MAINE STATE LEGISLATURE

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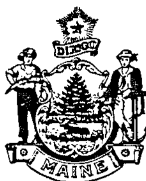

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 26, 1995

Senator Dana C. Hanley
Chair, Joint Standing Committee on
Appropriations and Financial Affairs
State House Station #5
Augusta, ME 04333

Dear Senator Hanley:

I am writing in response to your inquiry of April 5, 1995, soliciting the Opinion of this Department concerning the ability of the Legislature to divert certain funds appropriated to the Department of Inland Fisheries and Wildlife to nondepartmental purposes, in view of the provisions of Article IX, Section 22 of the Maine Constitution. For the reasons which follow, it is the Opinion of this Department that the constitutional provision does not prevent the Legislature from diverting, for nondepartmental purposes, funds appropriated to or otherwise in the possession of the Department prior to the effective date of the constitutional amendment, nor does it prevent the Legislature from so diverting funds appropriated in a particular fiscal year which are in fact in excess of the total revenues collected by the Department pursuant to the various sources listed in the constitutional provision.

Article IX, Section 22 of the Maine Constitution provides, in pertinent part:

> The amount of funds appropriated in any fiscal year to the Department of Inland Fisheries and Wildlife . . . may not be less than the total revenues collected, received or recovered by the department . . . from license and permit fees, fines, the sale lease or rental of property, penalties and all other revenue sources pursuant to the laws of the state administered by the department . . . .

The purpose of this amendment, which became effective on November 23, 1992, is clear from its plain language: The Department of Inland Fisheries and Wildlife has a constitutional right to all of the revenues collected by it through its various programs, and the Legislature is required each fiscal year to appropriate an amount of money equal to those revenues for the Department's use. Your inquiry, however, concerns funds appropriated to or otherwise in the possession of[1] the Department in advance of the effective date of the constitutional amendment, and funds which the Legislature might have subsequently appropriated in any fiscal year in excess of the total revenues collected by the Department through its programs.

With regard to funds appropriated to the Department prior to the effectiveness of the constitutional amendment, there would appear to be little question that the Legislature could divert these funds to other purposes so long as it is clearly established that the funds in question are attributable to appropriations occurring prior to November 23, 1992, or were otherwise in the possession of the Department prior to that date. There is no indication in the constitutional amendment, nor in its legislative history, that the Legislature intended that it be applied retroactively. Thus, if it can be established that certain funds were appropriated to the Department prior to November 23, 1992 or were otherwise in its possession prior to that date, and have simply never been expended since that time, those funds would not be protected by the amendment and could be diverted to other purposes by the Legislature.

With regard to funds appropriated which are in excess of the revenues actually collected in any fiscal year, the result would be the same. In order to carry out the purposes of the constitutional amendment, the Legislature is obliged, at the beginning of each fiscal year, to make an appropriation to the Department based on an estimate of the amount of revenues which the Department will collect during that fiscal year. It is quite possible, therefore, that this estimate will prove to be higher than the amount of revenues actually collected. If that eventuality should occur, the excess would not be protected by the constitutional amendment, and could be diverted to other purposes by the Legislature. This Department hastens to add, however, that if there should be an excess in the Department's accounts caused by the fact that the Department expended less money in a particular fiscal year than the amount of revenues collected by it, that amount of money, being part of the constitutionally required appropriation, could not be diverted by the Legislature for other purposes.

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[1]This Office is advised that some of the funds in question were the subject of prior legislative appropriations, and some were revenues which were collected by the Department and were not the subject of a specific appropriation.

These conclusions are not disturbed either by comparison with the provisions of Article IX, Section 18 of the Maine Constitution (relating to the Maine State Retirement System), to which you draw our attention, nor by the provisions of 12 M.R.S.A. § 7910(13), to which the Department draws our attention. The constitutional amendment relating to the Retirement System provides that "Funds appropriated by the Legislature for the Maine State Retirement System are assets of the System and may not be diverted or deappropriated by any subsequent action." This provision stands in contrast to Section 22, quoted above, in that it declares that once funds have been appropriated to the Retirement System they may not be deappropriated. Section 22, on the other hand, directs only that the Legislature appropriate an amount of money equal to the revenues collected by the Department of Inland Fisheries and Wildlife in a particular fiscal year. It clearly does not provide that should funds be appropriated in excess of this amount, they may not be subsequently diverted to other purposes if the Legislature should so direct.

With regard to 12 M.R.S.A. § 7910(13), that section provides

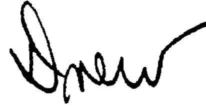
> All General Fund appropriations to the department may not lapse but must be carried forward in a separate General Fund program and appropriated by the Legislature to the department for the purposes described in section 7074. Funds in this program are revenues collected by the department and must be added to the sum of all other revenues collected, received and recovered by the department in calculating the amount of funds that must be appropriated to the department pursuant to the Constitution of Maine, Article IX, Section 22.

According to its text, this provision not only directs that any appropriations made by the Legislature to the Department which might not be expended in a particular biennium shall carry forward to the next biennium, but also attempts to direct future legislatures to appropriate such funds to the Department. The problem with this provision is that, notwithstanding that on its face it provides that funds once appropriated to the Department may not be later diverted for other purposes, its provisions are not part of the Constitution of the State, such as those of Article IX, Section 22, and therefore are not binding on future legislatures. As this office has advised in other contexts, it is a well-established principle of constitutional law that one legislature may not, through the passage of ordinary legislation, bind succeeding legislatures. See Op. Me. Att'y Gen. 91-9 (copy attached). Thus, while the provision of Section 7910(13) directing that funds appropriated to the Department but not expended during a particular biennium shall not lapse has legal force absent further action of the Legislature, the provision of the section which seeks to direct future legislatures to reappropriate such funds to the Department must be regarded as having no legal force. In short, the actions of the Legislature in appropriating funds

to the Department are restricted only by Article IX, Section 22 of the Maine Constitution, as outlined above, and cannot be affected by 12 M.R.S.A. § 7910(13).

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

Sincerely,



ANDREW KETTERER
Attorney General

AK:sw

cc: Senator Stephen E. Hall
Representative Dorothy A. Rotondi
Chairs, Joint Standing Committee on Inland Fisheries and Wildlife
Ray B. Owen, Jr., Commissioner
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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; . . .

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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.")

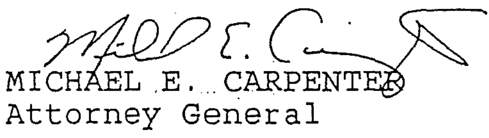
3/ The Supreme Judicial Court has not been faced with this issue, but it has ruled that the Legislature is not prevented from amending a statute which was previously enacted after a legislatively authorized referendum. Jones v. Maine State Highway Commission, 238 A.2d 226, 230 (Me. 1968).

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.