AFFILIATION PROCEEDINGS IN VICTORIA

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The lot of the illegitimate child in Victoria has long been a sorry one. In this article, Professor Sackville examines one means of protecting the child which has been adopted throughout Australia. He traces the legal background and present practice of affiliation proceedings in Victoria on the basis of a sample of such proceedings in five Magistrates' Courts. The conclusions reached point the way for further reforms which should be undertaken if the disabilities of the illegitimate child are to be further remedied.

The most direct point of contact between the parents of an illegitimate child and the legal system is usually the institution of affiliation proceedings against the putative father, in which maintenance is claimed on behalf of the child. Consequently a study of the legal status of illegitimate children and their parents cannot ignore affiliation proceedings. However if the study is to be useful, more is required than an examination of the relevant legislation and case law. An attempt must be made to examine the manner in which the legal rules operate in practice and specifically to explore the relationship between those rules and welfare practices that are applied to mothers of illegitimate children. Only then is it possible to ascertain what reforms are required in the rules and procedures now in force. This article examines affiliation proceedings in Victoria, primarily through a sample of complaints initiated since the commencement of the Maintenance Act 1965.

I THE LEGAL BACKGROUND

The liability of parents to support their illegitimate children is created and regulated by the maintenance legislation of the States.[1] The legislation is usually referred to as uniform, although in fact there are substantial variations in the law and practice of each State.[2] In Victoria section 10 of the Maintenance Act 1965 provides that

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[1] Maintenance Act 1964 (N.S.W.); Maintenance Act 1965 (Vic.); The Maintenance Act of 1965 (Qld); Maintenance Act 1926-65 (S.A.); Married Persons and Children (Summary Relief) Act 1965-67 (W.A.); Maintenance Act 1967 (Tas.); Maintenance Ordinance 1968 (A.C.T.). This legislation was enacted as the result of discussions by the Standing Committee of Attorneys-General designed to draft a uniform law of maintenance.

[2] For a more detailed survey of the legislation see Sackville and Lanteri, 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5, 51-6.

> [W]here the court,[3] upon complaint made on behalf of an illegitimate child, is satisfied—
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> (a) that the defendant is the father of the child; and
> (b) that he, without just cause or excuse—
>
> (i) has neglected and still neglects to provide the child with adequate means of support; or
> (ii) is about to remove out of Victoria without providing the child with adequate means of support—
>
> the court may order the defendant to pay for or towards the maintenance of the child such amount as it thinks reasonable.

Section 11 imposes an obligation in similar terms upon the mother of an illegitimate child. In fact of course it is rare for proceedings to be taken against the mother under section 11, although the Social Welfare Department commonly enforces the statutory duty of the mother of a child admitted to the care of the Department to contribute to the support of the child.[4] The focus of this paper is upon affiliation proceedings brought in Victoria against the putative father of an illegitimate child. In practice such proceedings are initiated almost invariably by the mother on behalf of the child, although the wording of section 10 would permit the complaint to be made by any person with a genuine interest in caring for the child.

The Act places no limit on the amount that the defendant in affiliation proceedings may be ordered to pay for the maintenance of the child. However, in assessing the appropriate amount, the court is to take into account the defendant's means, earning capacity and ability to pay, but not any allowance that might be paid to the mother of the illegitimate child by the Social Welfare Department. The court is also to consider the accustomed condition in life and the whole financial position of the person for whose benefit the order is to be made, but it seems that these criteria are intended to apply to deserted wives rather than to illegitimate children.[5] In addition, the Act provides that the father of an illegitimate child is liable to pay a reasonable sum for the 'preliminary expenses' of the mother, if a claim is made by her during her pregnancy or within twelve months of the birth of the child.[6] Preliminary expenses include the expenses of the maintenance of the mother for two months preceding the birth and three months thereafter, and the maintenance of the child for three months after the birth, together with all reasonable medical, surgical, hospital and nursing expenses.[7] The mother's claim for preliminary expenses is for her own benefit, unlike a maintenance claim which is formally instituted by her on behalf of the child. Upon a complaint for preliminary expenses

[3] The 'court' referred to is a Magistrates' Court consisting of a Stipendiary Magistrate sitting alone: Maintenance Act 1965, s. 3(1). Before the coming into force of the Justices (Amendment) Act 1969, Magistrates' Courts were called Courts of Petty Sessions. For convenience all references in this paper are to Magistrates' Courts.

[4] Social Welfare Act 1970, Part II, Div. 7.

[5] Maintenance Act 1965, s. 5(2), (3).

[6] S. 12.

[7] S. 3(1).

brought before the birth of the child the court, in the same proceedings, may order the father to pay maintenance for the child if it appears that he 'will probably neglect to provide the child with adequate means of support'.[8]

The father of an illegitimate child may be required to pay special medical expenses incurred for a child in respect of whom an order is in force.[9] A maintenance order, once made, normally continues until the child attains the age of 18 years, dies or is adopted.[10] Alternatively, the order terminates upon the death of the father.[11] There is power in the court to extend the order beyond the child's eighteenth birthday in certain circumstances.[12] The court also has power to discharge, vary or suspend an existing order if changed circumstances warrant such a course of action.[13]

A complainant in affiliation proceedings fails if she cannot establish on the balance of probabilities that the defendant is the father of the child in respect of whom the complaint has been issued. In addition the Maintenance Act 1965 affords two specific defences to a defendant resisting affiliation proceedings. First, the mother's evidence that the defendant is the father of her child is not to be accepted without corroboration, except where the defendant is in court and does not deny paternity on oath or, alternatively, where he is not present in court but has been served personally with a summons to attend.[14] In the two exceptional cases the court may, in its discretion, accept the uncorroborated evidence of the mother as to paternity.[15] Secondly, it is a defence to an affiliation complaint to establish that at or about the time of conception of the child the mother was a common prostitute or had had sexual intercourse with men other than the defendant.[16] No provision is made in the Victorian legislation for the use of blood tests in affiliation proceedings. Consequently the use of blood tests is limited to cases where the parties to the proceedings agree to submit to the tests.[17]

[8] S. 13.
[9] S. 16.
[10] S. 21. Before the Maintenance (Amendment) Act 1970 the orders normally determined when the child attained 16 years.
[11] *Ibid.* In Victoria an illegitimate child in receipt of a maintenance order against his father may be entitled to claim provision from his father's estate, if the father's will fails to make adequate provision for the proper maintenance and support of the child. The child may apply also if the father dies intestate: Administration and Probate Act 1958, Part IV; *Re Wren* [1970] V.R. 449.
[12] S. 22.
[13] Part II, Div. 4.
[14] S. 27(1).
[15] Corroboration will be supplied by any independent evidence tending to confirm in a material particular the mother's evidence that the defendant is the father. See generally *Popovic v. Derks* [1961] V.R. 413; Bourke and Fogarty, *Maintenance Custody and Adoption Law* (2nd ed. 1967) 115-22.
[16] S. 27(2).
[17] See Sackville and Lanteri, *op. cit.* 53-5; *Report of the Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings* (1968), especially Appendix B; Family Law Reform Act 1969 (U.K.) Part III; *S. v. McC (orse.S.) and M. (D.S. Intervener)* [1970] 3 W.L.R. 366, [1970] 3 All E.R. 107 (H.L.).

II THE SETTING FOR AFFILIATION PROCEEDINGS

The reasons motivating the mother of an illegitimate child to commence affiliation proceedings against the putative father vary considerably from case to case. The variation reflects the diverse character of the relationships that confront courts, if only fleetingly, in affiliation proceedings. The mother often has been party to a semi-permanent relationship with the father of the child and contemplates legal action simply to direct the rather cumbersome maintenance collection machinery of the law at the father, following the withdrawal of his regular support. Of course the mother often may be inspired, at least partially, by a desire for revenge against the father. Nevertheless the main purpose of the action is to provide a source of support for the offspring of the *de facto* relationship[18] and, although in some instances the defendant may disclaim paternity, in general no problem of identification of the father is likely to arise. At the other end of the scale is the relationship that is usually thought of as the typical subject of affiliation proceedings. This is the case of a single woman who has borne a child without having cohabited for any length of time with the putative father. In this situation the defendant is more likely to dispute paternity of the child and, if he does, the mother may find it extremely difficult to establish to the satisfaction of the court that the defendant is in fact the father of the child. Certainly a case in which the defendant denies paternity requires very careful preparation of evidence and a sound understanding of the rules relating to corroboration and the admissibility of evidence. This is true even where the mother perceives the relationship between the father and herself to have been a love relationship,[19] since it is always open to a defendant to contend that the mother had intercourse with other men about the time conception took place.[20] Between the two extremes of a recently terminated *de facto* relationship and a casual affair, affiliation proceedings embrace many kinds of relationships.

There are significant variations in the degree of enthusiasm with which complainants initiate affiliation proceedings. Even in the case where the mother apparently acts independently of pressure from an outside source, the decision may be fraught with emotional difficulty. The legal proceedings require her to maintain contact with a man whom she may wish

[18] In all Australian States other than Tasmania, neither party to a *de facto* relationship has any right to receive maintenance from the other regardless of the duration of the relationship. In Tasmania a woman who has cohabited with a man for a period in excess of twelve months is entitled to maintenance for herself to the same extent as if she were married to the man: Maintenance Act 1967 (Tas.) s. 16. For an analysis of s. 16 see *Maddock v. Beckett* [1961] Tas. S.R. 46. In that case Burbury C.J. referred to the term '*de facto* wife' as an 'inaccurate euphemistic neologism'. But comfort can be derived from the fact that the Chief Justice's suggested alternative, 'concubine', is hardly likely to command widespread usage in the present context.

[19] The literature on this issue is surprisingly sparse. See Vincent, *Unmarried Mothers* (1961) Ch. IV.

[20] Maintenance Act 1965, s. 27(2).

to forget, in circumstances that maximize feelings of humiliation and bitterness. Not only must she reveal intimate details of her life to strangers,[21] but she renders herself liable to cross-examination on those details within a legal structure which, in requiring corroboration of her evidence, suggests that she is not to be trusted. This may be a very high price to pay in order to obtain a small amount of income to supplement other sources of support, especially since it is likely that difficulty will be experienced in enforcing the order against the putative father. In many cases in which no pressure is exerted on the mother by government agencies, she is nevertheless a reluctant party to the proceedings in the sense that her parents, or some other person with whom she has close contact, insist upon the taking of action as a condition of support, financial and moral.

It is a sobering thought that in Victoria, as in other States, a large percentage of affiliation proceedings are commenced by mothers solely because they are required to do so by the Social Welfare Department as a condition of the receipt of assistance from the Department. Assistance to mothers of illegitimate children is provided by the State under the Social Welfare Act 1970. The Commonwealth plays no direct role in affording relief to mothers, except that pursuant to the inappropriately named States Grants (Deserted Wives) Act 1968 the Commonwealth subsidises the State to the extent (*inter alia*) of one half of payments to mothers of illegitimate children, provided that the payments do not exceed the level of the Commonwealth Class 'A' Widows' Pension.[22] Payments to

[21] Under s. 111 of the Maintenance Act 1965 affiliation proceedings are heard *in camera* unless the court in the interests of justice permits any person other than those specified (*e.g.* the parties, their legal advisers, court officials, witnesses while being examined) to be present. Despite this section the mother must relate the circumstances of her relationship with the defendant at least to her solicitor (if she is represented), the court officials and the representatives of the defendant (if he is represented).

