INDIGENOUS JUSTICE CLEARINGHOUSE

A series of papers designed to highlight current initiatives in Indigenous justice

Reducing the unintended impacts of fines

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Introduction

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC 1991) raised concerns about the imprisonment of Aboriginal people for fine default. Automatic imprisonment for fine default has now been abolished in all jurisdictions. However concerns remain about the hardships caused by fines and the fines enforcement system to Indigenous people. These hardships include financial stress, loss of mobility due to driver's licence suspension or car registration cancellation, imprisonment for both fine default and secondary offending (such as unlicensed driving), emotional distress and social exclusion.

The fines enforcement system, on its surface, treats Indigenous and non-Indigenous people equally. However the disadvantage experienced by many Indigenous people results in the fines enforcement system having disproportionate impacts upon them. Indigenous people are much more likely than non-Indigenous people to have low incomes and to be unemployed (ABS 2009b). They are more likely to have poor literacy and numeracy skills and to have little or no English (ABS 2006, ABS 2009b). They are more likely to move frequently (Memmott, Long & Thompson 2006). These disadvantages and cultural differences mean that Indigenous people are less likely to be able to pay their fines and less likely to be able to negotiate the fines enforcement system. In New South Wales, a survey found that 40% of the Aboriginal community have outstanding debts with the State Debt Recovery Office (Elliott & Shanahan Research 2008), while in Victoria "Koories are significantly more likely than non-indigenous people to receive a Community Work Order for unpaid fines" (Victoria. Department of Justice 2008).

This paper will report on the impacts of fines and their enforcement on Indigenous people. It will outline the various efforts that have been made in Australia and New Zealand to ameliorate these impacts, and describe some innovations that can improve outcomes for Indigenous people and other marginalised people. Some examples of good practice are provided, although it was not possible to include reference to all of the work done by justice agencies in this area. The relevant legislation is listed in the Appendix.

Courts and the ability to pay

The common law principle is that an offender should not be fined a sum which s/he has no means of paying (for example *R v Rahme* (1989) 43 A Crim R 81). Most jurisdictions have enacted provisions requiring judicial officers to consider the offender's means to pay when determining whether to fine and how much (for example, *Sentencing Act 1995* (WA) s53). However as legal aid is not usually available when the defendant is not at risk of imprisonment, defendants may appear unrepresented. In addition, the disorganisation of many offenders and their reluctance to disclose their financial circumstances means that courts often do not have complete information about income, debts, family obligations and community expectations. In particular, judicial officers may be unaware of unpaid fines, as they are not routinely provided with this information by fines enforcement agencies.

Even where information is available about the defendant's means to pay, a judicial officer may have to impose a fine that the defendant is unable to pay, either because legislation sets out a minimum penalty, or because there is no other sentencing option available. A survey of NSW magistrates revealed that

44% of respondents sometimes or often impose a fine knowing that the defendant cannot or will not pay, usually because it was the only sentencing option available (McFarlane & Poletti 2007).

Reducing the impact of court ordered fines

The Homeless Persons Legal Service / Public Interest Advocacy Centre (2006) ("HPLS/PIAC") report recommended that magistrates should have access to information about unpaid fines, and where it is clear that payment is unrealistic, should consider adjourning the matter to allow the defendant to undertake community service or to address the underlying causes of offending, such as drug or alcohol abuse or mental health problems. If magistrates are to avoid imposing crushing fines on people with no reasonable prospect of paying them, legislatures may need to reconsider the use of mandatory minimum fines.

The North Australian Aboriginal Justice Agency ("NAAJA") reported that Indigenous people who are fined often do not understand the court proceedings and leave without realising they have been fined, or knowing what the options are for paying a fine (NAAJA 2010). NAAJA called for greater use of interpreters at court to explain outcomes, and a fine repayment option to be arranged on the day of court. In Western Australia, people who are fined can immediately make an application to the magistrate for time to pay. If they are not able to pay the fine, even by instalments, they can make an application for the fine to be converted to community service (Western Australia. Department of the Attorney General). Time to pay arrangements are further discussed below.

