



**REPUBLIC OF NAMIBIA**

**LAW REFORM AND DEVELOPMENT COMMISSION**

**REPORT**

**on**

**MAINTENANCE**

**LRDC 5**

**Windhoek, Namibia;  
September 1997**

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**LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA**

**THE HONOURABLE MINISTER OF JUSTICE, DR E N TJIRIANGE**

**I have the honour to submit to you in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) the Commission's Report on Maintenance.**

**MR U D NUJOMA  
CHAIRPERSON  
1997-09-02**

(iv)

**LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA**

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991).

The members of the LRDC (on 1 September 1997) are:

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Adv B Gawanas (Ombudswoman of Namibia)  
Adv V Erenstein Ya Toivo  
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**CONTENTS**

1. **Introduction..... 1**

2. **Summary of Maintenance Court Procedure..... 3**

3. **Recommendations for law reform..... 5**

# REPORT

The Law Reform and Development Commission of Namibia has been established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991). The objects of the Commission are to undertake research in connection with and examine all branches of the law of Namibia and to make recommendations for the reform and development thereof, including, amongst others “..... (d) new or more effective procedures for the administration of the law and the dispensing of justice”. (Section 6).

This Report deals with proposed amendments to the Maintenance Act, 1963 (Act 23 of 1963). The Commission has decided not to submit draft legislation with this Report. The said Maintenance Act has already been amended several times and there is indeed a need that it should be consolidated and re-enacted. Another amendment Act will just make the legislation in this regard even more inaccessible to the general public.

**The Commission therefore recommends that the existing Act should be consolidated with incorporation of the necessary amendments resulting from the recommendations contained in this Report.**

## REPORT ON REFORM OF THE MAINTENANCE ACT 1963, (ACT NO. 23 OF 1963)

### 1. Introduction

Maintenance means financial and material support for a dependent: providing in the basic needs of life, namely food, clothing, education, medical care and shelter.

Maintenance law as applied in Namibia is based on the common law principles and the rule that grandparents, parents, children and grand children have a reciprocal liability to maintain each other if any of the family members need to be maintained. Spouses also have a mutual duty to support each other.

For the purposes of this Report, research has not been done on the possible different customary law approaches to the law of maintenance which might involve members of the extended family.

The Maintenance Act, 1963 (Act 23 of 1963) – hereinafter referred to as the Act - governs the procedural process in which the substantive rules of maintenance are enforced in the maintenance courts. It creates a free and simple procedure to assist individuals in obtaining maintenance from persons who are legally liable to maintain them.

In its report on the operation of Maintenance Courts, the Legal Assistance Centre pointed out that the maintenance procedure is used almost exclusively by women raising children of absent fathers. Thus the effectiveness of the Maintenance Courts' procedure is an important factor in determining the household resources of households headed by single mothers and in the economic empowerment of women.

It has become apparent through community dissatisfaction expressed *inter alia* to the Commission through its Women and Law Committee, Women's Groups, the Department of Women's Affairs and the offices of the Legal Assistance Centre country wide that the maintenance rules and procedures are experienced as inadequate and ineffective to a large extent. Consequently the Commission initiated an investigation with the aim of addressing the shortcomings through law reform.

During 1993 the Women and Law Committee of the Commission identified the *Procedure in obtaining and executing Maintenance Orders* as a priority for law reform. At about the same time the Ministry of Justice forwarded some proposals on this issue to the Commission for its comments. The Legal Assistance Centre in Windhoek was also prepared to conduct research in this field and to recommend the necessary reforms.

It is thus with full realisation of the import which effectiveness of the maintenance procedure has for the social and economic situation of many families, that this Law Reform Project has been undertaken by all interested parties.

Discussions were held by the Legal Assistance Centre, the Women and Law Committee, Maintenance Officers and Magistrates, persons in the Ministry of Justice who are involved in the administration of the Maintenance Courts, the Office of the Prosecutor General and the Chief: Lower Courts in the Ministry of Justice.

The Legal Assistance Centre embarked on field research encompassing in various regions of the country:

- (a) Examination of maintenance court files;
- (b) Interviews with individuals and maintenance court personnel, group discussions, public meetings and consultations with community members.

They compiled an initial document titled "Comments on the proposed Maintenance Act Amendment Bill". It was reviewed and discussed by representatives of the Legal Assistance Centre and the Women and Law Committee.

During 1995, the Legal Assistance Centre published the report "**MAINTENANCE, A STUDY OF THE OPERATION OF NAMIBIA'S MAINTENANCE COURTS**". The report covered the legal background, field research, recommendations and a draft bill. The Minister of Justice handed this report to the Commission and its Women and



Law Committee for review during late 1995. In many instances the amendments in the South African maintenance laws were followed where they were useful. In the light of the reciprocal enforcement of maintenance orders between Namibia and South Africa uniformity should be encouraged. Additional amendments provide for unique Namibian situations.

