GETTING BLOOD OUT OF STONES: PROBLEMS IN THE ENFORCEMENT OF MAINTENANCE ORDERS FROM MAGISTRATES' COURTS

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Many families throughout Australia depend for their support on moneys paid under magistrates' courts' orders pursuant to the "uniform" maintenance acts of the various states.[1] The successful enforcement of such orders is of the greatest importance not only to the family depending on these payments but to the state which must bear the burden of support if enforcement methods fail. The purpose of this article is to examine methods of enforcement available under the Australian maintenance legislation,[2] in particular, the Victorian *Maintenance Act* of 1965.[3]

1 THE EXTENT OF THE PROBLEM

The author has undertaken a study of a sample of 300 magistrates' court orders by way of a pilot study in order to derive preliminary conclusions on problems in the field of maintenance, including enforcement problems. The sample was taken from the files of the Oakleigh Magistrates' Court, a Victorian suburban court with a large maintenance jurisdiction. The orders were all "live" (ie. still in force) on the 1st January, 1972, and were examined in January and February of 1972. They reveal some alarming features in the realm of enforcement.

For example, of the 300 orders in the sample only 77 had never been in arrears. In a further 40 cases, it could be said that there was substantial compliance in that up until 1st January, 1972, the order was in arrears by 6 weekly payments or less. Thus 117 of the 300 orders could be considered to be substantially complied with. However, as the commencement of enforcement proceedings is the only way whereby arrears are disclosed on the files, this number probably includes a number of cases in which arrears accrued but no proceedings were taken to enforce payment.

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1 *Maintenance Act*, 1964 (N.S.W.); *Maintenance Act* 1965 (Vic.); *The Maintenance Act* of 1965 (Q.); *Social Welfare Act* 1962-1965 (S.A.); *Married Persons and Children (Summary Relief) Act*, 1965 (W.A.); *Maintenance Act* 1967 (Tas.); *Maintenance Ordinance* 1968 (A.C.T.); *Maintenance Ordinance* 1971 (N.T.). The legislation is usually referred to as uniform, but there are substantial variations between the states.

2 Only intrastate enforcement methods will be considered.

3 *Maintenance Act* 1965 (Vic.).

Moreover, when the 183 orders which were in arrears by 6 weekly payments or more are examined it can be seen that in 14 of these nothing had been paid under the order at all, and in a further 18 cases while some payments had been made under the order the husband could no longer be found. Thus in 32 cases in the sample (10 per cent) it was likely that no further payments would be forthcoming under the order and 39 per cent of all the orders in the sample (183) were in substantial arrears. Moreover, there is enormous expenditure in time, money and energy associated with efforts to enforce maintenance orders; there were 253 complaints for commitment made, resulting in 101 committal orders from the court. The orders in arrears exhibited some interesting characteristics. For example, it has been popularly thought that child support orders are more regularly complied with than orders for the support of a spouse. Indeed, defendants giving evidence to the Bedford College survey stated that they were happy to comply with orders for children but not for wives. The survey found that while this sentiment probably represented their initial intentions the compliance rate for child support orders was not significantly better. The same is true of the Oakleigh statistics. Of the 183 orders substantially in arrears the compliance rate appears in table A.

TABLE A

Type of Order	No. of Orders in Sample	No. of Orders in Arrears	% of Type of Orders in Arrears
Wives only	48	26	$\frac{26}{48} = 54\%$
Children only	102	50	$\frac{50}{102} = 48\%$
Wives and Children	150	107	$\frac{107}{150} = 71\%$
Total	300	183	—

Thus 54 per cent of all the orders made for wives, 48 per cent of the child support orders and 71 per cent of orders made for wives and children were in arrears.

The compliance rate in respect of child orders is not significantly higher than that relating to wives, while the non-compliance rate on the combined orders for wives and children is very high indeed. Thus when one attempts to predict which orders are most likely to fall into arrears the beneficiary of the order is not the basis for the calculation. The 71 per cent non-compliance with combined orders, on the other hand, is significant and could be explained on the hypothesis that the combined orders would be

those for the highest amount. To test this hypothesis the relationship between the compliance rate and the amount of the order is shown in table B.

TABLE B

Amount of Order	No. of Orders	No. of Orders in Arrears	% of Orders in Arrears
$ 0 to 9	57	25	$\frac{25}{57} = 44\%$
$10 to 19	90	47	$\frac{47}{90} = 53\%$
$20 to 29	83	55	$\frac{55}{83} = 66\%$
$30 to 39	42	37	$\frac{37}{42} = 88\%$
$40 to 49	19	12	$\frac{12}{19} = 63\%$
$50 to 59	9	7	$\frac{7}{9} = 78\%$
Total	300	183	—

This relationship appears to be a very significant one. The arrears rate for the smallest amount orders ($0 to 9) is 44 per cent while that for the higher amounts (e.g. $30 to 39) is 88 per cent, indicating a very real tendency for the arrears rate to increase with the amount of the order. To be sure there is a slight improvement in the $40 to $60 range (although the rate of non-compliance is still very much greater than for the small orders). Perhaps the types of defendants who have been ordered to pay these very large amounts are drawn from a socio-economic group which varies from the rest of the sample in its greater means to pay and a greater aversion to the stigma and publicity of court proceedings. The very pronounced tendency of arrears rates to increase with the amount of the orders is depicted in figure 1.

This tends to the conclusion that a smaller order, regularly complied with may be of a greater use to a dependant family than one for a larger amount which is constantly in arrears and which engenders expense and trouble for its enforcement.

It might also be thought that the rate of compliance is a function of the duration of the order. Table C shows the proportion of orders of different duration by type of order.

