ICC 227
C08/719

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Frank Terenzini MLA
Chair
ICAC Parliamentary Joint Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Dear Mr Terenzini

RE: QUESTIONS ON NOTICE

The purpose of this letter is to answer two questions taken on notice at the hearing on 9 July 2008.

Ms McMahon asked a question concerning action taken in response to a recommendation made by the ICAC Inspector to improve probity vetting procedures.

I understand the Inspector's recommendation related to a staff appointment in 2002. The person concerned was initially appointed on secondment at which time the usual probity vetting was conducted. The probity vetting was conducted prior to the completion of a NSW Police misconduct investigation relating to that person. The person was subsequently appointed to a permanent position. There was no documentation on file to show whether or not any further probity vetting had occurred before the permanent appointment was made.

On the assumption that no further checks had been undertaken the Inspector recommended that the Commission review its probity vetting procedures to ensure that any previous checks are updated prior to permanent appointment of staff previously seconded to the Commission. He also recommended that all probity vetting records be kept on the same file.

It is current Commission practice to actively monitor issues identified in any probity vetting procedure. In the matter considered by the Inspector that would involve continued liaison with the NSW Police to ascertain the outcome of any investigation, making a record of that outcome, and assessing what if any further action should be taken by the Commission. The Commission also ensures that probity vetting files contain all information relating to probity vetting, including any updates and action taken in response to those updates.

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Mr Donnelly requested information on the publication schedule for the public report on the Commission's RailCorp investigation.

The Commission has decided to publish eight reports on this investigation. The first seven reports will deal with separate corruption exposure segments of the investigation. The final report will deal with corruption prevention issues.

The first two reports, dealing respectively with the conduct of Michael Blackstock and Renea Hughes, were made public on Wednesday 13 August. It is anticipated that the remaining reports will be published in September and October 2008.

Yours sincerely

Theresa Hamilton
Deputy Commissioner
14th August 2008

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C08/120

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Frank Terenzini MLA
Chair
ICAC Parliamentary Joint Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Our Ref: Z08/0094

Dear Mr Terenzini

RE: Proposed amendments to the *Independent Commission Against Corruption Act 1988*

The purpose of this letter is to identify and seek the Committee's support for a number of amendments to the *Independent Commission Against Corruption Act 1988* (the *ICAC Act*).

Some of these amendments were foreshadowed by the Commissioner during our recent appearance before the Committee on Wednesday 9 July 2008.

Section 116(2)

Section 116(2) provides that if an offence against the *ICAC Act* is an indictable offence, a Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent. Section 116(3) provides that if a Local Court convicts a person of such an offence then the maximum penalty that the court may impose is, in the case of an individual, the smaller of a fine of 50 penalty units or imprisonment for two years, or both, or the maximum penalty otherwise applicable to the offence.

The concern in relation to these provisions arises in the context of convictions for offences under section 87 of the *ICAC Act* of giving false or misleading evidence to the Commission. Section 87 of the *ICAC Act* creates an indictable offence with a maximum penalty of 200 penalty units or imprisonment for five years, or both.

The giving of false or misleading evidence to the Commission at a compulsory examination or public inquiry fundamentally affects the Commission's ability to effectively perform its principal functions under the *ICAC Act*. It has been the Commission's experience that most witnesses who are involved in corrupt conduct knowingly give false evidence. It is only when

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they are faced with overwhelming evidence of their involvement in corrupt conduct that some change their evidence and make admissions. Even these admissions are often limited to what they think the Commission already knows.

Witnesses who give false evidence do not appear to be concerned about the possible criminal consequences. This may be due to the relatively light sentences which are being imposed on persons convicted of offences under section 87 of the *ICAC Act*. The Commission is concerned that a perception exists that people who tell lies at a compulsory examination or public inquiry will either not be punished or will not receive any serious punishment. It is certainly the case that the prospect of possible punishment is not acting as a deterrent.

