REPORT OF THE LAW REFORM COMMITTEE

ON

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

See Executive Summary below.

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I. General and Background

A. Terms of reference

1 The Maintenance Orders (Facilities for Enforcement) Act[1] (hereinafter "MO(FE)A") and the later Maintenance Orders (Reciprocal Enforcement) Act[2] (hereinafter "MO(RE)A") provide statutory bases for reciprocal enforcement of maintenance orders in Singapore. The former has been little amended since its enactment in 1921 while in the latter case very limited use has been made of the power to declare foreign non-Commonwealth states as reciprocating states. The sub-committee is tasked to consider whether either legislation is in need of reform, taking into account, changes, if any, in family relationships and personal mobility; national spousal and child support systems, ease of asset relocation and secretion which complicates the identification of the maintenance debtor's assets; other operational difficulties in the cross-border recovery of maintenance; and the convergence, if any, of international opinions on maintenance of spouses and child support.

2 The sub-committee understands that these terms of reference do not require or warrant consideration of the merits or demerits of accession to the UN Convention on the Recovery of Maintenance Abroad 1956 (also the "New York Convention 1956"), the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children 1956 (also the "Maintenance Obligations Convention 1956), the Hague Convention on the Law Applicable to Maintenance Obligations 1973 (also the "Maintenance Obligations Convention 1973")[3] and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007. All four conventions offer alternative reciprocal schemes with non-Commonwealth states on bases which are markedly different from the MO(FE)A and MO(RE)A. In at least two of them, an essential change in approach would be entailed. Accession to the New York Convention 1956, for instance, would require the Government to designate an authority to represent an applicant for maintenance and to nominate a Transmitting Agency and a Receiving Agency to prosecute claims for maintenance on the applicant's behalf. Accession to the 2007 Convention would require even greater commitment and devotion of resources by the Government to child support. Clearly, the issues which are raised by proposals to establish public authorities with responsibility to recover maintenance abroad on behalf of private persons and which therefore will involve expenditure of public funds are not suitable for the sub-committee to address.

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1 Cap 168, 1985 Rev Ed.

2 Cap 169, 1985 Rev Ed.

3 Both conventions will be replaced by the Hague Protocol on the Law Applicable to Maintenance Obligations 2007 when it comes into force. The text was adopted on 23 November 2007 at the 21st Diplomatic Session of the Hague Conference on Private International Law.

3 This report which the sub-committee is pleased to present as a discussion document recommends a bifurcated approach to the question of reform. We first conclude that the MO(FE)A remains a sound and tested structure for reciprocal enforcement within the Commonwealth but should be improved to ensure that it can operate more cheaply, efficiently and fairly. We conclude however that the MO(RE)A requires a thorough overhaul if it is not to remain merely as a more modern version of the MO(FE)A but largely inoperative with respect to non-Commonwealth countries. Our conclusions are underscored by a number of premises which it will be helpful to state at the forefront. First, there is no essential difference between spousal support and child support; and in particular the same procedures are applicable to the one as well as the other. Secondly, the basis of statutory enforcement of foreign maintenance orders is reciprocity. Thirdly, where a foreign maintenance order is reciprocally enforceable, the enforcement measures that are relevant will be those supplied by the local internal law. These premises also underlie or are unchanged from those which underlie the two systems of reciprocal enforcement under review. In two respects, however, and so far as the MO(RE)A is concerned, we recommend that reform must go beyond removing delays and inefficiencies and that more fundamental reform is necessary. That reform will involve the introduction of provisions which limit the jurisdiction to make reciprocal maintenance orders and require the courts to have regard to applicable law if raised by the maintenance debtor as a defence.

B. The Maintenance Orders (Facilities for Enforcement) Act ("MO(FE)A")

4 At common law, the prospects of enforcing a foreign maintenance order made by a court of international jurisdiction are narrowly circumscribed. As only final and conclusive judgments for a fixed sum are enforceable, common law enforcement is severely limited to orders for a lump sum payment, which are in practice rarely made, and accrued arrears under an order for periodic payments, which may come too late to do much good.[4]

5 The prospects of recognising a foreign maintenance order made by a court of international jurisdiction are also very limited. A maintenance creditor entitled to a right to maintenance under her matrimonial law or the law of her habitual residence faces serious difficulties if she attempts to sue in Singapore for breach of her right to maintenance relying on a foreign maintenance order to raise an issue estoppel as to the existence and breach of this right. To the common law court, maintenance is a judicial relief, not a matter of substantive right, and the courts in Singapore will likely refuse to recognise the cause of action, notwithstanding the right is conferred and breached under foreign law. The courts will prefer to grant maintenance as a judicial relief if it has jurisdiction to do so. Even if they are willing to recognise the cause of action, it is doubtful if a foreign order for periodical payments – which is thereby lacking in finality

4 See *Harrop v Harrop* [1920] 3 KB 386.

– can raise an estoppel as to the existence and breach of the right to maintenance under the foreign applicable law.[5]

6 These difficulties imply that a person can easily evade his liability to maintain his spouse, children and other dependents by leaving the country where they are domiciled or habitually resident and taking advantage of the obstacles in the common law relating to the enforcement of maintenance orders abroad where his new residence is in a common law country. In order to "secure justice and protection for wives and children who [had] been deserted by their legal guardians", the UK legislature enacted the Maintenance Orders (Facilities for Enforcement) Act 1920 as long ago as 1920 to provide a statutory solution and circulated its text to constituent parts of the British Empire with a request for corresponding legislation to be passed.

7 The MO(FE)A was enacted as such corresponding legislation in Singapore about a year later; albeit its operation no longer automatically depends on mere enactment of reciprocal legislation in a Commonwealth state but on designation by the Minister of participating states as reciprocating states if he is satisfied that reciprocal legislation has been passed in those states.[6]

8 Exactly as its English precursor, the Singapore legislation differentiates between two categories of cases, namely final orders and provisional orders. Provisions are made for enforcement of final orders against persons who have, before the orders can be enforced, ceased to reside in the jurisdiction of the court which made the orders. These orders are either transmitted from Singapore and registered in a reciprocating state or transmitted to and registered in Singapore, as the case may be.

9 In the case of persons who have ceased to reside in the jurisdiction before an order can be obtained, provisions are made for obtaining a provisional order in that jurisdiction for the purposes of confirmation by the court in the jurisdiction where the defendant is now resident. Provisional orders are either transmitted from Singapore for confirmation in a reciprocating state or transmitted to and confirmed in Singapore, as the case may be.

C. Scope of MO(FE)A

10 Notwithstanding that the MO(FE)A is drafted as a bilateral arrangement between Singapore and England (and Northern Ireland), the provisions of section 11 make it clear that the Act may be extended by declaration to member states of the Commonwealth. Please refer to Annex A for the list of countries which have been declared to be within the scheme.