[22] The Social Welfare Department of Victoria divides the mothers of illegitimate children in receipt of assistance into three classes: single mothers, deserted *de facto* wives and *de facto* wives of prisoners. Of course the dividing line between single mothers and deserted *de facto* wives may be very fine and depend upon the subjective assessment of an officer acting on information supplied by an applicant. The numbers receiving assistance within each group are as follows:

	at 30 June 1970	at 30 June 1971
Single mothers	765	1280
Deserted *de facto* wives	424	721
De facto wives of prisoners	60	39
Total unmarried mothers	1249	2040

The extraordinary increase in numbers reflects, at least in part, the rising number of illegitimate births and an increasing tendency for mothers to retain custody of their illegitimate children, rather than place them for adoption. This tendency probably has been reinforced by the greater benefits paid by the State to unmarried mothers since the Commonwealth began to subsidise the benefits under the State Grants (Deserted Wives) Act 1968, which applied to Victoria as from 4 April 1970. The result of the Act was to increase maximum benefits from $6 per week to the approximate level of a class 'A' widow's pension at that time ($26 per week for a woman paying rent and with one child under 6 years).

mothers are made in general under section 16 of the Social Welfare Act 1970 which provides that

> [w]here any child is without sufficient means of support any parent or other person who has the care and custody of any such child *and who is prepared to take all necessary legal proceedings that are available for obtaining sufficient means of support for such child* may [apply] to the Director-General that a periodic sum be paid to him or her towards the maintenance of such child. [Italics supplied.]

The requirement expressed in the italicised words was in fact stated rather more stringently in an earlier draft of clause 16 of the Social Welfare Bill. The original draft, which cause heated debate in both Houses, was as follows:

> [w]here any child is without sufficient means of support *and no available legal proceedings can be taken to obtain sufficient means of support for such a child* any parent [or any other person having custody of the child may apply for the payment of a periodic sum for the maintenace of the child.][23] [Italics supplied.]

During the debate in the Legislative Assembly the Opposition spokesman on social welfare matters (Mr Bornstein) proposed that the italicised words be omitted.[24] He argued that his amendment reflected the 'strong feelings' of social workers within the Social Welfare Department and (somewhat inaccurately) that it followed the South Australian precedent.[25] Although Mr Bornstein's amendment failed, clause 16 was amended to its final form in the debate in the Legislative Council.[26] The amendment was seen as permitting the speedy determination of applications, yet ensuring that the father of children receiving assistance would be forced to meet his obligations.

The provisions of section 16[27] are administered stringently. The general rule is that the mother is informed at the time of making her application for

[23] This draft followed the form of s. 30 of the Children's Welfare Act 1958, as amended by the Social Welfare Act 1960. Cf. the formulation in the Social Services Act 1947-71 (Cth) s. 62(3): 'A pension shall not be granted to a widow, being a deserted wife or a woman whose marriage has been dissolved and who has not remarried, unless she has taken such action as the Director-General considers reasonable to obtain maintenance from her husband or former husband.'

[24] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 December 1970, 3302.

[25] Although it is true that the South Australian Social Welfare Act 1926-65 contains no provision similar to that in the original draft of cl. 16, the practice of the South Australian Social Welfare Department is to require the taking of affiliation proceedings, where practicable, as a condition of assistance. In fact the requirement appears to be administered a little more leniently in South Australia, in that in some cases where the mother refuses to take affiliation proceedings, she is not denied assistance altogether, but is subject to a reduction of about $6 per week, the amount that can be expected from proceedings in the usual case. Information supplied by Maintenance Branch, Social Welfare Department (S.A.), interview 14 May 1971.

[26] Victoria, *Parliamentary Debates*, Legislative Council, 16 December 1970, 3676-7.

[27] Of course s. 16 is not confined to the provision of assistance for persons having custody of illegitimate children. The Social Welfare Department is also responsible, *inter alia*, for the payment of assistance to deserted wives and wives of prisoners with dependent children in their care during the six-month period before they become eligible for a widow's pension paid by the Commonwealth under Part IV of the Social Services Act 1947-1971 (Cth). The text, however, examines the administration of s. 16 only as applied to mothers of illegitimate children.

assistance that she must commence proceedings against the putative father in order to obtain assistance from the Department. In the typical case where the mother applies in person for assistance at the Department's offices in Melbourne she receives, if otherwise eligibile for assistance, a form letter 'requiring' her to contact the Magistrates' Court nearest her place of residence in order to initiate proceedings against the putative father. The Department itself does not assist the mother in taking the necessary legal action, beyond directing her to the clerk of the appropriate Magistrates' Court. The mother must journey to the court herself, seek out the clerk and elicit his assistance in issuing a summons against the putative father or, if the father's whereabouts are unknown, in issuing a warrant of apprehension.[28] The form letter given to the mother includes a section to be filled out by the clerk of court and returned to the Social Welfare Department in order to advise the Department that proceedings have been intiated. If a summons is to be issued it is necessary for the clerk to interview the mother concerning the details of her relationship with the putative father. This follows from the requirement that the complaint be in writing and on oath[29] and that

> [e]very summons or warrant on a complaint for maintenance of an illegitimate child or for preliminary expenses in respect of an illegitimate child shall have endorsed thereon immediately following the cause of complaint a statement showing the date or dates as near as possible when it is alleged that sexual intercourse between the parties took place and where the child is already born, the date of birth of the child and whether the birth was or was not premature.[30]

The interview may be conducted in a private room, but not infrequently the mother is required to divulge the necessary information in the outer part of the office, perhaps within the hearing of members of the public. If the summons is served and the complaint comes on for hearing, the mother is not provided as a matter of course with legal representation in preparing and presenting her case. The Legal Aid Committee is the only body in Victoria that provides legal assistance to complainants in affiliation

[28] Under s. 33(2)(b) of the Maintenance Act 1965, the justice or magistrate before whom the complaint is sworn, if satisfied by oath that the whereabouts of the defendant are unknown to the complainant, or that the defendant has moved or is about to move out of the State, may issue a warrant for the apprehension of the defendant. See generally Justices Act 1958, ss 26-30. The usual procedure is that a warrant, when issued, is filed with the Information Bureau of the Victoria Police and is executed, in general, only if the defendant is arrested in respect of some other matter or if the complainant ascertains the whereabouts of the defendant and instructs the clerk of court to execute the warrant. It is apparently becoming more frequent for clerks or magistrates to refuse to issue warrants of apprehension where they consider the procedure to be futile.

[29] S. 33(1).

[30] Maintenance Rules 1966, r. 409.

proceedings.[31] This body administers a scheme providing legal representation for persons unable to afford their own representation for the purpose of conducting civil litigation. Such persons are usually relieved of the obligation to pay all or part of the cost of proceedings, the decision on this question being within the discretion of the Committee. The Committee does not advertise its activities and, in relation to maintenance proceedings in Magistrates' Courts, relies very heavily upon the clerks of court to acquaint complainants with the fact that legal assistance is available. Where the complainant in affiliation proceedings requests legal aid, the Secretary to the Committee, rather than the full Committee, has authority in fact to approve the grant of assistance. It appears that, although the Legal Aid Committee keeps no separate record of affiliation cases, a large percentage of complainants who actually find their way to the Committee will be approved for assistance.[32] If assistance is granted, the complainant is referred to one of the panel of solicitors that accepts cases from the Legal Aid Committee. Cases are allocated to solicitors according to a roster system and not on the basis of any expertise in the subject matter of the litigation.[33]

[31] The Legal Aid Committee is incorporated under the Legal Aid Act 1969. It consists of 8 members of whom 4 are appointed by the Victorian Bar Council and 4 by the Council of the Law Institute: Legal Aid Act 1969, s. 7(1). The Committee receives no financial support from the State. The expenses of the scheme are met out of the Legal Aid Fund which receives moneys from four main sources of support:

(a) surplus moneys paid from the Solicitors' Guarantee Fund pursuant to s. 55A(3) of the Legal Profession Practice Act 1958 (in general, 30 per cent of the excess over $1,000,000 in the Solicitors' Guarantee Fund is paid to the Legal Aid Fund);
(b) costs paid to the Fund as the result of litigation conducted on behalf of an assisted person;
(c) contributions to the Fund made by assisted persons as assessed by the Committee;
(d) moneys paid to the Fund under s. 3 of the Appeal Costs Fund Act 1964.

[32] Interview with Mr J. Heffernan, Secretary, Legal Aid Committee, 29 April 1971. For some reason, the records of the Committee categorise custody and affiliation cases together. In 1968-9 the Committee received 227 applications for assistance in this category. Of these 117 were 'dealt with' by the Secretary, meaning that the matters were disposed of more or less on the spot. The remaining 110 applications were referred to the Committee and 93 were finally approved for assistance. In 1969-70, 280 applications were received of which 107 were dealt with by the Secretary and 173 by the Committee. Of the 173, 132 were approved for assistance. See *Report of Legal Aid Committee for year ended 30 June 1970;* (1970) 45 *Law Institute Journal* 172. The Secretary estimates that about 80 per cent of the custody and affiliation applications approved are in fact affiliation cases. The procedure in affiliation cases is usually to refer the application to a participating firm and act on the advice of that firm, rather than have the Committee consider the application.

[33] Virtually all solicitors in Melbourne accept work from the Legal Aid Committee. Their participation in the scheme is not wholly gratuitous, since the Committee makes a bi-annual distribution to solicitors who have performed work through the scheme. Under the Legal Aid Act 1969, s. 12(3) participating solicitors receive 80 *per cent* of their costs from the Legal Aid Committee. The rate of distribution for the 6 months to 31 December 1969 (before the new Act came into force) was 62.3722 *per cent* of costs. *Report of Legal Aid Committee for year ended 30 June 1970,* Appendix B; (1970) 45 *Law Institute Journal* 172, 175.

