



**Issue Paper 28**

**REVIEW OF THE MAINTENANCE ACT 99 OF 1998**

**Project 100**

**Closing date for comment: 30 NOVEMBER 2014**

**9 SEPTEMBER 2014**

**ISBN: 978-0-621-43034-9**

## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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## PREFACE

This issue paper has been prepared to provide the basis for the Commission's deliberations, to elicit comments and suggestions from relevant stakeholders, and to disseminate information about the review of the Maintenance Act to the general public. Given these purposes, this paper does not contain any clearly defined proposals for law reform. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

Submissions on this issue paper, coupled with the results of further intensive research, will form the basis for a subsequent discussion paper. The discussion paper will contain the Commission's preliminary proposals for law reform, the results of comparative studies, and draft legislation. The discussion paper will be circulated for general comment, and extensive consultation with relevant role-players and members of the public will follow. The purpose of the consultation process will be to test public opinion on solutions identified by the Commission.

Submissions on the discussion paper will in turn form the basis for preparing a report. The report will contain the Commission's final recommendations, including the Commission's final proposals and draft legislation (where applicable). The report and draft legislation will be submitted to the Minister of Justice and Correctional Services for consideration. Should the Minister deem fit, he or she may implement the Commission's recommendations by introducing the draft legislation in Parliament.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **30 November 2014** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are

marked "Confidential". Respondents should be aware that the Commission may in any event be required under the Promotion of Access to Information, Act 2 of 2000 to release information contained in representations.

The project leader responsible for the project is Mr Irvin Lawrence. The researcher allocated to this project, who may be contacted for further information, is Ms Jennifer Joni.

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## CHAPTER 1

### ORIGIN AND BACKGROUND OF THE INVESTIGATION

#### A Background

1.1 On 1 February 2011, the South African Law Reform Commission (the SALRC or the Commission) received a request from the then Minister of Justice and Constitutional Development (the Minister) to include in its law reform programme an investigation into the Maintenance Act of 1998<sup>1</sup> (the Act or the Maintenance Act). The Minister furthermore requested that this investigation and review should receive priority attention.

1.2 The request by the Minister was informed by challenges that were identified with regard to implementing the Act; these were outlined in an annexure to the letter referred to above. The challenges identified by the Minister were as follows (quoted here verbatim):

- (a) The Act is silent as to when an application for future maintenance can be made and whether a maintenance court has jurisdiction to deal with such an application. The Act also does not indicate who must administer the money when any annuity, gratuity or compassionate allowance or other similar benefit is attached or is subjected to execution under a warrant of execution.
- (b) It is not clear who has *locus standi* in a case where a child attains majority but is still dependent on his or her parents.
- (c) It is not clear who has *locus standi* in a case where a child attains majority but is still dependent on his or her parents and such child refuses to claim maintenance from the relevant parent.
- (d) Section 20 of the Act provides that the maintenance court holding an enquiry may make any order as it considers just relating to the costs of the service of process. Representations have been received that this provision must be amended to extend the power of the maintenance court to make any order relating to costs as a result of the abuse of the process by persons against whom maintenance orders have been made.
- (e) The Act does not provide for sufficient assistance to an applicant in making his or her choice as to the different remedies relating to civil execution, available in terms of Chapter 5 of the Act. In terms of section 26(1) of the Act a maintenance order shall be enforced –

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<sup>1</sup> Act 99 of 1998.

- “(i) by execution against property as contemplated in section 27;
  - (ii) by the attachment of emoluments as contemplated in section 28; or
  - (iii) by the attachment of any debt contemplated in section 30.”
- (f) There is an anomaly in the Act relating to the appointment of maintenance officers in so far as the role of the National Prosecuting Authority (the NPA) and the Department of Justice and Constitutional Development (the Department) are concerned. Section 4(1) of the Act provides that a public prosecutor to whom a Director of Public Prosecutions has delegated the general power to institute and conduct prosecutions in criminal proceedings in a particular magistrate’s court shall be deemed to have been appointed as a maintenance officer of the corresponding maintenance court. Section 4(2) of the Act provides that the Minister, or any officer of the Department authorised thereto in writing by the Minister, may, subject to the laws governing the public service, appoint one or more persons as maintenance officers of a maintenance court. As the NPA is regarded as a separate entity, the NPA appoints prosecutors, who are then deemed to be appointed as maintenance officers, in accordance with the salary scales fixed in respect of prosecutors. In addition, maintenance officers, who must since 2007 have a legal qualification, are appointed in terms of section 4(2) of the Act but in accordance with different salary scales. Since maintenance matters are not *per se* regarded as criminal cases, prosecutors are not always dedicated to maintenance matters which result in the need to appoint maintenance officers under section 4(2) of the Act. This situation also creates uncertainty regarding the persons to whom section 4(2) appointed maintenance officers must report.
- (g) Due to budgetary constraints it is not possible to appoint a maintenance investigator for every magistrate’s court and it may be more appropriate in the circumstances to provide in the Act for the appointment of maintenance investigators for a cluster.
- (h) The Act does not provide for the power of arrest by a maintenance investigator. In many cases a defaulter is often only traced after a lengthy period and many efforts by the maintenance investigator. The question has arisen whether in these circumstances justice would not be better served if the maintenance investigator could arrest the defaulter.

1.3 The Minister also identified specific challenges that need to be looked at, related to the following points (quoted here verbatim):

- (a) The Act must provide clearly which movable property of the person who failed to pay maintenance is susceptible to attachment.
- (b) Provision must be made in the Act for the holding of a financial inquiry.
- (c) Three remedies are cited in section 26 of the Act to enforce maintenance orders. When interpreting section 26(1) of the Act, it appears that the three remedies are provided as alternatives. The question has arisen whether



provision should not be made for a complainant, under certain circumstances, to select more than one remedy at the same time. For example, if a person fails to pay maintenance and the complainant can prove that the amount in arrears exceeds the value of any movable property owned by the defaulter and attachable under a warrant of execution provided for in section 27 but an amount is due to the defaulter which can be attached as a debt in terms of section 30.

- (d) In terms of rule 38 of the Magistrates' Courts Rules a sheriff may, if he or she is in doubt as to the validity of any attachment or contemplated attachment, require that the party suing out the process in execution, shall give security to indemnify him or her. It appears that in practice sheriffs often require complainants to provide security before executing any process from a maintenance court. It is common knowledge that many complainants are not in a position to provide the required security, the result being that the execution process is rendered useless. This aspect should be investigated.
- (e) An investigation should be conducted regarding future maintenance default amounts, having regard to the protracted processes in connection with, and delays in, obtaining and executing execution process. A warrant of execution is issued for a particular amount, which amount constitutes the amount due to the complainant at that stage. It often happens that the amount in arrears increases after the issuing of warrant of execution. It is understood that a complainant has to approach the maintenance court again for the amount accrued after the issuing of the warrant of execution. The warrant of execution cannot merely be amended to include the additional amount without the intervention of the court.
- (f) Many defendants try to avoid payment of maintenance through the establishment of a trust. This matter should be dealt with in the Act.
- (g) Procedural issues are usually prescribed by way of rules and the procedures relating to civil execution [are best] regulated by way of rules rather than regulations[;] and therefore an enabling provision should be inserted in the Act to make provision that the Rules Board must make rules relating to the execution procedure.

1.4 After receiving this request from the Minister, the SALRC subjected the request to the SALRC's internal processes. A preliminary investigation was conducted to determine whether the requested investigation should form part of the SALRC programme. The preliminary investigation culminated in the development of a proposal paper, which made recommendations on the inclusion of an investigation in the Commission's programme and the priority rating to be accorded to the proposed investigation in line with the Minister's request.

1.5 The proposal paper was presented to the Commission for approval at its meeting convened on 22 October 2011. The Commission approved the recommendations made in

the proposal paper, namely to include the investigation in the SALRC programme under Project 100.<sup>2</sup>

1.6 The recommendations in the proposal paper emphasise that the request from the Minister contained areas that do not require law reform and areas that do require reform. A detailed discussion on the conclusion by the SALRC is contained in the proposal paper.

1.7 The areas that were identified and approved by the SALRC for law reform are:

1. future maintenance;
2. *locus standi*;
3. appointment of maintenance officers;
4. the power of arrest by maintenance investigators;
5. civil execution of maintenance orders;
6. trusts; and
7. cost orders and choice of remedy.

1.8 The matters referred to in item 7 of paragraph 1.7 above deal with areas that were identified as not requiring law reform. The SALRC was of the view that certain topics in this category needed to be explored with stakeholders to bring finality to the discussion. These areas have therefore been included in the terms of reference of the SALRC investigation and will be discussed later in this issue paper.

1.9 The SALRC has previously been tasked with investigating a possible review of the maintenance system. A brief outline is given below of the SALRC involvement in this regard.

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<sup>2</sup> Project 100 deals with all investigations concerning Family Law and the Law of Persons. The current investigations under Project 100 are as follows: Custody of and Access to Minor Children; Review of Aspects of Matrimonial Property Law; Hindu Marriages; and the Review of the Maintenance Act of 1998.

## B SALRC involvement in the maintenance system

1.9 Prior to receiving the above-mentioned request from the Minister, which forms the basis for the current investigation, the SALRC had conducted an investigation on the Maintenance Act of 1963.<sup>3</sup> The pre-investigation was conducted under Project 100 of the SALRC programme, and the current investigation falls under the same project.<sup>4</sup>

1.10 The investigation mentioned in paragraph 1.9 above was conducted shortly after the completion of an investigation by the Lund Committee, which examined various concerns regarding a family support system in South Africa. The Report of the Lund Committee on Child and Family Support (the Lund Committee Report)<sup>5</sup> was commissioned by the Department of Social Development. The Lund Committee's objective was to consolidate social security measures in the new democratic Republic.<sup>6</sup> In other words, the Committee was appointed to look at state maintenance grants and to recommend policy options for child and family support, for consideration. The Lund Committee's analysis of the private maintenance system is insightful and raises issues that are still relevant today.<sup>7</sup>

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<sup>3</sup> Act 23 of 1963.

<sup>4</sup> Note 2.

<sup>5</sup> Lund Committee on Child and Family Support (Chairperson Ms F Lund) *Report of the Lund Committee on Child and Family Support* 1996.

<sup>6</sup> As gleaned from the Terms of Reference of the Lund Committee, its mandate was very wide. The Committee was required to look at (among other issues) the private maintenance system. The Terms of Reference were as follows:

1. To undertake a critical appraisal of the existing system of state support, in all departments, to children and families.
2. To investigate the possibility of increasing parental support through the private maintenance system.
3. To explore alternative policy options in relation to social security for children and families as well as other anti-poverty, economic empowerment and capacity-building strategies.
4. To develop approaches for effective targeting of programmes for children and families.
5. To present a report giving findings and recommendations.