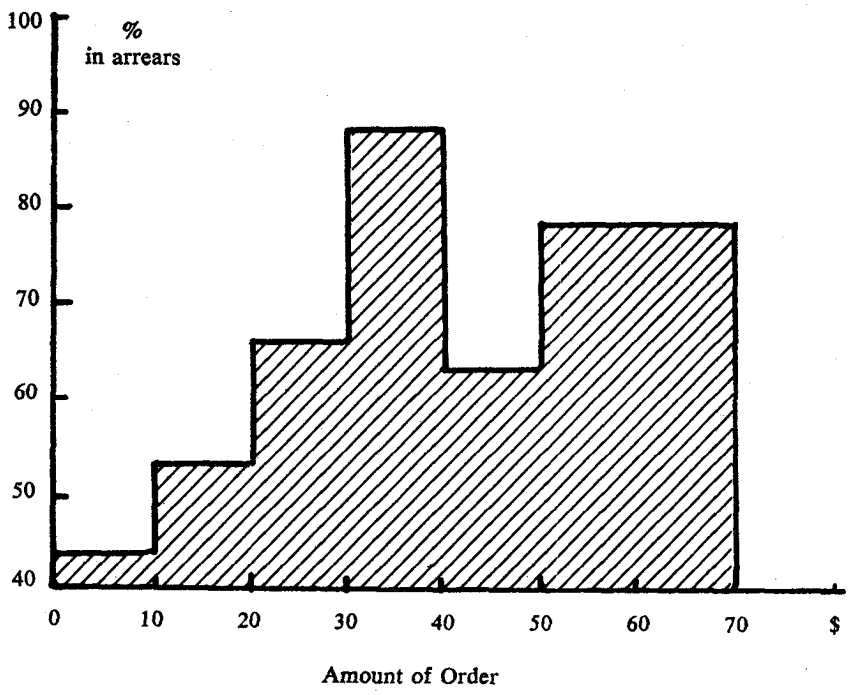

Fig. 1. Arrears as a function of amount of order

TABLE C Proportion of Orders of Different Duration by Type of Order

Duration of Order	Affiliation and Maintenance Orders providing only for Children (%)	Maintenance Orders with provision for Wife and Children (%)	Maintenance Orders with provision only for Wife (%)	TOTAL (%)
Under 3 months	5	7	3	15
3 months but under 6 months	4	2	1	7
6 months but under 1 year	8	17	5	30
1 year but under 2 years	9	14	2	25
2 years but under 3 years	4	4	2	10
3 years but under 5 years	3	2	1	6
5 years but under 7 years	—	2	1	3
7 years but under 9 years	½	1	½	2
9 years but under 12 years	½	½	½	1½
12 years but under 15 years	—	½	—	½
				100

Table C shows that 77 per cent of the 300 orders in the sample were in fact under two years old, most of these (30 per cent of the total), being 6 months to 1 year old. The substantial arrears rate of 39 per cent is therefore very high indeed given that most of the orders have been operative for a relatively short time.

The extent to which the duration of an order affects its arrears probability may be observed in table D, which analyses not the 183 orders in substantial arrears but the 117 substantially compliant orders (in arrears of less than 6 weekly payments).

TABLE D

Age of Order	1 No. of Orders in Sample	2 No. of Compliant Orders	3 % of Compliant Orders of that age	4 % of Orders of that age in arrears	5 % of Compliant Orders in Compliant Total	6 % of Orders in Sample
0 to 3 months	45	40	$\frac{40}{45}=89$	11	$\frac{40}{117}=34$	15
3 months but under 6 months	21	17	$\frac{17}{21}=81$	19	15	7
6 months but under 1 year	90	34	$\frac{34}{90}=38$	62	29	30
1 year but under 2 years	75	23	$\frac{23}{75}=31$	69	20	25
2 years but under 3 years	30	1	$\frac{1}{30}=3$	97	1	10
3 years but under 5 years	18	1	$\frac{1}{18}=6$	94	1	6
5 years but under 7 years	9	0	0	100	0	3
7 years but under 9 years	6	0	0	100	0	2
9 years but under 12 years	5	1	$\frac{1}{5}=20$	80	1	1
12 years but under 15 years	1	0	0	100	0	1

Of the compliant orders in table D the following may be observed. 40 of the 117 were less than three months old, i.e. nearly $\frac{1}{3}$ of the compliant orders were so young that they may be felt to be an unreliable indicator of compliance. Column 5 shows that the percentage of *young* orders in the

compliant group is very much greater than that in the sample. The significance of table D resides in the percentages arrived at in column 3. There we see that in the 0 to 3 months old group of orders 89 per cent are compliant and that this compliance rate falls as the orders age. Thus in the 6 months to 1 year group the percentage of compliant orders falls to 38 per cent; in the 1 year to 2 years group it is down to 31 per cent, and in groups older than this it is negligible. Figure 2 shows the dramatic tendency of arrears to increase with the age of the order.

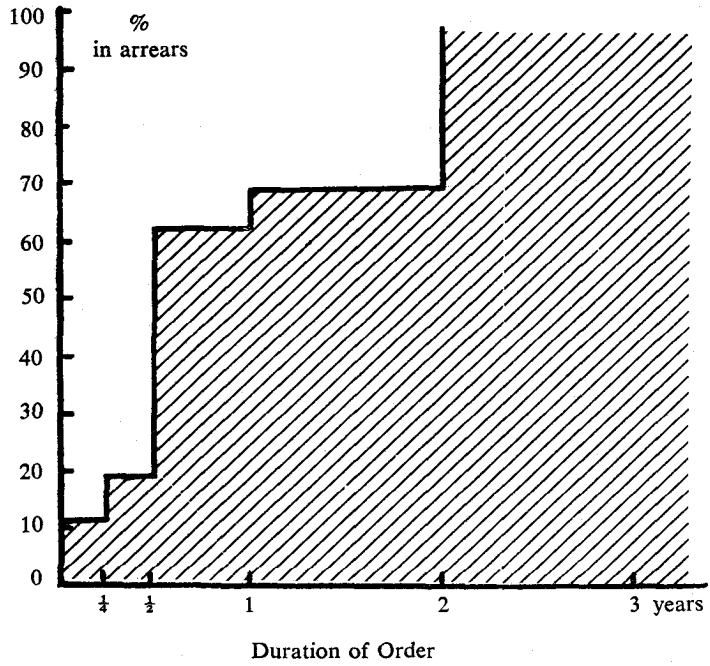

Fig. 2 Arrears as a function of Duration of Order

The clear trend for the arrears in the sample is to increase with time: the older the order becomes the more likely it is to fall into arrears, so that by the time it is 2 years old substantial arrears become almost inevitable. Thus, if the Oakleigh sample can be regarded as typical the most that the beneficiary of a maintenance order can depend upon is 2 years of substantial support. This statistic tends to the sad conclusion that in many cases the problems of enforcement of maintenance orders may frequently outweigh their utility.

Nor does the Victorian experience of poor rates of enforcement seem to be an exceptional one. The Report of the Graham Hall Committee on Abolition of Statutory Maintenance Limits[4] cites figures from the English

[4] Cmnd. 3587.

