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**Panel on Administration of Justice and Legal Services**

**Minutes of special meeting  
held on Tuesday, 16 December 2003 at 3:00 pm  
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Margaret NG (Chairman)  
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)  
Hon Albert HO Chun-yan  
Hon Martin LEE Chu-ming, SC, JP  
Hon CHAN Kam-lam, JP  
Hon Miriam LAU Kin-yee, JP  
Hon Ambrose LAU Hon-chuen, GBS, JP  
Hon Emily LAU Wai-hing, JP  
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon James TO Kun-sun  
Hon TAM Yiu-chung, GBS, JP
- Non-Members present** : Hon Kenneth TING Woo-shou, JP  
Hon James TIEN Pei-chun, GBS, JP  
Dr Hon Eric LI Ka-cheung, GBS, JP  
Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP  
Hon SIN Chung-kai  
Hon Andrew WONG Wang-fat, JP  
Hon Abraham SHEK Lai-him, JP  
Hon IP Kwok-him, JP
- Public officers attending** : Ms Elsie LEUNG, GBM, JP  
Secretary for Justice

Mr I Grenville CROSS, SC, JP  
Director of Public Prosecutions

Mr Harry MACLEOD  
Deputy Director of Public Prosecutions

Miss Annie TAM, JP  
Director of Administration & Development

Mr Howard CHAN  
Administrative Assistant to Secretary for Justice

Mr Robert LEE  
Senior Assistant Director of Public Prosecutions

Miss Lily WONG  
Senior Government Counsel

**Clerk in attendance** : Mrs Percy MA  
Chief Assistant Secretary (2)3

**Staff in attendance** : Mr Jimmy MA  
Legal Adviser  
  
Mr Paul WOO  
Senior Assistant Secretary (2)3

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- I. Meeting with the Secretary for Justice on the case of Mr Antony LEUNG Kam-chung**  
(Letter dated 15 December 2003 from the Secretary for Justice enclosing a press release and a statement made by the Secretary for Justice and the Director of Public Prosecutions respectively)

The Chairman said that this special meeting of the Panel was held in response to the formal announcement made by the Secretary for Justice (SJ) on 15 December 2003 of the decision not to prosecute Mr Antony LEUNG Kam-chung (Mr LEUNG), the former Financial Secretary, for his conduct in respect of a car purchased by him on 20 January 2003, several weeks before an increase in First Registration Tax (FRT) in the 2003-2004 Budget. The Chairman said that this meeting provided an opportunity for Members to raise questions to the

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Administration in relation to its decision and the Administration to clarify relevant issues.

2. The Chairman added that in a letter dated 15 December 2003 to Members, SJ had proposed to meet Members in a closed-door session to discuss relevant issues. However, she was of the view that the discussion of the Panel should be held in an open session in the interest of transparency. She said that in the event that certain issues came up in the discussion which called for the need of a closed-door meeting, the Panel would take a decision at that juncture.

3. The Chairman declared that she was a member of the Operations Review Committee of the Independent Commission Against Corruption (ICAC). She said that as a member of the Operations Review Committee, she was duty bound not to reveal the deliberations of the Committee. The questions she raised at this meeting on the case of Mr LEUNG would be confined to the issues raised in the public statements made by SJ and the Director of Public Prosecutions (DPP) on 15 December 2003.

4. Ms Audrey EU also declared that she was a member of the Operations Review Committee of ICAC.

Statements made by SJ and DPP

5. At the invitation of the Chairman, SJ and DPP briefed members on their respective statements issued on 15 December 2003. The statements set out the facts of the case and the legal reasoning behind the decision not to prosecute Mr LEUNG for the criminal offence of misconduct in public office, in the light of the reports of the ICAC, the evidence, the law and the legal advice provided by two leading counsel at the private Bar, Mr John GRIFFITHS, SC, and Mr Martin WILSON, QC. The advice given by Mr GRIFFITHS and Mr WILSON and their conclusions reached on the case were summarized in the statement made by DPP.

6. SJ said that the Administration was well aware that the case of Mr LEUNG had aroused serious public concern. As Mr LEUNG was her former colleague as a Principal Official of the Government of the Hong Kong Special Administrative Region and a Member of the Executive Council (ExCo), she had, from the outset, delegated to DPP the full authority of deciding whether or not to prosecute Mr LEUNG. To avoid any possible perception of bias, DPP was not required to seek instructions from her in arriving at his decision. However, as head of the Department of Justice (DoJ) who was ultimately accountable for any prosecution decision, she had fully considered DPP's decision and all the evidence and the independent legal advice. She had accepted DPP's decision of not instituting prosecution, and was satisfied that due process was observed in the whole conduct of the case and was in strict accordance with the prosecution policy.