In certain cases the Department of Social Welfare does not insist that a mother applying for assistance must take affiliation proceedings against the putative father. Broadly speaking, these fall into three categories. The first case is where the mother does not know the identity of the father and consequently there is no reasonable likelihood of success in affiliation proceedings. The inability of the mother to identify the father may arise simply because her acquaintance with him was casual and she never learned his true name. Alternatively she may have had intercourse at about the time of conception with several men. If so, not only is it impossible to identify the father with certainty[34] but the Act affords a defence to all potential defendants.[35] Secondly, the Department does not insist upon action where, although the identity of the putative father is known, it is manifest that proceedings will prove futile because of the father's lack of means.[36] Thirdly, in rare instances the Department may exercise a 'compassionate discretion' if, for example, the child was born as the result of a relationship between the mother and her brother-in-law of which the mother's sister is unaware. Of course it is very much within the Department's discretion to determine whether the mother should be exempted from the requirement of taking legal action against the father. It should be remembered that not only must the mother's application for assistance reveal any information known to her about the father of the child, but she is usually required to verify on oath before a special magistrate[37] all details contained in the application form. Special magistrates, despite their name, do not perform a judicial role, but rather adopt an inquisitorial role and make at least a preliminary determination of an applicant's eligibility for assistance. Consequently it is not likely that a mother's claim that she is ignorant of the father's identity will be accepted without close questioning and scrutiny by the special magistrate.

Despite the discretionary power in the Social Welfare Department to waive the requirement of taking maintenance action against the putative

[34] If it is established by evidence, for example, that three men had intercourse with the mother at about the time of conception, blood tests might indicate which of the three is the father by providing exclusion results for the other two. However, the prospective defendants cannot be compelled to undergo blood tests. See text accompanying note (T.A.N.) 17 *supra.*

[35] S. 27(2). See T.A.N. 16 *supra.*

[36] The father may be in gaol or perhaps in receipt of a pension himself.

[37] The appointment of special magistrates is provided for by s. 24 of the Social Welfare Act 1970. Broad powers of investigation are conferred on the magistrates by s. 25, although in practice the full powers are not utilised. At the time of writing the department has four special magistrates who in fact have been career officers within the Department. During the debate on the Social Welfare Bill in the Legislative Assembly the use of the phrase 'special magistrate' gave rise to an attack by Mr Bornstein on the ground that it was 'particularly offensive and in line with the general correctional or punitive aspects of the bill'. However Mr Bornstein's suggested alternative of an 'assistance officer' was not accepted by the Government, although a promise to consider the matter was made: Victoria, *Parliamentary Debates,* Legislative Assembly, 9 December 1970, 3306-7.

father, a mother seeking welfare assistance is usually compelled to initiate proceedings. If the mother is fortunate enough to receive legal aid, she is obliged to communicate with a number of different persons or bodies, located in different places, before the action reaches the stage of a hearing. After the initial interview at the Social Welfare Department, the mother must contact the appropriate clerk of court who may refer her to the Legal Aid Committee which, in turn, directs the mother to the legal firm which is to handle the complaint on her behalf. The Department, unlike its counterparts in at least some of the other States, plays no role in representing the mother or in gathering evidence to advance her case. Thus the solicitor who finally represents the mother will receive no assistance from the Department in presenting the case. Of course if the mother is unrepresented her task is especially difficult since she must not only persuade the magistrate of the veracity of her claim but she may also be required to adduce corroborative evidence. For a person quite unfamiliar with court procedure and often bewildered by the events which have overtaken her, this is a formidable undertaking. By way of contrast with the Victorian position, the South Australian Department of Social Welfare conducts affiliation proceedings not merely on behalf of applicants for assistance, but on behalf of any mother wishing to take action against the putative father.[38] The Department has a maintenance branch which accepts the task of interviewing the putative father and, if possible, obtaining an admission of paternity from him. Officers from the branch gather other evidence required for the presentation of the mother's case and in particular interview corroborative witnesses if paternity is denied. In most cases a maintenance officer represents the mother at the hearing. Although the maintenance officers are not trained lawyers, they do acquire considerable expertise in the law and practice of affiliation proceedings by virtue of long experience. In actions involving difficult questions of law an officer of the Crown Law Department may represent the complainant with the assistance of the maintenance officer. All enforcement proceedings are taken by the Department on the complainant's behalf, the order normally specifying that payments are to be made to the Director of Social Welfare.[39] In Victoria, on the other hand, the Department plays no direct role even to the extent of enforcing orders obtained by mothers against putative

[38] In the year 1967-68 the Social Welfare Department handled 449 affiliation cases; in 1968-69 the figure was 409 cases, in 1969-70, 412 cases and in 1970-71, 546 cases. These figures do not include maintenance cases conducted on behalf of children in the care and custody of the State. Of course some affiliation proceedings in South Australia are brought through solicitors' firms, but the number is low. The activities of the Department do not extend to all areas of the State because of geographic problems. *Report of the Department of Social Welfare (S.A.) for Year ended 30 June 1970*, 12; *Report of the Department of Social Welfare (S.A.) for year ended 30 June 1971*, 22.

[39] The position as to the participation of the various Social Welfare Departments in affiliation proceedings differs quite considerably from State to State. It is intended that these differences should be the subject of a separate study.

fathers. This is despite the fact that for every dollar received by the mother pursuant to the order, her assistance payment is reduced by that amount.[40]

III A SURVEY OF AFFILIATION PROCEEDINGS IN VICTORIA

(a) *The Procedure Adopted*

There is no systematic collection of data concerning affiliation proceedings in Victoria.[41] Consequently, there is no easy means of ascertaining, *inter alia,* the number of cases commenced annually, the disposition of complaints issued, the proportion of complainants and defendants represented by counsel, the number of blood tests administered during the proceedings and the overall effectiveness of affiliation proceedings as the means of enforcing maintenance obligations against fathers of illegitimate children. In an attempt to obtain at least some information on these matters, a survey was made of affiliation proceedings instituted in Victoria since the Maintenance Act 1965 came into force on 1 April 1966. Since it was not possible to examine files in all Magistrates' Courts in Victoria, it was decided to investigate complaints issued at a sample of five courts. These courts provide a cross-section in terms of the socio-economic status of the residents of the area served by each court. The choice of courts was based partly on a ranking of Melbourne suburbs by Lancaster-Jones.[42] In his study Lancaster-Jones classified 133 of Melbourne's suburbs into eight groups reflecting, in descending order, the socio-economic score of each suburb. Table 1 shows the four Magistrates' Courts in the Melbourne metropolitan area chosen for the study, the areas covered by the courts[43] and their ranking in the social survey.[44]

[40] The policy of the Social Welfare Department is to deduct all income received by an applicant from the amount of assistance paid by the Department. This is done as a matter of administrative practice, and is not embodied in any statutory enactment or regulation. S. 182(a) of the Social Welfare Act 1970 authorises the Governor-in-Council to make regulations with respect to allowances under Div. 2 of Part II of the Act, but that power had not at the time of writing been exercised. Cf. Children's Welfare Act 1958, s. 77.

[41] The only information readily available is the number of 'maintenance cases' instituted annually in Magistrates' Courts. In 1969, for example, there were 7264 such cases, compared with 5460 in 1966. *Year Book,* Victoria, 1971, 576. However, these figures include not only affiliation complaints, but maintenance proceedings between husband and wife. Moreover all complaints and applications, whether or not successful (including enforcement proceedings), are embraced in the total.

[42] Lancaster-Jones, 'A Social Ranking of Melbourne Suburbs' (1967) 3 *Australian and New Zealand Journal of Sociology* 93, 109-10.

[43] There are no precise boundaries to the jurisdiction of individual Magistrates' Courts in Victoria. It is open to the defendant to object to the case being heard at the court nominated by the complainant, on the ground that there is another court 'more easy of access' taking into account the defendant's residence and also the place where the subject-matter of the complaint arose: Justices Act 1958, s. 89. Presumably the subject-matter of the complaint arises, in general, at the place where the father neglects to provide the child with adequate means of support, i.e. the place of residence of the child. See generally *Burnett v. Burnett* [1957] V.R. 709.

[44] The article also provides a ranking of suburbs according to a socio-economic status/ethnicity scale. Although there are some differences in the two scales, they are unimportant for present purposes. Lancaster-Jones, *op. cit.* 96ff.

TABLE 1

Courts and socio-economic ranking of areas served

Court	Areas included (not exhaustive)[45]	Socio-Economic Ranking
Brighton	Brighton, Brighton East, Bentleigh, Gardenvale, Hampton (Bayside residential area south east of city)	I, II
Moonee Ponds	Moonee Ponds, Essendon, Ascot Vale, Keilor, Tullamarine, Airport West (Residential area north west of city)	III, V
Footscray	Footscray, Maidstone, Yarraville, North Altona, Newport, Maribyrnong (Industrial area west of city)	V, VI
Fitzroy	Fitzroy, Fitzroy North (Inner suburb north east of city)	VIII

The Geelong Magistrate's Court was included in the examination because it includes the largest provincial city in Victoria, embracing the cities of Geelong, Geelong West and Newtown and the Shires of South Barwon and Corio.

The intention of the project was to examine the files of all affiliation cases instituted in the five courts between 1 April 1966 and May 1971 (when the examination took place). The file of an affiliation case invariably commences either with the complaint and summons by which the proceedings are initiated,[46] or in appropriate cases, with the complaint and warrant to apprehend the defendant.[47] If the complaint proceeds to a hearing and an order is made for the payment of maintenance or preliminary expenses (or both) the formal order is included in the file.[48] It might be thought that the files also include notes made by the magistrate at the hearing, especially in cases where the complaint is dismissed. In fact during the survey it was found that very few files contain magistrates' notes, either because notes are not taken or because they are destroyed by the magistrate at the conclusion of the hearing. If an order for maintenance or preliminary expenses is made, that does not usually end the matter since the major problem is to enforce the order. The uniform maintenance legislation provides for a considerable array of techniques for the enforcement of orders, although of course a variety of enforcement procedures is no guarantee of effectiveness. The following procedures are available to the complainant or to a person acting on her behalf:[49]

[45] See n. 43 *supra*.

[46] Maintenance Act 1965, s. 33(2)(a); Maintenance Rules 1966, Form No. 2.

[47] Maintenance Act 1965, s. 33(2)(b); Maintenance Rules 1966, Form No. 3.

[48] Maintenance Rules 1966, Form No. 8 (maintenance order); Maintenance Rules 1966, Form No. 10 (preliminary expenses). Form No. 10 is also used in cases where the defendant is ordered to pay medical expenses in respect of an illegitimate child or the funeral expenses of a deceased illegitimate child: see Maintenance Act 1965, ss 14(3), 16.

[49] Enforcement proceedings may be taken by the complainant or by the clerk of the court upon application made to him by the complainant. Maintenance Act 1965, s. 64; Maintenance Rules 1966 Part 2 and Form No. 12.

