

2/21/1/6/40



CONSTITUTIONAL ASSEMBLY

SECTION 13: "ARBITRARILY"

UPDATED MEMORANDUM

TO: CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

FROM: EXECUTIVE DIRECTOR

DATE: 18 MARCH 1996

RE: THE EFFECT AND AND DESIRABILITY OF THE USE OF THE WORD "ARBITRARILY" IN SECTION 25(2) OF THE WORKING DRAFT (BILL OF RIGHTS)

We enclose for your consideration a memorandum from the Panel of Experts entitled "*The Effect and desirability on the use of the word "arbltrarily" in Section 25(2) of the Working Draft (Bill of Rights).*"

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PANEL OF CONSTITUTIONAL EXPERTS TECHNICAL COMMITTEE 4

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 14 MARCH 1996

RE: THE EFFECT AND DESIRABILITY OF THE USE OF THE WORD "ARBITRARILY" IN SECTION 25(2) OF THE WORKING DRAFT (BILL OF RIGHTS)

1. INTRODUCTION

The CC has requested the Panel of Experts and Technical Committee to advise on the effect and desirability of the use of the word "arbitrarily" in S 25(2) of the Working Draft which reads:

"No one may be evicted from their home **arbitrarily** and without an order of court made after considering the relevant circumstances".

2. EFFECT OF THE USE OF THE WORD

- 2.1 The casting of subclause (2) in the negative has a corresponding effect on the meaning of the word "and" after the word "**arbitrarily**" in the subsection. The subsection in effect means that 2 conditions need to be complied with for the eviction to be improper in terms of the subsection namely, the eviction must be both arbitrary **and** effected in terms of an order of court. The subsection therefore contemplates that
- 2.1.1 an eviction permitted by legislation which is considered not to be arbitrary can be made with impunity even if it is made without an order of court; and
- 2.1.2 an order of court authorising an eviction, could in theory, legitimate what would otherwise be an arbitrary eviction.
- 2.2 If the consequences in 2.1 are intended by the parties, the section must remain as drafted.
- 2.3 It is considered advisable to furnish our view of what the effect of the section would be if the word "**and**" in the subsection was substituted with

the word "or". In that event, the only one of the two conditions must exist for the eviction to be improper. In other words, eviction will be improper if:-

2.3.1 it is arbitrary even though there is an order of court; or

2.3.2 it is not arbitrary and there is no order of court.

2.4 The difficulty is that the section contemplates the existence of an order of court even if the eviction is arbitrary.

3. DESIRABILITY OF THE USE OF THE WORD

3.1 It is accordingly suggested that the use of the word "arbitrarily" is undesirable in the way it has been used in the subsection.

3.2 It is however, at least arguable that if the concept of arbitrariness is left out altogether, courts of law might be obliged to grant orders of eviction where the legislation authorizing such eviction contains arbitrary elements resulting in an arbitrary eviction in substance.

3.3 This problem can be avoided by the following formulation which is recommended (perhaps subject to further refinement):

No one may be evicted from their home without an order of court made after considering all the relevant circumstances and no legislation may authorize/permit arbitrary evictions.