Ministry of Social Security for 1963, 1964 and 1965 concerning women receiving supplementary benefit. These show that about ½ the orders of separated wives, ⅔ of orders for mothers of illegitimate children and less than ½ the orders of divorced women are complied with regularly. About 1/5 of the orders are complied with irregularly and the remainder not at all. These are the figures in which the Ministry of Social Security has an interest. The Bedford College Research project concerns orders in all categories live on the first of January 1966. Of these 38 per cent were in arrears by amounts representing 6 weekly payments or more, and 24 per cent by amounts representing payments for 6 months or more.[5]

Another study[6] examines a sample of 163 fathers placed under court orders at the time of divorce to support their minor children in a metropolitan county in Wisconsin in 1955. Their progress was noted over the next ten years. It was found that 42 per cent of defendants made no payments during their first year and an additional 20 per cent were in defiance of the court order through failure to pay the full amount. The initial rate of conformity was therefore only 38 per cent and this was observed to decline steadily over the ten year period to a low 13 per cent. Moreover, it was observed that of the 163 defendants in the sample, 84 per cent were in defiance of the court at some time during the ten year interval, yet only 36 per cent of those eligible for prosecution had legal action initiated against them. Of these 36 per cent (45 men) 31 defendants (or 69 per cent) had more than one action initiated against them. These figures indicate a high rate of visible deviance to be contrasted with a low rate of enforcement on the one hand and a lack of effectiveness of legal sanctions on the other since a majority of defendants remained in defiance of the court order despite legal pressure. They also bear out the English experience[7] that arrears rates in respect of orders for the support of children are very comparable with those in respect of wife support orders. This contradicts what was said by defendants in evidence to the Graham Hall Committee that they were happier to provide for children than for wives.

The statistical evidence we have examined on standards of compliance with support orders indicates the overwhelming problems facing both the dependants relying on these orders for their maintenance and the courts in their role as enforcement agencies.

In Victoria a complainant[8] may take enforcement proceedings or may apply to the clerk of the court to take action on his or her behalf.[9] This

[5] Cited in McGregor Blom-Cooper, Gibson, *Separated Spouses* (G. Duckworth & Co., London 1970) p. 93.
[6] K. Eckhardt, "Deviance, Visibility and Legal Action; The Duty to Support", (1968) 15 Soc. Prob. 470.
[7] Report of the Graham Hall Committee on the Statutory Maintenance Limits Cmnd. 3587 at p. 42 of the report.
[8] The term "plaintiff" will be used henceforth in this article to denote someone for whose benefit a maintenance order has been made, and who seeks to enforce it.
[9] *Maintenance Act* 1965 (Vic.) s. 64, *Maintenance Rules* 1966, Part 2 Form No. 12.

enforcement procedure has been praised[10] as being effective, cheap and quick with police serving summonses and executing warrants. Local surveillance is thereby maintained and in fact formal procedures are supplemented by a great deal of informal threats, exhortation and encouragement from the clerk's office which handles the routine business involving correspondence with maintenance defaulters. One of the advantages of the magistrates' court maintenance order is that it will, unless otherwise requested, usually require the periodical payments to be made to the clerk of courts.[11] The use of the clerk of courts as an enforcement agency in turn, has the merits of providing a system for keeping detailed accounts and the clerk can thus readily initiate enforcement proceedings at the plaintiff's request.

We will examine now those modes of enforcement available against a defendant who defaults under a maintenance order made by a magistrates' court under the Victorian *Maintenance Act* 1965.

2 ENFORCEMENT UNDER THE VICTORIAN MAINTENANCE LEGISLATION

The *Maintenance Act* 1965 (Vic.) offers a number of methods of enforcement of orders made in Victoria in Part IV Division 1.

Subdivision 1 Orders to Acquire Assets and Moneys

Under s. 40 the court may order the seizure and sale of any goods, chattels and securities belonging to the defendant or the receipt of certain income and money deposited in his bank accounts. Such an order can be made on an application made at any time and ex parte by or on behalf of the recipient of the maintenance order. Section 40 creates a very wide power which appears to provide an effective additional method of recovering arrears. However, the provision has been used very seldom in Victoria; no such order appeared in the entire Oakleigh sample, and in other magistrates' courts such as the Melbourne and Collingwood courts only one or two such orders are made in a year.[12] The lack of popularity of the mode of enforcement in s. 40 may perhaps be attributed to the fact that it could only be effective against a defendant who has means and whose assets are in the form which attracts the operation of s. 40. Moreover, the provision may easily be thwarted by the simple and well known expedient of transferring title to property to a mistress or friend. Furthermore, the procedure in s. 40 involves going to the court, getting an order and causing property to be seized. It is too cumbersome to be used effectively against defendants who default regularly because orders will have to be made as

10 Graham Hall Committee op. cit. 16.
11 *Maintenance Act* 1965 (Vic.), s. 35.
12 This information was kindly supplied by Mr B. Ries who is the immediate past collector of maintenance for Victoria and is currently the clerk of the Collingwood Magistrates' Court in Victoria.

each new batch of arrears accumulate. Despite these problems inherent in the s. 40 procedure, however, it may be thought that more advantage could be taken of the provision if the legal profession was more familiar with it and it may be that there is a genuine need for publicity on this score.

Subdivision 2 Registration in the Supreme Court of a Certificate of Arrears

Payment of arrears may also be enforced by the method in s. 41 of the Act. This involves going to the magistrates' court, proving the arrears on oath and getting from the court a certificate stating the amount due under the order. The plaintiff can then file this certificate with the Prothonotary of the Supreme Court who enters judgment for the amount certified. This judgment is then enforceable[13] in any manner available in respect of a final Supreme Court judgment. However, the debt remains due under the magistrate's order and not under the certificate, so that if the order itself is set aside or quashed, proceedings cannot be taken in the Supreme Court to enforce the judgment there.[14]

Despite the superior methods of enforcement of the Supreme Court being attracted by the s. 41 procedure, this provision like s. 40 suffers from an almost complete lack of use. The reasons for this are several. First, clerks of courts do not undertake this method of enforcement so it is only a plaintiff who has legal advice who would even be aware of the provision.[15] Secondly, whereas it is true that this would enable the plaintiff to use the writ of fieri facias procedure to sell land belonging to the defendant to satisfy her order, by the time she has acquired the s. 41 order, filed it in the Supreme Court, issued the writ and executed upon it she has run up considerable costs in legal expenses and sheriff's commissions. Moreover this method is cumbersome compared to the comparative simplicity of alternative procedures offered by the Act.[16]