Some jurisdictions (including Western Australia, Northern Territory, Victoria, South Australia and New South Wales) have reported that the use of Aboriginal liaison officers has been effective in improving interactions with the justice system. Liaison officers may educate and support the fine defaulter while identifying ways in which the system can accommodate them – including making arrangements for time to pay, converting the fine to community service, or making applications to have the fine withdrawn/remitted (see Welch 2002). The use of case management officers dealing personally with defaulters has been found to be very effective in Tasmania. In New South Wales a key part of the Aboriginal Client Service Specialists' role has been to help clients negotiate time to pay arrangements with the State Debt Recovery Office (RPR Consulting 2005).

Specialist and problem solving courts

Specialist courts, such as drug courts, alcohol courts and Indigenous courts, may be better able than mainstream courts to identify vulnerable people for whom a fine is an ineffective response, and instead impose sentences that address the causes of offending, such as mentoring or treatment for addiction. For example, in Queensland, a person who is homeless or has impaired decision making capacity and is pleading guilty to public order or procedural offences can be referred to the Special Circumstances Court Diversion Program for an assessment. The findings of the assessment can be taken into account by the magistrate in sentencing, and the program can help defendants with accommodation, addressing outstanding fines, and referral to legal, health, and other services (Queensland Courts nd). Mainstream courts can also incorporate such responses. In NSW, magistrates can quickly divert a defendant who has a cognitive impairment under the *Mental Health (Criminal Procedure) Act 1990*, discharging them without conviction on the condition that they receive assessment or treatment (Gotsis & Donnelly 2008, Spiers 2004).

On-the-spot fines

Until recently, on-the-spot fines were only issued for minor offences such as parking infringements and fare evasion. More recently, law enforcement officers have been able to issue such fines for offences including offensive conduct, offensive language and shoplifting (NSW, NT and Vic), and possession of cannabis (NT, SA and WA). The extension of these police powers has been accompanied by warnings about the risk that such powers would be overused in relation to Indigenous people: for example the dissenting commissioners in the New South Wales Law Reform Commission report, *Sentencing*, considered that "the infringement notice system should not be expanded, on the ground that it … may simply become a vehicle of oppression for particular groups in society, such as young people and Aboriginal people" (NSW Law Reform Commission (NSWLRC) 1996 at [3.50]).

The NSW Ombudsman (2009) found that in 2008, the first year that police were able to issue Criminal Infringement Notices (CINs), 7.4% of all CINs were issued to Aboriginal people, while Aboriginal people make up just over 2% of the population in New South Wales. The most common offence for Aboriginal CIN recipients was offensive language, making up 45% of all CINs issued to Aboriginal people. In addition, 89% of Aboriginal CIN recipients failed to pay in the time allowed, compared with 48% of all CIN recipients. Aboriginal recipients are more likely to have other fine-related debt (60%, compared with 51% of all recipients). Concerns about net widening appear to be justified, as there was a significant increase in the number of people sanctioned for public order offences after the introduction of CINs (NSW Ombudsman 2009).

Recipients of on-the-spot fines have the option of contesting the fine in court. The Law and Justice Foundation of NSW reports that there is evidence that going to court will usually result in the fine being reduced or replaced with another option, such as a caution (Clarke et al 2009). However the NSW Ombudsman (2009) found that in six years, only seven Aboriginal people chose to contest their on-the-spot fines in court. Submissions suggested that the reasons for this included both disadvantage and lack of information

about how to contest a fine or access legal advice. In addition, there are disincentives for contesting a fine in court: the risks of an increased fine, having court costs ordered against the fine recipient, and having a conviction recorded. In some cases, legal representatives and advocates for fines recipients have had difficulty in ascertaining the policies of police and fines enforcement agencies around contesting a fine.

Reducing the impact of on-the-spot fines

The impact of on-the-spot fines could be reduced by ensuring that they are only used when other options, such as a caution, a warning, or other diversionary option, are unsuitable (see further Clarke et al 2009, Walsh 2004). The NSW Sentencing Council (2006) has noted with concern that many agencies empowered to issue fines do not have a discretion to caution, warn or refer to a diversionary program or community service, and do not have a procedure for internal review where a penalty is contested or special circumstances are demonstrated.

If a fine is necessary, providing more information with the fines notice about how to dispute the offence, seek a withdrawal, seek leniency, contest the fine in court, or obtain legal advice could reduce the disproportionate impact of fines on Indigenous people (NSW Ombudsman 2009). The information should be provided as paper fact sheets as well as on the internet, and should be available over the telephone from the issuing agency. The information should also be disseminated to community legal centres and advocacy organisations who can distribute them as well as provide the information orally to those without literacy skills or internet access.