(1) An order may be made for the seizure and sale of goods belonging to the defendant or for the receipt of any annuity, rent or income (other than earnings) payable to the defendant, including moneys credited to him in a bank account.[50]

(2) A certificate stating the arrears of maintenance owed by the defendant may be registered in the Supreme Court. Upon registration the arrears may be enforced by any means available to enforce a final judgment in those courts, for example by the execution of a writ of *fieri facias* in relation to land owned by the defendant.[51]

(3) An order may be made for the attachment of debts (other than earnings) due to the defendant.[52]

(4) The earnings of the defendant may be attached if, through wilful refusal to pay or culpable neglect, he is in arrears to the extent of four weekly payments or, alternatively, if he has persistently failed to comply with the requirements of the order.[53]

(5) If the defendant has disobeyed the maintenance order, the court may order him to be committed to gaol in default of payment of arrears for a term not exceeding twelve months.[54] The court is not to commit the defendant if it is satisfied that he has not had the means and ability and could not by reasonable effort have had the means and ability to comply with the order or if there is any other reason why the order should not be enforced by imprisonment.[55] It is a rule of practice that the court will not order more than twelve months' arrears of maintenance to be enforced by imprisonment (or indeed by any other procedure) unless there are exceptional circumstances.[56] Although the defendant is not liable to serve imprisonment more than once for any given period of arrears, the imprisonment does not discharge the amount due.[57] The term of imprisonment may be reduced by payment of the arrears.[58]

(6) In order to determine which, if any, of the above procedures is appropriate in a given case, the defendant may be examined as to his means and ability to comply with the order and he may be required to provide particulars of his employment and earnings.[59]

[50] Maintenance Act 1965, s. 40; Maintenance Rules 1966, Form No. 13.
[51] Maintenance Act 1965, s. 41 (the side note in the Act is misleading in its reference to the County Court); Maintenance Rules 1966, Form No. 14.
[52] Maintenance Act 1965, s. 42; incorporating the provisions of the Justices Act 1958, ss 130-40.
[53] Maintenance Act 1965, ss 46-61; Maintenance Rules 1966, Forms No. 18-20.
[54] Maintenance Act 1965, s. 43(1); Maintenance Rules 1966, Forms No. 16-17.
[55] Maintenance Act 1965, s. 44(1).
[56] See generally *Welsby v. Welsby* [1961] V.R. 362; *Greig v. Greig* [1962] V.R. 485.
[57] S. 43(2).
[58] S. 44(3)-(6).
[59] S. 63.

A file therefore includes documents relating to enforcement action, such as a warrant of commitment for disobedience of a maintenance order or an attachment of earnings order. The Act provides for the enforcement interstate and in overseas reciprocating countries of orders made in Victoria.[60] Any such enforcement action is reflected in documents in the file, such as a copy of a request by the Victorian Collector of Maintenance to the appropriate interstate authority asking that a Victorian order be made enforceable in the other State.[61] Apart from formal documents made out under the Act or the Rules, the file may include correspondence between the court and the parties or other interested persons. Thus, if the Legal Aid Committee grants assistance to the complainant in affiliation proceedings, it is customary for a form letter to be sent to the clerk of the Magistrates' Court advising him of the fact and drawing his attention to legislation providing that costs recovered from the defendant are payable to the Committee or the solicitors who acted for the complainant. If the parties have agreed to the administration of a blood test upon themselves and the child who is the subject of the application, the results[62] also appear on the file together with any correspondence concerning the test.

One difficulty encountered by the survey related to files of complaints where no order had been made, either because the complaint had been dismissed at the hearing or because no hearing was ever held. In two courts[63] the practice in such cases is to retain the complete file in an accessible place, thus permitting inspection of the relevant documents. In the remaining courts, however, the practice is to store obsolete files together in circumstances rendering it impossible, with limited resources, to locate a particular group of cases—such as affiliation complaints terminated without the making of an order. Moreover, at least in one court,[64] the situation is exacerbated in that documents other than the original complaint and summons are often returned to the parties or their solicitors. Thus in the three courts where the 'no-order files' could not be located information about those cases was limited to that specified in the Register.[65]

(b) *The Results of Complaints Issued*

A total of 281 complaints were issued in the five courts between April 1966 and May 1971, claiming orders for maintenance or preliminary

[60] Maintenance Act 1965, Part IV, Div. 2; Maintenance Rules 1966, Part 3.

[61] Maintenance Act 1965, s. 72; Maintenance Rules 1966, Form No. 23.

[62] Administered in Victoria, almost invariably, by the Commonwealth Serum Laboratories, which issues its own mimeographed set of rules governing the conduct of the tests. The fee for such test is $50. In addition, the parties must meet the cost of taking blood samples and of the attendance of solicitors.

[63] Moonee Ponds and Footscray.

[64] Geelong.

[65] It is the duty of the clerk of such court to keep a register in the form prescribed by Form 2 in the First Schedule to the Justices Act Rules 1963. See Justices Act 1958, s. 86(2)-(6); Justices Act Rules 1963, ss 7-9, 122-3.

expenses (or both). All 281 complaints were directed to the putative father of the child; no case was encountered in which the mother was a defendant to proceedings instituted on behalf of an illegitimate child. Orders were made in 175 cases and were not made, for a variety of reasons, in the remaining 106 cases. Using these figures and other available information, a very approximate estimate can be made that in the five year period from April 1966 an average of 800 affiliation complaints were issued in Victoria and about 500 orders were made annually.[66]

TABLE 2

Number of complaints issued and results of complaints

Result of Complaint	Brighton	Moonee Ponds	Footscray	Fitzroy	Geelong	Total
Order made	13	42	38	32	50	175
No order made	11	38	11	24	22	106
Total Complaints	24	80	49	56	72	281

(i) THE ORDER CASES

A breakdown of the 175 cases in which orders were made, according to whether the order followed a hearing or was made by consent and according to the kind of order made, appears in Table 3.

[66] In Victoria in 1969, Magistrates' Courts dealt with a total of 7264 maintenance cases: see n. 42 *supra*. In that year the number of cases dealt with by each of the courts in the sample was as follows:

	Brighton	Moonee Ponds	Footscray	Fitzroy	Geelong	Total
Orders	30	99	59	38	137	363
Dismissals	25	51	18	35	46	175
Total	55	150	77	73	183	538

(Figures kindly supplied by Crown Law Department.)

It can be seen, therefore, that about 7% of all maintenance cases in Victoria were dealt with by these 5 courts. This percentage has not varied significantly over the last few years. If 7% of *affiliation proceedings* are instituted in these courts, it follows that about 4,000 affiliation complaints have been issued in Victoria during the 5 year period covered by the sample and about 2,500 orders made (the 5 courts having made 175 orders out of 281 complaints in that time). This suggests, as an extremely rough measure, that an average of about 800 complaints were issued and just over 500 affiliation orders were made annually in Victoria during the 5 years from 1966 to 1971. Of course the likelihood is that the numbers were somewhat lower than this in 1966 and higher in 1971, in line with population growth and, specifically, the growth in numbers of illegitimate children not given up for adoption.

TABLE 3
Kinds of orders

Kind of Order	Brighton	Moonee Ponds	Foot-scray	Fitzroy	Geelong	Total
(1) *Following hearing*						
(a) for maintenance[67] *and* preliminary expenses	3	10	12	11	10	46
(b) for maintenance only	3	12	14	10	13	52
(c) for preliminary expenses only	2	3	—	4	3	12
Total orders following hearing	8	25	26	25	26	110
(2) *By consent*						
(a) for maintenance *and* preliminary expenses	2	5	4	3	6	20
(b) for maintenance only	3	12	7	4	18	44
(c) for preliminary expenses only	—	—	1	—	—	1
Total consent orders	5	17	12	7	24	65
TOTAL ORDERS	13	42	38	32	50	175

It appears from Table 3 that over one-third of the orders are made by consent of the parties.[68] Presumably the main factor motivating a defendant to consent to an order is his belief that he is in fact the father of the child. However there may be cases in which he harbours doubts as to the paternity of the child, yet consents to the order, perhaps in return for the mother's agreement to accept a lower sum by way of maintenance than she might receive from the court if paternity were established. Of course those defendants who consent to a maintenance order are not the only fathers of illegitimate children who agree to support their children. Many fathers in fact do so without the institution of legal proceedings. A man may be prepared to maintain his illegitimate child because he is living with the mother or is sufficiently concerned about her welfare and that of the child to provide her with financial support. Alternatively, even if his feelings towards the mother are not benevolent, the mere threat of

[67] In two cases complaints were dismissed in the Magistrates' Court for want of corroboration, but appeals to the County Court of Victoria were upheld. One case originated at Brighton and the other at Footscray. Prior to the County Court (Jurisdiction) Act 1968 an appeal in affiliation proceedings was taken to the Court of General Sessions. That jurisdiction has now been conferred on the County Court.

[68] 'Although [s. 4 of the Maintenance Act 1965] requires that the Court be satisfied of certain matters before it may make an order, the court is entitled to make an order by consent in appropriate circumstances. Where the parties are both represented the court will readily do so on the basis that the parties have been advised of their respective positions and are the best judges of their own interests; where one is unrepresented the court may still make an order by consent provided it is satisfied that the unrepresented party is really consenting and that he or she understands the nature and effect of the order.' Bourke and Fogarty, *op. cit.* 72.

proceedings may be enough to induce him to make regular payments for the maintenance of the child.

Table 3 also indicates that in most cases the order does not include both maintenance and preliminary expenses. There may be several reasons why an order is confined to an award of maintenance. The defendant may have voluntarily paid the expenses of the complainant in respect of her confinement before the issue of the summons. This usually is the case if the defendant has been living in a *de facto* relationship with the mother and has terminated the relationship some time after the birth of the child. In some cases the complainant's expenses may have been negligible because of her participation in a medical benefits scheme or because another person (such as a relative) has met most expenses. The final reason derives from the requirement in section 12(2) of the Maintenance Act 1965 that a complaint seeking preliminary expenses must be issued within twelve months of the birth of the child. As Table 5, *infra,* shows, 55 summons were issued more than one year after the birth of the child. No doubt in some of these cases the defendant had satisfied the obligation to pay preliminary expenses but in others the claims of the mother would be barred by section 12(2). The thirteen files in which an order for preliminary expenses only was made might be explained where the mother had given up the child for adoption, but wished to recoup the expenses connected with her confinement. Of course in such cases the adoption order extinguishes the liability of the natural father to support the child.[69] In one case the child had died and the mother succeeded in a claim for preliminary expenses and funeral expenses. Interestingly, 9 of the 13 complaints for preliminary expenses only were issued *before* the birth of the child, suggesting that these complainants knew their entitlement and the course of action they intended to pursue. As Table 5 shows, only 14 complaints in cases in which orders were made (and 17 in the whole sample) were issued before the child was born. The small number of cases seeking only an order for preliminary expenses suggests that few unmarried mothers who give up their child for adoption are aware that the father is liable to pay preliminary expenses. Alternatively it may be that they are reluctant to enforce their legal rights, perhaps because there is less urgency to do so since they do not face the problem of supporting the child. Certainly there is a strong feeling in many unmarried mothers that once their child is placed for adoption they wish to regard the episode as complete and, in particular, want nothing further to do with the father of the child, even if their wish involves financial loss.

(ii) NO-ORDER CASES

It must not be thought that the 106 no-order cases represent complaints that have proceeded to a hearing and have been dismissed on the merits. In fact, so far as can be determined, the entire sample of 281 complaints

[69] Adoption of Children Act 1964, s. 32; Maintenance Act 1965, s. 21(b).

contained only 4 cases that were actually dismissed on the merits. This appears from Table 4, which specifies the reasons for the absence of an order in the 106 cases.

