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## COMMENTS ON THE TOURISM AMENDMENT BILL 2019

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**DATE:** 11 June 2019

### SUMMARY OF POSITION

Sakeliga considered the Tourism Amendment Bill of 2019. Herein included is extensive comment and analysis. In essence, we come to the following conclusion –

- South Africa's economy and business sector is underperforming: economic growth is weak, unemployment is high and many live in poverty;
- cumbersome red-tape and regulatory burdens created by constrictive legislation is not helping to create vibrant industries, businesses and entrepreneurship;
- the tourist accommodation sector is already subjected to many pieces of legislation, regulations and by-laws from all levels of government;
- current legislation and regulations are cumbersome and carry compliance cost for Hotels, Guesthouses and B&Bs;
- excessive regulation will hamper the tourism sector in general, which is incompatible with government's developmental goals for economic growth, small business development and the promotion of tourism;
- given the current economy and the existing compliance burdens on tourism, we foresee the marginal impact of further laws and regulations to be economically detrimental;
- instead of placing new restrictions on one particular sector of the accommodation industry, we propose that government should attempt to find ways of lessening the regulatory burden of the industry as a whole;



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- thresholds on short-term home sharing will make it more difficult for many entrepreneurs to participate in the growth phase of the 'sharing economy';
- the public cannot afford the South African tourism industry not making the most of the substantial opportunity that the sharing economy presents.

We appeal on the new Minister of tourism to give serious consideration to the impact of the current regulatory environment on hotels, guesthouses and B&Bs, and to determine the contribution of legislation and regulations to the cost of doing business in the tourist accommodation sector.

Furthermore, we request the Minister to find innovative ways of lessening the red-tape, bureaucracy and legislative requirements that contribute to challenges for tourism enterprises in general and accommodation enterprises specifically.

We request the minister to not hold back the the short-term home sharing sector with national thresholds and red-tape.



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## INTRODUCTORY REMARKS

The Tourism Amendment Bill was first published on 12 April 2019 and republished on 15 April 2019 in the Government Gazette, No. 42404, Notice 235 of 2019.

Sakeliga decided to engage the on the Bill given the likely impact on small businesses, emerging entrepreneurs, tourism in general and the broader business environment.

Sakeliga is a not-for-profit organization (NPO) registered in the Republic of South Africa and represents more than 12 000 members in businesses across different sectors of the South African economy.

Sakeliga supports constitutional order, free markets and a favourable business climate in the interests of its members, as well as in the interest of communities wherever its members do business.

The *Tourism Amendment Bill* seeks, among other things, to regulate the market segment for short-term home rental through a suggested amendment to Section 7 of the Tourism Act no 3 of 2014.

The Act as amended will bestow on the minister of tourism broad powers to set “norms and standards” for “thresholds with regards to short-term home rental”.

In the first section of our submission, we will provide brief comments on a number of issues we deem pertinent for the department’s consideration.

In the second section of our submission, we present a constitutional comment that considers the bill on face-value.

We retain the right to amend or expand on our comment in future submissions and parliamentary proceedings.

Furthermore, we request an opportunity to make oral representations of our position on the bill at an appropriate forum if required.



## SECTION I: ECONOMIC, POLICY, AND BUSINESS CONSIDERATIONS

Prepared by Gerhard van Onselen, Senior Analyst: Sakeliga

### 1. General economic remarks

The dismal state of South Africa's economy in the first quarter of 2019 is evident. Statistics South Africa penciled in a decline in real GDP in the first quarter of 2019, with real GDP decreasing by 3,2% quarter-on-quarter on a seasonally adjusted and annualized basis. (Real GDP growth was measured at 0% on a year-on-year basis in the same quarter). In 2018 South Africa's real GDP grew by only 0,8%. The picture is even worse when the per capita GDP growth rate is considered.

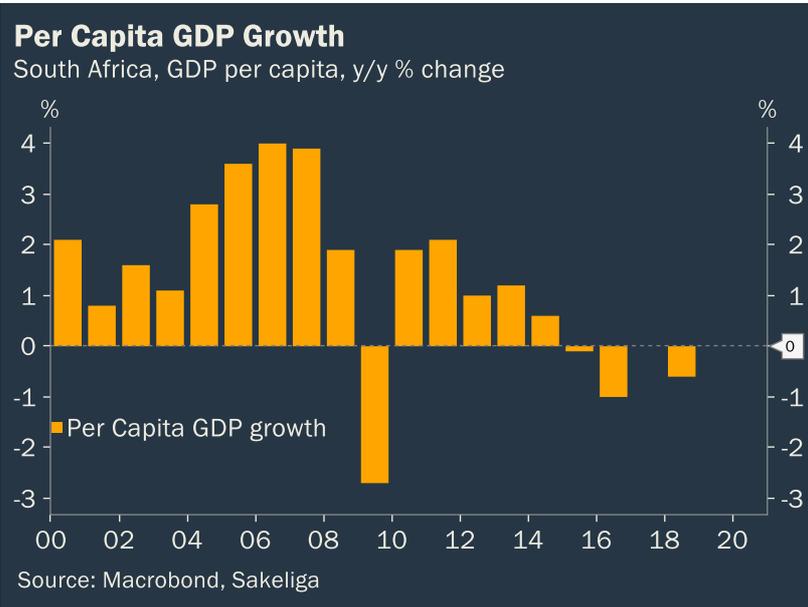
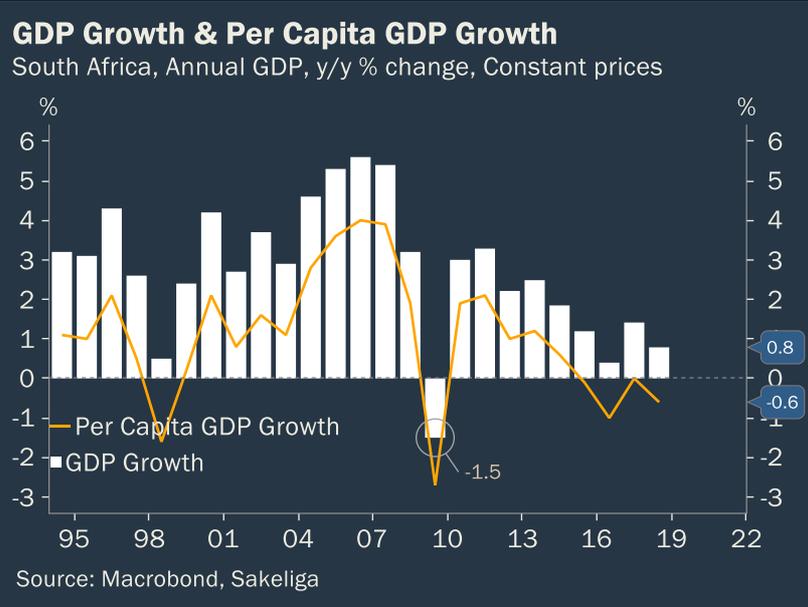
Growth is much lower than the more than 5% annual GDP growth called for in the National Development Plan (NDP). Slow growth means that much-needed economic development will remain hampered.