Both the Law and Justice Foundation of NSW (Clarke et al 2009) and the NSW Sentencing Council (2006) have noted that on-the-spot fines are sometimes disproportionate to the offence: for example in New South Wales the penalty for smoking on a train station is $400. Some advocates have suggested that there should be concession rates for people with pension or health care cards, and that these people should not be subject to enforcement fees (Clarke et al 2009, HPLS/PIAC 2006). The New South Wales Law Reform Commission is presently considering the use of penalty notices, including whether current penalty amounts match the objective seriousness of the offence (see NSWLRC 2010).

Service of both court-ordered and on-the-spot fines by post poses particular problems for Indigenous fines recipients who are homeless, itinerant, or transient, and for those who live in remote communities or town camps without a regular mail service. The NSW Ombudsman (2009) has recommended that service by post only occur as a last resort, while NAAJA (2010) has recommended that there should be less reliance on written letters, and if they are necessary, simple language should be used.

Specialist courts may be well placed to reduce excessive impacts of fines. Victoria has established the Infringements Court which administers the Enforcement Review Program for fines issued on the spot. Defaulters with special circumstances, including cognitive impairment, serious addiction to a substance or homelessness, can seek remittance of their on-the-spot fines (Victoria Attorney-General, 2009).

Case study
In Victoria, the *Enforcement Operations Koori Strategy* requires the inclusion of information about the Aboriginal Legal Service on all forms issued by enforcement agencies and the Infringements Court. All agencies issuing fines must have an internal review process. Special circumstances, such as intellectual disability, serious substance addiction, or homelessness, are grounds for review. The agency can confirm the decision to issue the fine, withdraw it, issue a warning, or refer the matter to the Infringements Court.

The impact of fines and the fines enforcement system

All Australian jurisdictions and New Zealand use a fines enforcement model based on an escalating series of sanctions: enforcement fees, licence/ registration cancellation, seizure of goods / garnish wages, community service and imprisonment.

Enforcement fees

If a fine is not paid within a certain time period, enforcement fees of between $21 and $65 are added to the penalty. In some jurisdictions, the enforcement fee is imposed for each fine rather than each client, meaning the debt can increase quickly. In NSW, the Ombudsman (2009) found that only 9% of Aboriginal recipients of on-the-spot fines paid at the initial stage, compared with 48% of all recipients. Where fines are not paid due to poverty, these fees amount to a further penalty for those who can least afford it.

In 2010, the Victorian government held a seven week amnesty during which fine defaulters were able to pay only their initial penalty, with enforcement and other fees being waived. More than $112 million was paid as a result (Victoria. Department of Justice 2010).

Time to pay

In some jurisdictions, fines recipients cannot enter into arrangements to pay by instalments until after the fine is overdue and enforcement fees have been imposed. In addition, some courts and fines enforcement agencies require an applicant for payment by instalments to provide onerous amounts of information, including details of all income and expenses and the value of all assets, including car, television, stereo and furniture. The NSW Sentencing Council suggested this may be a reason why many disadvantaged offenders, particularly Aboriginal offenders, do not seek time to pay arrangements (2006). Allowing time to pay on presentation of a Centrelink or Health Care Card could improve uptake of this option.

Some agencies require minimum payments which are beyond the means of the very poor and reject payments that are below a specified minimum. NAAJA (2010) has called for a more flexible system where all repayment offers above $5 per fortnight are accepted. However the administrative cost of processing payments at this rate may make some enforcement agencies reluctant to take this approach (Peter Mitchell, Sheriff of Western Australia, personal communication, 22/11/10).

Some jurisdictions now allow fine recipients who are on Centrelink benefits to apply for time to pay before being charged an enforcement fee. In New South Wales, Tasmania and Western Australia, fine recipients can apply for payment by instalments over the phone. In Victoria and South Australia, if a fine recipient is on Centrelink benefits, they do not have to provide any further financial information with their application.

Fine recipients in most jurisdictions can use Centrepay, which allows automatic deduction of fines instalments from Centrelink benefits, and appears to have increased compliance among Centrelink recipients. However under the income management system in place in the Northern Territory, social security recipients are not usually able to pay fines from their income management account. NAAJA (2010) reported that this has discouraged fines recipients from making Centrepay arrangements.