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7. Concerning the seeking of advice from the private Bar, SJ informed members that Mr GRIFFITHS and Mr WILSON were the only outside counsel who were instructed to advise. She stated that the rumours that five outside counsel had been consulted and that four of them were of the view that Mr LEUNG should be prosecuted were totally untrue.

8. DPP added that the way the case was handled by DoJ involved unprecedented transparency. He said that in his experience, this was an extremely exceptional case where the identities of the counsel as well as their advice were revealed to the public. DPP said that, in this connection, he was grateful to the two leading counsel for their agreement to having their opinions summarized and made known to the public so as to ensure public understanding of the ultimate decision taken by DoJ.

Issues raised by members

*Counsel advising on the case*

9. Mr IP Kwok-him, Ms Audrey EU, Ms Emily LAU and Ms Miriam LAU said that they welcomed the SJ's decision to explain in public the approach and the process that had been adopted in handling the case and the decision not to prosecute Mr LEUNG.

10. Mr Albert HO said that the Democratic Party was in general satisfied with the process adopted by DoJ in handling the case and considered that it was a right decision to make known to the public the legal advice provided by counsel on the case in an open manner.

11. Mr Albert HO asked whether other counsel, apart from Mr GRIFFITHS and Mr WILSON, had been approached by DoJ for opinions on the case and if so, the reasons for their failure to give advice.

12. DPP replied that Mr Michael THOMAS, Senior Counsel, who represented the HKSAR in *Shum Kwok-sheer v HKSAR*, was first approached by DoJ. Mr THOMAS, however, declined the request for advice because of his acquaintance with Mr LEUNG. Mr GRIFFITHS, who was Senior Counsel for the appellant (defendant) in *Shum Kwok-sheer v HKSAR*, was then approached and agreed to accept the brief. DPP said that having examined the advice of Mr GRIFFITHS, he was of the view that a second independent opinion from an outside legal expert would be beneficial. In so deciding he bore in mind the sensitivity of the case, the complexity of the law and the level of public concern. The second counsel selected was Mr WILSON. DPP said that there was no other counsel whom DoJ had approached for advice on the case.

13. SJ added that there was absolutely no truth in allegations that DoJ had fished around for an opinion to fit in with a predetermined conclusion.

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14. Mr Martin LEE asked whether DPP had agreed with all the views of Mr GRIFFITHS when he decided to seek the opinion of a second counsel. Ms Emily LAU and Ms Miriam LAU asked why DoJ had not sought advice from the two outside counsel at the same time.

15. DPP replied that having considered the case of Mr LEUNG, which was a rare and difficult one, he was of the view that it would be a better approach for him to first consult an independent counsel. He said that he had not formed any concluded opinion after receiving the advice of Mr GRIFFITHS. Having analysed the advice obtained, he decided that he would be further assisted by the opinion of a second legal expert to see if the same conclusion as that reached by Mr GRIFFITHS could be drawn. He added that in making his decision, he had borne in mind the sensitivity of the case, the complexity of the issues involved and the particular law on the subject, as well as the need to reassure the public that proper consideration had been given to the case.

*Legal advice and criteria for prosecution*

16. Mr IP Kwok-him pointed out that as set out in paragraph 36 of DPP's statement, Mr GRIFFITHS had advised that, objectively, Mr LEUNG should have realized what the effect of the purchase of the car would be, and that consequently there was a prima facie case, or a case to answer, based on inference. Nevertheless, the eventual conclusion reached by Mr GRIFFITHS was that prosecution should not be taken against Mr LEUNG because of the absence of a reasonable prospect of conviction. Mr IP said that the case had aroused serious public concern because the public had high expectation on senior Government officials regarding their conduct and behaviour. He asked whether public expectation that senior Government officials should behave with the utmost probity was a relevant factor which DoJ should take into account in deciding whether a suspected case of misconduct in public office with prima facie evidence should be prosecuted.

17. Mr Albert HO opined that for cases with prima facie evidence, DoJ should let the court decide whether criminality was involved. He pointed out that certain types of cases, for example, shop-lifting cases, were tried in the courts if there was prima facie evidence.

