

**LegCo Panel on
Administration of Justice and Legal Services
4 February 1999**

**Statement by the Secretary for Justice
in respect of the decision
not to prosecute Madam Aw Sian**

Madam Chairman,

I am grateful for being given this opportunity to explain my decision not to prosecute Madam Aw Sian.

On 23 March 1998, I informed this Panel that at the conclusion of the trial of the three accused in the Hong Kong Standard case, I hoped to be in a position to make a public statement upon my decision not to prosecute. The trial concluded on 20 January 1999, and I am now in a position to address this issue. Before dealing with the substance of the matter, it is necessary for me to dispose of some preliminary issues.

I wish, firstly, to refute accusations that, after the case ended, it was not my intention to give an explanation, or that I have been stalling. My primary concern has been that I should not prejudice any appeal by those convicted, or any trial that might result from the ICAC's further enquiries.

When the judgment was delivered on Wednesday, 20 January 1999, my Department issued a press statement indicating that we would study the Reasons for Verdict, the case report of the prosecutor, and, if necessary, the transcript. The statement added that we hoped shortly to be in a position to make a public statement, and that the timing of any such statement would need to take into account any matter which might be raised if there were an appeal against conviction.

At the time the statement was made, it was not clear whether an appeal against conviction might raise issues that would make it improper for me to comment on the case. After a study of the various documents, it became apparent that this was not the case. I so informed the Clerk to this Panel on 23 January 1999.

At the same time, I informed the Clerk that I was awaiting a report by the ICAC as to whether there was any further evidence that I needed to take into account. The ICAC had obtained my consent to seek to interview the three convicted defendants, and it was hoped that firm responses from their lawyers would have been forthcoming by the end of last week or early this week. Hence I agreed to attend before the Panel today. Although those responses are still awaited, the public concern over this case is such that I have decided that I should nonetheless proceed with my statement today.

I also wish to reiterate the two reasons that I gave to the Panel last year for not then explaining my decision. First, according to a well-established policy, the Department of Justice does not disclose in detail the reasons for deciding not to prosecute someone. I will explain the basis for this policy in a moment. The second reason was that, until the conclusion of the trial, I could not make any remarks that might prejudice a fair trial. The restrictions relating to matters that are *sub judice* are well established.

It can be seen that my decision not to make a statement until today was not an attempt to stall for time, but was in strict compliance with well-established principles. The existence of those principles safeguards the rule of law in Hong Kong.

The trial

At the trial, Judge Line convicted one former, and two serving executives of Hong Kong Standard Newspapers Ltd., (Henrietta) So Shuk-wa, (David) Wong Wai-shing and Tang Cheong-shing, of the offence of conspiracy to defraud. So and Tang were also convicted of six charges of false accounting, while Wong was convicted of four such charges. They were imprisoned. They may appeal; honourable members will wish to keep that in mind.

The conspiracy charge alleged that the three defendants, between 1993 and 1997, conspired in Hong Kong with (Sally) Aw Sian and (Raymond) Lo Hi-yin:

to defraud such companies, firms and persons who purchase or might purchase from Hong Kong Standard Newspapers Limited, advertising space in the Hong Kong Standard and Sunday Standard newspapers by dishonestly -

- (1) *inflating the circulation figures of the Hong Kong Standard and Sunday Standard newspapers by causing Hong Kong Standard Newspapers Limited to print newspapers in excess of genuine, known or anticipated demand for those newspapers;*
- (2) *using Mornstar Limited as a means to purchase excess newspapers printed;*
- (3) *falsifying documents, accounts and records of Mornstar Limited and Hong Kong Standard Newspapers Limited in order to provide operating revenue to Mornstar Limited to enable it to purportedly purchase excess newspaper printed;*
- (4) *falsifying documents, accounts and records of Hong Kong Standard Newspapers Limited to reflect the purported purchase by Mornstar Limited of excess newspapers printed knowing that there was no genuine underlying transaction;*
- (5) *producing to the Audit Bureau of Circulations Limited false Publishers Returns of Average New Circulation which Returns included purported sales to Mornstar; and*
- (6) *disposing, as waste papers, excess newspapers purportedly purchase by Mornstar Limited.*

Those six particulars constituted the six overt acts which were advanced in support of the conspiracy.

Mr. Raymond Lo, who was named in the charge as a co- conspirator, gave evidence for the prosecution at the trial of the three defendants, pursuant to an immunity. Ms. Aw Sian did not stand trial and remained an unindicted co-conspirator. When I appeared before this Panel on 23 March 1998, I touched upon examples of how that situation can arise. Judge Line, in his Reasons for Verdict, explained the position in these terms :

Before I leave this subject I think it right to point out that the question I have been deciding is whether the defendants conspired with Aw Sian, and not whether Aw Sian conspired

with them. I can understand an initial puzzlement at this distinction in those unused to the criminal law and I anticipate their question as to how could a court say that A conspired with B but that B did not conspire with A. The answer is that the law of evidence provides that the same evidence will implicate some persons and not others.

Let me give an example : if A confesses outside of court that he has committed a crime then it is common sense that he be taken to court and the confession used against him. If A says that B also committed the crime then, unless A becomes a prosecution witness, that is insufficient to put B on trial. What a man may say about you out of court when you are not there to challenge or test it or contradict it is not evidence against you. It is obviously right that this should be so. The rule is based on common sense and fairness and has long been part of our law.

