record of payments. A copy of the photograph may be provided to anyone executing a court order or serving a document on the defendant.²⁷

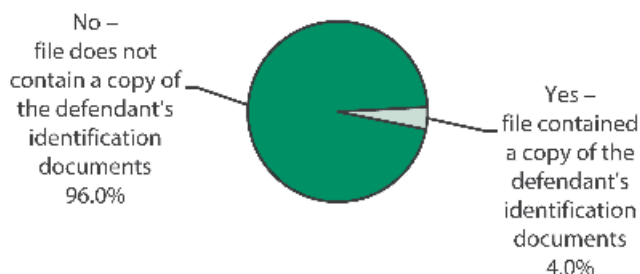
These provisions were innovations of the new Act and were intended to make it easier to enforce maintenance orders; if court officials have a photograph of the defendant, the defendant cannot pretend to be someone else when an official tries to serve court documents. However, **only four percent of the files (67/1 687; 4.0%) contained identification documents belonging to the defendant and less than 1% (14/1 687; 0.8%) contained a photograph of the defendant.** Of these, only two had the details of the defendant endorsed or copied on the back of the photograph. It is to be expected that more files had information about the defendant's ID than a photograph as it is probably easier for the defendant to produce an identification document to be copied compared to producing a photograph.

²⁶ Maintenance Act 9 of 2003, section 48.

²⁷ Maintenance Regulations, regulation 27.

Despite the small sample identified, all of the courts except for Swakopmund had at least one file containing a copy of the defendant's identification document. Photographs were contained in files from 7 of the 18 courts.²⁸ **The low number of files containing either piece of information suggests that the practice of filing photographs or copies of identification documents is not common at the courts. We recommend that the Ministry of Justice send a circular to the courts to remind court personnel that they can keep photographs and copies of identification documents of the defendant on file and to explain why this may be useful in practice.**

Chart 64: Does file contain a copy of the defendant's identification documents?



Summary of identifying information on file with maintenance orders

Only four percent of the files (67/1 687; 4.0%) contained identification documents belonging to the defendant and less than 1% (14/1 687; 0.8%) contained a photograph of the defendant.

12.12 Transfers of maintenance files between courts

A complainant and a defendant both have a duty to notify the court of certain changes that occur while a maintenance order is in place.

If the defendant changes his/her place of residence or employment, he/she must notify the court where the maintenance order is registered within seven days.²⁹ The defendant must also notify the person, organisation or institution to whom the payment is made if this is not the maintenance court.

If the complainant changes his/her place of residence, he/she must notify the maintenance officer at the maintenance court which has jurisdiction in the area where the complainant now resides within thirty days. When the clerk of the court where the case was initially registered receives notice that the complainant has moved, the clerk must transfer the file to the new court. The clerk must retain copies of orders, judgements and records of payments and send the original documents by hand or registered post to the clerk of the new court. The clerk at the new court must number the case with the next consecutive number for maintenance cases for the year during which it was received.³⁰ The clerk at the new court must notify the defendant and any other person who is required to pay or deliver any payment or money to the complainant.

Our sample contained 51 notifications of change of address. The complainant changed address in 49 files and there was one notification of change of address by the defendant. In two cases the complainant changed address twice.

Whilst we noted 51 notifications of change of address, there were 53 files that were transferred between the courts (53/1 687; 3.1%; it is likely that two files did not contain the notification of change of address). Three files involved two transfers. A similar finding was identified in the 1995 study

²⁸ Mariental (1), Okakarara (1), Oshakati (6), Rehoboth (1), Rundu (1), Swakopmund (1) and Tsumeb (3).

²⁹ Maintenance Act 9 of 2003, section 17(5).

³⁰ Id, section 24(1) and regulation 14.

which found that transfers of maintenance orders from one magisterial district to another took place in only about 1% of cases.³¹

The clerks at a number of courts complained about problems associated with transferring files. The clerk at the Gobabis court complained that it can take approximately two months to receive a file. He said that this was a particular problem with the Katutura court. The clerks of the Ondangwa and Rehoboth courts also stated that transfers from the Katutura office are problematic.³² One clerk noted that “sometimes people give the complainant her own file and tell her to take it herself to the other court”. This is contrary to the transfer process stipulated in the Act and regulations.

A further problem, noted by the clerks of the Karasburg and Keetmanshoop courts, is that when a transferred case has an order for the attachment of wages, it may take the employer some time to arrange for the payments to be transferred from one court to the other court. During the intervening period, the payments continue to be made to the original court and the money must then be transferred. The clerk at the Mariental court noted that this can be a problem, saying that it can take 3-6 months for money to be paid to the correct court, and complainants suffer due to this delay. The maintenance officer at the Oshakati court noted a similar concern, suggesting that this is a problem experienced across the country.

We recommend that the Ministry of Justice review the steps taken when transferring files to address these problems.

I don't know how I'll make these maintenance payments. My monthly car payments are very expensive. I also owe money for the groceries I sell in my shop.

Your child's needs have to come before your fancy car. But the court will try to make sure that you are able to continue with your business.



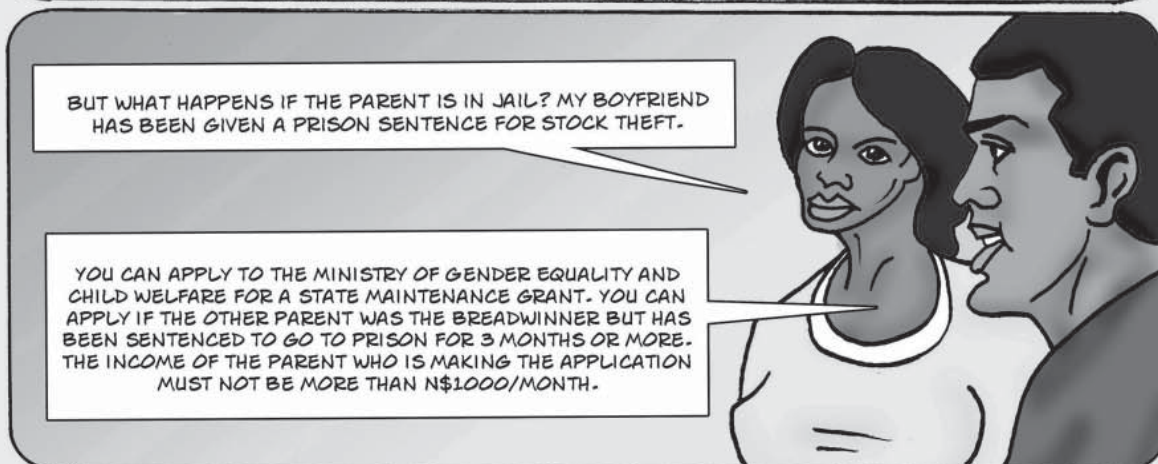
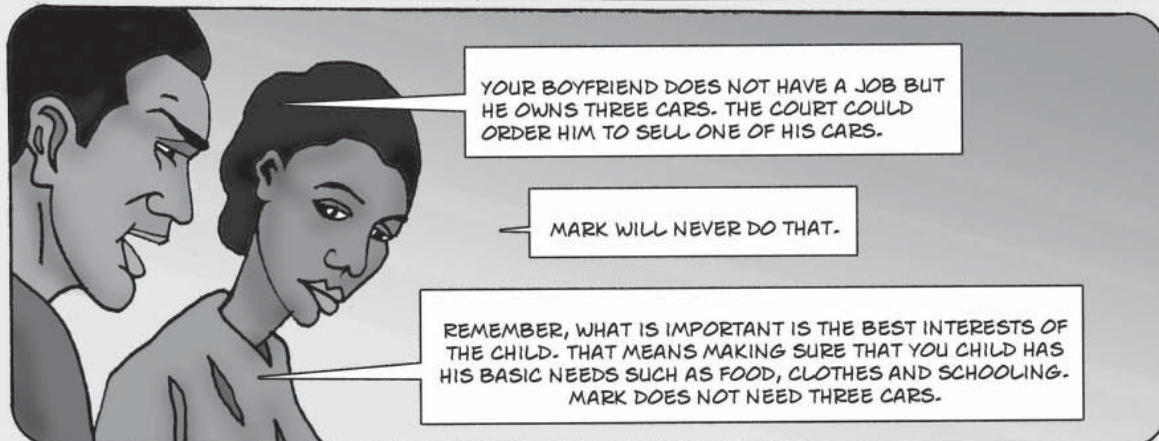
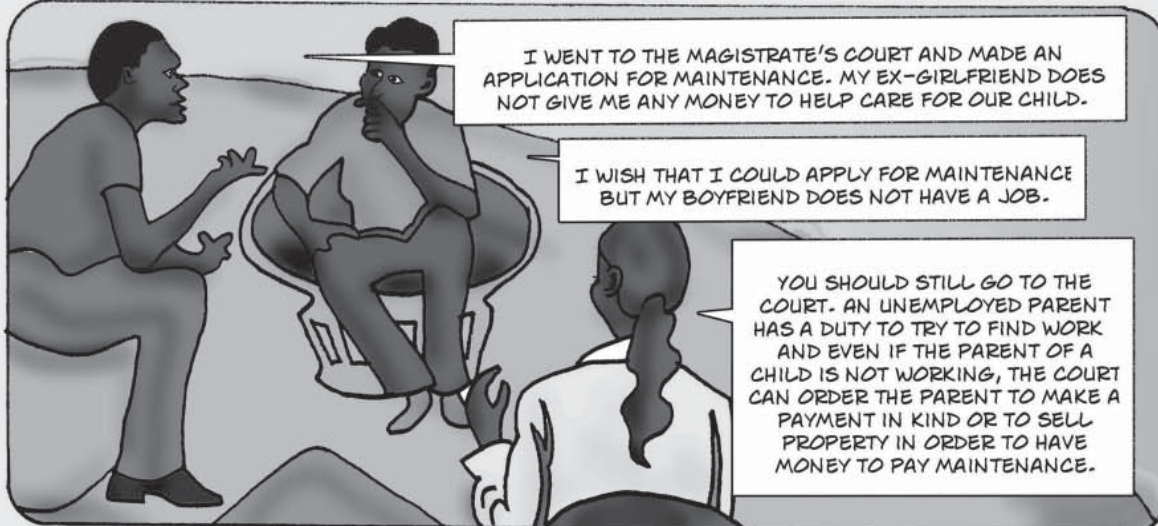
I am happy that I am able to help you now, after all the support you gave me when I was growing up.



³¹ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 126.

³² Although significant delays are not reasonable, it should be noted that the Katutura court deals with over 1 200 maintenance complaints per year compared with approximately 150-200 complaints per year at the Gobabis, Ondangwa and Rehoboth courts.

Can I claim maintenance if the father of my child is not working?



Gender Research & Advocacy Project,
Legal Assistance Centre. Windhoek Namibia 2010



Development Cooperation
Ministry of Foreign Affairs



One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.



Chapter 13

CHANGES TO MAINTENANCE ORDERS

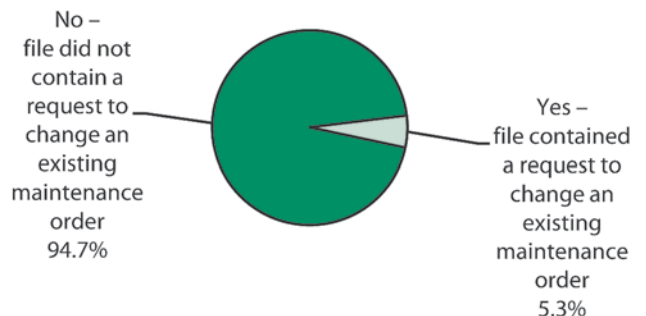
Parties to a maintenance complaint can ask the court to suspend, substitute or discharge an order.¹ A request to change an existing order should be made on a form that is the same as or substantially similar to Form B contained in the regulations (see Form B excerpt next page). When changes are made to a maintenance order, the clerk of the court must amend the register.²

A maintenance officer may also vary the manner of the maintenance payment or set aside an order for payments in kind. If a maintenance order is varied, the maintenance officer must inform the complainant and the defendant, and if relevant, the employer or person paying debts directly to the court.³

A very small minority of files contained a request to change an existing order (89/1 687; 5.3%). The majority of these files contained one request for change (76/89; 85.4%). In 13 files (13/89; 14.6%) there were two requests for change, resulting in a total of 102 applications for change being included in the sample (102/1 687; 6.0%). Given the small number of files, all the data in this section should be treated with caution.

Although only a small number of requests to change a maintenance order were recorded, as noted in chapter 8, some new maintenance complaints might have been better made as requests to change an existing order because the defendant had been paying maintenance in terms of a maintenance order in the past. It is also possible that some requests for change were made to orders in the sample but the details were not recorded. We can make this supposition because our sample shows that some files contained a second order substituting an original order even though there is no formal request for change on file. This often

Chart 65: Did the file contain a request to change an existing maintenance order? (n=1 687)



“There must be a good reason for requesting the change. If there is no reason for changing the initial maintenance order, then the maintenance officer will not arrange an enquiry. The reason for the change will usually involve changed circumstances, but there could be some other ‘sufficient cause’.”

Beukes v Beukes 1995 (4) SA 429 (OPA)

¹ Maintenance Act 9 of 2003, section 16(5).

² Id, section 23.

³ Id, section 22 and Regulations for the Maintenance Act contained in Government Notice 233 of 2003 of 17 November 2003, *Government Gazette* 3093 (hereinafter “Maintenance Regulations”), regulation 12.

occurred when the amount of maintenance to be paid was increased. As information on why or how the changes were processed is missing, we have included in our analysis only the 89 requests for change that were documented in the files as formal requests for change.

Excerpt from Form B Changes to existing maintenance order

(This information should, as far as possible, be given in order to investigate the complaint)

I, (full name of deponent)
 born on (date) / age
 identity number
 living at
 telephone number
 working at
 telephone number

Hereby *declare under oath/truly affirm as follows:

1. (full name of defendant)
 born on (date) / age
 identity number
 living at
 telephone number
 working at
 telephone number

was ordered by (Court)
 on the day of to pay –

(a) on a *weekly/monthly basis with effect from

Towards the maintenance of myself and/or the following beneficiary(ies) in the sum of –		
N\$	Name of Beneficiary	Born on
N\$	Complainant
N\$
N\$
N\$
N\$

All payments should have been made to
 in favour of

and

(b)

(other contributions, for example medical and dental costs, school fees, fees to tertiary institutions, school clothes, expenses for sport and/or cultural activities, birth expenses and maintenance for children from birth).

A copy of the order is attached.

2. Good cause/reason exists for the **substitution** of the said maintenance order as follows:

(a) A *weekly/monthly payment with effect from in the amount of

N\$	Name of Beneficiary
N\$	Complainant
N\$
N\$
N\$
N\$

[...]

13.1 Who requests the change?

The majority of requests for change were made by the complainant (64.7%; 66/102) with the remainder being made by the defendant (26.5%; 27/102). Information on who made the request to change was not clear in nine (8.8%) cases.

Of the 66 complainants who requested a change, we could determine the probable language group of the complainant (based on the assumption that it is the same person who made the original complaint) in 47 cases. The language groups of complainants involved in cases with a request for change were proportionally similar to the language groups of complaints from the original applications. This is the same as the 1995 study which also found that the language groups of complainants who made requests for change followed the same broad patterns as the language groups involved in all maintenance complaints. This suggests that there is no particular community which has more or less information about this procedure or is more or less likely to utilise the procedure.⁴

The language groups of the defendants involved in cases with a request for change was also broadly similar to the language groups of defendants from the original applications.

The majority of applications to substitute an order were made by the complainant (54/71; 76.1%), with the remaining 23.9% of the applications to substitute an order being made by the defendant (17/71). This result is similar to the 1995 study which showed that the vast majority of substitutions (89%) were requested by the complainant.⁵

The applications to discharge/suspend an order were nearly equally divided between those made by complainants (6/15; 40.0%) and defendants (9/15; 60.0%), with slightly more applications made by the defendant. The 1995 study did not assess applications to discharge or suspend orders. This may be because the Act did not clearly outline the process to do so and so few people applied to the court to discharge or suspend orders.

Chart 66: Type of change requested to a maintenance order (n=102)



Chart 67: Who applied for a substitution of an existing order? (n=71)

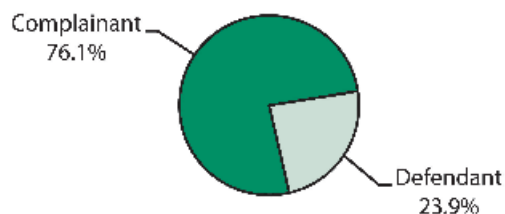
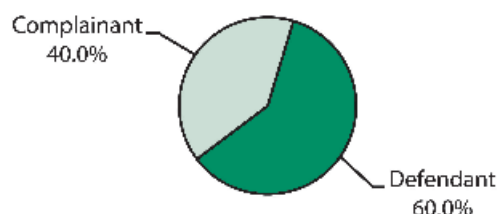


Chart 68: Who applied for a discharge/suspension of an existing order? (n=15)



The results can also be analysed in a different way. Of the requests for change made by complainants, complainants most commonly requested the order to be substituted (81.8%; 54/66). As would be expected, these were almost always requests for increases in the amount of maintenance to be paid;

⁴ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 99.

⁵ Ibid.

only one complainant requested a decrease.⁶ Approximately one in 10 of the applications made by a complainant were for the order to be discharged/suspended (9.1%; 6/66). Two applications requested that the method of payment be changed (2/66; 3.0%).

Of the requests for change made by defendants, **defendants most commonly requested the order to be substituted (63.0% 17/27)** with the remainder of requests being for the order to be discharged/suspended (9/27; 33.3%); only one defendant requested an increase.⁷ The reason for one application was unclear (1/27; 3.7%). The fact that it is more common for the defendant to request a substitution than a discharge/suspension suggests that the option to request a change is not being abused by defendants.

Chart 69: Who requested a change to an existing order? (n=102)

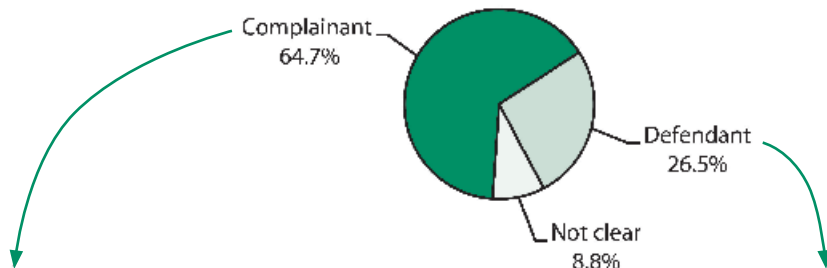


Chart 70: Type of change requested by complainant (n=66)

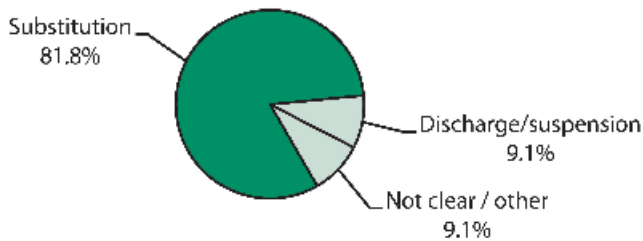
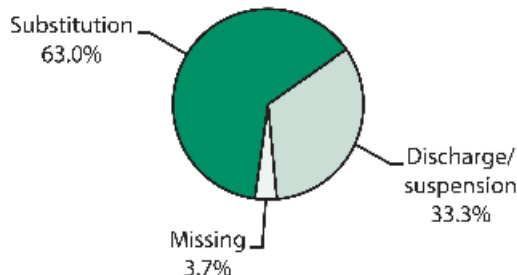


Chart 71: Type of change requested by defendant (n=27)



13.2 What changes are requested?

The majority of applications for change were for the order to be substituted (71/102; 69.6%), whilst a minority of applications for change were for the order to be discharged or suspended (15/102; 14.7%). The nature of the change requested was not clear from the information recorded in respect of 12 applications for change.

Four applications were for requests which should not have utilised the mechanism for requesting changes. In one case the complainant requested the enforcement of a maintenance order made as part of a divorce order. In this case the defendant challenged the complainant’s request for enforcement because he was unemployed. However the court upheld the complainant’s request. In the second case, the complainant requested a change in the method of payment from a deposit into the complainant’s NamPost account to payment to the court. The complainant requested this change as the defendant had made only two deposits into the bank account. In the third case, the complainant requested a once-off payment of N\$120 000. This case is further discussed on page 258. The reason for the request in the fourth file was unclear.

⁶ In this case a consent order was made for N\$300 for one beneficiary. Two months after the order was made, the complainant requested a decrease in the amount of maintenance from N\$300 to N\$150. There is no information as to why this decrease was requested. Two months after this request (four months after the order was granted), the complainant applied to cancel the maintenance order. There is no information as to why the complainant applied for the decrease or closure of the case. It is possible that there was a change in custody.

⁷ In this case the defendant stated that he would no longer contest the paternity of the third child for whom he was paying maintenance. Instead he offered to contribute a further N\$250 to the amount ordered.

As discussed at the start of this chapter, some files contained two requests for changes. There were a variety of reasons for more than one request for change being made. For example, in some cases the complainant applied for two successive increases in the amount of maintenance paid, whilst in others the defendant applied for successive decreases. In other cases the first application was for an increase, the second for the discharge of the order when the beneficiary became self-supporting. Other examples include both a request for a change to the amount of money paid and a request for a change in the means of payment, or a request for change in the amount paid followed by a notification that one of the beneficiaries had died.

Table 126: Type of change requested to a maintenance order and by whom

Number of files	Complainant	Defendant	Missing	Total number and percentage of orders where changes were requested	
				Number	Percentage
Substitution – increase	53	1		54	52.9
Substitution – decrease	1	16		17	16.7
Discharge/suspension	6	9		15	14.7
Other	4	0		4	3.9
Missing	2	1	9	12	11.8
Total	66 (64.7%)	27 (26.5%)	9 (8.8%)	102	100.0

The data from the 1995 study showed similar results. Requests for substitutions were contained in 5.7% of cases (35/618) compared with 4.2% of cases in the current sample (71/1 687). **One of the recommendations in the 1995 report was that “both women and men need to be informed of the possibility of requesting an increase or decrease in a previous maintenance order in light of changed circumstances. This should be explained by court personnel to both parties when the initial maintenance order is made (as is already the practice of some maintenance officers).”⁸ We make this recommendation again in this report.**

The 2004 study on the South African Maintenance Act also found that only a small proportion of the files contained an application for change (11%).⁹ The low number of requests for change identified in the current study shows that there continues to be a need for more public education on the possibility of requesting substitutions. In recent years the Legal Assistance Centre has provided information about specific provisions within the Maintenance Act through the placement of full-page comic adverts in the newspaper about topics such as claiming for pregnancy-related expenses or the possibility of a child making an application. To date the LAC has not focused on the option of applying for a substitution, discharge or suspension of an order but would like to do so in future if resources are available. **We recommend that a simple factsheet or pamphlet that explains the process to apply for a change is developed. Court officials could give this information to both parties to a maintenance complaint during the initial application process to ensure that they are informed from the start.**

Approximately half of the applications for change in the current study were made at the Windhoek Court (54.9%) even though the files from the Windhoek court represent only 17% of the sample. It may be that the Windhoek court is ensuring that parties to a maintenance order are aware that they are able to make changes. Alternatively it may be that the Windhoek court is more accessible for people, whereas people in other areas live further from the court and the cost of travelling to the court, perhaps on numerous occasions, or the difficulty in getting leave from work, outweighs the anticipated benefit from a change that might be made (as discussed in more detail under section 7.1, the majority of people in Khomas live less than 10 km from the Windhoek Magistrate’s Court).

⁸ D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 99.
⁹ Community Agency for Social Equality (CASE), *Implementation of the Maintenance Act in the South African Magistrate’s Courts*, Braamfontein: CASE, 2004 at 36.

Table 127: Courts where applications for change were made

Court	Frequency	Percentage
Gobabis	1	1.0
Keetmanshoop	5	4.9
Mariental	4	3.9
Oshakati	1	1.0
Otjiwarongo	2	2.0
Outapi	1	1.0
Rehoboth	5	4.9
Rundu	9	8.8
Swakopmund	4	3.9
Tsumeb	3	2.9
Walvis Bay	11	10.8
Windhoek	56	54.9
Total	102	100.0

I do not like this decision of the magistrate that I must pay N\$100 a month for my child. I am going to go back to the court and see if I can get another magistrate who will decide differently!

That won't work! You did not appeal against the order at the time. The maintenance court will not change the maintenance order now unless there is a good reason.



13.3 Reasons changes are requested

Approximately two-thirds of the applications for change provided a clear reason for the request (66/102; 64.7%).

The applicant listed a reason for the increase in 39 of the 54 applications for an increase (72.2%). Of the reasons for requesting an increase, nearly half (17/39; 43.6%) specified contributions to School Development Funds or school-related expenses such as transport to school. In nine applications (9/39; 23.1%) the applicant cited a general increase in expenses but did not mention school-related costs and in two applications (2/39; 5.1%) the complainant stated that the defendant had found employment. A range of other individual reasons were also listed. In some applications it appears that the defendant was not making payments and the complainant was really applying for the enforcement of the order by changing where or how the payment was made, and using the opportunity to apply for an increase at the same time.

The amount of maintenance that should be paid has been discussed in a 1998 court case in South Africa, in which the judge clarified that a parent has a duty not only to provide maintenance according to his or her income but maintenance according to his or her earning capacity – “a parent cannot be allowed not to realise the full potential of his/her earning capacity to the detriment of his/her children who are in need of maintenance”.¹⁰

Eleven of the 17 applications for a decrease listed a reason. Over half of these applications (6/11; 54.5%) stated that the maintenance order was too high in light of the defendant’s responsibilities to support other dependants. For example one defendant informed the court that he had fathered another child, another defendant stated that he had five other children and could not meet his financial obligations, whilst others cited expenses for other children (N\$300-N\$1 900) but did not cite the number of children. In three other applications for a decrease, the defendant applied because he was unemployed or did not have regular employment. The fact that these three defendants applied for a decrease rather than a discharge is a positive finding as it suggests that the defendants are aware of their commitments but know that realistically they cannot provide the amount of maintenance required by the order at the time and so ask for a decrease but not cessation of the maintenance payments.

¹⁰ “An inability to pay maintenance or to pay the full amount required for maintenance must be real and not apparent. A parent cannot be allowed not to realise the full potential of his/her earning capacity to the detriment of his/her children who are in need of maintenance. In a given case the facts may amply demonstrate that a parent can earn more than he/she is actually earning and that it would be a matter of relative ease for him/her to so adjust his/her position as to be able to earn a higher income. In such a situation the courts would be failing in their duty if they were to accept ... that the parent is unable to pay maintenance or to pay maintenance to the extent of the children’s needs.” (Mgumane v Setemane 1998 (2) SA 247 (Tk D))

Reasons for applications to discharge or suspend a maintenance order were listed for all applications reviewed (n=15). In four of the applications, the defendant cited unemployment. By itself, this is not a reason to discharge an order. The 1995 Maintenance Study noted that “*many members of the public and court officials seem to be under the impression that it is impossible to make a maintenance order against a respondent who is unemployed*”. However, although “*the assumption that an unemployed respondent will not have the means to pay maintenance is often true ... this assumption should not discourage complainants or the court from proceedings against respondents who are able to pay even in the absence of regular income*”.¹¹ The statement continues to hold true. Furthermore, the Maintenance Act of 2003 was intended to address problems of lack of formal employment as the option to make payments in kind was an innovation of the Act included in an effort to broaden the options a person may have for providing maintenance. However, despite this provision, it seems that some people still think that the court can order maintenance only if the defendant is employed. For example in addition to the formal applications to discharge an order as discussed in this chapter, other files contained records of informal applications to discharge orders. For example one file contained a letter from the defendant informing the court that he is no longer employed because his employer shut down and as a result he is no longer able to pay maintenance. The file does not contain any information as to whether the defendant received a retrenchment package. The defendant did not offer to make other contributions or suggest a timeline for when payments could restart. We do not know the outcome of this case as the file contained only the application for a maintenance order, a consent maintenance order and this letter. In another file, the doctor of the defendant wrote a letter confirming that the defendant had a foot injury which meant that he was disabled and unable to continue working. Again the file does not contain any information as to whether the defendant received compensation and does not contain details about the outcome of the case.

In three cases the application for discharge was made because the parties settled outside of court. Two applications for discharge were made because the beneficiaries were aged 18-21 and were either no longer attending school or were working. In another application, the defendant died and in a fourth, the paternity of the child was in dispute.

Two other applications for discharge were made by the complainant. Unfortunately we can glean little information as to the motivation of these complainants. The files show that one complainant simply stated, “*I don’t want to proceed with the case; [it] concerns family matters,*” whilst the other stated, “*I do not want to proceed with the case anymore.*” In the latter file the defendant was warned to refrain from intimidating the complainant. However it appears that this warning was ineffective given that the complainant withdrew her case. Further discussion of the withdrawal of cases is contained in chapter 11.

These examples show that the applications to discharge an order are made for a range of reasons. Whilst in some cases the application reflects a changing situation (such as the defendant being unemployed or the beneficiaries leaving school and working), there is also some indication that intimidation occurs in some cases. Further discussion on intimidation is also found in chapter 11.

We know why two cases were suspended. In one case it was because the children were staying with the grandparents. In the second case the complainant stated the reason was “*because I am under pressure because of the negative attitude of my husband*”.¹² Whilst there are no further details, this suggests that the complainant was experiencing some form of intimidation.

As noted, some files contained informal records of changes. For example, in some cases the complainant informally applied for a discharge to avoid conflict with the defendant or due to sympathy for the defendant:

¹¹ D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 23.

¹² In this case the complainant had requested maintenance for herself and four children.

“I want to withdraw [my maintenance order] my reason is I am feel pity [for] his father he has a lot of child perhaps he cannot afford.”

“I want to declare I reported my boyfriend on maintenance his name is I want to declare that the maintenance which I reported [I] want to cancel it because my boyfriend is supporting my kids. So I feel that I can withdraw the case”¹³

The files also contained examples of situations where the children were now living with the defendant:

“I am hereby declare under oath that I am the biological mother for ... born in ... at ..., I declare that from today her biological father ... he is the one who is going to take care of the child. The maintenance which was N\$250 is cancelled due to the reason that the child is going to stay with her father. That is all I can declare.”

“I the above mentioned person so hereby declare that I am the complainant in a maintenance case no ... and I would like to withdraw this matter against the respondent The reason why I withdraw the matter is simply that the respondent promised to look after the child. I declare that this information is true and correct.”¹⁴

In one file the complainant withdrew the order because she had married the respondent and they were now *“living under the same roof”*.

Table 128: Reasons for requesting changes in maintenance orders

Change requested	Number of applications stating reason for request
Applied for an increase	39
Reason includes reference to School Development Fund contributions or school-related expenses	17
General increase in expenses	9
Defendant has found employment	2
Other (including defendant has not been paying maintenance so complainant applies for enforcement and an increase; defendant has told complainant to leave the common house; beneficiary added; enforcement of a maintenance order in a divorce order)	11
Applied for a decrease	11
Expenses are too high (other beneficiaries cited)	6
Unemployed	3
One of the beneficiaries died	1
Other (children now staying with defendant)	1
Applied for a discharge/suspension	15
Defendant is now unemployed	4
Settled outside of court	3
Complainant withdraws case / pressure from husband	3
Beneficiary is aged 18-21 and is working	2
Other (defendant died; paternity dispute; children staying with grandparents)	3
Other (applied for a change in the means of payment without a change in the amount of maintenance paid)	1
Total	66
Missing	36 (35.3%)
Total	102

¹³ Sworn declarations from complainants.

¹⁴ Ibid.

CASE STUDIES

The Legal Assistance Centre received the following query by email from the wife of man who was ordered by the court to pay maintenance for children from a previous relationship. The case is an example of a defendant who is considering requesting a change to a maintenance order due to his commitments to all his children. In this instance the client wanted to know whether all children should receive the same amount of maintenance:

Husband remarried, according to divorce order pays maintenance for child. (ok) ([children] receiving N\$450). Has 2 children aged 14 out of wedlock, long before marriage, he has paid for year[s] N\$200 per child and since 2010 is paying N\$350 per child. If one looks at these 3 children (2 of them get N\$350, 1 get N\$450) is this the way it should be?

One parent from the N\$350 child summoned the father to court, magistrate ordered, not even taking in consideration his other 2 children with wife, that he pays N\$500 for clothing, buy toiletries and school fees.