Statistics SA also indicates that, at present, around 10 million South Africans are currently unemployed according to the expanded definition of unemployment. Moreover, many South Africans are trapped in poverty.

The only hope for many members of the public is an economic revival, coupled with increases in employment opportunities. These matters are serious and the law- and policymaker needs to take careful note of these realities when drafting any new laws and regulations.

Government itself has mandated that new policies and laws undergo a Socio-Economic Impact Assessments (SEIAs).

At various occasions in the recent past, government has also noted the need for reforms to increase GDP growth and investment. Most notably, the 2019 *Budget Review* calls for, *"Increasing the long-term growth rate to sharply reduce unemployment and raise the revenues needed for social and economic development requires far-reaching structural reforms."*



Among other things, the Budget Review calls for an arrest in South Africa's declining ranking on a number of indexes, such as competitiveness and the ease of doing business. The treasury has noted a



specific intention to improve South Africa's rankings on the World Bank's *Ease of Doing Business* rankings.

Moreover, the office of the state president voiced a commitment to the development of small business in South Africa. Recently, to illustrate, president Cyril Ramaphosa announced the BLSA campaign and is quoted in saying,

*"The BLSA campaign supports government efforts, led by President Cyril Ramaphosa, to **broaden economic participation and dilute the concentration of the South African economy** in which a relatively small number of enterprises dominate all levels of supply chains and limit choices for consumers."*

It is our contention that the proposed thresholds envisaged by *Tourism Amendment Bill* will not support the development of small businesses in tourism. Moreover, it seems unlikely that these interventions will increase the ease of doing business, especially for emerging small businesses in tourism, businesses that we suppose also fall within the ambit of governments policy of promoting small business.

## 2. Introduction

The American firm Airbnb is one of a number of IT platforms that form part of a revolution in tourism markets, which have come to be known as the 'sharing economy'. Technology platforms, or online short-term lodging brokerages as they are sometimes called, such as the Airbnb, allow people to list various forms of accommodation for short-term rental – a market that caters largely to tourists.

Consequently, an increase in the number of accommodation options available to tourists and an expansion in the range of accommodation experiences offered through sharing platforms has been the result – in other words, a richer and more vibrant consumer market with more options for consumers.

Platforms such as Airbnb have enabled an increasing number of entrepreneurs across the globe, including in South Africa, to enter the market for the provision of short-term accommodation. From an Airbnb report, it is suggested that,

*"For many South Africans, hosting on Airbnb helps them to make ends meet and to stay in their home, especially given that half of them are freelancers, work part-time, or are stay-at-home parents. The economic benefits generated via travel using the Airbnb platform are also better spread as more than half the guests' spending occurs in the local neighbourhood where they stay, which is in many cases outside of tourist hotspots."*



Consequently, a new industry in the form of short-term home-rental management businesses also emerged. These businesses service short-term home rental units with guest hosting, cleaning services and room preparation among other services. Such businesses now also contribute to employment and GDP – likely compensating to some extent for losses in other parts of the economy.

## 2.1 Dealing with disrupted markets

It is the case that the rapid uptake of the sharing economy and online booking platforms over the past number of years, while innovative, is also disruptive to the current industry. Importantly, it is also disruptive to the current regulatory environment. National regulation, in our evaluation, is, however, likely to be a blunt response and unlikely to succeed in a true “leveling of the playing-field” for tourist accommodation providers.

We think that local councils, body corporates, and the industry itself, is better positioned to develop reasonable rules (that take on the role of regulations) to determine the proper operation of short-term home rentals in different localities.

Moreover, before setting thresholds by means of national regulation, national government should first investigate the degree to which national legislation may potentially infringe on the domain of local authorities.

Furthermore, we are of the opinion that the regulatory burden placed on the established industry is already too onerous. A patchwork of national, provincial and local laws, regulations and by-laws are already affecting the tourism industry. Onerous regulations are likely to drive up costs and compliance burdens for many enterprises. It flows logically that the Bill in question will not reduce the existing compliance burdens.

In order to truly level the playing-field, we propose that government relaxes onerous red-tape, taxes and charges, and compliance burdens that hamper tourist accommodation providers specifically.



### 2.3 Regulatory impact assessment: Do we know what existing and new regulations cost?

We therefore request government to undertake a proper assessment of the overall regulatory burden placed on tourist accommodation providers, and the contribution of regulation to the 'cost of doing business', as part of a published socio-economic impact assessment, before implementing the Tourism Amendment Bill. Such an analysis should broadly consider the impact of local, provincial and national government laws, regulations and by-laws affecting the tourism accommodation sector.

Moreover, we request the minister to embark on a process to find innovative ways of lessening the red-tape, bureaucracy and legislative requirements that contribute to challenges in tourism enterprises in general and accommodation enterprises specifically.

### 3. The 'sharing economy'

The rise of the sharing economy is a global phenomenon. The global uptake of Airbnb reveals, among other things, a persistent change in consumer demand. The 'sharing economy', facilitated through services such as Uber, Airbnb and other platforms, is fast becoming a firmly established global consumer norm. Airbnb has recorded 500 million guest arrivals to date. It is said to have listings in 100 000 cities across the globe.