It is thus the case that the criminal liability of Aw Sian has not been, and never could have been, an issue in this trial, which has been solely concerned with whether these three defendants are guilty or not. The trial has been about what they did and not about what Aw Sian did. It follows that the evidence in the trial has been limited to that relevant to these defendants only.

One last point in this regard is that there is an established practice for prosecutors who draft conspiracy charges to name persons in the charge if there is some evidence against a defendant that that defendant did conspire with that other person, (see paragraph 33-42 of Archbold 1998). The practice is based upon fairness to the accused so that he knows the case he has to meet with particularity. That interest is put before the interests of the named persons who are named publicly but who are not parties to the proceedings and who are thereby unable to put their side of the case in the trial.

Prosecutorial policy

There has been firmly in place for many years in Hong Kong, in England, and elsewhere in the common law world, a prosecutorial policy of not disclosing in detail the reasons for prosecution decisions. Instead, the criteria applicable are disclosed, namely, whether there is sufficient evidence to prosecute and whether it is in the public interest to prosecute. In

England, the rationale for the policy of not disclosing reasons was expressed in these terms by the Director of Public Prosecutions, Barbara Mills QC, in a letter to the Chairman of the Bar Council, Anthony Scrivener QC, dated 29 May 1992 :

The public are entitled to know the principles with which the Crown Prosecution Service approaches its cases, and to be given a broad indication of the reasoning which underlies our decisions ... it would be wrong to go further and provide details of individual cases. I see no distinction here between decisions to prosecute and decisions not to prosecute. I am sure you would agree that it would be inappropriate for me to discuss the former; this would breach the confidentiality of the interests and reputations of all the parties involved - witnesses, the victim, and the accused or suspect. If a case has not yet been heard, the trial might be prejudiced by a public discussion. ... Similarly, I cannot publicly discuss a decision not to prosecute. This would amount to a trial of the suspect without the safeguards which criminal proceedings are designed to provide. It would be absurd and unfair to embark upon a public discussion as to why that person had been suspected in the first place.

In like vein, in February 1992, Sir Patrick Mayhew QC, then the English Attorney General, told the House of Commons :

It is extremely important that where somebody has not been prosecuted or where a prosecution has been discontinued against someone, the evidence that would have been available had that prosecution continued should not be paraded in public.

Like my predecessors, I endorse those sentiments. This policy has been consistently applied in Hong Kong. It is a policy which is both good and just. It is rooted in fairness to the suspect. As I explained to the Panel on 23 March 1998, the policy is not designed to suit the Secretary for Justice. It exists to safeguard the integrity of the criminal justice system and to protect the legitimate interests of those caught up in that system; to ensure that the fundamental safeguards provided for a defendant in a criminal trial are not swept away in the course of a non-judicial enquiry, where there are no rules of evidence, no presumption of innocence, no right of cross-examination and no requirement of proof beyond reasonable doubt. I will never accept the views of those who are prepared to countenance trial by

media, or of those who seek to determine issues of guilt or innocence by a public debate of the evidence. It has always been a cherished feature of our system that the only proper forum for the determination of questions of guilt or innocence of crime is the court, where the suspect has the right to a fair trial in accordance with the rules of criminal justice. It is with a heavy heart, therefore, that I feel obliged on this occasion to depart from a policy which has served the interests of justice in Hong Kong so well over the years. In so departing, I must emphasize that I am not setting a precedent for the future. Unless circumstances which are truly exceptional can be shown to exist, detailed reasons will not be given in future in other cases. Instead, as hitherto, my Department will confine itself to an indication of the broad parameters within which we operate. Those suspected of crime have inalienable rights, whether they are prosecuted or not, and I will uphold them unflinchingly.

Reasons for not prosecuting Ms. Aw Sian

On this occasion, I am prepared to disclose my reasons for not prosecuting Ms. Aw. I do so for three reasons :

- (1) The allegation of bad faith on my part cannot be disregarded. It must be answered;
- (2) In fairness to Ms. Aw. The record of her interview with the ICAC dated 4 June 1997 has most regrettably and irresponsibly been leaked to the media. The nature of the evidence said to support her role in the conspiracy has thus entered the public domain. It has become the subject of public comment;
- (3) The allegation that my decision was based upon improper considerations may have had unfortunate ramifications; it is said that it has shaken confidence in our legal system both in Hong Kong and internationally. It is incumbent upon me to make clear that any such concerns are not well founded.

Overview of the prosecution case at the recent trial

The prosecution case at the recent trial was that over some three years from 1994 the circulation figures of the Hong Kong Standard and the Hong Kong Sunday Standard were routinely and substantially exaggerated. It was alleged that So, as general manager of Hong Kong Standard

Newspapers Ltd., Wong, as circulation director, and Tang, as finance manager, all played important parts in achieving that end.

Circulation figures are important to advertisers who provide much of the income for newspapers. A company existed in England called the Audit Bureau of Circulation Ltd ('ABC'). If a newspaper used its services, then, subject to compliance with its rules and satisfactory audits, it would certify a circulation figure. The Hong Kong Standard used the services of ABC, and the allegation was that ABC was given false and inflated figures, and that detection was avoided through the use of falsified documentation.

