

## THE VEILED SCEPTRE

### Reserve Powers of Heads of State in Westminster Systems

This book is a comprehensive review and analysis of the reserve powers and their exercise by heads of state (including vice-regal representatives) in countries that have Westminster systems. It addresses the powers of the Queen in the United Kingdom, those of her vice-regal representatives in the older realms of Canada, Australia and New Zealand, and those of heads of state in the less studied realms and former colonies that are now republics.

Drawing on a vast range of previously unpublished archival and primary material, including from the Royal Archives at Windsor Castle, *The Veiled Sceptre* contains fresh perspectives on old controversies. It also reveals large constitutional crises in small countries, which have escaped the notice of most scholars. This book places the exercise of reserve powers within the context of constitutional principle and analyses how heads of state should act when constitutional principles conflict.

Providing an unrivalled contemporary analysis of reserve powers, this book will appeal to constitutional scholars worldwide, as well as to judges, public servants, politicians, lawyers and others involved in the administration of systems of responsible government.

ANNE TWOMEY is Professor of Constitutional Law at the University of Sydney, Australia. She has previously worked for the High Court of Australia, the Parliament of the Commonwealth of Australia, the Australian Senate Legal and Constitutional Committee and the Cabinet Office of New South Wales. She continues to advise governments, intergovernmental bodies and vice-regal representatives about constitutional matters, particularly in the fields of federalism, executive power and the Crown.

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Reserve Powers of Heads of State  
in Westminster Systems

ANNE TWOMEY



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-1-107-05678-7 — The Veiled Sceptre  
Anne Twomey  
Frontmatter  
[More Information](#)

## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India  
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.  
It furthers the University's mission by disseminating knowledge in the pursuit of  
education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9781107056787](http://www.cambridge.org/9781107056787)

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First published 2018

Cover designed by Kerry Cooke, eggplant communications  
Series designed by Jackie Taylor  
Typeset by SPi Global

*A catalogue record for this publication is available from the British Library*  
*A Cataloguing-in-Publication entry is available from the catalogue of the National Library  
of Australia at [www.nla.gov.au](http://www.nla.gov.au)*

ISBN 978-1-107-05678-7 Hardback

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Cambridge University Press  
978-1-107-05678-7 — The Veiled Sceptre  
Anne Twomey  
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This book is dedicated to the memory of  
Elaine Joy Donovan Twomey:  
‘Blessed are the peacemakers: for they  
shall be called the children of God’.

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## PREFACE

The reserve powers are the subject of intense discussion and analysis when political conflicts turn into constitutional crises in countries that have a Westminster-style system of responsible government. In the older Realms, the occasions upon which this occurs are rare, but intensely scrutinised. The King/Byng affair in Canada in 1926, the dismissal of the Whitlam Government in Australia in 1975, and the 2008 Canadian prorogation crisis have attracted the most attention and passionate debate. Discussion of these events is often coloured by the politics of the day. There are few objective analyses of the exercise of the reserve powers. Those that exist tend to be old, such as the works of Evatt and Forsey. Since their day, there have been many other examples of the exercise of reserve powers in the newer Realms and former British colonies in Asia, the Pacific, and the Caribbean. These have received little attention or analysis.

The aim of this book is to provide an updated and much broader discussion and analysis of cases in which the exercise of the reserve powers has occurred, been contemplated, or been averted. It has two primary objects. The first is to record the details of a large number of incidents concerning the exercise or potential exercise of the reserve powers. This is because precedent is relevant to the formation of convention and may also be instructive to participants in a current crisis. Study of past examples can expose risks, identify factors that need to be considered, and reveal possible means of best resolving a crisis. The greater the number and range of examples, the more likely at least one will be relevant to any set of new circumstances and provide useful guidance.

The second object is to reconceptualise the reserve powers by reference to the constitutional principles to which they ought to give effect. Strict rules and categorisation have not proved helpful when it comes to the assessment of when it is appropriate to exercise a reserve power. In this book, it is contended that the reserve powers exist to support and give effect to fundamental constitutional principles including responsible

government, representative government, the rule of law, and the separation of powers.

These principles and the conventions to which they give rise are common across countries with a British colonial heritage that have adopted a Westminster-style system of representative government. They are the threads that link together the constitutional experiences of the countries discussed in this book, despite the textual differences between their Constitution Acts. When considering the exercise of a reserve power, a head of state should not only have a good knowledge of precedent and convention, but also consider whether that action is consistent with, and supportive of, fundamental constitutional principles and how any conflict between those principles can best be resolved.