This change in consumer demand presents a market opportunity for the tourism sector in South Africa. Many entrepreneurs have already jumped at the opportunity – as Sakeliga believes they are fully entitled to do. This shift is so evident that even big global hotel groups, such as Marriott, through Homes & Villas by Marriott for example, have entered the market for short-term home rentals, in an attempt to compete directly with Airbnb.<sup>1</sup>

Online accommodation platforms, such as Airbnb, can only be successful when they continue provide a satisfactory service to a great number of consumers, consumers who vote with their wallets when supporting these services. In other words, the likes of Airbnb's success flows from its ability to provide a good resource coordination, greater efficiency, and the bringing to market of 'idle' resources and good value in the market of short-term rental accommodation. Airbnb and similar platforms have strong incentives to ensure guest safety and valued experiences. They therefore sets market-relevant (consumer demanded) requirements (rules) for listing on their platforms.

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<sup>1</sup> Cf. Homes & Villas by Marriott: <https://homes-and-villas.marriott.com/>



### 3.1 Market rules and self-regulation

These platforms, illustrate the working of well-coordinated market incentives towards setting consumer-relevant norms and standards for proper market behaviour.

Economists typically call for regulation in settings with evident 'market failures'. In our estimation, platforms such as Airbnb are working in the opposite direction of a market failure and towards more efficient markets by:

- a) Increasing the supply of services, options and consumer choice;
- b) increasing competition by opening up the accommodation market to new entrepreneurs;
- c) challenging existing market concentrations;
- d) reducing barriers to entry; and
- e) reducing 'asymmetric information', increasing trust, and reducing 'transaction costs' through technology.

### 3.2 Mutual ratings

The growth of IT systems (applications) for mutual ratings, where both guests and hosts on the lodging platforms can rate one another sets strong incentives to weed out poor service providers and, and rather innovatively, also poor customer behavior.

This we regard as an important market innovation that creates a higher trust, i.e. more economically efficient, marketplace. The result is market-tested rating systems that undergo continuous development in the competitive environment.

Competition occurs among platforms and guest/host rating systems to develop the most consumer-relevant ratings systems, which gives feedback virtually in real-time. Listing providers have every incentive to maintain reliable ratings system – a consistent failure in providing consumer-relevant ratings will result in brand and reputation damage.

The voluntary interaction of numerous customers and accommodation providers in a setting of rapid feedback, continuous improvement and self-regulation, works toward an efficient higher-trust marketplace. This leads to a reduction in information asymmetries and transaction costs and increases economic efficiency.



### 3.3 Potential effects

In our general analysis we foresee some potential effects (depending on government's responses and regulation) owing to the uptake of rental accommodations platforms such as Airbnb in the South African market:

- a) An increased supply of short-term rental units will increase competition in the industry and put downward pressure on prices.
- b) Lower prices and richer options are likely to attract a greater number of tourists than may have been the case otherwise.
- c) A greater number of tourists will very likely benefit the tourism and related industries in general. Moreover, an inflow of foreign tourists can contribute to foreign exchange and GDP.
- d) Certain sectors in tourism, specifically in accommodation, will be disrupted – market disruptions pose clear entrepreneurial, but not necessarily regulatory, challenges.
- e) Positive (inflow of tourist spending in areas) and negative (impact on local communities and rental markets) neighborhood-effects are likely.

Considering local maps of Airbnb listings it suggests that neighborhood effects are likely to be highly localized in some regions, such as Cape Town. We emphasize that municipal councils, body corporates and similar bodies are likely more properly positioned to deal with these local effects than national government through national regulation.

### 3.4 The bottom-line

In the end we think that having more tourists than would have been the case otherwise holds clear benefit tourism and related industries, and the economy in general, even in spite of market disruptions and new entrepreneurial challenges in the accommodation sector specifically.

Increasing numbers of tourists, and a subsequent increase in tourist expenditure, will mean 'economic stimulus' to tourism in general and to related industries such as restaurants and tourist attractions.

A growing tourism industry is a policy-goal of government. The impact of new regulations also has to be measured against its likely impact on the aims of existing government policy, such as economic growth and employment, and small business cultivation.



#### 4. The Tourism Amendment Bill and Thresholds

In the bill government seeks to set norms and standards with regards to thresholds for short-term home rental. The exact nature of these thresholds are presently unclear. An outline on the thresholds was not published with the bill, but the bill seems to give the minister broad scope to set thresholds.

If thresholds were to be used, as some have suggested, as a mechanism to 'level the playing-field', it would come down to a short-term home-rental entrepreneur exceeding some thresholds for guest-stays, income earned or some other metric.

After crossing the policy threshold, a short-term home rental will likely have to comply with more onerous and costly requirements for compliance. This may include expensive requirements for commercial zoning, higher property rates and taxes, or other mandated requirements for compliance. Such higher costs, we think, hold economic trade-offs.

In imposing higher direct costs such as hefty licensing fees or higher taxes, or indirect costs such as onerous and complicated mandated operational requirements for the short-term rental sector, it will reduce the sector's livelihood with increasing cost, which may have consequences including:

- Marginal short-term home-rentals may disappear from the market completely, which may reduce revenue of related industries and home-rental management providers in a region.
- A further likely result is an industry concentration the hands of larger enterprises more able to comply with cumbersome and costly regulations.

While thresholds may indeed reduce new market competitors of guesthouses and hotels, it is likely do so at a loss of economic efficiency and the creation of 'dead weight losses' in the economy – i.e. where coercive higher prices mean fewer tourist visits than could have been the case in a more competitive industry.

The best course of action, in our estimation, is for government to conduct a proper impact assessment of present regulations placed on the tourism sector, and of the contribution of said regulations toward the cost of running hotels and guesthouses. Thereafter, government should look for opportunities to 'level the playing-field' through deregulation, where appropriate.



## 5. Current state of industry regulation

We do recognise from our discussion with stakeholders that the current state of regulation over the established sector is onerous. Guest Houses, B&Bs and Hotels do have substantial regulatory requirements to uphold. This was evident in our discussions with various industry participants.

These regulations flow from the levels of national to local government. Amongst others, they include business licenses required by some enterprises, commercial zoning and consent-use requirements on guesthouses – along with differential residential and commercial tariff structures in municipalities.