18. DPP responded that Mr GRIFFITHS had stated that although a prima facie case, or a case to answer, existed, there had to be a reasonable prospect of conviction to warrant a criminal prosecution. Mr GRIFFITHS had advised that in order to establish the offence of misconduct in public office in relation to the car purchase in Mr LEUNG's case, it was necessary to demonstrate that Mr LEUNG had acted wilfully and intentionally in conducting himself as he did. The motive of evading FRT by purchasing the car in January 2003 had to be proved to be Mr LEUNG's dominant motive. Having examined the representations made by the defence lawyers, however, Mr GRIFFITHS had

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come to the view that the inference that Mr LEUNG intended to evade tax by making the purchase was not the only one that could be drawn. Other competing inferences could equally be drawn including, for example, the perceived urgent need and the desire of his wife to buy a more suitable car to carry the baby after the birth due in February 2003. Hence, any court might doubt an intention to avoid FRT was the compelling and only inference that could reasonably be drawn. As it could not be established with certainty that Mr LEUNG subjectively intended to purchase the car with the dominant motive to save himself FRT, there were some, but only speculative prospects of securing a conviction of the offence of misconduct in public office. The decision was that on the evidence as a whole, criminality could not be established to the required standard to justify a prosecution.

19. DPP further said that it had never been the rule in Hong Kong that those suspected of criminal offences must automatically be the subject of prosecution. Prosecutions could only be instituted on the basis of sufficiency of evidence. Furthermore, in considering a prosecution, DoJ would have to take into account any defences which were plainly open to, or had been indicated by, the accused. DPP quoted paragraphs 8.1 and 8.2 of the Statement of Prosecution Policy and Practice (2002) issued by DoJ (copies of which were circulated at the meeting) as follows -

*"8.1 When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. ...";*

*"8.2 A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. The prosecutor should also consider any defence which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction. In a matter as vital as the liberty of the citizen the prosecutor will wish, in the event of uncertainty, to err on the side of caution."*

20. DPP added that had there been sufficient evidence and a reasonable prospect of conviction, the public interest would have required a prosecution of Mr LEUNG.

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21. SJ drew members' attention to paragraph 6 of her statement. She said that the Court of Final Appeal, in its judgment in *Shum Kwok-sheer v HKSAR (2002)*, had indicated that the offence of misconduct in public office involved the following elements, each of which must be proved -

- (a) a public official;
- (b) in the course of or in relation to that public office;
- (c) wilfully and intentionally;
- (d) culpably misconducts himself.

The misconduct must also be serious enough to warrant criminal conviction and punishment.

22. SJ and DPP said that the same criteria for criminal prosecution set out in the Statement of Prosecution Policy and Practice applied to all alike, regardless of whether the accused was a person of high office or an ordinary member of the public. No special treatment was given to senior Government officials.

23. Referring to the view held by Mr GRIFFITHS that it could not be established on the evidence as a whole that the motive to evade FRT was the only dominant motive of Mr LEUNG in purchasing the car, Mr Albert HO opined that the co-existence of other motives should not necessarily bar a criminal prosecution.

24. The Chairman said that the view held by Mr GRIFFITHS that it was necessary to prove the existence of a single compelling motive in order to establish the offence of misconduct in public office appeared to have imposed an additional element to the offence which was absent in the criteria set out in the judgment in the case of *Shum Kwok-sheer v HKSAR*. The Chairman opined that if DoJ would refrain from prosecuting in cases where there could be more than one compelling motive for the suspect to commit the offence of misconduct in public office, prosecution of the offence would become extremely difficult. She asked whether the Administration would prosecute Mr LEUNG if it could be proved with certainty that Mr LEUNG was perfectly aware that he would save money by purchasing the car in January 2003, despite that there could be other motives for him to buy the car.

25. DPP said that in deciding whether or not prosecution should be instituted, the prosecution would have to be perfectly certain as to the alleged offence that it intended to take to the court, and the sufficiency of evidence for the offence. If there was doubt on the part of the prosecution, the defendant should be given the benefit of doubt. He referred members to paragraph 42 of his statement, which also set out the view of Mr WILSON that even if it were possible to

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allege that Mr LEUNG had used his knowledge of the imminent tax increase to take advantage of it in his private capacity, and that this amounted to an offence, it would be necessary also to establish that because of that knowledge he did something which he otherwise would not have done. However, it was not possible for the prosecution to prove that without the inside knowledge Mr LEUNG would not have bought the car.

