TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022

ON THE FOLLOWING MEASURE:
S.B. NO. 2342, RELATING TO PAYMENTS OF SUPPORT.

BEFORE THE:
SENATE COMMITTEE ON LABOR, CULTURE AND THE ARTS

DATE: Monday, February 7, 2022 **TIME:** 3:10 p.m.

LOCATION: State Capitol, Room 225, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General,
Mark T. Nugent, Deputy Attorney General

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General supports the intent of this bill and provides the following comments.

The purpose of the bill is to amend the definition of "income" in sections 571-52, 571-52.2, 576B-102, 576D-7, and 576E-16, Hawaii Revised Statutes (HRS), to include tips or gratuities paid directly to an individual by a customer of the employer and reported or declared to the employer. These sections deal with the assignment of future income for payments of child or spousal support.

Statutory changes may be unnecessary because the current definition of income includes tips received by employees. Also, employers are required to follow the Consumer Credit Protection Act, Title III (CCPA) when garnishing employees' wages for payments of support. For tipped employees, the U.S. Department of Labor Wage and Hour Division provides guidance in Fact Sheet #30, which states:

> For employees who receive tips, the cash wages paid directly by the employer and the amount of any tip credit claimed by the employer under federal or state law are earnings for the purposes of the wage garnishment law. Tips received in excess of the tip credit amount or in excess of the wages paid directly by the employer (if no tip credit is claimed or allowed) are not earnings for purposes of the CCPA.

Pursuant to federal guidelines, employers are limited to only including the cash wages and tip credit as earnings subject to withholding and are not allowed to consider

tips over these amounts. Thus, this bill may have a limited effect on existing employer withholding practices.

If the intent of the bill is to deem the entire amount of the tips, including those tips received in excess of the tip credit, to be included as earnings subject to withholding, then the proposed wording may conflict with the federal law. The U.S. Department of Labor Wage and Hour Division has stated as guidance that "tips received in excess of the tip credit amount or in excess of wages paid directly by the employer (if no tip credit is claimed or allowed) are not earnings" subject to garnishment. Thus, such state law that requires a larger amount to be garnished than the federal law permits in the CCPA may be considered preempted by the federal law. To avoid this potential conflict with the federal law, we suggest that "to the extent permitted under relevant federal law" be added to the new wording in section 1 on page 1, lines 7 through 9, section 2 on page 2, lines 5 through 7, section 3 on page 3, lines 4 through 6, section 4 on page 3, lines 18 through 20, and section 5 on page 5, lines 7 through 9, such that the wording in each section be revised to read as follows: "including tips or gratuities paid directly to an individual by a customer of the employer and reported or declared to the employer <u>to the extent permitted under relevant federal law,</u> . . . ."

In addition, the bill proposes that the guidelines used in calculating child support may include consideration of tips or gratuities paid directly to an individual by a customer of the employer and reported or declared to the employer. The family court recently issued the Child Support Guidelines in 2020, which, at page 19, state that gross income is income from all sources, including tips. If the bill passes, the family court may consider defining tips more specifically in the next review, but the guidelines will not automatically change upon this bill's enactment.

Thank you for the opportunity to provide testimony.