

# “The Politics of Regulation and the South African Sex Industry”

An Interest Group Analysis of Power and Civic Participation in public policy on Adult Commercial Sex work

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## *DECLARATION*

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: Zukiswa Mqolomba Date: 08/10/2010

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## Abstract

This dissertation is an interest group analysis of power and civic participation in public consultations on adult commercial sex work<sup>1</sup> and legal reforms in South Africa. It determines the interests, the strategies and tactics<sup>2</sup> employed, as well as power relations between interest groups in the social policy process as led by the South African Law Reform Commission (SALRC). The research study solicits answers to the following research question: What is the role of power and civic participation in public policy on adult commercial sex work and how does the distribution of power shape policy outcomes?

The dissertation is narrative, interpretative and analytical on the subject matter and uses multiple data collection methods to collect data (*i.e. secondary desktop research, semi-structured interviews and documentation reviews*). It uses qualitative methods of enquiry, reviewing both primary data as well as an array of secondary data in the area of power, public policy and adult commercial sex work.

Findings affirm that the public policy process in South Africa is indeed multi-layered and is a site of struggle where social actors wrestle for legitimacy and domination (cultural pluralist perspective). The politics of regulation occurs over a number of levels and power is unevenly dispersed. Though South Africa's public policy process is open to a number of interest groups and places a premium on civic participation, what is evident is that policy decisions are at the behest of a powerful bloc namely the ruling state/political elite<sup>3</sup> (comprised of the ruling party, its alliance partners, and state deployees). This group,

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<sup>1</sup> Commonly referred to as adult prostitution

<sup>2</sup> Strategy refers to a plan of action designed to achieve a particular goal. In usage, strategy is distinct from tactics, which are concerned with the conduct of an engagement, while strategy is concerned with how different engagements are linked.

<sup>3</sup> Refers to the relationship between the state and the ruling political elite, which recognizes that the South African state is not neutral or independent from the ruling party, contrary to the assumptions embedded in *normative and positivist theories*. In the case of South Africa, the distinction between the state and the political elite is a superficial one as state bureaucracy is often the political instrument of the other.

however, is not homogenous and is also contested. Contrary to *Pluralistic Group theories* therefore, public policy is dominated by single power blocs despite the presence and participation of a number of interest groups in public policy. However, similarly with *Special Interest theory*, there are various contending groups that serve as a countervailing force to absolute forms of power, directly and indirectly, both within and outside the SALRC process. These include *inter alia* the judiciary; media, donor funding agencies and civil society groupings. Whereas power over the policy process is largely dominated by civil society groups; power of policy outcomes is concentrated at the level of the ruling state/political elite as well as the judiciary (to a certain degree). Power over the policy process<sup>4</sup> is largely determined by modes of policy engagement, group size, as well as hegemonic ideas. Power over policy outcomes, however, is determined by the extent to which interest groups can make decisions on policy outcomes (i.e. political, bureaucratic and judicial power).

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<sup>4</sup> This refers to the nature, character and dynamism of civic participation in the public policy process itself.

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## Glossary of Terms

1. Civic Participation; refers to the involvement of non-state actors or interest groups in decision-making process of interest or of issues that potentially affect them. It is used interchangeably with stakeholder engagement or popular participation. It implies involvement that influences outcomes.
2. Civic Society; refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil societies are often populated by organizations such as non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, social movements, business associations, coalitions and advocacy groups.
3. Commercial Sex Worker; refers to a person(s) who provides sexual services specifically for *financial* reward.
4. Common law vs. Statutory Law; refers to the law of the land created by customs and judicial decisions but excluding that created by legislation. Statutory law, on the other hand, is the law of the land created by legislation.
5. Criminalisation; refers to the act of making something illegal through criminal law, and a process of attaching penal sanctions to a given conduct.
6. Decriminalisation; refers to the act of repealing all existing criminal codes against sex-work. The business of sex-work would then be subject to general civil, business and professional codes.
7. Interest group; refers to a collective of individuals that attempts to influence public policy to advance their own and/or the interests of their members. Broadly defined, interest groups are associations or movements in any political system with the ultimate goal of influencing public policy in a particular direction. Some of these groups can be labor unions, business organizations, gender, religious and public interest groups, professional associations and occupational groups among others.
8. Legalization; refers to decriminalisation but with controls. It entails the provision of a safer and more manageable environment for the trade. It commands state intervention in which

for example the state would sanction the establishment of state-sponsored, regulating them to ensure better access to health, welfare and educational programs for parties. Sex-workers, in this model, would be required to undergo regular medical check-ups for Sexually Transmitted Diseases, which would improve the control over the spread of infection. A second form of legalization involves the establishment of twilight zones of tolerance away from residential areas, special places where sex-workers would have the legal right to operate.

9. Public policy; refers to all formal and publicly known decisions of governments that come about through predetermined channels in a particular administration (Gumede 2008a).
10. Power; refers to a measure of an entity's ability to control the environment around itself, including the behavior of other entities, in favour of desirable outcomes. It includes social, economic and political power as defined by Dahl (1961 cited Roskins et al 2008), as "A has power over B to the extent that it can get B to do something that B would not otherwise do".
11. Sexual Offence; describes the behaviour which is, or should be, prohibited by the offences; it is any act which results in the exploitation of a child, whether with their consent or not, for the purposes of sexual or erotic gratification. The unlawful human act is punishable by the state.
12. Sex worker versus Sex worker; commonly known as a prostitute, this refers to a person(s) who provides sexual services for material reward i.e. for transport, food, clothing or other material items. The phrase 'sex worker' precludes the moral-judgments and negative connotations associated with the phrase 'prostitution'. It is with this in mind that there is a deliberate choice to use the word sex-worker to describe the individuals of this 'trade'.
13. Social regulation; refers to the employment of legal instruments for the implementation of social-economic policy objectives, either as a social response to some market failure that is carried out in the 'public interest' or as an economic good of value to certain groups of society (Hertog 1999).

## **List of Acronyms and Abbreviations**

ANC	African National Congress
ASA	African Sex Workers Association
BUSA	Business Unity of South Africa
CBOs	Community Based Organisations
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CGE	Commission on Gender Equity
CONTRALESA	Congress of Traditional Leaders of South Africa
COSATU	Congress of South African Trade Unions
DA	Democratic Alliance
DEPCRO	Decriminalisation of Sex Work Network
ECHTL	Eastern Cape House of Traditional Leaders
IFP	Inkatha Freedom Party
ISS	Institute of Security Studies
LC	Labour Court
LAC	Labour Appeal Court
NEDLAC	National Economic Development and Labour Council
NGOs	Non-Government Organisations
NHTL	National House of Traditional Leaders
NPA	National Prosecuting Authorities
OSW	Office of the Status of Women
POWA	People Opposing Women Abuse
SACP	South African Communist Party
SALRC	South African Law Reform Commission
SWEAT	Sex Workers Education and Advocacy Task-force
LRC	Legal Resource Centre
WLC	Women's Legal Centre

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## Chapter 1: Introduction

The 1990s marked the culmination of a new epoch in South Africa: the emergence of a new set of policy perspectives befitting a new social order, and founded on the ideals of non-racism, non-sexism, equity, justice and human rights for all. Since the takeover of state and legislative power by the African National Congress (ANC), public policy has been conceptualised in a manner that is befitting a new democratic order. It has been conceptualised in a manner that promotes active citizenship and broadened participation, all of which constitute South Africa's democratic ideals. It is not surprising therefore that South Africa's public policy process has been a domain of scholarly interest.

A number of policy issues have received some serious attention since then i.e. economic growth, inflation targeting, globalisation and industrialisation, land redistribution, black economic empowerment, social security, education, and health to mention just a few. Issues of adult commercial sex work, however, seem to have fallen on fallow grounds, despite the presence of strong lobby groups that have agitated for a change in status quo. Whilst policy discourse in the past decade seems to have led to a gradual recognition of the need to review the current approach to adult commercial sex work in South Africa, government has yet to commit to legislative reforms. This poses a number of questions about the role of civic society in public policy processes, as well as demands critical analysis of the relationship between the state and interest groups, and how these shape, directly or indirectly, public policy outcomes in South Africa.

Debates on sex work (also known as 'prostitution') have been raging on in South Africa's public and legal domains since the 1990s. The relevance and appropriateness of South Africa's current regulatory framework has been brought into question, this becoming an area of contention, particularly amongst decision makers and varied interest groups.

In 1996, for instance, the Gauteng Ministry of Safety and Security embarked on a process of lobbying for legal reforms on adult commercial sex work, even drafting a policy document on sex work in favour of decriminalization (SALRC 2002). The final report was endorsed by the Gauteng Cabinet, which approved its set of recommendations. The call

for the decriminalisation of sex work was joined by the Western Cape's then Premier Gerald Morkel.

Gauteng's campaign even received support from the ANC at its national conference in Mafikeng in 1997 (SALRC 2002). It was then that the ANC Congress resolved that government should take appropriate measures to remove all legislation that makes 'commercial sex work' a criminal offence. The Congress also resolved that the Department of Health should take measures to ensure that persons engaged in sex work should have regular and confidential access to the public health system as a means of curbing the spread of all sexually transmitted diseases.

The Commission on Gender Equality (CGE) also supported the issue in 1998, producing a brief position paper supporting the decriminalisation of sex work and conducted research on options for legal reform (SALRC 2002).