In considering sentencing for an offence under section 87 of the *ICAC Act*, the Court of Criminal Appeal has previously held that, at least in the absence of extraordinarily compelling subjective circumstances, penalties which do not involve a significant sentence of full-time imprisonment are manifestly inadequate and inadequate to a point verging on irresponsibility (*R v Aristodemou*, NSW CCA, 30 June 1994).

Unfortunately, there has been a tendency of lower courts to impose comparatively light sentences for offences under section 87 of the *ICAC Act*. Where terms of imprisonment are imposed these have generally been suspended. In the last few years convictions in the Local Court for section 87 offences have all, with one exception, resulted in the imposition of suspended sentences. The one exception involved the imposition of a 4 month period of imprisonment to be served as home detention.

The Commission has recently been provided by the Office of the Director of Public Prosecutions with some statistics comparing penalties imposed by local and higher courts with respect to offences of perjury under section 327(1) of the *Crimes Act 1900* (which is analogous to an offence under section 87 of the *ICAC Act*) and making a false statement on oath under section 330 of the *Crimes Act 1900.* A copy is attached.

The statistics clearly indicate a substantial difference in penalties imposed by the Local Court and those imposed by higher courts. The number of sentences involving an actual period of imprisonment is significantly higher in the higher courts. The fact higher courts more often impose periods of imprisonment is recognition of the seriousness of such offences.

The Commission requests that section 116 of the *ICAC Act* be amended so that it does not apply to offences under section 87 of the *ICAC Act*. This would ensure that such offences are dealt with in the higher courts where the maximum penalty may be imposed.

Section 37

The current effect of section 37 of the *ICAC Act* is that, if a witness at a compulsory examination or public inquiry objects to answering a question or producing a document or

other thing, then the answer, the document or other thing is not admissible in evidence against the witness in any criminal, civil or disciplinary proceedings. The legislation provides an exception in relation to prosecutions for offences under the *ICAC Act*.

The protection should not extend to protect witnesses who may be facing disciplinary proceedings who are or become involved in civil proceedings. I do not consider there is any real justification for a person who has given evidence compulsorily to be protected from those answers in subsequent disciplinary or civil proceedings.

A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.

The removal of the protection with respect to disciplinary proceedings is not without precedent. Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the *ICAC Act*. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Law Enforcement Integrity Commissioner Act 2006* also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.

It is not unusual for the Commission to hear admissions from witnesses of frauds perpetrated on public authorities. In the Commission's recent investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto), evidence was given by a number of witnesses in which they admitted defrauding RailCorp of substantial sums of money. This evidence was given under objection which means that it cannot be used by RailCorp in any civil action it might consider taking to recover the amounts.

Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.

Summary offences

A number of offences in the *ICAC Act* are summary offences which means that a prosecution must be commenced within 6 months of the date from when the offence was alleged to have

been committed, unless another limitation period is specified with respect to the particular offence (section 179 *Criminal Procedure Act 1986*). Given the nature of the Commission's investigations it is not always possible to identify that an offence has occurred until after the expiration of the 6-month period. In other cases it may be that the offence has been identified but it may not be possible to commence criminal proceedings within the 6-month period without compromising the Commission's investigation by alerting persons to the fact that the Commission is conducting an investigation or divulging evidence obtained in the course of the investigation.

Recent examples of these problems have emerged in the Commission's investigation into corruption allegations affecting Wollongong City Council (Operation Atlas).

During the course of this investigation a number of public officials were required to provide statements of information under section 21 of the *ICAC Act*. It subsequently became apparent, as additional evidence was obtained, that a number of people provided false or misleading responses. It is an offence under section 82 of the *ICAC Act* for a person to knowingly furnish information in response to a section 21 notice which is false or misleading in a material particular. The relevant penalty includes imprisonment for up to 6 months. The offence however is a summary offence. As the false or misleading nature of the statements was not apparent until after the 6-month period it was not possible to commence any prosecution action under section 82 of the *ICAC Act*.