Now, those children get their maintenance and the parents just keep on demanding. My question, is there a way through all of this, so that all children get an equal amount of money, all 5 of them?

We responded that all children have a right to maintenance and the amount provided per child depends on his or her needs and the means of both parents. Therefore it may be that a father pays a different amount of maintenance for each of his children.

We also told the client that the defendant has a reasonable concern if he feels that his commitments to his other children have not been considered. When the amount of maintenance is considered by the court, the court should take into consideration all of the defendant's children as all children have a right to maintenance, regardless of whether they are born inside or outside of marriage.

We suggested that the client ask the court to review the defendant's case if he is concerned that the amount of maintenance ordered is not realistic.

13.4 Average time between initial maintenance complaint and application for change

On average, requests for change were made just over one year after the original order came into effect (mean 15.7 months; n=67; data missing for 35 applications). Given that the cost of living increases each year, requests for near-annual changes in the amount of maintenance paid are realistic. In general, requests for change were made sooner by the defendant than the complainant but the difference was not significant.

As discussed, the majority of requests for change were for increases in the amount of maintenance paid (54/102; 52.9%). **The average timeline for increases in the amount of maintenance paid was 20.3 months (n=39) after the initial order – in other words, just short of two years.** All but one of the applications to increase the amount of maintenance paid were made by the complainant. It may be that complainants are affected by increases in the cost of living but may not have the time or means to apply on an annual basis for an increase in the amount paid.

Applications to discharge or decrease the amount of maintenance paid were made sooner than applications to increase the amount of maintenance paid (discharge: 8.8 months; decrease: 10.9 months; n=11), although the sample size between these groups differs. As discussed, applications for discharge were made almost equally by the defendant and the complainant. All but one of the applications to decrease the amount of maintenance paid were made by the defendant.

In the 1995 report, the Legal Assistance Centre recommended that the maintenance court should be authorised to order automatic increases or decreases in maintenance orders on the basis of rises and falls in the consumer price index. The purpose of this recommendation was to remove the need for complainants to come into court and start the whole process over again in order to obtain an increase in maintenance to compensate for the rising costs of living. This recommendation was supported by magistrates as well as people who use the maintenance courts. However the recommended provision was not included in the 2003 Act. Based on the data identified in this study which shows that few people apply for increases in the amount of maintenance paid despite large increases in inflation in some years, we again recommend that the maintenance court should be authorised to order automatic increases or decreases in maintenance orders on the basis of rises and falls in the consumer price index. As suggested in the 1995 maintenance report, the complainant should be able to complete a simple application form, a copy of which the complainant must arrange to have delivered to the defendant. The increase should be made automatically unless the defendant objects within a set period of time. If the defendant chooses to oppose the application within the set time period, the defendant must be required to submit sufficient evidence to justify the opposition.¹⁵ Such a recommendation is not prejudicial to the defendant as the defendant could apply to the court for a decrease if the increase proved to be too burdensome.

Table 129: Median time between the date the original maintenance order came into effect and the date the request for change was made

Request for change	Number of orders*	Timeline in months
Average timeline for all requests	67/102	15.7
Average timeline for all requests made by complainants	47/66	18.0
Average timeline for all requests made by defendants	20/27	10.3
Applications to discharge – total	15/15	8.8
Applications by complainant to discharge	6/6	8.5
Applications by defendant to discharge	9/9	9.0
Applications to substitute (increase) – total	39/54	20.3
Applications by complainant to substitute (increase)	38/39	20.7
Applications by defendant to substitute (increase)	1/1	6.7
Applications to substitute (decrease) – total	11/16	10.9
Applications by complainant to substitute (decrease)	1/1	2.1
Applications by defendant to substitute (decrease)	10/16	11.7
Other requests for change (1 x enforcement of order; 1 x change of method of payment)	2/2	2.8

* In most cases information on the timeline was not available for all files.

13.5 Dates when applications for change are made

Complainants most commonly requested changes in maintenance orders in the months of February, March, April and August.¹⁶ Given that approximately half of the requests for increase were attributed to school-related costs, the timing of the requests are in line with the reasons cited.

Defendants most commonly requested changes in February and July. As discussed under section 13.3, the most common reason to apply for a decrease was the pressure of other expenses. Therefore, applications in February may be due to the impact of school-related costs on the defendant. Reasons

¹⁵ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 144.

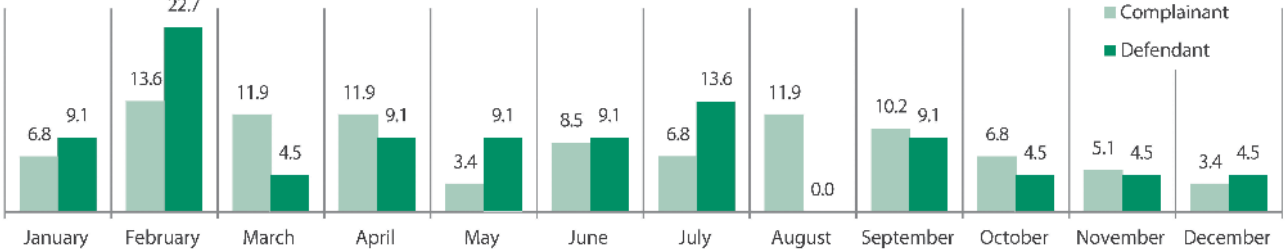
¹⁶ As discussed under section 8.4, maintenance complaints were most commonly made in January and February.

for mid-year applications could be that when children move from primary to secondary school, parents are sometimes required to pay towards the School Development Fund in advance and this cost is often incurred mid-year. Another reason suggested was that the defendant was hoping to receive a salary increase but this did not materialise.¹⁷ These financial pressures may mean that the defendants find themselves unable to meet the demands of the maintenance orders and so request a decrease.

Table 130: Month in which request for change was made

Month	Complainant		Defendant	
	Number of applications for change made during month	Percentage of all applications by complainant	Number of applications for change made during month	Percentage of all applications by defendant
January	4	6.8	2	9.1
February	8	13.6	5	22.7
March	7	11.9	1	4.5
April	7	11.9	2	9.1
May	2	3.4	2	9.1
June	5	8.5	2	9.1
July	4	6.8	3	13.6
August	7	11.9	0	0.0
September	6	10.2	2	9.1
October	4	6.8	1	4.5
November	3	5.1	1	4.5
December	2	3.4	1	4.5
Total	59	100.0	22	100.0
<i>Missing</i>	7	10.6	5	18.5
Total	66	100.0	27	100.0

Chart 72: Month in which request for change was made



13.6 Average age of beneficiary when change is requested

The median age of the beneficiary when the first request for change was made was 7 (mean 8.8; range 0-23; n=109). The median age of beneficiaries covered by successful initial orders was 6 (mean 6.9; range 0-23; n=1 252). This is in line with the finding that the average time between the original maintenance order and the request for change is 15.7 months (see section 13.4).

When the requests for change are sub-analysed, the median age of the beneficiary when an increase was requested was 8, when a decrease was requested was 5.5 and when a discharge was requested was 10.5. This pattern correlates to probable life patterns in some respects; an 8-year-old child will have recently started school and the complainant may be experiencing the impact of increased expenses.

¹⁷ Reasons based on discussion with parents.

Table 131: Average age of beneficiary when request for change is made

Average age	Number of beneficiaries	Median age	Mean age	Minimum	Maximum
Average age of beneficiaries when request for change is made	109*	7	8.8	0	23
Average age of beneficiaries when request for an application for an increase is made	64	8	9.0	0	22
Average age of beneficiaries when request for an application for a decrease is made	14	5.5	4.8	1	9
Average age of beneficiaries when an application for a discharge is made	26	10.5	11.5	2	23
Average age for other requests for change	4	4	4.3	3	6
Information missing	1	3	3.0	3	3

* The N number is higher than the number of requests for change because some requests involved more than one beneficiary.

Applications for change for beneficiaries over the age of 18

There were seven applications for change for nine beneficiaries over the age of 18. The beneficiaries were all aged 15-23 at the time of the original application for maintenance and were aged 19-23 at the time the request for change was made. Five of the seven applications were made by the complainant.

Table 132: Details of applications for change for beneficiaries over the age of 18

Age of beneficiary at date of first application	Age of beneficiary at date of first request for change	Who is requesting change?	Change requested	Outcome	Notes
17	19	Complainant	Substitution – increase	Granted	The complaint was also for three other beneficiaries who were under the age of 18.
15	19	Complainant	Substitution – increase	Granted	The complaint was also for four other beneficiaries under the age of 18. The complainant requested a lump-sum payment of N\$50 000 from the defendant's pension as the defendant had lost his job. The defendant agreed to pay N\$10 000.
17	22	Complainant	Substitution – increase	Granted	The inference from information on file is that the request was made because the beneficiary was still studying.
17	20	Complainant	Substitution – increase	Granted	The reason for the request was that the beneficiary was still studying. In this case the increment requested by the complainant was granted but was not made as part of the maintenance payments imposed by the order. Instead the defendant was ordered to contribute specifically to the School Development Fund costs and examination fees.
	22	Defendant	Discharge	Granted	The reason for the discharge was that the beneficiary had become self-supporting.
18	19	Defendant	Discharge	Granted	The complaint was also for four other beneficiaries who were under the age of 18.
19	19	Complainant	Discharge	Granted	The inference from information on file is that the request was made because one or more beneficiaries were still studying.
19	19				
21	21				
23	23				

Three of the applications were for the maintenance order to be discharged. All three requests for discharge were granted. In one case the defendant applied for the discharge because the beneficiary was self-supporting, in another case because the defendant was over the age of 18. One of the applications for discharge was made by the complainant. The complainant was an older sibling who had applied for maintenance on behalf of his six siblings. The defendant, who was the father, had disputed the complaint throughout the process. The elder brother applied for the discharge because “we have come to an agreement that he’s [the father] going to maintain us out of court because if he resigns the bursaries shall also stop paying the studies”. This suggests that the father was threatening to resign from his job to avoid paying maintenance. The Maintenance Act makes it an offence to compel or induce a complainant not to file a complaint at the maintenance court or not to lay a criminal charge against a defendant for his or her failure to support a specific person.¹⁸ There is no record in the file of whether this provision and the legal remedies were discussed with the complainant.

The other four applications were for an increase in the amount of maintenance paid for beneficiaries aged 19, 20 and 22. In all four cases the increase was granted. In two cases the beneficiary was continuing studies, but no specific reason other than increased costs were cited.

13.7 Details of assets, income and expenditure

Only one application for change made by a defendant contained information about expenditure. None of the applications made by a defendant contained information about income or assets. One application made a complainant contained information about his/her assets, five applications made by complainants contained information about income and nine contained information on expenditure. In three files additional information related to the request for change was included in the file. It is possible that this information was discussed in person and the details not recorded. However the lack of record-keeping is still a problem; if requests for change are made at a later date, the court has little information to reference on previous actions taken. Due to insufficient information, we have not analysed this data as the analysis would be misleading.

13.8 Beneficiaries in requests for substitution of an existing order

Number of beneficiaries

In the majority of requests for a substitution, the complainant sought maintenance for only one beneficiary (51/71; 71.8%). This finding is the same as that for initial maintenance orders, as discussed in section 12.4.

In four applications for change, the complainant requested an increase in the number of beneficiaries and in one application the complainant requested a decrease in the number of beneficiaries. In one application, the complainant also made a request for him/herself.

Table 133: Number of beneficiaries in applications for change

Number of beneficiaries	Frequency	Percentage
1	51	73.9
2	7	10.1
3	6	8.7
4	1	1.4
5	4	5.8
Total	69	100.0
Missing	2	2.8
Total	71	100.0

¹⁸ Maintenance Act 9 of 2003, section 41. The offence may be subject to a fine of up to N\$20000 or imprisonment for up to five years.

Change in number of beneficiaries

Of the four applications for an increase in the number of beneficiaries, two applications involved an increase from one to two beneficiaries and two applications involved an increase from two to three beneficiaries. In one of these cases the paternity of one of the children was in question. The defendant subsequently withdrew his opposition to paternity and agreed to pay more maintenance than was originally requested. In the case where the complainant also asked for maintenance, the defendant and complainant were married with one child. The defendant was paying N\$350 maintenance for their child. Following an enquiry into the application for change, the defendant agreed to increase the amount of maintenance paid from N\$350 to N\$950.

In one application, the defendant applied for a decrease in the number of beneficiaries after one of his children died.

13.9 Amount of maintenance requested in applications for change

Requests for an increase in the amount of maintenance paid

In cases where the applicant requested an increase, the beneficiary/ies were **currently receiving N\$200** (n=52). This figure is the same for requests for change for beneficiaries alone and for cases where the complainant was also a beneficiary. The amount being received at the time of the request is slightly lower than the median amount of maintenance in the total sample of maintenance orders (N\$250), but in light of the difference in sample size (n=52 vs n=1 103) we cannot comment on this difference.

Excluding maintenance for the complainant, the median amount of **maintenance requested in an application for change was N\$500** (n=52), representing an increase of N\$300 in the typical case. Maintenance requested for all beneficiaries including applications for maintenance for the complainant and beneficiary together was N\$550 (n=55). **The new amount of maintenance requested in these applications for change is the same as the median amount of maintenance requested in respect of initial orders. This indicates that people who request a change are not requesting amounts that are any higher than the average amount of maintenance requested at the outset (N\$500; see section 8.7), suggesting that the amount originally requested may be a realistic reflection of the complainants' needs.**

In one case the complainant requested a once-off payment of N\$120 000. The complainant and defendant appear to have been in the process of a divorce.¹⁹ The outcome of the case is not clear as the file only contained a request for change and a summons. In another case, a complainant who was receiving N\$200 per month for five children requested a once-off payment of N\$50 000 as the defendant had lost his job (this case is also referred to under section 13.2. The defendant agreed to pay a lump sum of N\$10 000.

Requests for a decrease in the amount of maintenance paid

In cases where the applicant requested a decrease, the beneficiary/ies were **currently receiving N\$475** (n=14). Maintenance received for beneficiaries excluding complainants was N\$400 (n=13).

¹⁹ Where maintenance is needed before a divorce but the divorce is pending, there is a special procedure for this under Rule 43 of the Rules of the High Court. It may have been more appropriate for the High Court to have used this procedure rather than the parties going separately to the maintenance court.

The amount being received at the time of the request is higher than the median amount of maintenance in the total sample of maintenance orders (N\$250) but in light of the difference in sample size (n=14 vs n=1 103) we cannot comment on this difference.

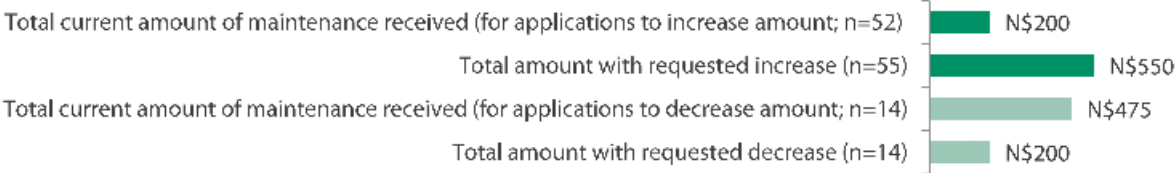
The median amount of **maintenance requested in an application for change was N\$200** (n=15), representing a reduction of nearly 60% on the median initial order in these cases. Maintenance requested for beneficiaries excluding complainants was N\$175 (n=14), similarly representing a decrease of nearly 60% from the initial maintenance order.

These results show that requests for increases and decreases are not made in small increments. This may be because of the effort it takes to seek a change (complainants wait until they need a lot more money before making a request), because the original amount ordered was unrealistic or for some other reason.

Table 134: Amount of maintenance currently received and new amount of maintenance requested (N\$)

	Contribution currently received for complainant	Contribution currently received for beneficiary/ies	Total current contribution received	Amount of maintenance requested for complainant	Amount of maintenance requested for beneficiary/ies	Total amount of maintenance requested	Change in the total amount of maintenance requested	Percentage change
Requests for increases								
Number of orders	7	49	52	8	52	55	50	175%
Median request for applications to increase the amount of maintenance paid	300	200	200	650	500	550	300	
Requests for decreases								
Number of orders	2	13	14	2	14	15	14	57%
Median request for applications to decrease the amount of maintenance paid	550	400	475	250	175	200	225	

Chart 73: Change in the total amount of maintenance requested



Most applications for change involved one beneficiary (51/71; 71.8%). Given the small number of cases involving more than one beneficiary (20), an assessment of the change in the amount of maintenance requested per beneficiary would not be statistically meaningful and so has not been assessed.

13.10 Other special forms of maintenance requested in applications for change

Information about special forms of maintenance in the original order was recorded on only five of the applications for change. In all five of the orders, other forms of contribution were in addition to regular financial support. The contributions were for medical costs (two applications), school fees

(two applications), school clothes (two applications), fees for tertiary education (one application), expenses for sport (one application), payments towards a study policy (one application) and payments towards school expenses such as books, stationery and clothes for extra-mural activities (one application).

Requests for other forms of contribution were included on only one application for change, where the complainant requested contribution towards medical costs. This request had also been made and ordered in the original order.

Two files contained an application to set aside the order, including the other contributions. In one case the defendant applied for a discharge of the maintenance order as he had retired. In the second case the complainant withdrew the order because the defendant “sent me an sms on my phone which I am not pleased with. This is all I declare.” Therefore the reasons for stopping these forms of payments were related to the payment of maintenance in general, rather than to the specific contribution in question.

13.11 Changes in the frequency of payments in applications for change

Applications for change rarely requested a change in the frequency of payments. Where the information was available (58/73; 79.5%), all of the original orders required the defendant to make monthly maintenance payments. This was also true for the requests for a substituted order, except for two applications which requested once-off payments as discussed on page 258 (56/73; 76.7%).

13.12 Changes to how the payment is made

In one file the complainant requested the mode of payment be changed from a deposit in a NamPost account to payment to the court. The defendant had gone into arrears and it seems that the complainant was hoping that payment through the court would help to prevent this problem. As discussed under section 8.11, many people, both complainants and court officials, are of the opinion that payment through the court is taken more seriously by the defendant. This change could have been requested as a variance to an order, the procedure for which is discussed in section 13.15.

13.13 Summons to attend court for applications to change an order

Chapter 9 discusses summoning the complainant, defendant and witnesses to court. The data shows that **only a minority of the summonses were issued for requests for a substitution, discharge or suspension (78/1 498; 5.2%).**

The majority of summonses issued for an application to change a maintenance order were served (56/78; 71.8%). This success rate is similar to the success rate for all summonses, which was 62.2% (see page 196).

Table 135: Type of maintenance enquiry summonses issued for

Type of maintenance enquiry	Frequency	Percentage
Making of a new maintenance order	1 384	92.4
Substitution of an existing order	53	3.5
For arrears	36	2.4
Discharge/suspension of an existing order	25	1.7
Total	1 498	100.0
<i>Missing</i>	295	16.5
Total summonses included in the sample	1 793	100.0

Table 136: Outcome of summons

Outcome	Substitution	Discharge/suspension	Total	Percentage
Served	36	20	56	71.8
Not served	4	1	5	6.4
Information not clear	13	4	17	21.8
Total	53	25	78	100.0

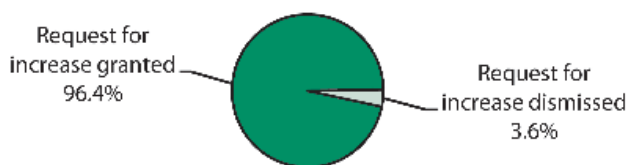
13.14 Outcome of applications for change

Overall, where the information is available, only a small percentage of applications for change were dismissed (6/69; 8.7%). Most were granted (45/69; 65.2%) or had another outcome. For example, in three cases the request was settled outside of court without a formal order being made to discharge the maintenance order. In one of the cases, the defendant sold the complainant a business which would provide the complainant with an income. In two cases the defendant agreed to continue to maintain the beneficiaries without a court order. In one of these cases, the complainant stated “if he resigns the bursaries shall also stop paying”. Data on the outcome of the applications is missing for approximately one-third of the requests (33/102; 32.4%).

Where the information is available, all but one of the requests for an increase were granted (27/28; 96.4%). However data on case outcome was missing in respect of nearly half of the requests (26/54; 48.1%).

The majority of the substituted orders for increases were consent orders (23/28; 82.1%). Three substituted orders were made following a hearing (10.7%) and two were default orders (7.1%).

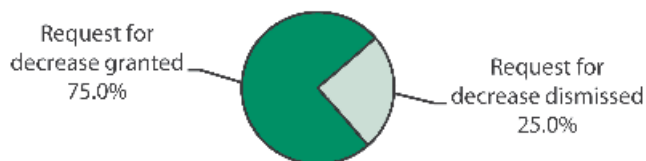
Chart 74: Outcome of requests for increase (n=28)



Where the information is available, two-thirds of the requests for a decrease were granted (9/12; 75.0%). However again a high proportion of data was missing (5/17; 29.4%) and the sample size is small (n=17).

Again the majority of substituted orders for decreases were consent orders (7/9; 77.8%), with one such order being made following a hearing.

Chart 75: Outcome of request to decrease (n=12)



Where the information is available, the majority of requests to discharge/suspend the order were granted (9/11; 81.8%). However again the sample size is small in total (n=15).

Table 137: Outcome of applications to change

Outcome	Number of orders	Percentage
Granted	45	65.2
Dismissed	6	8.7
Other	18	26.1
Total	69	100.0
<i>Not clear</i>	33	32.4
Total	102	100.0

Table 138: Outcome of requests to increase the amount of maintenance paid

Outcome	Number of orders	Percentage
Request for increase granted	27	96.4
Request for increase dismissed	1	3.6
Total	28	100.0
<i>Outcome of request for increase not clear</i>	26	48.1
Total	54	100.0

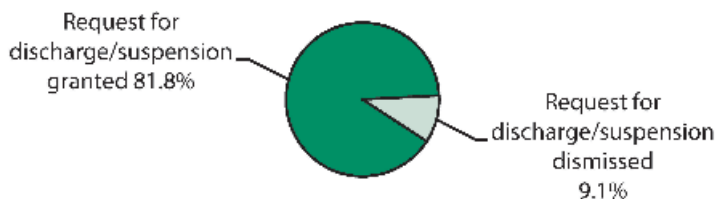
Table 139: Outcome of requests to decrease the amount of maintenance paid

Outcome	Number of orders	Percentage
Request for decrease granted	9	75.0
Request for decrease dismissed	3	25.0
Total	12	100.0
<i>Outcome of request for decrease not clear</i>	5	29.4
Total	17	100.0

One consent order and five orders following a hearing were made. The type of order for the remaining three requests is not clear.

Table 140: Outcome of requests to discharge/suspend the amount of maintenance paid

Chart 76: Request to discharge/suspend (n=11)

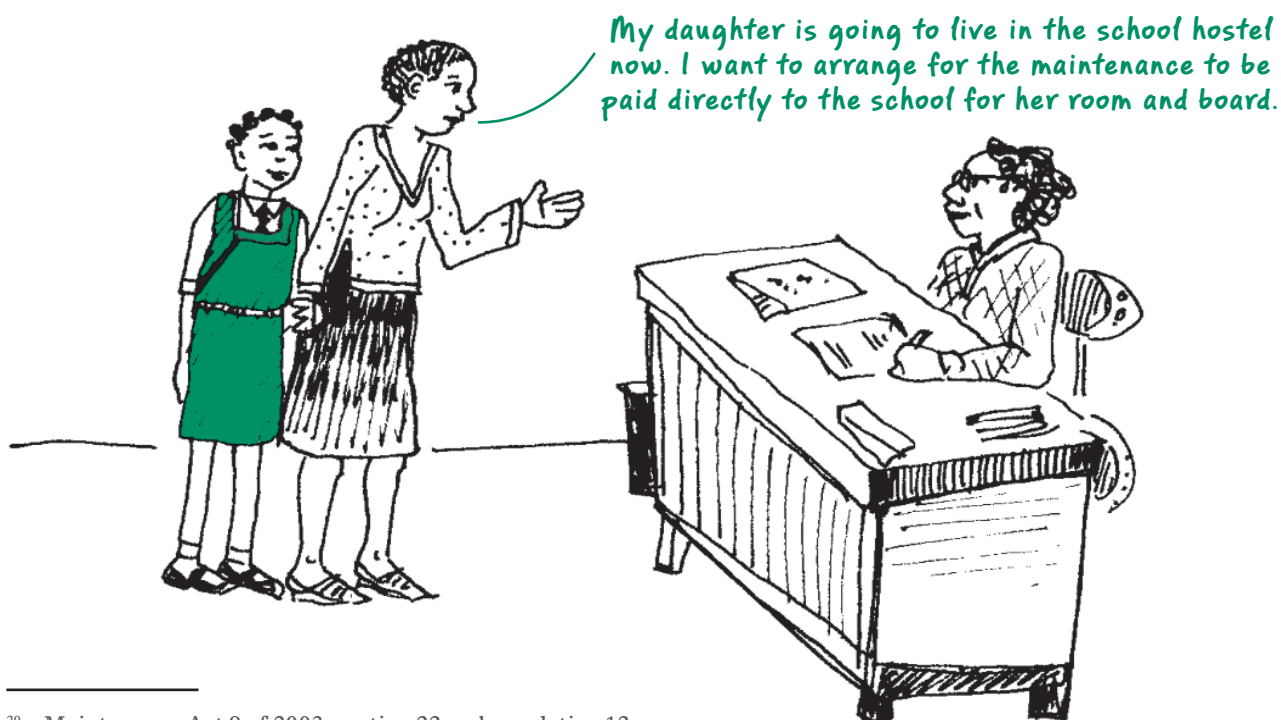


Outcome	Number of orders	Percentage
Request for discharge/suspension granted	9	81.8
Request for discharge/suspension dismissed	2	9.1
Total	11	100.0
<i>Missing</i>	4	26.7
Total	15	100.0

13.15 Requests to vary a maintenance order

A maintenance officer may vary the manner of the maintenance payment including setting aside an order to make payments in kind. Changes could include changing who receives the payment or where the payment is made. The maintenance officer must inform the complainant and the defendant, and if relevant, the employer or debtor paying amounts directly to the court, using a form the same as or substantially similar to Form J.²⁰

We identified 69 files in the sample that contained a variance to the maintenance order (69/1 687; 4.1%). Whilst the majority of files contained one variance, three contained two variances, resulting in a total of 72 applications for variance in the sample. However the information was filed as handwritten notes rather than through completion of Form J. **We recommend that the Ministry of Justice train maintenance officers on the use of Form J.** All of the notices were for a change in designation of who was receiving the payment. For example, in one case the payments were changed from the mother (who was studying in Windhoek at the Polytechnic) to the grandmother who was living with the child in another town. In another case the beneficiary was now living with the sister of the complainant and the request was to transfer the payment to the sister. In a third case the complainant died and the request was to transfer the payment to the relative caring for the child. In the three files with two applications for change, these were to change the recipient of the payment, and then to change it back again to the complainant.



²⁰ Maintenance Act 9 of 2003, section 22 and regulation 12.

Summary of requests to change a maintenance order

- A very small minority of files contained a request to change an existing order.
- The majority of requests for change were made by the complainant. The majority of applications for change were for substitutions. Where defendants requested changes, they most commonly requested substitutions, not discharges.
- The applications to discharge or suspend an order were made almost equally by defendants and complainants, although the sample size is very small.
- Of the reasons in applications for an increase, nearly half specified School Development Fund contributions or other school-related costs (eg transport to school).
- Of the reasons cited in applications for a decrease, over half stated that the maintenance order was too high in light of the defendant's responsibilities to maintain other dependants.
- The sample contained only a small number of applications to discharge an order. Reasons to discharge the order included the defendant's unemployment, the beneficiary leaving school or becoming self-supporting, or an arrangement made by the parties outside court. Some requests to discharge the order were made by complainants due to possible intimidation from the defendant.
- On average, requests for change were made just over one year after the original order came into effect. Applications to discharge or decrease the amount of maintenance paid were made sooner than applications to increase the amount of maintenance paid.
- Complainants most commonly requested changes in maintenance orders in the months of February, March, April and August. Defendants most commonly requested changes in February and July.
- The median age of the beneficiary when the request for change was made was 7.
- Where an increase in maintenance was requested, the applicant requested approximately double the amount of maintenance currently being received. The amount requested is the same as the median amount requested for first applications.
- Where a decrease in maintenance was requested, the applicant requested to pay approximately 60% of the amount of maintenance currently being paid.
- The majority of applications for change were granted.

13.16 Divorce orders

The basis for the maintenance court's jurisdiction over divorce orders is discussed in section 4.9. The legal provisions on this are less straightforward than in the 1963 Act, and we have recommended that they be clarified.

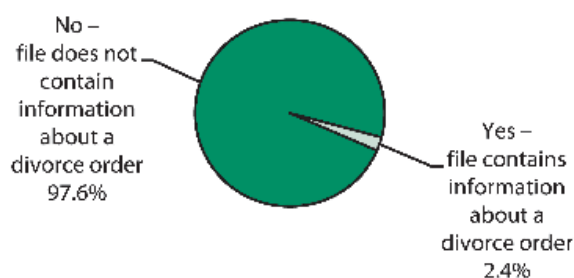
Despite the lack of clarity on jurisdiction, **a small proportion of files involved divorce cases**. A total of 40 files in the sample contained information about a divorce order (40/1 687; 2.4%). It was unclear from half of the files (19/40; 47.5%) whether the divorce order or divorce proceedings were in place before or after the first maintenance complaint was made.²¹ Where this information was available, half of the cases involved divorce proceedings before the maintenance complaint was made (10/21; 47.6%) and half involved divorce proceedings which started after the maintenance complaint was made (11/21; 52.4%).

²¹ Where interim maintenance is needed while the divorce case is pending, there is a special procedure for this under Rule 43 of the Rules of the High Court.

Given the lack of clarity in the law, it is not surprising that there was no consistency amongst courts regarding the procedure where the complainant applied for an increase in the amount of maintenance paid by the defendant in terms of a divorce order. For example, whilst some courts requested the complainant to complete a new maintenance complaint form, considering the request a new case, other courts used a request for change form, considering the request part of an existing case. Whilst either method is feasible, it would be useful for all courts to operate under a standard protocol for ease of implementation and monitoring. **We recommend that the Maintenance Act should be amended to include a more straightforward statement of the maintenance court’s jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court.**

The 1995 study included 25 maintenance complaints made following a divorce (25/618; 4.0%).²² Therefore the total proportion of files containing information about a divorce is slightly higher in the 1995 study than the proportion of files identified in this study. When only the proportion of files containing a maintenance complaint after a divorce is compared, the difference is greater (10/1 687; 0.6% from the current sample versus 25/618; 4.0% for the 1995 study). However given that the sample size is small from both studies we cannot draw conclusions from these comparisons.

Chart 77: Does the file contain information about a divorce order? (n=1 687)



For files where the complainant came to court after the divorce, some contained information on the maintenance ordered at the time of the divorce. In these cases, the median amount of maintenance ordered by divorce order (n=27) was N\$400 (mean N\$460). This is higher than the average amount of maintenance ordered in a maintenance order, although the sample size is much smaller.

Maintenance in a divorce case is also not necessarily comparable to maintenance in a situation involving separate households. In divorce cases, a court may consider property division, spousal maintenance and child maintenance all in conjunction in an effort to achieve overall fairness. In one of the applications to the maintenance court following a divorce order, the complainant requested an increase in the amount of maintenance. The defendant was resident in South Africa and therefore it is a case of an application for a reciprocal maintenance order (see section 4.12 for further discussion of reciprocal maintenance orders). In this case the complainant asked for the maintenance payment of N\$250, which the defendant was paying irregularly, to be increased to N\$1 500 to cover pocket money, medical aid (N\$500), school-related costs (N\$380), food and clothes. The court sent a letter to the Permanent Secretary of the Ministry of Justice for further action. Four months later there is a note on the file saying that a fax from the complainant was sent to the Permanent Secretary, but there is no detail as to what the message said. There is no further information in the file. This suggests that the attempts to resolve this case of cross-border maintenance were not successful.

Summary of maintenance orders related to divorce proceedings

Only a small proportion of files involved divorce cases. One reason for this may be the lack of clarity in the law as to whether a maintenance court can amend provisions on maintenance in a divorce order.

²² D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 105.