The various consultations and the research results have pointed out that the reforms are not greatly needed in the substantive legal rules, but to a large extent in the procedural rules: In other words, the amendments need not to concentrate on the rules indicating which people are liable to maintain others, but rather on the manner in which these rules are enforced. For this reason not much comparative legal research needed to be done. Practical solutions had to be found for the practical shortcomings experienced by maintenance officers, magistrates, complainants and respondents alike.

It is however abundantly clear that a lack of practical experience and practical guidelines for personnel contributes largely to the ineffectiveness of the maintenance system. A comprehensive set of regulations providing guidelines for each step in the maintenance process is indispensable and should be issued by the Ministry of Justice without delay.

Not all the problems can be addressed through amendments to the Act and by drafting of rules thereto. Some of the problems lie on the levels of international agreement and reciprocal law enforcement legislation, social perceptions of the role and purpose of maintenance courts and dedication of Maintenance Officers and officers serving and executing maintenance processes.

It is also abundantly clear that the Maintenance Officers and Clerks of the Magistrates' Courts are in dire need of a complete set of rules supplementing and directing the acts that should be taken to maintain an efficient procedural system.

## 2. Summary of Maintenance Court Procedure

The following is a summary of the procedures followed when a complainant approaches the Maintenance Officer at the Magistrates' Court with a maintenance complaint: -

Two different forms of complaints exist: Firstly a complaint may be an application for an order to receive maintenance for the first time (an initial complaint); secondly a complaint may be an application regarding an existing order, namely for an increase or for a decrease or for the setting aside/cancellation of an existing order. Both a divorce order covering maintenance and a Magistrates' Court maintenance order may be amended.

The Maintenance Officer has a discretion to institute proceedings or to refuse to institute proceedings. If in the opinion of the Maintenance Officer there are grounds for an application, he or she determines a date for such a hearing and issues out summonses

(subpoenae) to all relevant witnesses. These summonses are forwarded to the Namibian Police for service. The police officer sends a "return of service" (a report of service) to the Maintenance Officer. If the person to be summoned as a respondent or a witness cannot be found, a return of non-service (a report that service could not be effected) is sent to the Maintenance Officer.

If the respondent from whom maintenance is claimed could not be found, this whole process of setting a date, issuing out summonses and awaiting returns has to be repeated until the respondent appears in the Maintenance Court for the maintenance enquiry.

If the summons is successfully served and the respondent responds thereto, he or she will appear for a maintenance enquiry. The maintenance enquiry is not a criminal case – it is an investigation before the Magistrate, steered by the Maintenance Officer, during which the applicant and the respondent lay their financial circumstances before the Maintenance Court. The Maintenance Court determines the reasonable needs of the person to be maintained and determines the *pro-rata* liability of each of the persons liable to contribute in accordance with their financial resources. A maintenance order is then made. Both parties may have legal representation at the enquiry, but such an enquiry is held in a closed court. Therefore no friends or relatives of the parties, interested persons or the press are allowed.

The Maintenance Court order usually stipulates that the maintenance shall be paid to the Maintenance Court (to the Clerk of the Magistrates' Court), but not necessarily.

If the circumstances of the case change, namely the maintenance needs increase or one party experiences a drastic decrease in income or ability to contribute, the Maintenance Court may again by application for an increase or decrease be requested to re-assess the situation and to issue an amended order.

It must, however be noted that the parties to an enquiry may reach an agreement prior to the maintenance enquiry: The respondent will sign a consent form, which will upon acceptance thereof by the applicant, be made an order of court.

If someone fails to comply with a maintenance order by not making the maintenance payments regularly, the beneficiary or person in whose favour the order was made, may approach the Maintenance Officer and make a statement under oath on the prescribed form complaining about the aforesaid failure.

The Maintenance Officer thereupon issues a criminal summons, charging the person who does/did not comply with the maintenance order in a criminal court. The summons again has to be served to bring the accused before court. If the accused person had been paying into the Maintenance Court, the records kept by the Clerk of the Magistrates' Court forms an invaluable source of evidence in addition to the evidence of the complainant.

If an accused person is convicted, the sentences are mostly imprisonment suspended on condition that the convicted person pays off the arrears in instalments that he or she can afford, in addition to the regular maintenance payments. Sometimes periodical imprisonment (i.e. imprisonment over weekends) is also imposed.

Section 11(1) of the Act does however provide that the Maintenance Court may in addition to or in lieu of any penalty, grant an order for the recovery from the convicted person of any amount he or she failed to pay in terms of the first-mentioned order. Such an order shall have the effect of a civil judgement of that court and shall be executed in the prescribed manner, which means by attachment of property or through debt recovery procedures.

