

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

IMPERIAL ACTS (SUBSTITUTED PROVISIONS)

(AMENDMENT) ORDINANCE 1987

No. 45 of 1987

The principal purpose of this Ordinance is to amend the Imperial Acts (Substituted Provisions) Ordinance 1986 ('the Principal Ordinance') to repeal 5 Imperial Acts that are in force in the Territory as part of the law of the Territory and to replace those Acts with similar provisions drafted in modern form.

The Ordinance also amends Part 20 of Schedule 2 of the Principal Ordinance with respect to the powers conferred by a warrant issued under clause 1 of that Part and changes references in the Principal Ordinance to Queen Elizabeth to references to Queen Elizabeth the First.

Following further examination of Imperial Acts in force in the Territory, it has been decided to repeal and replace with substituted provisions in modern form the following Imperial Acts, instead of continuing them in force in their existing form:

- |        |  |
|--------|--|
| (1262) | 52 Hen. 3 c.17, which deals with the duties and powers of guardians of children;   |
| (1539) | 31 Hen. 8 c.1 and 32 Hen. 8 c.32, which deal with the partition of land held by persons jointly;                                     |
| (1774) | 24 Geo. c.78, section 86 of which provides that actions do not lie in respect of damage caused by fires that begin accidentally; and |
| (1874) | 37 and 38 Vic c.37 which clarifies the manner in which a power to appoint property among 2 or more persons may be exercised          |

The Law Reform Commission of the Territory, in its Report on Imperial Acts in force in the Australian Capital Territory, recommended that Act 52 Hen. 3 c.17 should be retained in its existing form until a complete revision of the law of guardianship had been made. Since that Report was presented, the Testamentary Guardianship Ordinance 1984 has been made. That Ordinance covers generally the law of testamentary guardianship in the Territory, and, as amended by the Testamentary Guardianship (Amendment) Ordinance 1987, it supersedes 52 Hen. 3 c.17 in relation to testamentary guardianship. However, the Testamentary Guardianship Ordinance 1984 did not repeal 52 Hen. 3 c.17.

Act 52 Hen. 3 c.17 is expressed in terms relevant to obsolete forms of holding property and rights. The new Part 1A inserted by this Ordinance in Schedule 2 to the Principal Ordinance retains, in respect of non-testamentary guardians, the basic principles laid down in that Act but expresses them in terms relevant to current laws.

The Law Reform Commission recommended the repeal of Act 31 Hen. 8c.1 and Act 32 Hen. 8 c.32 on the ground that they were obsolete and that the topic was completely dealt with by the Partition Act 1900 of New South Wales, which was (and is) in force in the Territory.

It appears that the Commission may have misunderstood the relationship between those Imperial Acts and the Partition Act 1900. The latter Act confers on the Supreme Court power to order the sale of land held jointly and the division of the proceeds in place of a partition of the land among the joint owners. The Act does not itself empower the Court to order the partition of land among the joint owners but operates only where one of the joint owners is entitled to have the land partitioned.

The only rights conferred on a joint owner in the Territory to have land partitioned are those conferred by these Imperial Acts. The new Part 4A inserted by this Ordinance in Schedule 2 to the Principal Ordinance will confer rights to have land partitioned among joint owners similar to those conferred by those Imperial Acts but expressed in modern form.

The Law Reform Commission of the Territory did not refer in its Report on Imperial Laws in force in the Australian Capital Territory or in its Supplementary Report to Act 24 Geo. 3 c.78, section 86. That section provides that an action does not lie against a person on whose property a fire accidentally begins for or in respect of damage caused by the fire to another person or to the property of another person.

The section is still in force in most Australian jurisdictions. The new Part 15A inserted in the Principal Ordinance by this Ordinance will confer a similar protection, but expressed in modern language.

The Law Reform Commission of the Territory did not refer in its Report on Imperial Laws in force in the Australian Capital Territory or in its Supplementary Report to Act 37 and 38 Vic. c. 37. That Act deals with the appointment of property under a power conferred by a deed, will or other instrument and provides that an appointment for one object or among 2 or more objects will not be invalid in law or in equity on the ground that one or more objects have been altogether excluded.

The Act is not expressed to extend to all the dominions of the Crown but it is regarded as being in force in New Zealand. The New Zealand Imperial Laws Application Bill 1986 proposes to continue it in force in New Zealand.