Promoting the time to pay option can help reduce the impact of fines on Indigenous people. In New South Wales, Aboriginal Client Service Specialists have actively promoted this option, resulting in increased proportions of clients on time to pay arrangements (RPR Consulting 2005). Community Justice Group Coordinators are also focusing on educating the community about repayment options (NSW Ombudsman 2009). The Coffs Harbour Legal Aid office held a one day forum in 2008 to assist 35 Aboriginal people to arrange fine repayments and have their licences returned (NSW Ombudsman 2009).

In Western Australia, Aboriginal Liaison Officers and Sheriff/ Community Development Officers deliver awareness packages to Aboriginal communities addressing time to pay options. The combination of the liaison officers, simplified time to pay arrangements and the use of Centrepay has led to marked increases in Aboriginal people taking up this option (Peter Mitchell, Sheriff of Western Australia, personal communication, 22/6/2010).

Licence and registration cancellation

If fine default continues, most Australian jurisdictions will suspend the fine recipient's driver's licence and/or vehicle registration, even where the original fine was unrelated to driving. In New Zealand, licences are not suspended but the car may be clamped. Most commentators have identified these provisions as having caused significant hardship in Indigenous communities (NSW. Sentencing Council 2006, HPLS/ PIAC 2006, NSW Ombudsman 2009, NAAJA 2010, NSW. Legislative Council 2006). Some young people with multiple unpaid fines are unable to obtain a learners' permit (NSW. Legislative Council 2006). A survey of 300 Aboriginal people in New South Wales found that half of all licence holders had had their licences suspended or cancelled, and for 59% of these the reason was unpaid fines (Elliot & Shanahan Research 2008). Suspension of a driver's licence needed for work exacerbates poverty. In communities where no public transport is available, suspension of a driver's licence may also eliminate access to health services, shops, and extended family. When a car's registration is suspended, the whole community can be affected if another vehicle or licensed driver is not available. If alternative transport is not available for essential services and travel, then the fine defaulter is likely to drive unlicensed and unregistered, placing him/herself at risk of convictions for more serious offences and imprisonment. Submissions to the NSW Sentencing Council (2006) indicated that it may be a breach of customary law for a person to refuse a request to drive another person who is in a particular kinship relationship.

> "Martin is an Aboriginal man living in a regional area. He was unemployed for seven years. Although he qualified for a truck driver's licence nine years ago, he was excluded from driving due to a fines debt. This severely affected Martin's ability to get work in an area with no public transport. Martin recently participated in an innovative program aimed at helping Aboriginal people without a licence to obtain their drivers' licences and deal with any outstanding fines. Soon after he got his licence back, Martin successfully applied for a full-time job as a truck driver."
> (HPLS/PIAC 2006: 7)

Where a licence is suspended, safeguards can be developed to ensure that rules do not operate unjustly against impoverished offenders and their communities. For example, exemptions for employment and travel to essential services would reduce the disproportionate impact of fine default. NAAJA (2010) has suggested that suspension of registration should not be used, as it penalises the whole community rather than just the individual offender. In some jurisdictions the entire fine, plus penalties, must be repaid before a licence is restored. HPLS/PIAC have called for driving sanctions to be lifted on entering a payment arrangement. In New South Wales, the State Debt Recovery Office has discretion to lift restrictions on a person who has applied for time to pay and who lives in an Indigenous community (or needs their licence for employment, health need, or lives in a remote location) (State Debt Recovery Office nd). In Western Australia, once a time to pay application is approved, the suspension order is lifted.

Driver education programs in New South Wales (*On the Road Lismore Driver Education Program*), Victoria (*Aboriginal Driver Education Program*) and Queensland (*Indigenous Driver Education*) have helped to address the problem of unlicensed driving by assisting Aboriginal people to obtain licences. An important part of these programs

is assisting with applications to fines enforcement agencies for time to pay.

Seizure of property / wages

If the fine remains unpaid, enforcement agencies may seize and sell goods belonging to the fine defaulter, or garnish his/her wages. Fine defaulters are credited with the amount received at auction of the goods, which is usually much less than their purchase price or replacement value. In New Zealand, the court can prevent a fine defaulter from travelling overseas (New Zealand Ministry of Justice nd).