The papers had to be printed to the inflated figure. It was difficult to make false claims without the printing of the papers. The inflation posed two problems : how to make it appear in the paperwork that the extra copies were legitimately sold in a manner justifying inclusion in the figures sent to ABC, when they were not in fact sold, and what to do with the unsold copies.

In relation to the former problem, a company called Mornstar Ltd was purchased and run by Hong Kong Standard employees. Debit notes were created charging Mornstar for copies of the newspaper; cheques were drawn on Mornstar's account to pay for them; the money to pay for these purported sales was raised from the Hong Kong Standard by Mornstar claiming payments for fictitious services that it never rendered, a practice described as '*contra invoicing*'. Bogus order forms for newspapers from Mornstar to the Standard were created to mislead the auditors.

The use of Mornstar was not the only way in which the paperwork was falsified to cover what was going on. Three friendly distributors of the paper each joined in similar arrangements whereby they were invoiced for newspapers they did not buy or receive. Before their cheques in payment of those invoices were cleared they received a cheque from the Hong Kong Standard in a like sum for fictitious services they had not provided.

As to the problem of what to do with the copies that had been over-printed, Mornstar was used to rent warehouse premises and a contractor was employed to carry them there, leave them for a week or so before disposing of them as waste paper at the pier in Wanchai.

When the ICAC became aware that substantial numbers of the current edition of the Hong Kong Standard were being dumped in that

manner, they moved in on the day's consignment for 14 August 1996, and found 14,000 copies of the paper there. They concluded that there was dishonesty, namely, cheating over the circulation figures. After that action by the ICAC, the purported sales to Mornstar dropped immediately, but the overall circulation figures showed no corresponding drop. The papers were still being dumped, but were shown as sales to the three friendly distributors.

As a result, So, Wong and Tang faced the charge of conspiracy to defraud, a charge which related solely to the inflation of circulation figures in respect of Mornstar. They also faced substantive charges of false accounting in respect of the returns made to ABC. Those charges only concerned the inflation of figures in relation to the three friendly distributors.

That, in substance, was the case for the prosecution.

Prosecution case against the three defendants

The case for the prosecution against each of the three accused individually rested upon various bases. The judge summarised the case in these terms :

- (1) Henrietta So : She admitted her part in the scheme when interviewed by the ICAC; *and*, Sylvia Sun, a subordinate of So, attributed to So incriminating remarks as to the purpose of Mornstar; *and*, Raymond Lo, a distribution manager of the company, who testified pursuant to an immunity, said that he held conversations with So in which she instructed him to inflate the figures; *and*, Jim Marett, a former general manager of the company, implicated So by relating conversations concerning the false inflation of figures; *and* the circumstances *and* the contemporaneous documents demonstrated her knowing involvement.
- (2) David Wong : He confessed to his part in the scheme when interviewed by the ICAC; *and* the evidence of Raymond Lo, a subordinate of David Wong, *and* of Vivien Wong, another employee, established conduct by him which was at the core of the charges; '*their evidence*', as the judge said of Lo and Wong, '*demonstrated for sure that he was instrumental in*

falsifying the sales figures to cover copies of the newspaper that were dumped.' [The judge added that '*given the power of the evidence from these two sources there is no need for me to deal with all the other evidence against (Wong), which certainly existed.'*]

- (3) **Tang Cheong-shing** : His admissions to involvement when interviewed by the ICAC; *and*, his position, as the former circulation director, given that the inflation of the circulation figures and dumping had been proved; *and*, the documentation for which he was responsible; *and*, the evidence of his close involvement with Mornstar.

I do not wish to say more about the three defendants, given that they may appeal. It is in any event, not necessary for me to do so. I have demonstrated the extent of the case advanced against each of the defendants. I had no difficulty in concluding that there was sufficient evidence to place So, Wong and Tang upon trial.

Reasons for not prosecuting : general considerations

I turn now to Ms. Aw, who was, and is, the Executive Chairman of Sing Tao Holdings Ltd., a publicly listed company, which has a number of subsidiaries, most involved in publishing. One such subsidiary is Hong Kong Standard Newspapers Ltd.

When I decided, on 23 February 1998, that Ms. Aw ought not to be prosecuted, I considered the evidence against her, which consisted of a record of interview conducted by the ICAC on 4 June 1997. It was apparent to me from the outset that the evidence which the ICAC presented against Ms. Aw was nowhere near as substantial as it was against the other three suspects. Nor was it ever suggested otherwise. In particular, Raymond Lo did not implicate her. No other witness implicated her. No business records or documents implicated her. And it was against that background that I asked myself if there was sufficient evidence to prosecute and if it was in the public interest to prosecute. In that regard, I received advice from my advisers, and representations from Ms. Aw's lawyers, and to these I gave due weight. I reached my decision after the most careful evaluation of the evidence and of the advices and the representations.

