Her majesty's secret

May 25 2012, By Anne Twomey

The Queen may be the one person on the planet about who the most is written but the least is known, says Anne Twomey.

One of the greatest cliches uttered about her majesty Queen Elizabeth II is that in 60 years of reigning over us, "she has never put a foot wrong". This may well be true, but how do we know? What do we really know about how the Queen fulfils her constitutional functions? Does she intervene in the political affairs of the countries over which she reigns? Does she exercise substantial political power? Or is she just a rubber stamp - a form of eccentric British formality that has charm but no substance?

In fact, we know astonishingly little about how the Queen actually fulfils her constitutional functions because extraordinary efforts have been

made to prevent scholars, historians and the Queen's subjects from finding out what she does. Indeed, such secrecy surrounds the exercise of the Queen's constitutional functions that one begins to wonder what is so shocking that it must be so carefully hidden.

Documents held by the Queen's office, known as "The Royal Household", are deemed not to be public records. Unlike government documents, they are not open to access after 30 years and are not accessible through the National Archives or freedom of information. They are locked away in the royal archives in Windsor Castle and in practice tend only to be released - to an official biographer - some years after the monarch's death. This is not terribly helpful in the case of a long-lived and long-reigning monarch.

The justification given by Buckingham Palace for these restrictions is that: "It is a fundamental constitutional principle that communications between the Queen and her ministers and other public bodies should remain confidential, and that the political neutrality of the Queen and the royal family, and the Royal Household acting on their behalf, should be maintained." If neutrality can only be maintained by secrecy, this implies that it does not, in fact, exist and that confidence in the monarchy would be undermined if its functioning were revealed. This is not the most ringing endorsement of the institution of constitutional monarchy, especially in an age where such importance is placed upon transparency, scrutiny and accountability.

These restrictions also flow through to other realms of which the Queen is sovereign, such as Australia. This is because correspondence between the Queen and her governors-general is regularly packed up and sent to be archived at Windsor Castle so that neither end of the correspondence is accessible through freedom of information. For example, any correspondence between the governor-general and the Queen about the dismissal of the Whitlam government would not be available in

Australian archives. Instead, it would be locked away in Windsor Castle.

The only chink in this armour of secrecy occurs when the Queen's private secretary, or a governor-general, corresponds with a government official, revealing the actions or wishes of her majesty. For example, while we might not have copies of correspondence between John Kerr and the Queen, we know from British government records that in October,1975 Kerr asked the British high commissioner what sort of disciplinary action would be taken against Queensland governor (from 1972 to 1977), Colin Hannah, who had embroiled himself in political controversy by criticising the Whitlam government. Kerr, who was contemplating embroiling himself in far greater controversy by dismissing the Whitlam government, wanted to know what sort of penalty might be applied. He asked whether British ministers would pressure Hannah into resigning. Kerr was told that they would not (although, in fact, they fully intended to engineer Hannah's "resignation"). UK records also show that on November 4,1975, Kerr was advising the palace that the most appropriate way of dealing with Hannah was by refusing to extend his term of office.

So Kerr went into the events of November 11, 1975 believing that the worst penalty he would face for his actions, at the British end, was the failure to extend his term of office. His actions in dismissing the Whitlam government also had the unexpected effect of saving Hannah. A British official wrote to the Queen's private secretary noting that the Queen would be involved in a major political row if she dismissed Hannah for stepping down from his pedestal into the political arena, when the governor-general had done so in a far more spectacular fashion. So Hannah was instead "rebuked" and the extension of his term refused, as Kerr had suggested.

These British documents, which shed partial light on what occurred, only became accessible because they were held by the government rather than

the Royal Household. They were therefore subject to the 30-year rule (now reduced to 20 years) and freedom of information rules.

Even this limited mode of access, however, has now been cut off in the UK. In 2011, a new British law came into effect so that any government documents recording communications with the Queen, the heir to the throne and the second in line to the throne, or anyone acting on their behalf, are absolutely prohibited from release for a minimum of 20 years from the time they are made, and then for the continuing lifetime of the relevant member of the royal family, plus an extra five years after their death. *

No public interest test applies, nor are there any exceptions or qualifications. For example, if Prince William were to live a long life, communications with him today might not be released until around 2080. Equally, any government communications with the Queen that are made today cannot be known for at least 20 years, and then not until five years after her death. On this basis, there is no hope for the people of the UK to truly understand what it is that their monarch does and the type of role she plays in the constitutional governance of the nation. By the time any useful information is released, the role of the monarchy, if it still exists, is likely to be quite different.

Before this dripping tap of information was turned off last year, what did we learn, through British archives and freedom of information, about the Queen's exercise of her constitutional role? Two examples, using previously accessible documents, are enough to illustrate her significant role.