Write off

At the later stages of the enforcement process, most jurisdictions permit review of the defaulter's capacity to pay, and the fine may be remitted in part or in full. Most jurisdictions give this discretion to remit to magistrates, court officers or enforcement agencies.

Convert to unpaid work or treatment order

Where a fine defaulter demonstrates that he or she cannot pay, a court may convert the fine to unpaid work. In most jurisdictions it is converted to a community service order administered by the corrective service agency. At law, a community service order is a more serious sentencing option than a fine, so there are concerns about impecunious offenders effectively receiving harsher penalties. On the other hand it is undesirable for impecunious offenders to be unsanctionable (Arie Freiberg. Personal communication, 8/6/2010), and the HPLS/PIAC (2006) argues that the option of undertaking community service would be "of significant benefit", particularly if it were available before enforcement costs are incurred (see also NSW. Legislative Council 2006). This is possible in Queensland, where a fine option order permits a court, having ordered a fine, to convert it immediately to unpaid work. In 2009-10, 64% of fine option orders were successfully completed (Queensland. Department of Community Safety 2010).

Limitations of this option, however, are that community service orders impose a financial burden on the corrective service agencies who supervise them, and they are often not available in remote areas.

New South Wales is trialling the Work and Development Order. It is available to people who are homeless, have a mental illness, personality disorder, intellectual disability or a cognitive impairment or who are experiencing acute economic hardship. The fine defaulter can undertake voluntary unpaid work, health treatment, financial counselling, drug or alcohol treatment, education or training, or mentoring. The order is supervised by approved organisations (usually non-government agencies) or health professionals, who report to the fines enforcement agencies on compliance with the order. Breach of the order does not incur a penalty but the fine remains payable. (NSW. Attorney General 2009)

Imprisonment

Imprisonment remains as a sanction of last resort. In some jurisdictions, a fine defaulter can be imprisoned for non-payment of the fine. In others, a community service order will be imposed on a fine defaulter, and the penalty for breaching the community service order is imprisonment.

Imprisonment for fine default only has declined significantly in most jurisdictions: South Australia reported nine people (including two Aboriginal people) imprisoned for fine default in 2008-09 (South Australia. Department of Corrective Services, 2009); New South Wales reported none (New South Wales. Corrective Services 2009) and Northern Territory reported seven in 2007-08, one of whom was Indigenous (Northern Territory. Department of Justice 2008). However it is not known how many people are imprisoned for breaching a community service order consequent to fine default.

Of concern is the likelihood that many Indigenous people are imprisoned for "secondary offending", that is offending associated with fine default such as unlicensed or unregistered driving. On 30 June 2009, 5.5% of Indigenous prisoners in Australia, or 408 people, had as their most serious offence "traffic and vehicle regulatory offences" (compared with 4.6% of non-Indigenous prisoners) (ABS 2009a). It is not known what proportion of these were driving unlicensed / unregistered due to fine default. Steps have recently been taken in New South Wales to enable collection of data on secondary offending due to fine default (NSW Ombudsman 2009).

Some jurisdictions permit fine defaulters to convert their imprisonment from full time to periodic detention (for example, the ACT) or home detention (for example, New Zealand). This permits the defaulter to continue to work and pay off their fine, and thereby shorten the time spent in detention. This also ensures that fine defaulters are not placed with higher classification convicted inmates.

Fines and prisoners

Leaving prison with outstanding fines can be a significant obstacle to reintegration, particularly if those fines prevent driving, and the prospect of having wages garnished can be a disincentive to take up employment (Stringer 1999). In the Northern Territory, when an offender is sentenced to a term of imprisonment for an unrelated offence, the court orders that any outstanding fines be acquitted concurrently with the term of imprisonment. On release the offender begins with a clean slate which can assist with reintegration. Similar schemes are in place in Queensland, Victoria and Western Australia. In the ACT, time served in prison for another offence automatically counts towards reducing fine-related debt.

In other jurisdictions, when a person is sentenced to imprisonment the debt remains, but enforcement fees do not accrue. The New South Wales Legal Aid *Back on Track* project helps prisoners with their legal needs, including fines, and free calls to the fines enforcement agency are available (NSW. Corrective Services 2009). The NSW Sentencing Council (2006) has recommended that prisoners

be permitted to pay their fine at a reduced rate proportionate to prison industries wages.