<sup>7</sup> Note 5 Chapter 5 at pages 48-65.

1.11 The SALRC's process commenced with the publication of an issue paper on the review of the Maintenance Act of 1963.<sup>8</sup> The issue paper was published on 30 May 1997 and it invited interested parties and stakeholders to make comments on the suggested options for law reform contained in the paper.

1.12 An interim report on the investigation was approved by the SALRC in April 1998.<sup>9</sup> This report made various recommendations for the Department to consider when amending the Maintenance Act of 1963. The recommendations were as follows:

1. The Commission recommends that a statutory basis be provided for the appointment of maintenance investigators.
2. The Commission recommends that the court's power to make a maintenance order in the absence of a person who is under an obligation to pay maintenance to be extended.
3. The Commission recommends the introduction of a procedure for the automatic recovery of maintenance payment from the income of a person who is under an obligation to pay maintenance.
4. The Commission recommends the introduction of a procedure for the execution of maintenance orders which will function independently from the prosecution for failure to comply with a maintenance order.
5. The Commission recommends the extension of the definition of "maintenance order" to include payment of non-periodical expenses, made towards a person's maintenance.<sup>10</sup>

1.13 The new Maintenance Act was promulgated in November 1998 by the then Department of Justice and Constitutional Development (DOJCD; the Department<sup>11</sup>). The legislature had incorporated some of the recommendations made by the SALRC in its interim report (as cited in the paragraph above) into certain provisions of this Act.

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<sup>8</sup> South African Law Commission *Issue Paper 5*. The issue paper explored options that are available to the State in implementing the maintenance system. The systems looked at included the judicial and administrative systems of maintenance.

<sup>9</sup> South African Law Reform Commission *Maintenance Interim Report*.

<sup>10</sup> South African Law Reform Commission *Maintenance Interim Report* at iv.

<sup>11</sup> As of May 2014, renamed the Department of Justice and Correctional Services

1.14 At that stage, the new Maintenance Act was regarded as an interim measure pending further research on the entire maintenance system. This sentiment was illustrated in the Preamble to the Act, which reads as follows:

**AND WHEREAS the South African Law Commission is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system.**

AND WHEREAS it is considered necessary that pending the implementation of the said Law Commission's recommendations, **certain amendments be effected in the interim to the existing laws relating to maintenance and that, as a first step in the reform of the entire South African maintenance system.** [sic] Certain of those laws be restated with the view to emphasizing the importance of a sensitive and fair approach to the determination and recovery of maintenance. (Emphasis added)

1.15 The interim status of the Act was also referred to during parliamentary debates on the Maintenance Act,<sup>12</sup> and by various academic writers<sup>13</sup> and service providers working in the area of maintenance law.

1.16 Because of the Act's interim status, in pursuing the current investigation the SALRC has decided to take this window of opportunity to look at all other issues that still need revision to ensure that the Act progresses to being a comprehensive and final piece of legislation. That is, the investigation is not limited to issues raised by the Department. Furthermore, the SALRC is cognisant of other pending legal developments related to the Act.<sup>14</sup>

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<sup>12</sup> Hansard Report *Second Reading Debate* 02 November 1998 at 7187. This report will be referred to as the Hansard Report on the Maintenance Act.

<sup>13</sup> Van Zyl L *Handbook of the Law of Maintenance* 52.

<sup>14</sup> The SALRC is aware of the *Judicial Matters Amendment Act* of 2011 (the Amendment Act), which intends to amend certain sections of the Act. The information on the amendment of the Act was presented by the Department to the Portfolio Committee on Justice and Constitutional Development on 6 June 2011. The sections that will be amended are the following:

- Section 6 (jurisdiction);
- Section 18 (default orders);
- Section 22 (substitution or discharge of orders);
- Section 23 (transfer of maintenance orders);
- Section 31, 35, 38 and 39 (penalties and offenses) and
- Section 41 (conversion of criminal proceedings into maintenance inquiries).

At the time the input was made to the Portfolio Committee, the Department indicated that the proposed amendments had been approved by Cabinet and were to be tabled in Parliament.

1.17 The list of issues that the SALRC has identified for revision is not “closed”. This list includes issues identified through desktop research and interaction with various stakeholders who work with maintenance issues, as well as matters referred to in official documents developed by the Department. The issues that require revision are outlined in detail in the paragraphs below.

1.18 For purposes of the current investigation, the SALRC wishes to emphasise that its proposal to review the law may include other matters not specifically included in the Minister’s request or identified by the Commission in its pre-investigation. We wish to ensure that stakeholders have ample opportunity to examine whether the issues raised do require law reform. This is also an opportune time for stakeholders to raise any other critical matters that may need to be explored for possible law reform.

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Although the proposed amendments have no bearing on the issues under investigation, the SALRC will monitor them closely.

## CHAPTER 2

# OVERVIEW OF THE MAINTENANCE SYSTEM IN SOUTH AFRICA

### *A Introduction*

2.1 The law relating to maintenance is of particular importance in the South African context. This salience can be attributed to the fact that maintenance is an area of law that aims to secure the rights of the most vulnerable people in society: women and children who, for reasons beyond their control, are unable to support themselves financially.

2.2 It is trite law that the duty of support exists in our legal system to ensure that people who have a responsibility to support others are urged to comply with this obligation. The duty of support is premised on both legislation and the common law, both of which prescribe that parents must support their children proportionately according to their means.<sup>15</sup>

2.3 The Maintenance Act of 1963 was the predecessor of the current Maintenance Act. The 1963 Act regulated issues to do with maintenance, but was regarded by many as lacking in certain respects to ensure the proper implementation of its provisions. The biggest challenge with the 1963 Act was its enforcement mechanisms, which were regarded as ineffective.<sup>16</sup>

2.4 The promulgation of the Maintenance Act 99 of 1998 was therefore primarily intended to restate and improve certain aspects of the law relating to maintenance in South Africa. The 1998 Act was intended to address the challenges associated with implementation that the 1963 Act had encountered.<sup>17</sup> The enactment of the 1998 Act was

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<sup>15</sup> Note 12 at page 4.

<sup>16</sup> De Jong M “Ten year anniversary of the Maintenance Act 99 of 1998 – a time to reflect on improvements, shortcomings and the way forward” 2009 *South African Law Journal* at 590.

<sup>17</sup> Note 12 at 52. Mamashela 2005 *SALJ* 227.

also aimed at ensuring that South Africa complies with its obligations enshrined in the Constitution<sup>18</sup> and international conventions,<sup>19</sup> which the country has ratified in line with its international commitments.<sup>20</sup>

2.5 The Convention on the Rights of the Child (CRC) is instructive about the status to be accorded to maintenance issues by member states. Article 18 of the CRC emphasises that the primary responsibility for the upbringing and development of children is that of parents and/or legal guardians. Similarly, Article 27 (4) of the CRC obliges State Parties to take all appropriate measures to secure the recovery of maintenance funds for children from their parents or other persons who have financial responsibility for those children.<sup>21</sup>

2.6 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also considers issues that are relevant to family support. Although CEDAW does not specifically refer to maintenance issues, it includes Articles that deal with discrimination against women in matters affecting marriage and the family.<sup>22</sup>

2.7 When the 1998 Act was promulgated, it was regarded by some commentators as an improvement over its predecessor because it introduced features which had not existed in the 1963 Act. The objective of the new Act is to ensure a “simpler, speedier, cheaper

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<sup>18</sup> The Constitution of the Republic of South Africa Act 108 of 1996. Section 27 provides that everyone has the right to health care, food, water and social security, and section 28 provides that every child has the right to family care or parental care and to basic nutrition, shelter, and basic health care services.

<sup>19</sup> United Nations Convention on the Rights of the Child (1989) (CRC). South Africa acceded to the Convention on the Rights of the Child, which it signed on 20 November 1998. United Nations Convention on the Elimination of all forms of Discrimination against Women (1979) (CEDAW). South Africa ratified the CEDAW on 15 December 1995.

<sup>20</sup> South Africa has signed the World Declaration on the Survival, Protection and Development of Children, which was agreed to in New York on 30 September 1990. Although the Declaration does not specifically address questions about maintenance, emphasis is made on point 5 of the 10-point programme contained in the Declaration, namely that committed countries will ensure respect for the role of the family in providing support for children.

<sup>21</sup> Note 12 at 54.

<sup>22</sup> Article 16 (1) (c) and (d) implores State Parties to take appropriate measures to eliminate discrimination against women, and to accord them the same rights and responsibilities both during marriage and at its dissolution; and on matters affecting their children.



and more effective enforcement mechanism”.<sup>23</sup> Some of the salient features introduced in the 1998 Act are as follows:

1. The appointment of maintenance investigators;
2. The developing of guidelines for factors to be taken into account by the court when making maintenance orders;
3. Attachment of emoluments;
4. Attachment of debts;
5. Orders by default;
6. A civil enforcement mechanism;
7. The taking of photographs of maintenance debtors; and
8. Stringent penalties and offences.<sup>24</sup>

2.8 Professor de Jong conducted a review for the DOJCD to mark the tenth anniversary of the Act.<sup>25</sup> In this 10-year review, de Jong analysed the challenges and strengths of the provisions of the Act, and highlighted the successes that have been accomplished through the implementation of the 1998 Act. Successes were evident in the following areas:<sup>26</sup>

- the regular use of default orders;
- the use of civil and criminal enforcement mechanisms;
- the positive role that maintenance investigators play in the maintenance system; and
- positive spinoffs achieved due to interventions introduced by the Department.

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<sup>23</sup> Hansard Report on the Maintenance Act at 7191; The Preamble to the Act.

<sup>24</sup> Hansard Report on the Maintenance Act at 7191–7192. Mamashela M 2006 *Obiter* 590-605 at 590. Some of the recommendations made by the SALRC in its interim report (published in 1998) related to issues about the appointment of maintenance investigators, the attachment of emoluments, and orders by default; these are referred to in paragraph 1.12 of this issue paper.

<sup>25</sup> See n 15.

<sup>26</sup> De Jong at 609. The DOJCD interventions identified in de Jong's 10-year review include “Operation Isondlo”; the introduction of electronic systems, such as the Justice Deposits Account System (JDAS) and Electronic Funds Transfer (EFF); and securing access to the TransUnion / ITC information system.

