

**A Statement by the
Secretary for Justice**

**The case of
Mr Antony Leung Kam-chung**

Following a media report on the 9 March, 2003, the Independent Commission Against Corruption (ICAC) received complaints against Mr. Antony Leung Kam-chung (Mr. Leung), the former Financial Secretary. The complaints related to his purchase of a Lexus saloon several weeks before he delivered the 2003-2004 Budget Speech. In that speech, he announced a sharp increase in the First Registration Tax of motor vehicles (FRT). By purchasing the car before, rather than after, that tax increase, Mr Leung made a saving of \$190,000. A Report was submitted by the ICAC to the Department of Justice on the 15 July, 2003, for advice as to whether the act complained of would justify a charge of 'Misconduct in Public Office'. We advised that further inquiries should be made and a Supplementary Report was submitted to us on the 21 August, 2003.

2. When the Director of Public Prosecutions (DPP) reported the matter to me for the first time after receipt of the two reports, I made the following decisions: (1) that the DPP should have conduct of the matter without seeking instructions from me; and (2) that independent advice should be sought from a private member of the Bar.

3. In respect of my first decision, I was aware of the sensitivity of the matter because Mr. Leung was my colleague as a Principal Official of the HKSAR Government and a Member of the Executive Council, and the matter had aroused serious public concern. I was satisfied that the DPP had had no connection with Mr. Leung financially, socially or otherwise. Therefore, I gave him full authority to deal with the matter. However, I made it clear that, before the decision was announced, I wanted to see the case papers and all legal

advice given or obtained. This was because, as Head of the Department, I am ultimately accountable for any decision that he makes.

4. In respect of my second decision, the latest judicial authority on 'Misconduct in Public Office' is *Shum Kwok-Sher v. HKSAR* (2002) 5 HKCFAR 381, in which Mr. Michael Thomas, SC represented the HKSAR and Mr. John Griffiths, SC represented the Appellant (defendant). Counsel involved in that case would be the first choice to advise on this matter since the law on the subject was exhaustively argued in the Court of Final Appeal. I understand from the DPP that Mr. Thomas was approached but declined our request for advice because of his acquaintance with Mr. Leung. However, Mr. Griffiths, who has had no contact whatsoever with Mr. Leung, agreed to accept the brief. After considering the matter, he advised that no prosecution should be brought. Having examined the advice of Mr Griffiths, the DPP felt this was a rare case in which a second independent opinion would be beneficial. In so deciding the DPP bore in mind the sensitivity of the case, the complexity of the law, and the level of public concern. The legal expert selected was Mr. Martin Wilson, QC. Mr. Wilson also advised that no prosecution should be brought.

5. On the 9 December, 2003, the DPP submitted a full report to me on the matter. He came to the conclusion that, when all the evidence involving Mr. Leung in the period January to March 2003 was examined as a whole, criminality could not be established in this case to the required standard on a charge of Misconduct in Public Office. Having had the opportunity of studying the case papers, the two Leading Counsel's opinions, the authorities which I was referred to, and the submissions made to the Department of Justice by Mr. Leung's lawyers, I am satisfied that the DPP's decision must be right.

6. The offence of Misconduct in Public Office involves 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) willfully and intentionally;
- (d) culpably misconducts himself.

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

7. The reasons why the DPP has come to the conclusion not to prosecute are fully set out in the statement which he has issued simultaneously with mine. I do not wish to re-iterate those reasons.

8. However, I must stress that Mr. Griffiths and Mr. Wilson were the only outside Counsel whose opinions the Department of Justice sought in this matter. No other outside Counsel, apart from these two, was consulted. The rumours that five Counsel were consulted and that four of them were of the view that Mr. Leung should be prosecuted were totally untrue. Such false rumours could not be allowed to mislead the public, and statements of denial were issued as soon the stories were published.

9. Prosecutorial decisions are often difficult and controversial. I am satisfied that due process was observed in the whole conduct of the case, which was in strict accordance with prosecution policy. The present decision is fair, free from any interference, and displays professionalism. I commend the DPP for making his decision under tremendous pressure. It would be much easier for him to claim the moral highground by prosecuting a person who previously held an important position in the government. But that would be contrary to a fundamental principle of our prosecution policy : there must be a reasonable prospect of securing a conviction before a prosecution may be brought, and even borderline cases should not be prosecuted. This Department has the responsibility to safeguard citizens from arbitrary prosecutions, which may affect the liberty of the subject. If the provable facts of the case meant that there was a reasonable prospect of conviction on the whole of the evidence, the public interest would require that Mr. Leung be charged. But there was no such reasonable prospect.

10. In our Statement of Prosecution Policy and Practice, which was revised last year, we have committed ourselves to as much openness in relation to the decision-making process as is consistent with the due administration of justice. We stated that reasons for decisions in the course of prosecutions may be given where practicable, usually only to those with a legitimate interest in the matter and where it is appropriate to do so. Public hearings and debates were held in Legislative Council in respect of this case, and many of the facts have been disclosed to the public and widely reported in the media. We therefore find it necessary to give an account of our decision to the Legislative Council and to the public at large.

11. The Director of Public Prosecutions will be holding briefings to answer queries that may be raised on the conduct of the matter.

Ms Elsie Leung
Secretary for Justice
15 December 2003