An additional problem arose in Operation Atlas when it was discovered that two persons had impersonated Commission officers. Evidence in relation to this was only obtained more than 6 months after the event. Although it is an offence under section 95 of the *ICAC Act* to impersonate a Commission officer, no prosecution could be commenced due to the expiration of time.

Section 116 of the *ICAC Act* has previously been amended to provide that proceedings for summary offences under sections 80(c) and 81 of the *ICAC Act* may be commenced within 3 years of the commission of the alleged offence. That section also provides that proceedings for an offence under section 112 of the *ICAC Act* may be commenced within 2 years after the commission of the alleged offence.

The Commission recommends that section 116 be amended to provide that proceedings for offences under sections 82 and 95 of the *ICAC Act* may be commenced within 3 years after the commission of the alleged offence.

Section 112

Section 112 allows the Commission to make non-publication orders. There is considerable doubt as to whether this section allows the Commission to make non-publication orders with

respect to written submissions made about available findings and recommendations arising from evidence given at compulsory examinations or public inquiries.

At the conclusion of its public inquiries (and some compulsory examinations if it is proposed to produce a public report) Counsel Assisting the Commission makes submissions as to what findings and recommendations may be available to the Commission on the evidence. These submissions are usually written.

It is the usual practice for the submissions of Counsel Assisting to be provided to all relevant parties. In certain circumstances submissions received in response may also be circulated to other interested parties for comment.

In many cases it is preferable that submissions not be publicly available, at least until such time as the Commission has published its findings and recommendations in its section 74 report. This is because the submissions may canvass findings and recommendations that may not ultimately be accepted by the Commission. Publication of such submissions may have an adverse impact on reputation and may incite unnecessary public speculation. Publication may result in members of the public erroneously believing the submissions represent the findings or view of the Commission.

There have been cases in the past where copies of submissions have been obtained and published by the media which has led to unnecessary speculation as to what findings might ultimately be made by the Commission. This problem could be overcome by amending section 112 of the *ICAC Act* to make it clear that the Commission has power to make non-publication orders with respect to written submissions.

Please advise if you require any additional information in relation to any of the above matters.

A copy of this letter will be provided to the Premier for his information.