2.9 Despite the improvements introduced by the Act, de Jong identified areas in the maintenance system that still required improvement. She described them as follows: manpower, practices and procedures, training, infrastructure, attitudes, and the dynamics between different court officials.<sup>27</sup>

## ***B Issues***

### **1. General challenges in the maintenance system**

2.10 In this section, the challenges facing the maintenance system are identified. The purpose of doing so is to invite comment on the need for law reform and to identify possible solutions for problem areas. Questions are presented to stimulate discussion and proposals about how the problems should be addressed.

#### **a) Perceptions about the maintenance system**

##### **(i) Problem: how should challenges to the effectiveness of the maintenance system be addressed?**

2.11 Various legal commentators and people who work in the area of the law relating to maintenance have lamented the challenges that still exist with regard to the implementation of the Act. Some have pointed out that certain challenges relate more to the implementation of the Act rather than the provisions of the Act itself. The challenges around the implementation of the Act were also highlighted by the Constitutional Court in the *Bannatyne* judgment.<sup>28</sup> In that case the court argued that the insufficiency of the maintenance system compounded the denial of the rights of women and children.

2.12 Central to the issues raised are perceptions held by the Department's officials, lawyers and members of the public about maintenance issues. It is alleged that officials dealing with maintenance cases do not accord such cases the same status as other cases

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<sup>27</sup> De Jong at 609–614.

<sup>28</sup> *Bannatyne v Bannatyne* 2003 (2) BCLR 111 (CC)

which are dealt with by other courts (eg cases in civil courts). Consequently, officials working on maintenance issues feel they are wasting their time and talent in the maintenance court, to the extent that those who do work in that court have to be compelled to do so.<sup>29</sup> In other instances maintenance work is found to be less attractive to deal with, with the result that such maintenance matters are attended to only after attending to the ordinary criminal court roll.<sup>30</sup>

2.13 Over the years the DOJCD has demonstrated a clear shift in the way that it has been dealing with maintenance issues. The Department's commitment to deal decisively with maintenance issues is illustrated in its Strategic Plan for the years 2011 to 2016, as tabled in Parliament on 6 June 2011 wherein it outlined its plan on maintenance issues. The Strategic Plan outlines the following project-related activities to be undertaken:

1. Investigating Saturday courts for maintenance and other family related matters.
2. Introducing mediation services for maintenance matters.
3. Facilitating skills training for maintenance line managers and front line staff on maintenance norms and standards and the Maintenance Act.
4. Appointing additional maintenance investigators over 3 years.
5. Facilitating the appointment of maintenance complaints managers to fast track maintenance complaints received from the Presidential hotline and other sources.
6. Launching an improved media and awareness campaign.
7. Launching maintenance guidelines for the judiciary.
8. Introducing initiatives to address delays in the service of maintenance process documents.
9. Facilitating proposals to urgently amend the Maintenance Act to make provision for future maintenance, role clarification of maintenance officers and maintenance prosecutors[,] and a more effective way of enforcing maintenance orders.

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<sup>29</sup> Lund Committee Report at 50–51.

<sup>30</sup> Mamashela M 2006 *Obiter* 590–605 at 597.

2.14 The DOJCD also initiated other interventions to ensure compliance with the Act. First, around 2005 the DOJCD initiated a project dubbed “Operation Isondlo”<sup>31</sup> to address some of the challenges experienced with regard to implementation of the Act. This project was reportedly very successful and one of its highlights was the arrest of numerous maintenance defaulters who had long outstanding warrants of arrest. The arrests were made at roadblocks set up with the cooperation of the South African Police Services. Second, the Chief Directorate: Promotion of the Rights of Vulnerable Groups adopted a Turnaround Strategy<sup>32</sup> (the DOJCD Turnaround Strategy) to give effect to the Department’s Strategic Plan referred to above. The DOJCD Turnaround Strategy for the implementation of the Act is aimed at improving “service delivery at various service points in the current maintenance system.”<sup>33</sup>

2.15 In addition to improving the delivery of services and monitoring the implementation of the Act, the DOJCD Turnaround Strategy identified gaps in the Act that may require either law reform or the development and implementation of guidelines to assist users in implementing the Act.

2.16 Although the Department has demonstrated its good intentions with regard to improvements that need to be made in the maintenance system, a lot still needs to be done to change the perceptions of the public at large. Clearly, one cannot legislate a change in perceptions. However, the targeted education of court officials (both maintenance court officials and lawyers) as well as users of the system and the public will do much to improve the status of maintenance issues in society at large.

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<sup>31</sup> De Jong at 596–597. “Operation Isondlo” was a three-year project launched in December 2005, aimed at transforming the maintenance system. Some of the planned activities of the project were to decrease the backlog of maintenance cases, enforcement of the provisions of the Act, capacity building in courts, public education and awareness raising, and building relationships with communities and stakeholders. The project is ongoing and is mentioned in the Department’s Turnaround Strategy (referred to in note 31) at 5.

<sup>32</sup> Department of Justice and Constitutional Development “The Project Kha ri Unde: Maintenance Turnaround Strategy for the Speedy and Effective Implementation of the Maintenance Act, 1998.” Unpublished Report. The project is referred to in this paper as the DOJCD Turnaround Strategy.

<sup>33</sup> DOJCD Turnaround Strategy at 9.

**(ii) Suggested solutions and questions for comment**

2.17 This issue paper does not make specific proposals for resolving issues related to perceptions of the law on maintenance, other than to support the DOJCD interventions outlined above.

**b) Use of mediation in maintenance matters**

**(i) Problem: should mediation be introduced for maintenance inquiries?**

2.18 The South African legal system is adversarial in nature and this can result in lengthy and usually very costly legal processes. By and large, there is acknowledgement of and support for alternative dispute-resolving mechanisms such as conciliation, mediation and arbitration, which have been incorporated in other fields of law (eg labour and commercial law).

2.19 In recent years, mediation has been incorporated in pieces of legislation dealing with family law, such as the Children's Act<sup>34</sup> and the Child Justice Act.<sup>35</sup> The Children's Act provides for mediation before a case involving a child is referred to court. Section 69 (1) of the Act provides for the referral of a contested matter in the Children's Court for a pre-trial conference, which includes mediation between the parties, settlement of the dispute between the parties to the extent possible, and the definition of issues to be heard by the court. The provision is not peremptory as the court has discretion whether to refer such a contested matter or not. The Child Justice Act also provides for the manner in which to deal with children in conflict with the law. Section 9 (4) specifically provides for a meeting convened by a probation officer to establish the circumstances of the allegations against a child. Section 18 also provides for a preliminary inquiry where a child offender is involved. All these procedures provided for in the Act are a departure from the norm as special measures are encouraged when dealing with child offenders.

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<sup>34</sup> Act 38 of 2005.

<sup>35</sup> Act 75 of 2008.

2.20 The DOJCD has more recently published draft Mediation Rules that propose mediation for all contested court cases before they proceed to trial. This proposal for mediation is motivated by the prospect of speedy resolution of disputes without any formal adjudication or trial in court. To date, the draft Mediation Rules have not been approved by the Minister of Justice and are yet to come into operation.

2.21 Section 3 of the draft Mediation Rules provides for a mandatory referral to mediation of all civil cases where an appearance to defend has been filed. Despite mediation being mandatory, any party to the dispute may refuse to submit to mediation.<sup>36</sup> The consequence of a refusal to submit to mediation is that a court can award costs against the party that refused mediation, if the court finds that the refusal was unreasonable and that “mediation may have resulted in substantially the same finding as the court.”

2.22 The legal profession is divided on how to respond to the proposed court-based mediation. Opposition to mediation, where it comes from legal practitioners and attorneys, seems to be based on the fact that the process will take work away from them. In this regard they have proposed some amendments to the Rules, including (among other things):

- a) ensuring that mediation is not mandatory;
- b) allowing legal representation at mediation meetings; and
- c) delaying a referral to mediation for a later stage instead of after the filing of a notice of intention to defend.<sup>37</sup>

2.23 In other quarters, such as academia, there is support for mediation because of the benefits it will bring to dispute resolution. The supporting view is premised on the speedy resolution of disputes, and additional perceived benefits.<sup>38</sup>

2.24 Concerns around the introduction of mediation are not unique to South Africa. In the United Kingdom, where Alternative Dispute Resolution is also being proposed,

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<sup>36</sup> Section 6 of the draft Mediation Rules.

<sup>37</sup> Hawkey K. 'Mandatory Mediation Rules to shake up justice' *De Rebus* December 2011 20-21.

<sup>38</sup> Jordaan B. 'The Potential of Court Based Mediation' *De Rebus* March 2012 18-21.

concerns similar to ones raised in South Africa are being debated. Lord Justice Jackson, an architect of civil mediation, has suggested ways in which mediation can be assimilated into the system. These include not forcing parties to seek mediation, except in family matters; educating the public about the benefits of mediation; and introducing a structured cost regime for the process.<sup>39</sup>

2.25 The Department's support for mediation is validated by the development of a Maintenance Project in the DOJCD Turnaround Strategy, which incorporates mediation in the maintenance management chain. The DOJCD Turnaround Strategy also mentions that during the 2008–2009 financial year, the Chief Directorate: Promotion of the Rights of Vulnerable Groups conducted a pilot project in which mediation was introduced as a means to resolve maintenance disputes. This pilot project was reportedly a success as it led to a "speedy resolution of the matters and the mutual agreement by the parties to the solution."<sup>40</sup>

2.26 In line with its determination to incorporate mediation in the Maintenance Project, the DOJCD Turnaround Strategy proposes the development of a Maintenance Matters Protocol. This is because the Act makes no provision for mediation. The protocol is intended to foster agreement about including mediation for maintenance matters, and to ensure uniformity in all courts.<sup>41</sup>

2.27 Considering the successes that are possible through using mediation as a dispute-resolving mechanism, in this issue paper we propose that mediation processes should be explored and considered for inclusion in the Act.

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<sup>39</sup> John Hyde "Educate, don't mandate: Jackson on mediation"  
<http://www.law.gazette.co.uk/print/64635> Accessed on 12/03/2012

<sup>40</sup> DOJCD Turnaround Strategy at 19-20.

<sup>41</sup> DOJCD Turnaround Strategy at 26.

**(ii) Suggested solutions and questions for comment**

Clearly, some of the issues that prolong the maintenance process could be resolved amicably between the parties through mediation.

How should the principle of mediation be structured in maintenance matters?

Should the Act make provision for referring maintenance cases for mediation before they are referred to court for a formal inquiry?

Should the referral for mediation be mandatory in all maintenance cases?

Or should mediation be voluntary?