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5 See generally *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* [1967] AC 853; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446.

6 See s 11.

D. Maintenance Orders (Reciprocal Enforcement) Act ("MO(RE)A")

11 The MO(RE)A sets up the second and later scheme to which we next draw attention. It was copied from the 1972 UK Act, though not the entirety of it. Encouraged by the success of the 1920 legislation and developments elsewhere in Australia and New Zealand as well as on the non-Commonwealth front, the UK Parliament passed the Act in 1972 in three parts. Part I was an improvement of the 1920 legislation which took into account the modifications adopted in Australia and New Zealand. Parts II and III of the UK legislation then extended to the UK the provisions of the UN Convention on the Recovery Abroad of Maintenance 1956 and the Hague Convention on the Enforcement of Decisions Relating to Maintenance Obligations 1973. In consequence, there are four categories of countries for the purposes of reciprocal enforcement of maintenance orders: (a) Commonwealth member states and their dependencies under the 1920 Act; (b) Commonwealth member states and their dependencies under the 1972 Act; (c) UN Convention countries; and (d) Hague Convention countries.

12 The MO(RE)A is based solely on Part I of the UK Act and was passed a mere three years or so after the UK legislation. Although modeled on the 1920 Act, it contemplates that the Act will be open to any reciprocating country, including a Commonwealth country. Use of the declaratory power has however been very modest. To date only three notifications have been gazetted, designating as reciprocating countries, Commonwealth countries such as New Zealand (specifically), UK (generally), Manitoba (generally) and an ex-Commonwealth law district, HKSAR. The first notification was in fact a transportation of two countries included under the MO(FE)A, namely the UK and New Zealand, to the MO(RE)A.

13 In several ways the MO(RE)A is an improvement on the older MO(FE)A. It contains a fuller and wider definition of maintenance orders, with liberty to the Minister to apply a narrower or wider definition discriminately by designation.[7]

14 The basic features of the MO(RE)A and the MO(FE)A, in particular, the differentiation between final orders and provisional orders, are similar; for instance, there are similarly no avenues for setting aside the registration of final orders or the making of provisional orders. However, there are also important differences. One vital difference is the replacement of judicial involvement by a more administrative process in the MO(RE)A. Under the MO(RE)A, the courts are not involved in transmission of final orders but the maintenance creditor may apply to an officer of the court for transmission and the officer forwards the application only if the information he provides as to residence of the maintenance debtor is judged sufficient. With respect to provisional orders, the courts are similarly not concerned with proof of residence of the maintenance debtor.[8] An officer of the court will be responsible for seeing that there is

7 See s 17(2).

8 S 4(1).

sufficient information as to that residence for the purposes of transmission of the order by the Minister.[9] The MO(FE)A contrastingly entrusts the court with transmission of final orders to the Minister once it is proved to the court that the maintenance debtor is resident in a reciprocating state.[10]

15 Provisions for variation and revocation which are conspicuously limited in the MO(FE)A to provisional orders, whether those made by the Singapore court or confirmed overseas provisional orders, are notably more extensive in the MO(RE)A. Under the MO(FE)A, the confirmation abroad of provisional orders made in Singapore does not affect the Singapore court's power to vary or rescind such orders.[11] Moreover, the Singapore court may after confirming a provisional order made abroad vary and rescind it as if the confirmed order had been its own.[12] It has however been held in *Pilcher v Pilcher* that there is no power under the MO(FE)A to vary or rescind registered final orders.[13] Significantly, the same power to vary or rescind provisional orders exists under the MO(RE)A but the corresponding provisions of the MO(RE)A additionally permit variation and revocation or discharge of registered overseas final orders.[14] The MO(RE)A but not the MO(FE)A also significantly contains a number of safeguards to ensure that the maintenance creditor will not be prejudiced by any variation or revocation. Thus, a foreign order registered in Singapore can only be varied by a provisional order unless both the parties are resident in Singapore or by request of the creditor or the variation effectuates a reduction in quantum of maintenance award solely on the ground of change in the financial circumstances of the debtor and the courts in the original reciprocating country do not have power to vary the maintenance.[15]

E. Practical Operation of the MO(FE)A

16 The table below contains statistics on the number of cross-border maintenance claims to and from Singapore. These figures show fairly modest recourse to both the provisional orders and the registration provisions. They may seem a little surprising in view of rising cross-border divorces. Traffic is pretty much one-way, with more applications going out from Singapore to reciprocating countries than *vice versa*. Although there is a noticeable jump in 2006 in the number of foreign orders to be enforced in Singapore, it is not possible at this time to say that this signifies an upward trend.

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9 S 4(5).

10 S 4. See also s 5 with respect to the transmission of provisional orders.

11 S 5(5).

12 S 6(6).

13 [1955] P 318.

14 S 9.

15 See s 9(2).

	FOREIGN TO LOCAL	**FOREIGN TO LOCAL**	**LOCAL TO FOREIGN**	**LOCAL TO FOREIGN**	
	PMO	REMO	PMO	REMO	
2000	3	5	7	9	24
2001	1	2	7	11	21
2002	2	7	11	16	36
2003	2	4	16	15	37
2004	3	3	17	14	37
2005		2	18	14	34
2006		12	17	17	46
TOTAL	11	35	93	96	235

17 In order to obtain a more qualitative understanding of the difficulties of cross-border recovery of maintenance claims, we also circulated a preliminary draft of this report among family law practitioners and judges of the Family Court and sought their views and comments on the practical operation of the MO(FE)A by way of questionnaire and response. Most of our respondents had no comments to give because cross-border recovery of maintenance claims was not a common feature of their law practice. However, of the two more detailed questionnaire responses we received, one was extremely helpful because it revealed the lack of clear guidance among our law officers as to what procedures of enforcement were available and where (*ie* at which court) they were available. In the words of the respondent practitioner who was endeavouring then to enforce a maintenance order of the Family Court in Sydney: "We were sent all over the place, from the Family Court to the Subordinate courts to the High Court." The same respondent referred to another case (involving a Chinese order) on which he or she was consulted and implied that it was astonishing that there was no reciprocity of enforcement between Singapore and China.

18 A second respondent pointed to or hinted at the need to avoid an isolationist approach but to adopt a more holistic approach to the problem which would achieve greater harmony between recovery of maintenance and access rights. He or she ventured to think that many maintenance debtors would not begrudge their child maintenance and would not require to be compelled to pay maintenance if there was some arrangement that assured them that they would see their child at some point in time. This comment is in line with various comments which have been made to the

Special Commission convened at the Hague Conference 1999 to study the problem of cross-border recovery of maintenance claims. In their report and conclusions published in December 1999,[16] the Commission drew attention to the difficulties which impede cross-border recovery of maintenance claims; such as differences with respect to establishing paternity, locating the defendant, availability of legal aid and incidence of costs, documentation difficulties including the lack of a standard form; and responsibility for the transfer and receipt of funds. It is significant that the majority of these enumerations are concerned not with the procedures for enforcement but are obstacles that precede the application of those procedures. The Special Commission did not of course ignore the operational difficulties of ongoing enforcement such as the collection and transfer of maintenance payments. These served to reinforce its conclusion that a new global instrument was needed.