Where a Maintenance Court acquits the accused and finds that he or she failed to comply with the order because he or she was financially unable to make such payments, the Maintenance Court will convert the criminal hearing into a new maintenance enquiry where all circumstances will again be considered before an order is made. (The maintenance arrears are in effect written off.)

### 3. **Recommendations for law reform**

The recommendations by the Commission are as follows:

- (1) **That Maintenance Officers should retain a discretion to institute maintenance enquiries or to refuse to do so, where there is an existing order. An enquiry shall be held upon every initial application (i.e. where there is no existing order).**

When a complaint is made to a Maintenance Officer, it often appears as if a maintenance enquiry would be a waste of time, especially where the respondent is unemployed. It has however been shown that Maintenance Officers and Clerks of the Magistrates' Courts overlook the possibility of other forms of income and livelihood when determining whether to proceed with an enquiry or to refuse it as a waste of time. The better view seems to be that the enquiry and decision on whether there are grounds to make a maintenance order, should be made by the Maintenance Court, rather than to have the matter prejudged by the Maintenance Officer.

On the other hand if it is made a legal duty to institute an enquiry whenever a complaint is made, it is feared that the Maintenance Court rolls will be clogged with frivolous applications for increases or decreases in existing orders.

An idea was also considered that court orders for maintenance should incorporate automatic increases on a regular basis but it was rejected on the grounds that all relevant circumstances should always be taken into account before a maintenance order is made or varied.

The recommendation is therefore a midway solution to the two problems:

Where there is no existing maintenance order, it shall be compulsory for the Maintenance Officer to institute an enquiry in the Maintenance Court after investigating such complaint. The Maintenance Court will judge the merits of the complaint.

Where there is, however, an existing order and the complainant applies for an increase, a decrease or setting aside of the order, the Maintenance Officer may investigate the complaint and decide whether to institute an enquiry or to refuse to do so. The criterion to be applied by the Maintenance Officer should be as follows: If new facts of altered circumstances or relevant additional information are presented, a new enquiry will be instituted. However if the applicant cannot present relevant new facts which might alter the presiding officer's decision then the Maintenance Officer may refuse to institute an enquiry afresh.

- (2) **That a person other than a parent who is responsible for the daily care of a child, has the right to bring a complaint to the maintenance court and to receive maintenance payments directly.**

Children are regularly left with their grandparents or other extended family members (primary caretakers) for their daily care, whilst the custodian of the child live and work elsewhere. These primary caretakers should be able to directly demand maintenance payments from both the mother and the father and a Maintenance Court should be able to make an order most suitable to the immediate needs of the child. Under the Act as it now stands, many maintenance payers complain that the maintenance money is paid to the custodian (e.g. mother) who lives far from the child and complain of a suspicion that the funds are not actually applied for the maintenance of the child.

If the Maintenance Court does find grounds for such a suspicion, it would be able to make an order that the maintenance be paid directly to the primary caretaker or Clerk of the Magistrates' Court or other officer or institution in the region where the child is taken care of. The maintenance records should also be transferred to the Magistrate's Court of that region for record purposes.

- (3) **That a Maintenance Court may grant judgement in a claim for pregnancy and birth related expenses and in addition thereto also for actual proven past expenses, which judgement may be amplified by a court order for settlement in monthly instalments, alternatively it may be executed as a civil judgement.**

Research done by the Legal Assistance Centre has pointed out that the average age of a child for whom maintenance is claimed for the first time through the statutory maintenance procedure is 7 years of age.

Irrespective of the reasons for the delays in claiming maintenance, the result is often that someone has borne a disparate financial burden of giving birth to and/or maintaining the child up to the stage when maintenance is claimed. The actual custodian of a child might be the grandparent or member of the child's extended family which person would be entitled to make a claim for expenses incurred from the child's father or mother or both parents. Because of the fact that the other person(s) liable to contribute to the said maintenance, has for a period of the time not carried their fair share of this burden, people have contended that the Act should empower the Maintenance Courts to make maintenance orders retro-active.

Retro-active orders pose various difficulties, such as the proof of the necessity and reasonableness of past expenses and the measurement of the past abilities of all parties liable to pay. Furthermore, it would be particularly difficult to arrange for payment thereof as current maintenance instalments are already determined on account of the respondent's current ability to pay. To add another burden for past expenses, might just negatively influence payment of the respondent's current maintenance payments.

The Commission therefore recommends that a Maintenance Court may grant judgement against a respondent only in respect of his or her proportionate/*pro rata* liability for -

- (i) pregnancy and birth related expenses actually proven;
- (ii) other past maintenance expenses actually proven, and interest thereon.

The normal burden of proof upon a balance of probabilities will rest upon the applicant.