Chapter 14

APPEALS AND MISUSE OF MAINTENANCE PAYMENTS

14.1 Appeals

We did not identify any appeals of a maintenance case in our sample. The magistrates at one court said that it is rare for a defendant to make an appeal as “*both complainants and defendants feel they have no grounds on which to appeal the decision. In particular, fathers seem to come to the realisation that it was their responsibility to maintain their children once they had attended a court enquiry or hearing.*” The clerk from another court made a similar statement.

A search of reported Namibian High Court cases and unreported High Court cases available online turned up only one example of an appeal filed under the 2003 Maintenance Act. This case, which is described in detail at page 85, involved an appeal against the outcome of a request for substitution. In brief, there was a maintenance order in place for N\$450/month for a child beneficiary. The child’s mother requested an increase to N\$1 000/month, but the maintenance court granted an increase to only N\$600/month. The mother appealed this decision, but the High Court, after reviewing the financial position of both parents, confirmed the decision of the maintenance court on the grounds that the mother had not discharged the onus of showing that the father could pay any higher amount.¹ As the Act contemplates, the mother was represented in the appeal by a state prosecutor.² The respondent in the appeal also had legal representation.

14.2 Misuse of maintenance payments

One innovation of the 2003 Maintenance Act was to introduce a penalty for the misuse of maintenance payments. The complainant, beneficiary, defendant or any person who is affected by a maintenance order may complain to the court about the misuse by any person of a payment made in terms of a maintenance order.³ The maintenance officer is obliged to investigate the complaint, and if found

¹ *Mokomele v Kaihivi* [2009] NAHC 101 (12 June 2009).

² See Maintenance Act 9 of 2003, section 47(2). The prosecutor in the case was from the unit established by the Office of the Prosecutor-General to specialise in sexual offences, domestic violence and maintenance.

³ Maintenance Act 9 of 2003, section 9(3) and (4)(b)(ii).

guilty, the person misusing the maintenance could receive a fine of up to N\$4 000 or imprisonment for a period which does not exceed 12 months.⁴

Two files reported information about misuse of maintenance money. This represents 0.1% of the total files sampled (2/1 687; 0.1%). Both cases were reported at the Katutura court, in 2005 and 2006 respectively. The maintenance orders were for N\$500 and N\$1 000 per month. In one case the maintenance order was for the beneficiary alone, in the second case it was for a beneficiary and the complainant. The defendants complained that the complainants were not using the funds for the basic needs of the children. Both defendants made similar complaints, the first stating that the complainant “*does not even pay school fees for the children*”, whilst in the second case the defendant stated that the complainant “*is not paying water & school fees and she’s not buying food for the house*”.

One of the files contained a letter from the school principal confirming that the complainant had not paid the School Development Fund contribution. The letter stated that “*it is affecting negatively the school work of the children*”. The allegation of the misuse of maintenance money was made in March and the complainant was given until May to show proof that she had paid the School Development Fund. The file contains a notice of postponement in May. A warrant of arrest was issued in July as both parties were absent from court. There is no further information in the file. Two years later the case was closed as the defendant made a lump sum payment to the complainant. The defendant had lost his job and the money (N\$10 000) was intended to give him time to find another job without having to worry about monthly maintenance payments.

In the second complaint, the court issued a summons to the complainant to attend a criminal hearing on the charge of misuse of maintenance payments. The case was postponed twice and then withdrawn. There is no further information in the file.

Interviews with court officials suggested that the incidence of reports of the misuse of maintenance money is slightly more frequent than our sample suggests, but that the allegations are not always documented. For example, at one court the maintenance officer may ask a social worker to investigate the situation and talk to the complainant. At another court the clerk stated that they call in both parties and attempt to resolve the problem. At another court the clerk will call the complainant to the court and remind her of her responsibilities with regard to the maintenance payments. These steps are in line with the process to investigate a complaint about the misuse of maintenance payments. However, the court officials should ensure that the information about such steps is documented in the files. The clerk at one court stated that when a complaint is made about misuse of maintenance money, the court will stop payments until the case has been investigated. This practice is incorrect as the Act does not give the court the power to stop payments in this manner. The Act simply states that the maintenance officer must investigate the complaint and provides a penalty for the offence.⁵ The reason for allowing the payments to continue is that it could be detrimental to the best interests of the child to abruptly stop the payments, particularly if it transpires that the payments are in fact being used for the benefit of the child. **We recommend that the Ministry of Justice send a circular to the maintenance courts clarifying the procedure for addressing the misuse of maintenance money, including the importance of documenting complaints, investigations and outcomes.**

One clerk noted that concern over the misuse of maintenance money is often greater than the reality – he explained that “*men complain about the way that women spend an amount as small as N\$70 per month. They say: ‘I saw my child playing in the street without shoes, the mother is not spending the maintenance money properly.’ I say: ‘We are in Africa. Just because the child is not wearing shoes does not mean he does not own shoes.’*”

⁴ Id, section 40.

⁵ Id, section 9(4)(b)(ii). Misuse of maintenance could result in a fine of up to N\$4 000 or imprisonment for a period not exceeding 12 months (section 40).

The problem of the misuse of maintenance payments was considered in some of the focus group discussions. In the discussions in Keetmanshoop, both the women's and men's focus groups shared similar perceptions that maintenance funds were sometimes misspent on clothes, alcohol, gambling and new boyfriends. They suggested that in some cases the mother may send the child to live with another relative but will continue to receive maintenance payments without passing them on. Participants in the male focus group discussion suggested that men who are concerned about how the maintenance money is being spent should spend time with their children. Then they can then see the reality of the day-to-day costs and can also use the time to bond better with their children. All of the participants expressed strong disapproval of the misuse of maintenance and there was a great sense of injustice associated with this practice.

Summary of appeals and misuse of maintenance payments

- We did not identify any appeals of a maintenance case in our sample.
- Two files reported details of the misuse of maintenance money. This represents 0.1% of the total files sampled.

It is important to remember that money is interchangeable. For example, suppose that you see a woman pick up a maintenance payment at the court. She gets into a taxi and takes the money to her new boyfriend. Is she abusing the maintenance payment? Maybe. But it may also be that her new boyfriend loaned her money for groceries during the month which she is now re-paying.

Research conducted by the Legal Assistance Centre did not find abuse of maintenance money to be a problem. The typical maintenance payments are very low. Someone looking for easy money would most likely look elsewhere. But the provision on abuse is still a welcome one – anyone who misuses maintenance money for their own selfish purposes should be punished.

A NOTE TO DEFENDANTS

If you suspect that maintenance money is being abused, this is NOT a good reason for failing to pay. The right course of action is to ask the maintenance officer to investigate. But you must continue to obey the maintenance order as long as it remains in force.



“It is true that there are some women who receive maintenance benefits and do not use it in the best interest of the children. At the same time, it is also true that there are men who do not maintain their children. It is a fact, and that is why this law is clearly focusing on both parents, that we must take care of our children and not think that somebody else will do it for us. Therefore, this law should not really be seen as a law for women; it is a national law because everybody is going to benefit.”

Hon. Nandi-Ndaitwah,
Minister of Women Affairs and Child Welfare
Parliamentary debate on the Maintenance Act

Excerpt from *Guide to the Maintenance Act 9 of 2003*, Windhoek: Legal Assistance Centre, 2007 at 66.

Will you be there from
start to finish?



Be part of your child's success!

Child Maintenance Campaign coordinated by:



Legal Assistance Centre in consultation with Doufi Namalambo and Nepeti Nicanor
Pictures courtesy of Marcus Weiss

Funded by the United States Government and the Austrian North-South Institute for Development Cooperation

One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.



Chapter 15

ARREARS AND ENFORCEMENT

The Maintenance Act states that if maintenance is not paid, the complainant may apply 10 days after the date the payment was due for the maintenance court to enforce the order.¹

The Maintenance Act states that when a request for the enforcement of a maintenance order is made, the application must include a copy of the maintenance order, a statement under oath or affirmation confirming the amount of money that has not been paid and a statement indicating the preferred method of enforcement.²

The court can impose a number of civil options to address the failure to pay maintenance: namely, a warrant of execution, an order for the attachment of wages and/or an order for the attachment of debts. Procedures seem to vary across courts. For example, the researchers collecting data from the Keetmanshoop court noted that the court appears to issue a default order for the attachment of wages when the defendant goes into arrears. In contrast, in Swakopmund the court appears to deal with cases of arrears by summoning the defendant and making a new order for payment to cover the amount in arrears alongside the regular maintenance payments. Although this is not one of the methods of enforcement envisaged by the Act, it is not problematic if it is effective at promoting the payment of arrears.

Ultimately, the court can also implement criminal proceedings, although these will usually be a secondary option as the primary purpose of enforcement is to ensure the payment of maintenance, not the punishment of the defendant. Failure to pay maintenance is a crime punishable by a fine of up to N\$4000 or imprisonment for up to 12 months.³

A criminal proceeding which results in a conviction can be combined with the recovery of arrear maintenance owing.

The diagrams on the next page summarise the different enforcement mechanisms which are available.

“Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children.”

Bannatyne v Bannatyne
(Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC) (Mokgoro J),
on the South African Maintenance Act,
which is very similar to the Namibian law

¹ Maintenance Act 9 of 2003, section 28.

² Id, section 28.

³ Id, sections 39(1) and 33.

Chart 78: Civil enforcement mechanisms

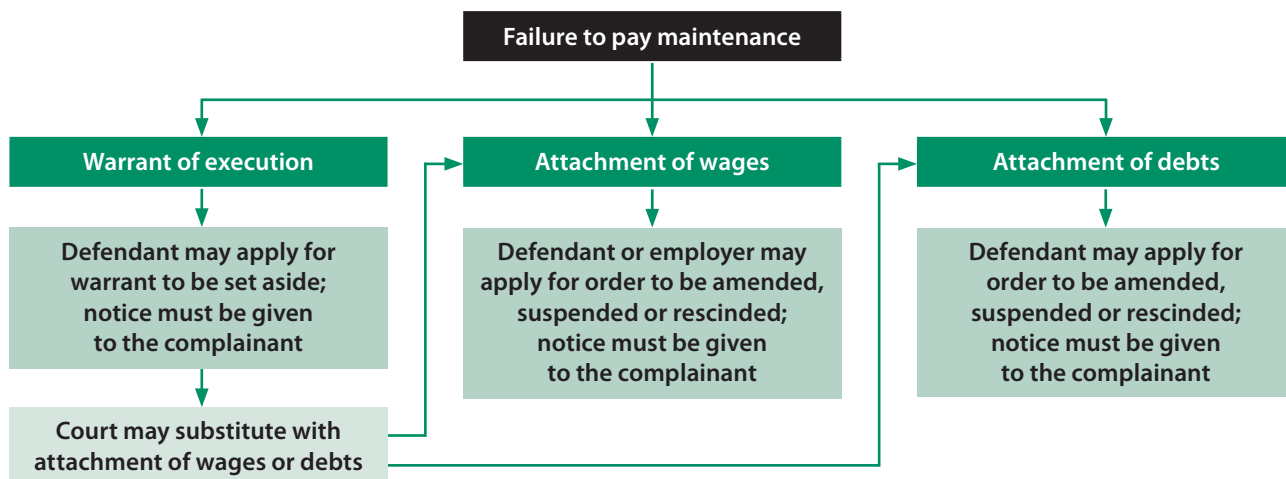
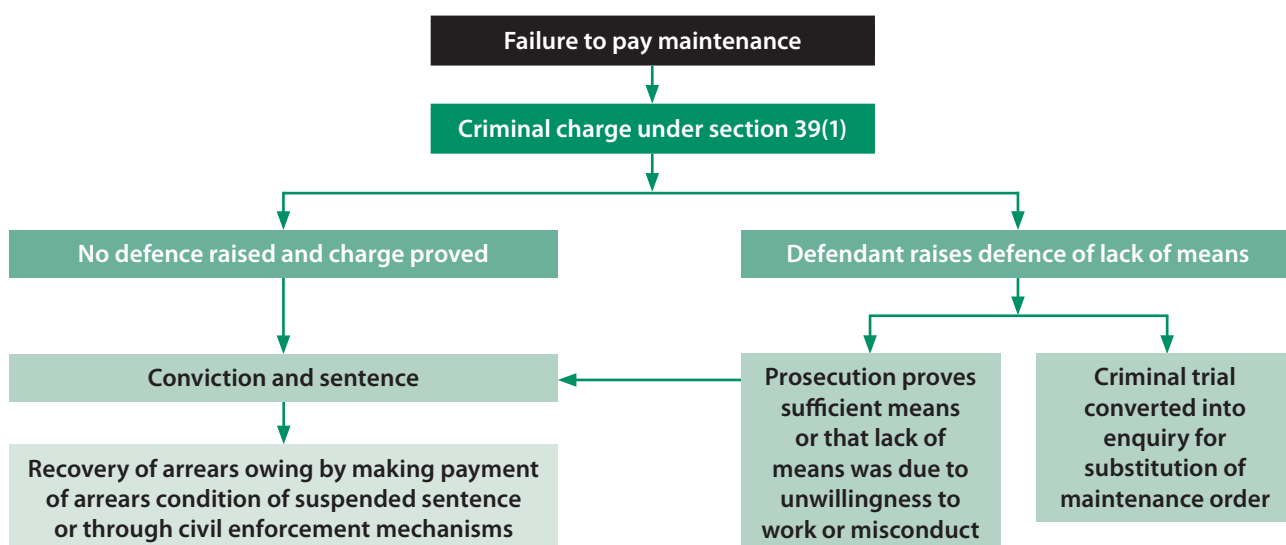


Chart 79: Criminal enforcement mechanisms



15.1 Incidence and characteristics of maintenance cases in arrears

Approximately one in six files contained at least one reported breach in the payment of maintenance (276/1 687; 16.4%). A total of 346 breaches of maintenance orders were recorded in 276 files. This percentage is similar to, but lower than, the incidence of arrears in the 1995 study which reported that approximately one in four files contained at least one breach (26%).⁴ Despite the decline, the incidence of breaches continues to be high. Given that so many cases go into arrears, we **recommend that the court be allowed to attach the wages of the defendant at the time of making an initial order rather than only when a breach has occurred.**⁵ This mechanism could be used in cases where the complainant is able to provide sufficient motivation.

⁴ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 107.

⁵ This was proposed during discussion of the draft Maintenance Bill, but not incorporated into the final bill. The defendant can agree to an attachment of wages at any time. This may be easier for the defendant, or may remove temptation to spend the money owing on something else.

The number of reported breaches per file ranged from one to four (median one; mean 1.5). The number of files containing either three or four breaches totalled 13. The number of breaches per file is much lower than identified in the 1995 study which reported a range of 1 to 28 breaches with a median of five (mean seven). However it is possible that some people stop reporting breaches after they have occurred once or twice out of a sense of futility, meaning that some incidences of repeated breaches in may go unreported.

Chart 80: Does file contain a reported breach of the maintenance order? (n=1 687)

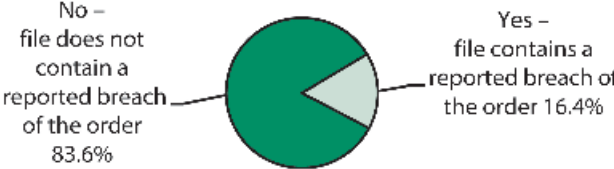


Table 141: Number of declarations of arrears per file

Number of reports of a breach on file	Number of files	Percentage
1	223	80.8
2	40	14.5
3	9	3.3
4	4	1.5
Total	276	100.0

Table 142: Comparison of the incidence of breaches between the current study and the 1995 study

Incidence of breaches	Number	Median	Mean	Minimum	Maximum
Incidence of breaches in current study	346	1	1.5	1	4
Incidence of breaches in 1995 study	Not reported	5	7.0	1	28

The fact that both the percentage of files containing breaches and the number of breaches per file is lower than identified in the 1995 study suggests that the public has become more aware of the consequences of failing to pay maintenance in the intervening years. A contributing factor may be the stronger enforcement mechanisms provided for in the 2003 Maintenance Act, such as attachment of wages without first requiring a criminal conviction and the power to order the payment of arrears with interest. The risk of being subjected to such enforcement mechanisms may provide sufficient deterrent to many defendants to prevent them from going into arrears. As one magistrate said, in the majority of cases, *“once you inform the defendant of the consequence of failing to pay (ie prison, attachment of wages), the defendant normally pays within two days”*. Similar opinions emerged at the male focus group in Keetmanshoop, where participants felt that people do not want to fall into arrears because they are aware of the negative consequences. As one participant said, *“Most of the guys don’t want to go to jail so they will pay. You have to maintain yourself too. Maintain your child, stay out of trouble.”*

However the clerk of the Keetmanshoop court was of a different opinion, saying that *“there are more cases for outstanding arrears than for new cases themselves”*. The clerk explained that many defendants deliberately go into arrears in order to delay paying the complainant. The female participants at the Keetmanshoop focus group discussion suggested that this may be because the man wants to *“get back at the mother”*, for example because she *“dumped him”* and *“he still wants to be with her but she doesn’t want to be with him”*. They also suggested that the father may have another family, lacks sufficient resources to support all his children, and does not want his wife to know about his other child. The clerk of another court made a similar statement, saying that some defendants will not pay until they are *“followed, until they are summoned”*, as the defendants *“neglect, they just ignore”* their obligations. The participants at the female focus group discussion in Ondangwa stated that *“sometimes fathers pretend that they have forgotten to pay their maintenance, but really they haven’t”*. Another clerk of court said that the most common request from complainants is for assistance in getting maintenance payments that have gone into arrears. The clerk said that the complainants also want to know how long it will take to receive the outstanding money. Participants at the female focus group discussion in Keetmanshoop concluded, *“Most of us have problems with that [arrears]. There are fathers that really do their best and there are mothers who aren’t even trying but mostly in Namibia it is the fathers [not trying]. There are situations where fathers get a lot of money and you take them to the law but nothing is done.”*

In contrast, participants at the male focus group discussion in Ondangwa stated that *“most men default because the mother is misusing the money”*. As discussed on page 265, data from this study

suggests that women do not misuse maintenance payments. The Act also contains a mechanism to address the misuse of maintenance money which the defendant could utilise if he were genuinely concerned that the money was being misspent.

In general, the proportion of files from each court containing a breach is similar to the proportion of files from each court in the total sample. However at some courts there was a different proportion of breaches than would be expected – for example the Rehoboth court which represents 6.6% of the sample, had 15.6% of the breaches. In contrast, the Mariental court, which represents 6.0% of the sample, had only 2.6% of the breaches and the Karasburg court, which represents 4.3% of the sample, had only 0.3% of the breaches. It would be interesting to conduct a small qualitative survey in areas where breaches are particularly high and low to assess whether there are any specific reasons for reported breaches occurring so frequently or infrequently.

The 1995 study also found regional differences, identifying a higher incidence of arrears in Windhoek (representing 45% of the sample compared to 52% of cases involving arrears) and Gobabis (representing 4% of the sample compared to 9% of cases involving arrears) and a lower incidence of arrears in Keetmanshoop (8% of the sample compared to only 1% of arrears), Rehoboth (6% of the sample compared to only 1% of arrears) and Swakopmund (10% of the sample compared to 6% of arrears).⁶

Table 143: Incidence of breaches by court

Court	Total number of files sampled	Percentage	Records of breaches	Percentage
Bethanie	15	0.9	5	1.4
Eenhana	46	2.7	6	1.7
Gobabis	97	5.7	15	4.3
Karasburg	73	4.3	1	0.3
Keetmanshoop	111	6.6	28	8.1
Khorixas	34	2.0	2	0.6
Mariental	101	6.0	9	2.6
Okakarara	17	1.0	4	1.2
Ondangwa	93	5.5	4	1.2
Oshakati	136	8.1	46	13.3
Otjiwarongo	108	6.4	23	6.6
Outapi	93	5.5	13	3.8
Rehoboth	111	6.6	54	15.6
Rundu	121	7.2	0	0.0
Swakopmund	121	7.2	24	6.9
Tsumeb	66	3.9	4	1.2
Walvis Bay	109	6.5	33	9.5
Windhoek	235	13.9	75	21.7
Total	1 687	100.0	346	100.0

"Where can I go if I already have a maintenance file open in Rehoboth, but I am living in Windhoek, and the father doesn't pay?"

Text message sent to the Legal Assistance Centre

⁶ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 108.

CASE STUDIES

Breaches of maintenance orders

The Legal Assistance Centre (LAC) regularly receives complaints from the public regarding problems with maintenance arrears.

I start[ed] a maintenance [complaint] in 2003 in July but a man paid only one month since now he did not paid, what can I do? I'm having three kids with [him] now is only me who struggle with my kids, the first born now is having 15 years, the other one is having 13 and my last born having 11, what can I do for him?

The father of my daughter paid maintenance [for] only six months and stop[ped] in 1996 now she is 14 years and never receive a cent from him, he is having a nice house and still working he never even call her and she never meet her since she was born. WHAT MUST I DO PLZ HELP ME.

Text messages sent to the Legal Assistance Centre

In one case, the LAC assisted a client to access maintenance payments through a disability fund. The defendant had been paying maintenance through attachment of wages but left his employment due to being declared disabled. The employer should have contacted the court, in light of its duty to inform the court within seven days if the defendant leaves its employment (Maintenance Act 9 of 2003, section 31(2)). However the employer did not fulfil this obligation and the complainant did not receive any further maintenance payments. The LAC liaised with the company in question, which referred the LAC to the company's insurance provider for assistance with transfer of the maintenance order to the disability income the defendant was receiving.

In another case the client asked the LAC to intervene because the court was failing to act on her report that the maintenance payments had gone into arrears. The LAC wrote a letter to the court on behalf of the client, reminding the court what the law says in regard to failure to pay maintenance and summarising the mechanisms that can be used to enforce payment. The client did not make further contact with the LAC, indicating that she had received sufficient assistance to proceed without further support from us.

To the Maintenance Officer

RE: Management of maintenance claim for complainant

We are writing to the XXX Magistrate's Court following a request for assistance by XXX. Ms XXX has informed us that she has experienced difficulties with a maintenance case that she has opened at the XXX Court. We would like to enquire whether all required steps have been taken in the above-mentioned case.

Based on the information we have received, we would like to make the following comments:

1. The defendant appears to have defaulted on maintenance payments. This is a violation of the Maintenance Act and can be punished by a fine of up to N\$4 000 or imprisonment for up to 12 years.
2. If the defendant is failing to pay maintenance, the money can be obtained through the following means:
 - a. attachment of wages;
 - b. selling of property;
 - c. the payment of any debts owed to the defendant to the complainant;
 - d. the payment of any pensions or annuities for the defendant to be paid directly to the complainant.
3. If the defendant is not working, the payment of any pensions, annuities or other income to the defendant can still be paid directly to the complainant if appropriate. Alternatively, property could be sold. Furthermore, the reason for the defendant being unemployed should be queried. It is a violation of the Maintenance Act to stop working to avoid payment of maintenance.

The aim of the Maintenance Act is to ensure that the best interests of the child are met. The payment of maintenance should come above all other expenses except for financial commitments that are necessary to the parent's ability to support him or herself or other dependant.

The vast majority of breaches occurred following a consent order (315/346; 91.0%). However, as the vast majority of maintenance orders were consent orders (92.5%), this finding is to be expected. Court officials did not identify particular characteristics of cases where breaches occurred, although the magistrate at one court said that arrears often involve soldiers and police officers. However there is no quantitative data to back up this anecdotal statement.

Table 144: Type of order first made in cases where breaches were reported

Type of order	Frequency	Percentage	Percentage of all orders
Consent order	315	91.0	92.5
Divorce order	10	2.9	–
Order following a hearing	5	1.4	3.6
Default order	4	1.2	3.9
Not clear	12	3.5	–
Total	346	100.0	100.0

Amount of maintenance outstanding and duration of arrears

The detail in the case files is insufficient to allow an accurate assessment of when defendants go into arrears and how long complainants wait before informing the court. However, using the available information, we can calculate approximations of these timeframes.

The median amount of maintenance outstanding when a breach was reported was N\$1 500 (range N\$50-N\$65 992). **The typical amount of maintenance outstanding is six times greater than the median maintenance payment (N\$250; see section 12.5⁷).** This is the equivalent of 6 months of the median maintenance payment although we cannot be sure of this timeline as we know only when the complainant reported the breach, not when the defendant went into arrears. The 1995 maintenance study found that the median amount of maintenance outstanding (N\$450) was four times higher than the median amount of maintenance per child per month (N\$100).⁸

An alternative way of looking at arrears is to assess the time lapse between the date of the order and the date when the breach was reported. Again this does not show exactly when between the two dates the defendant went into arrears, but it does help to give some indication of the timeline. **The median time between the date the maintenance order came into effect and the date the breach was reported was 9 months,** meaning that a defendant who goes into arrears is likely to do so fairly soon after the order has been made. This suggests that either some defendants do not take the implications of a maintenance order seriously, or that the terms of the maintenance order are not viable for the defendant.

These findings suggest that the defendant is in arrears for approximately 6-9 months before the complainant reports it to the court. To encourage regular payments and prompt reporting of breaches sooner, **we recommend the development of a simple pamphlet on a parent’s responsibility to pay maintenance and the consequences of failing to pay maintenance, to ensure that defendants clearly understand their duties in this regard and that complainants know what recourse they have in the event of a breach. The pamphlet should also include information on how to apply for a change to a maintenance order.**

Whilst the majority of cases that went into arrears were reported within 6 months of the order (110/276; 39.9%), this is followed by a similar proportion of cases that were reported 7-12 months later (64/276; 23.2%) or 1-2 years later (69/276; 25.0%). In four cases breaches were reported more than 4 years after the order was made.

⁷ N\$250 is also the median amount of maintenance ordered only for the cases that were in arrears.

⁸ D Hubbard, *Maintenance: A Study of the Operation of Namibia’s Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 69 and 109.

The 1995 study found that the average arrears case involved a complaint about arrears made 13 months after the date on which maintenance payments began.⁹ Similar to this study, the 1995 study found that 35% of all arrears cases involved defendants who fell into arrears within six months of the date on which maintenance payments were to begin, 26% fell into arrears 7-12 months later and 21% fell into arrears 1-2 years later.¹⁰

One possible explanation for the longer timeline for reporting breaches in the 1995 study is because the previous Act did not specify a timeline for when a breach could be reported and some courts followed a policy of not instituting criminal proceedings until the respondent was at least three months in arrears. The justification for this timeline was the need to establish that the defendant was clearly not going to pay maintenance rather than simply being late. Given that maintenance is provided for basic needs, allowing the defendant to be in arrears for such a long period of time could put the complainant under considerable pressure.

The 2003 Maintenance Act improved on the 1963 Act by providing a specific timeframe for making complaints, specifying that complainants may report a breach 10 days after a missed payment was due.¹¹ However despite this provision, it appears that many complainants wait much longer than 10 days before making a complaint. When the beneficiary is a child, failure to provide maintenance for such a long time is not in the best interests of the child. It also makes it very difficult for the defendant to repay the amount of money owed, as the mounting arrears will be much higher than the regular monthly payments. Therefore, **by leaving the breach unaddressed for so long, the complainant may be making it increasingly unlikely that the arrears will be paid, or making it take much longer for the full amount of arrears to be paid off.** It also sends the message that defendants do not have to comply with a court order.

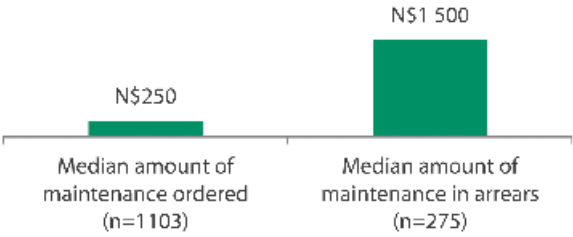
Table 145: Amount of maintenance outstanding and time maintenance is outstanding

Time/amount	Number of cases in arrears	Median	Mean	Minimum	Maximum
Amount in arrears (N\$)	275	1 500	3 133.25	50	65 992
Duration in arrears (months)	276	9	12.2	<1	76

Table 146: Time between date order was made and date breach was reported

Time maintenance is in arrears	Frequency	Percentage
0-6 months	110	39.9
7-12 months	64	23.2
1-2 years	69	25.0
2-3 years	22	8.0
3-4 years	7	2.5
More than 4 years	4	1.4
Total	276	100.0

Chart 81: Comparison of median amount of maintenance ordered per month and median amount of maintenance outstanding



Some of the court personnel explained why breaches in maintenance orders are not dealt with 10 days after they occur. One clerk in Ondangwa explained, “If the defendant does not pay maintenance after 10 days, the court must follow up. But the post office alone takes one week. Let’s say the defendant is in southern Namibia and pays via the post office. The payment may take one or two weeks to register. Ten days is inconvenient for the men. Men cannot travel to Ondangwa to pay maintenance; they must use the slow postal service.”

⁹ Id at 108.

¹⁰ Id at 109.

¹¹ Maintenance Act 9 of 2003, section 28.

The clerk at another court stated that they do not process complainants about a failure to pay after the 10-day time period stipulated in the Act because this would result in too much paperwork if applied in every case where the situation occurred. The clerks from three other courts stated that they require the complainant to wait for three months of non-payment before they will process a claim for arrears. In other words, the system used under the old law is still being applied in practice.

It appears that some of the courts use mechanisms outside those outlined in the Act for dealing with cases that go into arrears. For example the clerk at one court explained that the court will write a letter to the defendant after one month if payments have not been received and send a second warning letter if payment is not made for a second month. Only then will the clerk arrange for a summons to be sent. Another clerk stated that, “*There needs to be more attention on other measures to recover outstanding monies. We need something quicker and more detailed,*” despite the fact that there are quick and detailed mechanisms already in place. As noted under section 9.3, a small proportion of the summonses in the sample were issued for cases that had gone into arrears (36/1 493; 2.4%).

Feedback from community members from the focus group discussions also shows that people often wait for some time before reporting breaches. One of the activities at the focus group discussions was for the participants to postulate the end of an incomplete story. One of the scenarios put to the group was that a father is trying to delay the process by not attending court. The female participants at the Keetmanshoop focus group discussion agreed that the defendant will “*get three chances, up to 3 months or so*”. All of the women agreed that a grace period of three months is the norm in Keetmanshoop, although they noted that after three months the defendant should be locked up, saying that the “*court is more serious about arresting people than before*”.

The Legal Assistance Centre has produced materials to encourage the public to report breaches in maintenance orders as early as possible. For example, the LAC produced a comic entitled *What to do if someone stops paying maintenance* and a radio advert which was broadcast on a commercial radio station in 2011 and distributed to other radio stations in 2012. **We recommend that the public is made more aware of their right to report a failure to pay maintenance 10 days after a payment is missed. Maintenance officers should also inform complainants at the time the order is granted of the correct timeline for reporting arrears. Defendants should also be fully informed about the process and the implications of not paying maintenance. Maintenance officials should also receive training on the process and the mechanisms for the enforcement of maintenance orders, and encouraged to review cases where breaches occur to ensure that the best possible payment arrangement is in place (see section 8.11 for further discussion on payment options).**



More public awareness materials about breaches of maintenance payments are also needed. Currently the information materials produced by the LAC focuses on the role of the complainant to report breaches in maintenance payments. However there is also a need for opinion change to be generated amongst people paying maintenance about why going into arrears is a problem for the child they are supporting. **We recommend that public information materials are developed to better explain the importance of paying maintenance and how the failure to pay maintenance can affect a child.**



CASE STUDY

The failure to pay maintenance

The Legal Assistance Centre was approached by one client who asked for information about her options. She had an informal maintenance agreement with the father of her children. The father informed her that he had left his current job and was going to move to another town and be employed the following month. Whilst the father had fairly good record of paying maintenance, he now informed the mother that he was unable to pay maintenance in the current month and that “*she must give him time*”. The mother was very concerned as she did not have money available to cover the missed maintenance payment. We advised the client to discuss the situation with the father. For example, could he borrow money from a relative to pay maintenance? Could they agree on a lower amount of maintenance that he could provide during the month in question to help cover critical costs? If the client felt that informal discussions were now a problem, she could also apply to the court for a maintenance order.

This case study illustrates the impact of the failure to pay maintenance. The father was right in discussing his changing situation with the mother, but it is unfair of him to simply expect the mother to cope without his monthly contribution as the costs the mother is incurring for the care of her children will not go away – she will not be able to put on hold the buying of food or the payment of childcare costs. Therefore whilst open communication is very important, it is also important to ensure that parents who pay and receive maintenance understand that such payments are often crucial for the child’s wellbeing and so should be an important priority.

Illustrating this message, one of the male focus groups in Ondangwa created the following role play:

Lucus: Oh my friend, how are you?

John: Fine.

