

For information
3 May 2011

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, when he is questioned, his specific immunity of not to incriminate himself through answering questions if he does not wish to do so. 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."

The above statement also serves to remind a suspect that if he elects to answer questions, the answers may be given in evidence.

3. At an earlier meeting of the Legislative Council Panel on Security on 3 January 2006, the then Chairman suggested adding the following sentence to the beginning of the statement: "你有權保持緘默" (English translation: "You have the right to silence"). On 15 April 2011, the Administration received the Chairman's further suggestion to revise the caution statement as "根據法律，你有權保持緘默，保持緘默不會對你構成不利。如你自願作供，供詞將予紀錄，且或會成爲呈堂證供。" (English translation: "You have the right to silence under the law. 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.")

Legal Considerations

4. It should be noted that it is not the spirit of the common law to discourage a suspect from telling the truth during an investigation, provided that he reveals it voluntarily. It is settled law that a confession statement may be admitted in evidence if the suspect had not been compelled or induced to make it, and that the residual discretion would seldom be exercised to exclude a statement voluntarily made.

5. In line with that spirit, the common law emphasis at the investigation stage is not a suspect's general "right to silence", but the specific immunity of not to incriminate himself through answering questions when he does not wish to do so. On this, the suspect is reminded by the existing caution "*You are not obliged to say anything unless you wish to do so.....*". It is not without significance that the term "right to/of silence" does not appear in the Basic Law, nor in the Bill of Rights Ordinance, and it is not employed in the caution used by the police in the UK, Australia and Canada.

6. The proposed "no detriment" reminder may also be problematic. If the suspect remains silent when he has an obvious explanation, he may suffer the detriment of further custody and a subsequent trial. While no adverse comment can be made at trial on his silence during investigation, he may not be awarded costs after acquittal if his silence had misled the prosecution into thinking that their case was stronger than it was.

7. In conclusion, the proposed adoption of the term "the right to silence" in the caution, while a convenient label, may not accurately reflect the true common law position, and may generate unintended detriment to the suspect.

Way Forward

8. We do not propose to amend the current caution, which has been in use for nearly two decades and is generally accepted by the courts. We will continue to monitor any comments from the courts in this regard.

**Department of Justice
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