The research conducted for this book was primarily funded by an Australian Research Council Discovery Project grant (ARC DP11014481). I am very grateful for the research assistance provided by Laura Thomas, Natalie Vella, Kathleen Heath, Jackson Wherrett, Theadora Fabricius and Monica Loftus. I also owe thanks to James Bowden and Karim Loutfi who helped me with material from Canada and London respectively.

My thanks are also due to Katharina Serrano and Julie Reynolds for giving me access to the library at the University of the South Pacific and Hamid Ghany for access to the library of the University of the West Indies and for sponsoring my visit to Trinidad. I am grateful for the assistance I received at archives and libraries in the United Kingdom, Canada, New Zealand, Vanuatu and in every State in Australia.

The Tasmanian Government and the office of the Tasmanian Governor kindly gave me access to the confidential exhibits of the Carter Royal Commission into an Attempt to Bribe a Member of the House of Assembly including the many legal advices provided to the Tasmanian Governor in 1989. Sir Gordon Ward, Chief Justice of Tuvalu, was also extremely helpful in giving me access to judgments and legal documents that were not otherwise accessible from Australia.

Documents were provided to me from the family collections of a number of former holders of vice-regal office. I am particularly grateful for the assistance of the family of Sir Walter Campbell, a former Governor of Queensland, and the family of Sir Paul Hasluck, a former Governor-General of Australia. The family of Sir John Kerr also gave me copyright permission to quote from his works. I am also grateful for the assistance of those Governors, former Governors, Lieutenant-Governors, Official Secretaries, and Solicitors-General who spoke to me 'off the record' about events, so as to give me a better understanding of what

actually happens in practice. Jason Potts SC provided invaluable advice about royal regalia.

Documents from the Royal Archives at Windsor Castle were provided with the kind permission of Her Majesty, Queen Elizabeth II. My thanks to all those at the Royal Archives who provided me with assistance and permitted me to undertake research in such an extraordinary setting.

This book refers to many different national and sub-national Constitutions. Its primary source for doing so is the *Constitute* website, <https://www.constituteproject.org>. It is inevitable that some references will be out of date or otherwise inaccurate. While every effort has been made to rely on primary sources in describing the events surrounding exercises of reserve powers, sometimes there was no option but to resort to media reports or accounts by participants, which may be biased or misleading. For all inaccuracies or misrepresentations, I apologise. They should not, however, affect the value of this book which rests in its higher level analysis of constitutional principles and conventions.

There were many difficulties in choosing terminology to cover a host of different official titles. For convenience, the term ‘head of state’ is used to cover Presidents of republics, hereditary rulers, and vice-regal representatives, even though the latter are not formally heads of state, as discussed in Chapter 11. The term ‘chief minister’ is used to describe the head of government, including Prime Ministers, Premiers, and First Ministers. While terminology has largely been standardised, the hyphen in Governor-General and Lieutenant-Governor has been removed with respect to Canada to reflect usage in that country.

Where possible, archival references have been given to provide the source of government documents. However, in some cases, government documents were acquired through freedom of information or by informal means without any file or archival references being provided. In these cases, as much information is given as is possible.

Finally, I would like to express my thanks to my husband Mark and son James who, as always, have been extremely supportive of the writing of this book, including taking our family holidays in obscure parts of the world where I can access a useful archive or library.

**Anne Twomey**  
7 September 2017

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ABBREVIATIONS

ANZ	Archives New Zealand
BCA	British Columbia Archives
CAB	UK Cabinet Office
CAN	Canada
CO	Colonial Office
CRO	UK Commonwealth Relations Office
Cth	Commonwealth of Australia
DO	UK Dominions Office
DPMC	Department of the Prime Minister and Cabinet, Australia
FCO	UK Foreign and Commonwealth Office
FOI	Freedom of Information
IWM	UK Imperial War Museum
NAA	National Archives of Australia
NSW	New South Wales, Australia
NSW SRO	New South Wales State Records Office
NZ	New Zealand
PREM	UK Prime Minister’s Office
PROV	Public Records Office of Victoria, Australia
Qld	Queensland, Australia
RA	Royal Archives, Windsor Castle
SA	South Australia, Australia
Tas	Tasmania, Australia
TNA	The National Archives of the United Kingdom (previously Public Records Office)
UKG	Files of the United Kingdom Government released under FOI or at special request, but not yet re-catalogued by The National Archives.
Vic	Victoria, Australia
WA	Western Australia, Australia