Lucus: I’m so concerned. I received a letter that makes me wonder. I don’t know where it’s from. It says I have to pay maintenance fees for kids that I’m raising. My cattle are dead. I only have 3 goats and now my house is empty. What can I do? My girlfriend has now put a maintenance fee for me and I don’t know how to pay.

John: Ask your relatives to help. You must support your children.

Advert encouraging complainants to report failure to pay maintenance, aired by the Legal Assistance Centre on commercial radio in 2011.

Lady 1: I applied for maintenance order in January and the court ordered Luke’s father to pay maintenance every month but he only made one payment.

Lady 2: That’s a crime.

Lady 1: It’s been so long, can I still report it?

Lady 2: Yes you can, you can report it 10 days after the maintenance was due or anytime after that. You don’t need a lawyer. The court can order money to be deducted from his salary and be paid directly to you.

Man: Failure to pay maintenance without good reason is a crime. Parents, take responsibility for you children. Go to your nearest magistrate’s court to report a failure to pay maintenance.

This advert was produced by the Legal Assistance Centre. Fighting for human rights in Namibia since 1988.

“Guys should get arrested if they dont pay maintenance!!!!”

Comment posted on the LAC Facebook page in response to a question on what to do if someone stops paying maintenance

15.2 Overview of outcome of cases involving arrears in maintenance payments

The files show that there were a wide range of outcomes following a breach in the payment of maintenance. Unfortunately in approximately half of the cases, the outcome of the situation was not clear (176/346; 50.9%). In approximately **one-third of the cases there was a positive outcome for the complainant (120/346; 34.7%)**. This included the defendant paying or agreeing to pay all or most of the arrears,¹² the court making a new maintenance order to include the amount in arrears, the court ordering the attachment of wages or a warrant of execution, or the beneficiary going to live with the defendant (this is classed as a positive result as the court should allow this only if it is in the best interests of the beneficiary). The new mechanisms introduced by the 2003 Act, namely the attachment of wages or execution orders, were used in only a minority of instances (see sections 15.5 and 15.6 for further discussion of files that used these mechanisms).

In approximately one-sixth of the cases there was a negative outcome for the complainant (50/346; 14.5%). This included the amount in arrears being reduced or suspended, or the case being adjourned, postponed, withdrawn, or struck from the roll. Hearings were adjourned or postponed in 13 cases. Reasons for postponements included the court requesting proof of payment (5), absence of both parties (4), an appeal (1) and reasons not documented (3). In one case the payment of arrears was suspended until the defendant was better able to pay. Although this is a negative outcome for the beneficiary, it may still be the most realistic outcome in the circumstances as a defendant cannot be forced to pay maintenance if he does not have the means to do so.¹³ However, overall this finding is discouraging as the new law on maintenance was intended to provide more effective enforcement mechanisms. The problem seems to

Chart 82: Outcome of reported breach in a maintenance order (n=346)

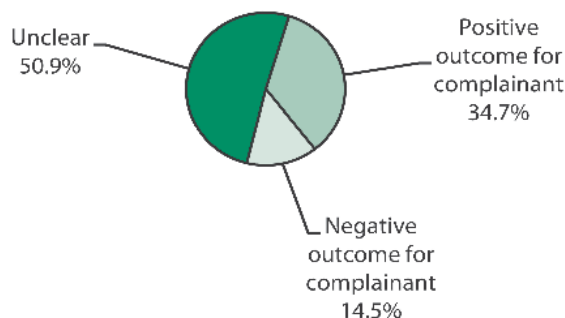


Table 147: Outcome of reported breaches of maintenance payments

Outcome	Frequency	Percentage
Positive solution for complainant	120	34.7
Arrears paid / partly paid	47	13.6
New maintenance order made including the amount in arrears	37	10.7
Order made for attachment of wages	27	7.8
Arrears to be paid (no court order)	4	1.2
Order for warrant of execution	2	0.6
Arrears reduced (beneficiary to live with defendant)	1	0.3
Case withdrawn (beneficiary to live with defendant)	2	0.6
Negative solution for complainant	50	14.5
Matter struck from roll	33	9.5
Case adjourned/postponed	13	3.8
Case withdrawn (defendant unemployed; reason unknown)	2	0.6
Arrears suspended until the defendant is better able to pay	1	0.3
Defendant ordered to pay arrears and fined but case overturned on appeal	1	0.3
Outcome of reported breach not clear	176	50.9
Total	346	100.0

¹² In the four cases where the defendant agreed to pay the arrears without a court order, in two cases the defendant made a sworn declaration that he would pay the arrears and in one case the defendant arranged to pay off the arrears in two instalments over a period of two years.

¹³ Maintenance Act 9 of 2003, section 5.

be that the options in the law are not being optimally implemented rather than the law failing to provide sufficient remedies.

We identified only two arrears cases that were withdrawn. One maintenance officer said that complainants will withdraw their case because they give up waiting for the payments to be made. Most problematic is the fact that in the small number of cases where the reported breach was struck from the roll (33/346; 9.5%), in half of these cases (17/33; 51.5%) it was because the defendant had not been summoned to court or because there was no proof that the summons had been served. Problems regarding the service of documents are discussed in more detail on page 196. In three instances the case was struck from the roll because the complainant failed to attend.

In the cases where the outcome was unclear (176/346; 50.9%), there was limited information in the files. **It is a matter of concern that 10% of all files (176/1 687; 10.4%) contained reports of a breach in the payment of maintenance but no record of follow-up or outcome.**

15.3 Timeline for outcome of cases in arrears

The median time between the date a breach was reported and the date an outcome were recorded for the breach was 3.5 months (mean 7.5 months; range 0-79 months). However this information is available for only 80 of the cases involving arrears.

CASE STUDY

A visit to the maintenance court

The Legal Assistance Centre assisted a client to deal with arrears in the payment of maintenance. The following is an account of a visit to the maintenance court made by one of the researchers for this project.

A meeting with the maintenance officer

P was supposed to be receiving monthly maintenance payments of N\$300 in total for three children. However the complainant only paid once in a year and a half and then paid N\$600 in the month when P told the father that she was going back to the maintenance court.

P had tried to recover the arrears. She had gone to the court, only to find that they had lost her docket. Fortunately, the docket was later found, and P returned to press her claim. The maintenance court had told the father that he needed to pay (although we do not know whether this was through a summons or informally), but he refused and the arrears continued piling up. In the meantime, the father had, against P's wishes, taken the eldest child to live in his household. He then convinced P that he was only supposed to pay R\$200 as he was already maintaining the third child, though he refused to pay that monthly sum as well.

What finally drove P back to the court was the pressing need for funds to pay the School Development Fund contribution for her middle child. Upon hearing of P's renewed requests for the money he owed, the father demanded a paternity test (paid for by him). They were still waiting for the results, but P was certain that he was the father of all three children.

The staff at the Windhoek maintenance court were supposed to start seeing walk-in complainants at 14h00. However, they did not open their offices until about 14h20. Although the waiting room was filling rapidly with anxious complainants, the process was painfully slow. Even when the offices were fully open there were only about three court staff who were seeing people. There was also very little order to whom was being seen first. The court staff did not necessarily take the people who had been waiting the longest, but rather those who had positioned themselves closest to the office doors. There was thus much jostling amongst those waiting (almost entirely female, although there were two men) to stand or sit in the coveted positions near the door.

After about an hour, complainant P and I sat down with the maintenance clerk, who was a young friendly woman. Most of the interview was conducted in a language that I didn't understand, but P seemed very satisfied with the responses she was getting from the maintenance officer. When the maintenance officer left the room to bring in P's file, P leaned over to me and said, "*She understands everything, my whole story.*"

The maintenance clerk was very sympathetic to P's story. She told P that she would arrange for P and the defendant to meet with a maintenance officer and suggested that P should request a warrant of execution against the father's property. Unfortunately, attachment of the father's wages was impossible as the father was a self-employed mechanic and shebeen owner. She also told P that P had full custodial rights of her eldest child, and that P should insist on the child's return. However, the maintenance officer gave P no advice on the legal steps which she could take to ensure the child's return. (She could have been referred to the children's court to apply for an order confirming that she is the custodian.)

Although the maintenance clerk had no immediate power to help with P's case, P seemed much heartened by the assurances that she was in the right. However, P essentially spent an hour and a half of waiting in exchange for reassurance that the law was on her side, without any actual action. Everything, it seemed, would have to wait until the meeting with the father. The law allows the court to issue a warrant of execution in the defendant's absence, which the defendant can then oppose if he chooses to do so. Given that this defendant had not paid maintenance for over a year despite promises that he would, the court should not consider it unreasonable to issue a warrant for execution against his property.

A hearing before the magistrate

The Legal Assistance Centre did not attend the informal discussion between the complainant and defendant but was invited to attend the ensuing hearing before the magistrate.

I arrived at the maintenance court at appointed time of 08h30. There were around 30 people waiting in the crowded room. Many sat on the floor or simply hovered outside the doorway. About three-quarters of the people were women. Several of the women had brought their children with them. Around 09h45 a court official called out a list of names (including P's). The court official asked the people to follow him to an empty court room where we, again, sat and waited (although this time everyone got a seat). Around 10h30 another court official entered the room and announced the specific courtrooms for each case. We then waited a further two hours for the case to start. The father of P's children was also present, waiting in the same area. I can imagine that, in some situations, the complainant could feel intimidated by the defendant whilst waiting for such a prolonged time together.

At the end of our four-hour wait, the case was finally heard by the magistrate. I sat in the gallery, along with P, the father, the father's "supporter" (a male, probably a friend or family member) and another woman who was also having her maintenance case heard that day (and the woman's baby). Clearly, this was not a closed court as the law requires. Also present were a translator and a translator-in-training.

The maintenance officer entered, and called the father to stand in the witness box to the right of the judge's chair. Leafing through the parties' maintenance file, he asked the father a few questions in Afrikaans. When the magistrate (a young woman) entered, the enquiry commenced in earnest.

Despite the fact that the court proceeding was totally in English, it was hard for me to understand what was going on. The magistrate asked the father a few questions about his payment of the contribution towards the children's School Development Fund and then dismissed him from the stand. She spoke in English which was translated for the father. The father did speak English, but I think the translator was simplifying the language the magistrate had used, for example explaining the meaning of statements like "*it is not within the ability of this court to consider that aspect right now*".

The other woman who had also been waiting then had her case heard. Her case was also about failure to pay maintenance. The defendant in her case had failed to attend court. The maintenance officer recommended that the magistrate execute a warrant of arrest, which she did. The magistrate also told the woman not to bring her baby into the court again.

Following the hearing, the maintenance officer spoke with P and the father in Afrikaans. P became more and more angry and agitated as the prosecutor tried to explain things to her. The father was also getting angry and his friend was laughing at certain moments, but the maintenance officer remained calm. Finally P walked away, upset with the conclusion.

The translator explained that the two parents had been getting very heated over the subject of custody of the eldest son. The translator seemed to think that the father had agreed to return the child, provided that the child stayed in school. The maintenance officer explained that the court had ordered the father to continue paying N\$600 for maintenance and arrears. The court was satisfied by the display of good faith the father had already shown by the first payment of N\$600 (as a result of P's warning to the father that she would go to court), particularly as the father was self-employed and would probably have struggled to get the money. There appeared to be no consideration of the fact that the mother was owed N\$4300 in arrears.

The prosecutor had not pressed for an attachment of property because the father owned only two cows and given the good faith he had shown in paying "double maintenance" in the preceding month to start reducing the arrears. P had not told me the father owned two cows and I asked the maintenance officer to check the file. It turned out that the father actually owned two cars, not cows, but the handwriting had been difficult to read.

Remembering the questions that the magistrate had asked about the payment of the School Development Fund, I asked the maintenance officer if this payment was in addition to the N\$600 or part of it. The maintenance officer said it was to be part of the N\$600 because the father hadn't initially been asked to pay for the School Development Fund on top of the other maintenance. But, when he checked the file again, he saw he had made another mistake – the original order had been for N\$300 *and* the payment of the School Development Fund. Unfortunately, the maintenance officer noted these mistakes too late; both parties had left the court.

Whilst an order to increase the monthly maintenance payments in order to cover the arrears is probably unrealistic, the danger remains that the father will stop paying as he had done in the past, so that P will be forced to repeatedly return to the court. Given the time and expense involved just for her to come to the court (which required either paying taxi fare or making a two-hour walk), P may easily not return to court to pursue further enforcement. Although P was pleased that a payment would be made, she was frustrated that she would have to come back to the court the following day to pick up the arrears money the father had left because the relevant office is open only in the morning.

Legal Assistance Centre volunteer lawyer

15.4 Overview of civil enforcement mechanisms

Civil enforcement mechanisms were used in approximately one-quarter of the arrears cases that had a positive outcome for the complainant (27/120; 22.5%). This information must be viewed in the context of the finding that only one-third of the cases where there was a breach had a positive outcome – in approximately half of the cases, the outcome of the reported breach was not clear and in approximately one-sixth of the cases there was a negative outcome for the complainant.

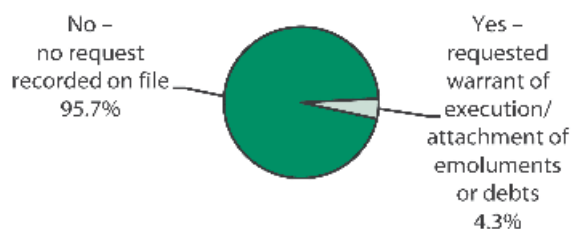
If the complainant would like the court to use one of the civil enforcement mechanisms (a warrant of execution or attach emoluments or debts), the complainant must request this using one of the forms provided in the regulations.¹⁴ However, of the 346 instances where a defendant fell into arrears

¹⁴ Maintenance Regulations, regulation 18.

with maintenance payments, **complainants requested the use of a civil enforcement mechanism in only a handful of situations (15/346; 4.3%)**. These applications were made at a limited number of courts (seven courts in total but predominantly at the Walvis Bay court, which accounted for eight of the fifteen requests). Twelve of the fifteen requests for civil enforcement were for the attachment of wages and two were for a warrant of execution. Data on the type of request is missing in one case. We did not find any records in our files of requests or orders for the attachment of debts and the court personnel interviewed did not discuss this as an option that is commonly used by the courts.

Given the limited number of requests for civil enforcement, we recommend that the Ministry of Justice revise the Act to give the court a greater discretion to address arrears. Complainants should be asked to provide the relevant information about non-payment, and the maintenance officer should investigate the defendant’s employment status and assets to determine whether civil enforcement is feasible.

Chart 83: Following a breach did the complainant request civil enforcement (warrant of execution or attachment of emoluments or debts)? (n=346)



Twelve of the 14 forms contained information on the amount of maintenance outstanding. The median amount of maintenance outstanding was N\$1 725. This is similar to the amount of maintenance outstanding for all breaches (N\$1 500, reported under section 15.1), indicating that there does not appear to be anything particular about these cases that led to an application for civil enforcement – keeping in mind that the sample here is very small.

Of the existing civil enforcement options, one maintenance officer stated that the attachment of property is the most effective way to discourage the defendant from defaulting on maintenance payments, since people never want to lose their property. This statement was corroborated by the participants at the Keetmanshoop male focus group discussion, who were opposed to both attachment of wages and sale of property. The example of selling a man’s car was particularly worrisome for them.

Many court officials found the attachment of wages to be problematic. For example one clerk explained that employers will send cheques rather than cash. This adds a delay to the process as the cheque must be cleared before the payment can be made to the complainant. The clerks at another court stated that it takes too long to arrange for the attachment of wages of a government employee. The court officials at another court stated that they do not use orders for the attachment of wages due to the challenges involved in arranging these payments, although they did not specify what these challenges are. One maintenance officer stated that they give employers three different options for payment, but each is problematic – employers are able to make payments through postal orders (which may cost up to \$30 each), electronic transfers (although some employers may not be set up to do this), or in person (which the prosecutor described as costly, time-consuming and generally inconvenient since employers may be based some distance from the court). The maintenance officer was of the opinion that some employers dismiss defendants when an attachment of wages order is made by the court. However when she calls the employer and tells them such action is not permitted by law, the employer responds by fabricating a ‘legitimate’ reason for the defendant’s dismissal.¹⁵ The maintenance officer cited four instances over three years where employers were fined N\$1 000 for not paying money to the court as ordered.¹⁶

A further problem with the attachment of wages arise when files containing such orders are transferred (see page 243). Some court officials said that it can take the employer some time to arrange for the payments to be transferred from one court to the other. During the intervening period, the payments continue to be made to the original court, causing delays in getting the money to the complainant.

¹⁵ The dismissal of an employee due to an emolument order would constitute unfair dismissal under the Labour Act 11 of 2007, section 33. An employer must not dismiss an employee without a valid and fair reason.

¹⁶ The court could have given a fine of up to N\$2 000 or up to six months imprisonment (Maintenance Act 9 of 2003, section 44).

The issues noted are clearly problematic. However there is nothing in the Act or the regulations that says that employer must pay the money to the court. In many cases it could be far more efficient for the employer to arrange payment of maintenance directly to the bank account of the complainant or even for the complainant to collect the payment from the employer. **We recommend that the Ministry of Justice send a circular to the maintenance courts to clarify the mechanisms of payment that an employer can use to fulfil an order for the attachment of wages. We also recommend that a simple pamphlet about the Maintenance Act is created for employers to inform them of their obligations and the different alternatives they have to transmit payments.**

15.5 Orders for the attachment of wages

Although we identified only 346 reported breaches from 276 files, within which there were 12 applications for the attachment of wages and 27 orders for the attachment of wages, the entire sample contained 469 orders for the attachment of wages in 416 files. This means that **approximately one-quarter of the files contained an order for the attachment of wages** (416/1 687; 24.7%).

It is possible that these orders were agreed to by the defendant as part of a consent order. For example, at the Walvis Bay court almost all consent forms are accompanied by a letter requesting the employer to deduct the amount of maintenance owed from the employee's wages. Alternatively the courts may not be recording the incidence of a breach in the case file before addressing it with an order for the attachment of wages.

Consent orders and attachment of wages

It appears competent for a defendant to agree to an attachment of wages as part of a consent order made under section 18 of the Maintenance Act, which states that a defendant may consent to the granting of the maintenance order applied for and submit the written consent to the maintenance officer. The maintenance court may then make a maintenance order in accordance with this written consent. The Act does not place any limits on what the defendant may agree to.

Another route to an order for the attachment of wages is via section 30, which provides for such an order on application by the complainant after the defendant has breached a maintenance order, or as an alternative to a warrant of execution.

Section 31 provides for notice to the employer of an order for the attachment of wages, obligates the employer to give notice to the court if the defendant leaves employment, provides that an order to attachment of wages in respect of maintenance will take priority over any other court order for attachment of wages and authorises the employer to deduct an additional amount for administration costs as determined in the court order. Section 30 also gives an employer the option of applying for the order for attachment of wages to be suspended, amended or rescinded. But all of these procedures apply only to orders for the attachment of wages **made under section 30**. Similarly, regulation 22 on the attachment of wages applies only to orders **made under section 30**.

Thus, it appears that a consent order incorporating attachment of wages, made in terms of section 18, would depend on the voluntary compliance of the employer.

The large number of orders for attachment of wages found in the files suggest that many of these must be associated with consent orders. It is likely that such orders are being treated in the same manner as orders for attachment of wages made under section 30.

We recommend that the Maintenance Act be amended to apply the same procedures to orders for the attachment of wages agreed to by the defendant and incorporated into consent orders, as for any other order for attachment of wages made in terms of the Act.

The majority of the files containing orders for the attachment of wages contained one such order (370/416; 88.9%), although some files contained two (41/416; 9.9%), three (3/416; 0.7%) or four (2/416; 0.5%). The files often contained more than one order for the attachment of wages when the amount of maintenance to be paid was changed or when the place of employment changed.

The time taken to serve the order for the attachment of wages on the employer is recorded in 66 files. The median time taken was 7 days (range 0-307 days).

The cost of return of service was recorded for 18 of the emolument orders. The median cost of service was N\$55.50 (range N\$39-N\$914). However, due to the small sample size this information can only be used as an indication of cost of service as the information is not statistically robust. Although the defendant can be ordered to pay the cost of service, we did not find any examples where this occurred in practice.¹⁷

Table 148: Number of orders for the attachment of wages per file

Number of emolument orders	Number of files	Percentage
1	370	88.9
2	41	9.9
3	3	0.7
4	2	0.5
Total	416	100.0

The defendant or the employer may apply for an order for the attachment of wages to be suspended, amended or rescinded.¹⁸ The sample contained one application for the suspension of an emolument order. However the request was made by the complainant rather than the defendant or employer. The complainant requested the suspension because she wished to wait for the defendant to receive a pay increase before continuing her complaint. A final order was made two months later, intended to remain in force until a pending divorce hearing between the complainant and defendant.

Contribution Orders

Seven files from the Ondangwa court opened in 2005/06 contained orders for the attachment of wages using a form from the Children's Act of 1960 to make a contribution order. A further fifteen orders for the attachment of wages using the correct form from the Maintenance Act were also made at the Ondangwa court in 2005/06. It is not clear why the incorrect form was used on seven occasions. It is possible that the court did not have copies of the form from the Maintenance Act available.

The Children's Act 33 of 1960 defines a contribution order as an "order for the payment or recurrent payment of a sum of money as a contribution towards the maintenance of a child in a place of safety or in any custody wherein he was placed under this Act or the Criminal Procedure Act, 1955, or towards the maintenance of a pupil".

The Ministry of Gender Equality and Child Welfare has prepared a Child Care and Protection Bill which is expected to replace the Children's Act. The Child Care and Protection Bill provides a system for contribution orders that is similar to the one in the Children's Act, with some technical adjustments.

15.6 Warrants of execution

Two warrants of execution were recorded in the sample. One was accompanied by an application for such a warrant, the other was not. One warrant of execution ordered N\$1 400 to be levied, the other N\$10 200.

Part D of the warrant of execution provides a space for the messenger of court and the debtor to sign that the amount has been paid within half an hour of the messenger entering. This timeline appears

¹⁷ Maintenance Act 9 of 2003, section 20.

¹⁸ Maintenance Act 9 of 2003, section 30(2).

unrealistic given that the debtor may not be expecting to receive the warrant and is unlikely to be able to raise the sum of money requested within 30 minutes. In the two cases identified in our sample, neither Part D was signed. **We recommend that the warrant of execution is amended to allow for a more realistic period of time for the defendant to raise the amount of money/property requested.**

15.7 Warrants of arrest

The Maintenance Act lists a number of offences for which the court may issue a warrant of arrest, including failure to make a specific maintenance payment. These are summarised on page 94.

Approximately one in 10 files contained a warrant of arrest. A total of 278 warrants of arrest were found in 216 different files. This represents 12.8% of all the files in the sample (216/1 687). The number of arrest warrants on file ranged from one to six. The majority of files contained one (172/216; 79.6%) or two (33/216; 15.3%). Eleven files contained three, four or six. The number of warrants of arrest on file is not the same as the number of arrests. Page 287 discusses whether or not arrests were made.

The prosecutor at one court stated that he intends to create a register of files containing warrants of arrest. This will help with the tracking of cases. **We recommend that other courts also create a register for warrants of arrest for maintenance orders and keep better records of the outcome of the warrants of arrest.**

Chart 84: Does the file contain a warrant of arrest? (n=1 687)

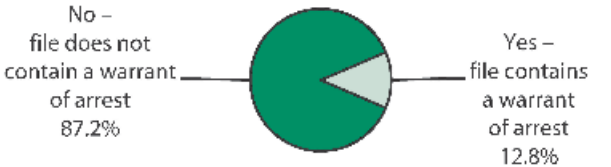
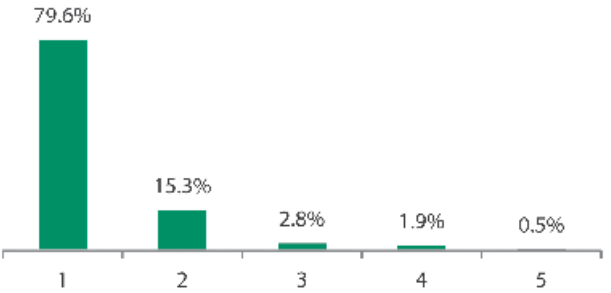


Table 149: Files containing a warrant of arrest: number on file

Number of arrests on file	Number of files	Percentage
1	172	79.6
2	33	15.3
3	6	2.8
4	4	1.9
6	1	0.5
Total	216	100.0

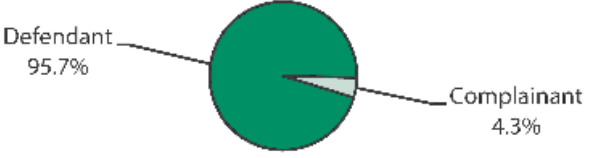
Chart 85: Number of warrants of arrest on file (n=175)



Person to be arrested

The majority of warrants of arrest were issued for the defendant (266/278; 95.7%), and a small minority were issued for the complainant (12/278; 4.3%).

Chart 86: Who was to be arrested? (n=278)



All of the warrants of arrest for the complainant were issued from the Windhoek court over all four years of the study. Only two of the twelve files in which a warrant of arrest was issued for the complainant contained details of why the warrant of arrest was issued. In both cases, the warrant was issued because the complainant failed to attend the enquiry. As discussed on page 194, the Windhoek court often summons the complainants to hearings and enquiries, which explains why the court is then able to issue a warrant of arrest when the complainant does not attend court. The records available do not allow us to confirm whether or not any of the complainants for whom a warrant of arrest was issued were arrested, but we can confirm that the complainant was *not* arrested in respect of four of the warrants issued, although the files do not contain details about why these complainants were not arrested.

Reason for warrant of arrest

Approximately half of the warrants of arrest (134/278; 48.2%) were issued for failure to respond to a summons to attend court and approximately 40% were issued for a failure to pay maintenance (114/278; 41.0%). It is not clear why the warrants of arrest were issued in the remaining files (30/278; 10.8%). However the differentiation between the two main reasons for arrest is not exclusive; in some instances the warrants of arrest for failure to attend court were issued because the defendant failed to attend court to explain why maintenance payments had stopped. A lack of clarity in the files makes it difficult to differentiate the reasons for the warrants of arrest into more clearcut categories.

Chart 87: Reason warrant of arrest issued (n=278)

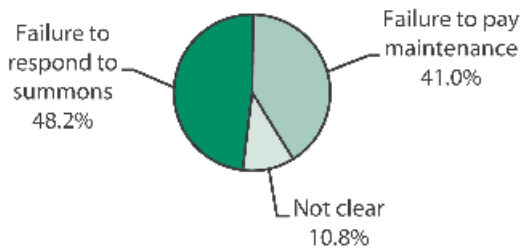


Table 150: Reason warrant of arrest issued

Reason for warrant of arrest	Frequency	Percentage
Failure to respond to summons	134	48.2
Failure to pay	114	41.0
Not clear	30	10.8
Total	278	100.0

It is not surprising that more warrants of arrest were issued for failure to attend court than for failure to pay maintenance. Failure to attend court can be enforced by court officials. Failure to pay maintenance will be enforced only upon application by the complainant, who has the option of requesting civil or criminal proceedings.

We can also assess warrants of arrest in cases where there was a reported breach. The results show that in approximately one-quarter of the cases of reported breaches, at least one warrant of arrest was issued (94/346; 27.2%).¹⁹ The proportion of cases that went into arrears and resulted in the issue of a warrant of arrest is substantially lower than that found in the 1995 study where a warrant of arrest was issued in 89% of the cases where the defendant fell into arrears.²⁰ This suggests that the courts may be attempting to use civil mechanisms to resolve failures to pay maintenance, despite the small number of files containing applications for such enforcement measures (29/346; 8.4%).

We can also assess the correlation between the incidence of warrants of arrest and the incidence of breaches by court. For example, over one-quarter of the warrants of arrest were recorded at the Rehoboth court. This finding is consistent with the fact that this court also recorded a high incidence of breaches (15.6% of the breaches recorded in the sample). We also identified a number of courts where the percentage of breaches is much higher than the percentage of warrants of arrest, namely Keetmanshoop (8.1% vs 4.0%) and Oshakati (13.3% vs 5.0%). It is possible that these courts are effectively dealing with breaches in other ways; alternatively it may mean that these courts are struggling to deal with the problem of breaches. Unfortunately the sample size is too small to assess whether or not individual courts are effectively dealing with cases of maintenance arrears. The Outapi (3.8% vs 7.2%) and Rundu (0.0% vs 2.9%) courts both had notably fewer breaches than warrants of arrest. This may indicate that these courts ensure that the defendant is able to pay the amount ordered on the first order, or that the courts ensure that the defendant clearly understands the consequences of not paying maintenance. Alternatively it may be that record-keeping on files that went into arrears is not good at these courts.

¹⁹ There is a slight discrepancy between the number of warrants of arrest issued for failure to pay maintenance (114) and the number of warrants of arrest issued in reported breaches (96). This may be because some of the files did not contain an arrears declaration although there is some other information in the file to suggest that failure to pay maintenance is associated with the criminal proceedings. The difference is not large enough to affect the analysis.

²⁰ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 110.

Table 151: Comparison between the total sample size and incidence of warrant of arrest on file

Court	Number of files in sample	Percentage of files in sample	Records of breaches	Percentage of breaches in sample	Record of one or more warrants of arrest on file	Percentage of warrants in sample
Bethanie	15	0.9	5	1.4	2	0.7
Eenhana	46	2.7	6	1.7	4	1.4
Gobabis	97	5.7	15	1.7	8	2.9
Karasburg	73	4.3	1	0.3	2	0.7
Keetmanshoop	111	6.6	28	8.1	11	4.0
Khorixas	34	2.0	2	0.6	1	0.4
Mariental	101	6.0	9	2.6	4	1.4
Okakarara	17	1.0	4	1.2	4	1.4
Ondangwa	93	5.5	4	1.2	6	2.2
Oshakati	136	8.1	46	13.3	14	5.0
Otjiwarongo	108	6.4	23	6.6	9	3.2
Outapi	93	5.5	13	3.8	20	7.2
Rehoboth	111	6.6	54	15.6	65	23.4
Rundu	121	7.2	0.0	0.0	8	2.9
Swakopmund	121	7.2	24	6.9	27	9.7
Tsumeb	66	3.9	4	1.2	2	0.7
Walvis Bay	109	6.5	33	9.5	19	6.8
Windhoek	235	13.9	75	21.7	72	25.9
Total	1 687	100.0	346	100.0	278	100.0

Outcome of warrants of arrest

We can confirm that the person named in the warrant of arrest was arrested in only one in 10 cases (30/278; 10.8%). In each instance, the arrests were made for the defendant. Of the 30 arrests that were made, 27 were for the first or only warrant of arrest on file. Overall, out of the entire sample, arrests were made in less than 2% of the files (27/1 687; 1.6%).

We can confirm that the person named in the warrant of arrest was *not* arrested in 25 instances (9.0%), and one-quarter of the warrants of arrest were cancelled (71/278; 25.5%). For the remainder of the warrants of arrest (152/278; 54.7%), the outcome is not clear. It is not necessarily a failure that a warrant of arrest was cancelled; it could mean that the person in question attended court voluntarily. However it is a concern that we do not know the outcome for half of the warrants.

Table 153: Outcome for the warrant of arrest

Outcome for arrest warrant	Frequency	Percentage
Arrest	30	10.8
No arrest	25	9.0
Warrant cancelled	71	25.5
Not clear	152	54.7
Total	278	100.0

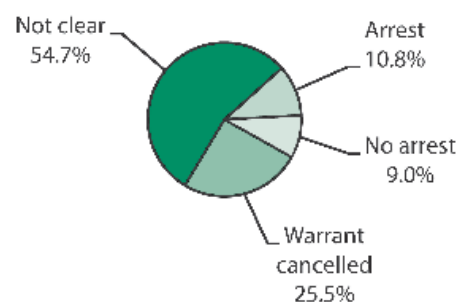
Table 152: Number of warrants of arrest issued before recipient arrested

Warrant of arrest	Successful arrests
1	27
2	3
3	0
4	0
6	0
Total	30

Chart 88: Does the file contain details that the defendant was arrested at some point? (n=1 687)



Chart 89: Outcome for the warrant of arrest



In 10 of the 30 instances where the defendant was arrested, records show that bail was posted. The amount set for bail ranged from N\$200-N\$1 000.

We can assess the timeline for files that contained more than one warrant of arrest. However the number of files is very small and therefore the data can give a flavour of the timelines for some cases but cannot provide statistically-valid information.