These claims should further be restricted as follows:

The applicant (claimant) has to address past (retro-active) expenses at the time of the respondent's first appearance in the Maintenance Court, subject to the provisions of the Prescription Act, 1968 (Act 69 of 1968). He or she cannot claim these expenses at any later hearing. A mother's claim in respect of pregnancy and

birth related expenses furthermore has to be made within 12 (twelve) months from date of birth of the child.

A Maintenance Court judgement in respect of the aforesaid two kinds of expenses already incurred, shall have the effect of a civil judgement. This means that property may be attached and sold in execution of the said judgement, as more fully discussed also under the heading of paragraph (11), below.

- (4) **That the Act should clearly stipulate that both natural parents of a child are liable to maintain the child and that other persons may be liable to maintain the child by principles of common law or principles of customary law.**

The Maintenance Act currently still refers to the Native Administrative Proclamation, 1928 (Proclamation No. 15 of 1928) - and other discriminatory legislation - in terms of which a customary union is defined as a marriage according to native law and custom. In terms of Article 66 of the Namibia Constitution a customary union should be understood as a marriage according to customary law.

Section 5 of the Act should be rephrased with retention of the idea that a customary union is regarded to have the same consequences as a civil marriage with regard to the duty to maintain. Thus a husband and wife under a civil marriage and under a customary marriage or union, both have a duty to maintain each other during the marriage and after dissolution thereof.

An amended section 5 should furthermore deal with the duty of a natural parent to support his or her child and should make all natural parents legally liable to maintain their children in accordance with Article 15 of the Namibian Constitution, whilst expanding the concept of a person "legally liable to maintain" to encompass customary law concepts. The recommended section of the act should read that the natural parents of any child shall be liable to maintain the child in proportion to their respective resources, unless the child has been legally adopted in which case the adoptive parents become so liable. The liability of persons, other than the parents, to maintain a child shall be determined in accordance with the principles of the common law or of any customary law which may be applicable to the child.

This approach should give a Maintenance Court the authority to apply customary law for the purposes of determining legal liability to support where customary law is clearly applicable. A Maintenance Court will apply common law unless customary law applies to the enquiry to the exclusion of common law.

The proposed amendment will hopefully support harmonisation of the customary and common law in this field and accommodate the practices of people in areas where the maintenance procedure as contained in this Act is rarely used.

The maintenance of children is such an important issue that a unitary system in the whole of the country is advisable. It is recommended that jurisdiction in maintenance matters be limited to the Magistrates' Courts envisaging the possibility of extension to Community Courts by legislation.

- (5) **That representation be allowed to the parties at maintenance enquiries, by persons other than legal practitioners e.g. by a friend or family member.**

It is suggested that any party to a maintenance enquiry may be represented at the enquiry by a legal practitioner or any other person who has been authorised to represent him or her. As some applicants and respondents neither qualify for legal aid assistance, nor can afford a legal practitioner's fees, such an amendment will make it possible to use a para-legal or knowledgeable friend as a representative.

This right should be limited to maintenance enquiries where the procedure is of an investigative nature. In criminal proceedings, where a person is charged with non-compliance of a maintenance order, representation for the accused should be limited to legal practitioners.

- (6) **That written statements be admitted into evidence under certain conditions, without the personal appearance in court of the person making the statement.**

The idea of the suggested amendment is to make the maintenance procedure as quick and simple as possible. This amendment would allow a Maintenance Court to accept written statements of a person's assets such as livestock or wages (i.e. an employer's statement). As provisions regarding admission and objection contained in all legislation tend to be somewhat complicated, the Act should allow a presiding magistrate discretion in the procedures where prescribed procedures were not followed possibly because of a lack of knowledge or ability of any of the parties.

- (7) **That guidelines be set for assessing needs, ability to pay, value of contributions and calculation of maintenance.**

The Legal Assistance Centre's Report suggested that statutory guidelines be set to indicate what expenses should be considered in assessing maintenance needs and the abilities of all maintenance contributors to pay.

It is hoped that Maintenance Courts will be able to approach maintenance matters with more uniformity and that the totality of circumstances of each case will be presented to the Maintenance Court.

The provisions of such a new section should clarify the position that it is possible to make a maintenance order against a respondent who is unemployed if he or she possesses sufficient assets or acquires informal income from which proceeds or income someone else can be supported.

- (8) **That orders for payment in kind be allowed both for settlement of arrears and for payment of maintenance instalments - if the complainant agrees thereto and such appropriate assets are available.**

Payment in kind refers to payment by delivery of goods or livestock as an alternative to payment with money.

Voices have been raised that maintenance should also be payable in the form of produce, livestock and/or other forms of goods. Where both the applicant and the respondent live in a very rural setting far from a suitable collection point and/or shops and where the respondent does not earn a salary, payment in the form of produce, such as milk and crops or poultry or livestock at regular intervals, might be more appropriate to the circumstances of both parties.