Despite the strong lobby group in favour of decriminalisation, however, the ANC at national level decided not to finalize its support in 1998, unable to make a unified statement. Contrary to popular expectations, the Gauteng Cabinet is also reported to have been reprimanded by national government for having run a policy campaign of this nature. It is reported that they were reprimanded for running a campaign that fell outside of the provincial sphere of decision-making and/or policy making.

#### *Adult Commercial Sex work in the Second decade of Democracy*

Debates resurfaced once again in the second decade of democracy. Public discourse on adult commercial sex work heightened particularly in light of the 2010 Fifa World Cup, as well as judgments by the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court (LC), and Labour Appeal Court (LAC) on the Kylie v Michelle van Zyl case in 2007 and 2010 respectively.

Pronouncements by former national police commissioner, Mr. Jackie Selebi, in June 2007 for instance placed the debate within the domain of public deliberation. Selebi's

submission that parliament should relax laws against adult commercial sex work in light of the 2010 Soccer World Cup brought shock-waves in South Africa's public discourse and its corridors of power. Selebi's argument was premised on the assumption that an increase in tourists in 2010 would inevitably impose a correlated increase in the demand for sex work. This, according to him, would consequently pose serious challenges to the limited capacity of the state. This motion was supported by a number of MP's, some of whom believed that decriminalising sex work would also decrease the number of rapes and related incidences that took place in South Africa. This proposal was not well-received, however, particularly by activists lobby groups. Selebi's proposal was seen as driven by the need to save policemen from the burden of arrests of masses of sex-buying foreigners, and the demand to provide legal pleasure to foreign 'sex-buying' men a rationale that reinforces female subordination to male desire.

In response to the call, a number of lobby groups raised serious reservations about temporary legislative reforms ahead of 2010, contrary to popular expectations. The Human-Rights lobby groups led by Sex Workers Education and Advocacy Taskforce (SWEAT)<sup>5</sup>, for example, see the proposal to legalise sex work for a limited period as clear evidence that the interests and protection of sex workers themselves remain very low on the government's priority list. They continue to agitate for permanent legislative reforms beyond 2010, stressing that sex workers' rights should be recognised and protected, and not only for the duration of the 2010 World Cup.

The judgments by the CCMA, LC), and LAC on the *Kylie v Michelle van Zyl* case in 2007 and 2010 respectively have also done much to elevate public discourse on the matter, particularly in the corridors of the legal fraternity. In a prior judgment, for example, the CCMA had ruled that it did not have jurisdiction to hear a case of the wrongful dismissal of "Kylie", a sex worker fired by her massage parlour boss. Though the LC judgment affirmed the CCMA's ruling as correct in accordance with common and constitutional law

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<sup>5</sup> SWEAT is a non-profit organisation situated in Cape Town, South Africa. SWEAT works with sex workers around health and human rights. It lobbies and advocate for the decriminalisation of adult sex work in South Africa.

principles, a recent LAC judgment ruled otherwise. When the LAC considered an appeal against the LC ruling, the LAC ruled that Kylie had rights to protections of labour law as one of the fundamental rights which are enshrined in the Constitution (at least from an employment law perspective). The recent LAC judgment suggests increasing tension between popular consent as enshrined in criminal law and its ability to extend constitutional rights to sex workers. The recent judgments pose definite questions about the appropriateness of South Africa's current policy response to adult commercial sex work, particularly in light of the need to extend socio-economic protections to vulnerable groups in South Africa.

Vocal human rights organisations and networks (i.e. SWEAT, Lawyers for Human Rights, Women's Legal Centre, Decriminalisation of Sex work Network (DEPCRO)) have also done much to focus public attention on this issue, heightening the need for legal revision on the matter (SALRC 2002). Since 2000, conferences jointly hosted by SWEAT and Women's Legal Centre, have fuelled ardent debates on sex work and legal reforms, ensuring that it receives serious attention amongst legislators and human rights activists across the region. There continues to be a strong and relentless motion by sex-work activists for regional governments to acknowledge sex workers' rights as human rights. These conferences have raised, amongst other things, vehement concerns about criminal law that has placed sex workers at greater risk of poverty, HIV/Aids, harassment and violence, discrimination and social marginalisation. There has been a relentless drive by sex work activists to set into motion a national sex-workers movement on a quest to decriminalise sex-work in South Africa and regionally.

The new Ministry of Women, Youth, and Persons with Disabilities, the Gauteng legislature, as well as some local municipalities in the Western Cape and North West have also made public pronouncements on the matter, and in favour of legal reforms. The National Director of Public Prosecutions and the City of Cape Town, however, have discouraged policy moves in favour of legal reforms.

The above debates rage on therefore and years later, and without clear policy positions by the South African government. Despite various lobby groups over the decade, government is yet to commit itself to legislative reforms. This brings into question the role of various interest groups in South Africa's public policy process; a question which remains important for understanding the power dynamic of the policy process on adult commercial sex work as led by the South African Law Reform Commission (SALRC).

#### *Public Consultations on Legal reforms*

The SALRC<sup>6</sup> has been leading independent investigations on adult commercial sex work since 2002. Legal reviews have been conducted with the view of protecting sex workers from violence, exploitation and coercion and affording them the rights enshrined in the Bill of Rights (SALRC 2009). The SALRC first published Issue Paper 19 on Adult Sex Work in July 2002, which was the first paper of the third leg in the series of the investigation into sexual offences (Project 107). This paper set forth the Commission's preliminary views regarding adult commercial sex work. After considering the current debates surrounding adult sex work, the existing legal framework and the international developments, also in respect of trafficking and HIV/AIDS, the Commission opted not to commit to any particular policy position. Instead, they opted to make further investigations on the regulatory pathways that can be pursued to deal with the South African sex industry. It highlighted the implications of each model, and posed questions for government's consideration.

The issue paper has now evolved into a discussion paper for public deliberation. This paper raise questions about the appropriate response to adult commercial sex work, particularly in the context of constitutional imperatives of human rights and social justice, of South Africa's international obligations, and international law. It suggests that South Africa's current legal framework which criminalises adult commercial sex work might fail to comply with the above. After considering the socio-economic circumstances of adult commercial sex work, the impact of the existing legal framework and the international

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<sup>6</sup> Is an independent statutory body mandated to do research work on legal matters in order to make recommendations to Government for the development, improvement, modernisation or reform of the law.

developments, also in respect of trafficking and HIV/AIDS, the Commission has proposed four main options for legal reforms. To give effect to the different reform options, the South African Law Reform Commission has proposed that the legislature enacts a new Adult Sex Work Reform Act that will do give effect to one of four models: non-criminalisation of adult commercial sex work; partial criminalisation of some forms of adult commercial sex work and related acts; regulation of adult commercial sex work and related acts; and total criminalization of adult commercial sex work (maintain current legal framework) (SALRC 2009).

Interest groups have since been invited to make comments on the discussion paper, and to participate in public consultations and workshops over a period of three months (May – July 2009). The Constitution provides for public participation in South Africa's legislatures (Heyns 2009). In the first instance, both Parliament and the provincial legislatures have the duty to include the public – including the media – from any of its meetings, unless it is reasonable and justifiable not to do so within the ambits of a democratic society.

In regards to public consultations, the predominant event for the public discussion of policy was workshops. The public consultations of the SALRC have largely included public consultative workshops across six provinces (Gauteng, Western Cape, Kwazulu Natal, Mpumalanga, North West and Eastern Cape). The workshops took place in Pretoria, Johannesburg, Cape Town, Durban, Nelspruit, Mabatho, Kimberley, Port Elizabeth and Makupane. Other foras included radio talk shows, written submissions (submissions sent via email and post), and private requests to be addressed on the matter. The SALRC also went on police-guided tours of Gauteng's hot-spots (i.e. Hillbrow) speaking to street-based sex workers.

The SALRC intends conducting further consultations with legal and constitutional experts, human rights practitioners, and Chapter 9 institutions (i.e. Human Rights Commissions, Public Protector, National Persecutors Agency) and as well as relevant government departments comprising the Justice and Security clusters (i.e. Justice, Health, Labour,

Safety and Security). The intention is to establish some level of consensus on the interpretation of constitutional law in relation to the respective policy options, and to preempt the policy outcomes, and on the basis of context-specific experiences, as well as international experiences.

This process is expected to culminate into a series of refined policy proposals and a draft bill that will come before parliament by 2009/2010. The final report documenting the outcomes of consultations and the final recommendations will also be sent back to stakeholders for rigorous engagement. The SALRC expects to finalise its report only by March 2011. The process of reviewing the Act, which includes submissions received following a public consultation phase, will most likely only be completed by 2011. Only once the resulting report is approved by the SALRC will it be forwarded to the Minister of Justice and Constitutional Development for consideration regarding a policy decision on the legislative process. The policy decision will be made by government as a proposal by the Justice Minister through the cluster system, through the justice and security cluster committee. The SALRC, however, have stresses that government is under no duress to make a policy decision on the matter, particularly if it is not a key priority area.

