Opening statement by DPP in respect of prosecution policy relating to illegal broadcasting at Legco Panel on IT and Broadcasting
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Following is the opening statement by the Director of Public Prosecutions, Mr I Grenville Cross, SC, in respect of Prosecution Policy relating to Illegal Broadcasting at Legislative Council Panel on Information Technology and Broadcasting today (February 19):

Mr Chairman, Ladies and Gentlemen,

I welcome this opportunity to address the Panel on prosecution policy relating to illegal broadcasting and breaches of the provisions of the Telecommunications Ordinance.

As a prosecutor, I will, obviously, be confining my comments to prosecution issues, and not dealing with ancillary issues outside my remit. Equally, given that a series of prosecutions for alleged breaches of the Telecommunications Ordinance are presently before the courts, the Panel will appreciate that I must respect the principle that I cannot engage in any discussion of those cases or the issues that might arise in them. But what I can do is to tell the Panel something about the parameters in which we as prosecutors operate, and how, in a general way, we have discharged our duties in respect of the Telecommunications Ordinance.

Sometimes prosecution decisions are controversial. The prosecutor is sometimes criticised for prosecuting, and at other times for not prosecuting. That makes it vital for the prosecutor to act independently at all times. A decision to prosecute should only be made after all relevant factors have been carefully and professionally assessed, and after a measured application of prosecution policy guidelines.

It has never been the position in the common law world that those suspected of criminal offences must automatically face prosecution. A prosecution is only ever appropriate if there is sufficient evidence and the circumstances of its commission are such as to demonstrate that such a course is justified in the public interest. So what is meant by ‘public interest’? The community, through its legislature, enacts its laws. The community is entitled to expect that the relevant law enforcement agency will investigate breaches of the law, and that the prosecuting authority will prosecute such breaches. But that is not the end of the matter.

The essential question is whether a prosecution is required in the public interest. In deciding this, it is necessary to examine all the circumstances of each case. The factors which may properly be taken into account in deciding whether the public interest requires a prosecution vary greatly from case to case. In general, the more serious the offence the more likely is it that the public interest will require a prosecution to be instituted.

In deciding whether a prosecution is appropriate, various factors are assessed. These include such factors as the gravity of the offence, the circumstances of its

commission, the likely penalty, the alternatives to prosecution, the view of the victim, and the issue of whether the consequences of a prosecution would be out of all proportion to the seriousness of the offence. The prosecutor will sometimes conclude that the justice of the situation will be satisfied by means of a suitable warning to the suspect. If such a warning proves salutary, it will be an effective alternative to prosecution.

When cases of alleged breaches of the Telecommunications Ordinance are considered by prosecutors, they are processed in the same way as other cases. The first stage involves a consideration of the evidence. If there is insufficient evidence, the case cannot proceed, no matter how important or serious it may be. If the case satisfies the evidential test, the prosecutor will decide if the public interest requires a prosecution. The cases under the Telecommunications Ordinance fall into two categories.

The offences under section 8(1)(a) concern the unlicensed establishment and maintenance of means of telecommunications, and are punishable on indictment with a maximum penalty of 5 years imprisonment and a fine of $100,000. There have been numerous prosecutions for this offence in recent times. The offence under section 23 of participating in unlicensed broadcasting activities is less serious by comparison, and is punishable with a maximum fine of $50,000. No prosecutions were instituted under section 23 before last year. That was either because there was insufficient evidence to prosecute or alternatives to prosecution in the form of warnings to suspects were deployed, or else because those concerned were already subject to prosecution under section 8.

In 2007, arising out of incidents which allegedly occurred on 20 April and 25 May, five persons were prosecuted for delivering messages by unlicensed means of telecommunications in respect of the first incident, and three persons for the second incident. These cases were prosecuted after specific and general warnings had been issued on 9 December 2006 to the effect that anyone who participated in unlicensed broadcasting activities committed an offence and was liable to prosecution.

For present purposes, activities during two distinct periods are relevant :

(a) late 2005 to 9 December 2006;
(b) 9 December 2006 and thereafter.

In the first period, there were reports of breaches of section 23, some substantiated and some not. Things came to a head in late 2006 when various persons openly participated in unlicensed broadcasting activities in the street. Although on the evidence presented by OFTA it was open to prosecutors to prosecute certain persons for involvement in these broadcasts, it was decided not to do so.

The decision not to prosecute anyone for a section 23 offence prior to 2007 was influenced by the hope that specific warnings to those involved would suffice to deter any such conduct in the future. A series of warning letters was therefore sent by OFTA on 9 December 2006 to persons believed to have been involved in the unlicensed broadcasting activities. That same day, and to ensure that no one was

under any illusions that they could break the law with impunity, a general warning was issued by OFTA by way of a press release.

Some have queried how the date of 9 December 2006 came to be chosen. Let there be no mystery on that score. As indicated, things came to a head in late 2006, when persons were openly participating in illegal broadcasting in the street. These activities were duly investigated by OFTA, and legal advice was sought and given. In consequence, prosecutions were instituted at year's end against some persons for alleged breaches of section 8, the court appearances of whom were widely reported in the media, and warnings were issued to others for alleged breaches of section 23. Whereas the informations against those accused of breaches of section 8 were laid at court on 7 December 2006, with the summonses issued on 8 December 2006, the warning letters followed immediately on 9 December 2006, together with the general warning of the same date.

Turning to the second period, from 9 December 2006 onwards, OFTA submitted two cases of illegal broadcasting which occurred in April 2007 and May 2007. As there was sufficient evidence for prosecution in respect both of the section 8(1) offences and the section 23 offences, and given that everyone interested had been put on clear notice that those suspected of breaching section 23 were liable to prosecution, we had no reservations over instituting prosecutions in both cases.

As will, I hope, be readily apparent, prosecutions for breaches of the relevant provisions of the Telecommunications Ordinance have been fairly and judiciously instituted, and established legal criteria have been scrupulously observed. Prosecutors have acted throughout in complete good faith, and maximum restraint has been applied. The suggestion that improper motives have somehow intruded into the decision-making process is as fanciful as it is false.

Ends/Tuesday, February 19, 2008