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PLEASE REPLY TO:

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February 27, 1992

Honorable Joseph C. Brannigan
Honorable Lorraine N. Chonko
Chairs, Joint Standing Committee on
Appropriations and Financial Affairs
State House Station #3
Augusta, ME 04333

Dear Senator Brannigan and Representative Chonko:

I am writing in response to your letter of February 26, 1992, to this Department, asking whether the Legislature would be prohibited from enacting Sections X-26, X-28, X-29, X-30 and X-31 of Legislative Document 2185, "AN ACT to Make Supplemental Appropriations and Allocations for the Expenditures of State Government and for the Fiscal Years Ending June 30, 1992 and June 30, 1993 That Change Certain Provisions of the Laws," because of the provisions of 30-A M.R.S.A. § 5684, which purport to prohibit the Legislature from enacting legislation containing a "state mandate" upon the counties and municipalities of the State, if such a mandate requires additional funding, and if such funding is not provided.

Please be advised that this Department does not believe it is necessary to determine whether the provisions of L.D. 2185 constitute such "mandates" because the provisions of 30-A M.R.S.A. § 5684 are of no effect in controlling the actions of the Legislature. As this Department explained more fully in an opinion rendered to Secretary of State G. William Diamond last summer, the Legislature is without power to enact legislation binding the actions of future Legislatures. See Op. Me. Att'y Gen. 91-9 and the authority cited therein. A copy of that opinion is attached.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

CABANNE HOWARD
Deputy Attorney General
Chief, Opinions Division

CH:sw

cc: Governor John R. McKernan, Jr.
Representative Judith C. Foss
Sponsor, Legislative Document 2185

91-9

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DEPUTY, CONSUMER/ANTITRUST
BRIAN MACMASTER
DIRECTOR, INVESTIGATIONS

August 5, 1991

Hon. G. William Diamond
Secretary of State
State House Station 29
Augusta, Maine 04333

Dear Secretary of State Diamond:

You have advised this Department that you have been requested to approve, pursuant to 21-A M.R.S.A. § 901 and § 906, a petition to initiate legislation, pursuant to Article IV, Part 3, Section 18 of the Maine Constitution, which would restrict the ability of the Maine Legislature to enact any statute pertaining to discrimination based upon sexual orientation unless such statute is submitted to the voters of the State and approved by them in a state-wide referendum. You have inquired of this Department whether the enactment of such initiated legislation would be constitutional. For the reasons which follow, it is the opinion of this Department that it would not be constitutional for the voters of the State (or the Legislature itself) to pass legislation conditioning future acts of the Legislature upon a state-wide referendum.

Any discussion of the ability of the electorate through the initiative process to bind future actions of the Legislature must begin with a discussion of the ability of the Legislature itself to enact such restrictions. On this issue, as the United States Supreme Court stated nearly a century and a half ago,

> It is a principle controverted by no one, that, on general questions of policy, one legislature can not bind those which shall succeed it; . . .

Woodruff v. Trapnall, 51 U.S. 190, 208 (1851).1/ With regard to the Maine Legislature, the Supreme Judicial Court concurs. Edgerly v. Honeywell Informations Services, Inc., 377 A.2d 104, 107 (Me. 1977); Maine State Housing Authority v. Depositors Trust Co., 278 A.2d 699, 707-08 (Me. 1971); Opinion of the Justices, 146 Me. 183, 189-90 (1951). See Op. Me. Att'y Gen. 89-12. This rule extends not only to the substance of legislation, but to the procedure by which future legislation may be enacted. Thus, to quote the Supreme Court of Georgia,

> One Legislature can not lawfully provide that, whenever a subsequent Legislature enacts a statute with reference to a given subject, such statute shall embrace certain specified provisions. It can not tie the hands of its successors, or impose upon them conditions with reference to subjects upon which they have equal power to legislate.

Village of North Atlanta v. Cook, 133 S.E.2d 484, 489 (Ga. 1963), quoting Walker v. McNelly, 48 S.E. 718, 720 (Ga. 1904). Thus, for example, it has been held that a Legislature may not impose by statute a requirement that future legislation on a particular subject be enacted only by a supermajority. Tayloe v. Davis, 102 S.E. 433, 435 (Ala. 1924). Rather, if such restrictions on a Legislature are to be imposed, they must be found in the Constitution. See generally, 72 Am. Jur. 2d, States, Territories and Dependencies, § 40.