### *Empirical Relevance*

There are a number of studies that have done sociological research work on the South African sex industry (Davidson and Taylor 1995; Levick 1996; Bromberg 1997; Legget 1999; Arts 2000; Luiz and Roets 2000; Sloan 2000; Kaplan 2001; Vanwesenbeeck 2001; Scutin 2006; Richter 2008). However, literary reviews suggest that there are no studies that have examined the politics of sex work regulation e.g. the role of interest group power in shaping public policy outcomes. Interest group analysis is important in this regards as it helps locate social policy discourse within its contextual political environment. In light of the above, the dissertation investigates the interests, strategy and tactics, and power relations between interest groups in the social policy process. It analyses and interrogates the policy perspectives on adult commercial sex work, and the social actors which influence decision-making. The views and efforts of governments, business corporations,

community and pressure groups are deconstructed<sup>7</sup> to understand how why the discourse on legal reforms has evolved as it has and what influence various interest groups have on the current process of legal revision. It also examines the relationship between the state, and various interest groups, and how these shape policy outcomes.

### *Structure of the dissertation*

The dissertation is broken up into three main parts. The first part of the dissertation (Part A) is a critical analysis of secondary literature relative to the research question at hand. Chapter 2 is a synthesis of social and political theories relevant to the policy process on adult commercial sex work. It provides the theoretical base of the study; a survey of published works relevant to this investigation; and an analysis of the work relative to empirical findings, highlighting its implications. Chapter 3 is the research methodology, which briefly describes the research design, data sources, means of data collection, sampling techniques, analysis techniques, and other related methodological issues pertaining to this research study. The chapter also identifies research gaps and limitations, as well as locates the research question in the context of a dynamic and highly contested process of public policy.

The second part of the dissertation (Part B) presents findings analytically along clear thematic lines. Each chapter focuses on its own theme and subsets. Findings and analysis are presented concurrently as part of presenting a coherent or threaded narrative. This is pursued by following a thematic approach of organizing and analyzing data. Chapter 4 and 5 focuses on the socio-context of the South African sex industry; the contending policy perspectives on adult commercial sex work; the policy process; as well as probable policy implications. Chapter 6 focuses on the dominant strategies and tactics employed by actors and how these interface with the policy process. Chapter 7 looks at the locii of power in the policy process, and Chapter 8 explores the relationship between the state and key interest groups and how these interact to shape policy outcomes.

The third part (Part C) gives an integrated analysis of empirical data and concludes with a set of recommendations to strengthen interest group participation in policy-making in South Africa.

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<sup>7</sup> Analysed as individual groups

## Chapter 2: Literature Review: Power, Social Regulation and Public Policy

The literature review draws from two bodies of literature that do not often overlap, but are relevant for the purposes of analysis, namely; political theory and social theory. Whereas literary work on political theory has focused on the sources and manifest forms of power, social theory has focused on the motives or impetus of social regulation, which often has given rise to the need to exercise innate forms of power by different or contending interest groups. Both sets of literature are useful for the purposes of interest group analysis. These are relevant particularly for the purposes of examining the dynamics or interplay between power, interest group participation and the public policy process.

### *Power and the Public Policy*

An understanding of the interface of power, interest group participation, and public policy is crucial in the current policy discourse on adult commercial sex work. This is important, particularly in terms of understanding the interests and forces at play in public; how different interest groups interface with it to influence policy outcomes. Interest group analysis is particularly important as it will help us understand the nature, levels and sites of power in the policy process.

Public policy is seen by most policy analysts as a multi-layered process that involves social actors who wrestle for legitimacy, domination and power, and occurs over a number of levels and power is unevenly dispersed (Davis 1988 cited Roskins 2008; Fulcher 1989 cited Bourk 2000; Bahl and line 1994; Leftwich 1995; Persson and Tabellini 2000; Bourk 2000; Hill 2005; Dror 2006; Gumede 2008a).

Power in this regards refers to social and political power. Dahl (1961 cited by Roskins et al 2008) defines power as one party having power over another to the extent that it can get the other to do something that it would not otherwise do. Though there are narrow differentiations, the most common recognized sources of power include *inter alia*

bureaucratic power, knowledge and expert power, legitimate power, referent power, coercive power. Chapter 7 deals with these in depth.

Public policy, on the other hand, refers to all formal and publicly known decisions of governments that come about through predetermined channels in a particular administration (Gumede 2008a). It is aimed at improving the social welfare of a nation concerned, and purposed to make a positive impact on lives of a citizenry. According to Gumede (2008a) public policy involves public participation in policy-making largely because it affects people's lives.

According to Bourk (2000), for instance, all public policy forms within a cultural ecological system consisting of personal and collective programs and agendas, and is shaped by events.

Davis et al (1988, p. 5 cited Roskins et al 2008) also points out:

“Though individual actors might behave rationally in their own interest, policy formulation is a process shaped by the deliberate and the unintentional, without a necessary cohesion. Power is unevenly dispersed, authority fragmented and policy making uncertain, complex and intermittent.”

Evidence of research on public policy confirms that interest groups do play a significant role in shaping policy outcomes. A substantial number of studies have argued that interest groups exert a lot of influence in the policy process in many countries (Bosman 2009; Kihato and Rapoo; Elliot-Teague 2006; Ranchod 2007). Kihato and Rapoo (cited Ranchod 2007) argue that interest groups employ various strategies and tactics in efforts to influence policy outcomes. Modes of influence often include negotiations, petitions, lobbying, public debates and even intimidation, to mention but a few. The roles that interest groups play in public policy suggest that public policy is not only influenced by bureaucratic institutions and elected officials, but also by entities and organizations outside government. Secondly, they confirm the existence of political economy of public policy processes. This is reportedly the case particularly in advanced industrialized

political economies. While some groups may fight for particular activities that concern their members, others also deal with issues that affect a large number of people, including issues that concern the general public.

Davis et al (1985; p. 5) observe that:

“Theoretically it is the executive which has the final say, bestowing legitimacy on ‘policy’. In practice, (however), government agencies must make administrative decisions about (public participation, as well as) the allocation of resources (both material and human), and may maintain or expand programs without cabinet review.”

They argue that “it is not a logically ordered set of institutions, but an amorphous mass of interlocking organisations (interest groups) attempting to provide for the many public service demands of a modern industrial society (to serve their interests in modern industrial society). State institutions disagree or overlap, pursue different understandings of policy objectives and obstruct unacceptable choice. As a result policy making is inherently difficult, frustrating and only partly effective”.

Fulcher (1989 cited Bourk 2000) goes further to assert that even the superfluous distinction between policy and implementation serves political purposes, as this imposes the view that governments are in charge and that politicians hold real power. According to Fulcher (1989 cited Bourk 2000), this is most often intentional, and construes the real politics involved in public policy making, which at some instances would expose bureaucrats as mere administrators of public policy processes. This distinction in essence undermines the role and influence of powerful interest group in public policy outcomes.

Policy analysts are quick to point out, however, that the lack of cohesion or uneven dispersal of power amongst contending interest groups does not necessarily imply chaos (Fulcher 1989 cited Bourk 2000). They contend that instead, it means that while policy may precede in a planned direction the pace or final outcome may not be what was first envisioned or achieved by the original actors. Many policy analysts see public policy as a dynamic and politically charged environment, contrary to implicit economic analysis,

which most often conceptualises the policy process as a linear progression of rational thought. Those cited above often hold, and on the basis of evidence, that public policy is a haphazard evolution.

In terms of the impact of interest groups in the policy process, literature argues that this can depend on a number of factors (Fulcher 1989 cited Bourk 2000). Firstly, impact depends on whether or not elected politicians and bureaucratic agents consider and incorporate the inputs of organized interest groups when making final policy decisions. Secondly, influence of interest groups depends on whether or not interest groups are well-organized, and have collective abilities to lobby, persuade and influence public policies in a manner consistent with their interests. Thirdly, policy analysts have indicated that the impact of interest groups in public policy also depends, and largely so, on the nature of the political system, particularly concerning a political system's degree of corporatism. Countries with high level of corporatism tend to be more accommodating, to look for consensus amongst interest groups, and to have several groups trying to influence the policy process, and therefore no single group can dominate public policy. Braun and Gilardi (2006), however, also assert that policy outcomes are also influenced by perceived effectiveness of policy options, as well as perceived policy pay offs beyond the public policy process. Most importantly, they argue that policy shifts are likely to occur if the expected utility of change is better than the status quo. Secondly, they argue that policy changes are also likely to take place if there are no to limited number of veto players (i.e. ruling parties, popular civil groups) opposed to them. Thirdly, that policy reforms are most likely to occur if they are deemed effective by policy-makers, as well as popular or unlikely to be opposed by powerful interest groups (i.e. ruling party, trade union movement). Their arguments, of course, assume good will, preparedness, and rational behaviour on the part of all policy actors concerned. Secondly, the arguments implicate policy makers as intrinsic in determining policy outcomes, affirming the view that the state bureaucracy has as much interest in policy outcomes, as the interest groups that are invited to participate in policy processes.

### ***Interest Group Analysis, Social Regulation and Public Policy***

The relationship between interest groups and social regulation has received much debate amongst regulatory scholars, particularly amongst Economic-libertarians, the Normative-positivists, and the Radical/Marxist scholars. According to Morgan and Yeung (2007), social regulation has emerged as one of the most distinct and important fields of study in the social sciences, both for policy-makers and for scholars who require a theoretical framework that can be applied to any social sector. Regulation theory helps locate the motives for regulation or deregulation, or any government intervention at the level of public policy and legislation. Theories of regulation have often sought to understand the place of regulation in relation to different interest groups, with a biased focus on the relationship between government and business or the economic elite. Many of the rationales for regulating have been described as instances of ‘market failure’. Social regulation theory is therefore crucial in ones understanding of policy processes. Social regulation theories are equally important in policy discourse on adult commercial sex work as they help society understand why regulations on such social ills are often instituted. They give an account of the incentives faced by regulators, the costs and benefits of regulation, determine reasons which justify government intervention, as well as prescribe the conditions best suited for either regulation or deregulation. Most importantly, if one can locate the contending interests that ensue for regulation, as well as the sites of power with hegemonic control over policy decisions on regulation, it is possible to give an account for various policy outcomes.