19 The global instrument that the Special Commission called for has come eight years on, with the ratification and opening for signature of the Hague Convention on Independent Recovery of Child Support and Other Forms of Family Maintenance 2007. It is immediately obvious how much attention has been given to removing the operational difficulties which had beset the earlier conventions and remained formidable obstacles to their successful operation and utilization. Chief among the solutions adopted by the negotiators are streamlined, simplified, and standardised procedures which largely do not involve the courts and which may be invoked without legal assistance and at no costs or in a cost-free manner by the maintenance creditor. The costs in substance fall on the signatory state but those states which have ratified or acceded might have felt justified in trading off such costs against the ever increasing social support costs of maintaining abandoned children.

20 Although we have said that it is not part of our remit to consider whether effective and just enforcement of foreign maintenance orders requires the establishment of more pro-active and centralised administrative institutions and procedures, we share the views expressed by the Special Commission that there are serious pre-enforcement or pre-recovery obstacles which may sometimes be more telling than the operational deficiencies in existing enforcement procedures. These obstacles unfortunately require collaborative solutions, expenditure of public funds, and a level of international integration which does not presently exist. We have therefore refrained from making recommendations with respect to alleviating pre-enforcement or pre-recovery impediments to obtaining maintenance orders. There are additionally serious ongoing enforcement difficulties in relation to the MO(FE)A and the MO(RE)A. A positive contribution to improving the existing procedures is possible and we proceed therefore in this report to explain how this should be done.

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16 The terms of reference called for a review and examination of the practical operation of the 1956 New York Convention, the 1956 and the 1973 Hague Conventions. See *Report and Conclusions of the Special Commission on Maintenance Obligations of April 1999* (Hague: HCCH, 1999).

II. Whether Uniform Scheme

A. One Scheme or two?

21 The two reciprocating schemes for the enforcement of maintenance orders which we have reviewed in outline rest on two basic principles. The MO(FE)A caters to member states of the Commonwealth which are presumed to share similar laws on maintenance obligations arising out of a family relationship and procedures for the making and enforcing of maintenance orders. Reflecting this shared common law heritage, opportunities to review or withhold enforcement are denied once it is clear that reciprocal benefits are conferred by the state of residence of the maintenance debtor. Unfettered judicial assistance in making and confirming provisional orders is afforded as long as the maintenance debtor is resident within the jurisdiction in which the order will be confirmed. All this ensures that no one can shake off his "maintenance obligations" by moving from one to another reciprocating Commonwealth state. The MO(RE)A, an improved version of the earlier legislation, is however designed and intended to serve as a vehicle for enforcement of maintenance orders beyond the Commonwealth in relation to states with very different laws and procedures for the making and enforcing of maintenance orders. Accordingly, it envisages that the orders made for extending the Act to non-Commonwealth states will apply the Act with suitable, if not necessary, adaptations and modifications taking into account differences in the laws and procedures for the making and enforcing of maintenance orders.

22 Although intended to be a non-Commonwealth scheme, the MO(RE)A is erected on the same template as the MO(FE)A. As a result, it is possible to consider whether we should propose one common scheme for reciprocal enforcement of maintenance which assimilates both statutes. We note that in Australia and New Zealand there is only one statutory scheme for reciprocal enforcement of maintenance orders.

23 In Australia, the Family Law Act 1975 now provides the sole statutory scheme for registration and transmission of maintenance orders. The single scheme, however, contemplates varying degrees of application because the Minister may declare a country as being either a reciprocating country or a country with restricted reciprocity. To ensure that unknown orders are not enforced, orders from countries with restricted reciprocity may only be registered if they are similar to orders that can be made or enforced under the Act from fully reciprocating countries.

24 In New Zealand, the Domestic Proceedings Act 1968 provides the sole statutory scheme for registration and transmission of maintenance orders; albeit with differentiated treatment of Commonwealth and non-Commonwealth countries.

25 In both cases, apart from the differentiation between fully reciprocating and limited reciprocating countries, in effect between full and limited maintenance orders, there is no difference in the mechanisms for transmission and registration and appeal. Whether the order is to be transmitted to a fully reciprocating state or otherwise, the

same procedure is to be followed. The schemes are thus a little easier to apply and invoke by applicants and are more or less cheaper because they do not require complex legal advice to be given for their application.

26 Despite these advantages of a single scheme, we are not persuaded that the time is ripe for a single scheme and recommend the retention of both schemes in Singapore. In its report on enforcement of foreign *in personam* judgments, the Law Reform Committee ("LRC") had considered a similar question posed by the existence of two reciprocal enforcement schemes, namely the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA") and the Reciprocal Enforcement of Foreign Judgments Act ("REFJA"). The LRC had recommended the assimilation of both into a single scheme. There is however a vital difference between the enforcement schemes for *in personam* judgments and maintenance orders which argues against a similar assimilation of reciprocal enforcement of maintenance legislation. Both the MO(FE)A and MO(RE)A provide for active and extensive judicial assistance and cooperation in the making and confirming of provisional orders. This difference implies a need to be more cautious when affording the pro-active facilities of the legislation to unfamiliar laws of maintenance obligations since it could lead among other things to subjecting a maintenance debtor to the unfamiliar laws and jurisdiction of another state with which he has only a weak social and economic connection.

27 The chief reason for retaining two schemes is that the template on which the MO(RE)A is erected is not suitable for erecting a scheme to be applied between countries of different legal traditions. The template assumes that maintenance is a judicial relief that ought to be afforded as long as the maintenance debtor is resident in a reciprocating country. As we elaborate below, this assumption is highly questionable once we look beyond Commonwealth states and have regard to competing views held by many non-Commonwealth states that maintenance is a matter of substantive right conferred by the law of nationality of the spouses. If the MO(RE)A remains in its present state and form, it will remain practically inoperative since it is sanguine to expect that the basic differences between the common law and civil law of maintenance and child support can easily be overlooked when the Minister considers whether to designate a non-Commonwealth country under the MO(RE)A as well as when his civilian counterpart considers whether there should be mutual obligations between both states in relation to enforcement of maintenance obligations on a reciprocal basis.

28 It is a mistake, we think, to conceive of the MO(RE)A as an improved version to replace the MO(FE)A which will be phased out when countries designated under the latter are migrated to the former. An unattractive effect is produced. The MO(FE)A has been left in its pristine state and such modernisation of it as is necessary has appeared in the MO(RE)A which has however only been extended to three or four Commonwealth states. In our view, the MO(FE)A should be modernised while the MO(RE)A should be conceived as a distinct and separate enactment specially catering and exclusively devoted to the reciprocal enforcement of non-Commonwealth states' maintenance orders.