Before proceeding to particularity, I wish to emphasize one point. It is often far easier for prosecutors to take the decision to prosecute than it is for them to take the decision not to prosecute. It is nonetheless

vital for prosecutors to have the courage of their convictions. In a matter so important as the liberty of the subject there is no scope for prosecutors to avoid their duty carefully to assess the case. They must not take the easy way out by saying simply 'let the court decide'. To do that would constitute an abdication of responsibility. No one must be subjected to a criminal trial - with all the trauma that is inevitably attendant upon it - unless clear evidence exists to justify that course. That is a cardinal principle from which I will never tolerate deviance. I understand exactly what a distinguished former Law Officer of England and Wales, Lord Howe of Aberavon QC, meant when he wrote in *The Times* on 26 October 1998, that :

I had to learn that the discretion and the duty of a Law Officer upholding the rule of law sometimes permits, indeed requires, a decision that a prosecution should not be allowed to proceed.

When I considered the record of interview, I bore carefully in mind the high test which is rightly applicable in criminal proceedings. It is the duty of the prosecution, that is, to prove its case beyond reasonable doubt. Moreover, as paragraph 13 of the Prosecution Policy booklet (1998) makes clear:

The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a prosecution.

Rather, I had to decide whether there was a reasonable prospect of securing a conviction. Although it was a finely balanced judgment, in the absence of other evidence, and looking at the record of interview in its entirety, I was not convinced that such a prospect existed.

Reasons for not prosecuting : the evidence

I do not propose to deal with each and every answer given by Ms. Aw when she was interviewed by the ICAC. Suffice it to say, that the interview had to be examined as a whole - and there were 224 questions and answers - and not by reference solely to one or two answers. I bore in mind that although in criminal proceedings the weight to be attached to exculpatory material is not as great as is the weight to be attached to inculpatory material, a record of interview has to be looked at in its entirety. It is not right, that is, to look just at several questions and answers in isolation. By looking at the record in its totality, I concluded that although Ms. Aw wished to raise the circulation figures of the two newspapers to attract advertisers, she repeatedly emphasized that she had no intention to deceive ABC, which was one of the overt acts alleged against the three

defendants who were charged. Although it was agreed that the circulation figures could be improved by the printing of more papers, she was ignorant of the details and left all such matters to So. She knew nothing of the acquisition of Mornstar Ltd, another overt act alleged in the charge. Ms. Aw stated that she knew nothing of the doctoring of documents or of the falsification of accounts. My firm impression was that whatever was put in place by the three defendants went wholly outside anything that Ms. Aw had ever contemplated. When told by the ICAC of what had been done, Ms. Aw made plain that she had no idea that it constituted false accounting, and insisted instead that she would not have allowed this had she known of it. From the record it emerged that when Ms. Aw was advised by ICAC in August 1996 that what had occurred was not lawful, she told the others to stop printing extra copies. She seemed genuinely surprised when told of the level of over-production. Ms. Aw should perhaps have exercised greater supervision and control of her subordinates. She also perhaps acted unwisely in going along with a vague and what she called a '*temporary*' scheme to assist sales, without getting chapter and verse as to what exactly was in contemplation, and without properly evaluating the potential implications of that to which she was agreeing. However, she said she was not aware of the illegal acts which her subordinates, as the judge was to find, initiated, and she told them to stop when advised of them. There was nothing to contradict any of this. I looked repeatedly for evidence to link Ms. Aw to the various overt acts alleged in the particulars of the conspiracy against the three defendants, but I searched in vain. I must mention here that Ms. Aw, as Group Chairman and Director of the company, was not simply overseeing Hong Kong Standard Newspapers Ltd., which was just one subsidiary of the company, but also the other operations of the company which extended to printing, property development and holding, investment holding, finance and general management. It seemed to me at least arguable that she over-reached herself, and sought to take on too much and did not properly check what it was her subordinates were doing. She could not even recall ever having heard of the name of Mornstar Ltd. I was not convinced, ultimately, when I stood back and examined the case objectively, that the conduct of Ms. Aw was in fact fraudulent; that is, I was not satisfied that she acted dishonestly to prejudice or to take the risk of prejudicing another's right, knowing that she had no right to do so. It would accordingly not have been in accordance with the prosecution policy for me to have authorized the charging of Ms. Aw in relation to the offence of conspiracy to defraud.

As regards the substantive charges of false accounting of which So, Wong and Tang stand convicted, there was no evidence at all to implicate Ms. Aw. Nor was it suggested otherwise.

Some people have suggested that, provided there is some evidence against Ms. Aw, I should prosecute her. It is suggested that additional evidence may emerge during the trial; that the defendant would have the opportunity to explain her actions; and that the court could then decide on her guilt or innocence. I must reject such an approach. As I said earlier, no one must be subjected to a criminal trial unless clear evidence exists to justify that course. If it were otherwise then even if the court was ultimately to find the suspect not guilty, the accused would wrongly have been subjected to trauma, to legal costs, and to damage to her reputation and credit-worthiness. To initiate a prosecution simply to exonerate the Secretary for Justice from suspicion when there is not sufficient evidence to provide a reasonable prospect of conviction would amount to a miscarriage of justice.

Some people are of the view that since Ms. Aw stood to benefit from the crime she must be responsible for it. The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. There must be an intention to carry out the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which rendered the conduct illegal. As the evidence against Ms. Aw did not satisfy these criteria, even when taken at its highest, I was not prepared to proceed upon the basis of surmise. Since I have concluded that there was no reasonable prospect of securing a conviction, it would be wrong in principle for me to bring a prosecution. Nor will I do so simply to avoid public criticism of my decision.