26. The Chairman opined that Mr WILSON's view set out in paragraph 42 of DPP's statement was not one of the elements of the offence of misconduct in public office as set out in the court judgment in *Shum Kwok-sheer v HKSAR*. If this additional element was adopted, a suspect could hardly be prosecuted and convicted of the offence. In her view, in accepting Mr WILSON's view, DoJ had raised the threshold for prosecution of the offence of misconduct in public office.

27. Ms Audrey EU pointed out that Mr LEUNG had explained to the Chief Executive on 10 March 2003 and the LegCo Panel on Constitutional Affairs on 17 March and 8 April 2003 that he had not associated his purchase of a car with an increase in FRT when he bought the car in January 2003. According to Mr LEUNG, he also did not associate the two matters at the ExCo meeting on 5 March 2003, when three other ExCo Members declared at the meeting that they had recently bought cars. Ms EU said that it was hard to conceive that as the Financial Secretary responsible for the preparation of the 2003-2004 Budget, Mr LEUNG should have failed to associate his purchase of a car with the FRT increase and failed to disclose the purchase at the ExCo meeting. The two counsel advising on the case also did not appear to believe that Mr LEUNG had not associated the two matters at the ExCo meeting on 5 March 2003. Ms EU asked whether a deliberate intention of Mr LEUNG not to disclose the purchase to ExCo would amount to circumstantial evidence which could lead to the conclusion that the integrity of Mr LEUNG was in doubt. In her view, if the failure of Mr LEUNG to disclose the purchase to ExCo was deliberate, valid inference could be drawn about his motive in purchasing the car in January 2003.

28. DPP said that the evidence of the case had to be evaluated in its entirety. He said that if it could be established that in relation to the car purchase in January 2003, there was an intention on the part of Mr LEUNG to evade FRT, then the fact that Mr LEUNG had failed to disclose the purchase at the ExCo meeting on 5 March 2003 would have been important evidence in support of the prosecution's case. However, once it was decided that it was not possible to prove that the purchase of the car in January 2003 was caused by a dominant motive to save FRT, the case for prosecuting Mr LEUNG for the offence of misconduct in public office could not stand, and that placed the subsequent failure to disclose to ExCo in a much less serious category. DPP said that both Mr GRIFFITHS and Mr WILSON concluded that the failure of Mr LEUNG to declare the purchase to ExCo on 5 March 2003 arose from a desire to save



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himself embarrassment when a few other ExCo Members made declarations on that occasion.

29. DPP added that according to the criteria for the prosecution of the offence of misconduct in public office laid down in the judgment of *Shum Kwok-sheer v HKSAR*, there had to be not only a misconduct, but a misconduct of sufficient seriousness to warrant criminal punishment. DPP said that he and the two outside counsel, having analysed the evidence, formed a like conclusion that the conduct of Mr LEUNG, however reprehensible it might have been, did not amount to misconduct of a criminal nature.

30. Mr Martin LEE pointed out that the view formed by the two counsel that the failure of Mr LEUNG to disclose his purchase of a car at the ExCo meeting on 5 March 2003 arose from no more than a desire to save himself personal embarrassment was not included in the representations made by lawyers acting for Mr LEUNG. In his view, this was a very "generous" view taken by the counsel.

31. Mr LEE further referred to Mr GRIFFITHS's view that the inability of the prosecution to prove that the purchase of a car in January 2003 was motivated by a desire to save FRT had placed the failure to disclose the purchase at the ExCo meeting on 5 March 2003 in a much less serious category (paragraph 39 of DPP's statement). Mr LEE said that he had found it hard to understand why the two incidents, which happened on two separate dates and with different mens rea on the part of Mr LEUNG, should be associated in the consideration of a single offence.

32. DPP responded that it had been necessary for both counsel to evaluate the evidence as a whole. They concluded that as it could not be established that the car purchase in January 2003 was committed with intent to evade tax, prosecution of Mr LEUNG with reference to his failure to disclose the purchase to ExCo in March was not open. That was because the prosecution was unable to prove that the reason for not disclosing the purchase in March was to conceal a criminal act of misconduct in public office committed in January 2003. Furthermore, both counsel shared the view that the act of not declaring the purchase was not sufficiently serious to justify a criminal prosecution. DPP said that having analysed the evidence in its entirety, he accepted the counsel's view that Mr LEUNG, in not declaring the purchase at the ExCo meeting on 5 March 2003, was trying to save himself the possible embarrassment that would follow if it were known that he had bought the car. Although the non-disclosure was a form of misconduct, it was not serious enough to justify prosecution. The conclusion was that Mr LEUNG should not be prosecuted for the offence of misconduct in public office.