Whereas, public policy refers to all formal and publicly known decisions of governments that come about through predetermined channels in a particular administration (Gumede 2008), the concept of *regulation* is often used widely and in a number of different contexts. In this dissertation, however, regulation is understood as the employment of legal instruments for the implementation of social-economic policy objectives, either as a social response to some market failure that is carried out in the ‘public interest’ or as an economic good of value to certain groups of society (Hertog 1999). It refers to a specific set of rules, to all forms of deliberate state influence or to describe all forms of social control or influence, including those that are not derived from the state, such as markets

(Benjamin 2005). In more concrete terms, it refers to the participation of governments in market economies, either directly or indirectly, influencing the decision making processes of businesses and individuals (Christ 2003). This comprises various mechanisms which include *inter alia* legislative, administrative and judicial instruments which interact with public policy institutions and interest groups or actors that are involved in setting legislative standard. Through legal instruments, interest groups can be compelled by government to comply with prescribed behavior under penalty of sanctions. Regulation generally is often thought of as an activity that restricts behavior and prevents the occurrence of certain undesirable activities (a 'red light' concept) but the influence of regulation may also be enabling or facilitative ('green light') (Eerma nd).

Social regulations are instituted for a number of reasons. The impetus for regulation may be purely economic, or it may stem from broader social or environmental concerns i.e. worker protection laws. The arguments propagated by scholars, however, vary along a continuum. Some scholars, for instance, argue that social regulation is a function of and an expression of the will of the state or economic elite (Stigler 1971; Hertog 1999; Christ 2003). They contend that public policy is a function of monopoly control, and that policy outcomes reflect the collective will of either the state or the economic elite. Secondly, that civic participation is largely permitted to legitimize political outcomes and to impose collective responsibility on interest groups. They argue that public policy processes are driven by the pursuit, not of public good or collective interests, but of interests, and largely for the purposes of maximising political gain or monetary profits. Regulatory behaviour therefore is seen not as imbued with public spiritedness but as a competition of power between dominant interest groups. Centrists on the other hand contend that policy environments are not mere instruments of the state or economic elite but are terrains subject to the whim of any contending interest group. However, because they are politically contested terrains, the distribution of power is unequally spread (Becker 1983; Smith 1993 cited Lobina 2003; Martomort and Semenov 2008; Eerma nd).

## **Critical Theories**

There are four analytical perspectives that have emerged in regulatory and public policy discourse, namely the *Economic-libertarian* perspective, the *Normative-positive* perspective, the *Radical/Marxist anti-capitalist* perspective, and *Pragmatic-administrative* perspective (Hertog 1999). Leading theories and models of the policy-making process include systems analysis, *pluralism/group theory*, elitism, structuralism, and the state autonomy/bureaucratic model. All of these examine how different theories view the role of citizen participation, political leadership, bureaucratic institutions, interest groups, academic experts, and business in the policy-making process. They provide analytic tools to understand variations in the policy-making process across issues and policy sectors and therefore the opportunity to develop independent/alternative ideas and applications.

Two basic schools of thought that have dominated discourse, however, and remain relevant to interest group analysis, are positive theories of regulation and normative theories of regulation.

Positive theories of regulation are directed towards economic explanations of regulation and examine why regulation occurs (Hahn 2006). The positivist variant is directed to the economic explanation of regulation and deriving the consequences of regulation *ibid*. These include theories of market power, interest group theories that describe stakeholders' interests in regulation, and theories of government opportunism that describe why restrictions on government discretion may be necessary for the sector to provide efficient services for citizens, the natural customer.

The normative variant, on the other hand, is based on a theory of market failure, and investigates which type of regulation is the most efficient. The latter variant is called normative because there is usually an implicit assumption that efficient regulation would also be desirable. Policy makers or regulators are assumed to care about both the citizenry and the economic elite, with relative weight on each being a key parameter (Eerma nd). It holds that the social ideal is some kind of marginal cost between competing interests (i.e. profit motive and the public good). Normative theories of regulation therefore make a

cost-benefit analysis of various regulatory instruments. Normative theories of regulation generally conclude that *policy-makers* should encourage competition where feasible, minimize the costs of information asymmetries by obtaining information and providing operators with incentives to improve their performance, provide for *price structures* that improve economic *efficiency*, and establish regulatory processes that provide for regulation under the law and *independence*, transparency, predictability, legitimacy, and credibility for the regulatory system. Normative theories are particularly important in the evaluation of interest group actions and how they interact with the policy process, particularly because of the dissertation's focus on interest group analysis in relation to power and civic participation of policy on adult commercial sex work.

This dissertation will focus on both schools of thoughts of Interest Group Theories, namely Economic theories, Pluralism, Special Interest/Group Competition Theory, Corporatism, and Common Agency Theory.

### ***Interest Group Theories (IGT)***

Interest group theories of regulation and government (IGT) seek to explain decision-making as an irrational process determined by the power relations existing in society (Lobina nd). IGT assumes that there are a large number of pressure groups in society and that the level of power they exert over government and the allocation of resources depend on their representation and organisation. It tries to explain the behaviour of government and its agents as they interact with other interest groups, commonly seen as political actors.

It essentially holds the view that public policy making takes place within a politically contested terrain. As a result it is impossible to draw up rational models to explain phenomenon that are in a constant state of flux as result of unpredictable and shifting forces (Hertog 1999).

### ***1. Economic Theories of Regulation***

Economic theories of regulation are a form of positive analysis (Christ 2003). Economic theories of regulation tend to adopt the theoretical lenses of classical liberalism, which asserts that social welfare is maximized by those who pursue their own self-interest. They do not attempt to justify regulation, but purpose to explain its existence and form as the outcome of wealth-maximizing efforts of self-interested economic agents in society. They stress the extent to which public policy processes are driven by the pursuit, not of public or group, but of private interests (Hertog 1999). They see regulatory behavior not as imbued with public spiritedness but as a competition of power between interest groups. They try to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources. Social regulations are therefore seen as a necessary evil, as in the absence of government, the market would be monopolized, and information inadequacies and externalities would be left unattended (Hahn 2006). And where monopolies exist, markets fail as competition is deficient, and cannot act in the public good (e.g. to maximize profits, monopolistic firms restrict outputs and set prices above marginal costs).

Two main alternative views of the regulation of industry, however, are widely held. The first is that regulation is instituted primarily for the protection and benefit of the public at large or some large subclass of the public. The second view is essentially that the motives of the political process are easily defied as acts of virtue are easily comprised at the altar of bureaucratic or political self-interest (i.e. the desire to remain in office, to maintain political leverage).

The Chicago Theory of regulation and Capture theory are applicable to an interest group analysis of power and civic participation in the policy process on adult commercial sex work.

### 1.1. Chicago Theory of Regulation

The Chicago Theory of Regulation asserts that interest groups compete by offering political support in favour of favourable legislation (Peltzman 1976). It alleges that this is done through the guarantee of votes and provision of resources to politicians. It holds that regulation is most likely in these competitive settings as different interest groups compete for influence over regulation. Regulation is also more likely because of the huge loss that market failure inflicts on some interest groups.

### 1.2. Capture Theory

Capture theory highlights the extent to which regulatory developments are driven by the pursuit not of public or group but private interests, and therefore oppose altruistic theories of regulation (i.e. Public good theories) (Peltzman 1976). It makes the assertion that the policy process or regulatory process does not work in the public interest, but most times works for private interests who demand regulations, and is therefore an instrument of profit-maximisation. The theory holds that policy/regulatory processes are instituted as a response to the demands of profit (Stigler 1971).

According to Stigler (1971: 6) “Every industry or occupation that has enough political power to utilize the state will seek to do so in their own interests only and not necessarily in the public good.” So from this perspective, the policy process come to be controlled by industry due to the tightly focused orientation of interest groups, and is therefore created by captured legislators.

Regulatory capture is said to occur where, due to industry control of information and big capital, the effects of repeated interactions and career opportunism, the regulator comes to serve the interests of the regulated. In cases such as these, regulators do so through the introduction of direct subsidies, entry restrictions or tariffs, controls on substitutes, or price fixing. Industry is seen therefore as having a monopoly over public policy-making, and therefore regulation cannot and is not intended for the public good.

Consequently, the theory argues that it is of natural consequence that various interest groups are often absent, marginalised or muted from public policy processes, particularly ones that derive economic incentives for industry oligarchs. In addition, the policy process is seen as an instrument to serve the interests of those of industry (those who are regulated), and not just as a response to interest group demands. It argues that regulations through public policy processes are manipulated to meet economic/industry demands, and nothing more.

Economic theories of regulation have their sets of limitations, however. They do not address the political mechanism by which social regulation is achieved or how this mechanism itself influences the outcome (Hertog 1999). Contrary to implicit economic analysis, public policy analysis undoubtedly affirms that the policy environment is a dynamic and politically charged terrain. The mere existence of contending interests, (whether political, social or economic) means that the policy process cannot and is not a linear progression of rational thought.