Yours sincerely

Theresa Hamilton
Deputy Commissioner
14th August 2008

CRIMES ACT 1900

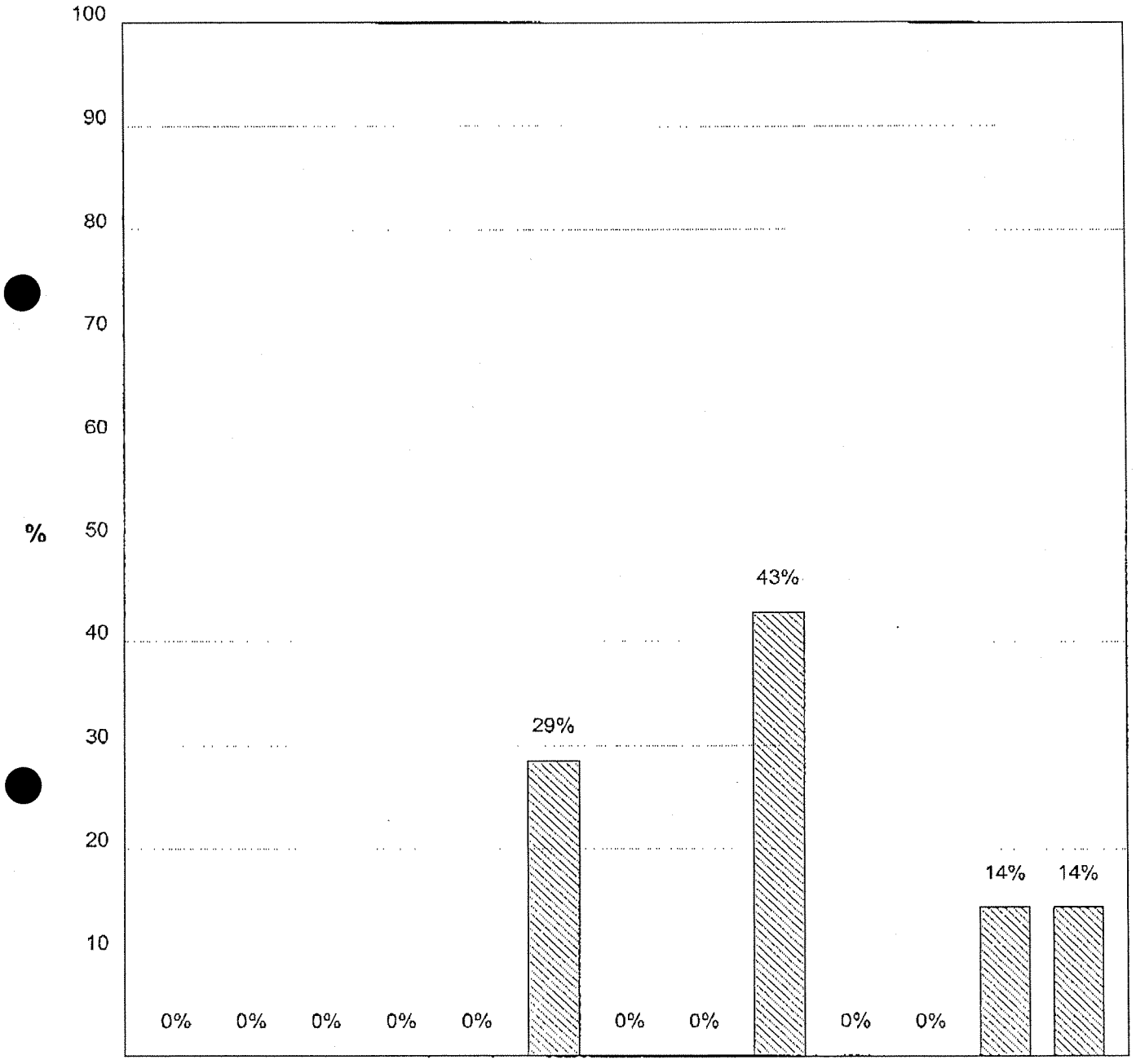
s.327(1) perjury

Local Courts - as at Jun

Sentences from Jan 2004 to Dec 07

Penalty Type

All Offenders



Total Cases	s.10 Dismi	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	Period Detent	Home Detent	Prison
7	0	0	0	0	0	2	0	0	3	0	0	1	1