TABLE 4[70]

Reasons for absence of order in no-order cases

Reason	Brighton	Moonee Ponds	Footscray	Fitzroy	Geelong	Total
Complaints not served	2	13	2	10[j]	6	33
Complaints withdrawn	1	2[b]	1[g]	—	3	7
Complaints struck out through non-appearance of complainant	5	4[c]	5[h]	3	3	20
Complaint struck out for unspecified reasons	1	5[d]	—	1	6	13
Adjourned *sine die*	1	—	—	—	4	5
Dismissed on merits	—	1[e]	3[i]	—	—	4
Complaints not finally resolved	1[a]	13[f]	—	5[k]	—	19
Unknown	—	—	—	5	—	5
TOTAL	11	38	11	24	22	106

The significance of the low number of dismissals should not be exaggerated. Several factors contribute to the apparent success of complainants. First, and most important, there is a process of informal selection before complaints are issued. Dubious cases are likely to be weeded out by clerks of court, solicitors and, in certain cases, officers of the Social Welfare Department. In particular, complainants clearly lacking corroborative evidence are unlikely to reach the stage of issuing a complaint. Thus

[70] Notes to Table 4:

(a) The complaint and warrant of apprehension were issued in 1971 and filed with the Information Bureau.
(b) One complaint was withdrawn as the complainant and defendant wished to marry. One complaint was withdrawn, on the complainant's request to her solicitors, for unspecified reasons.
(c) In 3 cases the defendant was represented but the complainant was not.
(d) In one case the complainant's solicitors successfully applied for a rehearing after the first complaint was struck out for want of appearance. Apparently the complainant again failed to appear at the second hearing, although this is unclear from the file.
(e) The complainant was not represented at the hearing, but the defendant was. The complainant's appeal was struck out for unspecified reasons.
(f) All 13 complaints were issued within 8 months of the survey. In 10 cases complaints and warrants of apprehension were issued.
(g) The parties later joined in an application for permission to marry under the Marriage Act 1961 (Cth), s. 16.
(h) In one case both parties were represented.
(i) One maintenance order was quashed on appeal. One dismissal was affirmed on appeal. In the third case complainant's counsel conceded that no corroborative evidence was available.
(j) One complainant advised the clerk of courts that her child had been adopted and that she therefore requested the return of the unexecuted warrant of apprehension.
(k) All 5 complaints were issued within 8 months of the survey. All involved warrants of apprehension.

the figures do not demonstrate that the statutory defences available in affiliation proceedings are unimportant. Secondly, about 30 *per cent* of the no-order cases are recorded as being struck out, mostly because of the failure of the complainant to appear at the hearing. Although the striking out of a complaint does not have precisely the same effect as a dismissal on the merits,[71] it is possible that many of the cases were struck out because the complainant was advised that the proceedings would be unsuccessful.[72] This hypothesis receives some support from the fact that in 3 of the 4 non-appearance cases in Moonee Ponds court the defendant alone was represented. Thirdly, it is possible that those complaints not served on defendants cover the most dubious claims of paternity reaching the stage of legal action. Nevertheless, the figures do provide some evidence that magistrates are anxious to lean in favour of complainants in affiliation cases, at least on the issue of paternity.

Table 4 shows clearly that one of the major difficulties facing complainants is that of successfully locating and serving the defendant with the complaint. If anything, this difficulty is under-estimated in the table, because most of the 19 complaints 'not finally resolved' were cases in which difficulty had been experienced in effecting service. (Somewhat ominously 16 of the 19 complaints were accompanied by warrants of apprehension.) Moreover, discussions with clerks reveal that in recent times magistrates have often declined to issue warrants of apprehension in cases where the procedure appears to be futile. The difficulty in effecting service on defendants is plainly a significant deficiency in the conduct of affiliation proceedings in Victoria. This deficiency is not remedied to any great extent by the use of warrants of apprehension. It is also plain that the problem is not easy to resolve, but it may be that if support action were taken against fathers of illegitimate children through the Social Welfare Department of the State, rather than by individual mothers, a start to resolving the problem would be made.

Although only 175 orders were actually made in the 281 cases in the sample, it is unlikely that all no-order cases terminated without the complainant receiving any support at all from the defendant. For example, in some of the 5 cases adjourned *sine die*[73] it is quite possible that the parties agreed that, in return for the complainant's promise not to press the proceedings, the defendant would contribute to the support of the child. Such an agreement permits the complainant to receive payments, yet

[71] *Paul's Justices of the Peace* (2nd ed. 1965) 194. The correct procedure where the complainant does not appear seems to be to adjourn the complaint or dismiss it; Justices Act 1958, s. 91(10). An order made in the absence of one party may be set aside on appropriate terms: Justices Act 1958, s. 69.

[72] Although no blood test which resulted in an exclusion for the defendant was detected in the sample, if such a test were administered presumably the complaint would not reach the stage of a hearing, but would be withdrawn or struck out earlier.

[73] Adjourned indefinitely, without a date fixed for the adjourned hearing.

preserves the opportunity of resorting to the court at short notice.[74] From the defendant's point of view this procedure enables him to avoid an order and a positive finding of paternity. A similar arrangement for support of the child may have been made in some of the cases that were withdrawn or struck out. A further explanation for the non-appearance of the complainant in so many cases is the resumption of a *de facto* relationship between the parties after the institution of proceedings. In addition at least 2 complaints were withdrawn because the parties had decided to marry. On the other hand it is likely that a number of complaints did not reach the stage of a hearing because of the distress and humiliation experienced by the complainants as a result of their initial contact with the legal process. It is also not unknown for a complainant to be deterred by the threats of the defendant to produce evidence, real or fabricated, of her promiscuity. Thus a great deal more may lie behind a complaint that has been withdrawn or struck out than appears from the formal documents in a file.

(c) *Time of Issue of Complaints*

TABLE 5

Time of issue of complaint relative to birth of child

Time of issue of complaint	Order cases	No-order cases	Total
Before birth of child	14	3	17
Within one month of birth	16	15	31
1-3 months after birth	49	13	62
4-6 months after birth	20	6	26
7-12 months after birth	18	10	28
1-2 years after birth	21	18	39
2-3 years after birth	10	5	15
3-4 years after birth	9	4	13
After 4 years after birth	15	13	28
Not stated	3	19	22
TOTAL	175	106	281

Table 5 shows that most complaints, in cases in which an order is made, are issued within twelve months of the birth of the child. Thus 117 of the 172 complaints in order cases where the date of issue of the complaint is known were issued within the twelve month period. In the no-order cases the figure is slightly less, but not significantly so—47 of the 86 complaints in which the date of issue is known. The information for the no-order cases was derived from the Register in three courts[75] with

[74] An agreement by the mother of an illegitimate child to accept payments from the father, in return for a waiver of the right to apply to the court for maintenance, will not in fact preclude an application to the court. An agreement purporting to oust the jurisdiction of the court in maintenance cases contravenes public policy and is void. See generally *Brooks v. Burns Philp Trustee Co. Ltd* (1969) 43 A.L.J.R. 131 (H.Ct) (a husband-wife case).

[75] See T.A.N. 63-5 *supra*.

the result that in 19 cases the necessary dates were not available. Table 5 includes complaints in respect of more than one child, the date of the birth of the last child being taken as the basis for ascertaining the time of issue of the complaint.

(d) *The Parties to the Complaints*

TABLE 6
Number of children the subject of each complaint

Number of children included in each complaint	Order Cases	No-order Cases
One	148	73
Two	21 [including 2 sets of twins]	11
Three	1	8
Four	3	4
Five or more	2	1
Unknown	—	9
TOTAL CASES	175	106

As Table 6 indicates, 148 of the 175 order cases involved only one child. A total of 218 children were the subject of the 175 order cases and, assuming each of the 9 unknown cases referred to one child only, 149 children were included in complaints that resulted in no orders. It seems to be a fair assumption that the parties to cases involving more than one child (except the two cases involving twins) were once living together in a *de facto* relationship. If this is so, it appears that at least 25 of the 175 order cases and 24 of the 106 no-order cases involved *de facto* relationships that had terminated. Of course these figures are minimum estimates, since a complainant whose complaint refers to one child only may have been party to a *de facto* relationship with the defendant. A further method of determining the proportion of cases involving *de facto* relationships is by reference to the period of time noted on each complaint during which the parties allegedly engaged in intercourse.[76] Of course this information may be regarded as especially unreliable since it is based on untested statements made (usually) by the complainant to the clerk of court at the time of issue of the complaint. Moreover, although the information required by the Rules to be noted on the complaint is normally interpreted to refer to the overall time during which the parties engaged in sexual relations, in some cases the date noted obviously was chosen to coincide with the particular gestation period in the case. Thus one complaint stated that the complainant had given birth to three illegitimate children by the defendant and that intercourse had taken place between the parties on three specified dates approximately nine months before the birth of each child. Again, the fact that the parties engaged in intercourse

[76] See T.A.N. 30 *supra*.

over a long period of time does not necessarily indicate that they were living together during that period. Nevertheless, the period during which intercourse has taken place in each case may give some clue as to the permanence of the relationship. If that period, as specified in the complaint, exceeds twelve months,[77] it is perhaps reasonable to assume that the complaint arises out of a relationship in which the parties were living together.

TABLE 7

Period during which intercourse took place	Order Cases (one child only)	No-order Cases[78] (one child only)	Total
On one occasion only	15	4	19
Less than one month	39	24	63
1-3 months	29	12	41
4-6 months	15	6	21
7-12 months	13	7	20
1-2 years	12	2	14
2-3 years	5	1	6
Over 3 years	12	6	18
Unknown	8	20	28
TOTAL	148	82	230

Accepting this as the criterion of a *de facto* relationship, it appears from Table 7 that 39 of the single child order cases and 15 of the single child no-order cases can be regarded as arising out of *de facto* relationships. Taking into account the complaints issued on behalf of two or more children, it can be concluded, with some misgivings, that at least 64 of the 175 order cases involved *de facto* relationships as did 39 of the 106 no-order cases. On the other hand, if the information specified on complaints is accurate, 54 of the order cases and 28 of the no-order cases involved apparently relatively casual relationships, since in these cases intercourse had occurred between the parties over a period of less than one month. However these figures are perhaps somewhat suspect since a relationship may be more than 'casual' even though the parties actually engage in sexual intercourse over a relatively short period of time.

(e) *The Amounts Ordered*

In the 162 cases in which a maintenance order was made against the defendant, the average amount of the order, as shown by Table 8, was approximately $6 per week. In nearly two-thirds of the cases (101 out of 162) the order fell within the range of $4.50 and $7.50 per week.

[77] Cf. Maintenance Act 1967 (Tas.), s. 16; n. 18 *supra*.