## ***2. Pluralism Group Theory***

Pluralism is an American theory, which stresses the costs and benefits of interest group organisation and lobbying, and suggests that any contending group can win benefits from the state (Lobina 2003). It argues that neither individuals nor whole societies are significant political actors in the public policy process. Because public policy involves civic participation, particularly in advanced democracies, no group or political faction is powerful enough to dominate the others. It sees the actions of groups in pursuit of various interests as significant sources of policy formulation and the source of politics in the public policy process. It views the public policy process as a market place of more or less perfect competition, with slight deviations in cases in where democracies are not fairly advanced.

Secondly, it holds that public policy emerges as a compromise between various interest groups (Lobina 2003). This somewhat brings along a specific rationale: each group adjusts its stance to take into consideration the others to promote stability, because even if a group

loses out this time, this means it still retains the ability to fight another day (commonly known as Partisan Mutual Adjustment).

Thirdly, pluralism suggests that conflict and dialogue is a necessary precursor to policy formulation, and that these will lead to a definition and subsequent realization of the common good (Lobina 2003). It implies that the scope and content of the common good can only be found in pluralistic policy environments and after processes of conflict and negotiation amongst interest groups.

Classical pluralism does acknowledge, however, that politics and decision making in public policy are mostly located in governmental ranks, but it contends that many non-governmental groups can use their resources to exert influence.

The theory has been criticized for having a number of limitations. Apart from some obvious limitations, such as the assumption of equal access to the policy making arena, perfect competition, the fragmentation of the public policy process, and the neutrality of government, this approach appears to place excessive emphasis on the resources of pressure groups, in terms of leadership, funding and membership density (Smith 1993 cited Lobina 2003). It assumes exclusivity of the public policy process, and a policy environment in which everyone is free to organize for political purposes. Secondly, it assumes that the policy-making process cannot be monopolized by powerful political forces and naively so. Furthermore, it assumes the independence of interest groups from the state, as well that government is neutral in the policy process. It undermines that the state often does and can have biases in favour of some groups over others, that it is involved (actively or passively) in the conflict resolution processes, as well as might sees need to defend interests of its own. It also undermines the role of resources (whether real or perceived) and how pressure groups use thee to influence government.

### ***3. Special Interest Theory/Group Competition Theory***

Special Interest Theory, similarly to Group Competition Theory, was developed as a response to the Capture theory (Becker 1983). Both theories reject the theory's emphasis

on monopoly control of the public policy process through government regulatory agencies by a single narrow group of private interests, and assert that competition exists amongst pressure groups for political influence over public policy processes the view so that it regulates in their favour.

According to both theories, political influence over policy outcomes depends on a number of factors. Firstly, it depends on the efficiency of each group to exert pressure, the effect of additional pressure on their influence, the number of persons in influences groups, and the deadweight costs and benefits of policy outcomes (e.g. taxation, subsidies) (Becker 1983). They differ from Pluralism Group Theory, in that they recognise the possibility of dominance in the public policy process, but by interest groups either than government or industry. Secondly, they recognise that the success of pressure groups to push for favorable regulation is largely dependent on the political power of interest groups, the levels of efficiency in producing pressure, the size of the groups involved, and the relative value of expected benefits.

Both allege that governments, through the public policy process, often regulate in favour of the politically powerful; both of which are produced by competition for political favours. They use an economic approach to public policy that assumes that political choice in public policy processes are determined by the efforts of individuals and groups to further their interests.

Both theories also hold that competition between interest groups induces efficient and balanced policies and that, as a result, a large political representation of private interests ensures that policies are better aligned with social welfare.

#### ***4. Corporatism***

Corporatism holds that business, labour, and government are involved as partners in the public policy process, particularly economic policy, and primarily to promote cooperation between them so as to avoid class conflicts and promote economic growth.

Smith (1993: p. 8 cited Lobina 2003) puts it in the following terms, “For corporatism, the increased complexity of industrial society, combined with the concentration of power within particular groups, forces the state to incorporate groups into the policy process in order to ensure economic growth and to avoid class conflict”.

In the neocorporatist model of Group Theory, the state/government grants a monopoly of representation to certain peak associations in exchange for their cooperation in developing policy (Lobina 2003)

Corporatism is limited, however, as it follows the same philosophy of public interest theories, which assume that government engages the policy process as a neutral player, as merely a facilitator, and in the interest of public good (to improve social welfare). Secondly, the theory is based on the idea that the public policy process should only be used to in pursuit of public interest related objectives (common interests), rather than group, sectoral, or individual self-interests (Eerma nd). This has the potential of disadvantaging minority rights, whose interests might be overlooked in the face of common public resistance. Thirdly, it does not recognise that government can use the policy process to grant short term benefits to particular groups at the expense of others, and solely for the purpose of gaining long term benefits that will advance its own interests. It overlooks the possibility that the policy process can be manipulated and abused by the state to further its own interests.

### ***5. Common Agency Theory/Model***

Particular reference must be made to Martomot and Semenov’s Common Agency Model, as this model can be used to explain not just the nature of power/social dynamic between interest groups, but the direction in which these are likely to form.

The model holds, and in accordance to interest group theory, that polarized interest groups compete to influence a decision-maker through monetary contributions (Martomort and Semenov 2008). The difference is that it is able to predict direction and levels of participation by interest groups, and on the basis of knowledge asymmetries between the

policy decision maker and an interest group, provided that these are known by the interest group.

It holds, for starters, that decision-makers choose one-dimensional policy preferences and have private information about their ideal policy outcomes, which is informed by ideological incline (Martomort and Semenov 2008). It asserts that often at times, policies are systematically biased towards these. Secondly, it asserts that competition between interest groups under asymmetric information yields a rich pattern of signals to the decision-maker, strategies and payoffs to lobby him over. These signals most often can be detected by the decision maker for private consumption. The decision-maker will also send signals back to the interest group that will communicate degrees of ideological convergence or divergence. Asymmetric information therefore can create transaction costs in the relationships between interest groups and the decision-makers. This is evident particularly in terms of rent-seeking, in which the most extreme decision-makers or the most moderate ones may get information rent depending on the degree of ideological symmetry between decision makers and interest groups, and the importance of their ideological bias.

The model is useful as it can help predicts the level and direction of participation of interest group in policy processes. It predicts, for example, that interest groups will participate more actively when they have knowledge of the private preferences/interests of decision makers, and stop contributing when there is too much uncertainty on the decision-makers ideology, and when there is convergence of ideological symmetries between the decision-maker and interest group (Martomort and Semenov 2008). Under common agency, therefore, competing lobbying groups (the principals) design non-cooperatively contributions to influence a decision-maker (the agent). At equilibrium, all organized interest groups actively contribute whatever their ideological distances to the decision-maker. This decision-maker chooses which contributions to accept and the policy to implement. Put different, the model suggests that decision-makers (whether individual/as collective) consider the views of interest groups whose views correlate or are similar with theirs. Lobby groups will also identify legislators who share common

ideologies on issues, and make attempts to collude with them or to lobby for influence. The problem with this second part, however, is that it requires interest groups to know the private thoughts of decision-makers/ legislators' preferences. Maybe, it might not be too difficult to solicit these through design of contributions, whether cooperatively or uncooperatively). It also suggests that, under complete information, decentralised public policy processes can be efficient (i.e. the aggregate payoff of the grand-coalition made of all principals and their common agent is maximized). The predictive capacity of the model is particularly useful particularly in cases where there is incomplete but sufficient information for analysis. Casual and empirical evidence have proven that interest groups have limited knowledge on legislators' preferences, and it is not always easy to solicit these (Martomort and Semenov 2008). Imperfect knowledge therefore determines whether interests groups contribute or not and, if they do so, the size of their contributions. This theory thus provides a richer pattern of equilibrium behaviours than predicted by complete information models.

### **Policy implications**

There are a number of issues that emerge from the above literature, which paint a bleak picture of the future of civic participation in public policy in South Africa. Undoubtedly, the literature on power and social regulation give rise to a number of questions that should take dominance in policy discourse on adult commercial sex work.

Firstly, the fact that a public policy process intended for public good can be captured by monopolistic interests and may therefore be an expression of private interests only, makes a mockery of the letter and spirit of South Africa's public policy provisions.

The Constitution of South Africa impresses upon the National Assembly, as well as local government to involve interest groups and wider-communities in policy-making (Gumede 2008a). Policy-making institutions are required by law to facilitate public participation in the legislative and policy-making processes; and to conduct policy business in an inclusive and open manner.

Secondly, because the policy process is a contested terrain, smaller or weaker civic groups may easily be swallowed up by bigger players, and therefore lose equal footing to compete for favourable policy outcomes.

The above two realities raise deep concerns about the future of civic participation in policy process; raising doubts about the prospects of creating inclusive, people-centred, people-driven democratic policy mechanisms in South Africa, wherein all voices are heard

In approaching the policy discourse on adult commercial sex work therefore, policy-makers must consider the following critical questions.