In 1979, NSW premier Neville Wran decided to legislate to terminate privy council appeals from state courts and require that the Queen be advised by state ministers, rather than British ministers, on the appointment of the state governor. This was announced in the governor's

speech opening the NSW Parliament in August 1979 and a copy was sent to Britain.

British officials were concerned about the constitutional validity of these moves. They decided that the most diplomatic approach would be to send back the standard letter to the governor, saying that the speech had been laid before the Queen, and then raise British concerns orally through their diplomatic representatives in Australia.

The Queen's private secretary disagreed, replying to the foreign secretary on October 5, 1979:

Her Majesty is very reluctant to agree that you should inform the governor that his speech has been laid before the Queen without drawing his attention to this paragraph [concerning the appointment of the governor and the abolition of privy council appeals]. Notwithstanding the opinion of your legal advisers that the absence of any comment could not be implied to be a judgment about the constitutional validity of such a bill, the Queen feels it would be proper at this stage to warn the governor that the foreign and Commonwealth secretary might well be forced to advise Her Majesty to refuse her assent.

The Foreign Office was obliged by the Queen to reassess how to deal with the issue. Instead of taking its preferred diplomatic approach, it deferred to her majesty's wishes by sending a dispatch from the UK foreign secretary Lord Carrington to the NSW governor that was - according to a Foreign Office official - "designed to fire a warning shot across the bows of the state government". In that dispatch, Lord Carrington stated that, "I advised her majesty that I did not consider that the New South Wales Parliament could, of its own accord, constitutionally legislate in this way; and I recalled to her majesty that it was my duty to advise her to refuse her assent to legislation which in my view was unconstitutional, whatever my view of the merits of such

legislation might be." In fact, it appears that the Queen advised (or at least reminded) the foreign secretary about royal assent, not vice versa.

The British high commissioner in Australia, Donald Tebbit, strongly objected to delivering such a provocative dispatch to the NSW governor and advised against it. He was told that the dispatch already had the Queen's approval and could not be changed. Tebbit delivered the dispatch on the morning of December 13, 1979. That same afternoon, the governor received a copy of the Privy Council Appeals Abolition Bill for royal assent. It had passed through the NSW Parliament with bipartisan support. This left the NSW government in a dilemma. Should it proceed with the process of reserving the bill for royal assent and face the prospect of it being refused assent by the Queen, or should it back down, negating the will of the Parliament? It decided to do nothing. The bill was left in the governor's desk drawer. Anxious British officials waited for the dreaded bill to arrive, checking to see if there were postal strikes and marshalling their precedents to justify the refusal of royal assent, but the bill never came. One jubilant British official later crowed: "New South Wales authorities, who had clearly been trying to pull a fast one, and were not really very surprised to be caught, simply gave in."

What is most remarkable about this story is not that the Queen, supported by the British government, was prepared to override the will of the New South Wales Parliament as late as 1979, but that this entire incident was hushed up so that the public never knew of it until at least 2006. It illustrates the immense "soft power" of the Queen. She does not have to refuse assent. It is enough to indicate that she might do so and in almost all circumstances a government will yield. This system is supported by the procedure for receiving advice from the realms. Informal advice must first be sent and it is only once the Queen's private secretary indicates approval of the informal advice that the formal advice may be given. Hence, any objections by the Queen are raised and resolved at the informal advice stage so that the Queen never rejects

formal advice.

There is a very strong principle in the political world that "thou shalt not embarrass the Queen" by asking her to do something she does not want to do or forcing her hand to reject advice. This principle is reinforced by the self-interest of governments. The "embarrassment" felt by her majesty is nothing compared to the political embarrassment that would be suffered by a government if its bill or other advice were rejected by her majesty. So the Queen almost always wins and never has to exercise her powers in a formal manner. It is enough simply to threaten to do so. Few are brave enough to call the bluff.

Not long after this incident, the states started negotiating in earnest to terminate their colonial links with the UK. The proposal was to enact identical legislation in Britain and Australia, known as the "Australia Acts", to sever these links. Even conservative stalwart Joh Bjelke-Petersen, who had had his fingers burnt over the Colin Hannah affair, was prepared to co-operate. The sticking point was who would advise the Queen about state matters if British ministers ceased to do so. The states wanted her to be advised by state ministers, but the Queen did not. The Commonwealth initially supported the Queen's view. Prime minister Malcolm Fraser told the states at a premiers' conference that he would not advise the Queen to accept advice direct from the states, because he was not prepared to put the Queen in the "embarrassing" position of having to reject this advice, as he was sure she would. But who would have been the more embarrassed if the Queen had rejected Fraser's advice?