Subdivision 3 Attachment of Debts Owing to the Defendant

Section 42 of the *Maintenance Act* enables the magistrates' court to make an order attaching debts owed to the defendant and gives these orders priority over any other orders directed to be paid by the garnishee to the same defendant. The section applies subdivision 7 of the *Justices Act* 1958 (Vic.) whereby the party entitled to enforce the maintenance order of the magistrates' court may apply to a justice or clerk of the court

[13] Subject to the procedures in s. 41(4) and s. 41(5) being observed.
[14] *Queenscliff* v. *England* (1897) 3 A.L.R. 17.
[15] In the Oakleigh sample only 52 per cent of the parties to maintenance proceedings had legal advice. In a survey of affiliation proceedings in a sample of Victorian magistrates' courts undertaken by Professor Sackville, (R. Sackville, "Affiliation Proceedings in Victoria" (1972) 8 M.U.L.R. 35) it was found that under half the complainants and only 20 per cent of defendants were represented.
[16] See notes to ss. 43 and 46 on pp. 77 and 81 post.

to summons the defendant before the court.[17] He may then be orally examined as to debts owing to him and as to his property or means. Witnesses may also be called concerning these matters under s. 131 of the *Justices Act*. The plaintiff may apply ex parte to a magistrates' court or justice or clerk of the court and state on affidavit that other persons in Victoria owe money to the defendant. These debts may then be attached, and the garnishee ordered to appear before the magistrates' court to show cause why he should not pay the debt owing to the defendant over to the plaintiff. The attachment procedure may be taken either before or after the oral examination of the defendant.

Like the procedures in ss. 40 and 41 that in s. 42 is seldom used. Apart from the fact that the attachment order may be refused if it could be considered worthless or vexatious, or where the debt sought to be attached is very small[18] the multiplicity of court procedures is prohibitive. Separate sets of proceedings concerning the plaintiff, the defendant and the garnishee are likely, and witnesses may need to be called. Even all these measures may be unfruitful if the garnishee proves to be recalcitrant and supervening on the various proceedings already undertaken there may be a need for a warrant of distress.[19] As with s. 41, enforcement under s. 42 will only be undertaken with legal advice and will thus be unavailable to a majority of those seeking to recover arrears under maintenance orders.[20] A further limitation on the use of s. 42 is that by the time the relationship between the parties has deteriorated to the extent that enforcement procedures for arrears of maintenance are contemplated the wife will not be in the position to know whether or not debts are owing to the husband so the lack of use of s. 42 seems hardly surprising.

The feeling of the English Committee on Enforcement of Judgment Debts[21] was that unpaid maintenance should not be attachable against a husband or father, so that the Committee would disapprove of s. 42 in its entirety. It was felt that attachment created too many complications and attracted troublesome litigation. Moreover, it becomes hopelessly messy when garnishee proceedings are superimposed on the powers to remit arrears, vary orders and order the payment of arrears by instalments. When this view is considered along with the infrequency with which s. 42 is invoked one might well conclude that the method of enforcement it provides is expendable.

[17] *Justices Act* 1958 (Vic.), s. 130(1).
[18] *Justices Act* 1958 (Vic.), s. 132.
[19] *Justices Act* 1958 (Vic.), s. 134.
[20] See fn. 15 supra.
[21] Cmnd. 3909, 1969, p. 190, para. 724.

Subdivision 4 Imprisonment

Perhaps the most controversial[22] enforcement procedure[23] provided in the Act is the power conferred in s. 43 to imprison a defendant who has disobeyed or failed to comply with a maintenance order. The court can commit a male defendant for up to twelve months, but the imprisonment does not discharge the liability to pay the arrears.[24] The term to be served is negotiable to the extent that the defendant is discharged on payment of the whole amount of arrears, or if he pays up some of the arrears the term is reduced by the proportion that the money paid bears to the whole.[25] Furthermore, the impact of a commitment order may be softened under s. 45(1) of the Act[26] which enables the court to vary an order previously made and grant additional time to pay if this is appropriate. In addition to this the Governor may order the discharge of a defaulter from prison upon his entering into a recognisance and observing any other conditions necessary to secure the payment of the money.[27]

The mere fact of arrears does not automatically render the man eligible for imprisonment. If the court feels that the defendant could not have met the payments by making reasonable efforts[28] or that for any other reason imprisonment is inappropriate[29] then the defendant will not be committed to gaol. The Act retains the over-all discretion always given to the court[30] as to whether it will make the commitment order, and also as to the amount of the order to be enforced by imprisonment.

Disobedience of a maintenance order is a continuous cause of complaint giving rights to recover *de die in diem* and in respect of each and every breach.[31] Subdivision 3 imposes no time limit for bringing proceedings,[32] but there is a rule of practice which confines the order to a maximum of twelve months' arrears.[33] An important consideration underlying this practice is that it is better to have in force an order "for a sum which a man will pay rather than go to prison instead of having one in force for which he will go to prison rather than pay".[34] The twelve months' limit, however, is only a rule of practice and only applies to cases where the wife

[22] This question is now the subject of a Bill before the Senate, *The Family Law Bill 1973*, which seeks the abolition of imprisonment of maintenance defaulters.
[23] On the question of whether these proceedings are for punishment or enforcement *Walker* v. *Walker* [1959] V.R. 9 holds that they are not truly criminal but quasi-criminal.
[24] *Maintenance Act* 1965 (Vic.), s. 43(2).
[25] S. 43(3).
[26] Substituted by the *Maintenance (Amendment) Act* 1969 (No. 7860) s. 3.
[27] *Maintenance Act* 1965 (Vic.), s. 45A.
[28] S. 44(1)(a).
[29] S. 44(1)(b).
[30] *Greig* v. *Greig* [1962] V.R. 485.
[31] *Cook* v. *Cook* (1923) 33 C.L.R. 369.
[32] *Cook* v. *Cook* supra holds that time limits in the *Justices Act* 1958 (Vic.), s. 215, have no application to the provisions of subdivision 3.
[33] *Greig* v. *Greig* (supra).
[34] *Pilcher* v. *Pilcher (No. 2)* [1956] 1 All E.R. 463, 465.

"allows" arrears to accumulate, i.e. where she could have enforced but did not do so.[35] Thus in a case where the wife is *unable* to find the husband for two years a Victorian court could commit him in respect of the whole amount of arrears for the two years.