Table 154: Time between warrants of arrest (days)

Interval measured	Number of files	Minimum	Maximum
First and second warrant of arrest	44	0	1 022
Second and third warrant of arrest	11	29	798
Third and fourth warrant of arrest	5	0	224
Fourth and fifth warrant of arrest	1	98	98
Fifth and sixth warrant of arrest	1	0	0

We are only able to determine why the person in question was not arrested for a small number of warrants (14/25; 14.6%), because this information was not recorded in many cases. Reasons are similar to those for the warrants being cancelled, suggesting that there is overlap between these categories. The warrants of arrest were not enforced or canceled because the defendant attended court, the defendant was warned rather than arrested, the defendant paid the arrears or the defendant was excused. In one case the police did not respond to the court. Regarding the use of warnings, one file contained a note to the police saying that the warrant of arrest should be lifted if the defendant appeared before the court on a specified date. If the police served the warrant of arrest before this time, the police should “give the defendant a warning and tell date of new hearing”. In other files, the records show that if the defendant failed to attend a hearing, the court would set a new enquiry date and draft a warrant of arrest in case the defendant failed to attend the new date. It also appears that the complainants sometimes requested the court to cancel the warrants of arrest. For example, during one interview with a court official, one of the researchers witnessed a complainant requesting that a warrant of arrest be cancelled. The complainant told the magistrate that the defendant had repented. The magistrate said that he commonly sees such situations, describing the defendants as “sweet talking” the complainants into withdrawing cases.

It is possible that for the instances where the outcome of the warrant of arrest is unclear, the defendant may have attended court, settled the arrears or made contact with the court, but that this information is not recorded on the file.

The fact that so few arrests are being made suggests that there are failures in the system. The Maintenance Act allows maintenance court officials to keep a photo and copy of the identification document of the defendant on file in an effort to ensure clear identification of the defendant. However as discussed in section 12.12, only 67 of the 1 687 files (4.0%) contained identification documents belonging to the defendant and only 14 of the 1 687 files contained a photograph of the defendant (0.05%). Better utilisation of this option might help increase the success rate of arrests.

Another problem may be when the defendant has moved to another magisterial district. Notes in some of the files suggest that there were often delays in these cases. As noted on page 198, **we recommend the Ministry of Justice develop a protocol for how courts can best work together on maintenance enquiries.**

The 1995 study found that approximately 51% of warrants of arrest resulted in an arrest. This is still low but substantially higher than the arrest rate in the current study. The study summarised the various reasons for arrests not always being made – in approximately 30% of the unsuccessful warrants, there were difficulties locating the person in question; the warrant expired without an arrest in another 10% of cases, which may also have been due to difficulties in tracking down the defendant. In 11% of these cases, warrants of arrest were cancelled, perhaps because the amount owing was paid into the court voluntarily. In one-third (30%) of these cases, no reason was recorded and the reason in the remainder was unclear.²¹

²¹ Id at 111.

“Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those dependent on the law. It is a function of the State not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children ... Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.”

South African case of *S v November and Three Similar Cases* 2006 (1) SACR 213 (C) at para (10), quoting *Bannatyne v Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*) 2003 (2) SA 363 (CC) (Mokgoro J), quoted with approval in *S v Gaweseb* [2006] NAHC 27 (Damaseb, JP) at para 11

Time between date warrant of arrest issued and date of arrest

For 25 of the 30 arrests, we can determine the time between the date the warrant was issued and the date of the arrest. **The median time between the date the warrant was issued and the date the defendant was arrested was 43 days (mean 71.5 days; range 6-245 days).** The arrests were fairly evenly divided between being made within the same month (36.0%), within 1-2 months (20.0%), within 2-3 months (20.0%) and longer than three months (24.0%). Given that nearly half of the arrests took over two months, the protracted timelines suggest that police may not be giving arrest warrants issued by the maintenance court the priority they deserve. Whilst the police force is understandably busy, it is not in the best interests of children for these delays to exist. **We recommend that the Ministry of Justice and Ministry of Safety and Security meet to discuss how best to expedite arrests in respect of warrants issued by the maintenance court.**

Table 155: Time between date warrant of arrest issued and date of arrest

Time between date of issue and arrest	Frequency	Percentage
Within the same month	9	36.0
1-2 months	5	20.0
2-3 months	5	20.0
More than three months	6	24.0
Total	25	100.0

The 1995 study found that the majority of successful arrests were made within one month although there were many problem cases that resulted in delays – the report states that 10% of the arrests took 2-6 months and 30% took three months or longer.²² However the findings from the current sample show that a greater proportion of warrants now take longer to be implemented.

For 40 of the 71 warrants of arrests that were issued but subsequently cancelled, we can calculate the timeline between the date the warrant was issued and the date of cancellation. **The median time between the date the warrant was issued and the date the warrant was cancelled was 19 days (mean 61 days; range 0-483 days).** For the warrants of arrest that were cancelled on the same day they were issued, one possibility may be that the warrant was issued at the time the enquiry should have been held and the defendant attended court later in the day.

15.8 Amount of maintenance owed in cases involving criminal proceedings

For some of the cases that involved criminal proceedings and arrears in maintenance payments, we can calculate the amount of maintenance owed. **The median amount of maintenance owed in cases involving arrests was N\$1 343 (mean N\$2 995.62; range N\$50-N\$65 992; n=124).** The arrears were

²² Id at 113.

outstanding for a median duration of 5 months although the sample size used to calculate this figure is small (n=43), and the range is very wide (from 1 month to over 4 years).

Information is also available for a smaller number of cases where there was more than one breach. In some instances the amount of maintenance owed is an accumulation of maintenance that has been unpaid rather than a separate breach. Given the small sample size it is not useful to split the cases that fell into arrears multiple times into these two categories.

Table 156: Amount of maintenance owed and number of months outstanding for cases involving arrears (where this information is available)

Instance of arrears	Amount of arrears should have paid	Number of months maintenance outstanding
First arrears	n=124	n=35
Median	1 343	5.0
Mean	2 996	9.4
Minimum	50	1.0
Maximum	65 992	51.0
Second arrears	n=51	n=5
Median	2 350	7.0
Mean	3 102	7.1
Minimum	200	4.5
Maximum	12 200	12.0
Third arrears	n=25	n=1
Median	3 000	6.0
Mean	4 725	6.0
Minimum	200	6.0
Maximum	14 200	6.0
Fourth arrears	n=13	
Median	4 900	
Mean	6 458	
Minimum	755	
Maximum	17 400	
Fifth arrears	n=5	n=1
Median	5 800	33.0
Mean	2 942	33.0
Minimum	900	33.0
Maximum	2 250	33.0
Sixth arrears	n=4	n=1
Median	6 700	36.0
Mean	5 423	36.0
Minimum	190	36.0
Maximum	8 100	36.0

15.9 Criminal trials

Overall a total of 89 files contained details of a criminal trial. This represents **5% of the maintenance files in the sample** (89/1 687). We do not have details as to why the criminal trials were held.

Incidence of postponements

Approximately half of the trials involved postponements (47/89; 52.8%). The median number of postponements was three (range 1-18). This resulted in a total of 203 postponements recorded in the sample.

In the case involving 18 postponements, the details on file showed that the complainant persistently reported problems with the receipt of maintenance for over three years. The case shows at times the defendant was not employed, and at other times he explains that he was not paying maintenance because he is paying maintenance for another child. On four occasions the case was postponed for further investigation. The defendant failed to attend court many times and on one occasion the defendant was arrested. In a case such as this where the defendant continually promised to pay maintenance but failed to do so, it may have been appropriate for the court to take stricter measures, such as the use of periodical imprisonment. Whilst the defendant faced challenges in having money to pay for maintenance – such as unemployment and the need to pay maintenance for another child – it does not excuse his obligations and the fact that the court persisted with the case shows that the court considered that the defendant had the means to pay maintenance.

Chart 90: Did the criminal trial involve a postponement? (n=89)

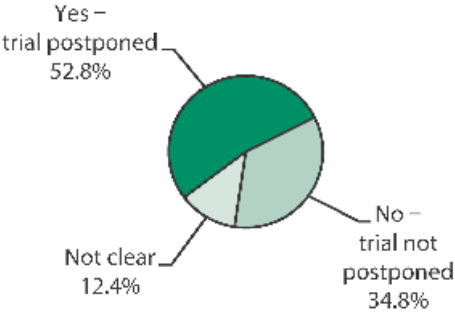


Table 157: Postponements

Status of trial	Frequency	Percentage
Trial postponed	47	52.8
Trial not postponed	31	34.8
Not clear	11	12.4
Total	89	100.0

Table 158: Number of postponements

Number of postponements	Number of trials containing this number of postponements	Total number of postponements	Percentage of trials containing this number of postponements
1	13	13	27.7
2	10	20	21.3
3	3	9	6.4
4	5	20	10.6
5	2	10	4.3
6	5	30	10.6
7	2	14	4.3
8	1	8	2.1
11	2	22	4.3
12	2	24	4.3
15	1	15	2.1
18	1	18	2.1
Total	47	203	100.0

Table 159: Average number of postponements in criminal proceedings trials that were held

Number of trials with postponements	Median number of postponements	Mean number of postponements	Minimum number of postponements	Maximum number of postponements
47	3	4.3	1	18

Reason for postponements

A total of 212 reasons for postponements were recorded (in some instances more than one reason was recorded). On nearly half of the occasions where an postponement was ordered, it was to allow the defendant to bring proof of payment or other unspecified proof (91/212; 42.9%). In approximately one-fifth of the cases the defendant did not attend court for unspecified reasons (42/212; 19.8%). In a further eight cases (8/212;3.8%), the defendant and complainant were both absent, the defendant could not be traced, the summons was not served on the defendant, or the defendant was ill or hospitalised.

Table 160: Reason for the postponement

Reason	Frequency	Percentage
Defendant to bring proof of payment / additional proof unspecified	91	42.9
Failure of defendant to appear in court (reason unspecified)	42	19.8
For enquiry	10	4.7
Defendant to seek employment / bring proof of employment	8	3.8
For plea	4	1.9
Failure of complainant to appear in court	4	1.9
Defendant requests legal representation	3	1.4
Both parties failed to attend	2	0.9
Defendant could not be traced	2	0.9
Defendant not summoned by police	2	0.9
Defendant hospitalised/ill	2	0.9
Complainant hospitalised/ill	1	0.5
Case changed through a divorce order	1	0.5
Magistrate absent	1	0.5
Other/unknown reasons	39	18.4
Total	212	100.0

Time between postponements

The median time between a postponement and the date on which the trial resumed was 42 days (mean 56.6 days; range 1-567 days). Analysis of the time between individual postponements does not show a particular pattern, suggesting that the time between postponements is dependant on the individual characteristics of the cases.

Table 161: Average time between date of postponement and date of new enquiry (days)

Postponement number	Number	Median	Mean	Minimum	Maximum
Postponement 1	47	56	64.9	7	321
Postponement 2	31	35	48.8	14	132
Postponement 3	24	57	66.7	7	161
Postponement 4	20	38.5	68.4	1	567
Postponement 5	14	22	25.9	2	62
Postponement 6	14	51	57.6	7	168
Postponement 7	8	29.5	45.4	7	126
Postponement 8	6	35	39.8	7	92
Postponement 9	6	77	67.2	21	98
Postponement 10	6	31.5	46.3	20	91
Postponement 11	6	42	55.0	1	133
Postponement 12	4	34	31.0	7	49
Postponement 13	2	52.5	52.5	35	70
Postponement 14	2	70	70.0	63	77
Postponement 15	2	87.5	87.5	84	91
Postponement 16	1	7	7.0	7	7
Postponement 17	1	133	133.0	133	133
Postponement 18	1	28	28.0	28	28
Average time between all postponements	195	42	56.6	1	567

15.10 Outcome of criminal trials

We can determine some form of outcome for just over half of the cases that went to trial (54/89; 60.7%). No outcome was reported in 40% of cases (35/89; 39.3).

- In approximately 25% of the cases, the accused paid or partially paid the arrears and did not receive a penalty.
- In over 10% of the cases a new maintenance order was made which incorporated the payment of the arrears over time.
- In 9% of the case the defendant was ordered to pay a fine.
- In over 6% of cases the case was struck from the roll.
- In nearly 4% of cases the complainant withdrew the case.
- The payment of the arrears was cancelled/reduced/suspended in approximately 3% of the cases.

In the eight cases where the defendant was ordered to pay a fine, two of the fines were levied because the defendant failed to attend court. One of the defendants stated that he did not attend the enquiry because he had been travelling for work. The court still enforced the penalty, a reasonable judgement given that the defendant should have informed the court that he could not attend rather than ignoring the summons. In another case the defendant explained that he “*did not know that summons was so important and so I did not care about it*”. The court (reasonably) still enforced the penalty. We know the size of the fines on seven of these eight cases:

- two fines of N\$300;
- one fine of N\$200 or 40 days imprisonment;
- two fines of N\$100 or 30 days imprisonment (recipients selected the fine in both cases);
- one fine of N\$100 or 2 weeks imprisonment (recipient selected fine); and
- one fine of N\$100 and 10 days imprisonment.

In one case the defendant was sentenced to pay arrears and a fine but the judgement was overturned following an appeal.

Only one case file contained any evidence of imprisonment – a sentence of 10 days imprisonment combined with a fine of N\$100.

None of the files with information on criminal trials contained any information on recovery of arrears after conviction.

There was no information in the files about cases where criminal trials were converted into enquiries, although this may have taken place in the 11 cases where new maintenance orders were made. A conversion of a criminal trial into an enquiry is discussed in a 1995 Namibian High Court case.²³

“Where the criminal proceedings have been converted to a maintenance enquiry I can see no reason why the maintenance court cannot include the issue of any payment towards the arrears when it conducts the enquiry into whether the existing maintenance order should be substituted.”

S v Kalundu [2012] NAHC 325 (30 November 2012)

The 1995 study also identified only a small number of cases where penalties were imposed – two cases involving imprisonment and nine involving fines. The remaining cases that involved criminal proceedings resulted in warnings or suspended sentences. The highest sentence of imprisonment imposed without suspension was for six months. The fines issued ranged from N\$50-N\$500.²⁴

²³ *Bingel v Salionga and Another* [1995] NAHC 23 (29 November 1995), discussed at page 82.

²⁴ D Hubbard, *Maintenance: A Study of the Operation of Namibia's Maintenance Courts*, Windhoek: Legal Assistance Centre, 1995 at 118-120.

The 2003 Maintenance Act introduced stronger penalties. However, a comparison between the results of the two studies shows that there has been little change in the number or strength of the penalties enforced. Whilst imprisoning or fining a defendant may not result in the payment of maintenance, the courts should consider these options where defendants persistently fail to pay maintenance or clearly avoid attending court. Of particular relevance is the fact that the court has the option to implement periodic imprisonments or punishment through community service, which could be effective in ensuring that defendants take their maintenance obligations seriously.

Table 162: Outcome of trial

Outcome of trial	Frequency	Percentage
Accused pays the arrears / pays part of the arrears	22	24.7
New order made including for the payment of arrears	11	12.4
Accused ordered to pay a fine	8	9.0
Struck from roll	6	6.7
Complainant withdraws the case	4	4.5
Arrears cancelled/reduced/suspended	3	3.4
No outcome reported	35	39.3
Total	89	100

"If the sentence is to be imposed which makes sure that an errant parent does not default again and/or one which seeks to recover arrear payments, it must be given serious and careful consideration, based, of course, on the facts of each case before Court."

S v Gaweseb [2006] NAHC 27 (26 July 2006)

The use of periodic imprisonment as a penalty for failing to pay maintenance

Although the files record only one short instance of imprisonment, other information shows that periodic imprisonment is occasionally given. See also page 76.

The Namibian, 3 February 2011

Maintenance deadbeat gets weekends in jail

By: Werner Menges

A DEADBEAT dad who failed to make his child maintenance payments as ordered by a court is now facing the prospect of spending the next few weekends locked up in prison.

On Friday at 18h00, bank employee Jackson Mesipo must report at Windhoek Central Prison to start his first weekend in jail, Magistrate Conchita Olivier ordered in the Windhoek Magistrate's Court in Katutura on Tuesday. Mesipo will have to stay in the prison up to 20h00 on Sunday, she ordered.

The three weekends after this will look the same for Mesipo – until he has served the 200 hours of periodical imprisonment that he was sentenced to in June last year.

Mesipo's sentence was suspended last year on condition that he has to pay the N\$6 600 in maintenance arrears that he had failed to pay to the mother of one of his four children at that stage.

Since receiving the suspended sentence, though, Mesipo failed to clear the arrears as ordered.

This prompted the prosecution to place his case back on the court roll in September last year so that the suspended sentence could be put into operation. At that stage, Mesipo

had paid nothing of the N\$4 800 that he was supposed to have paid to start cleaning the maintenance arrears. By November, N\$3 600 was still outstanding on the maintenance payments he should have made.

On Tuesday this week, State prosecutor Roxzaan Witbooi again asked the court to put Mesipo's suspended sentence into operation. She told the court that Mesipo is now in arrears to the tune of N\$6 300.

The mother of Mesipo's child told the court that she is struggling to survive without the monthly maintenance payment of N\$400 that Mesipo is supposed to make for his child, who is now ten years old.

Mesipo told the magistrate that he is employed as an insurance agent with a bank, where he earns only commission instead of a fixed salary. He promised to pay N\$1 500 on his maintenance arrears by the end of this week, and to clear all the arrears by the end of February.

Magistrate Olivier however said it was the court's opinion that Mesipo is indeed reluctant to pay the arrears. As a result, she decided to put the suspended sentence into operation – and with that sealed Mesipo's fate of a February of weekends in prison.

CASE STUDY

Desperate measures in the absence of maintenance

The Appellant was charged in the Magistrate's Court with the crimes of fraud and theft. She pleaded guilty to both charges. On the first charge of fraud she was sentenced to 30 months imprisonment of which 15 months were suspended for 5 years on the usual conditions. On the second count the Appellant was sentenced to pay a fine of N\$ 100-00 or, in default of payment, to imprisonment of 50 days ...

From the evidence and documents placed before the Magistrate it seems that the Appellant stole a blank page out of a cheque book. She then completed the cheque and was able to withdraw N\$1500-00 from the bank ... The Appellant is 26 years old and is the mother of three children. At the time when the Appellant was sentenced these children were respectively 4 months, 3 years and 6 years old. The Appellant furthermore informed the Court that when she committed the crimes she had financial problems. She was at that time estranged from her husband and he was not contributing anything towards the upkeep of the three children. She stated that she had to provide for the children. This included paying rent for the house in which they lived, for day care of the children so that she could work and other incidental expenses. The Appellant further informed the Court that she and her husband had, in the meantime, become reconciled and although she was still unemployed her husband was willing to assist her to repay the N\$ 1500-00. The State did not prove any previous convictions and it is clear that the Appellant is a first offender ...

... Looking at the circumstances of the Appellant in the present instance one is struck by the fact that the crime was committed at a time when she had become estranged from her husband and had lost the financial support for her three young children. Because of the unwillingness of her husband to fulfil his duties the Appellant landed in financial difficulty which caused her to commit the crimes of which she was convicted. This motive must be distinguished from those cases where a person steals or commits fraud to satisfy his or her own personal greed ... Furthermore, the Appellant has become reconciled with her estranged husband and she and the children are again supported by him. This, to a great extent, removed the reason for possible further criminal activity by the Appellant ...

On top of this the Appellant also offered, with the assistance of her husband, to repay the amount of NS1500-00 ...

Bearing in mind all the above circumstances and the fact that the amount involved is not big I am of the opinion that this was an instance where the Court should have imposed a sentence other than direct imprisonment. Again I want to state that I am not thereby saying that a person who defrauded or stole N\$1500-00 from another cannot or should not be sent to prison. What I am saying is that in the circumstances of this particular case and the circumstances of this particular accused a sentence of 30 months imprisonment of which 15 months were suspended is disturbingly inappropriate.

In the result the appeal succeeds and the sentence imposed by the magistrate is set aside and the following sentence is substituted:

N\$1000-00 or in default of payment 1 (one) year imprisonment, plus further imprisonment of 1 (one) year which is suspended for 4 (four) years on condition that she is not again convicted of fraud or theft committed during the period of suspension; and that the amount of N\$1 500-00 is repaid ... in six monthly instalments of N\$250-00 each.

S v Van Rooyen [1998] NAHC 9 (31 August 1998)

Applications for the recovery of arrears

The Maintenance Act states that where a defendant was convicted of a failure to pay maintenance, the public prosecutor may apply to the court for recovery of the arrears owing.²⁵ However, of the 346 instances where a breach was recorded, only half were accompanied by such applications (187 applications from 144 files; 54.0%). It appears that in some cases the recovery of arrears was taken forward without the

²⁵ Maintenance Act 9 of 2003, section 33. This application must be accompanied by a complaint from the complainant in Form Q, Maintenance Regulations, regulation 24.

requisite formal application. As it appears that some court officials are not familiar with the process for the enforcement of maintenance orders, **we recommend that the Ministry of Justice send a circular to the courts outlining the procedure for the recovery of arrears in criminal cases.**

The median amount of maintenance in arrears in these cases was N\$1 350 (similar to the median amount of arrears outstanding (N\$1 500 as discussed under section 15.1)) indicating that there is nothing particular about these cases which appears to have warranted an application from the prosecutor.

Table 163: Applications made by the public prosecutor for the recovery of arrears

Number of applications by the public prosecutor for recovery of arrears	Number of files	Percentage of files
1	109	75.7
2	28	19.4
3	6	4.2
4	1	0.7
Total	144	100.0

Summary of breaches in the payment of maintenance, civil enforcement measures and criminal proceedings

Arrears

- Approximately one in six files contained at least one reported breach in the payment of maintenance.
- The number of reported breaches per file ranged from one to four.
- The median amount of maintenance outstanding when a breach was reported was N\$1 500. The defendant appeared to be in arrears for 6-9 months before the case was reported to the court.

Civil enforcement

- There was a positive outcome for the complainant in only one-third of the cases where there was a reported breach.
- Orders for the attachment of wages or property were used in approximately one-quarter of the cases of a reported breach that had a positive outcome for the complainant.
- However, approximately one-quarter of all of the files contained an order for the attachment of wages, suggesting that some may have been part of consent orders.

Warrants of arrest

- Approximately one in 10 files contained a warrant of arrest.
- Approximately half of the warrants of arrest were issued for failure to respond to a summons to attend court and approximately 40% were issued for a failure to pay maintenance, although there is some overlap between these categories.
- The warrant resulted in arrest in only one in 10 cases, although one-quarter of the warrants of arrest were cancelled (which could mean that the person in question attended court voluntarily, or could be due to some other reason).
- The median amount of maintenance owed in cases involving arrests was N\$1 343.
- The median time between the date the warrant was issued and the date the person in question was arrested was 43 days.

Criminal trials

- Only five percent of all maintenance cases resulted in a criminal trial.
- Approximately half of the criminal trials involved postponements.
- The median time between postponements and the date on which the trial resumed was 42 days.
- In approximately 25% of the criminal trials, the accused paid or partially paid the arrears and did not receive a penalty. In 12.5% of the criminal trials, a new maintenance order was made which incorporated the payment of the arrears over time.
- The defendant was ordered to pay a fine in approximately 9% of the criminal trials.
- There was only one criminal trial which resulted in imprisonment, for a very short period. None of these cases applied periodical imprisonment or community service, although other evidence indicates that periodical imprisonment has occasionally been used in respect of failure to pay maintenance.



Chapter 16

INTERNATIONAL PERSPECTIVES

Absent parents are required to pay child support in a number of countries across the world, but the means by which this process is administered and enforced varies widely between countries. This chapter reviews some of the general principles and practical mechanisms used in various countries to facilitate maintenance payments, in search of ideas which might be useful in Namibia.

16.1 Principles regarding the duty to maintain

16.1.1 Maintenance for expenses incurred during pregnancy

In Namibia, a maintenance order can be made for pregnancy and birth-related expenses such as medical and hospital expenses incurred by the mother. Unless there is a reasonable explanation for a delayed claim, requests for pregnancy and birth-related expenses must be made within 12 months from the date of birth of the child.¹ Similar practice is seen in other countries across the world.

In **Australia**, a father may be liable to pay maintenance for the mother and reasonable medical expenses in relation to the pregnancy and the birth of the child, usually covering a period of 2 months prior to the birth and 3 months after the birth.² Additionally, in the event that the mother dies in childbirth or the child is stillborn, the father is liable to pay the reasonable costs of the mother's or child's funeral, respectively.³ The liability is determined through application to the courts.⁴

Similarly, in **Denmark**, the Regional State Administration may decide that a father must pay a contribution towards costs associated with childbirth – a so-called birth contribution of DKK 758 (N\$1 325; as of 2013). The father may also be asked provide support for the mother for two months prior to and one month following childbirth (DKK 1,322 per month / N\$2 311).⁵

In **Ghana**, a maintenance order requires fathers to meet medical expenses for the duration of the mother's pregnancy, as well as expenses relating to the delivery or death of the child. A periodic

¹ Maintenance Act 9 of 2003, section 17(3). On the question of whether a maintenance complaint can be made before a child's birth, see chapter 4 at page 33.

² Australian Government Child Support Agency, "The Guide: CSA's online guide to the new child support scheme", 2.6.15: Reason 9 – the duty to maintain a child or any other person, 28 February 2013, <http://guide.csa.gov.au/part_2/2_6_15.php>, accessed 31 May 2013.

³ See Section 135 of the Family Court Act 1997 (WA) (or Section 67B of the Family Law Act), available online at <[www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDdocument:16606P/\\$FILE/FamilyCourtAct1997-03-g0-01.pdf?OpenElement](http://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDdocument:16606P/$FILE/FamilyCourtAct1997-03-g0-01.pdf?OpenElement)>, accessed 24 September 2013.

⁴ See Section 136 of the Family Court Act 1997 (WA) (or Section 67C of the Family Law Act) for more information on this process.

⁵ "Child Support", 12 March 2013, <www.statsforvaltning.dk/site.aspx?p=6404>, accessed 29 May 2013. Only limited information is available in English, but more information on child support may be found in Danish at this site.

allowance for maintenance of the mother during her period of pregnancy and for a further period of nine months after the delivery of the child is also required, as well as payment of a reasonable sum to be determined by the District Court for continued education if the mother is still a child herself.⁶

16.1.2 Duration of child maintenance obligations

In Namibia, 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; (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 does not terminate until the child reaches the age of 21.⁷ Under common law, the duty to maintain a child may extend beyond these ages, until the child is able to be self-supporting.⁸ Again similar practice is seen in other countries although there is considerable variability in the normal duration of a maintenance order.

In the **UK**, support ends at age 16 or 20 if the child is in full-time education (support is limited to the child finishing secondary education, there is no obligation to support a child through university studies).⁹

In **Ghana**, a child support obligation ends when the child reaches the age of 18 years, with two exceptions; the obligation may lapse before this date if the child is 'gainfully employed', or the obligation may be extended beyond 18 years if the child is engaged in a course of continued education or training after that age.¹⁰

In **Poland**, support ends at 18 years, or 21 years if the person is in full-time education,¹¹ or 24 years if the person is disabled.¹²

In **New Zealand**, support ends at age 19 or before this age if the child marries (or begins living with another person in a civil union or *de facto* marriage relationship) or becomes financially independent, for example, if the child is in permanent employment, receives a student allowance, or leaves the care of the custodian.¹³

In **Romania**, a child having reached the age of majority and whose education is still in progress is entitled to receive a maintenance allowance from his/her parent until he or she reaches the age of 25 or (where he/she is attending a course of advanced education of more than 5 years' duration) the age of 26.¹⁴

In **South Africa**, as in Namibia, maintenance is required to be paid until the child is 'self-supporting', even if over the age of 18 years.¹⁵

⁶ Children's Act, 1998 (Act 560), section 51(1).

⁷ Maintenance Act 9 of 2003, section 26(1).

⁸ See chapter 4, section 4.3.9.

⁹ Arranging child maintenance through the Child Support Agency or Child Maintenance Service, 30 May 2013, <www.gov.uk/child-maintenance/overview>, accessed 6 June 2013.

¹⁰ Children's Act, 1998 (Act 560), section 53 and 54(1).

¹¹ This is based on the condition that upon reaching their 18th birthday, the child wishes to pursue further study and their results to date justify this choice. A parent is not required to pay maintenance if their child, although prepared for employment, chooses to take up further study and subsequently neglects their studies or does not make satisfactory progress. See Maintenance Claims – Poland, European Juridical Network for more information: <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_pol_en.htm>, accessed 24 September 2013.

¹² OECD Family Database, PF1.5 Child Support, 1 July 2010, <www.oecd.org/els/family/41920285.pdf>, accessed 28 May 2013.

¹³ Inland Revenue New Zealand, What is Child Support?, <www.ird.govt.nz/childsupport/background/>, and <www.ird.govt.nz/childsupport/paying-parents/questions/>, accessed 28 May 2013.

¹⁴ European Judicial Network, Maintenance Claims – Romania, 29 September 2007, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm>, accessed 29 May 2013.

¹⁵ Maintenance FAQ, undated, <www.justice.gov.za/vg/mnt-faq.html>, accessed 6 June 2013.

16.1.3 Cohabitation relationships and same-sex partnerships

Namibian law recognises no duty of support between cohabiting partners of different or the same sexes (in the absence of a private agreement to maintain, which cannot bind third parties).¹⁶ However some other countries do recognise maintenance obligations between such partners in certain circumstances. For example, in **Finland** the provisions on spousal maintenance are also applied to same-sex couples in registered partnerships. In **New Zealand**, there is duty of maintenance between opposite-sex or same-sex partners in civil unions.¹⁷ In **Germany**, maintenance duties apply to partners in registered conjugal relationships.¹⁸ In other jurisdictions – such as **Tanzania, Malawi and New South Wales, Australia** – certain maintenance obligations can arise automatically when couples live together in such a way as to acquire the repute of being married.¹⁹

16.1.5 Maintenance duties of other family members

In Namibia there is a mutual duty of support between close blood relatives, starting with the family members who are closest to each other, but there is no duty of support between persons (other than spouses) who are related only by marriage.²⁰

The customary law in different communities may apply different rules about the duty of support between extended family members. However the Maintenance Act overrules any customary law which is inconsistent with its basic principles regarding the duty of support.²¹

The law in **South Africa** is similar to that in Namibia, with maintenance obligations extending to various blood relations, but not to persons (other than the spouses themselves) who are related solely by marriage.²²

However the duty of support applies to a wider range of family members in a number of other countries.

In **Italy**, “*the duty to provide maintenance falls within the duties of family solidarity*”.²³ Those liable to provide maintenance, in order, are:

- the spouse, in cases where there is no duty to provide “*mantenimento*”, ie spouses separated through fault and spouses who have received the money awarded in the divorce settlement;
- children, including adopted children, or in their absence, direct relatives in the descending line;
- parents, or in their absence, direct relatives in the ascending line, and including adoptive parents;
- sons-in-law and daughters-in-law;
- fathers-in-law and mothers-in-law;
- full brothers and sisters, and half-brothers and half-sisters.

¹⁶ See the discussion above at page 39.

¹⁷ European Judicial Network, Maintenance Claims – Finland, 5 April 2006, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fin_en.htm>, accessed 29 May 2013. Barnardos New Zealand, Same-sex couples, undated, <www.barnardos.org.nz/Family%20Advice/Relationships/Same%20sex%20couples>, accessed 31 May 2013. Same-sex marriage in New Zealand became legal on 19 August 2013.

¹⁸ European Judicial Network, Maintenance Claims – Germany, 27 July 2006, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ger_en.htm>, accessed 29 May 2013.

¹⁹ See Legal Assistance Centre (LAC), *A Family Affair: The Status of Cohabitation in Namibia and Recommendations for Law Reform (Full Report)*, Windhoek: LAC at section 11.3.1, available on LAC website: <www.lac.org.na>.

²⁰ See chapter 4, section 39.

²¹ Maintenance Act 9 of 2003, sections 3(1)(c), 3(2), 3(4)

²² The common law on this point in South Africa is the same as that which applies to Namibia.

²³ European Judicial Network, Maintenance Claims – Italy, 25 May 2006, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm>, accessed 29 May 2013.