Arguably, the existing compliance burden is already restrictive and likely leading to inefficiencies and ‘dead-weight losses’ in the economy. To put it in another way, existing regulations are already driving up the running costs of established hotels, B&B’s and guesthouses and affecting the ability of such enterprises to invest and expand, or – for marginal enterprises – simply to survive.

Comments from the industry suggests that complete compliance for registered tourism establishments is, in itself, onerous, costly and nearly impossible. Existing operators are finding it hard to comply with a diverse range of requirements.

Calls for stricter regulations will not ease the existing compliance burden on the tourism sector in general. It will merely result in a misguided attempt to ‘level the playing-field’ on a higher plane of bureaucracy, red-tape and compliance cost.

### 5.1 Local government policies

Much of the problem appears to lie on the level of local government. A quick analysis of rate policies in Tshwane for example reveals that industrial, business or commercial enterprises pay significantly more in property taxes and service rates.

Eventually, Sakeliga would like to see businesses paying more competitive market prices for municipal services. That is why we are calling for a more open electricity market and a break with Eskom-municipal regional monopolies towards private competition. In the end, we would like to see a more competitive market for all municipal services.

Moreover, we would like to see commercial enterprises paying as little tax as possible in order for scarce resources to remain under control of private sector for (re)investment according to entrepreneurial discretion.

However, in raising the cost of doing business for home rental entrepreneurs by means of regulation, it will impede new entrepreneurs from making the most of the current market opportunity in short-



term home rental. Registered guesthouses and hotels will remain in a cumbersome and restrictive regulatory environment.

## 5.2 'Thresholds' will not really level the playing-field

From our analysis, we also conclude that even if short-term home rentals are regulated by means of thresholds proposed in the bill, and even if other requirements and costs are later enforced on such providers crossing some threshold, the impact thereof will still be of limited value for hotels and guest houses that provide a wider range of services.

Larger establishments will still have to comply with a range of regulatory requirements that are cumbersome to uphold.

The smaller scale and stripped-down offering of a short-term home rental means that many legal requirements simply will not apply in any case, even if home rentals are eventually regulated or registered.

New regulations may impose various costs on short-term home rental providers, but it is highly unlikely to impose compliance requirements related to things such as food services, liquor licenses and smoking areas for example. By its nature, short-term home rental accommodation is self-catering and in the majority of cases and unlikely to provide a food and liquor service or smoking areas.

	Large establishments: Hotels & Guesthouses	Short-term home rental
	Is compliance required? / Can requirements legally be avoided?	
Business license for enterprises offering a food service	Required / Hard to avoid	Avoid by not offering food service
Food service regulations	Required / Hard to avoid	Avoid by not offering food service
Liquor licenses	Required / Hard to avoid	Avoid by not offering a liquor service
Commercial zoning	Required / Hard to avoid	Subject to existing by-laws (may be legally contested)
Mandated smoking areas	Likely required / Hard to avoid	Avoid by listing as non-smoking
Commercial TV Licenses	Likely required – costly for enterprises with many TVs	Avoidable by not offering a TV set
Labour and EE legislation	Likely required – costly to administer	Overhead avoidable through outsourcing to small specialist rental management firms

We think that the (supra-marginal) operators of short-term home rentals, that remain spite of thresholds and regulation, could legally still avoid much of the regulatory compliance cost by remaining small and excluding certain guest services from their range of offerings.

In our estimation the incentive structure from the current regulatory environment makes a decision to remain small and nimble very reasonable. Larger and more involved accommodation enterprises



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will remain within an environment of numerous overlapping laws and regulations, which contribute to operational costs.

In any event, many consumers, judging by the market uptake of short-term home rentals and Airbnb-like platforms, appear comfortable with a smaller home-rentals.

The bigger players would, in our estimation, still have to apply with numerous costly requirements, which likely negatively affect the efficiency of the industry.

#### **6. Deregulation to “level the playing-field”**

For the reasons outlined above, we think that the use of national regulations and thresholds as a means to “level the playing field” will have a limited success.

Established larger guesthouses, B&Bs and Hotels will still have to incur significant compliance costs from the mere fact of their larger scale, range of services and facilities offered, and larger workforces.

For this reason, we believe that a commitment to across-the-board deregulation is the best way for government to really support all players in the tourism industry. Accordingly, Sakeliga is in favor of friendlier regulations, or a general reduction in the compliance burden placed on all operators in the Tourism industry.

In Section II of our submission we provide constitutional comment on the bill and recommended that the bill be repealed or amended to provide for the repeal of provisions in the Tourism Act and any other legislation which imposes cumbersome obligations, duties, fees, taxes, or other mandates that are not currently required of short-term home rentals.



## SECTION II: CONSTITUTIONAL COMMENTS ON THE TOURISM AMENDMENT BILL, 2019

### For inclusion in the broader Sakeliga submission on the bill

Prepared by **Martin van Staden**<sup>2</sup>

#### 1. Relevant provisions in the Tourism Amendment Bill, 2019

The problematic provisions of the Tourism Amendment Bill, 2019 we wish to comment on are the following:

- Clause 1(b) of the Bill provides for a new definition, that of a “short-term home rental”, which means “the renting or leasing on a temporary basis, for reward, of a dwelling or part thereof, to a visitor”.
- Clause 2 provides for the addition of another “norm and standard” for which the Minister may by fiat “determine”, being “thresholds with regard to short-term home rental”.
- Clause 10 provides for the addition of a provision concerning delegations and assignments of the powers of the Board. It provides *inter alia* that “any” such powers may be delegated “to an employee of South African Tourism” and even “to any other suitable body”.
- Clause 13 makes it mandatory for the Minister to develop a national grading system, a power previously optional.
- Clause 18 provides for a new provision that purports to allow registered tour guides to *inter alia* “provide guide services in relation to areas of interest to visitors or tourists”, “interpret the cultural heritage of an area for visitors or tourists”, “assist or coach visitors or tourists in specific recreational activities they undertake”, and “undertake any other activity determined by the Minister by notice in the *Gazette*”.
- Clause 19 empowers the Minister to determine by fiat “any additional requirements” with which potential tour guides must comply before being registered.
- Clause 22 empowers the Minister to “make regulations necessary to enhance tourist safety and the tourist guiding experience, including the setting of permissible ratios of tourist guides to tourists”.