CRIMES ACT 1900

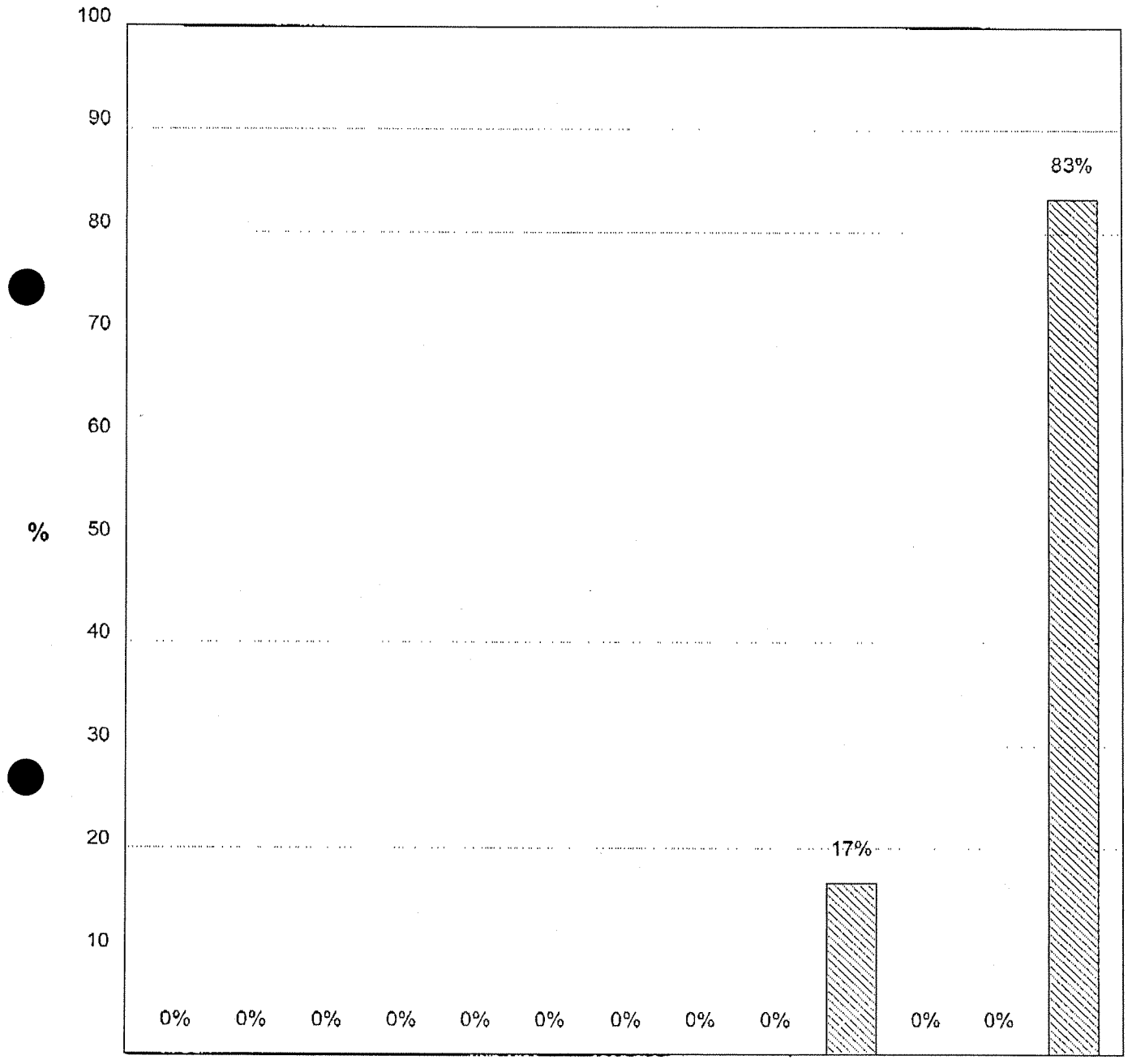
s.327(1) perjury

Higher Courts - as at 21

Sentences from Oct 2000 to Sept 07.

Penalty Type

All Offenders



Total Cases	s.10 Dismi	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	Period Detent	Home Detent	Prison
12	0	0	0	0	0	0	0	0	0	2	0	0	10