In particular, where a maintenance payer has fallen into arrears and he or she has attachable assets, such as livestock, he or she should be able to deliver such assets to the complainant in settlement of the outstanding debt instead of having to sell the said assets and deliver the money. As an example: If both parties belong to a rural community delivery of a goat might be of more value than payment with the proceeds of the sale of such goat.

On the other hand, these suggestions have met with some objection and difficulties are foreseen with maintenance orders for payment in kind in respect of ongoing payments. These objections are as follows:



- (a) It is difficult from a maintenance officer's perspective to monitor payments in kind and to prove that such payments have or have not been made.
- (b) Sometimes there is an urgent need for cash to maintain a child, e.g. to pay for tuition and transport of a child or to provide clothing.
- (c) Assets vary in quality, size and value. A chicken and a bag of groceries may differ in size and in contents to a large extent.

The amendment should be drafted to direct the Maintenance Court to make an order for payment in kind only if the complainant makes such a request. The Maintenance Court would of course consider all relevant circumstances and in particular whether it would be possible or practical for the respondent to make such payment in kind. If it seems practical and in the best interest of the maintenance beneficiary, such an order may be made. Such an order should also be allowed when the complainant and respondent agree to payment in such form and manner.

As a maintenance order can always be amended or a varied either of the parties may approach the Maintenance Court to substitute the order for payment in kind for another order, if the arrangement is not functioning well.

**(9) That maintenance orders may cover medical and pharmaceutical expenses.**

The Commission supports an amendment to the Act to unequivocally provide for payment of medical expenses and pharmaceutical expenses prescribed by a medical doctor. A Maintenance Court should also be entitled to order a respondent to register a dependant on his or her medical aid scheme, if the rules of the particular scheme would allow therefor.

A lack of clarity exists about such powers under the existing act, although many orders covering medical expenses as a component of maintenance have been incorporated into divorce orders issued by the High Court.

**(10) That the Act should provide for payment in favour of a person who has to be maintained or in favour of a custodian or a primary caretaker and for the punishment of persons who misuse maintenance funds.**

In the past maintenance payers have often expressed their resistance to make payment on the alleged grounds that the maintenance payments are misappropriated.

The proposed amendments of the act will have the following effect:

In addition to the fact that the Maintenance Court has a discretion to appoint either a parent, custodian or primary caretaker as the receiver of the maintenance monies, to ensure that the money is correctly applied, someone who is proved to have misused maintenance monies can be charged and convicted.

(11) **That a maintenance judgement may be executed by attachment of property and wages.**

Attachment of property and wages have always been available as a form of execution of civil judgements. The current Act stipulates that a maintenance order has the effect of a civil judgement, but attachment is hardly ever used as a form of execution, the reason probably being that the complainants find it difficult to proceed to execution if they do not have legal assistance to apply for writs of attachment, to deliver them to the messenger of court, to advertise execution sales as prescribed and to settle the various messengers' fees and/or legal practitioner's fees.

In an attempt to address the failure to use this form of execution the Commission approves of amendments along the lines of the South African amendments and recommend that the Courts be empowered to issue a writ of execution against movable or immovable property to satisfy an order for payment of arrear maintenance, after a summary enquiry which takes into account all relevant considerations.

A simplified speedy procedure should be introduced:

When a Maintenance Court has granted a judgement for claim of pregnancy and birth related expenses as discussed above, or when a Maintenance Court has convicted a person of failure to pay maintenance, the Maintenance Court may in a summary manner hold an enquiry into all relevant circumstances and in particular such person's ability to settle the arrears or judgement amount by a sale of his or her property.

In appropriate circumstances, the Maintenance Court will authorise a writ of execution - a warrant to attach property.

Rules have to be drafted to explain how the Maintenance Officer records such judgements in the register of civil judgements and arranges that the writs are issued and forwarded to the Messenger of the Magistrates' Court for execution.

Both movable and immovable property may be attached and sold by the messenger. A return of attachment is sent to the Maintenance Officer. Sales will

be held during the usual scheduled execution sales of the Messenger of Court and no advertisements as required in the civil execution procedure will be required.

The proceeds of such sales will be paid to the clerk of the Maintenance Court for credit of the complainant.

All costs and fees should initially be paid by the State and the procedures should be prescribed in the rules.

As alternatives to the attachment and execution procedure, the Court may also make an order for payment of these arrears in instalments which would be no different from an order issued under section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944) in the civil courts (debtors' courts). Here again of course the Maintenance Officer records will have to record the order as a civil judgement.

The Maintenance Court may strengthen the prospects of compliance with its order, by making an order for the attachment of such a person's wages, salary or remuneration. This procedure is explained more fully under paragraph (19) below.

It is however abundantly clear that the procedures as outlined above (and as applied in South Africa since 1991) need to be reduced to comprehensive but simple regulations, so that even the most remote Maintenance Officer, Maintenance Court and Messenger of the Magistrates' Court will have no doubts as to their duties and the procedures to be followed.