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<sup>2</sup> Martin van Staden LL.B. is a policy and legal analyst pursuing a Master of Laws degree from the University of Pretoria and author of *The Constitution and the Rule of Law: An Introduction* (Free Market Foundation, 2019).



## 2. Constitutionalism

Outside of the written law of the Constitution of the Republic of South Africa, 1996,<sup>3</sup> there exists a body of constitutional doctrine that obtains in South Africa by virtue of the mere existence of the Constitution. This is because the Constitution does not exist in a vacuum. It did not materialise out of thin air, but was negotiated, debated, drafted, and adopted within the context of a tradition. That tradition is known as *constitutionalism*.

Constitutionalism is the idea that government power must be, and legally is, limited. The ambit of this limitation is set out in the Constitution itself, both explicitly and implicitly. The explicit limitations imposed by the Constitution will be briefly set out under heading 3 below. The implicit limitations will now be considered.

### 1.1 Enumerated powers

The Constitution is the constitutive instrument of government in South Africa. It is the skeleton into which government grows, and which government cannot exceed. This is not only a legal, but also a logical, reality.

Government cannot lawfully give itself a power that is not recognised by the Constitution, meaning all legislation, policies, regulations, or official conduct, must have a basis in a constitutional provision. Where government purports to give itself the power to do something by legislation without that power having a constitutional basis that is explicit or *necessarily* implicit, government is acting *ultra vires* and unconstitutionally.

### 2.2 The Rule of Law

Section 1(c) of the Constitution explicitly recognises the Rule of Law as being co-equally supreme with the Constitution itself. Indeed, it states that South Africa is founded on the *supremacy of the Constitution and the Rule of Law*. The implications of this are substantial.

The Rule of Law comprehends a set of rules regarding how law, policy, and regulation is made, adopted, and enforced. These rules are inherent in the nature of law-, policy-, and regulation-making itself.

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<sup>3</sup> Henceforth “the Constitution”.



In his minority judgment in *Van der Walt v Metcash*, Madala J said of the Rule of Law:

“The rule of law has as some of its basic tenets:

1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
3. the legal protection of certain basic human rights.”

Referring to a judgment of the Supreme Court of India, Madala added that the Rule of Law “excludes arbitrariness and unreasonableness”.<sup>4</sup>

Law, in a constitutional democracy, is expected to come from those who have been democratically elected to legislate and represent those who are to comply with the law. This is because the law is a set of substantive rules of conduct that people must comply with regardless of their willingness, and it would be presumptuous for random nameless, faceless officials, as opposed to the recognised representatives of the people, to bring such rules about.

The notion of ‘delegated law-making’, despite its wide acceptance, is thoroughly unconstitutional and incompatible with the basic tenets of constitutionalism and of democracy. Laws are created in the open, subject to public comment, to the scrutiny of opposition parties, etc. ‘Laws’ created by executive functionaries in the basements of Pretoria are usually unknown to most South Africans and subject to much less review and scrutiny. Regulations are supposed to provide for the technical implementation of the substantive laws created by Parliament, and may not themselves impose substantive requirements either explicitly or implicitly.

Discretionary powers, on the other hand, will always be present in any system of government. However, discretionary powers must be constrained by the objective principles of law and by provisions that delimit the exact scope of the executive functionary’s power. If this is not done, and functionaries are simply empowered to decide things ‘in the public interest’ or based on their own whims and preferences, and then the Rule of Law is undermined.

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<sup>4</sup> *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) at paras 65-66.



A further feature of the Rule of Law is worth mentioning.

Government must not attempt or require something that cannot reasonably be done. This means, firstly, that those things a government *inherently* cannot do; for example, forbid breathing, must not be attempted. Secondly, it means that those things the government in the national context cannot do must also not be attempted, and government must not expect the people to do something unreasonable and patently against their own interests. This is why institutions such as the doctrine of necessity, and marital privilege in the law of criminal procedure, exist.

### 2.3 *How the bill fails to comply*

**Tone-deaf and uncontextual nature of the bill.** Unemployment on the expanded definition in South Africa is approaching 10 million jobless persons. Short-term home rentals, similarly to ridesharing, has provided new opportunities to thousands to turn their existing assets (homes, cars) into income-generating resources without having to go through the bureaucratic process of establishing a hospitality or transportation business. By placing another barrier in the way of ordinary South Africans liberating themselves from poverty, government is being unreasonable.

Within the context of South Africa's dire poverty and unemployment levels, any government action that exacerbates this state of affairs is irrational, in that it would be directly contrary to any legitimate government purpose. It is also disproportionate. A more proportional response to ensure that there is a level playing field between the traditional hospitality industry and short-term home rentals, is to remove the restrictions and burdens government already places on the former, rather than expand them to the latter. Finally, it is arbitrary, in that no real evidence has shown that there is a mischief or social ill to be cured, due to the absence of a Socio-Economic Impact Assessment. The mere fact that something has hereinto been unregulated does not in and of itself mean that it must be regulated. Regulation must seek to address an actual, rather than academic, problem.

As such, we recommend that the bill as a whole be withdrawn and abandoned.

**Determination of thresholds.** The power of the Minister to determine "thresholds" in clause 2 is vague and unclear, excessively discretionary, and contains no qualifying criteria.

The word "threshold" is not defined in the Tourism Act nor is it being inserted by the bill. It is unclear what this word means in this context, even though it has been assumed that it means the Minister may determine for how long guests may reside at short-term home rentals. It could, however, also mean the amount of short-term home rentals allowable in an area or in the whole of the country.



The ambiguity of this word means Parliament has delegated a law-making function to the Minister, who will now have the power to determine, arbitrarily, the nature of the restrictions they will place on short-term home rentals. The nature of the power to regulate must, however, be determined by Parliament as the law-maker, with the executive functionary simply exercising the power.

As such, we recommend the removal of this clause from the bill. Failing that, we recommend Parliament clarify in the clause what the nature of these “thresholds” will be, either by modifying the clause or by defining what “threshold” means within the context of the bill.

Despite the lack of clarity about the word “thresholds”, however, the Minister is still being delegated an excessively generous law-making power. Assuming for the sake of argument that “thresholds” is clarified to mean the number of short-term home rentals allowed in a particular area, this provision still has the consequence of empowering the Minister to arbitrarily decide when there are “too many” such rentals, when in fact such a determination is a market determination.