Reasons for not prosecuting : the public interest factors

As I had received written representations from lawyers acting for Ms. Aw, I gave these serious consideration. As a result, from the public interest point of view, I considered it not to be right to prosecute Ms. Aw. At that time, the Sing Tao Group was facing financial difficulties and was negotiating restructuring with banks. If Ms. Aw was prosecuted, it would be a serious obstacle to that restructuring. If the Group should collapse, its newspapers (which include one of only two English newspapers in Hong Kong) would, in all likelihood, be compelled to cease operation. I wish to add that several other newspapers had folded in late 1996, 1997 and 1998. Apart from the staff losing employment, the failure of a well-established and important media group at that time could have sent a very bad message to the international community. At a time when unemployment was on the rise, the prospect of a prosecution occasioning yet further widespread redundancies filled me with foreboding. It was my duty, in those circumstances, firstly, to consider the potential effects of a prosecution upon

other people. Then, secondly, it was necessary to ask myself whether the possible consequences of the prosecution were proportionate to the seriousness of the alleged offence. I decided they were not. The failure of an important media group at that time could have sent all the wrong signals to the international community, quite apart from the damage it would have done to local morale. Thus it was that I also decided that it was not in the public interest to initiate a prosecution of Ms. Aw. I then asked myself if these public interest factors required me to withhold my consent to the prosecution of the three other suspects. I decided they did not.

Review of decision not to prosecute

Honourable Members may reasonably ask if, from that moment on, my mind was closed as to the possibility of prosecuting Ms. Aw. The answer to that is 'no'. I appreciated that the situation could change in relation to each of the bases upon which my decision was grounded. Indeed, as of today it may be that the public interest factors to which I attached weight on 23 February 1998 are less significant, given the change in circumstances both of Ms. Aw and of the Company itself. And as regards the evidential aspect, I maintained, and maintain an open mind to the production of additional evidence, should such be forthcoming. Thus it was that on 19 March 1998 I asked the Director of Public Prosecutions to advise the Commissioner of the ICAC that I would be prepared to review my original decision not to prosecute Ms. Aw if the trial revealed any new evidence against her. That he did. Thereafter, I remained receptive to the consideration of fresh evidence from whatever source.

In the days immediately following the conclusion of the trial on 20 January 1999, I and my advisers studied the judge's Reasons for Verdict, the case report of leading counsel who prosecuted on fiat, and extracts from the transcript. No new evidence emerged at the trial such as to justify a review of my earlier decision not to prosecute Ms. Aw. This was so notwithstanding that there was live evidence from 53 witnesses and nearly 3,000 pages of exhibits. I was also advised on 22 January 1999 that as far as the ICAC were aware no new evidence had emerged at trial to implicate Ms. Aw in the conspiracy to defraud. As the trial judge himself observed, *'the trial has been about what they (the three defendants) did and not about what Aw Sian did. It follows that the evidence in the trial has been limited to that relevant to these defendants only.'*

After the trial concluded on 20 January 1999, the ICAC sought clearance, which was given, to pursue certain further lines of inquiry. Those

inquiries are continuing. I await the final report of the ICAC. Members will understand therefore if I say no more on that aspect.

Conclusion : decision made in good faith

That, then, is the background to this matter. Even with the benefit of hindsight, I would not have conducted myself any differently. I have placed my detailed reasons for not prosecuting Ms. Aw squarely in the public domain. I have gone further by far in disclosing my position than did any Attorney General in colonial times, and possibly further than any Law Officer has ever gone in England. My reasons may be criticised. I may, alternatively, also be criticised for having revealed so much. I have to say that I find distasteful in the extreme the parading in public of questions of guilt and innocence as these are matters for a court of law. I remain deeply wedded to the belief that the rights of suspects in this regard require the fullest of protection. However, I have been requested to account for my actions by this Panel and, in the exceptional circumstances as outlined, that I have done. I ask the Panel to accept my assurance that I acted in good faith at all times. No pressure of any sort was brought to bear upon me to take the decision I did. My decision was not based on considerations of any personal connections or political status. I strictly adhered to the established prosecution policy of my Department and to Article 63 of the Basic Law. I have accounted to this Panel for my position with, I hope, what members will feel to be candour and honesty. I ask the Panel to accept my account and to reject any speculation or report which stands inconsistent with it.

In conclusion may I remind members of the implications of Article 63 of the Basic Law. The Department of Justice is required to control criminal prosecutions, free from any interference. This means that prosecutorial decisions are not to be taken on the basis of any sort of outside pressure, from whatever source. The Secretary for Justice must never take the easy way out and prosecute someone simply to satisfy public or other pressure. It also means that the Secretary for Justice assumes personal responsibility for prosecutorial decisions. The particular decision that I have explained today has led to great criticism of the SAR Government. I very much regret this. I accept personal responsibility for the decision that was taken, and it is on that basis that I am here before you today.

**Press Statement by the Secretary for Justice
in respect of the decision
not to prosecute Madam Aw Sian**

I am grateful for being given this opportunity to explain my decision not to prosecute Madam Aw Sian.

2. I wish to state at the outset that my decision in the Hong Kong Standard case not to prosecute Aw Sian was made on the basis that there was inadequate evidence.