- (12) **That alternative places for payment be expressly allowed, namely, directly to the primary caretaker, curator, Clerk of the Magistrates' Court, other officer or to a specified banking account.**

The Act currently specifies that a Maintenance Court may make an order for payment "to such officer, organisation or institution and in such manner as may be specified in the order" which does in fact allow the Maintenance Courts a wide discretion to order maintenance payments to be made at the most suitable place and in the most suitable manner in each individual instance.

Some Maintenance Courts have however interpreted the Act so narrowly that they would not allow payments to be made directly to a beneficiary of the maintenance order: They insisted that payments be made to the Clerk of the Magistrates' Court to be collected at the court by the appropriate person.

The Legal Assistance Centre reports that "Women have complained about the extra time and expense involved in collecting the money from Maintenance Court, and the problem can be particularly acute in rural areas". Both men and women have expressed the opinion that other methods of payment might be more convenient. It is true that the Clerks of the Magistrates' Courts keep complete records of all maintenance moneys received and paid out and these records often form the evidentiary basis for a criminal charge of non-compliance with a maintenance order. For this reason many Maintenance Officers prefer that maintenance orders stipulate that payment be made to the Clerks of the Magistrates' Courts.

On the other hand, records of any bank account may disclose the particulars of payments directly into such account just as well, whilst payment in kind cannot be reflected either at the Clerks of the Magistrates' Courts or through any bank account records.

The recommendation of the Commission is that a Maintenance Court should have discretion to make an order most appropriate to each individual case, which discretion will of course be mostly influenced by the preference of the beneficiary under the maintenance order. It might well be that a respondent and complainant live in proximity to each other, but far from any Maintenance Court building, in which case direct payment to the complainant might be the best order.

It should be kept in mind that if the order does not function well, the Maintenance Officer has the authority in terms of the Act to request the Maintenance Court to vary the place of payment with immediate effect and the Maintenance Officer will inform the respondent of such change in place of payment.

- (13) **That default maintenance orders be made against respondents who fail to appear after due service of process upon him or her.**

Probably the most serious problem experienced in the court maintenance procedure is getting the respondent to appear in the Maintenance Court so that an order can be made. The problem is of a dual nature:

Firstly the maintenance summonses are not served diligently and timeously. The Namibian Police currently serves the maintenance process, but probably because they do not really have an interest in these services, it not being of a criminal nature, these documents are not high on the individual officers' priority lists. The maintenance summonses (subpoenae) are often returned unserved or returned after the date of the enquiry set by the Maintenance Officer.

The results are that a Maintenance Officer has to repeat his or her summonses again and again and the complainant has to return to the Maintenance Court time

and again without progress being made. In addition to the fact that no maintenance is forthcoming, the complainants become discouraged with the procedure.

Secondly, many respondents who have been served with a summons, personally or otherwise as described in the Magistrates' Courts rules, ignore the summonses and 'disappear'. Although they have knowledge of the complainants' quest to receive a maintenance contribution, no order can be made against them and no maintenance will be received until such time as they are actually arrested and brought before the Maintenance Court and an enquiry is held thereafter.

The Commission recommends that a maintenance order can be made against a respondent in his or her absence if he or she fails to appear at a maintenance enquiry in the circumstances where a maintenance summons was duly served on him or her. The prerequisite of such a default order is that the possibility of a default order should be clearly stated on the summons.

The new section should provide that the Maintenance Court will proceed with an enquiry and will make an order against the respondent if evidence has been presented to the Maintenance Court, whereupon the Maintenance Court may base its finding that the respondent is liable and able to contribute to the maintenance required by the complainant.

This provision would provide a strong incentive for respondents not to ignore summonses, but rather to put any evidence in their favour before the Maintenance Court and it could prevent repeated appearances in the Maintenance Court for a complainant.

(14) **That efficiency in serving process should be addressed as a matter of priority and urgency.**

As touched upon in the Introduction and explained above, service of maintenance process is one of the most pressing problems of the whole maintenance procedure.

The Ministry of Justice has recently arranged that maintenance summonses be served by the Messengers of the Magistrates' Courts, in substitution for the Namibian Police, and that the messengers fees will be paid by the Ministry. A drastic improvement in service of process is hoped for.

Although the Magistrates' Courts Act, 1944 (Act 32 of 1944) provides for service by Messengers of Magistrates' Courts, the Maintenance Act should also be amended along these lines. Appropriate rules will have to be drafted to supplement this recommendation and in particular to prescribe where these messengers should lodge their accounts for payment by the Ministry of Justice.

- (15) **That a Magistrate may summon anyone to appear before the Magistrate to be interrogated by the Maintenance Officer to furnish information which might trace a respondent or assets belonging to him or her.**

This recommendation aims at helping the Maintenance Officer in finding a respondent and in acquiring information about his or her income and assets. If a person summoned to be interrogated, voluntarily provides the information sought, no formal interrogation takes place.