CRIMES ACT 1900

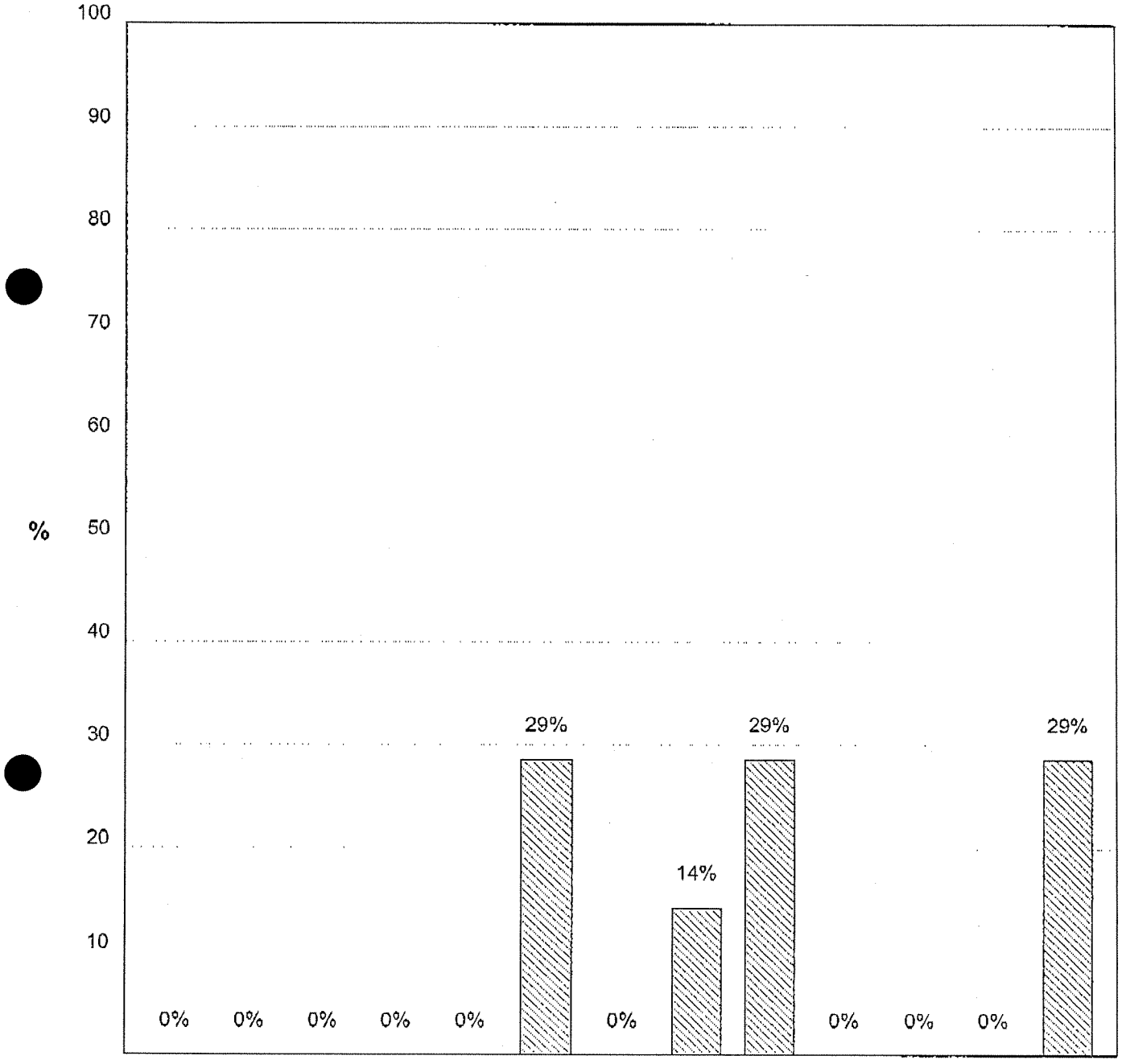
s.330 false statement on oath

Local Courts - as at Jun

Sentences from Jan 2004 to Dec 07

Penalty Type

All Offenders



Total Cases	s.10 Dismi	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	Period Detent	Home Detent	Prison
7	0	0	0	0	0	2	0	1	2	0	0	0	2