- What is the role of public policy and the law in regulating adult commercial sex work? What are the constitutional obligations?
- What are the intended and unintended consequences of social regulation as it stands and in which ways should it be altered to maximize social welfare in the interests of the common good?
- Is there a legitimate need for a shift in social regulation or government intervention in this regard? If yes, Should regulations be intensified or should they be relaxed? What is the evidence?
- To what degree is regulation intended to appease economic interests or economic need versus protecting the individual and general public from inherent social harm(s)?
- How should social regulation respond to the socio-economic needs of vulnerable groups without compromising public interest?
- What are the dominant interests at play and how do this inflate or undermine the role of public policy in regards to adult commercial sex work?
- What mechanisms have been institutionalized in the policy process to ensure that smaller interest groups are not swallowed up by more dominant groups, that they too have full access to the public policy process, both in terms of participation and the opportunity to influence policy outcomes?

### Chapter 3: Research Methodology

A qualitative research design was used to unpack the power dynamics between interest groups who participated in the legal reform process and how these influenced policy outcomes. Qualitative methods of data collection were employed for collation purposes. Multiple data collection methods were used to collect qualitative data (*i.e. secondary desktop research and semi-structured interviews*). Please see annexure A and C for the interview schedule and the sample interview transcripts respectively.

The choice between qualitative and quantitative methods was determined by the research question. Whereas the aim of the quantitative approach is to test pre-determined hypothesis and to produce generalizable results ('what questions'), qualitative approaches proved more relevant in understanding the socio-political dynamics of public policy and how these manifest. Qualitative approaches answered not just the 'what' but the 'why' and 'how' questions. They helped solicit answers to public policy dynamics as they were lived in their natural settings rather than in artificial isolation.

Firstly, a thorough literature review was done to identify the major research themes on power, social regulation and sociology of adult commercial sex work. Secondary research was conducted to gain a perspective of the issues of sex work and regulatory imperatives. Secondary data was sourced from the electronic journals available from the University of Cape Town's e-library platform <http://www.lib.uct.ac.za/>. Secondary literature provided the contextual background to the question at hand and helped locate the pulse of social discourse on the subject matter, even as it spanned across two overlapping disciplines, namely political and social theory.

Secondly, semi-structured interviews were conducted with decision-makers, policy makers, and key actors who participated (directly/indirectly) in the public policy process. Semi-structured interviews provided the opportunity to understand organization-specific points of views rather than make generalisations about interest group behaviour. These provided much needed flexibility allowing one to probe for answers and ask follow-up

and/or clarity seeking questions. Semi-structured interviews also added depth to research findings, recording approximate accounts of the experiences of respondents with reduced bias from the interviewer. In this regards face to face interviews were held with critical role-players (i.e. the SALRC, Office of the Status of Women, Ministry of Women, Children and Persons with Disability, the National House of Traditional Leaders) and respondents who fell within ones geographic reach. As a consequence tele-interviews constituted the predominant mode of data collection; a strategy that proved successful particularly for the purposes of securing interviews and conducting follow-ups. From initial observation, most respondents demonstrated less resistance to 30 minute tele-interviews versus face-to-face interview sessions. This is attributable to the fact that face-to-face interviews tend to take up more time than tele-interviews. Tele-interviews not only proved beneficial because they were ‘easy on the pocket’ (when offset against transportation and meal costs) but could easily accommodate individual time constraints, conflating schedules and last-minute cancellations. However, the disadvantages of tele-interviews cannot be understated, particularly when it comes to reducing one’s ability to read nuanced subtleties of non-verbal communication. Arguably, however, it was possible to pick up and probe at subtleties when one picked up variation in voice intonations.

### *Sampling Method*

Purposive sampling methods were used to select respondents. These participants were chosen based on the extent of involvement in the SALRC consultative process, as well as the level of knowledge of policy debates and the role of interest groups in South Africa’s public policy process. As I was only able to attend only two of the country-wide workshops, a series of meetings were held with project lead members of the SALRC to get a picture of the types of interest groups that participated in workshops. The SALRC identified the dominant and minor players, individual and coalition groups, cooperative and competing groups, as they observed of the policy consultations they hosted. This list of players was verified with successive interviews with interest groups (i.e. SWEAT and the Godly Governance Network). All respondents were given opportunity to comment on the matter and to recommend important players who might have been left out erroneously.

Respondents themselves were given opportunity to recommend prospective respondents, allowing for a sampling method commonly known as snowball sampling. Respondents had to give due reasons for their recommendations. Ultimately, however, purposive judgment was used to determine who was eventually interviewed. This was done on the basis of a sample frame comprised of organizational types<sup>8</sup> drawn largely from the SALRC accounts of public participation. The SALRC account was verified by other interests groups as demonstrated by the common narratives on the matter. As a consequence, a broad enough range of respondents were selected. These were interest groups who had specific experiences of the SALRC public policy process as well as respondents with special expertise on adult commercial sex work and processes of legal reforms.

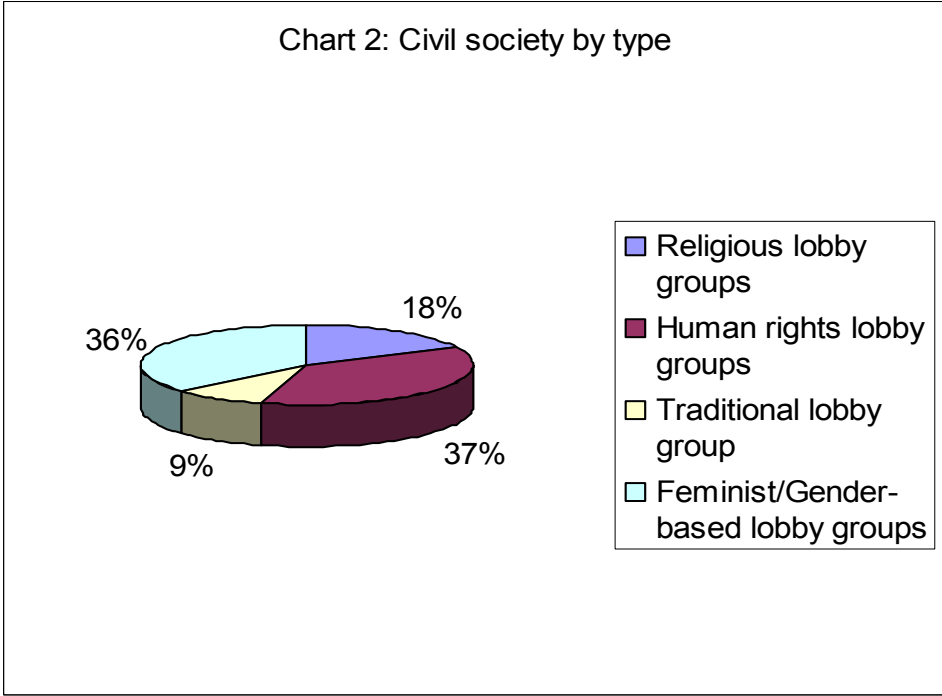
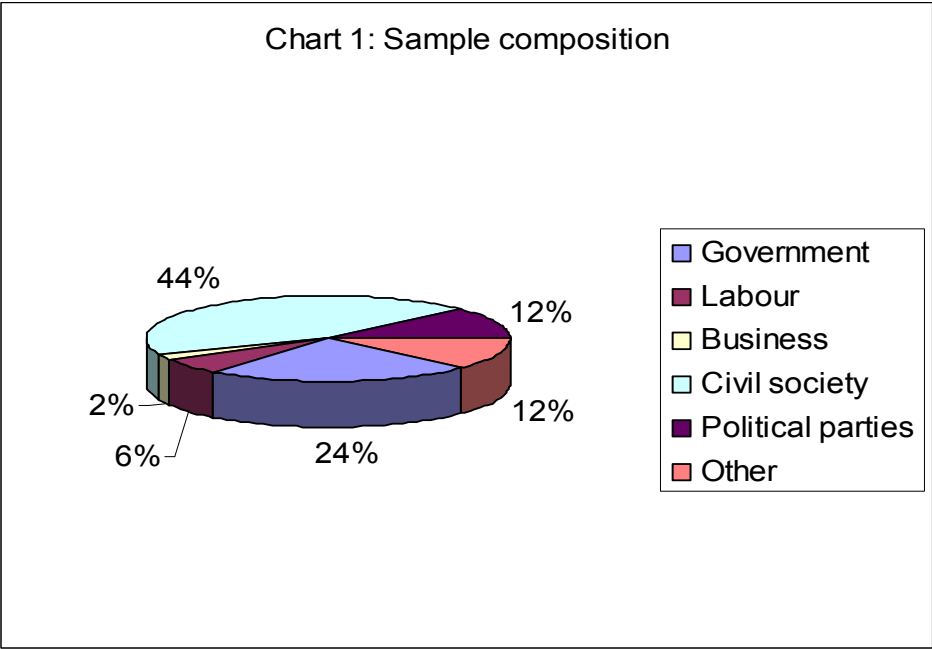
### *Sampling Composition*

Interviews were had with a variety of groups. A total of fifty (50) people were interviewed. The total number interview is a function of purposive judgement on questions of sampling composition and numerical ceiling<sup>9</sup>. For the purposes of analysis, interest groups have been divided into the following lobby groups, namely; *government, labour, business, political parties and civic society*. *Civil society can further be broken down into the religious and traditional lobby, human rights lobby and Gender-based/Feminist lobby*). Chart 1 below shows that civil society constituted the largest portion of the sample group. This is largely due to the extent of their participation in the public policy process. Chart 2 shows the breakdown of civil society by type. The religious community constitutes the biggest component of the civic lobby group. It is comprised of allied Christian/Muslim/Jewish/Hindu churches and associations. Please refer to annexure B for the full list of respondents.