- (16) **That every respondent and other persons liable to maintain any other person may be compelled to give evidence or testify.**

As a maintenance enquiry is not of a criminal nature but of an investigative nature, the Commission recommends that no one should be able to refuse the Maintenance Court information which might help in issuing the best and fairest order.

- (17) **That Maintenance Officers may initiate criminal prosecution against persons for failure to comply with existing maintenance orders to pay to the Clerk of the Magistrates' Court, on strength of both formal and informal complaints.**

The Legal Assistance Centre's Report initially recommended that the Act should be amended to require that the Maintenance Officer should take direct action on arrears, without waiting for charges to be filed by the complainant, in cases where payments are supposed to be made to the Clerk of the Magistrates' Court. Because of the fact that the records of payments and non-payments are available to the Maintenance Officer at the Maintenance Court it was felt that such an amendment would remove the need for complainants to take leave of employment, expend money to travel and come to the Maintenance Court to lay a complaint under oath as required under the current Act.

The Commission has however taken cognisance of the recurring facts that maintenance payers sometimes make payment directly to the maintenance beneficiary despite a court order to pay into the Maintenance Court. In such cases the beneficiary would not complain although the Maintenance Courts records would seem to indicate non-payment. For this reason and to avoid unnecessary charges against a payer, the Commission recommends that the Maintenance Officer shall only act when the beneficiary complains of failure to pay, but that informal complaints, thus a telephone call or a letter or another way of notification, would be an acceptable way of complaint. Such an amendment should alleviate the burden of unnecessary travelling expenses for complainants.

- (18) **That an order to pay interest should be available to a presiding Magistrate as a punitive measure, when sentencing a person convicted of failure to pay maintenance.**

It has been felt that a person who criminally fails to pay maintenance should be made to pay interest on the arrears in the same way that *mora* interest is payable on any other debt.

The Commission supports the principle, but realises that the Clerks of the Magistrates' Courts or the Maintenance Court itself cannot deal with the administrative burden of interest calculations on decreasing and increasing arrears. An already difficult situation of recording payment of arrears will probably be aggravated by adding the burden of calculating interest and updating records in that respect.

The recommendation as contained in the draft amendment act provides for an order to pay interest on arrears as a separate optional punitive measure. If the Magistrate finds the circumstances of the convicted person suitable for such an order - i.e. if the person has sufficient funds to pay his current maintenance plus settle the arrears plus pay interest on the arrears an order may be made. An 'interest-order' would be more suitable than any fine as the interest money will also be paid to the beneficiary as opposed to the fine which is paid to the State.

- (19) **That the Maintenance Court may make an order authorising and compelling employers to deduct maintenance payments from a person's salary, wages, allowances or other forms of remuneration, but only in the following instances:**

- (a) with the respondent's consent;
- (b) after conviction for failure to pay maintenance;
- (c) upon a respondent's default to appear at a maintenance enquiry;
- (d) *prima facie* non-compliance with a court order to make payment to a specific officer, organisation, institution or account.

The Commission recommends amendments to the section of the Act that would enable a Maintenance Court to issue an order for the attachment of wages on the advice of the Maintenance Officer in almost all instances, with the exception of the case where a Maintenance Court has made an order to pay maintenance and the respondent actually diligently pays the maintenance as prescribed whilst refusing that a salary deduction be registered by the Maintenance Officer against his or her remuneration at his or her place of employment.

The right to privacy of his or her financial matters of such an individual will be respected and his or her maintenance obligations will not be disclosed at his or her place of employment against his or her wish.

The Commission is however very much in favour of an administrative system of salary deductions for maintenance payments. This procedure will function as follows:

In the circumstances described hereafter, the Magistrate (Court) will make an order for attachment of a person's salary or remuneration for the amounts of the periodic monthly instalments. The Maintenance Officer at the Maintenance Court will send a notification of this order to the Messenger of the Magistrates' Court who will serve the document on the employer of that person. The employer has to comply with the order and will deduct the maintenance instalments from the persons salary or remuneration and will pay it over to such officer, institution or organisation as specified in the order. This will usually be the Clerk of the Magistrates' Court.

This procedure may be utilised in the following circumstances:

- Firstly - where a respondent voluntarily agrees to the administrative measure.
- Secondly - where a summons has been duly served on a respondent to appear at a maintenance enquiry and the respondent ignores the summons (which contains a warning of the possible results of failure to respond) an enquiry is held in his or her absence. If a maintenance order can be made, the Magistrate makes the order in the respondent's absence and instructs that the instalments be deducted from his or her salary or remuneration.
- Thirdly - where a person has been convicted of the offence of failing to pay maintenance, the Maintenance Court will endeavour to ensure regular payment and will resort to this administrative measure.
- Fourthly - although no one has been convicted for failure to pay maintenance, if the Maintenance Court has ordered that maintenance be paid in a particular manner to a specific officer, institution or account and an affidavit is received from such officer or person representing such institution or in control of such account to the effect that the maintenance payments are not received in compliance with the aforesaid court order, the Maintenance Officer may apply to the Magistrate



to issue an attachment order which will ensure payment in the correct manner.

