

For information
3 January 2006

LEGISLATIVE COUNCIL PANEL ON SECURITY

Rules and Directions for the Questioning of Suspects and the Taking of Statements: Caution Statement

Purpose

This paper reports on the Administration's consideration of some proposed amendments to the caution administered by law enforcement agencies when interviewing a suspect.

Background

2. The "*Rules and Directions for the Questioning of Suspects and the Taking of Statements*" (Rules and Directions), promulgated by the then Secretary for Security in 1992, stipulate, among other things, the caution to be used to remind a suspect of his right to remain silent when he is questioned. The statement reads as follows –

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

3. The above statement serves as a reminder to a suspect of his right to remain silent. It also serves to remind a suspect that if he elects to answer questions, the answers may be given in evidence. At an earlier meeting of the Legislative Council Panel on Security on 6 July 2004, the Chairman suggested amending the statement along the following lines –

"You have the right to silence. Remaining silent will not be to your detriment. If you are willing to give a statement voluntarily, your statement will be recorded and may be given in evidence." (English translation of original suggestion made by the Panel Chairman)

Considerations

4. At common law, there is a right to silence. The present caution is consistent with the common law. It is also similar to the Miranda warning used in the United States. In this latter regard, although the exact wording may vary from state to state, the warning used by the US Federal Bureau of Investigation in respect of the right to silence is illustrative and is as follows –

“You have the right to remain silent. Anything you say can be used against you in court.”

Similarly, the caution used by the Australian Federal Police and the Royal Canadian Mounted Police are as follows –

(Australian Federal Police)

“I must caution you that you do not have to say or do anything but that anything you do say or do may be used as evidence. Do you clearly understand this caution?”

(Royal Canadian Mounted Police)

“You need not say anything. You have nothing to fear from any threat and nothing to gain from any promise of favor. Anything you do say may be used as evidence against you in a court of law. Do you understand? Do you have anything you wish to say at this time?”

5. The current caution is also consistent with the right to silence and the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14(1) of ICCPR reads –

“...In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...”

Article 14(3) provides that –

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (g) not to be compelled to testify against

himself or to confess guilt.”

6. The current caution has been in use for many years, is well known and is generally accepted by the courts. We are not aware of any common law jurisdiction that has adopted wording to the effect suggested by the Panel Chairman. Indeed, we believe that in some situations the suggested formulation could be unhelpful to a suspect, e.g., if the suspect remains silent when he could give a satisfactory explanation that could lead to his release, he may remain in custody, which would be to his detriment. We, therefore, do not propose to amend the current caution.

Related Developments

7. We have also taken the opportunity to research into some related developments. We note that the United Kingdom (UK) Code of Practice for the Interviewing of Suspects stipulates that the caution to be given by a police officer should be in the following terms –

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

The right of a suspect to remain silent when questioned by the police is preserved in the UK. However, inferences may be drawn from the silence if –

- a suspect has, without reasonable explanation, failed to tell the police something which he later uses in his defence;
- a defendant does not give evidence on his own behalf at trial; or
- a suspect fails to account for his presence at a particular time and place or to account for objects, substances or marks on his person at the time of his arrest.

8. The European Court of Human Rights (ECHR) has dealt with some cases arising from the UK provisions. In the opinion of the ECHR, while it is self-evident that it is incompatible with the right to silence to base a conviction solely or mainly on the silence of the accused or on a refusal to answer questions or to give evidence himself, these immunities should not prevent the silence of the accused, in situations which clearly call for an explanation from him, from being taken into account in

assessing the persuasiveness of the evidence adduced by the prosecution. The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. A court cannot conclude that the accused is guilty merely because he chooses to remain silent. However, if the evidence against the accused “calls” for an explanation which the accused ought to be in a position to give, his failure to give an explanation “*may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty*” (Murray v. United Kingdom (1996) 22 EHRR 29, paras. 47 and 51).

9. Given the ECHR jurisprudence, there is no constitutional impediment to the introduction of a caution along the lines of the UK one and the underpinning legislation in Hong Kong. The Administration does not propose to do so at this stage, however. Instead, we will keep under review the evolving jurisprudence in this area.

Putonghua version

10. The Rules and Directions as gazetted contain two versions of the caution statement – English and colloquial Cantonese (Punti). The Administration has drawn up a literal Chinese version of the statement to cater for Putonghua speakers (details at **Annex**).

**Department of Justice
Security Bureau
December 2005**

**Rules and Directions for the
Questioning of Suspects and the Taking of Statements**

Rule II

Gazetted version – English (官方原文 – 英文)	You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.
Gazetted version – punti (官方原文 – 本地)	唔係是必要你講嘅，除非你自己想講喇，但係你所講嘅嘢，可能用筆寫低及用嚟做證供嘅。
Suggested version (建議譯本)	你不一定要說話，除非你有話要說。但是，你說的話可能會寫下來並用作證據。