29 Our conclusion necessitates that we must make recommendations in order to update and modernise the MO(FE)A so as to ensure that it will be cheap and easy to apply, and will not require complex legal advice to be given for its application. We first discuss the modernisation of the MO(FE)A before turning to reform of the MO(RE)A.

III. Improvements to MO(FE)A

A. Definition of maintenance orders

30 In our view, the following steps should be taken to modernise and improve the MO(FE)A with a view to removing existing anomalies and difficulties which impede the operation of the scheme that it establishes.

31 In order to provide a more comprehensive coverage for the Act, which is essential if cross-border recovery is to be simplified, the Act's definition of the class of maintenance orders within its reach should be widened. The present class covers only "an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made". This class should be widened to include the lump sum order. It is anomalous to provide a superior scheme for the periodical order whilst leaving the lump sum order to the common law enforcement process. One anomalous consequence is that the common law defences of breach of natural justice and offensiveness to public policy are relevant if a lump sum order is to be enforced but if a periodical order is to be enforced, the maintenance debtor may only rely on such grounds of invalidity as have been specified in the order. One prominent disadvantage is that variation and modification are impermissible under common law enforcement. Fresh proceedings to modify or vary must be brought at possibly great inconvenience to the defendant in the country in which the original order was made. For the avoidance of these difficulties, the lump sum order should be capable of reciprocal enforcement as a matter of course and the common law process should be preserved only where for some reason the statutory scheme is unavailable.

32 Extension of the Act to lump sum orders will however raise questions as to whether maintenance awards made under inheritance statutes are within the reciprocal scheme. There should be clarification that such awards are within the scheme. However, lump sum orders which are made as part of a property order or by way of a transfer of ownership in property of the other spouse should not be within the scheme without further qualification. One qualification would be to ensure that the order made is only enforceable to the extent it makes provisions for maintenance and not support or capital advancement. Another would be to ensure that its enforcement will not be contrary to the comity of nations in the sense that the order purports to be imposed on immovable property situate outside the jurisdiction of the court making the order in a manner contrary to the comity of nations.

33 Further, if lump sum orders are to be enforceable, there can be no reason to leave out arrears which have accrued, provided that or at least where the original orders are enforceable under the Act. This means that it should be possible to obtain enforcement at the same time in respect of payments which have accrued and in respect of future payments. It would be necessary however for the avoidance of abuse and to encourage timeous and prompt enforcement of maintenance orders to include a "no hoarding" rule so that arrears dating back more than a year will not be enforceable in the absence of special reasons. This will also resolve a problem which arose under the former New Zealand MO(FE)A 1921 before its repeal and replacement concerning the recoverability of arrears before the date of registration.[17] We suggest that the definition should cover arrears before the date of registration but recoverability will of course be subject to the "no hoarding" rule.

34 Consistent with our recommendations in paragraph 32, we recommend the insertion of clarification that the definition should always be applied in substance. Asset distribution may be disguised as a lump sum maintenance order in order to overcome the doctrine of territoriality which refuses recognition to an order purporting to deal with immovable property situate outside the jurisdiction of the court pronouncing the order. Applying the meaning of maintenance order in substance, the court can properly refuse the registration of such disguised maintenance orders.

35 Such clarification should also dispose of questions as to whether orders made ancillary to the recognition of a foreign divorce are within the definition. We elaborate on this in paras [76] to [78].

36 With respect to the recovery of maintenance by public agencies, we recognise that this is now increasingly common especially in the case of child maintenance. No special consideration is required if the public agency is merely a collecting agency which seeks to enforce a maintenance order made by a court in a reciprocating country on behalf of the child. However, where the order is made by the public agency as well or where the agency is seeking to recover welfare benefits paid or other social assistance payments made to the child, there may be questions as to the agency's partiality and hence possible unfairness to the debtor. Some of these concerns also arise in connection with affiliation orders. We feel that it is necessary to take account of these concerns and recommend that there should be flexibility to withdraw orders made by public agencies and affiliation orders emanating from designated countries from the benefits of reciprocal enforcement. A more fundamental difficulty is that orders made by child support public agencies which replace the courts in all but very limited circumstances may be unenforceable under the MO(FE)A (indeed also the MO(RE)A) in its present form. Although the definition of maintenance order in the MO(FE)A (as well as the MO(RE)A) does not explicitly rule out such orders, its tenor and structure are consistent with orders made by child support agencies being outside the scope of the statutes. The definition of maintenance order in the MO(FE)A should be expanded

17 See *Wedge v Wedge* [1960] NZLR 373.

to accommodate the development of nationalised systems for assessing and enforcing maintenance obligations which replace the courts in all but very exceptional circumstances.

37 While our recommendations thus far are for widening the definition, in one respect, the definition needs to be narrowed to ensure that no order for same sex marriage will be enforced; since there is no clear-cut defence of offensiveness to public policy to cater to this. However, recognising the growing consensus on the preeminent importance of ensuring adequate child support, we think that in the case where the applicant is a child, the fact that the child is maintained by a civil partner and not a spouse should not matter.

38 We favour a more broad based approach to the question of maintenance arising out of a family relationship. The family relationship should be understood in a comprehensive sense to include not only the spousal and the parent and child relationships but also relationships of affiliation or parentage and affinity. There should also be no difficulty, whether of policy or principle, in enforcing orders for periodical payments to aged parents as dependants or in making provisional orders of this kind and we therefore do not recommend a narrowing of the definition to exclude such orders.

39 As to the sum to be reckoned as maintenance, there is an unfortunate fact that in Commonwealth countries, the maintenance debt is never automatically increased to take account of inflation, without the necessity of a court order. However, Australia is now an exceptional Commonwealth country which has established an automatic indexation system for child support. There does not appear to be any objection in principle to enforcing such maintenance orders but we recommend that the rate and timing of indexation should be made clear in any application for registration of a foreign maintenance order. We feel that the court should have discretion where the maintenance award includes legal costs, to exclude them if it would not be just and convenient to make the debtor pay for them.

B. Inclusion of maintenance agreements

40 In our view, the scheme which the MO(FE)A establishes needs also to be modernised by extending its scope to include maintenance agreements which are voluntarily entered into between the spouses for the benefit of one or the other spouse and any child of the family. This inclusion would contribute to lowering the costs of maintenance disputes since it would encourage or at least not discourage voluntary efforts and arrangements to make provisions for maintenance between the spouses. At present, a spouse who had previously entered into a maintenance agreement with the other must obtain an order of the court enforcing such agreement before reciprocal enforcement under the MO(FE)A (and for that matter the MO(RE)A) can be considered. The advantages of bringing the maintenance agreement directly under the scheme is that the maintenance creditor can seek a provisional order in the country in which she resides with a view to enforcement in the country of residence of the maintenance debtor. If she had to sue on the agreement apart from the MO(FE)A, she

would have to bring proceedings where the debtor was resident and where litigation would likely be a burden to her. She would further be deprived of the other procedural advantages that the simpler procedures prescribed by the MO(FE)A in bringing this action. The inclusion of maintenance agreements under the MO(FE)A would significantly improve her access to recovery of the agreed maintenance but should not result in the enforcement of agreements which are invalid under their governing law or which should not be enforced in any case on grounds of public policy.