- (20) **That a maintenance payer be obligated to inform a Maintenance Officer of his or her (every) change of address.**

Section 14 of the Act should be amplified with more detail as to whom should be notified when a maintenance payer changes his or her residential or employment address, under threat of criminal conviction and punishment. The provision will only be effective if it is compulsory upon all Magistrates to bring the provisions of this section to the attention of the person against whom an order is made and rules will have to be drawn accordingly.

The amended act need to provide for admission of documentary evidence of an accused's employment or residential addresses and the fact that he or she is no longer employed or resident there.

- (21) **That the costs of service of process and the costs of tests to determine parentage be payable by the State or the parties as the Court directs.**

The Ministry of Justice has arranged with the Messengers of Magistrates' Courts that service of maintenance process will be effected by them for account of the State. It should be possible to reclaim these costs from either of the parties if his or her conduct has been wilful and such that unnecessary costs have been incurred. The Maintenance Court should therefore have discretion to make an order directing any party to refund the state with such costs.

Determination of parentage has often presented delays in the whole maintenance process due to the fact that the blood or tissue tests to determine parentage of a child have to be paid for in advance. Where neither the complainant nor respondent could pay for these tests forthwith, maintenance enquiries were often postponed for months. Immediate tests, with the Magistrate making a provisional order directing the State to pay the costs of the tests as an alternative to payment by either the respondent or the complainant, is recommended. This order may later be confirmed or substituted by an order having the effect that one of the parties refund the State.

- (22) **That the Act makes special provision for the transfer of files from one court jurisdiction to another.**

Although the transfer of Maintenance Court files is nothing new and happens when a beneficiary changes residence, some misunderstanding exist: some maintenance personnel hold that a file cannot be transferred whilst the maintenance payments are in arrears as the second court will have no jurisdiction to hear a criminal charge.

The suggested amendments will make it clear that a maintenance file can be transferred to the beneficiary's new residential area at any time and that the Maintenance Court will have jurisdiction at all times.

The rules promulgated under the Act should set forth procedures to guard against loss of files during transfer.

- (23) **That the existing 7 (seven) rules to the Act be expanded.**

The Commission recommend that the rules should -

- (a) spell out the grounds upon which a Maintenance Officer shall institute a maintenance enquiry and the grounds for refusal to institute such an enquiry;
- (b) cover all administrative aspects of the maintenance procedure and in particular the transfer of files and access to the records contained therein;
- (c) provide for payment by the Clerk of the Magistrates' Court to have photographs taken of respondents where a court so orders;
- (d) provide guidelines to the Maintenance Court as to who should be named as recipient when contradicting claims of the person to be maintained and/or the custodian and/or the primary caretaker exist;
- (e) regulate the wording of a summons to be served on a respondent which summons warns of a maintenance order which might be made in the absence of the respondent, should he or she fail to appear;
- (f) prescribe the formalities with which a written statement or any objection thereto should comply and the conditions under which such statement would be admissible as evidence to the same extent as oral evidence;

- (g) prescribe the procedure for noting a judgement of a Maintenance Court as a civil judgement of that court and the procedure for issuing out a writ of execution;
- (h) cover the payment of messengers fees and the costs of sales in execution as well as payment of the costs of determining parentage;
- (i) cover the procedures to reclaim fees and costs expended by the state from any party to maintenance procedures, if a court so orders;
- (j) prescribe the service of a notice to a person varying the specification of the place of payment;
- (k) prescribe the manner in which an enquiry should be held in the absence of a respondent and in particular service of the notice that such an order has been made, on the respondent;
- (l) regulate the execution of a warrant of arrest (of a respondent who fails to appear) by the Namibian Police as well as appearance of the arrested person on a charge of contempt of court;
- (m) regulate the keeping of maintenance records by the Clerk of the Magistrates' Court as to the noting of payments received and made, amendments to orders, convictions and suspended sentences which entails instalment payments of all arrears, calculations of interest and exemption of certain instalments where a court makes such orders;
- (n) provide guidelines for community service as an alternative sentence to the sentence of imprisonment;
- (o) prescribe service of orders for attachment of wages, salary or other forms of income of employers;
- (p) provide for a Magistrate to explain to all respondents the obligation to advise the Maintenance Officer of a change in his or her address of residence or employment and the consequences of a failure to do so;
- (q) to provide forms where applicable;
- (r) prescribe fees where applicable.