**c) Determination of maintenance awards**

**(i) Problem: how should maintenance awards be determined?**

2.28 The current maintenance system allows for a discretionary determination of maintenance awards. This determination is usually left in the hands of maintenance officers, who commonly oversee the negotiations between an applicant for maintenance and the party liable for maintenance as well as the magistrate who presides over the case. The Lund Committee Report found that maintenance awards are quite arbitrary and there is disparity in amounts that different courts grant or order in maintenance orders.<sup>42</sup> Furthermore, there is no logical explanation for the varied maintenance amounts that are awarded to various applicants for maintenance.<sup>43</sup>

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<sup>42</sup> Lund Committee Report at 50, wherein it is stated that courts in the Western Cape made widely varying awards; for example Mitchell's Plain, average R203.33; Athlone, average R219.83; and Wynberg, average R598.46.

<sup>43</sup> It is not clear why residential areas in the Western Cape would award different maintenance awards when they fall within the same geographical area. It is also not clear what measure was used by presiding magistrates in the different areas to determine that maintenance awards for a certain area should be a certain amount rather than any other amount.



2.29 As early as 1996 when the report of the Lund Committee on Child Support and Family Support was published,<sup>44</sup> it became clear that the discretionary system of maintenance was not desirable. In her report, Professor Lund mentioned the fact that maintenance awards made by the courts were found to fall below the household subsistence level, which itself was very low and inadequate to maintain the beneficiaries.<sup>45</sup>

2.30 An unpublished report on the research conducted by a non-governmental organisation (NGO) in Johannesburg states that most applicants at the courts where the research was conducted did not receive the amounts they had allegedly requested for maintenance.<sup>46</sup> The rejection by maintenance officers and magistrates of the specific amount requested is usually not explained. The report states that the problem is so extreme that some applicants for maintenance choose to forgo lodging maintenance claims because of the hurdles they encounter in the court system. In some instances the maintenance officers and magistrates allegedly take into account the government child support grant when determining the maintenance amount to be awarded.<sup>47</sup> In a few cases, it was alleged that the court's decision to award a lower amount was followed by advice from court officials for the applicant to supplement this amount with the child support grant.

2.31 Based on the research findings referred to above and anecdotal statements by the users of the maintenance system, it appears that the process of determining a maintenance amount can be equated to a bargaining process. In such a scenario, the outcome of a case may lie in the hands of court officials and bear little relationship to the actual needs of a child. The process would not be based on the principle that the parents, especially the non-custodial parent, must contribute towards the maintenance of the child in accordance with their (the parents') means. The ripple effect is that the parent who is

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<sup>44</sup> Lund Committee Report at 44.

<sup>45</sup> Lund Committee Report at 45.

<sup>46</sup> ProBono.Org "An Assessment of ProBono.org's Maintenance Project at four courts in Gauteng" March 2012 (Unpublished Report) at 34. This report will be referred to as the Probono Report. Probono.org is an NGO based in Johannesburg. One of the objectives of the organisation is to provide access to justice in the form of free legal services to marginalised communities. The research in the Report was conducted to evaluate the work done by its maintenance help desks based at four maintenance courts in the Gauteng province, namely Alberton, Roodeport, Vanderbyl and Vereeniging.

<sup>47</sup> Probono Report at 36.

liable for paying maintenance ends up not contributing appropriately or – most importantly – according to his or her means.

2.32 More often than not, the consequence of the discretionary determination of maintenance is that the custodial parent (who is claiming maintenance) does not receive an award that is appropriate and adequate for the maintenance of the child or children for whom maintenance is claimed.

2.33 The DOJCD Turnaround Strategy mentions the development of a practical calculation guide to determine maintenance contributions.<sup>48</sup> The current SALRC investigation will examine the development of this calculation guide, and will assess its status and whether it is being implemented.

## **(ii) Comparative overview**

2.34 Various jurisdictions in developed countries have methods for determining maintenance amounts. This issue paper will briefly look at the methods currently used in Canada and Australia. The choice of these two countries was based on the fact that they are commonwealth countries which have model formular based maintenance systems.

### **Canada**

2.35 In Canada, the federal government developed guidelines for calculating the maintenance contribution that should be paid by each parent.<sup>49</sup> Before the adoption of the Canadian Child Support Guidelines (the Canadian Guidelines) in 1997, the approach in that country was similar to that followed in South Africa, which is based on judicial discretion and the needs of the child. In South Africa, although the Act provides for maintenance support based on the “means” of the parent liable to pay maintenance, focus has always been on the earnings of that parent to the exclusion of other aspects such as his or her assets and property.

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<sup>48</sup> DOJCD Turnaround Strategy at 6.

<sup>49</sup> Cannelley M and Easthorpe J 2009 *Orbiter* 370–380 (at 370).

2.36 In terms of the Canadian Guidelines, both parents are regarded as having a joint responsibility to support their children. The aim of the Canadian Guidelines is to ensure that the child benefits from the support of both parents. There is an understanding that support from both parents means different things for the custodial and non-custodial parent. For example, the non-custodial parent pays maintenance whereas the custodial parent provides a home.<sup>50</sup>

2.37 The approach introduced by the Canadian Guidelines reduces judicial discretion in determining maintenance amounts. The guidelines provide a formula for calculating the maintenance that a non-custodial parent should be required to contribute. The calculation is performed by computer software, using the annual income of the non-custodial parent as the main variable. Necessary and legitimate deductions such as for taxes are included in the calculation. The average expenditure for raising a child was calculated through economic studies; however, the court is able to intervene to adjust the figures to account for possible income fluctuation or loss that may be experienced by some parents. What this means is that judicial discretion is retained but not as a matter of principle.<sup>51</sup>

## **Australia**

2.38 Australia is another country that has developed a policy to respond to the needs of the children of separated parents. The Australia Child Support Scheme was introduced in 1998 to address the issue of the living standards of resident parents and their children. In calculating the amount of money that the non-resident parent is required to pay, certain factors are taken into account, such as the number of children for whom a parent is liable to pay child support; the income of the payer (capacity to pay); whether the care of the children is shared and divided between the parents; the respective incomes of the resident and non-resident parents (above a relatively high income threshold); and whether the payer also has dependent children from a previous or subsequent relationship.<sup>52</sup>

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<sup>50</sup> Note 48 at 376.

<sup>51</sup> Note 48 at page 377.

<sup>52</sup> Australian Government "The impact of child support on the labour supply demands of resident mothers" <http://www.aifs.au/institute/pubs/rp47c.html> (accessed 30 July 2012)

2.39 The Child Support Scheme uses a formula to calculate what the non-resident parent is required to pay. The figure is calculated as a percentage of that parent's annual income, minus legitimate exemptions on that income, with the percentage of income depending on the number of children involved. Child support percentages are calculated as follows: 18% for one child, 27% for two children, 32% for three children, 34% for four children, and 36% for five children. The maximum number of children for whom child support is paid is five. In cases of shared parenting, the percentages will vary. The exempt income of the non-resident parent is increased where that person is in a new relationship and has other children from that relationship.<sup>53</sup>

2.40 In the Australian system, family support can be sought administratively through the Child Support Agency, judicially through the Australian Family Court, or privately through private agreements between the parties. In all scenarios, research has shown that the formula provided for in the Child Support Scheme has been relied upon to arrive at the amounts which parents must pay for child support.<sup>54</sup>

2.41 The experiences of other jurisdictions have been looked at so that various methods for determining maintenance amounts can be understood. The use of formulas can bring certainty to users of the maintenance system. If the awards are predictable it is often relatively easy to resolve certain disputes without referring them for a formal inquiry. The SALRC has resolved to study the maintenance systems of Canada and Australia, which make use of formula-based models, before it makes recommendations for local law reform.

2.42 Given the wide range of methods that have been used in South Africa and other countries to determine maintenance awards, we believe that discretionary determinations which do not have any scientific basis may not meet the needs of the children for whom maintenance is claimed. The Act currently has a gap because it lacks a clear prescription or calculation guideline for determining the monetary value of a maintenance award. This shortcoming can be cured by moving from a discretionary system to a formula-based system.

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

**(iii) Suggested solution and questions for comment**

A discretionary system of maintenance is not reliable as it is not scientific and can therefore lead to unintended consequences. There is a need for consistency in how maintenance awards are calculated.

Should the Act allow or prescribe a formula-based system for determining maintenance awards, instead of the current discretionary system?

Should the Act provide for the development of separate guidelines for calculating maintenance amounts? This would ensure that possible amendments of such guidelines are relatively easy in the future.

**d) Recognising additional forms of payment of maintenance claims****(i) The problem: should additional forms of maintenance payment be allowed?**

2.43 South Africa is a diverse country whose population is widely spread geographically. The country has both urban and rural settings, with the majority of the population based in urban areas. Among people who live rurally, most of them subscribe to customary laws that regulate their daily lives.

2.44 The Constitution recognises the rights of minorities, including the rights of persons who belong to cultural and linguistic communities.<sup>55</sup> This provision in the Constitution extends to protecting a cultural community to practise its culture without any interference. In simple terms, this means allowing people of a particular group to live their lives according to their cultural beliefs and values.

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<sup>55</sup> Section 31 of the Constitution.

2.45 The current Maintenance Act, which is very sophisticated, may not meet all the needs of communities based in rural settings. This is partly because the courts usually determine maintenance amounts in monetary terms, which might not be compatible with the way things are done in rural settings.

2.46 In rural communities the wealth of a person is not determined or measured by his or her shares and annuities in companies or savings in pension funds, but by the livestock that person possesses. Certain people against whom maintenance claims are made may be able to provide maintenance for their children, but not in the form that is recognised and assumed by users of the maintenance system.

**(ii) Suggested solution and question for comment**

Should the investigation look at incorporating the payment of maintenance claims in forms other than monetary?

**e) Consequences for defaulting on maintenance obligations**

**(i) Problem: should consequences for maintenance defaulters be broadened?**

2.47 A serious challenge in implementing the maintenance system has been the limited ability to enforce maintenance orders. Over the years, the Department has lamented the high rates of failure by maintenance debtors to comply with their maintenance obligations. The enforcement of maintenance orders is important to secure the rights of children and promote the rights of women; it is also critical for upholding the values enshrined in the Constitution.<sup>56</sup>

2.48 Various interventions have been explored to improve South Africa's maintenance system and bring maintenance defaulters to book. One such intervention is the DOJCD's "Operation Isondlo" project. Among other things, this project succeeded in apprehending

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<sup>56</sup> *Bannatyne* at 377E-G.

maintenance dodgers and arresting them at roadblocks and compelling them to pay maintenance in terms of the orders granted against them.

2.49 The previous maintenance regime focused on criminal enforcement mechanisms to ensure that people complied with their maintenance obligations. The newer Maintenance Act under review introduced (among other innovations) civil enforcement mechanisms, and restated parts of the criminal sanctions available in the old legislation, such as the 1963 Maintenance Act.