The closest relative according to the above ranking is liable to provide maintenance; should there be more than one person at the same level, liability is divided between them according to their financial situations.²⁴

In **Romania** the maintenance obligation exists between spouses, parents and children, adopters and adoptees, grandparents and grandchildren, great-grandparents and great-grandchildren, brothers and sisters, as well as between other persons specifically defined by law.²⁵

In **France** maintenance obligations exist between parents and children; spouses during the marriage, including in the case of legal separation; divorced spouses only if the divorce is granted on the grounds of the breakdown of the marriage, in which case the spouse who took the initiative in the divorce proceedings is required to make maintenance payments to the respondent; all descendants and direct relatives in the ascending line; and sons-in-law and daughters-in-law vis-à-vis their fathers-in-law and mothers-in-law, and vice-versa.²⁶

In **Canada**, in cases of divorce or separation, a step-parent can be obligated to pay child maintenance if it is established that the step-parent had been acting *in loco parentis* and had in fact contributed to the support of the child for at least one year – although a step-parent is likely to be liable to contribute a lesser amount of maintenance than a biological parent. Step-parents can be obliged to pay child support even when the other biological parent is already paying child support. This principle applies regardless of whether there was a formal marriage between persons acting as step-parents. The application must be brought within one year of the step-parent’s last voluntary contribution to child support.²⁷

16.1.6 Maintenance according to different customs

In **Nigeria**, there are three types of law (English law, customary law, Islamic law) – and three corresponding types of marriage – and the obligation to pay maintenance depends on which legal system applies. Under English law, maintenance obligations must conform to the provisions of the Matrimonial Causes Act and Rules and the Child’s Rights Act; these laws place a duty of maintenance on both parents, with the amount of maintenance in individual cases being determined by the Family Court. Maintenance under customary law varies. Under customary law in Eastern Nigeria, women reportedly have no custody rights to children except those still being breastfed and the mother is under no obligation to pay maintenance or contribute to the child’s upbringing (based upon bride price having been paid). Under Islamic law, the father has a duty to provide maintenance to his daughter for as long as she remains unmarried and under parental care.²⁸

This contrasts to the situation in Namibia, where the Maintenance Act establishes certain common principles regarding maintenance which apply to everyone in the country, regardless of any customary law to the contrary.

²⁴ European Judicial Network, Maintenance Claims – Italy, 25 May 2006, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_ita_en.htm>, accessed 29 May 2013.

²⁵ European Judicial Network, Maintenance Claims – Romania, 21 September 2007, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_rom_en.htm>, accessed 29 May 2013. Other persons defined by law to pay maintenance can include the heir of a person who had been under the obligation to pay maintenance for a minor who, without any obligation to pay themselves, has provided maintenance for that minor.

²⁶ European Judicial Network, Maintenance Claims – France, 6 August 2007, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fra_en.htm>, accessed 29 May 2013.

²⁷ The Canadian Bar Association (British Columbia Branch), “Child Support”, March 2013, <www.cba.org/BC/public_media/family/117.aspx>, accessed 31 July 2013.

²⁸ O Odewale, “Situation report on child maintenance in Africa: report on Nigeria”, 3 March 2013, <www.heidelberg-conference2013.de/tl_files/downloads-abstracts/abstracts-ab-3-3-2013/Abstract_Odewale.pdf>, accessed 11 June 2013.

Summary of comparative principles about maintenance

- In some countries, fathers have a clear obligation to contribute to the maintenance of the mother in respect of the period shortly before or after birth (such as in Australia), or to medical expenses for the duration of the pregnancy (as in Ghana).
- The point at which a maintenance obligation ends varies between countries. In some countries it may end as early as 16 if the child has finished education and is self-supporting. Many countries specify an end date that is between 18-21, although some countries allow payments to continue until age 24 or 26 or do not set an age limit, specifying only that the person must be self-supporting.
- Some countries recognise maintenance obligations between cohabiting couples of different sexes or the same sex.
- In some countries the duty of support between family members can be extensive – and can include step-parents and in-laws.
- Some countries allow for the application of customary law to determine maintenance obligations.

Co-parenthood

Co-parenthood is a term sometimes used to describe the relationship of parents of a child who are not married, cohabiting or in a relationship together. According to Skinner and Davidson, there has been an increasing focus in several countries on ensuring that the child maintains a relationship with the non-custodian parent in cases of parental separation or divorce.

In **France**, “*coparentalite*” (co-parenthood) has been promoted following the development of a new law in 2002, to ensure that both parents retain strong personal relationships with their children. **Belgium** is another country to have introduced co-parenting, or “*co-ouderschap*”, where child care can be equally shared – in which case neither parent is required to pay maintenance. Similarly, **Germany** also introduced the principle of co-parenthood in the Child Law Reform Act of 1998, where shared custody is now the norm and sole custody the exception. Authorities in the **UK** and **Australia** have also voiced concerns about the need to foster better relationships between separated parents.^a

Namibia allows joint custody of children by divorced parents. The concept of co-parenthood is not otherwise recognised, although with the passage of the Child Care and Protection Bill, parents will be able to make parenting plans which could be used as a means of defining co-parenthood obligations. Parenting plans are written agreements between co-holders of parental responsibilities and rights, confirmed by two witnesses, about things such as –

- where and with whom the child will live;
- maintenance;
- contact with various persons;
- schooling and religious upbringing; and
- medical care, medical expenses and medical aid coverage.

They are voluntary agreements which are intended to help prevent disputes, although provision is made for getting help to mediate a plan where there is disagreement. Parenting plans can be registered with the children’s court, which makes them enforceable in court.^b

^a C Skinner and J Davidson, “Recent Trends in Child Maintenance Schemes in 14 Countries”, 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

^b Child Care and Protection Bill, draft dated 12 January 2012, chapter 9.

16.2 Processes for claiming maintenance

The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Payments may also be determined privately and informally by the parents. Countries that predominately use a judicial process in maintenance cases include Namibia, Austria, Belgium, France, Germany, Ghana, Sweden, Canada (Ontario) and some US states (eg Massachusetts, Arizona). In contrast, countries that rely on administrative agencies to facilitate maintenance payments include Australia, Denmark, New Zealand, Norway, the UK and other US states (eg Maine, Oregon).²⁹ Even where different countries use the same mechanism (such as administrative agencies), there is variation in how each process is implemented. In addition, there are some countries where the state provides “advance maintenance” which may be recovered from the absent parent, as a strategy for providing more secure child support.

16.2.1 Judicial processes

Child support is claimed through a judicial process in a number of countries, including Namibia. The court’s role is somewhat different in different countries.

In **Germany**, child maintenance can be determined by parents themselves or, failing agreement, by the courts. Courts play a role in deciding the amount of maintenance in cases of parental disagreement or non-payment, or where the determination of child maintenance is part of divorce proceedings.

The process for determining child support in Germany underwent substantial change in 1998 following the introduction of several new laws, including the Child Law Reform Act which provided that child maintenance was no longer compulsory in the event of a divorce. The court now acts on maintenance obligations only at the request of a parent. All maintenance cases go through the Family Court.

While there are no strict rules, judges are strongly influenced by formal guidelines in determining maintenance payments. Several informal guidelines and ‘support tables’ exist, of which the “*Düsseldorfer Tabelle*” is the best known. This is used to calculate child maintenance payments based on the age of the child (separated into four age brackets: 0-5, 6-11, 12-17, above 18) and the income of the non-custodian parent. A new Child Maintenance Law enacted in 1998 introduced a “dynamic maintenance amount” (“*dynamischer Unterhalt*”), from which a standard minimum amount of maintenance (“*Regelbeträge*”) per month is determined.³⁰ The non-custodian parent’s net income (with taxes, health care and other costs deducted) is then used to determine which payment level should apply.³¹ The income of the custodian parent is not taken into account.

The “*Jugendamt*” (Youth Welfare Office) provides free legal advice to parents who care for children, especially unmarried parents.

In **France** child maintenance is determined by a civil procedure in the courts, if voluntary agreement is not reached by parents themselves. This is systematic after a divorce, but only occurs if demanded by separated or unmarried parents. The “*juge aux affaires familiales*” (judge of family issues) is responsible for hearing the case and determining amounts of maintenance support. The system is based on the broad juridical principle of “*solidarité familiale*” (family solidarity), which applies to

²⁹ OECD Family Database, PF1.5 Child Support, 1 July 2010, <www.oecd.org/els/family/41920285.pdf>, accessed 28 May 2013.

³⁰ The standard minimum amounts for 2013 are: €317 (N\$4262) for 0-5 year olds; €364 (N\$4853) for 6-11 year olds; €426 (N\$5673) for 12-17 year olds; and €488 (N\$6499) for those over 18 years old. See *Düsseldorfer Tabelle*, <www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_tabelle/Tabelle-2013/Duesseldorfer-Tabelle-Stand-01_01_2013.pdf>, accessed 24 September 2013.

³¹ Social Policy Research Unit at the University of York, A Comparative Study of Child Maintenance Regimes: National Questionnaire for Germany, 30 June 2006, <www.york.ac.uk/inst/spru/research/childsupport/Germany.pdf>, accessed 30 May 2013.

all family members but with more specific obligations between spouses and from parent to child. All parents are treated equally regardless of whether they have been married, have cohabited or have never lived together. There are four types of divorce and two types of legal separation in France, for which the decision process by the judge may vary. The use of lawyers is compulsory in cases of divorce, while they may help if requested when courts are determining child maintenance outside of divorce cases.

No formal guidelines are in place regarding maintenance amounts and decisions are largely at the discretion of the judge, taking into account the needs of the child and the resources of each parent (based on net income). For this reason, the amount of child maintenance can vary significantly across the country.

There are no government agencies assisting with this process in France. Parents may consult private associations for mediation (of which there are around 200), but these services may not be free.

Child maintenance in **Belgium** is determined either by voluntary agreement between parents or by the courts. The courts can be asked to determine the exact amount of maintenance, and there are no fixed rules to determine the amount of child maintenance due. Judges make discretionary decisions based on two principles: the capacity of the parents and the needs of the child. The judge may ask parents for a proposal. Both parents' net earnings are taken into consideration (income minus taxes and social security).

Demands for child maintenance are brought before the Juvenile Court. This happens automatically after divorce but must be brought to the court by parents in other situations. There is no distinction between the child maintenance obligations of parents who have been married, have cohabited, or have never lived together.

There are no agencies which assist in determining child maintenance, but there are organisations where parents can get help from mediators.³² Lawyers and notaries can also be used as mediators.

There is no maximum amount of child maintenance that may be ordered. Payments are likely to vary with age, but there is no fixed rate.³³

In **Canada (Ontario)** maintenance payments are decided through the courts if no agreement is reached by the parents. The exact process varies slightly in different Canadian provinces. The federal government is not directly involved with maintenance cases, but provides financial support to the provinces for this purpose. It is the provinces, not the federal government, that are responsible for enforcing support awards.

The court does not get involved in cases where there is no dispute, but voluntary agreements can be reviewed by the court. Lawyers and mediation services are often used to assist with voluntary agreements (of which there are two types: an agreement and a consent order, the latter having been reviewed by a judge).

Maintenance payments are generally determined using federal child support guidelines³⁴ and most provinces have adopted amended federal guidelines (except Québec, which has its own unique set of guidelines³⁵).

³² One such organisation is the *Centrum voor Algemeen Welzijnwerk* (Social Work Centre; CAW) CAW is an organisation that provides counsellors and mediation services to help with a variety of personal and family problems, including disputes over maintenance. Counsellors offer practical information advice, as well as care and counselling. See the CAW website for more information on their services: <www.caw.be/themas> (in Dutch), accessed 24 September 2013.

³³ Social Policy Research Unit at the University of York, A Comparative Study of Child Maintenance Regimes: National Questionnaire for Belgium, 30 June 2006, <www.york.ac.uk/inst/spru/research/childsupport/Belgium.pdf>, accessed 30 May 2013.

³⁴ See Federal Support Guidelines at <www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/>, accessed 24 September 2013.

³⁵ Québec uses civil law, while the rest of Canada uses common law.

Child support is calculated with a complicated formula using several different tables and taking into account the needs of the child and the net income of both parents. Once parents have determined what kind of parenting arrangement they will have, they then use the relevant table to decide the appropriate amount of maintenance. There are two initial tables, based on whether one parent will have sole custody or if the parents will share custody. Parents then use the relevant provincial or federal guidelines based on where both will be living (eg they may live in different provinces or territories, or one parent may reside outside of Canada). There are five circumstances in which an amount of child support different to that provided in the formal guidelines may be imposed: (1) if the child is over the age of majority;³⁶ (2) if the non-custodian parent's income is over \$150 000;³⁷ (3) if there is equally shared custody;³⁸ (4) if payment would cause undue hardship to the non-custodian parent; and (5) where another contributor stands in place of a parent (eg a step-parent).³⁹ (See excerpt from Ontario table on the next page.)

There is an additional rule in Québec that child support liability cannot exceed 50% of disposable income. There are also adjustments for shared care in Québec, where each parent's basic liability is calculated and then multiplied by the time the child spends with the other parent; liabilities are offset, then additional costs (such as music lessons or child care) are divided according to the income ratio. In other provinces, shared care usually only applies when each parent has at least 40% care.

There is no government agency which assists with the initial process, but there are provincial Maintenance Enforcement Programmes which assist with enforcement in the event of non-payment. These bodies monitor and enforce maintenance orders and agreements (for both child and spousal support). If payments are not made, they will contact the non-custodian parent and try to obtain the overdue payments voluntarily. If the parent does not comply, the agencies can use a number of enforcement measures, including suspending the parent's driving license or deducting funds from his or her bank account.⁴⁰

In **Ghana**, where parents cannot come to an agreement, they can apply to the District Court, formerly the Family Tribunal, for a maintenance order. In determining maintenance obligations, the District Court considers the income and wealth of both parents; any impairment of earning capacity of the person with a duty to maintain the child; financial responsibility with respect to other children; the costs of living in the area; and the rights of the child. The District Court may request a probation officer or social welfare officer to prepare a social enquiry report on the issue of maintenance before making a decision. Other non-judicial institutions that can be involved in mediating maintenance disputes include the Department of Social Welfare and community-based Child Panels.⁴¹

³⁶ Most child support payments end when the child reaches the age of majority, which can be 18 or 19 years depending on the relevant province or territory. However, maintenance obligation can be extended beyond this age, depending on the child's particular living situation and circumstances. If there is an end date on the maintenance order, non-custodian parents are liable to pay support up to this date only. If there is no end date specified, the authorities will ask the parent with custody for information regarding the child's present circumstances and may choose to extend the maintenance order (for example, a college student or child with serious health problems may require maintenance beyond the age of majority).

³⁷ Section 4 of the Guidelines gives the judge discretion to decide maintenance obligations for parents earning over \$150 000.

³⁸ Where parents share custody equally (ie a non-resident parent looks after the child at least 40% of the time), the court can make an order for child support to be paid in a lower amount than the Guidelines require.

³⁹ Social Policy Research Unit at the University of York, "A Comparative Study of Child Maintenance Regimes: National Questionnaire for Canada", 30 June 2006, <www.york.ac.uk/inst/spru/research/childsupport/Canada.pdf>, accessed 30 May 2013.

⁴⁰ See <www.justice.gc.ca/eng/fl-df/enforce-execution/provpro.html>, accessed 24 September 2013. The agency for enforcing support orders in Ontario is the Family Responsibility Office.

⁴¹ Children's Act, 1998 (Act 560), sections 49 and 50. A Child Panel is a district body with community representation. It includes the Chairman of the Social Services Sub-Committee of the District Assembly, a member of the Justice and Security Sub-Committee of the District Assembly, a member of a women's organisation, a representative of the Traditional Council, the district social worker, and two other citizens from the community of high moral character and proven integrity one of whom must be an educationalist. Section 29. The Child Panel mediates matters concerning children and is bound by principle of child participation: "A Child Panel shall permit a child to express his opinion and participate in any decision which affects the child's well being commensurate with the level of the understanding of the child concerned." Section 30.

Excerpt from one of the tables used to calculate the relevant contribution in Ontario, Canada (figures in Canadian dollars).⁴²

Ontario

Federal Child Support Amounts: Simplified Tables
Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Paieement mensuel (\$)			
	No. of Children/ N ^{bre} d'enfants					No. of Children/ N ^{bre} d'enfants					No. of Children/ N ^{bre} d'enfants					No. of Children/ N ^{bre} d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4		1	2	3	4
10820	0	0	0	0	16200	120	231	249	266	21600	173	328	452	499	27000	219	397	545	666
10900	2	4	4	4	16300	122	234	252	270	21700	174	329	454	503	27100	220	398	547	668
11000	21	50	54	58	16400	123	237	256	274	21800	174	331	455	508	27200	221	399	548	670
11100	23	54	59	63	16500	125	241	259	277	21900	175	332	457	512	27300	222	400	550	672
11200	25	59	63	68	16600	127	244	262	281	22000	176	333	459	516	27400	223	402	551	674
11300	27	63	68	73	16700	129	247	266	285	22100	177	334	461	520	27500	223	403	553	676
11400	29	68	73	78	16800	131	250	269	288	22200	178	336	462	524	27600	224	404	554	678
11500	31	72	78	83	16900	133	253	273	292	22300	178	337	464	528	27700	225	405	556	680
11600	32	76	82	88	17000	135	256	276	296	22400	179	338	466	533	27800	226	406	557	682
11700	34	81	87	93	17100	136	258	280	300	22500	180	340	468	537	27900	227	407	559	684
11800	36	85	92	98	17200	136	260	284	305	22600	181	341	469	541	28000	228	408	560	686
11900	38	90	96	103	17300	137	262	288	309	22700	182	342	471	545	28100	229	409	562	688
12000	40	94	101	108	17400	138	264	292	314	22800	183	343	473	549	28200	230	411	563	690
12100	42	98	105	112	17500	138	266	296	318	22900	183	345	475	553	28300	231	412	565	692
12200	44	101	109	116	17600	139	268	301	322	23000	184	346	476	557	28400	232	414	566	694
12300	46	105	113	121	17700	140	270	305	327	23100	185	347	478	561	28500	233	415	568	696
12400	48	109	117	125	17800	140	272	309	331	23200	186	349	479	565	28600	234	417	569	698
12500	49	112	121	129	17900	141	275	313	336	23300	186	350	481	570	28700	234	418	571	700
12600	51	116	125	133	18000	142	277	317	340	23400	187	351	483	574	28800	235	420	573	702
12700	53	120	128	137	18100	143	278	321	345	23500	188	352	485	578	28900	236	421	574	703
12800	55	123	132	142	18200	144	280	326	349	23600	189	354	486	582	29000	237	423	576	705
12900	57	127	136	146	18300	145	281	330	354	23700	190	355	488	586	29100	238	425	578	707
13000	59	130	140	150	18400	146	283	334	359	23800	191	356	490	590	29200	239	426	579	709
13100	61	134	144	154	18500	146	284	339	363	23900	191	358	491	595	29300	240	428	581	711
13200	63	137	147	158	18600	147	286	343	368	24000	192	359	493	599	29400	240	429	582	713
13300	65	141	151	162	18700	148	287	347	373	24100	193	360	495	602	29500	241	431	584	715
13400	67	144	155	166	18800	149	288	351	377	24200	194	362	497	604	29600	242	432	585	717
13500	68	148	159	170	18900	150	290	356	382	24300	194	363	498	607	29700	243	434	587	719
13600	70	151	162	174	19000	151	291	360	386	24400	195	364	500	609	29800	244	435	588	721
13700	72	155	166	178	19100	152	292	364	391	24500	196	366	502	612	29900	245	437	590	723
13800	74	158	170	182	19200	153	294	369	395	24600	197	367	504	614	30000	245	438	591	725
13900	76	162	173	186	19300	154	295	373	400	24700	198	369	505	617	30100	246	439	593	727
14000	78	165	177	190	19400	155	297	378	404	24800	199	370	507	619	30200	247	441	595	729
14100	80	168	180	193	19500	156	298	382	409	24900	199	371	509	622	30300	249	442	597	731
14200	82	171	184	197	19600	156	300	386	414	25000	200	373	511	624	30400	250	444	599	733
14300	84	174	187	200	19700	157	301	391	418	25100	201	374	513	626	30500	251	445	601	735
14400	86	177	190	204	19800	158	303	395	423	25200	202	376	515	628	30600	252	447	603	737
14500	87	180	193	207	19900	159	304	400	428	25300	203	377	516	631	30700	253	448	605	739
14600	89	183	197	211	20000	160	306	404	432	25400	204	378	518	633	30800	254	450	607	741
14700	91	186	200	214	20100	161	307	408	436	25500	205	380	520	635	30900	256	451	609	743
14800	93	189	203	218	20200	162	309	411	440	25600	206	381	522	637	31000	257	452	611	745
14900	95	192	206	221	20300	162	310	415	444	25700	207	382	524	639	31100	258	453	613	747
15000	97	195	210	225	20400	163	311	419	449	25800	208	384	525	642	31200	259	455	615	749
15100	99	198	213	228	20500	164	313	423	453	25900	209	385	527	644	31300	261	456	617	751
15200	101	201	216	232	20600	165	314	426	457	26000	210	386	529	646	31400	262	458	619	753
15300	103	204	220	235	20700	166	316	430	461	26100	211	387	531	648	31500	263	459	621	755
15400	105	207	223	239	20800	166	317	434	465	26200	212	388	532	650	31600	264	461	622	757
15500	106	210	226	242	20900	167	318	438	469	26300	213	389	534	652	31700	265	462	624	759
15600	108	213	229	245	21000	168	320	441	474	26400	213	390	535	654	31800	266	464	626	761
15700	110	216	232	249	21100	169	321	443	478	26500	214	391	537	656	31900	268	465	628	763
15800	112	219	236	252	21200	170	323	445	482	26600	215	392	538	658	32000	269	467	630	765
15900	114	222	239	256	21300	170	324	446	487	26700	216	393	540	660	32100	270	468	632	767
16000	116	225	242	259	21400	171	325	448	491	26800	217	394	541	662	32200	271	470	634	769
16100	118	228	245	263	21500	172	327	450	495	26900	218	395	543	664	32300	273	471	636	771

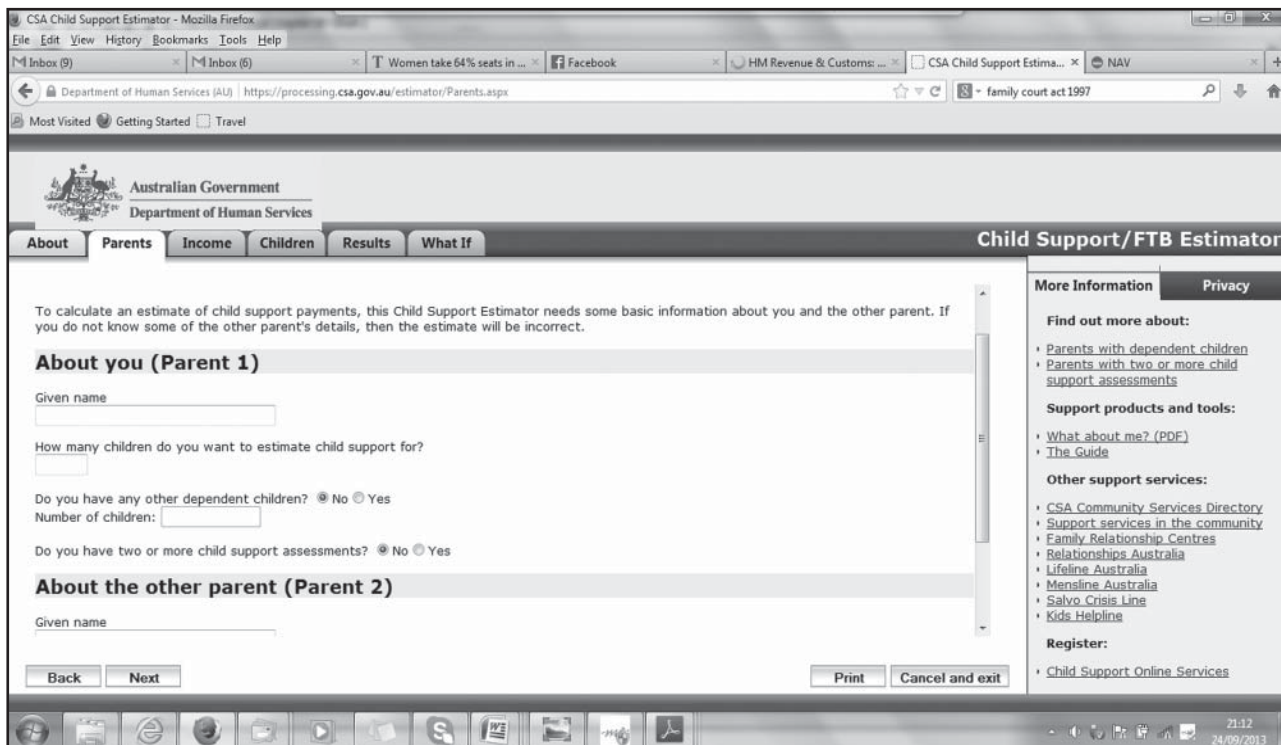
⁴² Department of Justice “2011 Simplified Tables in PDF Format”, <www.justice.gc.ca/eng/fl-df/child-enfant/fcsg-lfpae/2011/index.html>, accessed 17 September 2013.

16.2.2 Administrative processes

The processing of claims for child support is carried out by means of an administrative process in a number of countries, including Australia, the UK, Denmark, Norway and New Zealand.

In **Australia** child support payments can be agreed privately or arranged through the Department of Human Services (DHS). The paying parent can choose to make weekly, fortnightly, or monthly payments to the DHS, which will then pay the receiving parent directly. Payment methods are flexible and can include direct credit, transfers through the Australian Post Office, employment deductions, mail and other methods. A range of tools are available online to help parents estimate appropriate child support payments, including an online calculator with interactive worksheets.⁴³

The online maintenance calculator used by the Australian Government's Department of Human Services⁴⁴



In the **UK**, if maintenance is not agreed privately, the primary agencies for arranging maintenance payments are the Child Support Agency (CSA) or the Child Maintenance Service (CMS). The CSA manages the child maintenance schemes that were introduced in 1993 and 2003, while the CMS manages the 2012 scheme.

The CSA looks at several factors to determine maintenance payments, including the paying parent's net weekly income; the number of children needing maintenance; how often those children stay overnight with the paying parent; if the paying parent or that parent's partner receives government child benefit payments⁴⁵ for any other children; and if the paying parent is paying child



⁴³ Australian Government Department of Human Services, Child Support Payment, <www.humanservices.gov.au/customer/services/child-support/child-support-payment>, accessed 29 May 2013.

⁴⁴ Australian Government Department of Human Services, Child Support/FTB Estimator, <<https://processing.csa.gov.au/estimator/About.aspx>>, accessed 11 June 2013.

⁴⁵ Child benefit payments are a universal government payment that parents can claim for their children, usually paid every four weeks. There are two separate amounts of child benefit payments; £20.30 (N\$314.51) for the eldest child and £13.40 (N\$207.61) for all other children. For more information, see <www.hmrc.gov.uk/childbenefit/start/who-qualifies/index.htm>, accessed 24 September 2013.

maintenance for other children. Rigid rules are in place to determine maintenance amounts. For example, where care is shared, child support payments are reduced by 1/7 for each night of weekly shared care. The CSA has produced a leaflet explaining in detail how child maintenance is worked out and an online calculator is available to help parents work out how much child maintenance payments should be.⁴⁶

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Quick answer

Child maintenance calculator

1 How many children does child maintenance have to be paid for?

If you have children with more than 1 person, you must make a separate calculation for each person you want to have a child maintenance agreement with.

1

2

3 or more

Next step

There are four rates of child maintenance used by the CSA: nil rate, flat rate, reduced rate and basic rate. These are based on the paying parent's income and applied as follows:

- The *nil rate* is for parents who do not live with the child and do not have to pay child maintenance because they are a student, a child aged 16 or under (or 18 or under if in full-time education) or a prisoner; get an allowance for work-based training; live in a care home and get help with fees; or are 16 or 17 and they or their partner get certain government benefits.
- The *flat rate* is £5 (N\$74.98) per week regardless of how many children are involved. It is used if the paying parent's weekly income is between £5 and £100 (N\$1 502.03), where that parent does not qualify for the nil rate. It is also used if the parent gets certain government benefits, including incapacity benefit, income support, jobseeker's allowance, and others.
- The *reduced rate* is used if the paying parent's net weekly income is more than £100 but less than £200 (N\$2 999.14). The parent pays the flat rate of £5 plus a percentage of the net weekly income (25% for one child, 35% for two children, 45% for 3 or more children).
- The *basic rate* is a percentage of the paying parent's net income, where this parent has a net weekly income of £200 or more. The percentage depends on the number of children needing maintenance (15% for one child, 20% for two children, 25% for three or more) and the number of other children for whom the paying parent or that parent's partner receives a child benefit allowance.

The CMS (which applies the child maintenance scheme in place from 2012 onward) follows similar steps to calculate child maintenance, but uses five rates, based on the gross weekly income of the parent (nil, flat, reduced, basic and basic plus).⁴⁷

⁴⁶ Child Support Agency, "How is child maintenance worked out?", 12 April 2010, <www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/@benefits/documents/digitalasset/dg_198849.pdf>, accessed 11 June 2013; "Child maintenance calculator", <www.gov.uk/calculate-your-child-maintenance/y>, accessed 11 June 2013.

⁴⁷ "How child maintenance is worked out", 4 April 2013, <www.gov.uk/how-child-maintenance-is-worked-out/overview>, accessed 29 May 2013. The thresholds for gross weekly income for each rate for 2013 are: nil – below £5 (N\$74.98); flat – £100 or less (N\$1 500.29), or if the parent gets certain benefits; reduced – £100.01 to £199.99 (N\$1 504.55 to N\$3 000.80); basic – £200 to £800 (N\$3 008.80 to N\$11 996.80); and basic plus – £800.01 to £3 000 (N\$12 035.35 to N\$45 132.00).

The court plays a residual role in special cases (eg when the non-custodian parent lives abroad, to establish the maintenance obligations of a step-parent, or where payment liability may be disputed).

Private lawyers can also be used to facilitate private agreements.

In **Denmark**, parents can prepare and sign an “*aftale om børnebidrag*” (agreement on child maintenance). Where the parents request it, private agreements made during divorce or separation can be mediated by the Regional State Administration (“*Statsamt*”, a quasi-judicial regional body). When agreements break down, the parent with care of the child sends an “*Ansøgning om Børnebidrag*” (Petition for Child Maintenance) to the Statsamt. The parent with care may ask for the highest rate of maintenance, the standard rate, or a lesser amount. Where parents request the highest amount and when they cannot agree, the Statsamt uses rigid guidelines to determine payment amounts.⁴⁸

Child support consists of three parts: a fixed basic amount, a fixed supplement, and a possible additional supplement depending on the gross income of the relevant parent and the number of children.

Standard maintenance consists of a fixed basic amount and a fixed supplement. The total amount is DKK 1,247 (N\$2 198) per month, or DKK 14,964 (N\$26 380) per year. The fixed basic amount is DKK 13,248 (N\$23 355) and the fixed supplement is DKK 1,716 (N\$3 019) per year. This corresponds to a fixed basic amount of DKK 1,104 (N\$1 946) and a fixed supplement of DKK 143 (N\$252) per month.

Depending on the relevant parent’s gross income and the number of children this parent is required to support, a further supplement may be added. This supplement is calculated on the basis of the fixed basic amount.

Supplementary contributions may also be required in connection with childbirth and special occasions such as baptisms and christenings.⁴⁹

Parents in **Norway** are encouraged to make private voluntary agreements. If this is not possible, either party can use the agency “*Ny Arbeids-og Velferdsetat*” (NAV) to make a decision for them. The use of NAV is now considered a public service, for which each parent must pay 860 Norwegian Krone (N\$1 488). NAV charges only for the determination of maintenance amounts; forwarding and reclaiming services are provided free of charge.⁵⁰

The maintenance system in Norway uses several stages to determine payment amounts. The starting point for maintenance assessment is based on the “actual costs” of children, which are “standard” estimates based on a family with “reasonable” living standards, as calculated by the National Institute for Consumer Research. The assessed costs of children increase with the age of the child and are divided into three age groups (0-5 years, 6-10 years and 11 years and over).⁵¹ Child benefits and tax deductions for child care are then deducted from these standard estimates (as these costs are covered by the state). The second step is to share these costs between the parents. The non-custodian parent’s income is calculated as a percentage of the total income of the parents combined and this is then related to a six-step scale. This means, for example, that if the parents earn about the same income, the non-custodian parent will pay half of the costs of child maintenance. Or, if the non-custodian parent’s income is twice that of the parent with custody, the non-custodian parent will pay twice as much towards the costs of child maintenance as the custodian parent. As a third

⁴⁸ C Skinner, J Bradshaw and J Davidson, “Child Support Policy: an international perspective”, Leeds, UK: Department of Work and Pensions, 2007, at 38.