3. I also considered the matter from the public interest angle. The considerations are detailed below.

4. At no point was any consideration given to the political or personal status of Aw Sian.

5. Under Article 63 of the Basic Law, the Department of Justice shall control criminal prosecutions free from any interference. As Secretary for Justice, I have exercised this independent prerogative impartially in this particular case.

6. On 23 March 1998, I informed this Panel that at the conclusion of the trial of the three accused in the Hong Kong Standard case, I hoped to be in a position to make a public statement upon that decision. The trial concluded on 20 January 1999, and I am now in a position to address this matter.

7. I wish, firstly, to refute accusations that, after the case ended, I never intended to give an explanation, or that I have been stalling. My primary concern has been that I should not prejudice any appeal by those convicted, or any trial that might result from the ICAC's further enquiries.

8. When the judgment was delivered on Wednesday, 20 January 1999, my department issued a press statement saying we would study the

Reasons for Verdict, the report of the case being prepared by counsel who conducted the prosecution, and if necessary, the transcript. The statement then went on to say that we hoped shortly to be in a position to make a public statement, and that the timing of any such statement would need to take into account any matter which might be raised if there were an appeal against conviction.

9. At the time the statement was made, it was not clear whether an appeal against conviction might raise issues that would make it improper for me to comment on the case. After studying the documents referred to in the press statement, it became apparent that this was not the case. I so informed the Clerk to this Panel on Saturday, 23 January.

10. At the same time, I informed the Clerk that I was awaiting a report by the ICAC as to whether there was any further evidence that I needed to take into account. The ICAC had obtained my consent to interview the three defendants convicted in the case, and informed me that the response from the defendants would be forthcoming by the end of last week or early this week. Hence I agreed to attend before the Panel today. Although those responses have not yet been received, in the light of the public concern over this case I have decided that I should go ahead with my statement today.

11. I also wish to reiterate the two reasons that I gave to the Panel last year for not then explaining my decision. First, according to a well- established policy, the Department of Justice should not disclose the reason for deciding not to prosecute someone. The second reason was that, until the conclusion of the trial, I could not make any remarks that might prejudice a fair trial. The restrictions relating to matters that are subjudice are also well established.

12. You can see therefore that my decision not to make a statement until to-day was not a deliberate attempt to stall for time, but was in strict

compliance with well-established principles. The existence of those principles safeguards the rule of law in Hong Kong.

Overview of the recent trial

13. I would like to give an overview of the prosecution's case at the recent trial. Over some 3 years from 1994, the circulation figures of the Hong Kong Standard and the Hong Kong Sunday Standard were routinely exaggerated. It was alleged that So Shuk-wa (the General Manager), Wong Wai-shing (Circulation Director) and Tang Cheong-shing (Finance Manager) were responsible for this matter.

14. Circulation figures are important to advertisers. A company existed in England called the Audit Bureau of Circulation Ltd ("ABC") which would certify circulation figures subject to compliance with its rules and satisfactory audits. It was alleged that Hong Kong Standard submitted false documents to inflate circulation figures. First, it printed more copies than actual sales. A company called Mornstar was purchased and run by HK Standard employees to buy the excess copies. HK Standard issued invoices and sold the extra copies to Mornstar, which issued cheques to HK Standard in payment of them. HK Standard then paid back the amount received to Mornstar by way of fictitious service charges.

15. Apart from Mornstar, three other distributors also purchased the paper in the same manner. Warehouse premises were rented in the name of Mornstar for the storage of the excess copies purchased by Mornstar for a week or so, and then they were disposed of by a contractor who carried them to Wanchai pier as waste paper.

16. Hence on the face of the accounts and documents, HK Standard complied with the requirements of ABC for certification of the inflated circulation figures. In August 1996, upon information, ICAC found 14,000 copies of the paper discarded in Wanchai pier and started its investigations. The 3 accused were prosecuted.

Prosecution case against the three defendants

17. In his Reasons for Verdict, the judge summarised the case against the accused as follows:

- So admitted her part in the scheme when interviewed by ICAC; one of her subordinates attributed to So incriminating remarks as to the purpose of Mornstar; a distribution manager testified that she instructed him to inflate the figures; a former general manager of the company implicated So by giving evidence of conversations concerning the false inflation of figures; and the circumstances and contemporaneous documents demonstrated her knowing involvement.
- Wong confessed to his part in the scheme when interviewed by ICAC; one of his subordinates and another employee gave evidence that he was at the core of the charges; the judge said that their evidence demonstrated for sure that Wong was instrumental in falsifying the sales figures to cover copies of the newspaper that were dumped.
- Tang admitted to involvement when interviewed by the ICAC. His position as the former circulation director, given that the inflation of the circulation figures and dumping had been proved, the documentation for which he was responsible, and evidence of his close involvement with Mornstar also implicated him.

18. The judge also spent 3 pages of his Reasons for the Verdict to explain why in the crime of conspiracy to defraud, A may be charged for conspiracy with B and yet B is not prosecuted. This is because certain evidence may only be admissible against A and not against B. For example, a confession can only be used as evidence against the person who made it and not as evidence against others, unless that person is called as a prosecution witness. In practice, in order to enable the accused to

understand fully what case he has to meet, it is necessary to name in the charge the person with whom he is alleged to have conspired, but it does not necessarily follow that there is sufficient evidence to prosecute the latter. The judge emphasised that he had to decide whether the accused conspired with Aw Sian, and not whether Aw Sian conspired with them.