2.50 Civil enforcement mechanisms are contained in section 26 of the Act. Section 26 provides as follows:

**Enforcement of maintenance or other orders**

- 26 (1) Whenever any person-
- (a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or
  - (b) against whom any order for the payment of a specified sum of money has been made under section 16 (1) (a) (ii), 20 or 21 (4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-
    - (i) by executing against property as contemplated in section 27;
    - (ii) by attachment of emoluments as contemplated in section 28; or
    - (iii) by attachment of any debt as contemplated in section 30.
- (2) (a) If any maintenance order made under this Act or any order made under section 16 (1) (a) (ii), 20 or 21 (4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where any such order was made-
- (i) for an authorisation of the issue of a warrant of execution referred to on section 27(1);
  - (ii) for an order for the attachment of emoluments referred to in section 28 (1); or
  - (iii) for an order of the attachment of any debt referred to in section 30 (1)
- ...
- (4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.

The section prescribes various ways through which maintenance orders can be enforced. These include execution against property and the attachment of emoluments or debt owing to the maintenance debtor. Section 26 (4) goes further and extends to items that are susceptible for attachment where there has been a failure to comply with a maintenance order. This subsection provides for the attachment of “any pension, annuity, gratuity or compassionate allowance or other benefit” due to the person against whom a maintenance order has been made.

2.51 The provisions of section 26 seem to suggest that once all the remedies available in section 26 (1) and (4) have been explored, that is the end of the road for the maintenance creditor as far as civil remedies are concerned. The Commission submits that this should not be the case. It appears that the practice followed to enforce judgments made by the civil courts is not equally pursued for maintenance orders. However – and this is the reason for the Commission’s submission, section 24 (2) provides that an order made by a maintenance court has the same effect as a civil judgment.

2.52 It is common knowledge that in civil matters, where an order has been granted against a debtor, the judgment creditor or credit provider has the choice to proceed by way of blacklisting the name of the debtor until the debt has been paid in full. The dire consequence of this action is that the debtor is unable to access credit until his or her name is removed from the relevant credit bureau. The corollary is that credit providers are prohibited from providing credit to blacklisted debtors.

2.53 The process followed in civil matters or civil judgments is not extended to maintenance court judgments or maintenance defaulters, despite the court order being equivalent to that granted by a civil court. The remedy closest to that available for civil judgments is contained in section 31 (4) of the Act. This section deals with offenses relating to maintenance orders and provides as follows:

31 (1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.

(2) If the defence is raised in any prosecution for an offense under this section that any failure to pay maintenance in accordance with a



maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of such defence be entitled to an acquittal if it proved that the failure was due to his or her unwillingness to work or misconduct.

(3) If the name of the person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by the person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the maintenance order was made, shall on its production be *prima facie* proof of the fact that the maintenance order was made against the person so prosecuted.

(4) If a person has been convicted of an offence under this section, the maintenance officer **may**, notwithstanding anything to the contrary contained in any law, furnish that person's (sic) personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons. (Emphasis added)

2.54 Section 31 (1) provides that any person who has failed to make a payment in accordance with a maintenance order is guilty of an offence, and is liable on conviction to a fine or imprisonment. This means that where a person has failed to pay maintenance in terms of a maintenance order, they have to be brought into the criminal justice system to compel them to comply with the order, and if they fail to comply they are found guilty and are liable on conviction to a fine or imprisonment.

2.55 Section 31 (4) allows for the handing over of the details of a defaulter to businesses that grant credit or which conduct credit ratings, only after a conviction. In other words, a conviction envisaged in subsection (1) has to precede the process of handing over the details of the maintenance defaulter to businesses that grant credit or conduct credit ratings.

2.56 Even the sanction of handing over the details of the maintenance defaulter to a credit grantor or a business involved in credit rating is not peremptory. In cases where there is a conviction for failing to pay maintenance in terms of a maintenance order, the defaulter might be able to walk away scot-free, because the discretion to hand over a person's particulars lies with the maintenance officer.

2.57 The principle set out in section 31 (4) is a clear departure from the rule applicable in civil judgments, where the handing over of the particulars of debtors occurs as soon as

the civil judgment is granted by the court. This anomalous situation means that as long as the maintenance defaulter has not been brought to court and found guilty of an offence, he (or she) may be able to live his life with disregard for the needs of the beneficiaries he is liable to maintain.

2.58 Undoubtedly there is a need to embrace the sentiment set out in section 31 (4), but not in the context of section 31. There is no plausible reason why, in cases where there is an order for maintenance, the process should first be subjected to a criminal process before the judgment debtor's details are handed over to businesses that grant credit or conduct credit ratings. This delay in making sure that the judgment debtor is held accountable for paying the maintenance that is due and payable only prejudices the people who are dependent on such maintenance for their livelihood.

3.59 We submit that the provision in section 31 (4) is misplaced, and should rather form part of section 28 which deals with the civil enforcement of maintenance orders.

**(ii) Suggested solution and question for comment**

Should section 31 provide for the handing over of details of maintenance defaulters to credit rating agencies immediately after a maintenance order is granted? In other words, should the conversion to criminal proceedings to get a conviction, before the particulars of the defaulter are handed over to credit grantors or credit rating agencies, be scrapped?

Or is there a need for a process (criminal conviction) to precede the handing over of a defaulter's particulars to credit grantors and credit rating agencies?

## **2. Challenges identified by the Department of Justice and Constitutional Development**

2.60 In addition to the many challenges that have been identified by various stakeholders, including the SALRC, this issue paper will focus on matters specifically

raised by the Department of Justice through the then Minister. The Minister requested that these matters be considered for law reform.<sup>57</sup>

2.61 As stated in paragraph 1.7 of this paper, in addition to looking at further issues which the SALRC may identify for law reform, this investigation will give attention to pertinent issues identified by the Commission. The latter group includes future maintenance, *locus standi*, appointment of maintenance officers, the power of arrest by maintenance investigators, civil execution, and trusts.

2.62 Two other issues, although not requiring law reform, are included in this issue paper to solicit and canvas the views of stakeholders. The SALRC would like to learn more about these issues and the challenges associated with them, and would like to hear ideas about resolving these problems. These issues pertain to cost orders and choice of remedy.

**(a) Future maintenance**

**(i) Problem: should the Act provide for an application for future maintenance?**

2.63 The DOJCD contends that the Act does not regulate future maintenance, as it does not provide clarity on when an application for future maintenance can be made. Further, that the Act does not indicate who is responsible for administering the benefits that are eligible for attachment or execution under a warrant, such as any pension benefit, annuity, gratuity or compassionate allowance or other similar benefit. Similarly, the DOJCD contends that the issue of future default amounts which arise because of the protracted process prescribed by the Act needs to be looked at. Compensation for such shortfalls, or for shortfalls which arise through delays caused by having to obtain an execution order or by the lengthy execution process, need to be provided for in the Act (see paragraph 2.78 below).

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<sup>57</sup> In its proposal paper, approved by the Commission on 22 October 2011, the SALRC made a recommendation that it would not investigate all issues that the Minister had referred to the SALRC for investigation. In this regard see Chapter 1 of the issue paper, paragraphs 1.5 to 1.8.

2.64 As the law currently stands, the Act provides for the recovery of arrear maintenance<sup>58</sup> and maintenance that is required for the present needs of the beneficiaries. Similarly, the provisions of section 26 of the Act,<sup>59</sup> which deals with enforcement of maintenance orders, do not allow an applicant for maintenance to claim future maintenance from the party that has an obligation to maintain the beneficiaries. This matter has so far been left to the courts to exercise their discretion in making decisions about whether or not to make an order for future maintenance.

2.65 Section 26 referred to above suggests that an enforcement claim can only be made where there is default following an order for maintenance. This process is not forward looking and does not deal with issues of future maintenance that are not yet due and payable.

**(ii) Recent South African case law**

2.66 Various cases exist where presiding officers have made findings on future maintenance, and this is a step in the right direction. The following cases illustrate instances where various courts have used their discretion in making orders for future maintenance, despite the absence of a provision dealing with this issue in the Act.

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<sup>58</sup> Section 40 (1) provides for the recovery of arrear maintenance where a person has been convicted in terms of section 31(1) for failing to pay maintenance in terms of a maintenance order. Even in section 26 (4), which provides for the attachment of pension, annuity, gratuity or compassionate allowance or similar benefit, the attachment is aimed at enforcing compliance with a maintenance order – which in the context of Chapter 5 of the Act means arrear maintenance.

<sup>59</sup> Section 26 (1) relates only to arrear amounts or specified amounts of money. Section 26 (1) of the Act provides as follows:

26 (1) Whenever any person-

- (a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or
- (b) against whom any order for the payment of a specified sum of money has been made under section 16 (1) (a) (ii), 20 or 21 (4) has failed to make such a payment, such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-

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2.67 In *Mngadi v Beacon Sweets and Chocolate Provident Fund*,<sup>60</sup> the father had defaulted on maintenance payments for his minor children. The father had in fact voluntarily stopped working precisely so that he would not be expected to pay maintenance. An application for execution against the father's pension was unsuccessful, because the Pension Fund Adjudicator was of the view that the said funds were not regulated by the Maintenance Act. On appeal to the High Court, the Court ordered that the said money be attached to pay for future maintenance of the children.

2.68 In the *Magewu v Zozo*<sup>61</sup> case, the father was not responsible for losing his job; he had been retrenched. What the court had to decide was whether his pension fund money and retrenchment package could be withheld from him, so as to benefit (be paid out to) individuals that he was responsible for maintaining. The court ordered the attachment of the father's benefits to secure his child's future maintenance claims.

2.69 In other similar cases, courts have attached annuities or the proceeds of the sale of immovable property to secure the future rights of children. In *Soller v Maintenance Magistrate, Wynberg*,<sup>62</sup> the High Court granted an interdict to prevent the maintenance defaulter from making withdrawals from his annuity; this interdict secured the future maintenance of his child. The court further directed the fund to make periodic payments to the maintenance applicant for the benefit of the child. What had transpired in the matter is that a divorce court had granted an order for maintenance, which the maintenance debtor had not complied with. The applicant for maintenance had discovered that the debtor was making withdrawals from his annuity fund, to the detriment of the rights of the child he was ordered to maintain. The maintenance court had turned down her application for an order of attachment on her ex-husband's annuity; the court stated that it did not have the jurisdiction to make such an order. The applicant then approached the High Court for an interdict, the terms of which were as described above. Her application was successful.