⁴⁹ “Child Support”, 12 March 2013, <www.statsforvaltning.dk/site.aspx?p=6404>, accessed 29 May 2013.

⁵⁰ C Skinner, J Bradshaw and J Davidson, “Child Support Policy: an international perspective”, Leeds, UK: Department of Work and Pensions, 2007, at 37.

⁵¹ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML>, accessed 29 May 2013. See NAV website for more information: <www.nav.no/Forsiden> (in Norwegian), accessed 24 September 2013.

step, the non-custodian parent's ability to pay is assessed using fixed estimates for taxes, housing costs, and other factors. The maintenance amount is then adjusted accordingly (for example, if that parent's income after expenses is less than the maintenance assessment, then the amount which that parent is expected to pay will be reduced). A maintenance obligation is also adjusted with relation to the non-custodian parent's contact with the child, based on the number of nights spent with the child. The minimum contact for deduction is two nights per week.⁵²

In **New Zealand** child maintenance is overseen by the Inland Revenue Child Support (IRCS) agency. The IRCS has wide powers to collect information from tax payers and third parties and is the only agency that is legally charged with determining child maintenance and related matters. The functions of the IRCS include determining amounts of maintenance according to specified formulas, registering private agreements on maintenance, receiving and paying over funds and enforcing payments.⁵³

The child support scheme in New Zealand works by first determining the non-custodian parent's taxable income, then deducting the parent's living allowance from that income⁵⁴ and multiplying the remaining figure by a percentage based on how many children are to receive maintenance. If the non-custodian parent is not sharing care of the children (meaning that this parent has care of the children less than 40% of the time), the applicable percentages are:

- 18% for one child
- 24% for two children
- 27% for three children
- 30% for four or more children.

Where care is shared (meaning that this parent has care of the children on more than 40% of nights), each parent can apply for child support from the other and the percentages are adjusted accordingly.⁵⁵

16.2.3 Hybrid processes

Some countries have hybrid processes that involve both administrative agencies and the courts.⁵⁶

The Netherlands uses a tripartite system to determine maintenance payments using the courts, the "*Landelijk Bureau Inning Onderhoudsbijdragen*" (LBIO, a national collection and support agency), and municipal social assistance offices. Parents can come to a private agreement under the supervision of their lawyers. If parents cannot agree, or are receiving social assistance from the government, then a judge will make the decision concerning the amount of maintenance due, based on the national index on the cost of raising a child and taking into account any specific needs of the child as well as the non-custodian parent's income and expenditures. The municipal social assistance office is involved in determining whether the parent(s) will be able to support themselves and the child who is entitled to maintenance.⁵⁷

⁵² A Skevik, "Family Policies in Norway", NOVA-Norwegian Social Research, 2003, <www.york.ac.uk/inst/spru/research/nordic/norwpoli.PDF>, accessed 11 June 2013.

⁵³ C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

⁵⁴ The living allowance is graded depending on the number of children living with the paying parent. Allowances range from \$14960 (N\$118 471) if the paying parent is single with no children living with him or her, to \$37762 (N\$299 044) for a paying parent who is single, married, in a civil union or with a de facto partner with 4 or more children living with the paying parent (correct for 1 April 2013 – 31 March 2014). See <www.ird.govt.nz/childsupport/paying-parents/workout-payments/living-allowances/>, accessed 24 September 2013.

⁵⁵ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, A Comparison of Child Support Schemes in Selected Countries, 30 April 2012, <www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML>, accessed 29 May 2013.

⁵⁶ C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", 23 *International Journal of Law, Policy and the Family* 25-52 (2009).

⁵⁷ C Skinner, J Bradshaw and J Davidson, "Child Support Policy: an international perspective", Leeds, UK: Department of Work and Pensions, 2007. See LBIO website for more information: <www.lbio.nl/> (in Dutch), accessed 24 September 2013.

In **Finland**, parents who cannot reach agreement must seek advice from the municipal social welfare board or the court, which both use the same formal guidelines. Most often, parents will seek mediation through the municipal social welfare board. Divorcing parents must file a statement of arrangement for children in the court, which may as a result be involved in mediation in the case.⁵⁸

Comparative points from a 2009 study on methods of child support in 14 countries

All of the countries assessed in the study use the non-custodian parent's income as an important factor in calculating maintenance. Pre-tax gross income is used most often, although some countries use net income. The Netherlands is the only country that sets a threshold for whether gross or net income is used.

Several countries take into account the impact of shared care when determining maintenance obligations. Where children spent equal time living with both parents, the child maintenance obligation could be overruled in principle in 10 of the 14 countries analysed (excluding Australia, Austria, New Zealand and the UK).

There are two main methods for transmitting payments: money can be transferred privately or payments may be mediated by some agency. In countries such as France and Belgium, all payments are direct between parents and there is no collection agency. In the Netherlands, direct payments account for 94% of all child maintenance payments. In contrast, payments mediated through agencies are much more common in New Zealand and the USA.

information from C Skinner and J Davidson, "Recent Trends in Child Maintenance Schemes in 14 Countries", 23 *International Journal of Law, Policy and the Family* 25-52 (2009) at 45

16.2.4 Advance maintenance schemes

In Namibia the concept of maintenance provided by the parent is separate from maintenance provided by the state⁵⁹ – although there is a possibility of seeking a contribution order from one or both parents to reimburse state expenditure on children in some circumstances.⁶⁰

In approximately **half of OECD⁶¹ countries**, the custodian parent can apply to the government to receive advance child support payments, which can be reimbursed to the state. These systems are in place to ensure that children receive a minimum amount of money from the state, to prevent instability in situations where non-custodian parents do not regularly meet their maintenance obligations. Such

⁵⁸ C Skinner, J Bradshaw and J Davidson, "Child Support Policy: an international perspective", Leeds, UK: Department of Work and Pensions, 2007, at 39.

⁵⁹ The Ministry of Gender Equality and Child Welfare provides a state maintenance grant. A biological parent who earns less than N\$1 000 per month and supports a child under 18 years of age is eligible for a state grant of N\$250 per child per month in situations where the other parent receives an old-age pension or a disability grant, is unemployed, is in prison for six months or longer or has died, (Ministry of Gender Equality and Child Welfare, *Child Welfare Grants in Namibia* (pamphlet), 2010).

⁶⁰ In terms of Namibia's Children's Act 33 of 1960 (section 1 and chapter VI), a "contribution order" is an order to contribute towards the costs of maintaining a child who is in a place of safety or in any other court-ordered custody, or towards the maintenance of a pupil. Namibia's forthcoming Child Care and Protection Act is expected to retain the concept of a contribution order as a contribution towards the maintenance of a child who is placed in foster care or a residential child care facility by court order, or temporarily removed from the family by court order for treatment, rehabilitation, counselling or another reason. A parental contribution may also be sought as a short-term emergency contribution towards the maintenance of a child or for any urgent needs of the child, or to reimburse state expenditure on a state maintenance grant where the parent could have contributed towards the maintenance of the child. Child Care and Protection Bill, draft dated 12 January 2013, chapter 13.

⁶¹ The Organisation for Economic Co-operation and Development (OECD) is a forum of states in place to promote policies that will improve the economic and social well-being of people around the world. It currently has a membership of 34 states, including the UK, USA, Australia and others. Namibia is not an OECD country. See the OECD website for more information: <www.oecd.org/about/>, accessed 24 September 2013.

advance payments are available for a limited number of years and the government takes on the cost of pursuing the non-custodian parent for the payments owed, if applicable. In Sweden and Norway, custodian parents may apply to the relevant authorities to advance a standard level of maintenance (and take over responsibility for attempting to collect contributions from the non-custodian parent), while in other countries this service is available to a parent only where formal agreements have broken down.⁶² Advance maintenance systems play a significant role in poverty alleviation, but they can mean that governments incur a high expenditure in attempting to recover the maintenance payments – which is not always possible.

“Advance maintenance schemes ensure the regularity of at least a portion of entitlement.”

Joseph Rowntree Foundation, “Findings: European Approaches to Maintenance Payments”, June 1999.

In **Germany**, a system for the advance payment of maintenance (“*Unterhaltvorschuss*”) was set up in 1979. Payments can be made for children under the age of 13, for a maximum of six years.⁶³

In **France**, the “*allocation de soutien familial*” (ASF) is a government social benefit for single parents. In cases where maintenance payments have been agreed in court but the paying parent has failed to contribute, the ASF can also be used as an advance payment to the receiving parent, which is then recovered from the other parent.⁶⁴

In **Norway**, low-to-middle-income parents are eligible for “advance maintenance” from government where payers have a poor history of payment. The government then attempts to recoup the payments from the parent who is liable to contribute. The payment is also available to a mother who is caring for a child in cases where the father is unknown.⁶⁵ Levels of government assistance to families in Norway are generally higher than in many countries, with a universal child benefit, substantial public day care services, paid parental leave to cover the first year of the child’s life and benefits for single parents where the government provides more than it recoups from absent parents.

“Advance maintenance schemes ensure the regularity of at least a portion of entitlement. The direction of developments in advance schemes has been towards improvements and increasing their efficiency. There are some problems associated with advance schemes, including non-take-up and high costs, but there is strong support for the contribution made to the maintenance of children’s living standards and their protection from poverty. ...

Increasingly, in all countries, concern about relationships between parents, and between parents and children, is entering the debate about child maintenance. In all countries, there is much to learn about links perceived by parents between the maintenance due, their contacts with children and the way parents who live apart may share the care of their children.”

European approaches to child maintenance payments, Joseph Rowntree Foundation 1999, available at <www.jrf.org.uk/sites/files/jrf/F619.pdf>, last accessed 30 September 2013

⁶² Joseph Rowntree Foundation, “Findings: European Approaches to Maintenance Payments”, June 1999, <www.jrf.org.uk/sites/files/jrf/F619.pdf>, accessed 7 June 2013.

⁶³ Child Policy International, “1.104 Child Support: Germany”, undated, <www.childpolicyintl.org/childsupporttables/1.104Germany.html>, accessed 7 June 2013.

⁶⁴ Social Policy Research Unit at the University of York, “A Comparative Study of Child Maintenance Regimes: National Questionnaire for France”, July 2006, <www.york.ac.uk/inst/spru/research/childsupport/France.pdf>, accessed 30 May 2013.

⁶⁵ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, A Comparison of Child Support Schemes in Selected Countries, 30 April 2012, <www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML>, accessed 29 May 2013. See also <www.nav.no/Familie> for more detailed information (in Norwegian), , accessed 24 September 2013.

Summary of judicial, administrative, hybrid and advance processes for claiming maintenance

- The approaches to determining and claiming child support payments fall into three broad categories: judicial processes, systems managed by administrative agencies, and hybrid systems. Most countries encourage parents to reach private agreements on maintenance obligations before involving other actors.
- A judicial process, like that used in Namibia, involves the courts determining maintenance obligations. Countries that use similar processes include Ghana, Austria, Belgium, France, Germany, Sweden, Canada (Ontario), and some US states. Some countries that use a judicial process follow very strict guidelines and regulations, like Germany, which uses the “*Düsseldorfer Tabelle*” to help calculate maintenance payments. Other countries, like France, use no formal guidelines and leave decisions on maintenance largely to the discretion of the presiding officer in the case.
- An administrative process involves using government-affiliated agencies to help calculate and facilitate maintenance payments. Countries that use administrative agencies include Australia, the United Kingdom, Denmark, Norway, and New Zealand. Typically, administrative agencies use very formal rules to determine payments. Many have online tools which parents can use to calculate maintenance payments and apply for assistance in claiming them. Such agencies include the Child Maintenance Service in the UK and the Department of Human Services in Australia.
- Countries that use hybrid systems include the Netherlands, which uses a tripartite system of courts, a national collection and support agency, and municipal social assistance offices. In Finland, parents can turn to a municipal social welfare board or a court for assistance, depending on their situation.
- Some countries provide for advance maintenance payments where the government pays maintenance for the child and then recovers the amount owed from the absent parent.

16.3 Mechanisms for enforcing maintenance payments

Regulations and laws on the enforcement of child maintenance vary by country (and by state or province in the US and Canada, respectively). Some countries, such as Australia, have a national office to oversee enforcement of payments, while in other countries, such as Canada, the responsibility rests with individual provinces.

In **Canada**, federal, provincial and territorial laws set out a variety of tools to enforce support. The Government of Canada has the authority to trace defaulting parents through federal databases to attach federal salaries or to divert federal pension benefits to satisfy maintenance orders. Where parents consistently fail to pay, there is a special provision to allow pensions to be diverted before they become payable.⁶⁶ As a last resort to respond to failure to pay, a Maintenance Enforcement Program can apply to have the parent’s Canadian passport or certain federal licences suspended.⁶⁷ Defiance of a court order can also result in imprisonment. Various provinces also have access to provincial databases, including motor vehicle registries, and can trace and suspend car registrations where the owner is in violation of maintenance order.⁶⁸

⁶⁶ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML>, accessed 29 May 2013.

⁶⁷ This can happen while the parent in question is abroad, in which case they must either pay their support debt or obtain an emergency travel document to get back to Canada.

⁶⁸ Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, “A Comparison of Child Support Schemes in Selected Countries”, 30 April 2012, <www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-comparison-of-child-support-schemes-in-selected-countries?HTML>, accessed 29 May 2013.

In **Australia**, where payments are not made in full and on time, penalties are set at the amount of arrear maintenance outstanding. These penalties are paid to the Australian government rather than to the receiving parent, over and above the arrear maintenance owing.⁶⁹ Additional ways of recovering overdue payments include:

- automatically deducting maintenance from wages or state income support payments;
- working with banks to deduct money directly from bank accounts;
- benefit deductions;
- working with third parties to pay the money over on behalf of the parent in question;
- enforcing the requirement that the parent in question lodge a tax return, to enable an assessment of the assets available to pay the maintenance owing;
- intercepting tax refunds;
- stopping the parent in question from leaving the country; or
- taking the parent in question to court.⁷⁰

In the **UK**, the statutory child maintenance services – the Child Support Agency (CSA) and the Child Maintenance Service (CMS) – will take action if child maintenance is not paid. When a child maintenance payment is missed, the CSA or CMS will contact the parent in question to find out why the parent has not paid, arrange for payment of the amount owing and warn of action which will be taken in the case of future non-payment. The parent in default has a week to respond. If there is no response, the service can take further action to recover the arrear maintenance in the following ways:

- by deducting money directly from wages;
- by deducting money directly from government benefits such as a State Pension or War Pension;
- by working with banks to deduct money directly from bank accounts;
- by applying to the court for a liability order (a court order taken out against parents who fail to pay child maintenance when obligated); or
- by applying to court for a charging order (a further court order that can charge the debt owed for child maintenance against a person's property or home).

If all other enforcement methods have failed, the CSA or CMS can apply to court for the person to be disqualified from driving or sent to prison.⁷¹

In the **USA**, child maintenance regulations and enforcement vary between different state authorities. Parents who fail to pay child support can be imprisoned. Other penalties for non-payment used by several states include suspending various licences (such as driving licences, business licences and contractor licences) where the parent owes significant amounts. The Office of Child Support Enforcement partners with federal, state and local governments to promote parental responsibility and ensure that children receive support from both parents. A Passport Denial Program is also in force, allowing the Department of State to deny parents a US passport if they have child support debts exceeding \$2,500 (N\$24 743.75).⁷²

The following are examples of enforcement mechanisms used in the US state of Massachusetts. The State Department of Revenue (DOR) is authorised by federal and state law to collect maintenance arrears without going to court. The DOR may use one or more of the following methods to collect arrears:

- increasing the amount withheld from a paycheque by 25%;
- securing the debt against real estate or other property;
- seizing financial assets;
- suspending business, trade, professional or driver's license or motor vehicle registration;
- referring the case to the US Department of State for denial of a passport;

⁶⁹ As discussed on the Department of Human Service's website, child support payments can be agreed privately or arranged through the Department of Human Services (DHS). The parent in question can choose to make weekly, fortnightly, or monthly payments to the DHS, which will then pay the receiving parent directly. See DHS website: <www.humanservices.gov.au/customer/services/child-support/child-support-payment>, accessed 24 September 2013.

⁷⁰ Australian Government Department of Human Services, "Overdue Child Support Payments", undated, <www.humanservices.gov.au/customer/enablers/child-support/child-support-payment/overdue-child-support-payments>, accessed 28 May 2013.

⁷¹ "Arranging child maintenance through the Child Support Agency or Child Maintenance Service", <www.gov.uk/child-maintenance/nonpayment-what-happens>, accessed 29 May 2013.

⁷² See <www.acf.hhs.gov/programs/css>, accessed 24 September 2013.

- seizing a car, vacation home, boat, lottery winnings, funds from bank accounts and any business or personal property; or
- intercepting state and federal tax refunds, insurance claims, Worker’s Compensation or Unemployment Compensation payments.⁷³

In extreme cases, the Office of the Inspector General may intervene in child support cases, under the authority of the unambiguously named Deadbeat Parents Punishment Act of 1998. This applies to situations where:

- the parent in question has willfully failed to pay maintenance for more than one year and the state where the child lives is different from the state where the parent in question lives;
- the amount the parent in question owes is more than US\$5,000 and the state where the child lives is different from the state where the parent in question lives; or
- the parent in question travels to another state or country to avoid paying maintenance.

Punishment for a first offence for failure to pay child support is a fine, up to six months in prison, or both. In the case of a second or subsequent offence or a case when the obligation has been unpaid for longer than two years or is more than \$10,000 (N\$98975), the punishment increases to a fine of up to \$250,000 (N\$2474375), two years in prison, or both. Parents convicted of these offences must also pay restitution and/or settlements of the arrear maintenance owed.

“Project Save Our Children” is a multiagency law enforcement initiative that investigates and prosecutes the most egregious child support cases. Its members include investigative analysts from the Administration for Children and Families, Office of Child Support Enforcement, Special Agents from the Office of the Inspector-General, the US Marshals Service, US Attorneys’ Offices, and the Department of Justice, along with child support agencies across the United States. These entities identify, investigate, and prosecute parents who knowingly fail to comply with their maintenance obligations and meet the criteria for federal prosecution under the Deadbeat Parents Punishment Act.⁷⁴

Summary of mechanisms for the enforcement of maintenance orders

- Mechanisms for enforcing maintenance payments vary significantly between countries. Some countries have a national office to oversee the enforcement of payments, such as in Australia, while others place responsibility for enforcing payments on the bodies that grant the maintenance orders.
- Common methods to recover unpaid maintenance include automatically deducting child support payments from the salary of the parent in question, or deducting the money owed directly from that parent’s bank account or from other government benefits he or she receives. The UK, Australia, and Canada all use these methods.
- In the event of continued non-payment of maintenance, some authorities will also suspend the parent’s passport to prevent him or her from leaving the country, or suspend other licenses such as driving or business licenses. The province of Ontario in Canada and some states in the USA are examples of jurisdictions which use these methods.
- Defiance of a maintenance order can also involve the payment of a fine, and ultimately, imprisonment, as in Namibia and the USA.

⁷³ “Information for parents who pay child support”, <www.mass.gov/dor/docs/cse/parents/pay.pdf>, accessed 29 May 2013.

⁷⁴ Office of Inspector General, “Child Support Enforcement”, <<http://oig.hhs.gov/fraud/child-support-enforcement/>>, accessed 29 May 2013.

16.4 Lessons for Namibia from international practice

Maintenance during pregnancy

Namibia's provision on the duty of both parents to provide pregnancy- and birth-related expenses is similar to that found in many other countries across the world. However, **we note that some other countries conceptualise the provision of pregnancy-related expenses as maintenance for the mother during the pregnancy. This is a useful way to avoid the problematic question of whether child maintenance can be claimed before the birth of the child – and this approach could be considered by Namibia as a way of ensuring that contributions to pregnancy-related expenses can be sought during pregnancy.**

Duty of support

To a great extent, the duty of support in Namibia is governed by case law. This can mean that members of the public and maintenance court personnel may not have a clear understanding of who has a duty of support. **We recommend that the duty of support for some common relationships be further clarified in legislation, as in a range of other countries, without limiting the common law rules on liability to maintain.**

For example, the Legal Assistance Centre published a report on stepchildren.⁷⁵ In this report, we recommend imposing a legal duty of maintenance upon stepparents who are married to the biological parent of the child, if such a stepparent treats the stepchild as “a child of the family”. We suggest that this duty should be secondary to that of the biological parents and apply only upon application to the court, after consideration of specific factors. In addition, we recommend imposing a reciprocal duty upon stepchildren to maintain elderly or ill stepparents in specified circumstances.⁷⁶

The Legal Assistance Centre has also published a report on cohabitation.⁷⁷ In this report, we recommend that persons in a cohabitation relationship in the nature of marriage which has lasted for at least two years should have a mutual duty of support which would open up some limited possibilities for maintenance after the relationships breaks down (where one partner suffered economic disadvantage because of the relationship) and give cohabiting partners the possibility of claiming against third parties for loss of support in cases of accident or illness of one partner.⁷⁸

In cases where such a relationship is terminated by the death of one partner, we recommend giving that partner a right to apply for maintenance from the deceased estate if the surviving partner was in fact financially dependent on the deceased – if equity cannot be achieved through a fair distribution of assets which takes into account the contributions of the cohabiting partner and the claims of other family members.⁷⁹

Some countries recognise an extremely broad duty of support, for example in France where there is a possible duty of support between sons- and daughters-in-law vis-à-vis their fathers-in-law and

⁷⁵ Gender Research and Advocacy Project, *Stepfamilies in Namibia: A Study of the Situation of Stepparents and Stepchildren and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre, 2011.

⁷⁶ Id at 156.

⁷⁷ Gender Research and Advocacy Project, *A Family Affair: The Status of Cohabitation in Namibia and Recommendations for Law Reform*, Windhoek: Legal Assistance Centre, 2011.

⁷⁸ Id at 105.

⁷⁹ Id at 106.

mothers-in-law and vice-versa.⁸⁰ However, given the significant economic pressures on people in Namibia, we do not recommend that such extended maintenance duties be established in Namibia apart from the duties of support which already exist under common law or customary law.

As an interim measure whilst reforms in respect of stepfamilies and cohabiting couples are under discussion, we recommend popularising the possibility of utilising the Maintenance Act as it now stands to enforce private contractual agreements on maintenance (as discussed on page 317).

Administrative or hybrid systems for claiming maintenance

The determination of whether a judicial, administrative or hybrid system is best for Namibia is perhaps less about the system and more about the level of resource provision. Some countries such as the United Kingdom and Australia have impressive administrative systems due to the level of information and support that is provided. Namibia could learn from these examples simply by providing greater resources to the current judicial system – and particularly if dedicated maintenance investigators were employed, trained and equipped with guidelines and investigative tools as in South Africa. As recommended in this study, it would also be beneficial if there were greater voluntary involvement from civil society, churches and church-based organisations in providing support for parties involved in maintenance complaints.

Advance maintenance schemes

Many countries across the world allow parents to apply to the government to receive advance child support payments. Whilst the Legal Assistance Centre would like to recommend such an option for Namibia, given the numerous economic challenges faced by government and the many competing requirements for resources, we do not believe such a system would be feasible at present. However, this possibility should be noted for future consideration.

Additional enforcement options

Some countries use extremely practical methods to enforce the payment of maintenance – such as suspending or revoking driving licences or business licenses. Such techniques seem likely to focus the minds of maintenance defaulters without the need to resort to imprisonment. **We recommend that the possibility of revoking driving licences, and liquor and other business licences, or cancelling eligibility for tender awards, be considered as additional enforcement techniques in Namibia – particularly for repeat offenders, and in cases where such a penalty would not unduly undermine the defaulter’s ability to pay.**

Summary of lessons from international practice

- An examination of the approaches to maintenance in other countries suggests some areas where the Namibian law could usefully be clarified or amended:
 - to provide a clearer entitlement to contributions towards pregnancy-related expenses during the pregnancy;
 - to incorporate the common-law rule that the parental duty to maintain a child can extend past the age of majority if the child is for some reasons unable to become self-supporting;
 - to extend legal liability to maintain to a broader range of relationships, such as relationships between cohabitants, or between step-parents and step-children, even in the absence of a contractual agreement to maintain; and
 - to provide new penalties for non-payment of maintenance such as suspension of driving licences, liquor licences or other licences, or cancelling eligibility for tender awards - particularly in the case of repeat offenders.

⁸⁰ European Judicial Network, Maintenance Claims – France, 6 August 2007, <http://ec.europa.eu/civiljustice/maintenance_claim/maintenance_claim_fra_en.htm>, accessed 29 May 2013.

16.5 Lessons from South Africa

Because Namibia's Maintenance Act 9 of 2003 is modelled closely on South Africa's Maintenance Act 99 of 1998, it is instructive to look at some of the innovations and approaches which have been introduced in South Africa but not applied in Namibia.

The period at which maintenance ends

Maintenance in Namibia usually ends between the age of 18-21 although it can continue for longer if the child is indigent or has a disability. However many young adults aged 21 and over struggle financially and the LAC receives many requests from such persons, particularly from tertiary students, for assistance with accessing maintenance payments. However, whilst many young adults are undeniably struggling, many parents face similar if not greater financial burdens – and in terms of the current common law, a child over the age of majority would be likely to establish a parental duty to maintain only in circumstances of extreme necessity. As has already been discussed above, the overlap between Namibia's statutory provisions and the common law is somewhat confusing. Therefore, **we recommend that the Namibian Maintenance Act be amended to indicate more clearly, as in South Africa,⁸¹ that maintenance can be claimed until a child is self-supporting, even if the child is over the age of 18 years or over the age of majority;⁸² however, we recommend that standard orders (for example those not involving a child with a disability) should initially extend only up until age 18, or age 21 – 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.** We also recommend that the law should make it clear that a child who is over the age of majority can utilise the Maintenance Act to enforce the common-law right to maintenance in cases of extreme indigency, even if no maintenance order was in place before the child reached the age of majority.

Enforcing contractual agreements to maintain

The South African Maintenance Act can apparently be utilised to enforce a contractual duty of support between persons unrelated to each other by blood or marriage, such as cohabitees or stepparents and stepchildren.⁸³ The Namibian Maintenance Act has a provision on the application of the Act which is worded similarly to that in South Africa,⁸⁴ but the Namibian statute has not yet been interpreted or applied to contractual agreements, to the best of our knowledge. **We recommend that the Ministry of Justice send a circular to the maintenance courts on the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons**

⁸¹ The South African Maintenance Act 99 of 1998 states, in section 15 on “Duty of parents to support their children”: “(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.” (emphasis added). The Namibian Maintenance Act 9 of 2003 similarly states in section 3: “(1) Subject to section 26 and to the law relating the duty of a parent to maintain a child who is unable to support himself or herself, both parents of a child are liable to maintain that child...” (emphasis added). There is no definition of the terms “child” or “children” in either country's law, meaning that the term “children” could encompass adult offspring. However, in Namibia, the Act makes reference to the termination of maintenance orders at age 18 or age 21 (in section 26(1)-(2)), thus creating some confusion as to the basis for extending a maintenance order past these points. The South African Act contains no corresponding references to termination of orders for child maintenance at specific ages.

⁸² “Maintenance FAQ”, undated, <www.justice.gov.za/vg/mnt-faq.html>, accessed 6 June 2013.

⁸³ South African Maintenance Act 99 of 1998, section 2: “(1) The provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty. (2) This Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.”; DSP Cronje and J Heaton, *South African Family Law*, Durban: Butterworths, 1999 at 72: “... the application of the new Act clearly extends even to a contractual duty of support between persons who are not related to each other by blood or marriage (such as cohabitants)”.

⁸⁴ Namibian Maintenance Act 9 of 2003, section 2: “This Act – (a) applies where a person has a legal duty to maintain another person, regardless of the nature of the relationship which creates the duty to maintain; and (b) must not be interpreted so as to derogate from the law relating to the duty of persons to maintain other persons.”

who have no other legal liability to maintain each other. This option should also be explained to the public by means of a simple factsheet or pamphlet.

Lump-sum payments

Another innovation in South Africa is that the law there allows for payment of maintenance by means of a once-off lump sum.⁸⁵ There is nothing in the Namibian statute which would prohibit this, and we identified two examples of it in our study. However, this may not be clear to all role-players since once-off payments are not explicitly authorised.⁸⁶ **We recommend that the Ministry of Justice send a circular to the maintenance courts on the possibility of providing for maintenance by means of a once-off lump sum payment. This option should also be explained to the public by means of a simple factsheet or pamphlet.** One concern with this option is that the money might be rapidly spent, leaving the child without sufficient support in future years. The courts should allow lump-sum payments only in special circumstances – for example if there is a history of non-payment but the defendant has money available and the court is satisfied that the complainant will be able to administer the money in the best interests of the beneficiary until the beneficiary is self-sufficient.

Maintenance investigators

In South Africa, unlike in Namibia, significant numbers of maintenance investigators have been appointed – although their numbers are still insufficient to meet the needs of the maintenance courts.⁸⁷ The South African government reported that the first maintenance investigators were appointed in 2003, with 150 being in place by 2005.⁸⁸ Nonetheless, the following achievements have been attributed to the increased use of maintenance investigators:

- *reducing the turnaround time of the maintenance case backlog in general*
- *reducing or eliminating backlogs of untraced defaulters, particularly those who had eluded tracing for years*
- *moving large amounts of money into the hands of beneficiaries*
- *uncovering dishonesty or fraud by defaulters who tried to escape their obligations that way*
- *tracing beneficiaries who would otherwise not have received the payments due to them*
- *exposing dishonesty or fraud on the side of complainants.*⁸⁹

It has also been reported that “*the greatest successes resulting from the appointment of maintenance investigators were that they gained better access to communities and to information than had been achieved without them, thereby greatly improving the enforcement of maintenance orders.*”⁹⁰

⁸⁵ Section 1 of the South African Maintenance Act 99 of 1998, defines “*maintenance order*” as “*any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person ...*”. See Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 594.

⁸⁶ Section 1 of the Namibian Maintenance Act 9 of 2003 defines “*maintenance order*” with reference to the sections of the Act on consent orders, default orders and orders made after a hearing. Section 17(2)(b) of the Act, on orders made after a hearing, states that such an order “*must specify the period or periods and the time or times within which contributions must be made*” (emphasis added), thus arguably authorising a once-off payment; there is no indication that a maintenance order is limited to an order for periodical payments. This would also appear to be possible in respect of a consent order made pursuant to section 18 (which places no limits on what the complainant and defendant can agree to), or a default order made in terms of section 19 (which can include any order that could be made under section 17).

⁸⁷ Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 601 (statistics on courts which lack maintenance officers) and 605 (information on sharing of investigators across courts).

⁸⁸ Paul Mthimunye, “Improved Access to the Maintenance System” in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 21.

⁸⁹ Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 607-608.

⁹⁰ Id at 601.

One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.⁹¹

“These maintenance investigators have played a pivotal role in dealing with backlogs in the maintenance courts identified as hotspot areas for maintenance. The majority of outstanding cases for investigation in maintenance have been successfully dealt with. There is already a remarkable success in a number of centres with the tracing of maintenance defaulters.

There is an estimated 65% improvement in the last 8 months in the reduction of the cycle time of the hearing of maintenance cases in those courts [in] which Maintenance Investigators, Maintenance Officers and Clerks have been appointed. There are cases that have been dragging on for many years due to the unavailability of maintenance investigators where sheriffs could not assist due to their limited role which is restricted to serving of court processes.

The estimated cycle times have been reduced from six (6) months to three (3) months in cases where there were major backlogs, and from four (4) to two (2) months in courts where there [was] maximum administrative support of maintenance officers, maintenance clerks and dedicated magistrates and maintenance prosecutors ...”

Paul Mthimunye, “Improved Access to the Maintenance System” in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 21-22.

Electronic database on assets and finances

South Africa has also established an electronic database, known as the “Transunion ITC Information Support Service”, which can assist maintenance investigators to do their jobs. This database includes information on property ownership and value, credit profiles, company directorships, vehicle ownership, individuals’ financial status and particulars of individuals on file at the Ministry of Home Affairs.⁹² Such a database on assets may not immediately be within the capacity of Namibia, but it could be a goal for the future.

“The Transunion ITC Information Support Service provides an extra tool towards the effective and efficient tracing of maintenance defaulters.”

Paul Mthimunye, “Improved Access to the Maintenance System” in South African Department of Justice and Constitutional Development, *Justice Today*, Vol 1, December 2005 at 22.