[78] The large number of cases in which the period during which intercourse took place is unknown reflects the fact that in Brighton, Fitzroy and Geelong courts the no-order files were inaccessible and information was restricted to that noted on the register. The 20 cases where the information was unavailable came from those three courts.

TABLE 8
Amount of orders[79]

Amount per week	Brighton	Moonee Ponds	Footscray	Fitzroy	Geelong	Total
$0.01-1.50	—	—	—	1	1	2
1.51-2.50	—	1	1	2	—	4
2.51-3.50	—	1	2	1	3	7
3.51-4.50	—	3	2	3	9	17
4.51-5.50	2	6	7	3	15	33
5.51-6.50	3	10	20	9	8	50
6.51-7.50	3	4	1	3	7	18
7.51-8.50	1	5	2	4	4	16
8.51-10.00	—	—	—	—	—	—
More than 10.00	2	9	2	2	—	15
TOTAL CASES	11	39	37	28	47	162

Most orders apply to very young children[80] and the figures suggest that magistrates are extremely conservative in determining the appropriate maintenance award. The figures also suggest that there may be some variation in the approach of magistrates in different courts. For example a comparison between the orders made in the Moonee Ponds and Geelong courts indicates that maintenance awards in Geelong are generally a little lower and, in particular, do not exceed $8.50 per week, whereas in Moonee Ponds nearly a quarter of the cases result in orders in excess of $10 per week. No doubt the apparent discrepancy is in part a reflection of the varying capacity of defendants to pay maintenance, but in the absence of magistrates' notes it is difficult to assess the factors that are considered to be most important in applying the statutory criteria.[81] It must be remembered that the participants in affiliation proceedings are not necessarily representative of all parents of illegitimate children in the community. Those parents of a relatively high socio-economic status are perhaps less likely to find themselves involved in maintenance action. A mother from a middle class family who decides to keep her child may not be subject to the same pressures, financial and institutional, that often compel mothers without resources to issue proceedings against a father who refuses to contribute to the support of his child. Indeed from the very few cases in which information as to the defendant's financial position was available it seems that even modest orders are often exercises in futility. In one 1970 case, for example, the defendant was an undischarged bankrupt living with his wife and three children. From a weekly income of $45 he was not only supporting his legitimate family but paying creditors a total of $10 per week. Although the magistrate made an order

[79] The table includes the 27 orders in respect of more than one child. The amount of the order *per child* in such cases has been incorporated in the table. It should also be noted that the table refers to the amount of the order at the initial hearing and does not include subsequent variations: see *infra* p.

[80] See Table 5.

[81] Maintenance Act 1965, s. 5(2), (3).

for a weekly payment of $4, in such cases the available income from private sources for the support of the illegitimate child are simply inadequate. The complaint in that particular case may well have been prompted by the policies of the Social Welfare Department, but it illustrates the problem often encountered by magistrates in affiliation proceedings.

Two other points should be noted concerning maintenance orders. Under section 18 of the Maintenance Act 1965, a magistrate has power to make an order for the payment of a merely nominal amount by way of maintenance. This power may be exercised if the court is satisfied that an order for maintenance would be made but for the fact (a) that the child is not presently without adequate means of support; or (b) that the defendant is not presently able to contribute to the support of that person. According to the Explanatory Paper to the Maintenance Bill, the purpose of section 18 is to

> enable the courts to determine the merits of a case while the facts are fresh in the minds of witnesses and to come to some conclusion on the defendant's liability to pay maintenance . . . The defendant's liability having been established the amount of the order may be later varied [under section 29] when changes occur (if at all) in the financial position of the parties.

In the sample of 162 maintenance orders only two were apparently nominal orders made under section 18.[82] In one 1966 order the defendant, a student, was required to pay the complainant's preliminary expenses and the nominal sum of $1 per week for the maintenance of the child. The file contains no indication that the order was varied subsequently. In a case heard in 1971 the father of four illegitimate children was ordered to pay the sum of 50 cents per week for the maintenance of each child. No statement appears in the file as to the reason for the making of the nominal order. Thus it appears that the power to order the payment of a nominal sum for maintenance is exercised very sparingly. The second matter worthy of note is that under section 20 of the Act a magistrate has the power, where a complaint is adjourned for a period of not less than seven days, to make an interim order for maintenance, which order remains in force for three months or until the complaint again comes before the court (whichever first occurs).[83] There is an argument on the wording of section 20 that the power to award interim maintenance is confined to husband-wife cases. Nevertheless the power was exercised in one affiliation complaint, where the proceedings were adjourned in order to allow blood tests to be administered by the Commonwealth Serum Laboratories. Ultimately an order was made in the case but, interestingly

[82] There is a form prescribed by the Rules for a nominal maintenance order. Maintenance Rules 1966, Form No. 9. Payment of arrears due under a nominal order cannot be enforced unless the arrears exceed $10 or the order is varied under s. 29: Maintenance Act 1965, s. 18(2).

[83] The form is prescribed by Maintenance Rules 1966, Form No. 7. See also Maintenance Act 1965, s. 19, allowing an *ex parte* order for preliminary maintenance of a child.

enough, the file concluded with a letter from the parties stating that they had married shortly after the final hearing and they mutually desired the proceedings to be terminated.

Table 9 deals with the amounts payable under the 79 orders for payment of the complainant's preliminary expenses. There is an extraordinary variation in the amounts awarded, although the average is slightly in excess of $200.

TABLE 9
Orders for preliminary expenses

Amount of order	Number of cases
Under $50	2
$51-100	18
101-200	25
201-350	22
351-500	9
more than 500	3
TOTAL CASES	79

The lowest order was one made by consent (the complainant being unrepresented) for $16, while the highest was for an amount of $670. As far as could be ascertained, the most substantial awards were usually the result of especially expensive medical treatment. Thus in a case which resulted in an order for $600, the complainant had spent a total of 76 days in hospital and, allowing for medical insurance, had incurred hospital expenses of $350. In a somewhat more typical case, a sum of $342 was awarded, comprising $158 for medical and hospital expenses, $64 for the maintenance of the mother for two months immediately prior to the birth and $120 for the maintenance of mother and child for three months following the birth. One order for preliminary expenses, made on a complaint issued before the birth of the complainant's child, raises interesting questions. The consent order stated that the defendant did not admit paternity and, further, that payment was made on condition that the child would be adopted at birth and that the payment would not afford corroboration of paternity in any subsequent proceedings. There is no doubt that such an order is ineffective in so far as it purports to prevent the complainant from retaining her child and from commencing maintenance proceedings on its behalf. Whether, in the event of proceedings being brought *on behalf of the child,* the payment could be used to provide evidence of the defendant's paternity is a much more difficult question. It should be noted that many orders provided for payment of preliminary expenses by instalments.

(f) *The Use of Blood Tests*

One important question in the conduct of affiliation proceedings is the extent to which blood tests are employed as an aid in determining whether the defendant is the father of the child on whose behalf a complaint has been brought. In the present state of medical knowledge a

blood test administered on the mother, child and defendant cannot establish affirmatively *of itself* that the defendant is the father of that child. However, the test may reveal conclusively that the defendant's blood grouping excludes him from the range of possible fathers (an exclusion result). Of course when taken in conjunction with other evidence the blood test may aid in the positive identification of the defendant as the father of the child. The evidence may establish, for example, that the complainant had intercourse with only the defendant and one other man at about the time of conception. A blood test providing an exclusion result for the other man but a non-exclusion result for the defendant will constitute affirmative proof that the latter is the father. Similarly, if rare blood groups are involved, so that the chance of any given man having blood types consistent with him being the father of the child are remote, a non-exclusion result for the defendant may be valuable evidence of his paternity. In Victoria, the Commonwealth Serum Laboratories administers blood tests, if requested by the parties, utilising the ABO, MNSs and Rh systems. These systems together give approximately a 53 *per cent* chance of exonerating a man falsely accused of being the father of a particular child. It is possible by the use of other systems to bring the exclusion rate to approximately 60 *per cent* and to 72 *per cent* if haptoglobin tests are added.[84]

Despite the obvious utility of blood tests in affiliation proceedings, only 7 cases were found in the sample in which such tests had been administered. It is possible that this figure is too low since the only means of determining whether a blood test was administered in any given case is by the presence of a letter or other document in the file stating the results of the test. There was, however, no indication in any other file that a test had been performed or, indeed, was contemplated by the parties or the court. Moreover, it must be remembered that the Commonwealth Serum Laboratories refuses to perform the tests unless all parties agree not only to the tests but also to accept a written report to the court as to the

[84] United Kingdom, *Report of the Law Commission on Blood Tests and the Proof of Paternity in Civil Proceedings* (1968) Appendix B.

The following table in the Report, adapted from Race and Sanger, *Blood Groups in Man* (4th ed. 1962) specifies the cumulative chances of excluding a given person from paternity if all available tests are employed on the child, the mother and the putative father:

	Exclusion by such system (*per cent*)	Cumulative exclusion
1. ABO	17.6	17.6
2. MNS	23.9	37.2
3. RH (D, C, c, E)	25.2	53.0
4. Kell (K)	3.7	54.8
5. Lutheran (Lua)	3.3	56.3
6. Duffy (Fya)	4.7	58.4
7. Kidd (JKa)	2.0	59.6

It should be noted that one factor limiting the use of blood tests is that the ABO system should not be applied to a child under 3 months of age, because of the possibility that the antigens are imperfectly developed.

results obtained and the interpretations of those results, without the expert being called to give evidence. The figures therefore indicate that blood tests are relatively rare phenomena in affiliation proceedings in Victoria.

It is a reproach to a legal system that disputed cases involving such a fundamentally important question as the paternity of a child should proceed without the best scientific evidence that is available on that question. No doubt there are several reasons for the limited use of blood tests. Complainants and their advisers may be reluctant to consent to tests since the most that can be obtained from their point of view is a non-exclusion result, whereas if a complainant is mistaken or lying, it is more probable than not that the defendant will receive an exclusion result. In some cases the parties and their advisers may be ignorant of the tests and their significance, while in others the defendants may be unwilling to bear, at least initially, the not inconsiderable costs of the tests. Nevertheless there seems to be an urgent need for the introduction of a system of compulsory blood tests, perhaps based on the model of the Family Law Reform Act 1969 (U.K.).

The defendant did not receive an exclusion result in any case in which a blood test was performed. It is, however, possible that an exclusion result was obtained in cases in which the complaint was struck out, although no such test was seen. The usual form taken by the report to the court is that of a table detailing the blood groupings of the child, mother and putative father, followed by a statement (in the event of a non-exclusion result) that

> (i) the defendant does not receive exclusion under any of the systems, and
> (ii) the result does not indicate that the defendant is the father [but] only that he has blood group antigens of the same type as those inherited by the child from his male parent.