Fraser's successor as prime minister, Bob Hawke, was more flexible and eventually swayed to accept the proposal of state advice to the Queen on state matters, in exchange for the termination of privy council appeals. Once the Commonwealth and all the state governments had agreed to this proposal, even the British government accepted it because there was

nothing legally wrong with it. Yet the Queen continued to object. She was concerned that she might receive conflicting advice from Commonwealth and state ministers. The Queen's private secretary was also worried that she was more likely to receive "outlandish" advice from state premiers than prime ministers.

In the absence of British government support, the Queen's private secretary swapped hats and continued negotiating with Australia as the private secretary to the "Queen of Australia". The Foreign Office became alarmed. One officer wrote in March 1985:

A moment's reflection leads to the thought that we are engaged in Australia's independence negotiations. Typically, these should be conducted by the British government of the day with the dependent territory in question and with British ministers taking into their brief the concerns of the palace. But in this instance, the extraordinary situation has arisen where it is the palace that is now in direct negotiations with representatives of the dependent territory.

Back in Australia, the states were becoming anxious about the ongoing delays in finalising the Australia Acts. At a meeting of attorneys-general in May 1985, the states were told that "the monarch has indicated that when she is in a state she wants to do what she wants to do". This meant that she wanted the option to refuse the advice of state ministers when visiting a state. One of the attorneys expressed scepticism as to whether the Queen was all that concerned. The Commonwealth attorney responded adamantly that the Queen was personally involved with the issues and that the delay was due to her majesty's "real and personal" difficulties with the proposed bills. So the draft Australia Acts were changed to accommodate the Queen's concerns. Section 7 of the Acts says that the Queen is "not precluded from" exercising her powers while in a state. This is polite code for the Queen being able to exercise those powers if she wants but that she may decline to act on the advice of a

state premier if she so chooses.

Nonetheless, the Queen still objected. In the end, even the Commonwealth became fed-up. The secretary of the Department of the Prime Minister and Cabinet, Sir Geoffrey Yeend, was despatched to London, effectively to call the Queen's bluff. He told her majesty that it was the informal advice of her seven Australian governments that she agree to the enactment of the Australia Acts and that even if her majesty objected, it would still be part of their formal advice. He turned the tables by placing on the Queen the burden of having to reject the formal advice of seven of her governments if she wished to delay the matter any further. Any such action, if made public, would most likely have given rise to a republic. Sir Geoffrey reported back that the Queen, in response, agreed to receive direct advice from state premiers "without much enthusiasm".

One might wonder why the Queen's permission was needed at all. She had to give royal assent to the UK version of the Australia Acts, but no monarch has refused royal assent to a British bill since 1708 and the power to do so is generally regarded as obsolete. However, just as the informal/formal advice distinction is used to exercise soft power in relation to the realms, there is also a two-stage process for acquiring the Queen's assent regarding certain bills in the UK.

Any bill which affects the Queen's prerogatives (including her constitutional duties) or her personal and inherited property and financial interests, such as the Crown estate, the Queen's private estates, the Duchies of Lancaster and Cornwall and the Queen's interests as a landlord or employer, must first receive the Queen's consent before the bill can be passed by Parliament. As a UK government memorandum stated in January 1983, "this is not a formality since clauses in such bills frequently have to be referred by the palace to the Queen's solicitor for legal advice". Officials were instructed that bills had to be sent to the

palace well before their introduction into Parliament, in order to give the palace sufficient time to obtain legal advice and seek the Queen's instructions. This would seem to imply that the Queen might object to bills and seek amendments to them prior to their introduction. The extent to which she does so, if at all, is unknown and now unknowable until well after the Queen's death. However, given that she was not backwards in objecting to and seeking changes to the Australia Acts, it is fair to speculate that she has exercised similar power in other cases.

The Queen may be the person on this planet about whom most is written but least is known. The few skerricks of hard evidence that we have suggest that the Queen is politically engaged, interventionist, a master at the exercise of soft power and a sophisticated player of politics, who knows when to fight and when to withdraw. She is by no means a rubber stamp. It may well be that she has never put a foot wrong, but the truth is that this is not an assessment that can genuinely be made. It is, however, one that ought to be able to be made in a constitutional democracy.

More information: Anne Twomey is a professor of constitutional law at Sydney Law School. Her book, The Chameleon Crown - The Queen and Her Australian Governors, Federation Press, 2006, used archives and FOI, then accessible, to reveal the Queen's constitutional role with respect to Australia.

** The changes to the UK Freedom of Infomation Act were contained in Schedule 7 to the Constitutional Reform and Governance Act 2010 (UK). This was enacted in August 2010 and came into force on January 19, 2011.*

Provided by University of Sydney