Maintenance officers

Research in South Africa found a direct correlation between maintenance officers who have legal qualifications and use of the full range of enforcement mechanisms provided by the law. The researchers recommended that all courts should be equipped with maintenance officers who are legally qualified and have received further specialised training in relevant procedures, and that these officials should be dedicated maintenance officers and not prosecutors who are doubling as maintenance officers.⁹³ Although maintenance officers in Namibia are legally qualified, they often have numerous other duties in addition to their responsibilities as maintenance officers and so are often stretched beyond capacity.

⁹¹ Maintenance Act 9 of 2003, section 8(4).

⁹² Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 596.

⁹³ Id at 611-612.

Despite the progress made in increasing the number and qualifications of maintenance court officials in South Africa, ten years after the law was passed the shortage of dedicated maintenance court officials was still identified as the biggest obstacle to the recovery of maintenance.⁹⁴

“The crux of the matter is that it has been established that a well-trained and specialized corps of maintenance court officials is most definitely a prerequisite for the establishment of a fair and equitable maintenance system in South Africa.”

Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 596

Better training of maintenance court personnel

The South African Maintenance Act requires that the National Director of Public Prosecutions must, in consultation with the Minister of Justice –

“issue policy directions with a view to –

- (i) establishing uniform norms and standards to be observed by public prosecutors in the performance of their functions as maintenance officers under this Act;*
- (ii) building a more dedicated and experienced pool of trained and specialised maintenance officers.”⁹⁵*

Many court officials interviewed for this study requested more training and support to help them better implement the Act.

“In order to fulfil their task adequately, maintenance officers need to be given basic social training so that they can understand the stresses of family life, the costs of raising a family, gender-sensitivity issues, and accounting issues. The new Act therefore stipulates that policy directions be introduced to determine the functions of maintenance officers, to establish uniform norms and standards for maintenance officers, and to build a more experienced pool of trained and specialised maintenance officers.”

Waheeda Amien and Mohamed Paleker, “Women and the Law” at 33 (footnotes omitted), <www.engender.org.za/publications/Women&TheLaw.pdf>, accessed 16 September 2013

Improved payment systems

In South Africa, court processing of maintenance payments, along with bail payments and fines, has been made more efficient by the introducing of a Justice Deposits Account System which is an electronic tool for tracking payments made to and through the courts. Maintenance payments can be transferred from the court to the bank accounts of complainants by means of electronic transfers, and maintenance complainants without bank accounts are encouraged to open accounts through an initiative for “banking the unbanked”. Commercial banks have assisted by making staff with application forms available at various courts, and by placing ATMs in locations where they were most needed to serve maintenance complainants.⁹⁶ This use of such an electronic system, and improved cooperation with commercial banks, could be models for Namibia for the future.

⁹⁴ Id at 602.

⁹⁵ South African Maintenance Act 99 of 1998, section 4(1)(b).

⁹⁶ Madelene de Jong, “Ten-year Anniversary of the Maintenance Act 99 of 1998 – A time to reflect on improvements, shortcomings and the way forward”, 126 (3) *South African Law Journal* 590 (2009) at 598.

Enforcement and awareness campaigns

In 2005, the South African government launched a campaign called “Operation Isondlo” which was intended to address a number of weaknesses of the maintenance system through capacity-building of maintenance officials; stricter enforcement of maintenance orders by focusing on civil servant defaulters and by using police roadblocks to catch defaulters with long-outstanding arrest warrants; and a multi-media public awareness campaign on the right to maintenance and the procedures for claiming it. Maintenance court officials believe that this initiative has resulted in a better public understanding of the law and increased use of the maintenance court by women, as well as increased public confidence in the system.⁹⁷ Here again, this South African success could be a useful model for a commitment by the Namibian government to improve public understanding of maintenance and to enhance the operation of the Namibian maintenance courts.

Summary of lessons from South Africa

- Because Namibia’s Maintenance Act 9 of 2003 is modelled closely on South Africa’s Maintenance Act 99 of 1998, some innovations and approaches which have been introduced in South Africa could be usefully applied in Namibia.
 - Commentary on the South African Maintenance Act reports that it can be utilised to enforce a contractual duty of support between persons unrelated to each other by blood or marriage, such as agreements between cohabitantes or agreements between stepparents regarding the maintenance of stepchildren. Since Namibia’s law uses the same language as South Africa’s in the relevant provision, this would appear to be possible in Namibia as well. This option appears to be generally unknown and should be popularised.
 - The South African Act also allows for payment of maintenance by means of a once-off lump sum. Nothing in the Namibian law appears to prevent this, but the possibility could be clarified for use in appropriate cases.
- In South Africa, unlike Namibia, significant numbers of maintenance investigators have been appointed. A number of improvements in the system have been attributed to this increase in human resources, suggesting that progressive appointment of maintenance investigators in Namibia could similarly be of enormous benefit.
- South Africa has established an electronic database with information on individual financial status and assets which can assist maintenance investigators. A similar database might be considered as a long-term goal in Namibia.
- The South African Maintenance Act requires that the National Director of Public Prosecutions in consultation with the Minister of Justice to issue policy directions on the implementation of the Act. Such guidelines could be useful in Namibia, as many court officials interviewed for this study requested support for improved implementation.
- In South Africa, maintenance payments received by the court can be transferred electronically to complainants’ bank accounts, reducing court administration and increasing convenience for complainants. The courts use an electronic tool for tracking payments to monitor this process. If the direct payments already authorised by Namibian law do not become more well-utilised, this could be an option for Namibia for the future.
- In South African, government commitment to the maintenance system was signalled by “Operation Isondlo”, an initiative which incorporated capacity-building of maintenance officials, a public awareness-raising campaign, and stricter enforcement of maintenance orders by focusing on civil servant defaulters and by using police roadblocks to catch defaulters with long-outstanding arrest warrants – which led to better public utilisation of the law and increased public confidence in the system. An initiative of this nature could be useful in Namibia.

⁹⁷ Id at 596-598, 601-602.

**Will you disappear when your
baby is born?**

Be a man. Be responsible!

Child Maintenance Campaign coordinated by:



Legal Assistance Centre in consultation with Doufi Namalambo and Nepeti Nicanor
Pictures courtesy of Marcus Weiss

Funded by the United States Government and the Austrian North-South Institute for Development Cooperation

One of the posters produced for the Child Maintenance Campaign coordinated by the Legal Assistance Centre in 1998-1999.



Chapter 17

RECOMMENDATIONS

This chapter summarises the recommendations that have been made in this report. Further information on why the recommendations have been made can be found in the relevant chapters.

The recommendations have been grouped under the following categories:

- Improving implementation of the law
- Promotion of partnerships
- Public information and awareness-raising
- Providing trained volunteers to assist with maintenance cases
- Amendments to the Maintenance Act and regulations
- International enforcement
- Further research

Improving implementation of the law

The Maintenance Act already contains a number of provisions and procedures that would facilitate better management of maintenance complaints, but many of the innovations introduced by this law are unfortunately not being adequately utilised. We recommend that the Ministry of Justice provide additional information and training to maintenance court officials on the implementation of the Act, with specific attention to certain topics identified in the research as particular problem areas. Supervisory personnel should also be tasked to spot-check files to improve implementation. We also suggest some measures pertaining to cooperation between maintenance courts, identification of best practices and improved communication with parties to maintenance cases.

Additional resources

- **Budget to hire maintenance investigators:** We recommend that the Ministry of Justice review its budget allocations to assess whether the operation of the maintenance courts is receiving sufficient funding. One of the most helpful steps to improve the operation of the maintenance courts in Namibia will be the progressive appointment of maintenance investigators, as the law requires.
- **Extra personnel at busy times:** This study identified the fact that the maintenance courts receive a higher number of complaints at the start of the year compared to other months. We recommend that magistrates' courts allocate increased staff to the maintenance court at the start of the year to assist with the increase in the caseload at this time. We combine this recommendation with a suggestion that the public be encouraged to apply for maintenance early enough to allow sufficient time for investigation and resolution before pressing costs such as childcare and education-related costs must be paid.

Information and training for maintenance court officials

- **Key topics for improved information and training:** The study suggests information circulars and/or training on a number of aspects of the Maintenance Act which do not seem to be well-understood or well-utilised. Information on these topics could also be compiled into a **procedural manual for maintenance court officials**, or used as the basis for curriculum for a **specialised training course**. Information and training appear to be needed particularly on the following topics:
 - the right of minor children to claim maintenance on their own;
 - the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons who have no other legal liability to maintain each other (such as agreements between cohabitees, or agreements between step-parents for the maintenance of step-children);
 - guidelines on the procedure for opening, investigating and maintaining maintenance files, including procedures for comparing information on income and expenditure and investigating the defendant's financial position;
 - the appropriate use of directives versus summonses to call witnesses to give information at an investigation or an enquiry;
 - the procedure to follow when a default order should be made, including information on the process a defendant can use to challenge such an order;
 - appropriate duration of a maintenance order for a child with a chronic illness or disability;
 - the different payment arrangements permitted under the Act and the various records which can serve as acceptable proof of payment;
 - the permissible possibility of ordering the provision of maintenance by means of a once-off lump sum payment;
 - the mechanisms of payment an employer can use to fulfil an order for the attachment of wages;
 - the importance of keeping photographs of the defendant or copies of the defendant's identification documents on file as an aid to future enforcement;
 - the use of Form J for minor changes to an order which can be made by a maintenance officer without the involvement of the magistrate;
 - the process and mechanisms for the enforcement of maintenance orders, particularly the use of civil enforcement mechanisms, and the importance of reviewing cases where breaches occur to ensure that the best possible payment arrangement is in place;
 - the procedure to follow when a complainant seeks to withdraw a maintenance complaint;
 - the differences between the procedure for granting maintenance as part of a protection order under the Combating of Domestic Violence Act and the procedure for granting maintenance under the Maintenance Act;
 - the procedure for addressing the misuse of maintenance money, including the importance of documenting complaints, investigations and outcomes; and
 - the procedure for the recovery of arrears in criminal cases.

Utilising more efficient payment options

- **Encouraging increased use of direct payments:** Maintenance court officials should inform complainants of the different payment options which are possible, and assure them that breaches can be addressed regardless of the payment option chosen. More use of direct payments between the defendant and complainant, particularly through electronic bank transfers (including cellphone banking), could reduce administration on the part of the court and save time and costs for complainants and defendants by eliminating monthly trips to the court to make and collect payments.

Improving communication between maintenance court and parties

- **Preventing large amounts of arrears:** Maintenance officers should inform complainants at the time the order is granted that arrears can be reported as soon as a single payment has been outstanding for 10 days, to prevent arrear amounts from piling up. Defendants should also be fully informed about the implications of not paying maintenance, including the various enforcement possibilities which may be utilised in the event of non-payment.

- **Promoting the use of procedures for substitution or discharge:** The Ministry of Justice should develop a simple factsheet or pamphlet (which could be produced in multiple languages) explaining the process for applying for the increase, decrease or discharge of a maintenance order. Court officials could give this information to both parties to a maintenance complaint during the initial application process, so that they are informed from the start. To ensure that the defendant receives this information, the pamphlet could be enclosed with the original summons. Improved dissemination of this information could prevent the defendant from falling into arrears as a result of lack of means by encouraging substitution proceedings where there are genuine changed circumstances.

Improved investigations

- **Full utilisation of existing powers of investigation:** As recommended in the 1995 maintenance study, maintenance officers need to be encouraged to use their powers of investigation more assertively to help locate defendants or to obtain accurate information about the defendants' income and means, utilising their ability to summon witnesses to court for this purpose if necessary. However, this recommendation is likely to be effective only if maintenance investigators are appointed to support maintenance officers.

Cooperation between different maintenance courts

- **Dealing with parties residing in different jurisdictions:** Maintenance courts should develop a protocol for procedures to facilitate payments and enforcement in cases where the defendant and complaint live in different magisterial jurisdictions.
- **Efficient transfer of files:** The Ministry of Justice should review the steps taken by clerks when transferring files to identify problems with the transfer of files (for example to minimise delays and to ensure that steps are not missed – eg if the file in question contains an order for the attachment of wages, the employer must be notified that the court which must receive the payment has changed).

Identifying best practices

- **Sharing for success:** Problems and solutions on the implementation of the Maintenance Act should be discussed at conferences convened by the Magistrates Commission and at meetings of court officials from different courts. For example, such forums could be used to discuss best practice on the use of directives versus summonses, on how to prevent delays in service of process and on the application of civil enforcement mechanisms.

Promotion of partnerships

We recommend the Ministry of Justice develop closer partnerships with other government and non-government stakeholders on specific implementation issues.

- **Specific areas for improved cooperation:** Closer partnerships between the Ministry of Justice and the following stakeholders could improve implementation of the law:
 - **Ministry of Gender Equality and Child Welfare**, so that social workers may be more involved in maintenance enquiries and in addressing any concerns that emerge in such enquiries about children at risk of neglect or abuse;
 - **Ministry of Home Affairs and Immigration**, to assist clients who apply for maintenance in respect of children who lack birth registration documents and to supply public information materials on birth registration to the courts;
 - **Ministry of Safety and Security**, to involve police personnel in discussing how best to expedite arrests in respect of warrants issued by the maintenance court;

- **banks and other financial service providers**, to encourage them to leave public information materials at magistrates' courts to encourage complainants and defendants to open bank accounts in order to take advantage of electronic transfers of maintenance payments or attachments of wages; and
- **traditional leaders**, to encourage them to assist in negotiating maintenance agreements and referring families to maintenance courts where appropriate, with priority given to traditional leaders in the Kavango Region, where utilisation of traditional courts for maintenance seems particularly common (the research was conducted before the division of the Kavango Region into the two regions of Kavango East and Kavango West).

Public information and awareness-raising

We recommend that the Ministry of Justice take the lead in ensuring that information is disseminated to the public on particular issues, with the involvement in some cases of other relevant government stakeholders and NGOs.

Information for the general public

- **Information about the basic principles of maintenance and the Maintenance Act:** There is a need for more information on maintenance aimed at the general public. Such information could be disseminated by the Ministry of Justice, or by NGOs working in partnership with the Ministry, by means of radio and television, news articles or advertisements, and pamphlets or posters placed at popular public places and at maintenance courts. The topics which seem to be in particular need of popularisation include the following:
 - the importance of child maintenance, including the following concepts:
 - maintenance as part of the responsibility of every parent;
 - maintenance as a child-centred concept, encouraging mothers to apply for maintenance where the child's needs are not being satisfied;
 - children with disabilities may need maintenance for their entire life;
 - how the failure to pay maintenance can affect a child;
 - the possibility of applying for pregnancy- and birth-related expenses, which is currently under-utilised;
 - the possibility of seeking the provision of maintenance by means of a once-off lump sum payment (which might be particularly appropriate where a defendant receives a lump sum such as a pension payment, a retrenchment package, a workers' compensation payment or a payment from the Motor Vehicle Accident Fund) but only in cases where the court is satisfied that the complainant will be able to administer the money in the best interests of the beneficiary until the child is self-sufficient;
 - how to apply for substitution, suspension or discharge of a maintenance order;
 - the right to report a failure to pay maintenance 10 days after a single payment is missed, and the possibility of utilising civil enforcement mechanisms;
 - the possibility of using the Maintenance Act to enforce private contractual agreements for maintenance between persons who have no other legal liability to maintain each other (such as agreements between cohabitants, or agreements between step-parents for the maintenance of step-children).

Information for targeted audiences

- **Children:** The Ministry of Justice and NGOs working with children should disseminate information to children on how they can apply for maintenance for themselves.

- **Extended family members caring for children:** The **Ministry of Justice** and the **Ministry of Gender Equality and Child Welfare** should target this audience to ensure that extended family members are aware that they can use the Maintenance Act to apply for maintenance from one or both parents rather than applying for state grants, since the primary duty to maintain a child lies with the child's parents.
- **Pensioners and recipients of disability grants:** The **Ministry of Labour and Social Welfare** should produce a simple factsheet or poster aimed at pensioners and recipients of disability grants about the duty of children to provide maintenance to their parents in certain circumstances.
- **Employers:** The **Ministry of Justice** and **employers' organisations** should disseminate materials to employers to inform them of their obligations in terms of the Maintenance Act, such as an employer's duty to comply with an order for the attachment of wages and the different mechanisms an employer can use to comply with an order for the attachment of wages.
- **Communities who often utilise the law:** Based on analysis of the apparent language groups of people who often use the maintenance courts, we recommend that educational materials are produced in Oshiwambo and Damara>Nama to support complainants who most commonly make maintenance complaints.
- **Communities under-utilising the law:** Based on the analysis of the apparent language groups of people who under-utilise the maintenance courts, we also recommend that materials should be produced in Rukwangali to ensure that people from this language group are aware of how to apply for maintenance.
- **Rural communities:** We recommend that the **Ministry of Justice** and **other stakeholders** hold information sessions on the law in rural areas, to discuss specific obstacles to utilisation of the law by rural communities and to involve traditional leaders in popularising the law. Priority should be given to traditional leaders in the Kavango Region, where utilisation of traditional courts for maintenance seems particularly common.

Providing trained volunteers to assist with maintenance cases

Experience from South Africa and other countries shows that when parties to maintenance complaints are assisted by trained volunteers, they are more likely to positively resolve their application in the form appropriate for their situation. This assistance is particularly important given the resource limitations at the maintenance courts. We recommend that NGOs consider applying to donors for funding for programmes whereby trained volunteers are placed at the maintenance courts. The Ministry of Justice should be a partner in these programmes with a view to possibly integrating the programme into government services, or employing the volunteers as maintenance investigators in the long term.

- **NGOs staffed by volunteers to assist complainants and defendants in individual cases:** NGOs can provide volunteers to assist complainants to make maintenance complaints, or to give information to defendants who lack means on how to present information to the court or request a substitution or discharge where appropriate. Such volunteers will reduce the burden on court staff and help to make the process more child-centred, particularly in cases where the parents are in conflict with each other. If, as in South Africa, there can be a progression from volunteer to employed court staff member, the role of volunteers would not only have altruistic benefits for the community, but would also provide economic benefits for the volunteers in the long term. This could be particularly beneficial given Namibia's high rate of unemployment.

Amendments to Maintenance Act and regulations

We recommend that the Law Reform and Development Commission and the Ministry of Justice consider amendments to the Maintenance Act to clarify and fine-tune some issues, including revision of some of the key forms. These recommendations do not introduce new principles or innovations, since the Act already provides the key tools required for a successful maintenance system.

General principles

- **Best interests of the child:** Include a provision to recognise the best interests of a child as the paramount consideration when considering maintenance orders for child beneficiaries.
 - **Duty of maintenance officer:** A separate provision should be included to assign the maintenance officer a particular duty to place information about the child's interests before the court.
 - **Legal representation for child if necessary:** Give the court 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.
- **Child participation:** Include a provision to recognise the role of child participation where appropriate in maintenance hearings – keeping in mind that child participation in this context will not always be in the child's best interests.
- **Religious marriages:** Amend the Act to place marriages concluded in accordance with generally-recognised religions on the same footing as civil and customary marriages for purposes of enforcing a mutual duty of support between spouses.
- **Clarify common-law duty of support:** Amend the Act to clarify the duty of support for 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 contributions to past maintenance:** Currently the Act does not clearly allow retrospective claims for maintenance, although it is possible under the common law to claim reimbursement in respect of past maintenance where one person paid more than his or her fair share of a joint liability to maintain. We recommend the Act is amended to clearly provide that a maintenance order may include an amount to reimburse the complainant for excess contributions towards a child's maintenance from the date of the child's birth.

Maintenance for persons with disabilities

- **Contents of costs of care for persons with disabilities:** Amend the Act to provide greater clarity on costs included under the heading of “*other care*” for a person with a disability. 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 medical care and equipment, medication or services incurred by the beneficiary as a result of the disability, in addition to other items.

Pregnancy and birth-related expenses

- **Claiming contributions to pregnancy-related expenses during pregnancy:** Currently it is not clear whether pregnancy-related expenses can be claimed before the birth of the child. As a result,

some courts allow such claims whilst others do not. The Act should be amended to make it clear that contributions to pregnancy-related expenses may be claimed before the child is born, and to provide for a procedure for refunds should paternity be disproved at a later stage. We note that some other countries conceptualise the provision of pregnancy-related expenses as maintenance for the mother during the pregnancy. This is a useful way to avoid the problematic question of whether child maintenance can be claimed before the birth of the child, and this approach could be considered by Namibia as a way of ensuring that contributions to pregnancy-related expenses can be sought during pregnancy. Allowing such claims during pregnancy could improve the health of mother and baby, by ensuring that there is money for expenses such as antenatal check-ups and vitamins.

Duration of duty to support

- **Maintenance for major children:** Amend the Act to state clearly, as in South Africa, that maintenance can be claimed until a child is ‘self-supporting’, even if the child is over the age of 18 years or over the age of majority – since this is already the position at common law, although the legal duty to maintain for adult children generally comes into play only in cases of extreme indigence. We recommend that maintenance orders in standard cases (for example, not involving a child with a disability or a chronic illness) should initially extend only up until age 18 or age 21 – 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.
- **Termination of duty to maintain a parent:** Amend the Act to state that a maintenance order for the support of a parent also comes to an end if the parent dies (currently this is not clear even though the Act states that a maintenance order for a child comes to an end if the child dies).

Maintenance investigations and enquiries

- **Directives versus summonses during investigations:** The distinctions between directives and summonses need to be re-examined with a corresponding review and clarifications of the forms and procedures, to ensure that these two methods of obtaining information during investigations are correctly and effectively utilised.
- **Rules on witness expenses:** The Act currently allows for the defendant to claim expenses to attend court for an enquiry but not when summoned to an investigation before the enquiry. There is no such distinction for the complainant. Given this unusual disparity, the rules on the payment of witness expenses in connection with summonses should be re-examined.
- **Clarity on privacy or maintenance enquiries:** The Act contains conflicting provisions about whether a maintenance enquiry must be held in a closed or open court; the provisions on privacy should be clarified.
- **Procedure for submission of written evidence:** 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 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.

Harmonising laws on maintenance, custody and parentage

- **Allow for consideration of maintenance together with custody challenges:** Align the Maintenance Act with the Children’s Status Act (and forthcoming Child Care and Protection Act) to allow maintenance and custody proceedings to operate in unison when required. For example, it should

be possible to convert a maintenance case to a custody hearing should the situation require this, with the possibility of ordering temporary maintenance in the meantime whilst the question of a possible change in custody is pending.

- **Proof of parentage proceedings:** The Act should be amended to incorporate the proof of parentage proceedings contained in the Children's Status Act, while retaining the flexible approach to orders for costs of scientific testing contained in the current Maintenance Act. It would make sense to have a single approach to proof of parentage in all magistrates' court proceedings where this issue arises.

Challenges to default orders

- **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. 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.

Appeals

- **Enforcement while appeal is pending:** The Act should clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because it challenges the finding that the defendant is legally liable to maintain the beneficiary.

Changes to maintenance orders

- **Automatic increases or decreases:** Most complainants do not return to court for an increase in maintenance ordered even though the cost of living increases each year – often at a faster rate than salary increases. Amend 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.
- **Temporary reductions during visits to non-custodian parent:** It might be useful to provide for a simple procedure whereby the complainant and the defendant may agree on a temporary reduction of maintenance during periods where the beneficiary visits the defendant for a period longer than one month. Such agreements could be placed on file with the court. However, this should not be allowed in cases where the maintenance payments are being satisfied by an attachment order (such as attachment of wages) because of the administrative burden which would accrue to third parties by such a temporary reduction. It must also be remembered that some expenses – such as rent and school-related expenses – would not be affected during such periods and the provision of maintenance should still cover these costs as the underlying order envisages.

Enforcement measures – civil enforcement

- **Allow attachment of wages before there is a breach:** Amend the Act to allow the court to attach the wages of the defendant at the time of making an initial 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.
- **Notice to complainant of opposition to civil enforcement measures:** 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.

- **Civil enforcement while appeal is pending:** Clarify that civil enforcement of a maintenance order is possible while an appeal is pending, unless the maintenance order is suspended while the appeal is underway because the appeal is challenging the finding that the defendant is legally liable to maintain the beneficiary.
- **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.

Enforcement measures – criminal enforcement

- **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 – where the defendant raises this defence, he/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.
- **Stay of criminal proceedings upon payment of arrears:** Amend the Act to allow the court to stay the 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 (in addition to the maintenance order which was breached). The criminal prosecution could then easily proceed if payment of arrears 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, and it could help to resolve the breach in payment of maintenance without leaving the defendant with a criminal record.
- **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. We suggest amending the Act so that such an order can also be made on the court’s own motion.
- **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.

Maintenance orders by other courts, including maintenance in divorces

- **Jurisdiction over other maintenance orders:** Amend the Act to include a more straightforward statement of the maintenance court’s jurisdiction to enforce, vary, suspend or set aside orders for maintenance made by any court, including the High Court. For example, the Maintenance Act should make it clear that the enforcement and variation measures provided by the Act are available in respect of –
 - provisions on maintenance in divorce orders made by the High Court, alongside any existing High Court procedures that apply to such orders;
 - interim orders for maintenance issued by the High Court while a divorce is pending; and
 - orders for temporary maintenance in protection orders made in terms of the Combating of Domestic Violence Act, including explicit provision for the possibility that a person with such a temporary maintenance order will approach the maintenance court for enforcement of a temporary order or a longer-term maintenance order.

Maintenance in traditional courts

- 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. This was recommended in the 1995 maintenance study, and continues to be a possibility deserving investigation.

Other technical issues

- **Timelines:** Amend the Act to include specific timelines allowable for postponements (unless special circumstances exist). It would also be advisable to amend the timeline for a warrant of execution, which when served currently requires the debtor to raise the sum of money requested within 30 minutes.
- **Change of address by complainant:** Require the complainant to notify the court of *any* change of address. It currently seems to contemplate notification by the complainant only in cases of a move from one court's jurisdiction to another. However, a complainant may not be aware of jurisdictional boundaries. Furthermore, the court should have the complainant's current contact details on file in case there is an application by the defendant for a change to the order.

Revisions to forms

- **Improved collection of information on financial position:** Simplify the method for collecting information on income, assets and expenditure of both the complainant and the defendant.
- **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. As a result, complainants may not be aware of what kinds of contributions they may request aside from periodic cash contributions towards monthly maintenance. Form A should separate the different categories of possible "*other contributions*" and explain more clearly what can be requested.
- **New case management form:** We also recommend that a new form is introduced to assist maintenance court personnel to monitor the management of cases. This recommendation is based on the example of the Eehana court where the maintenance officer informed researchers that he plans to introduce a register of withdrawn files. He had also drafted a form to be filled in for each file withdrawn, which specifies all actions taken by the maintenance officer or the maintenance clerk with regard to the case. 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.
- **Simplified form for applications by children:** The law allows child beneficiaries to apply for maintenance for themselves, and this does occasionally happen in practice. We suggest providing a simplified application form for children to use in such cases. An alternative solution could be to produce a simple pamphlet for children on how to apply for maintenance for themselves, and to ensure that clerks of court and maintenance officers prioritise assistance to child complainants.

International enforcement

We recommend the Ministry of Justice arrange for Namibia to take steps to improve the management of maintenance complaints that involve parties living in different countries through the signing of both international agreements and agreements with individual countries.

- **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;
 - 1956 UN Convention on the Recovery Abroad of Maintenance;

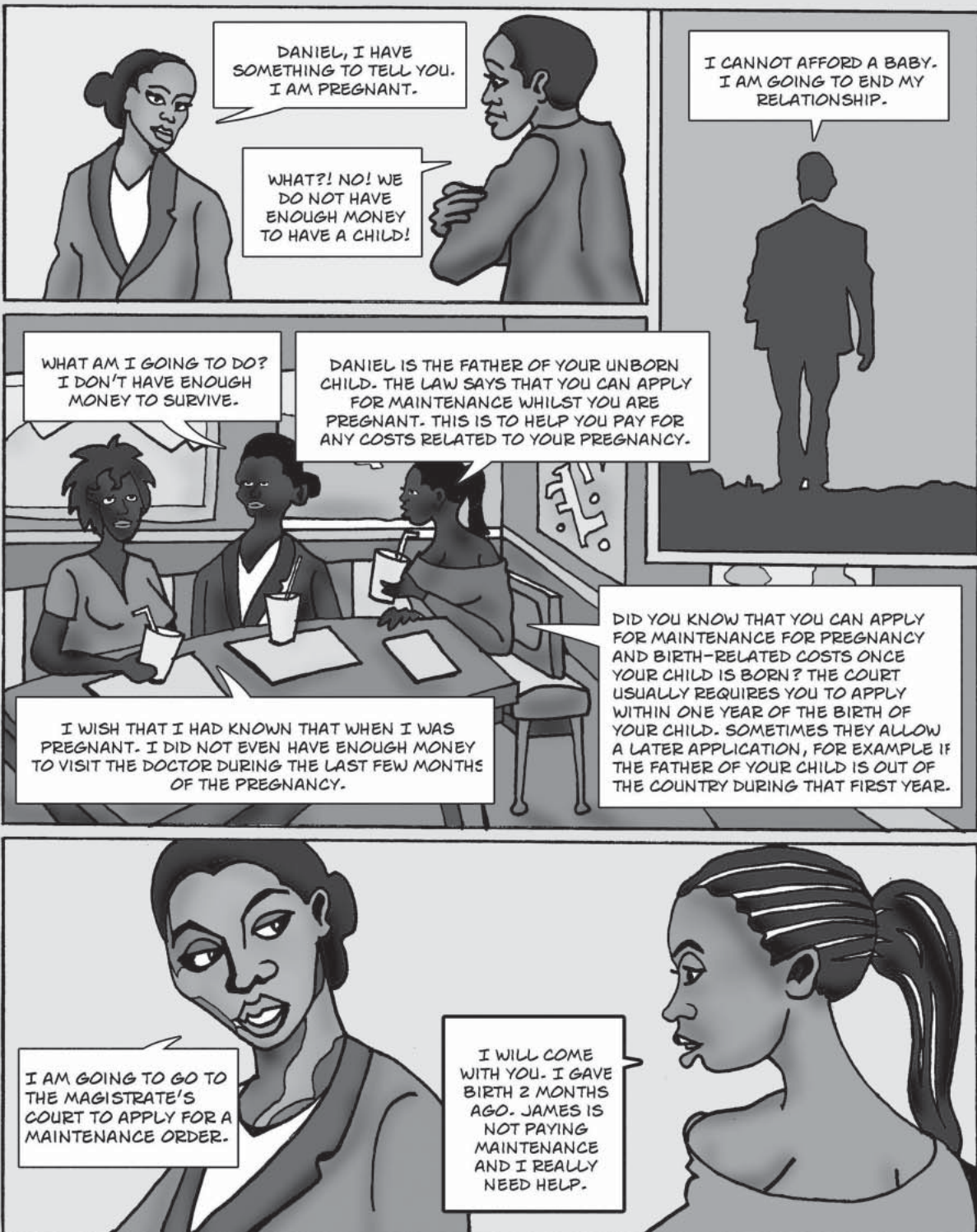
- 1958 UN Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children;
 - 1973 Convention on the Law Applicable to Maintenance Obligations; and
 - 1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
- **Reciprocal agreement 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. Namibia could make agreements with countries where requests for the enforcement of maintenance across borders are most commonly made. This would be a useful 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.

Further research

We suggest that the Ministry of Justice or the Ministry of Gender Equality and Child Welfare consider commissioning further research on specific topics arising from findings of the current study. These topics could have implications for the uptake of state maintenance grants provided by the Ministry of Gender Equality and Child Welfare.

- **Maintenance in cases where children live with extended family members:** Data from a number of reports shows that children often live with extended family or caregivers and in many situations one or both parents are still living. This study identified only a small number of maintenance complaints made by members of the extended family. Therefore we recommend that qualitative research is conducted on how children living separately from their parents are supported.
- **Maintenance in Kavango Region:** This study also identified a particularly low number of maintenance complaints in Kavango Region. We recommend that qualitative research is conducted in Kavango East and Kavango West Regions to assess what child support mechanisms are utilised in these communities, and what barriers may exist to utilisation of the general maintenance system.

HOW TO CLAIM MAINTENANCE DURING PREGNANCY



Gender Research & Advocacy Project, Legal Assistance Centre. Windhoek Namibia 2010



Development Cooperation
Ministry of Foreign Affairs



One of the one-page comics produced by the Legal Assistance Centre for publication in newspapers.