If imprisonment is to be retained as a method of enforcing arrears the following criticisms may be made of the Act as it currently operates. First, it may be said of the Victorian provisions that they offer too little by way of safeguards against imprisoning a man in an inappropriate case. The safeguards provided in ss. 44 and 45[36] could be augmented by a provision similar to the English interdiction against a magistrate proceeding to hear a complaint for enforcement of an order unless the defendant appears or unless he fails to appear after an adjournment.[37] The rule of practice by which magistrates do not enforce arrears of more than twelve months[38] by imprisonment could be strengthened so that such arrears could not be enforced without the leave of the courts.[39] It may also be said of the present Victorian committal powers, that they are excessive in that they may cause a man to be gaoled for up to twelve months; a rigorous penalty indeed. In New Zealand, on the other hand, the penalty on conviction for an offence has been reduced from a sentence of not more than six months' imprisonment to not more than three months or a fine not exceeding $200.[40]

These improvements to subdivision 3 have been suggested on the presupposition that committal to prison is an appropriate method of enforcement of maintenance arrears. In fact this is a question of some controversy, and it is to this debate that we must now turn our attention. Support for the power to imprison defaulters is very strong among many members of the Victorian magistracy and of the legal profession. In England, similarly, the *Administration of Justice Act* 1970 (Eng.) abolishes prison for most forms of civil debt but retains it for maintenance. Moreover, it is liberally used; in 1968 magistrates' courts in Britain made 2561 committal orders in respect of maintenance defaulters.[41] In the Oakleigh sample of 300 cases[42] there were 11 committals the efficacy of which can be testified to by the fact that 7 paid up the full amount of the arrears within hours of detention. Even more significant than this perhaps, is the fact that the courts use this committal power in combination with an order to pay by instalments.[43] On failure to pay this a warrant of commitment becomes due to be issued

[35] *Welsby* v. *Welsby* [1961] V.R. 362.
[36] See fn. 27 to 33 supra.
[37] *Magistrates' Courts Act*, 1952 (U.K.) s. 74.
[38] See fn. 33 supra.
[39] This applies with respect to the English High Court and County Courts; *Matrimonial Proceedings and Property Act* 1970 (U.K.), s. 10.
[40] *Domestic Proceedings Act* 1968 (N.Z.), s. 107(1).
[41] Cited by S. Cretney, "The Maintenance Quagmire" (1970) 33 M.L.R. 662, 679.
[42] See p. 67 supra.
[43] S. 45.

without further proceedings. The enormous threat value offered by this power is reflected in 101 such orders of committal being made in the Oakleigh sample, only 11 of which actually resulted in the imprisonment of the defendant. Similarly in England this postponed order has been considered by the Justices' Clerks' Society and the Magistrates' Association[44] to be the most effective way for getting in maintenance arrears.

In England the whole question of the power to imprison maintenance defaulters has been examined by the Committee on the Enforcement of Judgment Debts. The members of the committee were unable to agree on whether the power should be abolished, and the outcome was in fact two reports; a majority was in favour of retention of the power to commit and a minority report favoured its abolition. A number of factors impressed the majority. They felt that the English provisions provided ample safeguards against imprisonment in an inappropriate case. Moreover, the English legislation contains powers to review the committal and a power of remission in whole or in part of the sums due.[45] Thus the defaulter is given the chance to earn money to discharge his debts with further reviews as may be necessary. Furthermore, they pointed out that there are many more postponed commitment orders made than executed warrants of commitment, indicating the efficacy of the threat constituted by the imprisonment power. The threat of imprisonment means that defaulters can buy their release by paying up what is properly due and what, in fact, they can afford. "Thousands of persons who now pay unwillingly and under pressure would cease to pay at all."[46]

The majority was thus impressed with the efficacy of the committal power, given that it was used as a very last resort and then only with respect to a man who wilfully refused or neglected to pay despite being able to do so. Furthermore, in considering the committal sanction, it was stressed that a debtor who really could not pay could always resort to the right to appeal from the original maintenance order or to seek its variation. The only reservations expressed in the majority report[47] were those relating to the evidence available to magistrates who committed defaulters. It was felt that this evidence should be improved to ensure that the distinction between those defendants who allowed orders to fall into arrears and those who refused to pay constitutes an adequate safeguard.

The six members of the committee who submitted the minority report against the imprisonment of maintenance defaulters were not confident that magistrates' courts succeeded in applying the distinction between refusal and inability to pay. They cited the finding of the Committee on

[44] Cited in the Report of the Committee on the Enforcement of Judgment Debts op. cit., p. 266, par. 1031.
[45] *Administration of Justice Act* 1970 (U.K.), s. 12. Similar provisions appear in ss. 45, 45A of the Victorian Act.
[46] Committee on Judgment Debts, op. cit., p. 269, para. 1045.
[47] Ibid., 270.

Statutory Maintenance Limits,[48] that most of the parties in maintenance proceedings had very limited financial resources. They felt that there was "some evidence to suggest that magistrates' courts . . . too readily and too easily make a finding of wilful refusal or culpable neglect to pay maintenance".[49]

They expressed a distaste for the use of imprisonment where there was no crime, but only a civil debt, for research has shown that the characteristics of most civil prisoners are not that they are bad or dishonest but rather inadequate, unfortunate, feckless or irresponsible. Some defaulted as a matter of principle when, for example, they hated their wives or were saddled with the support of children who were not theirs.[50] In short, the notion of punishment achieved nothing in terms of the aim of the enforcement system which is to make assets available for deserted families. For if defaulters have the means to pay then the maintenance machinery should be used for extraction to the full; if they do not have the means then prison will not help. On the contrary, the imprisonment itself would further reduce their low earning power, while the taxpayer pays not only the cost of the family support but that of the imprisonment. Indeed, where the defendant has taken on an illicit family the imprisonment leaves two families unsupported instead of one; if he were free to work he would at least be supporting the second, the reality being that he cannot support the first as well, in any event.[51]

The minority report concludes with some persuasiveness. "We do not think the policeman and the prison officer are appropriate agents for the regulation of family life because they bring penal sanctions into a social area where compensation and restitution are the only relevant and tolerable aims and moral censure the only proper method of expressing disapproval."[52] To these criticisms of the minority may be added the thought that while the rate of imprisonment is very small compared with that of the actual number of suspended orders for committal (101 suspended orders cf. 11 committals),[53] the proliferation of suspended orders represents a very considerable expenditure in courts' time and resources.