C. Replacement of judicial involvement by administrative process

41 Our next group of recommendations relates to measures which are necessary to cut down delays and inexpedition in ongoing enforcement of designated Commonwealth maintenance orders.

42 It is a serious criticism of the MO(FE)A that it depends on judicial recourse or involvement to an unwarranted extent. As we have said, the court has to be satisfied as to the maintenance debtor's residence in a reciprocating state but on the other hand, it is not stated but assumed that it is the creditor who must prove the debtor's new residence. This is unattractive because it increases the costs of enforcement and prejudices applications from low income spouses and children. We expect these concerns to be more acute in the face of escalation in both registration and transmission cases, as more Singaporeans marry non-Singaporeans and more are employed overseas and on the other hand, more non-Singaporeans are employed in Singapore. As in the case of the MO(RE)A, it should be sufficient to entrust the proof of such matters as residence in a reciprocating state to an officer of the court. Experience elsewhere with the administrative process of the reciprocal-enforcement-of-maintenance-orders legislation has shown that judicial involvement in these matters is an unnecessary safeguard. This suggests that the need to ensure fairness to the maintenance debtor is likely to be adequately secured by making limited judicial recourse available to him in exceptional cases which have gone terribly wrong.

43 For instance, where orders are varied on changed circumstances, there may be vast discrepancies between the alleged facts and circumstances and this fact may operate unfairly on the maintenance debtor. The provisional order scheme has the advantage of convenience for the deserted or abandoned spouse or child since facts are stated *ex parte* by the person requiring maintenance in his or her country of jurisdiction and opposed by the other in the country of jurisdiction which is asked to confirm the order. There is however and consequently no tribunal which hears both sides of the case, which may encourage a maintenance creditor to put forward factual assumptions or allegations which are falsified or without foundation. The availability of judicial recourse in exceptional cases will enable the court to intervene by giving an opportunity to the debtor to impugn the evidence, the burden of proof being on him.

D. Addition of variation and revocation

44 Another serious and well known criticism of the Act is the absence of provisions on variation and revocation of final orders.[18] We recommend rectification of this omission. It is already provided that provisional orders confirmed in Singapore as well as provisional orders to be confirmed outside Singapore may be varied or revoked. However, variation of final orders is susceptible of greater abuse on the part of the maintenance creditor and the safeguards which are found in the MO(RE)A should be imported into the MO(FE)A.

45 We further recommend that a confirmed order in favour of a spouse should automatically be revoked by his or her remarriage.

E. Setting aside registration and appeals

46 One of the more difficult questions which we have to consider is whether there should be provisions for setting aside the registration of a transmitted final order or the confirmation of a provisional order. In part, this is because the MO(FE)A contains an ambiguity as to when an order may be set aside.

47 The MO(FE)A requires a transmitted order to be registered. Section 3 says very plainly that it shall be registered. This mandatory language appears to leave no room for any discretion to avoid registration and plainly offers no ground for setting aside the registration of a transmitted final order. There is a simple reason for this. It is necessary to keep the scheme simple for deserted spouses and effective against deserting spouses.

48 There is only one avenue by which registration may be voided, namely by the maintenance debtor showing that the order is not one coming within the Act.

49 Despite what seems plain on the language of the Act, Canadian case law on the Canadian legislation which is in *pari materia* with the Act has given the maintenance debtor two defences to registration (based on want of jurisdiction and fraud).[19] It is not clear however whether these defences are to be determined by reference to the law of the original or registering state.

50 We are not persuaded that wholesale inclusion of these developments would be beneficial or justifiable. While the scheme ought not to sacrifice the interests of the maintenance debtor in a fair disposal of the question of liability to maintain, it should also not introduce safeguards which are easily abused by the maintenance debtor. The first defence could jeopardise the smooth operation of the Act. If it is permitted, the

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18 See *Pilcher v Pilcher* [1955] P 318.

19 See *A-G for Ontario v Scott* (1956) 1 DLR (2d) 433; *Re Kenny* [1951] 2 DLR 98.

maintenance debtor would be tempted to raise it in order to take advantage of difficulties intrinsic in the very nature of residence as a ground of jurisdiction. He might do this even though he had no dissatisfaction with respect to the assessment of the applicant's maintenance needs. The second appears to be too broad-brushed. It covers both fraud as to the merits and fraud as to jurisdiction. We think that while the original aims of the MO(FE)A rightly stressed effectiveness of claims against deserting spouses, modern applications of the Act have moved beyond the problems of deserted spouses. It is right that the maintenance debtor should be permitted to defend himself by proving fraud on the part of the claimant. We would however prefer to confine the defence of fraud to fraud on the jurisdiction, provided that this has not previously been decided upon or should previously have been raised for decision. As for the inclusion of breach of natural justice as a ground of setting aside, we think that it is not necessary to do justice in individual cases. This is because the courts have power to vary or rescind the original maintenance order and the maintenance debtor who has had no opportunity to be heard in the original proceedings may be given an opportunity to persuade the court to vary or rescind the order. In short, breach of natural justice is already curable under the MO(FE)A.

F. Conversion of currency

51 We turn to consider two difficulties which are of a financial nature and which inhibit the maintenance creditor from recovering the true and real value of what she needs to maintain herself and her child in the country in which she and her child reside. Such creditor may fail to recover her true loss if due and proper allowance is not made for exchange rate losses. In order to bring the MO(FE)A into alignment with modern economic and financial conditions, we recommend importing the provisions of section 16 MO(RE)A into the MO(FE)A. Justice could not otherwise be done under today's circumstances of fluctuating exchange rates.

G. Prohibition of requirement of security for costs

52 In order to ensure that the maintenance creditor will not be impeded from recovering maintenance by reason of financial impecuniosity, we further recommend that if she seeks a provisional order as foreign plaintiff, she will not be required to put up security for costs as might otherwise be required. Although the MO(FE)A envisages that the applicant for maintenance is very likely to seek a provisional order in the state where she is residing, it does not prohibit an applicant doing so in another reciprocating state in which she is not resident. In applying for such a provisional order, the applicant for maintenance as a foreign plaintiff is hardly going to be able to provide security for costs and it would impede the achievement of the pro-active objectives of the Act to require security for costs. We recommend disapplication of this requirement in relation to proceedings under the MO(FE)A.