As such, we recommend the removal of this clause from the bill. Failing that, we recommend the insertion of qualifying criteria circumscribing the Minister’s power and setting out the conditions for when the power may be exercised. For instance, if a large number of short-term home rentals would pose a threat to national security, the Minister may impose a threshold. Such qualifying criteria must be strict and clear.

**Delegation of Board powers.** Clause 10 gives an open-ended power to the Board to delegate “any” of its powers to “any” employee of South African Tourism or anyone else it deems “suitable”. This provision is excessively discretionary, allowing the Board to arbitrarily decide which functions to delegate to which people without any restraint.

The bill does not define what a “suitable body” is, effectively leaving such determination to the Board and giving the courts which will inevitably have to decide on the matter no guidance on what would be suitable. This provision has the potential consequence of monopolisation or cronyism, whereby the Board could delegate its functions to a private-sector participant in the tourism industry which would exercise those functions in a way that is beneficial to its own interests.

As such, we recommend the removal of “(b) to an employee of South African Tourism; or” and “(c) with the concurrence of the Minister, to any suitable body” from this clause.

**Tourism grading unnecessary.** Clause 13 proposes to make it mandatory for the Minister to develop a national grading system that will enhance the quality of tourism.



South Africa's tourism suffers not because of inferior or suboptimal quality of tourism providers, but because of environmental factors such as crime and a worsening national economy. The only consequence of this clause will be to create additional bureaucracy and regulatory burdens for the industry, and will make the operation of the tourism department more expensive to the taxpayer.

As such, we recommend clause 13 be removed.

**"Allowing" guides to guide.** Clause 18 purports to "allow" registered tour guides to do a number of things ordinarily associated with tour guiding.

It is unclear what the intention of this provision is. By adopting clause 18, the law will imply that *only* registered tour guides may, for instance, "interpret the cultural heritage of an area for visitors or tourists". This would be an unjustifiable infringement of freedom of expression in that it will disallow ordinary South Africans from conversing with foreigners or non-local South Africans about the heritage of something or an area for an award that is "monetary or otherwise". If this clause is adopted, for instance, it would make it unlawful for a hitchhiker, in exchange for a lift from Cape Town to Knysna with newly-arrived tourists, to provide commentary on the history and nature of the Garden Route.

If the bill's intention is in fact to regulate ordinary South Africans in this fashion, this itself will be an unjustifiable intervention in freedom of enterprise which will be discussed below.

As such, we recommend clause 13 be removed from the bill.

**Minister's power to decide "competence".** Clause 19 proposes to allow the Minister to determine "any additional requirements" for the competence of tour guides. Previously, the Qualifications Authority established the means by which competence is determined.

This power is excessively discretionary as it contains no limiting or constraining criteria. This means the Minister may determine that only persons who have doctorates in nuclear physics are competent to be tour guides. The Qualifications Authority is the specialised organ of State set up to ensure an adequate qualifications framework for South Africa, and this should be respected in place of creating more unnecessary bureaucracy.

As such, we recommend clause 19 be removed from the bill. Failing that, we recommend that qualifications to the Minister's unbridled discretion be inserted into the clause. These qualifications should make it clear that the Minister's "additional requirements" must related rationally to the quality and safety of tourism-related activities.



**Guide-to-tourist ratios.** Clause 22 proposes to allow the Minister to make any regulations they deem necessary to “enhance tourist safety and the tourist guiding experience, including the setting of permissible ratios of tourist guides to tourists”.

This power is excessively discretionary in that it allows the Minister an unfettered discretion in determining what is “necessary” to make tourists’ experiences more pleasing. The Minister might, then, require in a regulation that all tour guides wear clown costumes to “enhance the tourist guiding experience”. It is consumers themselves who determine whether the experience was satisfactory. If not, consumers may take their business elsewhere. Rating systems run by private companies have almost perfected the ability of consumers to discern which tour guiding companies are good over those that are not.

The power given in clause 22 will always be dependent on the Minister’s subjective preferences, and as such cannot easily be legally rectified.

As such, we recommend that the words after “safety” in clause 22 be removed from the bill. Failing that, we recommend that criteria be added to the clause that circumscribe the Minister’s power.

### 3. The Constitution

#### 3.1 Section 1 and the founding values

Section 1 of the Constitution provides:

“Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the **advancement of human rights and freedoms.**

(b) Non-racialism and non-sexism.

(c) **Supremacy of the constitution and the rule of law.**

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” (my emphasis)

Section 1(a) provides that the “advancement of human rights and freedoms” is a value upon which South Africa is founded. This foundational value has the effect of strengthening every right in the Bill of Rights, as discussed below, which cumulates into a right to enterprise. Whether or not South Africans should be free to make their own choices is not a question government gets to ask – it is a founding value and an imperative.



This advancement of human rights and freedoms, similarly, is a founding value in section 1 and not a right in the Bill of Rights. Its absence from the Bill of Rights means that it is not available to limitation under section 36 of the Constitution.

### 3.2 *Right to enterprise*

Chaskalson J wrote for the majority of the Constitutional Court in *S v Makwanyane* that a provision of the Constitution “must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular” other provisions in the chapter of which it is a part.<sup>5</sup>

This means that no part of the Constitution is left unaffected by other parts of the Constitution, especially the provisions in section 1 which provide for the broad constitutional basis of South Africa. These provisions are said to permeate the whole Constitution. Per Chaskalson J in *Minister of Home Affairs v NICRO*:

“The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution.”<sup>6</sup>

There exists a cumulative right to enterprise in the Constitution that becomes clear once the principle enunciated by Chaskalson J is truly appreciated – that the Constitution must be read as a whole. The right to enterprise means that South Africans may, free from the interference of government and other actors, voluntarily go about their own business. This right can only be limited by application of section 36 of the Constitution.

This right to enterprise is an accumulative rather than explicit right, meaning it is only evident by reading various provisions in the Bill of Rights together (informed by the section 1(a) commitment to the advancement of freedoms) and not in isolation. These component rights are:

Section 10 – the right to human dignity. In *Ferreira v Levin*, Ackermann J wrote:

“Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction.

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<sup>5</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.