Impact

This paper has detailed some of the points at which fines and the fines enforcement system can have a harsh impact on Indigenous offenders. Fines, especially on-the-spot fines, are intended to punish and deter offenders who have committed relatively minor crimes. However there is evidence that fines can create significant financial and psychological stress, reduce the offender's employment options, make access to essential services difficult, and create an obstacle to the reintegration of offenders. Indigenous Elders advised the NSW Sentencing Council (2006) that fines can be a barrier to the reunification of families who share the financial burden of repayments. Disturbingly, there is some evidence that fines imposed on people who cannot pay create an incentive to commit crime: a survey of prisoners found that 49 per cent of respondents had committed a crime to pay off debt (Stringer 1999). These impacts are all undesirable, unintended and disproportionate to the original offence.

Information and outreach

Reports from government bodies and advocacy groups have pointed to the need for simple, user-friendly processes in relation to fines and easily accessible information about those processes (Clarke et al 2009, HPLS/PIAC 2006, NAAJA 2010, NSW. Sentencing Council 2006, NSW Ombudsman 2009). Some justice agencies have acted on this by producing useful plain English pamphlets and websites outlining the fines recipient's options. Most agencies have websites which include clear information about their processes, but only some of the websites include information about the right to contest a fine or the possibility of having the fine reviewed or withdrawn, and few provide referrals to legal advice.

As noted above, in some regions case management officers and Aboriginal liaison officers are proving effective in easing the burden of fines enforcement on Indigenous people. Community education campaigns or outreach programs, whether run by liaison officers, legal aid offices, community legal centres or community justice groups, have found great demand for their services (NSW Ombudsman 2009). Expansion of these activities has the potential to reduce the number of Indigenous people burdened with outstanding fines debt. Similarly, providing assistance to prisoners to deal with outstanding fines has the potential to assist with their reintegration.

The best models of enforcement offer debtors a single point of contact for information, case management, streamlined payment, application and review, and, importantly, case managers make personal contact. This appears to be a key reason Tasmania has been able to significantly reduce its fines debt, as the Monetary Penalty Enforcement Service is able to use the government services outlet, Service Tasmania, with offices in most towns in the state (Tasmania. Department of Justice 2009).

Improving the system

This paper has identified a variety of ways that justice agencies have responded to the disproportionate impact of fines on Indigenous people. Some agencies are closely monitoring the impact of on-the-spot fines on Indigenous people. When magistrates have the discretion and necessary information, they can ensure that unpayable fines are not imposed, and can divert high needs defendants to treatment or support. Some fines recipients are receiving assistance, through interpreters and liaison officers, to understand their fines and the options open to them. Some are taking advantage of flexible time to pay options while others have their fine converted to community work or a work development order. The most disadvantaged fines recipients are having their fines written off, or are "cutting them out" while serving sentences for other offences. Fines remain an area requiring continuous attention and improvement.

Appendix: Legislation governing fines

	Sentencing legislation	Justice administration	Fines specific legislation
ACT	*Crimes (Sentence Administration) Act 2005* Ch 6A	*Magistrates Court Act 1930* (ACT) Pt 3.8	
NSW	*Crimes (Sentencing Procedure) Act 1999* Pt 2, Div 4		*Fines Act 1996*
NT	*Sentencing Act 1999* Pt 3 Div 3		*Fines and Penalties (Recovery) Act*
Qld	*Penalties and Sentences Act 1992* Pt 4		*State Penalties Enforcement Act 1999*
SA	*Criminal Law (Sentencing) Act 1988* Pt 9, Div 3		
Tas	*Sentencing Act 1997* Pt 6		*Monetary Penalties Enforcement Act 2005*
Vic	*Sentencing Act 1991* Pt 3, Div 4	*Magistrates Court Act 1989*	*Infringements Act 2006*
WA	*Sentencing Act 1995* Pt 8		*Fines, Penalties and Infringement Notices Enforcement Act 1994*
Cth	*Crimes Act 1914* s15a		
NZ	*Sentencing Act 2002* ss 13, 14, 39-43.	*Summary Proceedings Act 1957* Pt 3.	

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