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<sup>8</sup> The sampling frame, which categorized interest groups proved particularly useful for the purposes of analysis.

<sup>9</sup> In the case of the numerical ceiling, capping decisions had to be made particularly in the face of time constraints



*Questions – Themes, Structure and Frame*

Semi-structured interviews allowed for a fairly open framework appropriate for focused, conversational, and two-way communication. They gave the flexibility needed to probe

for details and discuss issues. Open-ended questions were asked to allow for detailed recollections of interest group participation. Questions were simple, unambiguous and straightforward to avoid misinterpretation and biases. Respondents were asked to give respective organisational positions on regulatory questions on adult commercial sex work. They were also asked to respond to questions that would solicit responses to questions of interest, strategies and tactics, and the distribution of power in public consultations.

The fieldwork for the project began on the 1st of October 2009 and finished on the 30 of June 2010.

### *Means of Data Analysis*

A review of all material and all notes were taken to identify key and recurrent themes that emerged during the process of enquiry. Key concepts, issues and themes were sifted and sorted, examined and referenced according to the thematic areas identified in the proposed table of contents. The thematic framework, however, was subjected to a series of amendments as and when were deemed necessary, particularly as new themes emerged. Logic and intuitive thinking was used to make judgements on meaning, relevance and importance of issues, and implicit connections between circumstances and ideas, attitudes and behaviours. Data (i.e. emergent issues, recurrent views, and analytical themes) was then represented descriptively and analytically and for the purpose of explaining the nature and direction of social dynamics between interests groups in the public policy process.

### *Research Challenges*

The issue of sex work has been a highly topical issue in South Africa. This has been the case particularly in the context of the foregone 2010 Fifa World Cup and increasing demand for legislative reforms. As a consequence, due to the contentious nature of the chosen topic, it was often difficult to get access to person(s) who are at the heart of policy decisions on the sex work i.e. African National Congress. There were also instances wherein interest groups possibly gave politically correct responses, modifying their responses in order to avoid backlash from political principals. A case in point is that of

Government official(s) who had great incentive to give inaccurate or artificial answers for the purpose of shielding government from possible criticisms. Government institutions were also more inclined to give politically correct answers for the purpose of diversion. All of the above tempted to undermine the validity of findings. As a countervailing force therefore, multiple stakeholder interviews were conducted to gather primary data. Multiple or differently phrased questions were also used to query aspects which are considerably controversial. Interviews were also supplemented with analysis from secondary research, as well as document analysis where necessary.

Secondly, there were definite yet minor challenges in regards to the design of an ethical and non-exploitative study of this nature. The most serious in this case was strongly related to issues of ethics and sampling of sex workers themselves. However, because of the lead role played by SWEAT in the policy process, it was possible to solicit the views of a sizeable portion of sex workers. SWEAT served as a representative body availing itself as a mouthpiece of a considerable portion of South African sex workers.

Thirdly, due to the number of sources used, the volumes of collated data tended to be vast and extensive in nature. The huge volumes of data often posed serious challenge in how data was organised and structured. A funnel method of structuring raw data by themes was therefore used to allow ease of analysis. Sufficient time was allocated to allow for comprehensive analysis of collated data.

### *Ethical Considerations*

Ethical considerations in social research are highly important as non-compliance can compromise the integrity of one's study (Moutton and Babbie 2001). A researcher must always be cognisant that ethical issues are centred round individual and collective rights. Whilst social scientists have a right to pursue truth, in the same breath, they also have a duty not to violate the rights of others (namely, the right to privacy, to choice, and all rights enshrined in the South African Constitution).

As a researcher therefore I committed myself to the undertaking of a research study that is informed and driven by principles of confidentiality, anonymity, voluntarism, dignity, honesty and truthfulness. Under no circumstances was confidentiality and anonymity breached. Permission had always been granted prior from respective respondents. Participants were informed of the rights to voluntary-participation, to anonymity and confidentiality. A section of the research has already disclosed the methodology employed and tools of analysis of the study. This section discloses its limitations, particularly methodological constraints in the broader interests of accuracy in the pursuit of scientific truth.

## Chapter 4: The World of Sex: The South African Experience

Chapter 4 represents a thematic synthesis of the socio-context of the South African sex industry. It presents *secondary data* which has sourced by means of literary review. It serves as a necessary backdrop to understanding the complexities of South Africa's adult commercial sex industry. Most importantly, it provides the backdrop to understanding implications of the discourse on adult commercial sex work, which is explored in depth in chapter 5.

### *Sector Profile – The South African Experience*

Adult commercial sex work in South Africa encompasses a broad range of activities and enterprises, which include the adult pornographic media industry, massage parlours, live performances such as 'strip' shows, brothels, escort agencies and outdoor or street sex work (SALRC 2002). The configuration of the sex trade in South Africa varies therefore from formal structures such as escort agencies, massage parlours and private brothels to less structured groupings such as street-sex work operating in 'twilight zones' which include truck stops, shebeens/taverns, mines, and isolated places such as parking lots or national roads (Luiz et al 2000). Sex workers therefore can range from escorts and masseuses, call girls/independent contractors, to street sex workers. Mobility between these forms of sex work is astonishingly low. The sex-industry is therefore very diverse. It is literally a world in one country. There are male and female sex-workers (heterosexual, homosexual and transgender) across all racial, religious, economic, social and cultural lines all operating in South Africa. It should be noted that although the majority of persons working as sex workers in South Africa are women, there is also a significant percentage of male and transgendered sex workers. The number of women making use of the services of sex workers is negligibly small. Their clientele also represent all sectors of society. Amongst client ranks are domestic and foreign businessmen, domestic and foreign tourists, seamen, and migrants.

Although the sector of the adult commercial sex industry generally referred to as 'sex work' is formally criminalised, it can be argued that the system in practice is a hybrid

mixture of criminalisation and legalisation. The adult pornographic media industry, for example, can to a large extent be described as legalized as the Films and Publications Act No. 65 of 1996 provides for the lawful possession, distribution and exhibition of adult pornographic material, provided that these actions take place within the framework constructed by the act. There are also instances where criminal prohibitions, though formally in place, are not enforced by police or the prosecuting authorities.

Davidson and Taylor (1995) assert that world-wide, the commercial sex trade is parasitic upon human misery. Studies have shown that the vast majority of sex workers both coming from first-world or economically developed and underdeveloped countries have been forced into sex-work due to a combination of a variety of factors, which often include socio-economic necessity and desperation and sexual abuse. Sex-work is at the very best, a job which is tedious as well as intrusive and demeaning. At its worst, it is one that involves the repeated experience of violence and personal violation, physical threat and disease, emotional pain and degradation. Research confirms the trend that sex work is often accompanied by rapes, robberies, and inevitable beatings, shouts of “bitch” and “whore” and “slut”, gratuitously meted out by pimps, by johns and by the police (Pauw and Brener 1997).

Carter and Giobbe (cited SALC, p 60, 2002) add; “There are the commonplace insults to injury that are directed at sex workers simply because they are sex workers.” Sex-workers also experience serious discrimination and social alienation and rejection throughout all sectors of society, even from their own clientele, for various social, cultural and religious reasons. Police are also notorious harassers of street sex-workers, and often demand sex in exchange for indemnity. Laws are often selectively enforced against street-based sex workers particularly. It is argued that it is the poorest of the sex-workers who bear the brunt of such harassment. To ward off violence and theft, some sex-workers often operate through pimps who facilitate their livelihood, such as hotel employees, bartenders or taxi drivers in exchange for sharing their earnings. These relationships are reported by as seldom exploitative and abusive (Pauw and Brener 1997). Most sex-workers do not even have access to health-care or programmes related to STDs and HIV/Aids (Luis et al 2000).

In South Africa, the sex market is characterized by gross income inequalities and service differentiation. Luiz and Roets (2000) found in their study that call girls and escorts, for example, can earn in excess of R10 000 a month, whilst the sex-workers working from taverns and shebeens can charge as little as R20 per session. Payments are negotiable between the sex-worker and the client, and amounts depend on the socio-economic status of the sex-worker and the type of client. Rewards for sexual services are not necessarily financial, and can include special goods such as clothing or jewellery, special work-related rewards, transport, and drugs and alcohol can also serve as a form of payment. It is often the material needs of sex-workers that will determine the number of clients, which can vary from 1-2 per day to as many as 15-18 per day, depending on the payment and the sexual act. It is believed that gross earnings of sex-workers in industrialized countries are on average five to 10 times the minimum wage, and can average as much as the earnings of lower professionals i.e. teachers, nurses, police. The issue of earning inequalities within the same industry is but one challenge out of many in the sex-industry.

As diverse as the South African sex-trade is, it is increasingly becoming evident that certain types of sex-workers tend to be more synonymous with particular forms of sex-work. South Africa's sex industry is visibly segregated and therefore 'racialised' to an extraordinary degree. Davidson and Taylor (1995) found that the women working in the least oppressive settings were almost exclusively white or coloured. They found no evidence of commercial sex-work by black women. Likewise, in the bars and nightclubs where independent sex-workers trade, the women employed to perform striptease acts were invariably white, and the vast majority, often 100% of the women and teenagers (who could easily earn up to R1200 a night) were white and coloured. At the bottom end of the sex-work market, the racial composition of the 'workforce' was almost reversed. The young street-sex workers that worked by gangs were almost exclusively black and coloured. And the children in dilapidated brothels were rarely ever white. According to Davidson and Taylor (1995), South Africa's sex industry is made even more unpleasant by the fact that it finds its current form as informed in part by the legacy of the apartheid regime. It therefore not only exploits the poverty and the absence of alternative economic

opportunities for women and girls, but feeds on the human suffering caused by the apartheid regime's particularly brutal distillation of racism, sexism and homophobia.

