



MAINTENANCE AND HIV AND AIDS



the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Overview of presentation

- **Presentation is made in line with**
 - a) LSSA objective for provincial workshops on maintenance; specifically measuring access to maintenance by understanding gaps and conflicts within current maintenance system**
 - b) Collaborative partnership between government and civil society organizations, aimed at improving lives of all people living in South Africa, particularly vulnerable communities**
 - c) The Department of Justice and Constitutional Development's (hereafter referred to as DOJCD) commitment to improving access to justice for all**
 - d) Presentation aims to present maintenance in the context of HIV and AIDS and make recommendations for discussion**

Understanding issues- maintenance legislative framework

- Spousal maintenance (in terms of Divorce and Rule 34 application)
- Child maintenance
- South African context – legislative framework
 - Constitution Act 108 of 1996
 - Maintenance Act 99 of 1998
- International context – Conventions
 - Convention on the International Recovery of Child Support and other forms of Family Maintenance 2007
- Other supporting legislation and international instruments that entrench right to support and maintenance

International maintenance

- **Convention on the International Recovery of Child Support and other forms of family maintenance 2007 (not yet in force)**
- **Aims to provide an effective system of cooperation**
- **Give recognition and enforcement of maintenance decisions**
- **Establish accessible, speedy and cost-effective procedures**

- **DoJCD International Relations Section coordination role with foreign countries, including maintenance issues**

- **Advocacy role: Educate, encourage and support care givers who are foreign nationals with maintenance orders**

Understanding issues – Maintenance system...Research findings

- Maintenance – gendered and influence on poverty
 - Feminization of poverty
- Child maintenance system – inaccessible and inefficient
- Inaccessible:
 - court processes – “complex forms” (literacy levels), “long queues”, “informal enquiries not in camera”, awards are “invariably too small” [Mills S, 2003]
- Inefficient:
 - “officials unaware of provisions of Maintenance Act” [Moyo B, 2003]
- Link between maintenance and HIV and AIDS in SA “not formally documented” [Tshwaranang Legal Advocacy Centre, 2007]
- Limited research to show positive / best practises/ successes

Understanding issues – HIV and AIDS

- **Effect on individual as opposed to families**
- **Families – effects include: disintegration, stigmatization, income (poverty) and discrimination**
- **Predominately affect families with low socio-economic status, particularly vulnerable families such as single-headed households, migrants etc**
- **HIV disease progression in children more rapid than in adults**



Understanding issues – HIV and AIDS

- National Strategic Plan on HIV and AIDS 2007 – 2011 (NSP)
- NSP acknowledges vulnerability and human rights framework in addressing HIV and AIDS
- NSP priority area 4 – human rights, access to justice and law reform
- NSP Strategic Goal 5 ‘increase access to legal services’ for vulnerable
- What does this mean for vulnerable families and care givers accessing maintenance?

Linkages – maintenance, human rights, HIV and AIDS and access to justice

- Maintenance and Human Rights Framework
 - Right to spousal maintenance (Divorce Act 88 of 1984)
 - Right to child maintenance (Constitutional right section 28, Child Care Act 74 of 1983, Maintenance Act 99 of 1998)
- Conflicting Rights:
- **Right to dignity:** Do court officials have a duty to uphold care-givers right to dignity by treating information about status with sensitivity, prioritize cases where status is disclosed and ensure that court facilities are accommodative?
- **Right to privacy:** Does the care-giver have a right to disclose status including that of child and how do we ensure right to privacy and confidentiality in court?
- **Right to just administrative action:** Does the lack of information by court officials about impact of HIV and AIDS in maintenance cases undermine care-givers right to efficient administration?

Maintenance and HIV and AIDS and access to justice

- **Balance rights in context of disclosure**
- **Legal assistance with court processes**
- **Service from legal officers (understanding impact of HIV and AIDS)**
- **Monetary award**
 - **Consider cost of HAART (Highly Active Antiretroviral therapy): R7 000 per patient (R583 per month) [Department of Health and Treatment Action Campaign, 2008]**
 - **HAART must be supported by nutrition and psychological support: Food per month to include nutrient supplements and Support could be in the form of support groups (transport to meetings etc): R1 500 per month**
- **Default and non involvement of care-givers (particularly devastating and life threatening for children infected by HIV)**

Moving forward... Ideas/ proposals for discussion

- **Realizing access to justice for maintenance users infected or affected by HIV and AIDS**
- **Continually improving maintenance system (from legislation to administration and resources)**
- **Defining Access to legal services**
 - **Some lessons [International Development Law Organization and UNAIDS, 2009]**
 - **No “one size fits all”**
 - **Legal information and advice: telephone hotlines, formal litigation and strategic litigation**
 - **Community legal education**
- **Research – best practises**
- **Involvement of maintenance users infected or affected by HIV and AIDS in development of interventions, strategies and policies**

Specific Recommendations – DoJCD and SANAC

- **Public awareness – focus on impact of HIV and AIDS in families and link with poverty**
- **NSP: include specific responsibilities for stakeholders such as Law Society and Bar, Magistrate and Judicial Commission**
- **Strengthen government campaigns**
- **Mainstream HIV and AIDS in campaigns, programmes etc**



Recommendations DOJCD

- **Improve maintenance system**
- **Research: experiences of care givers and their children living with HIV and AIDS and Accessing maintenance**
 - Time – legal process
 - Medical treatment – amounts
 - Responses of legal/court officials to maintenance and HIV and AIDS (maintenance officials (investigators, clerks), interpreters, court managers, attorneys, magistrates and prosecutors)
- **Research: Monitoring court cases**
- **Research: Different models of legal services in different contexts**
- **Policy formulation, implementation and monitoring**
- **Public awareness on international maintenance**
- **Training / Information provision for court officials**
- **Advocacy with LSSA and other stakeholders**

Recommendations...Stakeholders: LSSA and NGOs

- **Monitor and report on DOJCD commitment to improving maintenance system**
- **Advocate for greater access to treatment**
- **Develop strategy to provide legal assistance to vulnerable families, especially women and children infected and affected by HIV and AIDS**
- **Stronger linkages with organizations of people living with HIV**
- **Training and information sessions with attorneys and NGOs/Community based organizations**



References

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- **Van Empelen P ‘What is the impact of HIV on families’ WHO, 2005**
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- **Report: Workshop Report: HIV/AIDS and Family Well being, 28 – 30 Jan. 2004, Un Dept. of Economic and Social Affairs**