CRIMES ACT 1900

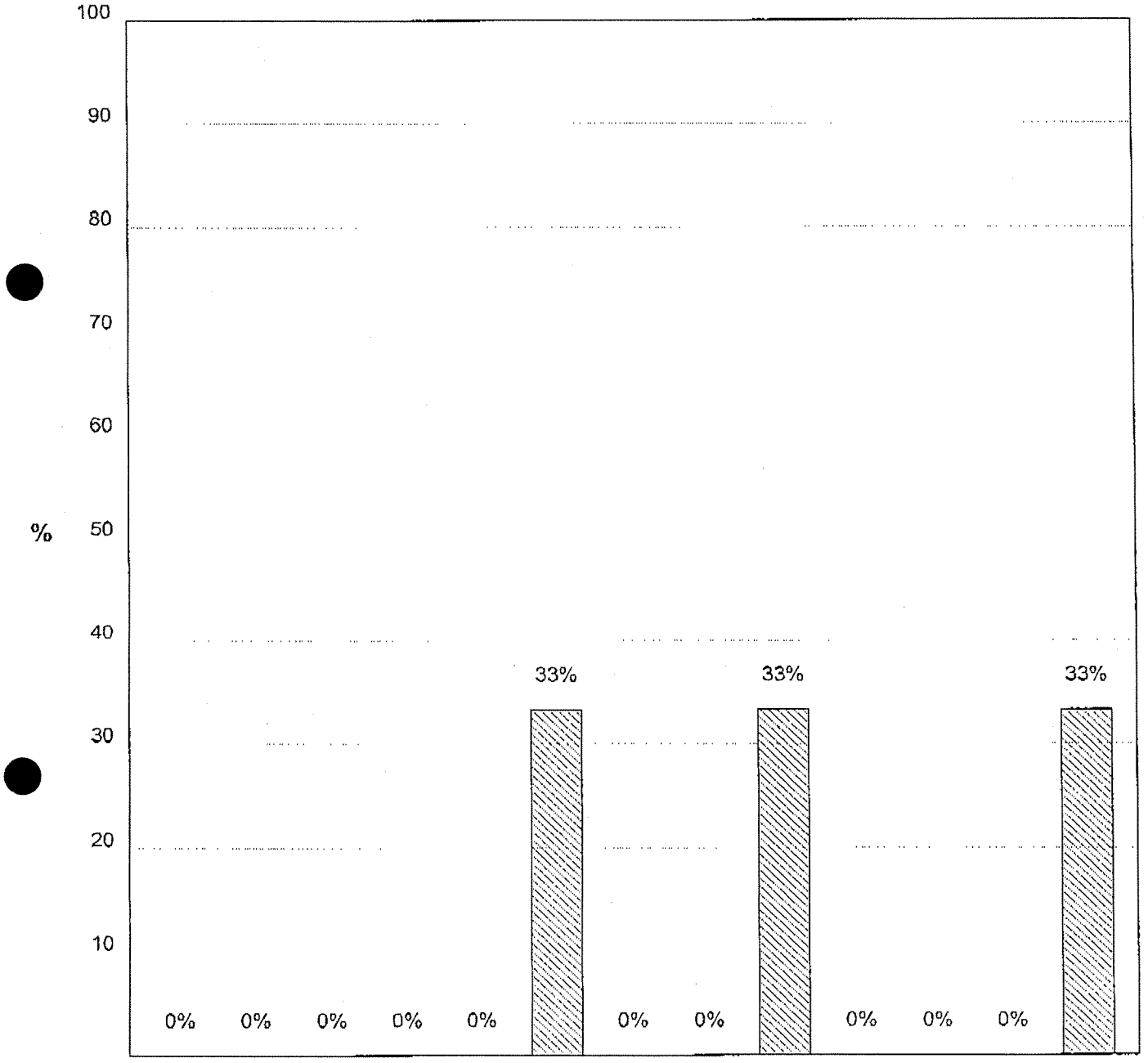
Higher Courts - as at 21

s.330 false statement on oath not amounting to perjury

Sentences from Oct 2000 to Sept 07

Penalty Type

All Offenders



Total Cases	s.10 Disml	s.10 Bond	s.10A	Rise of Court	Fine Only	s.9 Bond	s.9+ Super	CSO	Susp Sentce	Susp+ Super	Period Detent	Home Detent	Prison
3	0	0	0	0	0	1	0	0	1	0	0	0	1