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To: Rep. Martin Lalonde, Chair
House Committee on Judiciary

From: Domenica Padula
Assistant Attorney General
Chief of the Criminal Division

Date: April 30, 2023

Re: Version 2.1 of S.6, An act relating to law enforcement interrogation policies

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This memo addresses version 2.1 of S.6 and the changes it makes to section 4, regarding custodial interrogations, and section 5, regarding a model interrogation policy. The Attorney General's Office offers the following suggestions for the Committee's consideration, which we believe address the Committee's goals regarding deceptive tactics in law enforcement custodial interrogations of juveniles within the context of complex, sensitive investigations, including those conducted by the Attorney General's Internet Crimes Against Children Task Force ("ICAC").

The Attorney General's Office shares the Legislature's concerns about law enforcement tactics that may lead to false confessions but is mindful of the potential impact on investigations and public safety.

A. Sec. 4. 13 V.S.A. § 5587

1. Blanket ban of deception for under 18 age cohort

As a preliminary matter, the Attorney General's Office would be amenable to participating in further conversations and inquiry concerning whether a blanket ban on the use of evidence procured through deception for those under 18 is most appropriate for this age group, as currently articulated in (b)(2), or whether the rebuttable presumption envisioned for ages 18-21, as articulated in (c)(2), could be used for the under 18 age group providing a path to

admissibility, albeit it under a justifiably higher standard. Regardless, we look forward to participating in the process of developing a model interrogation policy, which we hope will include a focus on those in custody under age 18 (discussed *infra*). For the purpose of this memo's recommendations, we assume the Committee prefers to move forward with the blanket ban.

2. Removing the 18-21 age cohort

The Attorney General's Office advocates for completely eliminating the age range of 18 to 21 from the bill. Our position is largely due to the importance of confessions and admissions in sexual assaults that happen on college campuses[1] and child sexual abuse cases. Furthermore, as ICAC Commander Matthew Raymond testified, the removal of targeted deception will mean that victims previously unknown to law enforcement will not be identified and will, therefore, not receive the supports, services, and interventions they need.

This proposal would create two simple groups: those under 18 (a blanket ban on deception) and those 18 and older (status quo regarding deception).

3. Considering a rebuttable presumption under (c)(2)

Should the Committee move ahead with the current approach of permitting deception in cases of those aged 18-21 in which a rebuttable presumption is overcome, the Attorney General's Office would keep the standard as "clear and convincing" evidence in terms of "voluntariness" and delete (c)(2)(B) and (C) for the following reasons.

The Attorney General's Office's proposed revisions address Vermont's desire to hold law enforcement to a higher standard in juvenile custodial interrogations while also recognizing the importance of decades of caselaw that help practitioners and courts define "the voluntariness of confessions" through suppression hearings. Striking the language in (c)(2)(B) and (C) avoids confusion. It does so, first, by stating a clean and well-known legal standard, and, second, it affirms the separate issues of "reliability" and "voluntariness" which are important to established caselaw in criminal practice.

The rebuttable presumption envisioned in § 5587(c)(2) is presently addressed during a suppression hearing under a "preponderance of the evidence" standard for "voluntariness." It is important to note for the Committee that the function of a suppression hearing is to remedy unconstitutional law enforcement conduct by denying admission of non-voluntary confessions because, theoretically, if a statement was not voluntary, then it would not be reliable.

As written in the bill, the applicable standard conflates the separate concepts of "voluntariness" and "reliability." Under well-established suppression practice, the court at a suppression hearing is focused on "voluntariness" or *why* a person said what they said, not "reliability" which is *what* they said. A court, i.e., a judge, reviewing law enforcement conduct, addresses the issue of "voluntariness" though evidence regarding the totality of the circumstances of that element.

[1] An estimated 20-25% of undergraduate students will experience sexual assault during their undergraduate years. https://www.rainn.org/statistics/campus-sexual-violence.

Traditionally, prosecutors call members of law enforcement involved in an interview and law enforcement would testify to all the nuances of "voluntariness" which, based on caselaw, is extremely detailed. Questions regarding: Where the interview happened? At what time of day? How questions were being answered, such as, was someone too inebriated or for some other reason not coherent during questioning? Was the officer in uniform? How many officers were present? Did they have their weapon on them? Was it visible? Was any request by a suspect denied, and if so, why? These are a very brief sampling of the types of detailed questions that are examined when proving "voluntariness."

The Attorney General's Office supports the bill's requirement that law enforcement interrogations be video recorded when possible. Before the benefit of audio and video recordings, suppression hearings relied almost solely on the testimony of law enforcement officers. Now, with audio and video recordings, the court in a suppression hearing can utilize recordings of custodial interviews to analyze "voluntariness." The benefit of recordings cannot be overstated because it allows the court to not only hear *what* officers are saying, but *how* they are saying it, and, maybe more importantly for suppression purposes, how suspects are reacting to it. This is also an immense benefit to the jury as well if suppression is denied. The jury themselves, by using the video, can see the same circumstances and, as finders of fact, use that to weigh "reliability" and "credibility."

Moreover, the current language in (c)(2)(B) and (C), we believe, could create the need for "mini-evidentiary trials" within a suppression hearing. It is unclear from the current language that the Committee intends to create a need for such a "mini trial." Applying the language of (c)(2)(B) and (C) in a practical setting, we would ask, how does the State show "reliability," and by what standard? Is the intent of the current language to make the State produce witnesses—including the victim—to explain why a confession should be deemed reliable? Our proposed edits strengthen the test for "voluntariness," but keeps the issue of "reliability" with the trier of fact.

Further, our proposed edits do not change the defense's ability to raise the issues of "voluntariness" and "reliability" to a jury, even when suppression has been denied.

B. <u>Sec. 5. Vermont Criminal Justice Council Model Interrogation Policy</u>

1. Model interrogation policy for individuals under 18

The Attorney General's Office recommends that the proposed language regarding the model interrogation policy development focus on the issues of juvenile custodial interrogations of individuals under the age of 18. The Attorney General's Office supports the legislative aim of directing the Vermont Criminal Justice Council's ("CJC's") development of a Model Interrogation Policy for that age group which, in the future, may be extended under certain circumstances to other interrogation practices. The Attorney General's Office believes that prioritizing a model policy for those under 18 is the best way to begin to balance the competing interests that the Committee has heard through lengthy testimony. We urge a tiered approach in this area in order to ensure that important investigations involving proactive public safety, such

as undercover investigations, are carefully considered. This work is important to the Attorney General's Office in protecting vulnerable children through investigations conducted by ICAC.

To ensure this focus is included in the CJC's work, we would suggest adding a fifth policy topic to (c) as follows:

> (c) Policy contents. The evidence-based model interrogation policy created pursuant to this section shall apply to all persons subject to various forms of interrogation, including the following. . . .
>
> (5) custodial interrogation of individuals under the age of 18.