The debate as to the appropriateness of imprisonment for maintenance defaulters continues, and is difficult to resolve. If the *Family Law Bill* 1973, presently before parliament,[54] becomes law we will see the abolition of this mode of "enforcement". In the event, however, that it is unsuccessful,

48 Committee on Limits, loc. cit.
49 Committee on Judgment Debts, p. 282, para. 1093.
50 Ibid., p. 280, para. 1092.
51 In this regard it is interesting to note that the New South Wales Justice department is examining the possibility of making maintenance defaulters in gaol do some work and support their families.
52 Committee on Judgment Debts, p. 286, para. 1098.
53 See p. 79 supra.
54 Supra, fn. 22.

it is submitted that the rigours of the remedy should be softened[55] and that effective safeguards should be established to ensure against its improper use.[56] There is also a need for measures which would preserve the underlying aims of enforcement procedures, e.g. requiring imprisoned defaulters to do some work in gaol to support their families.

Subdivision 5 Attachment of the defaulter's earnings

Subdivision 5 of the Victorian Act enables a plaintiff to enforce arrears in the hands of the defendant's employers. The scheme of the legislation in subdivision 5 is similar to that in the third schedule of the *Matrimonial Causes Act* 1959-1966 (Cwth).[57] The attachment of earnings order is one invoked extensively with respect to arrears of maintenance.[58] Its popularity is due to several factors. First, it provides simplicity of procedure; it may be acquired without the need for independent legal advice i.e. clerks of courts are familiar with such orders. Secondly, it is effective against the husband who simply squanders or spends his earnings so that he has nothing with which to meet the maintenance orders. Thirdly, it suceeds where the four remedies already examined[59] have failed; it provides against future defaults instead of requiring new proceedings with respect to each bundle of arrears as they accrue.

The scheme adopted in subdivision 5 is as follows:

Section 46 defines (inter alia) earnings which may be attached to include pensions and compensation payments as well as earnings by way of salary and wages, but excludes pensions payable under certain Commonwealth Acts.[60] The form the order takes is determined by s. 47 subs. (5)-(10). A normal deduction rate is specified in the orders, i.e. the rate felt by the court to be a reasonable reduction from the defendant's earnings to satisfy the order.[61] To accommodate the need for differentiation in respect of accrued arrears as compared with future weekly sums the normal deduction rate may be higher for a specific number of pay days than for subsequent pay days.[62] The possibility that the normal deduction rate could prove harsh where the defendant's weekly earnings are reduced for some reason is contemplated in s. 47(7). His own needs and those of

[55] See fn. 40 supra.
[56] See fns. 37-39 supra.
[57] The differences are enumerated in Fogarty, *Maintenance, Custody and Adoption* (3rd ed., Butterworths 1972) 111, 112.
[58] However, the Oakleigh sample of 300 files contained only 5 such orders. In England, on the other hand, more than half the affiliation orders made by magistrates' courts in 1967 were followed by attachment of earnings orders; the proportion associated with married women's orders was lower. O. R. McGregor 'Social Effects of the Matrimonial Jurisdiction of Magistrates' 118 New L.J. 41 discussing findings of the Bedford College survey 1967.
[59] See pp. 74-81 supra.
[60] *Maintenance Act* 1965 (Vic.), s. 46(1).
[61] S. 47(5).
[62] S. 47(6).

anyone for whom he may or must reasonably provide are acknowledged by the requirement in s. 47(7) that the order has also to specify a protected earnings rate below which his earnings are not to be reduced by being attached. This order is then served on the defendant and on his employer whereupon it becomes effective seven days after service.[63] The employer then pays the amount of the order to the clerk of courts on each pay day.[64]

Having considered the nature of the order, it is now proposed to examine the circumstances in which an attachment of earnings order may be made. The plaintiff may apply to the court in writing for an order without specifying a particular employer. The court's jurisdiction to grant the order depends on its being satisfied that the defendant has or will be likely to have earnings. In addition to this, it must be proved that there are arrears amounting to a defined number of payments,[65] and that these can be attributed to the defendant's wilful refusal or culpable neglect.[66] An alternative method to proving amounts of arrears in this way is to show that the defendant has persistently failed to comply with the order.[67]

Alternatively, where proceedings are brought for any other order to enforce a maintenance order the court may make an attachment of earnings order instead of the order sought.[68] It is interesting to note the possible tension existing between the grounds for awarding an order in the discretion of the court (s. 49(1)) and those on application of the plaintiff. In the former case, the right would seem to be virtually unfettered whereas in the latter the right to an order depends on the ability to prove substantial allegations of guilt.[69] This gives rise to the possibility that it may be easier to request the court to use its discretion under s. 49(1) on making an application for some other order than to apply directly under s. 47 for an attachment of earnings order. However, it seems to be an accepted principle that the court would not exercise its discretion under s. 49(1) if grounds did not also exist under s. 47.

The effect of an attachment of earnings order is to prevent the plaintiff from issuing a warrant or other process in respect of proceedings begun before the order was made.[70]

The success of the order as a mode of enforcement is heavily dependent upon the co-operation of the employer so the Act includes a number of provisions to ensure this. Section 57 thus makes it an offence not to comply with the order. Nor can the employer dispense with the trouble of an attachment of earnings order by dismissing the employee; a further offence is committed if the employee is dismissed or prejudiced because of

[63] S. 47(10). The method of service is set out in s. 56.
[64] Ss. 47(8), 48.
[65] Four weekly payments or two payments other than weekly payments.
[66] S. 47(4).
[67] S. 47(3)(b).
[68] S. 49(1).
[69] See fns. 64-66 supra.
[70] S. 49(2).

the order[71] and the employer may be ordered to reinstate or remiburse the employee in that event.[72] The employer is also directed by another section[73] that the attachment of earnings order has priority over any other order in respect of the defendant's earnings that may be directed to the employer. The employer's co-operation is further enlisted by a provision[74] requiring him to notify the court upon the defendant leaving his employment.