33. Ms Miriam LAU said that it was not unusual that lawyers differed in their opinions on complex legal issues. However, in Mr LEUNG's case, both

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Mr GRIFFITHS and Mr WILSON offered firm and unqualified opinions and they both came to the like conclusion that Mr LEUNG should not be prosecuted. Ms LAU said that she was satisfied that the advice of the counsel was based on sound legal principles and the totality of evidence of the case, and the conclusion reached could be accepted.

34. Ms Emily LAU said that SJ had made a right decision to delegate to DPP the task of deciding whether or not to prosecute Mr LEUNG, and to seek independent legal advice on the case from outside counsel. She asked whether SJ would accept the decision of DPP ultimately, regardless of how the decision was arrived at.

35. SJ replied that as explained in her statement, when DPP reported the matter to her for the first time after receipt of the two reports from ICAC seeking DoJ's advice on whether the conduct of Mr LEUNG which was the subject of complaint would justify a charge of misconduct of public office, she made the decision that DPP should have full authority to deal with the matter without seeking instructions from her. She would not interfere with the decision of DPP, and she would accept the decision provided that it was made on rational grounds. However, before the decision was announced, she would study the case papers and all the legal advice given or obtained. That was because, as Head of DoJ, SJ was ultimately accountable for any decision that DPP made.

*Disclosure of full content of legal advice and ICAC reports*

36. Ms Emily LAU suggested that to further increase transparency, the reports from ICAC should be made open to the public. Subject to the consent of the counsel, DoJ should also make known their full advice on the case. She pointed out that there were precedent cases where the Administration had provided the full content of legal advice obtained from private counsel to LegCo.

37. SJ replied that it was a long-standing practice that legal advice sought by DoJ from private counsel on prosecution matters should be kept confidential. She pointed out that in the course of the discussions of the Bills Committee on National Security (Legislative Provisions) Bill on the legislative proposals to implement Article 23 of the Basic Law, the Administration had provided to LegCo Members the legal advice given by Mr David PANNICK, QC, on the various proposals put forth in the Consultation Document issued by the Administration. The views of Mr PANNICK, however, were of a different nature from those of Mr GRIFFITHS and Mr WILSON in that they were opinions on legislative matters, not on whether or not prosecution should be instituted in a specific case.

38. SJ added that counsel's legal advice included detailed examination of the facts of the case, evaluation of the evidence as well as analysis of relevant legal issues. If the full content of the legal advice obtained on the prosecution of a

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particular case was to be disclosed, it might open up an avenue for intense discussions by the public tantamount to a public trial where there would be no means of defence for the accused. This would create extreme unfairness to the defendant. SJ added that DoJ had already taken an exceptional approach in Mr LEUNG's case in that, with the agreement of the independent counsel, DPP had summarized their opinions in his public statement. The counsel had also confirmed that DPP's statement accurately reflected their views. SJ said that the counsel were entitled to confidentiality of their views. It would not be appropriate to violate the confidentiality rule by making public the full content of their advice.

39. SJ further pointed out that Article 35 of the Basic Law provided, inter alia, that all Hong Kong residents should have the right to confidential legal advice.

40. Regarding the reports on investigation conducted by ICAC, SJ said that they were confidential documents under the law and should not be made public.

*Connection of prosecutors to parties involved in the prosecution*

41. Ms Emily LAU expressed the view that it was important that prosecutors should not be acquainted with the parties to the cases which they handled. Ms LAU noted that SJ had explained in her statement that she gave DPP full authority to deal with the case because DPP had had no connection with Mr LEUNG financially, socially or otherwise. She asked whether such criteria would be applied to prosecutors in handling future cases.

42. SJ responded that appropriate restrictions and standards with which prosecutors should comply were presently in place to guard against miscarriages of justice and to uphold the image of impartiality of DoJ. She said that where it was considered that any connection of a prosecutor to the parties involved in a case might give rise to concern about unfairness in the conduct of a prosecution, the prosecutor would not be assigned to take up the prosecution.

43. The meeting ended at 4:50 pm.