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February 2, 2023

TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings Committee

FROM: Jer Welter, Assistant Attorney General

RE: SB 22 - Criminal Procedure - Custodial Interrogation - Codification (LETTER OF CONCERN)

The Office of the Attorney General writes to express concerns regarding Senate Bill 22. This bill would codify a statutory definition of the term "custodial interrogation," rather than its judicially determined meaning, and would impose certain requirements on officers conducting "custodial interrogations," as redefined.

The Office of the Attorney General shares the sponsor's evident aim of ensuring that the rights of suspects against potential self-incrimination are appropriately protected. Nevertheless, we believe that Senate Bill 22, as written, does not present a workable way to achieve this aim.

Under current law, the term "custodial interrogation" retains its "judicially determined meaning." Md. Code, Crim. Proc. § 2-401. That meaning, as it has evolved over the years, has been given shape by countless decisions of the United States Supreme Court, the Supreme Court of Maryland, the Appellate Court of Maryland, and other courts around the country. Very briefly summarized, it means: express questioning by police or its equivalent (*i.e.*, "interrogation"), under circumstances where there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest (*i.e.*, "custodial"). *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011); *Berkemer v. McCarty*, 468 U.S. 420 (1984). It is an objective standard that courts assess based on the factual circumstances of each case, not the "subjective views harbored by either the interrogating officers or the person being questioned." *J.D.B.*, 564 U.S. at 271.

That meaning has stood the test of time and strikes an appropriate balance between the needs of law enforcement and the rights of the accused. The new definition proposed in this bill would depart from the established meaning in several ways. First, the new

definition would be at least partly subjective, depending on whether a person actually "has a reasonable belief that the person is not free to leave the encounter." This would eliminate the "benefit of the objective custody analysis [which] is that it is 'designed to give clear guidance to the police.'" *Id.* Second, by expanding to include any situation where a person feels they are not free to leave, the new definition would cover questioning during a much broader range of routine police interactions—including, for instance, a request for "license and registration" in an ordinary traffic enforcement stop for speeding. *But see Berkemer*, 468 U.S. at 435–42 (holding that a routine traffic stop is not "custodial interrogation"). Third, by being limited to "questioning, by a law enforcement officer," the new definition would exclude circumstances that are the "functional equivalent" of express questioning, which would appear to diminish the rights of suspects under current law. *See, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 600–01 (1990) (questioning includes "'any words or actions ... that the police should know are reasonably likely to elicit an incriminating response from the suspect'"). The established definition of "custodial interrogation," and the well-developed body of case law applying it, should not be discarded.

The bill's additional requirement to document a suspect's receipt of advisement about their rights in custodial interrogation (*i.e.*, the classic "*Miranda*" advice of rights) either in a writing signed by the suspect or via a video or audio recording, is also problematic—particularly when combined with the proposed redefinition of "custodial interrogation." (Officers who conduct custodial interrogations under the existing definition routinely document the giving of the *Miranda* advice of rights in writing and/or on video.) Among other things, this statutory requirement, combined with the redefinition, would effectively make it impossible to conduct a routine traffic stop without having a body-worn camera (although the body-worn camera mandate enacted by 2021 Md. Laws ch. 60 will not fully phase in for county police forces, let alone municipal forces, until 2025), and would seem to mean that an officer effectively could not pull a minor over for a traffic infraction without summoning the minor's parents and a defense attorney (given the requirements for custodial interrogation of minors enacted last year in the Child Interrogation Protection Act, Crim. Proc. § 2-405).

The Office of the Attorney General is prepared to work with the sponsor to protect the rights of accused while striking an appropriate balance with the needs of law enforcement.

cc: Members of the Committee