An attachment of earnings order may cease to have effect in a number of ways. The court which made the order has a discretion to discharge it on the application of the defendant or the plaintiff.[75] The order also ceases upon the discharge or variation of the original maintenance order to which the attachment order relates.[76] Finally the attachment order may be superseded by the court making some other type of enforcement order.[77]

The provisions for attachment of earnings are open to criticism. Proof of guilt on the part of the defendant is a condition of making the order under s. 47.[78] There are two objections to this feature; it creates a stigma associated with the attachment of earnings order which is not otherwise inherent: secondly, it adds to the burden of proof of the plaintiff, when in fact the order should be a very simple one to acquire. Ideally it could be made by consent;[79] but at all costs it should be regarded by defendants as a convenient method of paying the debt rather than as a penalty. Certainly the court should be given the power to make the order if the defendant does not object. In England recent legislation[80] enables the debtor to apply for the order himself on the reasoning that as he has consented to it he will be more willing to honour the order.[81]

How effective is the attachment of earnings order as a means of enforcement of maintenance payments? 951 attachment orders were considered by the Bedford College Department of Sociology. It was found that in three-quarters of the cases attachment offered nothing as a way of securing payment of arrears while in one-quarter the order lasted for just over one year and did contribute towards reduction of arrears.[82] A similar lack of success may be reported in the Oakleigh sample.[83] In the 300 cases

71 S. 58.
72 S. 59(1).
73 S. 52.
74 S. 54(2).
75 Ss. 50(1), 51(1)(a).
76 S. 51(1)(b). However, the cessation of the attachment of earnings order may be suspended until arrears under the original order are recovered, s. 51(2).
77 S. 51(1)(c).
78 Guilt must be proved under the Australian Acts and the English *Attachment of Earnings Act* 1971 (U.K.), s. 3(5).
79 In New Zealand it may be acquired ex parte, without prior notice to the defendant or his employer.
80 *Attachment of Earnings Act* supra s. 3(1)(d).
81 Indeed the Committee on Enforcement of Judgment Debts notes at p. 159 of the report that there exist some entirely voluntary arrangements in England, operated by employers and employees.
82 See fn. 58 supra.
83 See p. 67 supra.

examined only 5 attachment of earnings orders appear. Of these 3 fell into further arrears after the attachment of earnings order was made; 1 of these 3 ended in the husband being imprisoned.

There are several limiting factors operating here. Self-employed defendants cannot have the order made against them at all, and even against a wage-earner the order proves easy to flout by the simple expedient of changing jobs, e.g. fifty-seven per cent of the 951 orders in the Bedford College survey were subverted by the defendant changing his job. It is hard to remedy this without violating the personal liberty of defendants. A further problem with the attachment of earnings order is that it is rendered useless if the defendant's earnings fall below the protected earnings rate through illness, seasonal fluctuations or some other cause. This may result in the family having no recourse but to hope that some of this amount may be recouped later as arrears. The attachment of earnings order also proves unpopular with some employers and although the Act provides against dismissing or prejudicing an employee merely because he is subject to an attachment order[84] it is very hard to prove against an employer that this was his reason for dismissing the employee.

There have been various legislative attempts made in other jurisdictions to strengthen the attachment order in its vulnerability to changes of employment. Whereas the Victorian legislation does not enable a former attachment order to revive on the defendant's changing jobs under the English legislation[85] the change does not have the effect of discharging the order. It simply lapses and can be easily revived by the wife making an ex parte complaint. This is far more flexible than requiring new proceedings on every change of employment. The English provisions also enlist the aid of employers in overcoming problems caused by change of employment by requiring them to notify the court if the defendant leaves his employment[86] and by requiring a new employer aware of an order to inform the court. The court can then direct the order to the new employer.[87]

Further flexibility could be achieved by incorporating a provision similar to that in New Zealand[88] which gives the court wide powers to vary, suspend or discharge an attachment of earnings order on the application ex parte of any person. This would allow the debtor to apply for a suspension of the order and to start new work without the order being disclosed as long as he kept up with instalments. A similar application could be made in the event of the defendant being unable to work for a time through illness or some other cause.

84 Ss. 58, 59.
85 *Attachment of Earnings Act* 1971 (U.K.), s. 9(4).
86 *Attachment of Earnings Act* s. 7(2).
87 *Attachment of Earnings Act* s. 15.
88 *Domestic Proceedings Act* 1968 (N.Z.), s. 99.

There have been other suggestions of a controversial nature aimed at strengthening the attachment of earnings remedy. The Committee on Enforcement of Judgment Debts considered[89] the possibility of using the P.A.Y.E. machinery of tax payment to deduct the debt from the defendant's earnings. As this would vest responsibility in the Board of Inland Revenue as well as employers this would solve such problems as the changing of jobs, and the lack of co-operation of employers. This measure could be supplemented by endorsing Ministry of Social Security insurance cards and/or P.A.Y.E. forms to the effect that the employee has an order against him. Employers with attachment orders could in this way be traced easily and new employers would automatically be notified. However, the committee was divided over these two ideas and ultimately proved unwilling to adopt them as they felt it to be more important that information from the P.A.Y.E. or the Ministry should be completely confidential than that the collection of civil debts or tracing of employees with attachment orders should be facilitated.[90]

A consideration of the attachment of earnings order as a mode of enforcement of maintenance payments leads one to several conclusions. In its present form the order would appear to be most effective in periods of unemployment when work is scarce and jobs are difficult to change. It could, on the other hand, be given teeth by various means. It should be easy to obtain and references to guilt on the defendant's part should be omitted. It should be made to endure notwithstanding changes in employments by the debtor. Provisions ensuring more effective co-operation of employers should be incorporated. Finally, the possibility of enlisting the co-operation of government agencies should be considered providing the personal liberties of defendants subject to attachment of earnings orders can be substantially preserved.

We have considered those methods of enforcement of maintenance payments available under the Victorian Act. It now remains to consider the merits of some methods not presently provided in our legislation.

METHODS OF ENFORCEMENT NOT AVAILABLE UNDER THE VICTORIAN LEGISLATION

(a) *Proof of Arrears in Bankruptcy*

Arrears of maintenance do not constitute a debt provable in bankruptcy under present legislation.[91] Indeed the law traditionally defers a man's obligations to his family to those to his creditors essentially as a matter of

[89] Report of Committee on Judgment Debts, p. 163, para. 618.
[90] Ibid.
[91] *Barnett* v. *Barnett* (1926) 20 Q.J.P.R. 166. The same is true of the English legislation

social policy.[92] This position was favoured in the Report of the Commission on Financial Provision in Matrimonial Proceedings[93] on the basis that "Marriage is a form of partnership, and on normal partnership principles neither partner should compete with the partner's creditors". Yet the opposite principle was adopted in the *Administration of Justice Act* 1970 (U.K.) which gives a maintenance order priority over an ordinary civil debt where there are competing attachment orders with respect to the defendant.[94]

In New Zealand, on the other hand, if the defendant is made bankrupt all arrears of maintenance constitute a debt provable in bankruptcy by the wife[95] without affecting her rights of recovery under the *Domestic Proceedings Act*. We could enact such a provision to provide an additional mode of recovery, in whole or in part, according to the assets and the liabilities in the bankruptcy. This method of enforcement could be strengthened by giving the maintenance debt priority over ordinary civil debts in the same way as the English attachment legislation confers priority.[96] However, these measures can offer no panaceas while it remains true that the contents of the defendant's matrimonial home can still be seized and sold for little return in execution of his commercial debts without regard for the welfare of his family. There is a need for systematic "thinking out" in the enforcement of matrimonial and civil debts.[97]