In view of these authorities, it is clear that the Maine Legislature may not bind future Legislatures by enacting a statute preventing the enactment of future statutes except upon ratification by the voters at a state-wide referendum. The question becomes, therefore, whether the result would be any different if the statute requiring such a referendum were

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1/ The rule is of even greater antiquity. A leading nineteenth century authority on the British Constitution, A. V. Dicey, confirms that Parliament is without power to "tie the hands" of its successors, A. V. Dicey, Introduction to the Study of the Law of the Constitution, ch. 1 at 64-70 (9th ed. 1939), and quotes from Francis Bacon a description of the unsuccessful effort of Henry the Eighth to prevent Parliament from passing laws during any minority rule of his son. When Henry did in fact die before Edward the Sixth was of age, the first statute passed by the next Parliament was to repeal Henry's Act, notwithstanding the King's minority. Id. at 64-65, n. 2.

enacted pursuant to the initiative process. In the view of this Department, the result would be the same. With regard to the relative constitutional weight to be assigned to legislation passed by the Legislature and legislation passed through the initiative process, the general principle is:

> Under general constitutional provisions vesting the legislative power of the state in a legislature but reserving to the people the right of initiative and referendum, there is no superiority of power as between the two. The legislature on the one hand and the electorate on the other are co-ordinate legislative bodies. In the absence of special constitutional restraint,[2] either may amend or repeal an enactment by the other.

Annotation, Power of the legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 A.L.R. 2d 1118, 1121, and cases cited therein. There is no such restriction in the Maine Constitution. Therefore, since initiated legislation does not have a special constitutional status in Maine, it may not be used to impose restrictions on the ability of future Legislatures to act.[3] Such restrictions may only be imposed through an amendment to the Constitution, which, of course, may

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[2] For example, the State of California has such a special constitutional restraint. CAL. CONST., Art. II, § 10(c) ("The Legislature may . . . amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.")

[3] The Supreme Judicial Court has not been faced with this issue, but it has ruled that the Legislature is not prevented from amending a statute which was previously enacted after a legislatively authorized referendum. Jones v. Maine State Highway Commission, 238 A.2d 226, 230 (Me. 1968).

not be accomplished by initiative. ME. CONST., Art. IV, pt. 3, § 18(1).[4]

Since the proposed initiative, if enacted, would be unconstitutional, the only remaining question is whether there is any barrier to the holding of a referendum on the question anyway. Here, as indicated in an Opinion of this Department issued earlier this year, the authority in Maine and elsewhere in the country is virtually unanimous that referenda may not be conducted on subjects for which the legislative body in question has no legal authority to take action. See Op. Me. Att'y Gen. 91-2, a copy of which is attached. Thus, it would appear that even if a sufficient number of signatures were gathered on the proposed petition to activate the initiative process, the holding of a referendum on the question would be illegal. To quote the Supreme Judicial Court, if the proposed legislation, if adopted, would be void, "It is not a proper matter for submission to the voters." Farris ex rel. Anderson v. Colley, 145 Me. 95, 102 (1950). In view of this authority, it is the Opinion of this Department that it would be within your authority under 21-A M.R.S.A. § 901 and § 906 to disapprove for circulation to the voters the petition form pending before you.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:lm
Attachment

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[4] It has been drawn to this Department's attention that the pending initiative proposal may have been based on a statute currently in force preventing the construction or operation of a low-level radioactive waste disposal or storage facility in Maine and preventing the State from entering into an agreement with any other state or states or the federal government concerning the disposal or storage of low-level radioactive waste, unless approved by the voters at a state-wide election. 38 M.R.S.A. § 1493, 1494. This statute, however, does not purport to limit the Legislature. Rather, it seeks only to limit the authority of private persons to establish a facility and the executive branch to enter into an agreement. The statute is, therefore, distinguishable from the one contained in the proposed petition.