2.70 In *Burger v Burger*,<sup>63</sup> the High Court granted the applicant an interdict prohibiting payment to her ex-husband the proceeds of sale of an immovable property. The applicant's ex-husband had fallen into arrears in his maintenance payments as ordered by

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<sup>60</sup> [2003] 2 All SA 279 (D).

<sup>61</sup> 2004 (4) SA 578 (C).

<sup>62</sup> 2006 (2) SA 66 (C).

<sup>63</sup> 2006 (4) SA 414 (D).

the divorce court. The court in this case acknowledged that there was no precedent for it to grant an attachment to secure future maintenance. However, the court held that there was scope for the extension of the Maintenance Act for it to make such an order, as the court could exercise its inherent powers to grant an order and would be entitled to award under common law.

2.71 The common thread in the cases referred to in paragraphs 2.67 to 2.70 above is that orders for future maintenance were granted by High Courts in various Provincial Divisions. In all cases, the maintenance courts had been unable to assist the applicants for maintenance, mostly because the Act lacks a provision that permits attachments for future maintenance.

2.72 The cases described here illustrate the need for future maintenance to be regulated by the Act in much the same way as arrear maintenance. If benefits such as pension, annuities, gratuity or compassionate allowances and other similar benefits can be attached to recover arrear maintenance, the same should be possible with regard to future maintenance. Both types of claim are aimed at securing the rights of maintenance beneficiaries.

2.73 The Act's failure to deal with future maintenance is identified by the DOJCD Turnaround Strategy as an area requiring attention.<sup>64</sup> The Maintenance Project is currently devising a multi-pronged strategy to close the gap left by the Act. First, the Chief Directorate is engaging the Office of the Chief Master to put in place processes to enable the Guardians' Fund to cater for funds received on behalf of future maintenance beneficiaries. Second, the Department is considering developing guidelines for the processes that are needed to manage funds for future maintenance. Third, the Department will hold workshops for magistrates to develop and agree on the best practice for dealing with future maintenance.

2.74 It is encouraging to note that the courts have taken a lead in rectifying this anomaly in the legislation. It is fact that the Act is silent or does not regulate future maintenance. But however noble the endeavours of the courts, a legislative prescription is required to

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<sup>64</sup> DOJCD Turnaround Strategy at 41–42.

ensure that, first, there is consistency in the orders made by the various courts for future maintenance; and secondly, to ensure that the rights of beneficiaries are protected from errant maintenance debtors – who would otherwise squander the money that would accrue to them in the future.

2.75 Although there seems to be consensus that the rights of children should be secured by attaching pension funds for future maintenance, some commentators maintain that this type of attachment should remain an exception rather than become the rule.<sup>65</sup> They argue that the attachment of pension benefits should be applied only in cases where maintenance debtors have demonstrated their intention not to comply with their obligations. They further argue that the applicant would have to prove that the maintenance debtor will dissipate the funds and thereby obstruct the beneficiaries' maintenance claims.

2.76 If the persistent and widespread concerns of maintenance beneficiaries and commentators are to be addressed, the issue of future maintenance cannot be left purely to the judiciary to decide.

2.77 The question that the Department raises about the administration of funds from sources such as pension funds, annuities, gratuities or compassionate allowances or similar benefits is valid. The Department has already begun to create interventions, and the Office of the Chief Master has been approached with the request that it administer such funds.

2.78 The issue that the Department raises about future default amounts which arise because of delays in the execution process also needs to be investigated, and a solution must be sought. Ordinarily, when default amounts arise because of the lengthy legal process, the applicant cannot deal with the increased amount in the same attachment under execution, as the new amount would not be contained in the original order. Surely this is a problem which should be investigated.

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<sup>65</sup> Sigwadi 2005 *SAMLJ* at 346.

**(iii) Suggested solution and questions for comment**

The law as it stands regulates only arrear and current maintenance; it does not regulate future maintenance. This poses a challenge in situations where there is reason to believe that the person responsible for paying maintenance will not honour his or her future maintenance obligations.

- Should the law regulate the issue of future maintenance and provide clear prescription on how this maintenance should be regulated? (in the same way as arrear maintenance is regulated).
- Is the Guardians' Fund an appropriate institution to administer funds for future maintenance? If not, which body or authority is best placed to administer these funds?
- How should the Act deal with future default amounts that arise because of the delay inherent in the execution process?

**(b) *Locus standi*****(i) Problem: should child beneficiaries have *locus standi* in maintenance cases?**

2.79 The issue of *locus standi* for maintenance beneficiaries who have reached the age of majority is not provided for in the Act. Specifically, the Act does not pronounce on who has *locus standi* in maintenance cases where a child beneficiary has reached the age of majority but still depends on his or her parents for support. The Act also does not specify what needs to be done in cases where a child who has reached the age of majority refuses to claim maintenance from the responsible parent.

2.80 Current law provides that a claim for maintenance can be made by a person who is owed a duty of support by someone else when they cannot support themselves. It is



assumed that the said duty of support is available either to minors who have to be cared for by their parents, or to adults who cannot support themselves due to reason of divorce and other related circumstances.

2.81 Section 2 (1) of the Act provides that "...this Act shall apply in respect of the legal duty of any person to maintain any other person irrespective of nature of the relationship between those two persons giving rise to that duty". Section 2 (2) goes further and provides that "[t]his Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons."

2.82 The interpretation of the abovementioned provisions is that whoever is responsible for taking care of another person, including an adult child, can make a claim for maintenance on that person's behalf.

2.83 Nowhere in the Act is there express provision made for the regulation of claims for maintenance by children who have reached the age of majority but are unable to support themselves. Because the common law duty of support prescribes that parents have a duty to support their children when they are unable to do so themselves, the assumption arises that this duty extends beyond the age of majority if the dependant is unable to support him- or herself. In other words, the duty of support is not time-bound and does not depend on the age of the child.<sup>66</sup> In *Kemp v Kemp*<sup>67</sup> the court held that the duty of support did not terminate when the child reached a particular age but that it might terminate after the age of majority.<sup>68</sup> The decision in the Kemp judgment was confirmed in *Burse v Bursey*,<sup>69</sup> where the Supreme Court of Appeal ruled that the duty of support continues until the beneficiary being maintained becomes self-supporting, even if this occurs only after they attain majority.<sup>70</sup>

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<sup>66</sup> Botha 2008 *SALJ* at 715-716.

<sup>67</sup> 1958 (3) SA 736 (D & CLD).

<sup>68</sup> *Kemp v Kemp* at 737 H.

<sup>69</sup> 1999 (3) SA 33 (SCA).

<sup>70</sup> *Burse v Bursey* at 38C-D.

2.84 The challenge becomes more apparent in situations where a beneficiary child has reached the age of majority but is still unable to support him- or herself. In such instances the pertinent question becomes “Who bears the responsibility to institute the claim for maintenance?” The challenge is exacerbated in situations where the beneficiary child who has reached the age of majority refuses or is unable to claim maintenance against the parent responsible to support him or her.

2.85 Certainly this may require some form of regulation by way of a provision in the Act to safeguard the interests of the child and of the custodial parent who needs support from the non-custodial parent.

**(ii) Suggested solutions and question for comment**

The scenario in which an adult child still requires support from the parent responsible for maintaining them is not dealt with in the Act.

Should the Act contain a provision that specifically prescribes that the Act applies to cases where an adult child is unable to support him- or herself?

**(c) Appointment of maintenance officers**

**(i) Problem: should there be one cluster of maintenance officers, that is, officers appointed either by the DOJCS or by the National Prosecuting Authority? Or should maintenance officers be appointed by both institutions?**

2.86 The provisions relating to the appointment of maintenance officers are a challenge that may lead to unintended consequences. Section 4 of the Act provides for the appointment of maintenance officers by the Director of Public Prosecutions (DPP) from a pool of prosecutors, whereas other officers can be appointed by the Minister or any delegated official of the DOJCS.

2.87 Section 4 provides as follows:

4.(1) (a) Any public prosecutor to whom a Director of Public Prosecutions has delegated the general power to institute and conduct prosecutions in criminal proceedings in a particular magistrate's court shall be deemed to have been appointed as a maintenance officer of the corresponding maintenance court.

(b) The National Director of Public Prosecutions shall, in consultation with the Minister, issue policy directions with a view to –

(i) establishing uniform norms and standards to be observed by public prosecutors in the performance of their functions as maintenance officers under this Act; and

(ii) building a more dedicated and experienced pool of trained and specialised maintenance officers.

(c) The Minister shall cause a copy of any policy directions issued in terms of paragraph (b) to be tabled in Parliament as soon as possible after the issue thereof.

(2) Subject to the laws governing the public service, the Minister, or any officer of the Department of Justice authorised thereto in writing by the Minister, may appoint one or more persons as maintenance officers of a maintenance court –

(a) to appear in the maintenance court in proceedings under this Act; and

(b) to exercise or perform any power, duty or function conferred upon or assigned to maintenance officers by or under this Act. (Emphasis added)

2.88 The maintenance officers that are appointed in terms of section 4 (1) are prosecutors, delegated by the DPP to act as maintenance officers in the designated maintenance courts located in their respective magistrates' courts. By contrast, section 4 (2) provides for the appointment of maintenance officers by the Minister or any other officer of the DOJCD.

2.89 The appointment of some maintenance officers by the DPP and others by the Minister or a designated official of the DOJCS leads to unclear lines of accountability, discrepancies in qualification requirements, and disparities in remuneration.

2.90 Thus, the appointment of maintenance officers in terms of section 4 subsections (1) and (2) does cause some confusion. At the centre of the confusion are issues around what criteria should be used when such appointments are made. Ideally prosecutors should not be designated maintenance officers simply by virtue of them being employed in the magistrates' courts where the maintenance courts are located.

2.91 There should be specific requirements for a person to qualify as a maintenance officer. Except for the maintenance officers appointed in terms of section 4 (1), there are

no specific requirements for maintenance officers appointed in terms of section 4 (2). Research has shown that some maintenance officers currently appointed in terms of subsection (2) do not have legal qualifications, despite such qualifications being crucial for understanding the provisions of the Act they are expected to implement. In addition, there is a perceived dilemma created by appointing prosecutors to do maintenance court work; prosecutors are specialists in criminal law and are employed to prosecute criminal matters adjudicated upon in their courts. It is therefore unacceptable to designate prosecutors to act as maintenance officers, whose functions are more civil in nature.

2.92 The challenges created by having two categories of maintenance officers are a concern to the Department. The DOJCD Turnaround Strategy proposes to address these challenges while awaiting law reform, which the Department acknowledges is a lengthy process.<sup>71</sup> The Maintenance Project aims to initiate a consultative task team that will develop directives to align aspects such as the following:

- requirements for the appointment of maintenance prosecutors and maintenance officers;
- clarification of roles, responsibilities and reporting lines; and
- the mentoring and learnership programme.