<sup>6</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 21.



Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.”<sup>7</sup> (my emphasis)

Section 12 – freedom and security of the person – especially sections 12(1)(a) and (c). These provisions provide that nobody may be deprived of freedom without just cause and that everyone has the right to be free from violence from both public and private sources. Violence must be understood as including the threat of violence, which underlies any new law or regulation such as the provisions of the present bill.

Section 13 – freedom from slavery, servitude and forced labour. If South Africans are guaranteed the right to be free from slavery – forced employment – the converse is also logically true: South Africans are to be free from forced unemployment as well, which is often the result of well-intended government policy. This is particularly relevant in the case of the present bill.

Section 14 – the right to privacy. The right to privacy implies that persons or groups of persons may go about their businesses without the interference or surveillance of others – including and especially government – if they do so without violating others’ rights.

Section 18 – freedom of association. This right entitles everyone to associate (or disassociate) with whoever or whatever they wish on whatever basis. The provision was formulated without any provisos or qualifications and is therefore absolute insofar as it is not limited by section 36. South Africans may freely associate or disassociate as long as they do not violate the same right of others or any of the other rights in the Bill of Rights. This right would include the right of tourists or visitors to associate with persons not registered as tour guides but who are providing ‘services’ ordinarily associated with tour guiding.

Section 21(1) – freedom of movement. The freedom to move – leave, return, roam – is a vital element of enterprise.

Section 22 – freedom of trade, occupation and profession. The freedom to choose one’s trade, occupation, and profession is, along with the property rights provision, the core of the right to enterprise. Section 22 provides that government may regulate (not prohibit) the practice (not the choice) of a profession. The regulation of practicing a particular profession cannot be so severe as to prohibit it.

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<sup>7</sup> *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49.



Section 23 – labour relations. The Constitution guarantees the right of employees and employers to associate with trade unions and employers’ organisations.

Section 25 – the right to property. There can be no right to enterprise, and no enterprise *per se*, without private property rights. Section 25, along with the freedom of trade, occupation and profession, forms the core of the right to enterprise and is a *conditio sine qua non* for South Africa’s prosperity. A right to property supposes that the owners of the property in question may do with that property as they see fit, insofar as they do not violate the rights of others.

### 3.3 *How the bill fails to comply*

That the bill infringes upon the right to enterprise in the Constitution is obvious. It places additional burdens on an overregulated and unemployed population who wish to make their own homes available for short-term rental.

Government will attempt to motivate this infringement by arguing that in terms of section 36, the bill amounts to a justifiable limitation of the right to enterprise or any of its component rights. We disagree for reasons that will be clear from the below discussion of the relevant elements of section 36.

**Law of general application.** The bill is a law of general application.

**Reasonable and justifiable.** A limitation of rights can only be justified if it is aimed at giving effect to a legitimate government purpose. Such purpose must be based in the Constitution, as government’s constitutive instrument. As we have already mentioned, it is unclear what mischief or social ill the bill seeks to cure, other than the notion that there is no equal playing field between the traditional hospitality industry and short-term home rentals. Even if this were the case, however, there is no provision in the Bill of Rights or in the Constitution that mandates or implies that government must ensure all industries are equally capable of competing with one another.

As will be clear from the discussion below, however, there are less restrictive ways of achieving this alleged purpose. We do not believe the bill is a reasonable government intervention.

**Open and democratic society.** In the African National Congress’ 1991 constitutional principles document, it asserted that an open society means the “Constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance”, and that the open society notion “requires guarantees for the free functioning of non-governmental organisations, such as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human rights as set out in the Constitution”. It continues, writing that non-governmental



organisations “should be encouraged”, but not forced, “to collaborate with the Government in furthering the aims of the Constitution, without thereby compromising their identity or independence”.<sup>8</sup>

The bill is not furthering the idea of an open and democratic society by *inter alia* forcing South Africans who are struggling economically to comply with arbitrary and strict government diktats on renting out rooms in their own homes, or forcing ordinary South Africans to forego talking about the heritage of something or someplace in South Africa simply because they are not registered tour guides. It does not call for collaboration between non-governmental organisations such as private companies or short-term home rental landlords, but instead force government’s arbitrary will upon them.

We do not believe the bill is reasonable and justifiable in an open and democratic society.

**Human dignity.** Freedom “is an indispensable ingredient of human dignity”.<sup>9</sup> Michael O’Dowd wrote that the essence of human dignity is the ability to make one’s own decision as regards one’s own welfare, and that the constitutional protection of human dignity “places limits – rather narrow limits – on the legitimacy of paternalist or ‘nurse maid’ activities of the state”.<sup>10</sup>

The bill intrudes into South Africans’ private homes which they are attempting to employ to save themselves from destitution. Such paternalism is ill-considered and an obvious affront to human dignity. As such we do not believe the bill is reasonable and justifiable in an open and democratic society based on human dignity.

**Equality.** In a somewhat perverse fashion, government is attempting to ensure “equality” between large, established hospitality companies and small, single-person short-term home rentals, by making operating more burdensome for the latter. This is indicative of unfortunate, perhaps unintentional, cronyism. The result of this intervention will not be to make the former and latter equal, but simply to push the latter out of the market completely. How to achieve such equality in a constitutionally-sound fashion will be clear from the discussion below.

We do not believe the bill is reasonable and justifiable in an open and democratic society based on equality.

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<sup>8</sup> African National Congress. “Constitutional Principles for a Democratic South Africa”. (1991). <http://www.anc.org.za/content/constitutional-principles-democratic-south-africa/>.

<sup>9</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) at para 49.

<sup>10</sup> O’Dowd, MC. *South Africa as an “Open Society”?* (1998). Johannesburg: Free Market Foundation. 11.



**Freedom.** Bills of rights are intended primarily to protect individual freedom from the excesses of government power.<sup>11</sup> Any government intervention, however, derogates from freedom, meaning not all impositions of authority can be considered unconstitutional in terms of section 36. But an intervention must be made in the spirit of freedom. As ill-considered and non-economic as they are, competition regulations do tend to be made in the spirit of protecting the competitive market. This bill, however, is being made in the spirit of simply filling a regulatory void rather than addressing any real social ill or mischief.

We do not believe the bill is reasonable and justifiable in an open and democratic society based on freedom.