In no case does the report on the file contain any analysis of the statistical significance of the non-exclusion result. Apparently the attitude of the Commonwealth Serum Laboratories is that any attempt to analyse the positive value of a blood test as evidence of paternity would prove too prejudicial to the defendant, although such an analysis will be made if specially requested. It cannot be denied, however, that in certain cases blood tests may provide 'valuable positive evidence that the putative father is in fact the father'.[85] It seems to be desirable that all blood test reports that indicate a non-exclusion result should carefully examine the value of that result as positive evidence of paternity, incorporating, if necessary, appropriate warnings by the serologists. Certainly any reform of the law[86]

[85] United Kingdom, *op. cit.* Appendix B, para. 10.
[86] Cf. Family Law Reform Act 1969 (U.K.), s. 20(2)(c); *T. (H) v. T. (E)* [1971] 1 All E.R. 590.

must consider this issue in prescribing the form of reports to be submitted to the court and the nature of the court that should determine affiliation complaints. The Commonwealth Serum Laboratories may well be correct in doubting the capacity of magistrates to interpret blood test reports correctly, but that is an argument for changing the composition of the court rather than for the withholding of valuable evidence. As a footnote, it is interesting to observe that one of the cases in which a non-exclusion blood test report was received was dismissed in the Magistrates' Court for want of corroboration of the complainant's evidence. This decision was reversed on appeal to the Court of General Sessions, but unfortunately the file does not reveal the significance of the blood tests in the appeal proceedings, although the magistrate concerned speculated that the report may have been regarded as corroborative evidence in itself.[87]

(g) *Legal Representation of the Parties*

One of the gravest problems in the administration of justice in Victoria is that there is no all-embracing system of legal aid for indigent parties to civil litigation. The Legal Aid Committee performs extremely valuable functions, particularly in the field of family disputes, but in the absence of large-scale government assistance cannot be expected to provide all the necessary services. One aim of the survey of affiliation proceedings was to determine the extent to which (a) complainants and defendants were represented and (b) representation was arranged through the Legal Aid Committee.

Unfortunately there is no completely certain means of determining whether the parties to a given case were represented, even if the full file is available. However, if certain notations are present in the file it is possible to deduce that the parties were represented. Thus if the complaint is prepared and issued by a solicitor it is clear that the complainant has been represented *at some stage in the proceedings.* Quite often the presiding magistrate notes on the complaint (or elsewhere in the file) the names of the legal representatives appearing at the hearing. It is also quite common for the remarks column of the Register to state the names of counsel appearing on behalf of the parties. Other indications that the parties are represented may be given by correspondence retained in the file or, in certain cases, by the terms of any order for costs. If the order provides for costs in excess of about $40 it is almost certain that the successful party has been represented either by a barrister or a solicitor. On the basis of information drawn from these sources an attempt has been made to assess the number of order cases in which the parties were represented. It must be noted, however, that representation for these

[87] Interview with Mrs Deirdre De Carro. It is a nice question as to when, if at all, a non-exclusion result in blood tests is capable of affording corroboration of the complainant's evidence.

purposes does not necessarily mean representation through the entire course of the proceedings. The same exercise could not be essayed for the no-order cases since in three courts the complete files for such cases were inaccessible. The figures from the other two courts are of limited utility because the vast majority of no-order cases do not proceed to a hearing.

(i) ORDER CASES

TABLE 10
Representing of parties[88]

Parties represented	Brighton	Moonee Ponds	Foot-scray	Fitzroy	Geelong	Total
Both parties	4	7	3	3	16	33
Complainant only	5	12	9	7	17	50
Defendant only	—	2	1	—	—	3
Neither party	4	21	25	22	17	89
TOTAL ORDERS	13	42	38	32	50	175
Total complainants represented	9(5)	19(7)	12(6)	10(5)	33(11)	83(34)
Total defendants represented	4	9	4	3	16	36

If there is any error in Table 10 it is on the side of underestimating the extent to which the parties in the affiliation proceedings were represented. However, the figures can be regarded as reasonably accurate on this question. In so far as the table incorporates an estimate of the number of cases (34 in all) in which complainants were assisted through the Legal Aid Committee, the figures might be regarded as a little more doubtful. The only means of ascertaining with certainty whether the Committee organized representation in a particular case is by the presence of a form from the Committee in the file or by documentation indicating that the Committee has taken enforcement proceedings in respect of an order for costs. Correspondence preserved in the file might also reveal the activity of the Legal Aid Committee. But there is no certain method of deciding that the Committee has *not* been involved in a case in which one or both parties are represented. It must be remembered that the Committee adopts the practice, where a person without means is referred to it by a firm of solicitors, of re-referring that person to the firm if aid is granted.[89] Thus a firm which issues a complaint on behalf of a complainant initially undertaking to pay her own costs, may finally represent her through the Legal Aid Committee. No file contained any indication that a *defendant* was legally aided, but this is perhaps an unreliable conclusion as there is less reason to expect a notification on the file concerning the intervention of the Committee on behalf of a defendant. In the result the figures for legal

[88] Cases involving Legal Aid Committee in brackets.
[89] The firm benefits in that the granting of legal aid ensures that at least 80% of costs will be received: see n. 33 *supra*.

aid assistance to complainants can be expected to be reasonably accurate, although perhaps erring a little on the conservative side.[90]

The picture that emerges from the table is hardly one that can be considered satisfactory, but is certainly not as inadequate as might have been expected. A little under half of the complainants in order cases were represented and about one half of those received assistance from the Legal Aid Committee. If it is true that the Committee is usually prepared to authorise representation for indigent complaints, obviously far too many are missing an opportunity otherwise available to them, presumably because they are never informed of the services available. One explanation for the relatively small percentage of complainants who receive legal assistance is the sifting procedure adopted by some clerks of Magistrates' Courts. Apparently some clerks accept the view that if the complaint's case appears to be unassailable or if it is unlikely that the defendant will contest the claim, there is no point in recommending legal representation unless the case is dismissed and an appeal is required. This view no doubt conserves scarce resources, but it ignores the possibility that in any complaint representation may be crucial on an issue other than paternity, such as the amount of the order. In addition, the entire judicial process is frightening to those without experience in its forms and procedures, so that representation may play an important part in reducing the terrors of the proceedings. The table bears out the commonly expressed view that there are significant differences in the practices of various clerks in obtaining representation for complainants. Geelong has a reputation for adopting a reasonably protective attitude to complainants, the clerks ensuring as far as possible that representation is arranged. This reputation seems to be confirmed by the figures which show that two-thirds of complainants in order cases were represented at Geelong compared with one-third or less at Footscray or Fitzroy. It seems desirable and urgent that a system be devised that avoids discrepancies of this nature.

From the point of view of defendants the position is even less satisfactory. Legal representation was obtained only by approximately 20 *per cent* of defendants. Considering the important and long term consequences of an order in an affiliation case, a putative father who genuinely wishes to dispute paternity of the child should be entitled to legal representation in order to present his case. It is interesting to note that in 20 of the 65 cases in which orders were made by consent the defendant was represented, whereas counsel were present in only 17 of the 111 cases which proceeded to a hearing (and which were presumably cases of disputed paternity, or at least involved an argument as to the proper award of maintenance).

[90] The Legal Aid Committee provided legal assistance for approximately 75 applicants involved in affiliation proceedings in 1968-69 and 105 in 1969-70. See n. 32 *supra*.

Table 11 shows the amount of the maintenance orders obtained in all cases, categorised according to the representation of the parties. The table seems to suggest that cases in which complainants alone are represented are less likely to result in small orders and those in which defendants are represented are less likely to result in very large orders.

TABLE 11
Maintenance orders according to amount and representation of parties

Amount of Order	Both parties represented	Complainant only represented	Defendant only represented	Neither party represented	Total
Under $1.50	1	—	—	1	2
$1.51-2.50	—	1	—	3	4
2.51-3.50	4	1	—	2	7
3.51-4.50	5	2	—	10	17
4.51-5.50	6	11	—	16	33
5.51-6.50	10	14	2	24	50
6.51-7.50	5	5	—	8	18
7.51-8.50	—	4	—	12	16
8.51-10.00	—	—	—	—	—
More than 10.00	—	5	1	9	15
TOTAL	31	43	3	85	162

Subject to this, however, the table apparently indicates that the presence or absence of lawyers makes very little difference to the size of the order finally obtained. As pleasing as this information might be to non-lawyers, no significant conclusions can be drawn from the table because the circumstances of each case vary so widely. Some cases in which complainants were unrepresented may have been quite straightforward as to liability and the appropriate order to be made, whereas the cases involving representation may have been more difficult from the complainant's point of view. Nevertheless the table provides some support for the view that the absence of representation does not necessarily lead to injustice as far as the outcome of a case is concerned.

(ii) NO-ORDER CASES

The only courts at which no-order files could be examined in full were Footscray and Moonee Ponds. In 4 of the 11 no-order cases at Footscray both parties were represented and in 2 of these the complainants' solicitors were appointed through the Legal Aid Committee. In one of the 4 cases an order for the complainant was quashed on appeal to the Court of General Sessions for reasons that do not appear on the file. In a second case, heard in 1970, dismissal of the complaint by the magistrate was affirmed on appeal to the County Court. The third complaint was dismissed following a concession by counsel that the complainant was unable to adduce corroborative evidence. In the fourth case the complaint was

struck out when the complainant did not appear at the hearing. Since both parties were represented, it is possible that the striking out of the proceedings was one of the terms of settlement of the dispute. In one further case at Footscray the defendant was represented by a solicitor following service of the complaint and summons, but the complainant was unrepresented. These proceedings ultimately were withdrawn, the parties later applying to the court for permission to marry under the Marriage Act 1961 (Cth) section 16, which governs marriages of minors without parental consent. Of the 38 no-order cases from Moonee Ponds only one involved representation of both sides (the complainant being legally aided) while 3 other complainants and 4 other defendants were represented (none of these 7 cases involving legal aid). In only one of the 8 cases in which parties were represented did the complaint reach the stage of a hearing, the others being struck out or withdrawn. In that one case the defendant alone was represented and the complaint was dismissed. An appeal to the Court of General Sessions was struck out, for reasons that are not clear. As far as could be ascertained, this was the only case in the sample that resulted in a dismissal without the complainant being represented.

(h) *Enforcement Proceedings in Order Cases*

Court orders requiring the payment of money are not self-executing and maintenance proceedings probably give rise to the greatest enforcement difficulties created by any civil litigation. Some of the reasons for the problems are obvious, but the solutions are not. A maintenance order, whether obtained against a husband or against the putative father of an illegitimate child, remains in force for a very substantial period of time. The order requires regular compliance by the defendant throughout that period and a failure to comply, even for a relatively short time, may place him in a hopeless position, caught between the need to make up arrears and the obligation to pay future instalments punctually. Of course some defendants seek deliberately to evade the obligations imposed on them by court orders. This may result from sheer irresponsibility, but often a defiant attitude stems from a belief, perhaps justified in certain cases, that the burdens imposed are unduly onerous or not warranted at all. Other defendants simply lack the resources to maintain two families, and consequently elect to devote the available funds to the family with whom they are living. This is especially true of cases in which a wife obtains an order against her husband on behalf of herself and her children, but it may also be true, to a lesser extent, of affiliation proceedings. Whatever the reasons, however, it is perfectly clear that extraordinary difficulty is experienced by complainants in affiliation proceedings in enforcing the orders obtained. This appears from Table 12, which details the number of enforcement applications made in cases in the sample.