**(ii) Suggested solutions and questions for comment**

The appointment of maintenance officers as made either by the Department or from among the ranks of prosecutors is not ideal, because the lines of accountability become unclear. It also leads to a situation where maintenance officers doing the same job have to comply with different qualification requirements depending on which authority appoints them.

- Should prosecutors be appointed (designated) as maintenance officers, as is currently the practice?
- or*
- Should maintenance officers be appointed from the ranks of legally qualified

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<sup>71</sup> DOJCD Turnaround Strategy at 40.

**(d) Power of arrest by investigating officers****(i) Problem: should the Act provide for investigating officers to have power of arrest?**

2.93 In terms of the current Act, maintenance investigators do not have the power to arrest maintenance debtors. This situation is a hindrance, considering the amount of time it usually takes for maintenance investigators to trace and finally locate maintenance debtors.

2.94 The Department is of the view that justice would be better served if maintenance investigators had the power to arrest maintenance debtors or defaulters who try to evade the law.

2.95 The Criminal Procedure Act<sup>72</sup> regulates the power of arrest by peace officers and by private individuals. Section 40 regulates arrests by peace officers, whereas section 42 regulates arrests by private individuals.

2.96 The provision/s that allow for an arrest by citizens (other than people working in the security cluster) is aimed at ensuring that people who are suspected of breaking the law can be apprehended.

2.97 On the face of it, extending the power of arrest to maintenance investigators would ensure that they are able to apprehend and bring to justice those errant maintenance debtors who would otherwise not be brought to justice for a long time.

2.98 There are other pieces of legislation, such as the Domestic Violence Act,<sup>73</sup> that empower a peace officer to arrest a person who is reasonably suspected of having committed an offence with an element of violence against the complainant.

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<sup>72</sup> Act 51 of 1977.

2.99 Other jurisdictions such as the United Kingdom (UK) have provisions that allow for arrests to be effected by any persons. The UK Police and Criminal Evidence Act 1984 provides for “any person arrest.” In terms of that Act, any person can arrest another person so as to assist in apprehending law breakers.

**(ii) Suggested solutions and questions for comment**

2.100 Having regard to the provisions of the Criminal Procedure Act and the Domestic Violence Act, the SALRC submits that the power to arrest maintenance debtors should be extended to maintenance investigators. This can be done by inserting a provision in the relevant Act. It is critical to ensure that maintenance investigators are able to implement the provisions of the Maintenance Act optimally.

2.101 The crafting of the said provision should ensure that it provides safeguards against abuse of this power by maintenance investigators, something that the Department may be held accountable for.

Maintenance investigators expend a lot of time and resources to locate a person who is required to pay maintenance. There are currently no measures in place to ensure that once a maintenance debtor has been located, he or she can be brought to book by maintenance investigators. The role of apprehending people who avoid their maintenance obligations lies with the Police Service; currently only the police have the power to arrest fugitives from justice.

- Would it be appropriate for the Act to grant powers of arrest to officers who investigate maintenance cases?

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<sup>73</sup> Act 116 of 1998.

**(e) Civil execution and other procedural matters**

2.102 The Department has identified a number of areas that need to be looked at with regard to the provisions dealing with civil execution. Some of these areas, such as choice of remedy and costs, have been dealt with separately. This section of the issue paper deals with issues that the Department has identified with regard to the following:

- the attachment of movable property;
- procedural matters related to holding a financial inquiry; and
- the proposal for rules to clarify the execution process.

**(i) Execution of movable property**

**(aa) Problem: should the Act specifically indicate what types of movable property are susceptible to execution?**

2.103 The Department is concerned that the Act does not properly identify movable property that is susceptible for attachment. The Department proposes that the remedy in relation to execution against movable property needs to be more specific; that is, the Act must specify movable property that is susceptible to attachment

2.104 Section 27 of the Act, which provides for warrants of executions, prescribes that the maintenance court can –

authorise the issue of a warrant of execution against the movable property of the person against whom a maintenance or other order in question was made and if the movable property is insufficient to satisfy such order, then against immovable property of the latter person to the amount necessary to recover the amount which the latter person has failed to pay...

2.105 Rule 41 of the Magistrate's Court Rules provides as follows:

**Execution against movable property**

41. (1) (a) The sheriff shall, upon receiving a warrant directing him or her to levy execution on movable property, repair to the residence, place of employment or business of the execution debtor or to another place pointed out by the execution creditor where movable property is to be attached as soon as circumstances permit, and there demand payment of the judgment

debt and costs or else require that so much movable property be pointed out as the said sheriff may deem sufficient to satisfy the warrant, and if such last-mentioned request be complied with the sheriff shall make an inventory and valuation of such property.

(b) If the property pointed out in terms of paragraph (a) is insufficient to satisfy the warrant, the sheriff shall nevertheless proceed to make an inventory and valuation of so much movable property as may be pointed out in part execution of the warrant.

(c) If the execution debtor does not point out any property as required in terms of subrule (1), the sheriff shall immediately make an inventory and valuation of so much of the movable property belonging to the execution debtor as he or she may deem sufficient to satisfy the warrant or of so much of the movable property as may be found in part execution of the warrant.

(d) If on demand the execution debtor pays the judgment debt and costs, or part thereof, the sheriff shall endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by him or her and counter-signed by the execution debtor or his or her representative.

(2) So far as may be necessary to the execution of any warrant referred to in subrule (1), the sheriff may open any door on any premises, or of any piece of furniture, and if opening is refused or if there is no person there who represents the person against whom such warrant is to be executed, the sheriff may, if necessary, use force to that end.

(3) The sheriff shall exhibit the original warrant of execution and shall hand to the execution debtor or leave on the premises a copy thereof.

(4) As soon as the requirements of this rule have been complied with by the sheriff, the goods inventoried by him or her shall be deemed to be judicially attached.

...

2.106 The execution process in the maintenance system is undertaken in terms of the Magistrates' Court Rules. These rules do not provide for the identification of movable property susceptible to attachment.

2.107 We submit that the identification of such movable property may in any event not facilitate the execution process, because it is highly likely that those maintenance debtors who are prone to defaulting would always make sure that the movable property they possess is not of a type susceptible to attachment. In the alternative, what would be the object of having the executable property identifiable? And what would be the recourse of a maintenance applicant if the defaulter possesses no movable property that is prescribed for attachment, but does possess other movable property that is not prescribed; that is, where only non-prescribed property is available for execution?



**(bb) Suggested solutions and questions for comment**

Should the execution process make provision for the attachment of identified movable property?

That is, should there be a category of “movable property that is liable for attachment” which would exclude other types of movable property?

**(ii) Holding a financial inquiry****(aa) Problem: should the Act specifically provide for holding a financial inquiry?**

2.108 The Department has raised a concern about the absence in the Act of a provision to deal with holding a financial inquiry. The details of this concern are not clear.

2.109 The reading of the Act indicates that various provisions in the Act do provide for a financial inquiry. These are sections 6 (2); 7(1) (b) (ii); 7 (2) (e) (ii); 8 (1) (b); and 9(1). The specific provisions are described below.

**Complaints relating to maintenance**

6 (2) After investigating the complaint, the maintenance officer may institute an inquiry in the maintenance court within the area of jurisdiction in which the person to be maintained, or the person in whose care the person to be maintained, resides with a view to inquiring into the provision of maintenance for the person so to be maintained.

**Investigation of complaints**

7 (1)...

(b) gather information concerning–

...

**(iii) the financial position of any person affected by such liability;**

...

(2) A maintenance investigator shall, subject to the directions and control of a maintenance officer–

...

(e) gather information concerning–

...

**(ii) the financial position of any person affected by such liability;**

...

**Examination of persons by maintenance officer**

8 (1) A magistrate may, prior to or during a maintenance enquiry and at the request of a maintenance officer, require the appearance before the magistrate or before any other magistrate, for examination by the maintenance officer, of any person who is likely to give relevant information concerning–

...

(b) **the financial position of any person affected by such liability.**

...

**Maintenance officer may cause the witness to be subpoenaed**

9 (1)

(a) A maintenance officer who has instituted an inquiry in a maintenance court may cause any person, including any person legally liable to maintain any other person to be subpoenaed–

(i) to appear before the maintenance court and give evidence; or

(ii) to produce any book, document or statement.

(b) A book, document or statement referred to in paragraph (a) (ii) includes–

(i) **any book, document or statement relating to the financial position** of any person who is affected by the legal liability of any person to maintain any other person; and

(ii) in the case where such person is in the service of an employer, **a statement which gives full particulars of his earnings** and which is signed by the employer. ...(emphasis added)

2.110 The inquiry stage in the maintenance process requires full disclosure of the financial status of the parties involved.<sup>74</sup> At this stage, the person from whom maintenance is being claimed has the duty to disclose his or her financial means, to assist the authorities in determining the amount that person must pay in maintenance. The maintenance officer is empowered in terms of the Act to subpoena any person to appear before the maintenance court to produce documentation or statements relating to the maintenance debtor's financial position. The Act further empowers the court holding the inquiry to cause any person to be subpoenaed as a witness, or to be examined even where that person was not subpoenaed as a witness.

2.111 The Department's concern that insufficient provision is made in the Act for holding a financial inquiry may be attributed to the manner in which maintenance cases have generally been investigated, and the manner in which maintenance amounts have been calculated. Case law illustrates the challenges faced by the courts, especially with regard

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<sup>74</sup> Van Zyl L *Handbook of the Law of Maintenance* at 63.

to enforcing maintenance orders. *S v November*<sup>75</sup> is a good case to illustrate how the courts still struggle with issues related to the financial inquiry. All four cases heard by the court under the same reference number demonstrate how the justice system fails children who rely on maintenance. In all these cases, no clear reasons were given for the defaulters' failures to meet their maintenance obligations, or for the courts having set the repayment of arrears at a low rate. The court lamented the failure by the presiding officers to conduct proper financial inquiries and their having resorted to accept whatever the accused (maintenance debtors) offered to pay.

2.112 We submit that the DOJ's concern is unsubstantiated as various provisions (referred to above) in the Act do provide for the holding of a financial inquiry. The problem might rather be with the implementation of the provision that deals with financial inquiries.

**(bb) Suggested solution and questions for comment**

Do you agree with the SALRC's submission that the Act does provide for financial inquiries?

In other words, would you agree that the major challenge might lie with the implementation of the existing provisions that deal with financial inquiries?