The following factors are those listed in section 36(1)(a)-(e) which must be factored into account when determining whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom:

**Nature of the right.** The nature of the right to enterprise is to ensure economic actors, be they ordinary consumers, small unregistered businesses and large corporations, are capable of pursuing their own interests, affairs, desires and preferences without being unduly burdened by the preferences of third parties, chiefly the State. Enterprise is what allows an economy to grow sustainably and allows people to care for themselves, their families and communities, rather than be cared for by government. This right is the basis for prosperity and the development of our own personalities.

The bill disregards the nature of the right to freedom of enterprise completely by seeking to regulate short-term home rentals and tour guides for no true reason other than regulation itself.

**Importance and purpose of the limitation.** While a limitation may thus be important for some social or international objective, the limitation cannot be seen in a vacuum unaffected by other values and provisions in the Constitution. Furthermore, for a limitation to have importance, it must be rationally related to a legitimate governmental purpose.

The real reason why the right to enterprise is being limited is unclear, but it has been said that the bill seeks to bring short-term home rentals under the regulatory domain of the tourism department to ensure that the hospitality industry and short-term home rentals are equally regulated. If this is, in fact, the reason, the limitation is important, in that the Rule of Law requires the law to be applied equally.

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<sup>11</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 154.



Why tour guides are being saddled with excessive interference in their conduct, on the other hand, is left completely unjustified. It appears to be a case of government simply seeking to regulate for regulation's own sake. The limitation in this regard is thus unimportant and unrelated to any constitutional mandate.

**Nature and extent of the limitation.** The greater the extent of the limitation, the more difficult it will be for government to justify. If the 'limitation', however, has the effect of completely extinguishing the right, its extent would have gone too far, as section 36 provides for the limitation and not denial of rights.

The nature of the limitation is that it infringes upon the right to enterprise and upon the nature of constitutionalism itself. It is an affront to the Rule of Law in that it has an unclear motivation, assigns excessive discretionary powers, and is formulated in a vague and ambiguous fashion, in both the cases of short-term home rentals and tour guides.

The extent of the limitation is itself left unclear because of the excessive discretionary powers given to the Minister in respect of both short-term home rentals and tour guides. The power for limitation is thus created but will depend in all instances upon the whim of the Minister.

**Relation between the limitation and its purpose.** This requirement mandates that a limitation be rational, i.e. that the limitation is in fact capable of achieving its desired outcome. Merely asserting that "it will", is insufficient. There must be a rational basis for believing that the limitation will achieve its outcome. One way of showing such a rational basis is by conducting Socio-Economic Impact Assessments (SEIAs), as mandated by policy from the Department of Planning, Monitoring, and Evaluation.<sup>12</sup>

If the purpose of the limitation on short-term home rentals is assumed to be to equalise the playing field between the hospitality industry and short-term home rentals, then a relationship exists only insofar as the Minister decides to exercise their discretion in a rational fashion. There is no inherent relationship because of the fact that no limitation yet exists in the absence of the Minister exercising their discretion. The unfortunate implication of this is that the bill assigns the power to infringe upon rights to an executive functionary, rather than entrench that power with Parliament where it belongs.

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<sup>12</sup> Department of Planning, Monitoring, and Evaluation. "Socio Economic Impact Assessment System (SEIAS)". (2015). <http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx/>. See also DPME. "Socio-Economic Impact Assessment System (SEIAS) – Guidelines". (2015). 3.



This is repugnant to the Rule of Law requirement that substantive law emanate from Parliament by way of legislation rather than from an executive functionary by way of regulation.

No Socio-Economic Impact Assessment accompanied the bill in the *Government Gazette* of 15 April 2019 and none is available on the website of the tourism department. It must thus be assumed that none was conducted, as ordinary South Africans would not be capable of locating it even if it were. As such, no evidence exists that a rational relationship exists between the bill and the limitation of the right to enterprise.

Finally, we repeat that we regard the bill as irrational for being proposed in South Africa's current economic context characterised by poverty and unemployment.

**Less restrictive means to achieve the purpose.** If there are ways to achieve the governmental purpose without limiting the right to enterprise – or limiting it to a lesser extent – government must prefer those alternatives. If such alternatives are in fact available, the bill's infringement on this right is unconstitutional and unjustifiable.

Section 7(1) of the Constitution provides that the Bill of Rights is one of the cornerstones of South Africa's democracy, and section 7(2) provides that government "must respect, protect, promote and fulfil the rights in the Bill of Rights". Furthermore, section 39(1)(a) provides that the judiciary, when interpreting the Bill of Rights, "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". These provisions, taken together, strongly imply that government cannot simply prefer a limitation over an alternative that does not limit rights, because of political expediency or bureaucratic preference. If there is a less restrictive alternative, it must be preferred over the limitation contemplated.

In the case of short-term home rentals competing "unfairly" with the traditional hospitality industry because it is not regulated like the latter is, it follows as a matter of common sense that the least restrictive means of achieving the purpose (an equal playing field) is not to impose regulations on short-term home rentals, but to remove the regulations on the traditional hospitality industry. In so doing, short-term home rentals and the industry will compete only on quality of service and convenience, rather than having one or the other or both saddled with compliance costs and regulations.

This is the only constitutionally-sound way for government to achieve its ostensible purpose. What the bill proposes is unreasonable, infringes on equality, and is disproportionate to the apparent mischief to be solved.



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As such, we recommend the bill be amended to provide for the repeal of provisions in the Tourism Act and any other legislation which imposes obligations, duties, fees, taxes, or other mandates that are not currently required of short-term home rentals.

#### **4. Conclusion**

The Tourism Amendment Bill, 2019, fails to live up not only to the text of the Constitution (particularly the founding values, the accumulative right to enterprise in the Bill of Rights, and the provision allowing limitation of rights), but also its spirit, purport, and values. Its unconstitutionality, further, is broader than mere inconsistency with the Constitution, but it is inconsistent with constitutionalism itself (in that it assigns excessive and unconstrained discretionary powers to the Minister and ignores various other imperatives of the Rule of Law).

In light of the comments made throughout this submission, it is our view that the bill be withdrawn in toto or that the specific concerns herein noted be rectified.

**Ends.**