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CONSTITUTIONAL ASSEMBLY

**MEMORANDUM**

**TO:** **Members of the Constitutional Committee Subcommittee**
**FROM:** **Executive Director**
**DATE:** **28 March 1996**
**RE:** **Panel Memorandum on *"Section 13 (Bill of Rights) - 'Unreasonable' Search and Seizure"***

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**We enclose for your consideration the memorandum from the Panel of Experts on *"Section 13 (Bill of Rights) - 'Unreasonable' Search and Seizure."***

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**H EBRAHIM**
**EXECUTIVE DIRECTOR**
**CONSTITUTIONAL ASSEMBLY**

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P. O. Box 15, Cape Town, 8000
Republic Of South Africa

**Tel**: (021) 245 031, 403 2252 **Fax**: (021) 241 160/1/2/3 **E-mail**: conassem@iaccess.za

# PANEL OF CONSTITUTIONAL EXPERTS
# TECHNICAL COMMITTEE 4

## MEMORANDUM

**TO:** CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

**DATE:** 27 MARCH 1996

**RE:** SECTION 13 (BILL OF RIGHTS) - "UNREASONABLE" SEARCH & SEIZURE

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1. In memoranda of 11 March and 15 March the Panel and Theme Committee 4 Technical Experts gave opinions on the possible inclusion of the words **arbitrarily** and **unreasonably** in Section 13. At the CC Subcommittee meeting of 18 March the Panel/TC4 were asked to liaise with Professor Nico Steytler, who had earlier made a submission on Section 13. After a meeting of Prof Steytler and some Panel members on Friday 22 March, the issue was further discussed with members of the Panel/TC4. There is agreement amongst Panel/TC4 members and Prof Steytler on the following:

2. The inclusion of **arbitrarily** is not advisable.

3.1 The most important possible advantage of the inclusion of **unreasonably** in Section 13 seems to be that it might be a more forthright and precise description of the relevant rights, because it would make it clear that the rights are not absolute and that e.g searches with warrants could take place. (In practice the inclusion would not make a substantial difference with regard to road blocks etc. Also see par 3 and 4 of the Panel/TC4 memo of 11 March.)

3.2 The most important factor to be weighed against this is the issue of onus. The person who alleges that the right to privacy has been violated, or that legislation providing for search or seizure is unconstitutional, would have to convince a court not only that search or seizure has taken place, or that legislation allows for search and seizure, but also that the search or seizure is unreasonable. Canadian courts, e.g have held that illegal search or seizure is unreasonable. It could thus also be established that the search or seizure was illegal and therefore unreasonable.

If unreasonableness is established, the state could still show that the unreasonable search or seizure was justified in terms of the general limitation

clause.

On the present wording, without **unreasonably**, the person alleging the violation of a right has to show that search or seizure took place or is provided for by allegedly invalid legislation, whereafter the state bears the onus to show that it was justified etc in terms of the general limitation clause. (This argument of course partly depends on whether or to which degree our courts are going to follow a "two stage approach" regarding the issue of the onus in the case of limitations or qualifiers.)

4. On balance, the Panel/TC4 recommends that **unreasonably** should not be included. In view of the still existing lack of access to adequate legal knowledge or assistance of many South Africans, *inter alia*, it is probably easier for the state to meet the onus under the general limitation clause, than the other way round under Section 13. Furthermore, as pointed out in previous memos, the use of **unreasonable** in Section 13 may result in a somewhat confusing overlap with the general limitation clause, *inter alia* depending on whether and how the concept of reasonableness is incorporated there. It would not be entirely clear whether reasonableness in S13 means something different, or whether something which is "unreasonable" in terms of Section 13 can still be "justifiable" in terms of the general limitation clause.

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