**(iii) Rules governing the execution process**

**(aa) Problem: should the Act provide for the promulgation of rules to regulate the execution process?**

2.113 The Department proposes that rules are necessary to regulate the execution process in maintenance matters. The Department is of the view that the Act should contain

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<sup>75</sup> 2006 1 SACR 213 (C).

a provision that will enable the Rules Board to develop such rules for an execution procedure in the maintenance system.

2.114 The Rules Board for Courts of Law (the Rules Board) is a statutory body established in terms of the Rules Board for Courts of Law Act 107 of 1985. The Rules Board makes and reviews the rules of the courts, subject to the approval of the Minister of Justice. Section 6 of the Rules Board Act empowers the Rules Board to make, amend or replace rules for the Supreme Court of Appeal, the High Courts, and the lower courts. This process is intended to ensure the efficient, timely and uniform administration of justice.

2.115 The maintenance court has been applying the rules of the Magistrates' Court to all its processes including the execution process. The DOJ proposal that rules should be developed for the execution process in maintenance matters is unclear, since the proposal does not clarify whether such rules should only apply to execution processes, and whether other processes should continue to follow the rules for the Magistrates' Court or not.

2.116 During the course of this investigation, clarity will be sought from the Department about whether it seeks rules to regulate the entire maintenance system or only the execution process.

**(bb) Suggested solutions and questions for comment**

2.117 Despite the lack of clarity discussed in paragraphs 2.115 and 2.116 above, the SALRC supports the proposal to develop rules to govern the execution process in maintenance cases. Our support for the proposal is based on the challenges that the current situation poses to women who use the maintenance system. As stated elsewhere in this issue paper, it appears that most women who seek to execute warrants against maintenance debtors are unable to do so, because they cannot afford to pay the surety that is required by sheriffs before the sheriff will begin the execution process. Surely it could not have been the intention of the legislature that the applicants would be faced with such hurdles when making claims for maintenance.

Should the maintenance court have rules to regulate the administration of justice in that court?

Should such rules be developed to regulate only the execution process in the maintenance system?

**(f) Trusts**

**(i) Problem: should the Act regulate trusts, especially trusts established to evade maintenance obligations?**

2.118 The Department has identified the establishment of trusts as an area requiring attention. In some instances, trusts have been established to allow a maintenance debtor to evade his or her maintenance obligations.<sup>76</sup>

2.119 In terms of South African law, trusts are regulated by the Trust Property Control Act 57 of 1988. The Trust Property Control Act defines a trust as follows:

Means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed–

- (a) To another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) To the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)

2.120 The Trust Property Control Act defines trust property as “movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of the trust instrument are to be administered or disposed of by a trustee.”

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<sup>76</sup> See paragraph 1.3 (f) above.

2.121 On the reading of the Trust Property Control Act, it is unclear what the object of creating a trust is or should be. From the current wording one may deduce that a trust can be created for any purpose as long as it complies with the requirements of the Act.

2.122 The common law position on parental support, which is restated in the Act, is that parents have the obligation to support their children in accordance with the parents' "means".<sup>77</sup> "Means" has been interpreted by various authors to include, among other things, income derived from employment,<sup>78</sup> but the use of this term suggests that something broader than earnings (ie remuneration for work) is intended. The word "means" may include any possessions that parents own, where such possessions may be considered or realised for the maintenance of their children.

2.123 Section 26 (4) includes a description of instruments susceptible to attachment, such as "any pension, annuity, gratuity or compassionate allowance or other similar benefit". This inclusion might signal the intention by legislature to allow a maintenance applicant to identify aspects of wealth, beyond earnings, that would enable a maintenance debtor to support his or her children. For this reason, we submit that trusts (ie income derived from trusts) should also be susceptible to attachment.

2.124 Thus, the list of instruments in section 26 (4) that are liable to be attached or subjected to execution should be extended to include trusts. Alternatively, the list should be broadened to include not only income but also aspects such as capital, in the form of savings, assets, and assets donated away. As indicated in the section dealing with future maintenance, the SALRC submits that the list of instruments liable for attachment for arrear maintenance should be extended so that it is similar to the corresponding list for future maintenance.

2.125 Indeed, the maintenance system should view trust property through the same lens through which it views any pension, annuity, gratuity, compassionate allowance, or other similar benefit. That is, the court must examine all such possessions and deal decisively with situations where maintenance debtors establish trusts with the sole intention of hiding

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<sup>77</sup> Section 15 (1) (ii) and Section 40 (3) (a) of the Maintenance Act.

<sup>78</sup> Note 48 at 373–374.

their assets to disadvantage the claimants. This issue paper proposes the inclusion of trusts in the list of instruments liable for attachment for arrear and future maintenance, as trusts constitute income for the maintenance debtor.

**(ii) Suggested solutions and questions for comment**

Should trusts be included in the list of instruments in Section 26 (4) that are liable for attachment in the execution process?

Should the same principle be applicable in a proposed provision for dealing with future maintenance? That is, should trusts also be included in the list of instruments liable for attachment for future maintenance?

**(g) Cost orders**

**(i) Problem: should the Act provide for awarding costs in maintenance matters?**

2.126 Cost orders should be viewed and understood in the context of their effect on the execution process. The execution process includes the requirement for a maintenance applicant to pay surety before a sheriff will execute the warrant of attachment. Anecdotal evidence suggests that this requirement to pay security for costs causes most women to abandon their maintenance claims, because most women cannot afford to pay such costs. The reality is that most women who claim for maintenance are unemployed and have no other source of income.

2.127 It is the Department's view that the Act does not give maintenance courts the power to make cost orders, except for costs associated with service of processes. The Department believes there is a need to give maintenance courts the power to award cost orders, such as punitive costs, against maintenance debtors who abuse court processes with the intention of frustrating claims instituted against them. The proposal by the Department is premised on the fact that if cost orders are permitted for service of

processes,<sup>79</sup> there is no reason why the same principle cannot be extended to costs for abuse of processes in the maintenance system.<sup>80</sup> The Department thus proposes that the Act should make provision for cost orders against people who abuse court processes. The Maintenance Act was promulgated with the intention to make the maintenance claim process simpler, speedier, cheaper and more effective. The awarding of costs against parties who frustrate the maintenance process is important and may deter maintenance debtors from abusing the system.

2.128 The Department also articulates the challenges that have been created in the maintenance system by the Magistrates' Court rule that permits the sheriff to demand security for costs before carrying out any execution process.<sup>81</sup> The Department is concerned that the requirement for security for costs renders the execution process ineffective, as most applicants for maintenance do not have the resources to provide the requisite security (as described in paragraph 2.126 above).

2.129 Indeed instances exist where the party from whom maintenance is claimed may be responsible for the delay. However, at times a delay might also be occasioned by the party who claims maintenance. In the latter instance, the person (usually a woman) claiming maintenance may be required to pay for wasted costs, which are sometimes charged at a hefty rate if the maintenance debtor is represented by an attorney or advocate. Most often, the debtor does have such representation.

2.130 Despite the SALRC proposal paper concluding that cost orders is not an area that requires legal reform, we hope that this issue paper will canvas ideas from relevant stakeholders. There needs to be consensus on whether cost orders would be appropriate in matters such as maintenance complaints, where the affected parties often rank among the most vulnerable in our society. For example, would it be fair to require a child claimant to be slapped with a cost order if that child is unable to attend court due to lack of funds? The same argument can be made about poor women complainants who depend solely on

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<sup>79</sup> Section 20 of the Act empowers the maintenance court to make orders for cost of service of process.

<sup>80</sup> See paragraph 1.2 (d) above.

<sup>81</sup> See paragraph 1.3 (d) above.



maintenance money for their survival. If a cost order is issued against such complainants, are there any chances of recovering those costs?

2.131 Despite the cumbersome consequence of requiring security for the cost of executing an attachment order in the maintenance system, and despite the possibility that cost orders may disadvantage applicants for maintenance, other pieces of legislation do make provision for the awarding of costs. For example, the Domestic Violence Act<sup>82</sup> provides that “the court may make an order as to costs against any party if it is satisfied that such a party acted frivolously, vexatiously or unnecessarily.”<sup>83</sup>

**(ii) Suggested solution and questions for comment**

Should the Act contain a provision that deals with awarding costs, as in any other court which deals in civil matters?

That is, should the Act provide for the awarding of punitive costs? If so, should the provision allow for an order for costs and leave it to the discretion of the presiding officers to determine in which cases such costs should be awarded?

Should the Act continue to allow for the payment of security for costs in execution processes, as provided for in Rule 38 of the Magistrates’ Court rules?

**(h) Choice of remedy**

**(i) Problem: are options for available remedies unclear in the Act? Should the Act provide specificity on available remedies and their hierarchy?**

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<sup>82</sup> Act 116 of 1998.

<sup>83</sup> Ibid, section 15.

2.132 Although the question of the choice of remedy was not recommended for law reform in the proposal paper, in this issue paper we have aired the Minister's concerns with related topics. We hope that this process will enable us to receive comment from stakeholders and information about the actual challenges that occur in the maintenance process in the real world. Such information would assist the SALRC in making concrete recommendations to the Minister.

2.133 The Department is of the view that the civil remedies available to maintenance creditors are currently inadequate. This is because maintenance creditors are not enabled to make a choice regarding the remedy or remedies to pursue, where the maintenance debtor fails to meet his or her obligation under a maintenance order issued by a court.

2.134 Section 26 (1) of the Act, which deals with the enforcement of maintenance orders or other orders, provides for three specific remedies. These are as follows:

- execution against property;
  - attachment of emoluments; **or**
  - attachment of debts.
- (emphasis added).

2.135 The plain interpretation of section 26 (1), by virtue of the use of the word "or" rather than "and", is that the said remedies are available as alternatives; that is, the maintenance creditor has the option to pursue one remedy above the other two at any given time.

2.136 The Department contends that the maintenance creditor should be given the option of proceeding with one or more of the remedies simultaneously, instead of only pursuing one remedy at a time.

2.137 The above proposition by the Department may create its own challenges, especially (for example) in cases where the maintenance creditor succeeds with all the remedies that they decide to proceed with.

2.138 It is submitted that the challenges around the remedies and how they are accessed by the applicants for maintenance could be the practice at the various courts. The reading of the Act indicates that an applicant can choose which remedy to pursue. If an applicant

opts to pursue the attachment of emoluments instead of the other remedies, they should be allowed to do so. However, it is unclear what the implication of using all the remedies simultaneously would be. On the face of it, a tenable situation could be created in cases where all the remedies are successful at the same time.

**(ii) Suggested solutions and questions for comment**

Should the Act allow an applicant for maintenance the option to pursue all civil remedies simultaneously?

Or does the problem lie with the court system, in that applicants are not given the option of stating which remedy they would prefer to pursue?

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## **CONVENTIONS**

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