TABLE 12
Enforcement action in maintenance order cases

Number of enforcement actions on file	Number of cases
None	86
1	24
2	12
3	14
4 or more	21
Unable to trace defendant to serve enforcement documents	5
TOTAL	162

Enforcement proceedings were thus instituted in nearly one-half of the order cases. This percentage perhaps underestimates enforcement problems, since some files in the sample were relatively new and consequently had not attracted enforcement action despite irregular compliance by the defendant. Moreover, the absence of enforcement actions does not necessarily indicate faithful compliance by the defendant with the terms of the order. Although only 5 files contained definite statements that the defendant could not be traced, it is highly likely that in other cases no action was attempted because there was no reasonable chance of locating the father. In other cases the complainant may be unwilling to take steps that might result in the defendant being committed to gaol. On the other hand, however, if the order has been obtained at the insistence of the Social Welfare Department, enforcement action will be required by the Department regardless of the feelings of the complainant. There is much to be said for the view that forcing recipients of social welfare benefits to take enforcement action adds unnecessarily to feelings of humiliation and harassment experienced in any event by those recipients. This problem could be ameliorated by adoption of the South Australian system under which orders are obtained by the Social Welfare Department in the name of the Director and enforcement action taken accordingly.

The range of enforcement procedures theoretically available to complainants in maintenance cases has been examined earlier.[91] In practice, the overwhelming majority of applications are for commitment of the defendant to prison for disobedience of the maintenance order. Surprisingly enough, in the sample only 2 orders were made for the attachment of the defendant's earnings (garnishee orders) and only 1 for the attachment of a debt due to the defendant. Three warrants of distress were issued in respect of arrears of maintenance and 12 in respect of costs payable by the defendant.[92] It is clear from these figures that the issue of a warrant of commitment is the usual enforcement procedure in affiliation cases and

[91] *Supra* p. 363.
[92] All these cases involved representation through the Legal Aid Committee.

that other techniques are employed only in exceptional cases. Several reasons are given by clerks of court for the failure to use procedures other than the warrant of commitment. The complainant often does not know where the defendant works and in most cases the defendant does not have regular employment or any substantial assets. A garnishee order has the disadvantage that, although it is illegal to do so,[93] an employer served with the order often dismisses the employee concerned. Nevertheless, although these points are undoubtedly valid in many cases, it would seem that there is perhaps over-reliance upon the threat of imprisonment as a means of inducing defendants to comply with maintenance orders. In particular, steps are not usually taken to examine defendants regarding their assets and earnings with a view to the institution of other proceedings for enforcement of orders.[94] It was not possible from the information available to determine the number of defendants actually committed to gaol, nor to assess with any precision the efficacy of the commitment procedure as a device for the enforcement of maintenance orders.[95] Even conceding, however, that the threat of imprisonment often spurs a defendant into producing the arrears of maintenance, it can be argued that this kind of action ought to be a last resort after all else has failed. The argument applies especially to defendants who do not appear at the original hearing and thus have not had their 'day in court' albeit through their own ignorance, stupidity or stubbornness. Certainly the imprisonment of a defendant hardly benefits taxpayers and does little to reduce the bitterness and humiliation often associated with maintenance action. The final point to note is that 6 maintenance orders were transmitted to other States for enforcement there. This procedure is available under section 72 of the Maintenance Act 1965, in cases where the Collector believes that the defendant is resident in or proceeding to another State.[96]

(i) *Other Matters*

(i) VARIATION OF ORDERS

Of the 162 order cases, applications were made in 12 cases to vary the original order. Seven applications were by complainants and 5 by defendants. Few details of the complainants' applications are contained in the files and in 4 cases the result is not specified. In 2 of the re-

[93] Maintenance Act 1965, s. 58.

[94] Maintenance Act 1965, s. 63.

[95] An attempt was made to determine the effectiveness of orders by recording the amount actually paid to the court and comparing that amount with the total sum due under the order. However, it became apparent that this procedure was not satisfactory. There are several possible explanations for the failure of the court to receive payments that are not inconsistent with the order being effective. In particular, payments might be made directly to the complainant, or the complainant might choose not to take any enforcement action. Those figures that were collected suggest that defendants subjected to a number of enforcement actions were often up to date with payments due at the time the file was examined. On the other hand in certain cases in which no enforcement proceedings had been instituted few payments, if any, had been made.

[96] Maintenance Act 1965, s. 72; Maintenance Rules 1966, Form No. 23.

maining cases the complainant received an extra $2 per week and in the final case the order was extended for a further 2 years in respect of a child who had attained the age of 16 but who wished to engage in further studies. The bases of the applications by the 5 defendants varied. One persistent defendant twice unsuccessfully applied for variation on the ground that he had married since the date of the order and in view of his extra commitments could not meet payments due under the order. A second defendant was rewarded rather more handsomely for persistence, each of his three applications being successful. The order against him had been made in respect of 4 children but 3 became wards of the State and the fourth became self-supporting, these events attracting the father's applications. In two cases the defendants had been injured in car accidents. In one case the complainant consented to a suspension of the order until the defendant had recovered and resumed employment, but the result of the application in the other case is not recorded. In the final case an order was suspended for 6 months upon a showing by the defendant (who was represented) that he could not meet the payments on the order.

Given the changes in the needs of children as they grow older and the ever present possibility of substantial medical or dental expenses, it is perhaps surprising that more applications for variation were not made by complainants. Considering the large number of defendants who default in payments due under orders, it is even more surprising that more applications are not made by defendants as a means of overcoming their problems. No doubt one very considerable hurdle facing a defendant is that in the absence of a completely satisfactory legal aid system, he may be unable to afford the cost of reducing the order which is contributing to his financial difficulties. Of course the clerks of courts may assist him in preparing the necessary forms, but the defendant must be aware of this practice in order to utilise the service. In any event, it is quite possible that he views the clerk as the representative of the complainant and thus hardly to be treated as an ally in proceedings for variation of an order.

(ii) APPEALS

The Maintenance Act 1965, section 107, provides for an appeal to the County Court from an order made by a Magistrates' Court under the Act. The 'appeal' is a curious procedure in that it takes place by way of a complete rehearing of the complaint, with the County Court hearing all evidence afresh. In the sample, 7 appeals were taken, 4 by complainants after dismissal of their complaints and 3 by defendants. Two complainants succeeded on appeal after the complaints had been dismissed by the Magistrates' Court on the ground that no corroborative evidence had been presented. The parties in these cases were represented on the appeal, although it is not clear whether they were also represented in the proceedings before the magistrate. In one of the two cases a blood test was

administered after the dismissal in the Magistrates' Court. In a third case the complaint was dismissed on the ground that the magistrate was not satisfied that intercourse had occurred between the parties. An appeal to the County Court, in which both parties were represented, was dismissed. No blood test was administered. In the fourth case the complaint was dismissed, the defendant only being represented, and the appeal was struck out.

On the hearing of each of the 3 appeals by defendants, both parties were represented. One appeal was dismissed after a blood test had been administered. In a recent case the appeal was allowed, but without the administration of a blood test. No reasons appear in the file for the quashing of the order on appeal. In the third case the appeal was adjourned *sine die* and, as far as can be gathered from the file, no payments were made under the order.

(iii) ACCESS

Under section 17 of the Maintenance Act 1965, the court has power on a complaint for maintenance to make an order committing custody of the child concerned to the complainant and, if appropriate, granting access to the defendant. Although the matter is certainly not free from doubt, the wording of section 17(1) suggests that the jurisdiction may be confined to complaints by one spouse against another.[97] Nevertheless in 3 cases heard at Moonee Ponds the magistrate granted access for a limited period each week to the father ordered to pay maintenance. There may be a real question as to whether magistrates should have the power to determine issues of custody or access. If they are to have the power, there is no reason to distinguish between legitimate and illegitimate children in this respect. In any event the powers of magistrates under section 17(1) should be clarified.

IV CONCLUSION

The foregoing study of affiliation proceedings in Victoria obviously does not answer all questions concerning the conduct of such proceedings. Apart from the deficiencies of the study itself, many difficulties are presented by the absence of detailed information on the files. Nevertheless some conclusions can be drawn.

In Victoria very nearly all affiliation complaints reaching the stage of a hearing culminate in an order for the complainant. The success of complainants does not necessarily mean that the statutory defences avail-

[97] S. 17(1) refers to a 'complaint made by or on behalf of a parent of a child of the family'. The phrase 'child of the family' is defined by s. 3 to mean 'in relation to the parties to a marriage . . . (a) any child of both parties; and (b) any child of either party who has been accepted as one of the family by the other party . . .'. On the other hand, 'child' is defined to include an illegitimate child and the word 'parent' is to be construed accordingly: s. 3.

able to a putative father are unimportant in discouraging the issue of proceedings, although it may indicate that magistrates lean in the complainant's favour on the issue of paternity. Nothwithstanding that at least one-third of complaints arise out of *de facto* relationships, a major problem confronted by complainants is that of locating the defendant and serving him with the appropriate documents. This problem might be alleviated, at least to some extent, if co-ordinated action through a single agency, such as the Social Welfare Department, were taken to initiate and conduct affiliation proceedings on behalf of illegitimate children. The amounts ordered by way of maintenance appear to be rather low, especially considering that the father is not liable to contribute to the support of the mother. However, there is nothing to suggest that the amounts ordered differ materially from those obtained on behalf of legitimate children in similar circumstances. Despite the low amounts defendants are usually ordered to pay, most complainants experience very considerable difficulty in enforcing the orders. Again co-ordinated action through the Social Welfare Department might alleviate this problem, but consideration might be given also to the utilisation of techniques other than commitment of the defendant as a means of enforcing orders.

Three firm conclusions can be drawn from the study. First, while the proper role of the Social Welfare Department in affiliation proceedings is open to debate, there is a clear need for greater co-operation between the Department, the courts and the Legal Aid Committee. The present system imposes unnecessary emotional and physical burdens upon complainants and is wasteful of scarce community resources. Secondly, ascertainment of the paternity of illegitimate children is a sufficiently serious legal and social problem to warrant urgent attention to be given to the introduction and implementation of legislation governing blood test evidence in cases of disputed paternity. It appears that far too often courts proceed without the assistance of scientific evidence that may be of crucial importance to the issue of paternity. Finally, the study demonstrates that too many parties to affiliation proceedings are obliged to have their day in court (and the child's) without legal representation. This deficiency of the legal system is not confined to maintenance cases—indeed the problem may be more urgent in the criminal jurisdiction. Nevertheless the evidence suggests that, valuable though the work of the Legal Aid Committee may be, a greatly expanded legal aid programme is required.