19. In brief, there were 53 witnesses and nearly 3000 pages of exhibits in court to prove that the accused were guilty of the offences for which they were prosecuted, but none of these witnesses or exhibits implicated Aw Sian.

Reasons for not prosecuting

20. When I made a decision not to prosecute Aw Sian in February last year, I found the evidence against the 3 accused was overwhelmingly more weighty than that against Aw Sian. Raymond Lo, the distribution manager did not implicate her. No other witness implicated her. There were no documents or business records that showed any connection between the crimes and Aw Sian. Therefore, I could only look at her statement. In doing so, I could not single out a few answers, but needed to look at the totality of the evidence. There were altogether 224 questions and answers. We cannot simply look at a few answers that might incriminate her and disregard others that point the other way.

21. In her statement, Aw Sian repeatedly emphasized that she had no intention to defraud ABC, that she agreed to increase the printing and sales of the paper to attract advertisers, but she did not know about the details. All such matters were left to So. Ms Aw did not know about Mornstar and was not aware of the falsification of documents. When the ICAC told her what had been done, she said that she had no idea that it constituted false accounting, and insisted that had she known that it would be necessary to make false accounts, she would not have permitted them to do it. When the ICAC told her of the illegal acts, she immediately told the others to stop. Ms Aw should perhaps have exercised greater supervision

and control of her subordinates. She was perhaps unwise in going along with what she called a temporary plan to assist sales of the paper without going into details as to what was planned. However, I was considering a charge of conspiracy to defraud. I was not convinced that the conduct of Mr Aw was in fact fraudulent.

22. Some people have suggested that, provided there is some evidence against Ms. Aw, I should prosecute her. It is suggested that additional evidence may emerge during the trial; that the defendant would have the opportunity to explain her actions; and that the court could then decide on her guilt or innocence. I must reject such an approach. As I said earlier, no one must be subjected to a criminal trial unless clear evidence exists to justify that course. If it were otherwise then even if the court was ultimately to find the suspect not guilty, the accused would wrongly have been subjected to trauma, to legal costs, and to damage to his reputation. To initiate a prosecution simply to exonerate the Secretary for Justice from suspicion when there is not sufficient evidence to provide a reasonable prospect of conviction would amount to a miscarriage of justice.

23. Some people are of the view that since Ms. Aw stood to benefit from the crime she must be aware of it and be responsible for it. The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. There must be an intention to carry out the illegal elements in the conduct contemplated by the agreement, in the knowledge of those facts which rendered the conduct illegal. As the evidence against Ms. Aw did not satisfy these criteria, even when taken at its highest, I was not prepared to proceed upon the basis of surmise. Since I have concluded that there was no reasonable prospect of securing a conviction, it would be wrong in principle for me to bring a prosecution. Nor will I do so simply to avoid public criticism of my decision.

24. Also, from the public interest point of view, I considered it not right to prosecute Aw Sian. At that time, the Sing Tao Group was facing

financial difficulties and was negotiating restructuring with banks. If Aw Sian was prosecuted, it would be a serious obstacle for restructuring. If the Group should collapse, its newspapers (which include one of only two English newspapers in Hong Kong) would be compelled to cease operation. I wish to add that several other newspapers had folded in late 1996, 1997 and 1998. Apart from the staff losing employment, the failure of a well- established important media group at that time could have sent a very bad message to the international community.

25. Having assessed the evidence before me and, weighing the effect of the prosecution, the role played by Aw Sian in the matter, and whether the consequences of the prosecution were proportionate to the seriousness of the alleged offence, I decided that Aw Sian should not be prosecuted both from the sufficiency of evidence angle and as a matter of public interest.

Prosecution policy

26. Finally, I would like to point out some legal principles. Normally, when the Department of Justice decides not to prosecute, it will not give reasons, in order to protect the person from an unfair trial outside the court. I would make it an exception this time due to the following reasons:

- I need to respond to accusations of bad faith on my part
- The disclosure of parts of her statement is unfair to Aw Sian
- I need to respond to concerns about the rule of law.

27. The decision not to prosecute was not based on Aw Sian's personal position or status. The requirement in law as to the sufficiency of evidence is uniform, and does not vary with the status of a person. Paragraph 10 of the Prosecution Policy begins as follows:

"10. In response to a question in the Legislative Council in March, 1987, Michael Thomas QC, Attorney General, emphasized that the Attorney General has a discretion whether or not to prosecute and he set out the factors to be taken into account when making a decision in these terms:

First, there must be enough evidence to prove all the ingredients of an offence. This is not always easy to determine, especially where an offence requires proof of a state of mind or an intention of which there is often little or no direct evidence. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is, generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a conviction because it is not in the interests of public justice, nor indeed of the public purse, that weak, or borderline, cases should be prosecuted."

Therefore, the decision not to prosecute Aw Sian was definitely not a decision made in bad faith.