H. Reciprocity or automatic

53 Finally, we note that the New Zealand legislation abandons the requirement of reciprocity but we do not recommend that this should be done. The New Zealand legislation confers the benefits of enforcement of existing and provisional orders automatically. In our view, the possibility of divergence within the Commonwealth is no longer negligible, the original objective of encouraging reciprocal enforcement enactments to the fullest extent has ceased to be urgent, and it is necessary to retain the requirement of reciprocity.

IV. Changes to MO(RE)A

A. Jurisdictional concerns

54 Reference has been made to the inappropriateness of the premises which underlie the MO(RE)A. Outside the Commonwealth, it cannot be taken for granted that the jurisdiction to make maintenance orders will be assumed on similar grounds and that maintenance orders will be grounded in similar considerations of principle and policy. While the Hague Conventions are outside the terms of reference, they helpfully elucidate a vital concern with jurisdictional and choice-of-law considerations which presently are wholly absent from the provisions of the MO(RE)A.

55 Thus, the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973 requires that the order presented for enforcement must be pronounced by a court or authority of competent jurisdiction, namely a court in the country of habitual residence at the time of institution of proceedings or a court in the country of nationality of either maintenance debtor or maintenance creditor at the time of proceedings or a court to whose jurisdiction the defendant has voluntarily submitted. We do not necessarily agree that all these are proper grounds of jurisdiction which should be written into the MO(RE)A. For one thing, they are very wide since they refer alternatively to the creditor or debtor and in particular, do not restrict the jurisdiction to make provisional maintenance orders to the country of the maintenance creditor's or the maintenance debtor's habitual residence. In addition they do not appear to be tempered by considerations of *forum non conveniens*. But the important lesson we would draw from the Convention is that residence alone is not "universally" regarded as a sufficient connection for assuming jurisdiction over claims to maintenance.

56 In our view, the existing MO(RE)A is unsuitable as a general model for extension to non-Commonwealth orders because of its omission to adopt appropriate rules of direct jurisdiction. It does not require that the maintenance order must be pronounced by a court of appropriate jurisdiction. Although the reciprocity of treatment is reason enough to extend the benefits of reciprocal enforcement to a foreign maintenance order, the notion of reciprocity does not ordinarily refer to matters of jurisdiction; and it seems very unlikely that a court enforcing an order under the MO(RE)A can refuse to do so on the ground that the trial court was without proper

jurisdiction when it made the order.[20] One unattractive consequence is that the Act thereby allows the benefits of enforcement and provisional orders to be enjoyed by a forum shopper. Under section 6, an order transmitted from a reciprocating country to Singapore must be registered if the prescribed officer is satisfied that the maintenance debtor is resident here. There is no requirement that the transmitted final order must have been made by a court of some prescribed jurisdiction and it is open to the claimant to forum shop for an order to be registered in Singapore. It is common for some non-Commonwealth courts to assume jurisdiction on the basis of nationality of the claimant who may not be resident in the territorial jurisdiction of the courts. Others assume jurisdiction on the basis of the creditor's residence without restricting the enforceability of any maintenance order that is granted in a provisional manner. Lacking a doctrine of natural forum, these courts are without the means of ensuring that adjudication is allocated to the more appropriate forum. Nevertheless, orders made by these courts must be registered under section 6 and we think that that is undesirable because the facts may not have been as conveniently and satisfactorily established as in the country of the creditor's habitual residence and could be unfair to the maintenance debtor.

57 The problems of forum shopping were hardly significant when the first reciprocal enforcement scheme, namely the MO(FE)A, was conceived as a law for the relief of deserted spouses and children. It seemed axiomatic that a deserted and destitute spouse could only seek maintenance in the one country in which she resided. The MO(RE)A which followed on the heels of the MO(FE)A shared its assumptions. More than 80 years on however, it has become obvious that cross-border recovery schemes are open to spouses who are by no means destitute or deserted spouses and in a position to seek to take advantage of different laws of maintenance.

58 We recommend that the MO(RE)A should stipulate that only the final or provisional orders of a court in the jurisdiction where the maintenance creditor or maintenance debtor is habitually resident can be registered and enforced or confirmed in Singapore, and that the courts in Singapore will only make final or provisional orders for enforcement or confirmation where Singapore is the country of habitual residence of the maintenance creditor or maintenance debtor. These recommendations come at a cost since they will open up to the maintenance debtor possibilities of challenge based on jurisdictional grounds. In order to balance off the merits and demerits as between creditor and debtor, we therefore further recommend in favour of the maintenance creditor that it will not however be open to the maintenance creditor to seek a stay of proceedings on grounds of *forum non conveniens* where the creditor establishes jurisdiction for a provisional order in terms of her habitual residence or domicile. In a word, we recommend that these should be mandatory grounds of jurisdiction.

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20 Cf *A-G for Ontario v Scott* (1956) 1 DLR (2d) 433; *Re Kenny* [1951] 2 DLR 98.

B. Choice-of-law concerns

59 The problem of forum shopping which has been described is exacerbated when the court making the order applies an inappropriate law in deciding whether maintenance is due and if so, the quantum of the award which ought to be made. The existing MO(RE)A is an unsuitable international model in that lacking in choice-of-law rules it allows the benefits of reciprocal enforcement to be enjoyed in excess of what the claimant could have expected in the country where the loss of maintenance is most felt.

60 According to the Hague Convention on the Law Applicable to Maintenance Obligations 1973, it is the law of the country of the maintenance creditor's habitual residence which determines among other things whether and to what extent an applicant is entitled to maintenance in respect of a family relationship, marriage or paternity, who is entitled to institute maintenance proceedings, the time limits for their institution, and the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor. (Note this is strictly inaccurate as this is only the first law to which reference may be made; the Convention relaxes this rule by permitting reference in the alternative to other governing laws, for instance, the common national law of the debtor and creditor if the law of the creditor's habitual residence does not allow the creditor to qualify for maintenance.) The Hague Convention gave the following reason for including provisions on choice-of-law: "the aim of the maintenance obligation is to protect the creditor. As he is the focal point of the institution, he must be considered in the reality of his daily life and not in the purely legal attributes of his person, as he will use his maintenance to enable him to live. Indeed in this field it is wise to appreciate the concrete problem arising in connection with a concrete society: that in which the petitioner lives and will live. Secondly, this system facilitates a degree of harmonisation within each State: all maintenance creditors living in that State will be put on the same footing …"

61 Under the Hague Protocol on the Law Applicable to Maintenance Obligations, application of the law of habitual residence of the maintenance creditor is maintained.[21]However, as a compromise which will make it more attractive for common law countries to sign the Protocol, the law of the forum is preferred above the law of habitual residence as the applicable law in certain cases involving "privileged" maintenance creditors.[22]

62 There is thus a sharp contrast between the Hague Convention and the MO(RE)A which does not require reference to the law of the country of habitual residence. The MO(RE)A takes for granted that maintenance is a judicial relief which may be provided wherever the defendant is resident. In this respect, the Act simply presumes that the common law applies and that the only relevant matter as to which the court requires to

21 Art 3.

22 Art 4(3).

be satisfied is that it has jurisdiction to pronounce the relief. This is a fair assumption only so far as concerns orders from Commonwealth countries with similar laws.