The Act is not in force in New South Wales but section 29 of the Conveyancing Act, 1919 of New South Wales makes similar provision. However, section 29 is not one of the sections of the Conveyancing Act 1919 that have been adopted as law of the Territory. It is desirable that the principles of law contained in 37 and 38 Vic. c.17 should continue to apply in the Territory. The new Part 20A inserted by this Ordinance in Schedule 2 to the Principal Ordinance makes provision similar to that made by Imperial Act 37 and 38 Vic. c.17.

The Senate Standing Committee on Regulations and Ordinances, upon considering the Imperial Acts (Substituted Provisions) Ordinance 1986, asked the Attorney-General to consider amending Part 20 of Schedule 2 to that Ordinance in order to bring clause 1, which relates to searches made under a search warrant, into line with the corresponding provisions in section 235 of the Credit Ordinance 1985. Section 8 of this Ordinance amends Part 20 accordingly.

Details of the proposed Ordinance are set out in Attachment A.

86/86

Authorised by the Parliamentary  
Secretary for Justice and Member  
of the Executive Council

ATTACHMENT A

DETAILS OF ORDINANCE  
NOTES ON SECTIONS

Section 1 provides that the proposed Ordinance may be cited as the Imperial Acts (Substituted Provisions) (Amendment) Ordinance 1987

Section 2 defines "Principal Ordinance" as the Imperial Acts (Substituted Provisions) Ordinance 1986

Section 3 inserts a new section 2A in the Principal Ordinance. The new section 2A applies sections 3, 4, 5 and 6 of the Principal Ordinance to any new Part inserted in Schedule 2 but requires references in those sections to the commencing date to be read, in their application to a new Part, as references to the date on which the new Part is inserted in Schedule 2.

Section 4 amends Schedule 1 to the Principal Ordinance:

- (a) to insert in the list of Imperial Acts for which the substituted provisions in Schedule 2 to the Principal Ordinance have been enacted, the Imperial Acts for which substituted provisions are being enacted by this Ordinance; and
- (b) to substitute for references to Queen Elizabeth references to Queen Elizabeth the First.

Section 5 inserts in Schedule 2 to the Principal Ordinance a new Part 1A.

Part 1A

Clause 1 authorises a guardian of a child to take into custody and manage the real and personal property of the child as trustee for the child and requires the guardian to account to the child when the child attains the age of 18 years.

Clause 2 excludes from the operation of clause 1 the Director of Welfare when he or she acts as guardian of a child and testamentary guardians.

Section 6 inserts in Schedule 2 to the Principal Ordinance a new Part 4A.

Part 4A

Clause 1 confers on the Supreme Court power to order the partition of an estate or interest in land held by persons as joint tenants or tenants in common and to give necessary and proper consequential directions.

Clause 2 provides that clause 1 does not affect the operation in the Territory of the Partition Act, 1900 of New South Wales.

Section 7 amends the Headings to Parts 7 and 8 of Schedule 2 to the Principal Ordinance by substituting "Eliz. 1" for "Eliz" (whenever occurring).

Section 8 inserts in Schedule 2 to the Principal Ordinance a new Part 15A.

Part 15A

Clause 1 provides that an action does not lie against a person in whose house, room or other building or on whose property a fire accidentally begins for damage caused by the fire to another person, or to the property of another person. It also provides that a fire started deliberately or negligently is not to be taken to have begun accidentally.

Clause 2 provides that nothing in Clause 1 affects, or renders void, any term of a contract or agreement between a landlord and a tenant relating to the leasing or letting of premises or a part of premises.

Section 9 amends the provisions of clause 1 of Part 20 of Schedule 2 to the Principal Ordinance relating to the powers conferred by a search warrant to express those powers in terms similar to those used in section 235 of the Credit Ordinance 1985.

Section 10 inserts in Schedule 2 to the Principal Ordinance a new Part 20A.

Part 20A

Clause 1 provides that an appointment in exercise of a power to appoint property among several objects is valid notwithstanding that not all objects take a share. However, this is not to affect a provision of a will, deed or other instrument creating a power of appointment which declares the amount of the share from which no object may be excluded or from which some particular object shall not be excluded.

Clause 2 provides that the Part applies to appointments made after the commencement of the Part whether the power was created before or after the commencement of the Part.