(b) *Charging Orders; Receiving Orders*

A further method of enforcement of payment of arrears available in New Zealand but not under the Victorian legislation is the power of the court to make a charging order.[98] This causes property owned by the defendant to be earmarked as security for the maintenance payments and is supplemented by the power to make a receiving order in the event of the defendant defaulting. As the charging order can be made contemporaneously with the maintenance order[99] and the power to nominate the property to be charged is a wide one this scheme would appear to achieve what the Victorian s. 40[1] sets out to do while avoiding many of the problems which beset s. 40.[2] The New Zealand charging order may be applied for ex parte and its making is in the discretion of the court.[3] The

92 This also used to be the position in England under the *Matrimonial Homes Act* 1967, s. 2(5).
93 Law Commission No. 25. U.K. (pursuant to s. 3(2)) *Law Commissions Act* 1965 (U.K.).
94 *Administration of Justice Act* 1970 (U.K.), s. 17.
95 *Domestic Proceedings Act* 1968 (N.Z.), s. 91.
96 See fn. 94 supra.
97 See S. Cretney, "The Maintenance Quagmire", (1970) 33 M.L.R. 662.
98 *Domestic Proceedings Act* 1968 (N.Z.), ss. 101-105.
99 S. 101.
1 *Maintenance Act* 1965 (Vic.).
2 See pp. 74, 75 supra.
3 S. 101.

charging order may relate to any real or personal property of the defendant including a life insurance policy,[4] but it does not have priority over any encumbrance on the property charged at the time the order is made. Once the defendant's property is subject to a charging order then if his payments fall into arrears the court may, at its discretion, order the public trustee or any other person to be the receiver of the whole or any part of that property or of its rents, profits or income.[5] The receiver is given extensive powers to deal with the property subject to the receiving order. For example, he may recover possession of land or other property; he can lease it for up to three years; he may raise loans on its security and appropriate its rents and income.[6] Such a provision may be a useful addition to the powers of enforcement in the Victorian legislation, especially where the defendant has means to pay but is pursuing a deliberate policy of obstruction.[7]

(c) *The Establishment of a Specialized Enforcement Office*

The Committee on Enforcement of Judgment Debts,[8] in the face of evidence of frequent ineffectiveness of the existing means of enforcing maintenance orders made a number of suggestions. It was able to "recommend a practice followed in some large and busy magistrates' courts whereby maintenance . . . defaulters are dealt with by a specially chosen arrears panel of justices who become rapidly experienced" in enforcement procedures.[9] This body would play a modest role in an ambitious scheme proposed by the Committee[10] whereby an enforcement office would be set up to synthesise and rationalize all the conflicting and overlapping jurisdictions of the various courts. This enforcement office would be a separate and autonomous body but still a part of the judicial hierarchy, and with all the attributes of an ordinary law court. Its functions would be (1) to ascertain the means and the circumstances of the debtor and (2) to have all the appropriate modes of enforcement to reach all the debtor's property and assets.

4 S. 102.
5 S. 104.
6 S. 105.
7 A case in which the power was invoked recently in the context of arrears of periodical payments under a divorce decree is *S.* v. *S.* reported in 117 Sol. J. 649. Dunn J., in the Family Division of the English High Court made a receiving order in these rather exceptional circumstances. The husband claimed he had no assets and no income and did not mind going to prison for short periods. In fact he was an astute dishonest businessman with an interest in a proprietary club, the premises of which he held on a 7 year lease. He had the means to pay but was deliberately making the home conditions unpleasant for the wife and children. Dunn J. appointed a receiver to take the profits from the club until the sum due was discharged, and ordered that the husband be restrained from assigning, charging or otherwise dealing with the property.
8 Cmnd. 3909.
9 Report of Committee on Judgment Debts, p. 270, para. 1051.
10 Ibid., pp. 92-95, paras. 332-339. It should be noted, however, that the enforcement office recommendations have not been implemented.

However, part VII of the report recommends that matrimonial and affiliation orders made by Magistrates' Courts should normally remain for enforcement in the Magistrates' Court. Nevertheless, the magistrates' court should be able at its discretion, on application by the wife or some other complainant or the Ministry of Social Security, to transfer them to the enforcement office. But unlike the very wide powers which are envisaged for the enforcement office, the range of enforcement procedures in the magistrates' courts is envisaged to be limited to execution on goods, attachments of earnings and committal orders (if the power to commit is retained). Thus it would not include the power to attach moneys, including debts, or the power to determine hire purchase and other agreements although the enforcement office would have the latter powers.

On the other hand, the enforcement office would have the husband under its supervision,[11] and the wife could exercise her right to transfer her claim to the enforcement office. Thus if the husband had assets all the modes of enforcement available to other creditors could be invoked.

The scheme proposed by the Committee is an ambitious one and depends upon an attack being made systematically on the whole gamut of judgment debts and on the whole court structure. Until this challenge can be taken up it suffices to say that a number of specific sanctions of value to someone who has a maintenance order from a magistrates' court may be conveniently added to the enforcement process already available. First, on the assumption that we are to retain all those methods provided by Part IV (and we have seen that this is not necessarily an appropriate assumption with respect to powers such as that in s. 42 and the power to commit) we have seen that many improvements may be made in the way these methods operate. Secondly, modes of enforcement which are currently not available under the Victorian legislation may usefully be adopted: arrears of maintenance should be provable in bankruptcy; matrimonial debts should, as a matter of social policy be given priority over ordinary civil debts; the powers to make charging and receiving orders may also be valuable weapons in the armoury of enforcement procedures which our magistrates' courts possess. If we do not act soon to streamline enforcement procedures we will find that the whole system of awarding maintenance to needy families will continue to be subverted by weaknesses in our present legislation. Finally, the role of the magistrate himself must be noted. When he decides the amount of the maintenance order at the outset he should keep in mind that a smaller order readily complied with yields a larger sum in the long run than one made without adequate consideration of the debtor's means and the other responsibilities he may have assumed. It is important, therefore, to ensure that the magistrate has the best available information on the debtor's means and that he considers very

[11] Ibid., p. 338, para. 1310.

carefully just how likely an individual defendant will be to comply with the order once it is made. This decision may ultimately determine whether the maintenance order provides a source of support for the family or whether it leads only to enormous expenditure in time, energy and resources in the effort to enforce it.