63 We are of the view that the common law characterisation of maintenance claims is inappropriate for a "multi-lateral" legislation that will apply to non-Commonwealth states which regard the liability to maintain as giving rise to a cause of action of an entirely substantive character. Under the MO(RE)A, the forum shopper can obtain higher limits of maintenance which could not have been awarded in the country of the creditor's habitual residence. There is no choice-of-law rule to prevent this. This may happen because a maintenance agreement which sets a higher limit and is not enforceable in the country of the creditor's habitual residence is upheld in the creditor's chosen forum. In the case of minor dependants, this may happen because the claimant's forum recognises different and higher age limits for minor dependants or it recognises a claim between persons related collaterally or by affinity contrary to the law of the habitual residence of the claimant. Moreover, in many non-Commonwealth countries, maintenance orders may be obtained by public bodies as applicants and a choice-of-law rule should be installed to ensure that only the public body recognised by the applicable law will be recognised for the purposes of recognition and enforcement of the maintenance order under the MO(RE)A.

64 The risk of forum shopping for a determination of paternity is also exacerbated. In some non-Commonwealth countries, the determination of paternity is made by reference to the law applicable to the maintenance obligation and a creditor may be encouraged to shop for a favourable determination, prior to seeking reciprocal enforcement in Singapore, which the courts in Singapore will be unable to reject. Conversely, although the availability of DNA testing will narrow the differences in paternity determination in many cases, it is open to a claimant to take advantage of the forum law and obtain a finding of paternity which would have been rejected under the applicable law. For states which regard maintenance as a matter of substantive right or obligation arising under an applicable law, the absence of applicable law provisions in the MO(RE)A will be an impediment to concluding a bilateral treaty or other arrangement for reciprocal basis. Such states may feel that the rejection or unavailability of applicable law will compromise justice in individual cases.

65 The potential for anomalous results is high particularly as under the MO(RE)A the pro-enforcement policy implies that there should only be very limited grounds for setting aside the registration of final maintenance orders or confirmation of provisional maintenance orders. To avoid multiplying anomalies, we recommend the introduction of a modified choice-of-law rule stipulating that it is open to the court on the behest of the maintenance debtor to vary or revoke the maintenance order taking into account the law of the country of the creditor's habitual residence. This is therefore a defence open to the maintenance debtor to raise, the burden of proof of which he must discharge. That is to say that we do not recommend that he should be entitled to rely on the presumption that in the absence of proof of difference, the foreign applicable law is similar to the law of the forum.

66 The introduction of a defence based on a modified choice-of-law rule raises a question of parity of application between cases begun in Singapore and abroad. However, this is a problem which we can tolerate for the sake of international comity and party justice. There could also be some additional costs for the debtor who has to furnish evidence of foreign applicable law may be relevant in his defence.

67 This proposal does not alter the rules of jurisdiction in Singapore in so far as the creditor sues the debtor who is resident in Singapore for an order to be enforced in Singapore. Thus, the maintenance jurisdiction of the Women's Charter which is based on residence remains unaltered and the courts in Singapore will continue to apply such maintenance relief as is mandated by the law of Singapore when making a final order to be enforced in Singapore.[23] Under the foregoing proposal regarding jurisdiction, however, the maintenance order of the Singapore court will not be registered and enforced in a reciprocating state unless Singapore was also the country of habitual residence of the maintenance creditor or maintenance debtor when the creditor commenced maintenance proceedings in Singapore.

68 Conversely, where a court in a civilian reciprocating state has assumed jurisdiction on the basis of nationality of one of the parties, an order of that court will not be registered and enforced in Singapore unless the maintenance creditor or maintenance debtor was habitually resident in the jurisdiction of that court at the time of the proceedings. If the condition mentioned exists, and if the court in the jurisdiction of the habitual residence of the debtor has applied an applicable law based on nationality, a court in Singapore may reduce the award if the maintenance debtor can prove that the award exceeds that which a court in the country of his habitual residence would have made.

C. Greater flexibility in withholding provisional orders

69 The existing definition of maintenance order in the MO(RE)A is of very wide scope partly for the reason that its application is subject to discrimination when the Minister makes the designation of reciprocating country. The Minister may designate a country as regards maintenance orders generally or specifically. Thus, affiliation orders and orders for the payment of birth and funeral expenses of a child may be excluded and have been excluded in the case of the designation of New Zealand.

70 We see little difficulty in retaining the flexible definition of maintenance orders but as with the MO(FE)A, it is necessary to ensure that the Act does not become a means to enforce orders in respect of same sex marriages or civil partnerships. The definition should be narrowed to this effect. The proposals to include lump sum orders, accrued arrears and maintenance agreements are equally desirable here.

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23 Women's Charter (Cap 353, 1997 Rev Ed) s 69 read with s 3(1). There is considerable uncertainty as to what the grounds of jurisdiction are. See Y L Tan *Conflicts Issues in Family and Succession Law* (Singapore: Butterworths, 1993) at pp 295–297.

71 In many non-Commonwealth countries, the maintenance debt is automatically increased to take account of inflation, without the necessity of a court order. Australia is an exceptional Commonwealth country which has established an automatic indexation system for child support. As in the case of the MO(FE)A, there does not appear to be any objection in principle to enforcing such maintenance orders but we recommend that the rate and timing of indexation should be made clear in any application for registration of the foreign maintenance orders.

72 In another respect, speaking more generally, we think that the flexibility of the MO(RE)A is inadequate to take account of the need to separate final orders from provisional orders. The existing Act links together the two aspects because it carries over the basic structure of the MO(FE)A. The two aspects are presented in a single, comprehensive package. In considering whether to designate, the Minister must therefore ensure that both aspects are catered to. If a country is prepared to afford facilities for transmission and registration of final orders though not for registration and confirmation of provisional orders, it will not be possible to designate the country for the purposes of the MO(RE)A. This is unfortunate and we recommend de-linking the two aspects so that the Minister will have discretion to designate a country for the purposes of transmission and registration of final orders only without automatically attracting the provisions on provisional orders. The availability of these simplified and more effective reciprocal enforcement facilities would be sufficiently attractive to warrant making a designation even though agreement on arrangements as to provisional orders cannot be reached.

D. Replacement of administrative process by judicial involvement

73 In our view, if the MO(RE)A is to cater exclusively to non-Commonwealth orders, it would be inappropriate to use an administrative process for the determination of habitual residence. Where a provisional order is sought for confirmation in the country of habitual residence of the maintenance debtor, the facts of habitual residence of the maintenance creditor should be proved to the court asked to make the provisional order.