28. As to the rule of law, an independent prosecution decision is a vital safeguard to the Rule of Law. Not to prosecute when there is no reasonable prospect of securing conviction is a well-established prosecution policy. Respect for this prosecution policy is still my unshakeable conviction. Under Article 63 of the Basic Law, the Department of Justice of the HKSAR shall control criminal prosecutions, free from any interference. If in making a decision whether or not to prosecute, public opinion is the foremost consideration, then the Secretary for Justice might make a decision to prosecute simply to protect her own reputation, whether or not there is sufficient evidence. The injustice would be borne by the citizens.

29. I made the decision and am fully responsible for the consequences. The decision not to prosecute Aw Sian was made regardless

of her position or status, but in compliance with Article 63 of the Basic Law and the well-established prosecution policy. The fundamental principle that there should not be any prosecution unless there is sufficient evidence should not be abandoned out of fear of criticism against me.

30. As Secretary for Justice, my role is to defend the independence and impartiality of criminal prosecutions. I will not be swayed by public comment to depart from the principles of our prosecution policy. In preserving the rule of law in Hong Kong, I shall adhere to this principle.

Hong Kong Standard Case:
Main points of the Secretary for Justice's statement

Misunderstanding over conspiracy charges

- The judge in the Hong Kong Standard case said he could understand an initial puzzlement in those unused to the criminal law as to how a court could decide that A conspired with B but that B did not conspire with A.
- The judge explained that this can be perfectly proper, because the same evidence may implicate A but not B.
- Because of this, it may also be perfectly proper for A to be charged with conspiring with B, but not vice versa.

Explaining prosecution decisions

- It is a well-established policy, based on fairness to suspects, that the reasons for prosecution decisions are not disclosed.
- This case is, however, exceptional and the reasons will be given.
- The case is exceptional since -
 - (1) allegations of bad faith made against the SJ must be answered;
 - (2) public comments have been made on the assumption that Ms Aw was a guilty party in the conspiracy, and lately the record of Ms Aw's interview with the ICAC has been improperly leaked to the press. In fairness to Ms Aw, the nature of the evidence against her should be clarified;
 - (3) it is necessary to restore confidence both locally and overseas in our legal system, which has been shaken by allegations of impropriety.

Adhering to prosecution policy

- No one must be subjected to a criminal trial unless there is clear evidence to justify that course.
- A prosecution should only be brought if the evidence is such that there is a reasonable prospect of securing a conviction, and not merely because there is a case to answer (i.e. a 'prima facie' case).
- Even if there is such evidence, a prosecution should not be brought if this would be contrary to the public interest.

Reasons for not prosecuting: (a) the evidence

- The evidence against Ms Aw was nowhere near as substantial as it was against the other three suspects.
- No witness implicated Ms Aw.
- The evidence against Ms Aw consisted of a record of interview conducted by the ICAC on 4 June 1997.
- That record must be looked at in its entirety; it is not right to look just at a few questions and answers in isolation.
- Although Ms Aw said that she wished to raise the circulation figures of the two newspapers, she repeatedly emphasized that she had no intention to deceive the Audit Bureau of Circulation Ltd ('ABC').
- Ms Aw said that she was not aware of the illegal acts which her subordinates (as the judge was to find) initiated and, when informed of those acts, she told her subordinates to stop them.
- On the evidence available against Ms Aw, the SJ came to the conclusion that there was no reasonable prospect of securing a conviction.

Reasons for not prosecuting: (b) public interest factors

- Ms Aw was (and is) the Executive Chairman of Sing Tao Holdings Ltd, a publicly listed company; one of its subsidiaries is the Hong Kong Standard Newspaper Ltd.
- In order to survive, the company set about restructuring itself.
- Were Ms Aw to be prosecuted, there were real risks that -
 - (1) public confidence in the company would be undermined;
 - (2) the banks which had assisted the company would call in their loans, with potentially disastrous consequences; and
 - (3) the loss of confidence in the company would drive away yet more advertisers, and this could damage the company to the extent that it would have to make significant redundancies, and might even have triggered its collapse.
- If the company failed, its 1,400 employees in Hong Kong, and more than 500 employees abroad, might have faced redundancy.
- The SJ decided that, on public interest grounds, the possible consequences of the prosecution were not proportionate to the seriousness of the alleged offence. The failure of a long-established and well-respected media group at that time could have sent all the wrong signals to the international community, quite apart from the adverse impact it would have on the local media and on the morale of the community.
- The SJ therefore concluded that it was also not in the public interest to prosecute Ms Aw.

Review of decision not to prosecute

- After the decision not to prosecute was made, the SJ appreciated that the amount of evidence available, and the public interest factors, that

she relied upon, could change. She therefore kept an open mind as to the possibility of prosecuting Ms Aw.

- No new evidence has emerged against Ms Aw. The ICAC is still pursuing inquiries which may or may not yield further evidence. The ICAC report will be considered once it is received.
- Under Article 63 of the Basic Law, the SJ is required to control prosecutions, free from interference. She has dutifully observed this requirement.

No other considerations

- Suspicion and allegations against SJ that she spared Ms Aw because of Ms Aw's social position and personal contacts are understandable but wrong.
- In considering the case against Ms Aw, SJ has not regarded her as someone special who would be put above the law. No other consideration was taken into account apart from those set out above.
- The rule of law means everyone (including those who are regarded as having special standing in the community) is equal before the law. There should be no double standards.