E. Setting aside registration

74 We recommend that the MO(RE)A should provide for setting aside the registration of the maintenance order transmitted from the reciprocating state if it is shown that that state was not the country of habitual residence of the maintenance creditor or the country of habitual residence of the maintenance debtor or that the order was obtained by fraud as to jurisdiction subject to appropriate qualifications. An order obtained in breach of natural justice should also be a ground for setting aside but we recommend that the court should have discretion to uphold the order despite the breach if in the circumstances the breach is capable of being cured.

75 In a multi-lateral legislation which will apply to non-Commonwealth states, there are greater possibilities of prejudice and unfairness arising from unfamiliar or

unknown causes of action. It would be advisable to stipulate a third ground for setting aside the registration, namely that it would be contrary to public policy to enforce the order. Further, there will be cases in which decisions have been made by the Singapore courts on matters governed by the applicable law. It will be necessary to stipulate that registration of a foreign maintenance order may be set aside on grounds of *res judicata*.

F. Parity of courts for registration and confirmation

76 We recommend that orders of superior courts should be registered or confirmed in the High Court while orders of inferior courts should be registered or confirmed in the subordinate court.

G. Variation and modification

77 In order to raise the potential availability of the scheme to non-Commonwealth countries, it will not be enough to provide, as we have recommended in para [70], for the possibility of withholding the provisions on provisional orders. In many non-Commonwealth countries, the modification of a maintenance decision at the enforcement stage by a court other than the original court is denied. (There is of course nothing to preclude two countries concluding a treaty on terms which permit modification at the enforcement stage.) We think that if as a general rule the registering court is empowered to modify a maintenance order, it would restrict the potential availability of the scheme significantly to those countries which do not reject modification. We therefore recommend a half-way position, namely that the Minister should also be empowered to withhold the provisions on modification when making a country designation under the MO(RE)A.

H. Impact on ancillary orders for relief in respect of foreign divorces

78 In determining whether the present availability of reciprocal enforcement of maintenance orders is satisfactory, both the MO(FE)A and MO(RE)A do not and likewise the sub-committee does not distinguish between maintenance orders arising out a subsisting family relationship or paternity and those arising incidentally or in an ancillary manner or consequent upon dissolution of a subsisting family relationship. If maintenance orders are made upon dissolution of a subsisting relationship, they may be enforced under the enactments just referred to in a manner indistinguishable from other maintenance orders arising out of a subsisting relationship. However, where no maintenance orders are made by the foreign court pronouncing a divorce decree in respect of a marriage between the parties, which is valid in the eyes of the courts in Singapore, neither enactment just referred to empowers the courts in Singapore to intervene by granting a former wife a provisional maintenance order capable of confirmation in a reciprocating country. The reason is that both the MO(FE)A and MO(RE)A do not confer independent jurisdiction to grant maintenance but seek to facilitate the exercise of such jurisdiction which must exist outside their terms. In fact, no such jurisdiction exists so far as the maintenance of a former or non-spouse is concerned because if the applicant is no longer or was never a spouse, there is no

jurisdiction outside the reciprocal enforcement legislation to grant maintenance. (The jurisdiction to maintain a spouse is a matrimonial jurisdiction and peculiarly dependent on the continued status of the applicant as a spouse.)

79 The sub-committee is also asked to consider whether this state of affairs should continue or whether a way should be created to allow the courts in Singapore to grant maintenance to a spouse who has been validly divorced or validly pronounced never a spouse in another state. This question is not confined to maintenance orders but is relevant also in the case of the matrimonial jurisdiction to divide the property owned in common between spouses or owned by one spouse. This report discusses the questions of reciprocal enforcement of maintenance orders exclusively. Questions of ancillary relief in respect of a foreign divorce or nullity decree have been considered in a separate report.

80 Nevertheless, mention should be made of the practical overlap between the two issues raised by the terms of reference since the ease with which foreign orders may be reciprocally enforced will reduce pressure to provide maintenance in Singapore for former spouses. It will be seen that the definition of maintenance order under both legislation is sufficiently wide to cover orders made against a former spouse or in favour of a former spouse. Provided the orders emanate from a reciprocating country, they will be enforced in Singapore and this will reduce the pressure to create a special jurisdiction to cater to former spouses who have not obtained maintenance orders in the course of foreign divorce or nullity proceedings.

V. Conclusion

81 As has been seen, we have adopted a bifurcated approach which requires a much clearer separation between the MO(FE)A and the MO(RE)A than is presently drawn. This approach questions two assumptions; namely that the MO(FE)A will be phased out eventually and that the MO(RE)A is suitable for non-Commonwealth countries. Since the MO(FE)A should not be phased out, we have made recommendations to modernise it and since the MO(RE)A is not suitable for non-Commonwealth countries, we have made recommendations for a new MO(RE)A which will contain rules of direct jurisdiction and applicable law.

82 A less radical solution is available if it is felt that the need to achieve reciprocal cross-border recovery of maintenance claims with non-Commonwealth countries is not imperative. This will involve phasing out the MO(FE)A, leaving only the reciprocal enforcement scheme which the MO(RE)A establishes. The MO(RE)A should then be modernised along the lines which we have recommended for reform of the MO(FE)A. Some of the recommendations will not be relevant since the MO(RE)A is actually an improvement on the MO(FE)A.

ANNEX A

1.

(a) Sri Lanka.

(b) Saint Vincent.

S 337/30
[21.2.30]

2. Malaysia

2566/38
[2.9.38]

3. Brunei Darussalam.

1722/39
[9.6.39]
1841/54
[30.7.54]

4. States of Jersey.

2951/54
[26.11.54]

5. States of Guernsey.

1484/56
[22.6.56]

6. Bailiwick of Guernsey.

403/57
[15.2.57]

7. Cook Islands (including Niue) and Western Samoa.

S 83/60
[18.3.60]

8. The following territories of the Commonwealth of Australia:

(a) Australian Capital Territory,

(b) Northern Territory of Australia,

(c) New South Wales,

(d) Victoria,

(e) Queensland,

(f) South Australia,

(g) Western Australia, and

(h) Tasmania.

S 92/73
[23.3.73]

9. Hongkong.

10. Malawi.

11. New Zealand.

12. Zambia.

13. All the States of the Republic of India except the States of Jammu and Kashmir.

14. The following provinces and territories in Canada:

(a) Alberta,

(b) Saskatchewan,

(c) North West Territories,

(d) Yukon Territory,

(e) New Brunswick,

(f) British Columbia,

(g) Newfoundland,

S 181/99, wef 01/04/1999

(h) Nova Scotia, and

S 181/99, wef 01/04/1999

(i) Nunavet Territory