As the South African sex industry is visibly segregated and 'racialised', the conditions of work vary therefore and are interplay between social and environmental factors, and therefore risk and vulnerability can vary considerably. Because the ecology of risk varies from sex work type and location within the Industry's hierarchy, street sex workers particularly are at higher risks in terms of losing social services and support structures (Sloan 2000). Street-based sex work occupies the bottom-rung of the sex-for-pay industry, and is associated with higher levels of arrest (because of visibility), drug-use, violence, social marginalisation, higher HIV/Aids and STI prevalence rate, and lower earnings. Out-door sex workers can also be categorised into two distinct groups: 'fast living' and 'subsistence' sex workers (Legget 1999). Fast living sex workers are characterised by higher client volumes (i.e. 80% have more than twenty pw), higher rates of sexual services, higher incomes (i.e. more than R4000 pm) and higher levels of drug abuse, are often white and older, and clustered in the inner-cities and residential hotels. Subsistence sex workers, on the other hand, are often black, live in informal settlements, found in remote areas, truck zones, and townships, and support families with their earnings (i.e. less than R200 pw, seeing less than ten clients per week). Out-door sex workers, however, unlike indoor sex workers, do have the advantage of choosing their client-base, are not subject to the control of management, neither are they obliged to adhere to agency codes of conduct/rules or performance measures.

Due to the fact that sex work is criminalized, basic conditions of work are not regulated and are therefore often unfavourable to sex workers, even with the case of indoor sex workers (SALRC 2002). Indoor sex workers, for example, are not legally entitled to medical aid or pension fund, paid annual leave and sick leave, maternity leave, overtime pay, paid public holidays etc. Neither do they have legal recourse for unfair dismissals nor unfair labour practices. Bargaining power and bargaining rights are located largely within the realm of management. The fact that adult commercial sex work is currently illegal, however, has not prevented efforts aimed at setting industry standards; neither does it

deny sex workers the rights to fair labour practices as enshrined in labour legislation (LAC 2010). In October 1999, for example, a code of conduct was drafted for male escort agencies in Cape Town. This code set out standards agreed to by agency management, sex workers and SWEAT, and included the following: (i) theft or extortion from clients will lead to dismissal of the masseur; (ii) no drugs will be permitted on work premises; (iii) managers must check the identity documents of sex workers to ensure that they are over the age of 'consent'; (iv) and sex workers must practice safer sex at all times. This includes using a condom, even for oral sex; (v) sex workers will be given a copy of the agency's rules and the penalties for breaking them; (vi) core working hours will be established and masseurs will be given time off from work; (vii) and minimum prices will be explored so that reasonable prices will be paid for services offered. No regulatory body exists, however, to deal with violations of this code of conduct. The establishment of such is highly unlikely due to the illegal status of the industry.

A further factor to be taken into consideration when fully conceptualising the nature of sex work in South Africa is the fact that sexual services are occasionally rendered for rewards other than financial (monetary) reward, such as food, clothes and accommodation (SALRC 2002) There are less traditional forms of sex work are practiced in rural and township areas. According to Wojcicki (2002), gives an account of sex-for money exchanges in Soweto and Hammanskraal's taverns/bars/shebeens that take place outside of traditional commercial sex work (Wojcicki 2002). He argues, for example, that women who exchange sex for money in taverns do not self-identify as commercial sex workers and experience less stigma from the communities from which they come. Unlike commercial sex work, which is understood to be associated with short skirts and other revealing attire, sex-for-money exchange in the taverns is viewed as more private, ambiguous and informal. Women who work as informal sex workers, or "-phandela imali" ('try to get money'), are understood to be using sex-for-money exchange to survive financially. This type of sex work is predominant in townships and rural South Africa, where young women are often obliged by family to give of themselves sexually to known men (often older and wealthier) in exchange for financial or material rewards that cover the subsistence needs of their families. It is similar to the subsistence sex work referred to

by Leggett, and refers to the type of sex work often described as “transactional sex,” “survival sex” or “informal sex work” by ethnographic and HIV/AIDS literature from sub-Saharan Africa. This distinction is important in the context of regulations, as these constitute as the statistically hidden types of sex work, existing within a particular cultural context. It is particularly important in relation to the conceptualisation of sex work in rural/semi-urban South Africa.

It is important to highlight, however, that research work on the South African industry has tended to focus narrowly on the subject matter. The first criticism that can be lodged against sex work research in South Africa is its narrow focus and emphasis on the supply side of the sex trade. Few studies have addressed the demand side of the market e.g. by customers (May 1999). Though there are studies that have investigated the reasons for the use of sex-workers and the specific sexual behaviours of customers that govern the manner in which customers engage with sex workers, few have contributed towards identifying interventions, remedial treatment and public policy issues in this area.

Secondly, whilst the sex industry is a heterogeneous one, most research has focused on female adult commercial sex work. Little to no work has been done on homosexual, transvestite, and transsexual sex workers and most likely because female sex workers comprise the largest component of the industry. This, however, has implications on one’s ability to fully comprehend the intrinsic dynamics of the industry, particularly in as far as the following issues are concerned:

- Relative risk-behaviours amongst homosexuals, transvestites and transsexuals, particularly in relation to HIV/Aids, drug-use and alcohol abuse;
- Prejudice, stigma, and violence against homosexuals, transvestites and transsexuals in the sex industry;
- Nuanced distinctions and variations in the experience of sex work or conditions of work.

Thirdly, work related issues have hardly been investigated by South African researchers, this probably owing to the illegal status of sex work in the country. Issues regarding social

and legal status, working routines, risks and stresses, and managing risk, work and identity have largely been in the domain of European and Eastern literature on sex work. This is a point of concern, particularly in light of the debates to decriminalize sex work, and to recognize it as another form of work.

Little or no research has been done also on the correlation between sex work and human trafficking in South Africa, and whether or not it is possible to regulate the South African sex industry without correlative increases in the levels of human trafficking. This is probably attributed to the fact that sex workers constitute the ‘hidden population’ due to the illegality of sex work. Proponents of decriminalisation have often argued that the inability for opponents to distinguish between “legitimate” forms of sex work (individual choice/protected work conditions/powers to negotiate favourable conditions) and its criminal elements (child pornography, human trafficking) is what has caused conflation in policy matters. Opponents, however, have argued that there is a strong interface between ‘legitimate sex work’ and sex crimes, a consequent also of the inherent vile nature of sex work. Such distinctions have been seen as meaningless to women and children in positions of trafficking, as clients often do not distinguish between voluntary and trafficked sex workers. The demand that leads to human trafficking is exactly the same as the demand for sex work. Issues of human trafficking and sex work therefore remain important consideration, particularly in light of proposed legislative reforms.

These research limitations make it difficult therefore to comprehend the varying dynamics and high complexities of adult commercial sex work, and how these should shape policy outcomes.

### ***Current Legal Regime to Address Sex work***

The South African legal system’s response and approach to sex work has evolved over the decades from a purely regulatory one to one that combines both prohibitory and regulatory elements of law (Milton 1993). The absolute prohibition of commercial sex work is actually a fairly recent phenomenon in South Africa. Adult commercial sex work has been the subject of legislation in South Africa since 1868, when the Cape government

promulgated the Contagious Diseases Prevention Act of 1866. Under this legislation, sex workers were required to undergo compulsory medical examination for venereal diseases. Following this was the passing in 1882 of the Police Offences Act No.44 of 1935, which prosecuted sex workers who loitered in public places for the purposes of sex work or solicitation. In 1893, the Cape Parliament passed legislation aimed at eradicating child sex work. The regulation and prohibition of sex work in the Cape colony consequently resulted in the migration of sex workers and pimps to other colonies i.e. Transvaal and Natal. The colonial governments therefore followed the legislative direction of the Cape colony and passed legislation to regulate brothel-keeping, pimping, the enslavement of females and children as sex workers, and the procurement of sex workers. All these colonial enactments remained in force until they were repealed by the promulgation in 1957 of the Immorality Act No. 23 of 1957, now termed the Sexual Offences and Related Matters Amendment Act No. 32 of 2007. The thrust of the Sexual Offences Act No. 32 of 2007 prior to 1987 was therefore to prohibit aspects and manifestations of sex work in the public interest and not to prohibit sex work as an occupation. Until 1987, engaging in sexual intercourse in order to receive a material or pecuniary reward was not prohibited by law. But the enactment of S<sup>10</sup>20 (1)(aA) of the Act in 1987 provides that:

‘Any person who...has unlawful carnal intercourse, or commits an act of indecency, with any other person for rewards, shall be guilty of offense’

When enacted, the act sought to regulate sex work by prohibiting all activities except – notably - “engaging in sexual intercourse in order to receive a material (non-monetary)... reward” (Combrinck 2000).

In 1988 the Act was amended to reflect a less permissive view regarding the act of sex work itself. The amended version of the Act, still currently in effect, continues to criminalise numerous aspects of the adult commercial sex working industry, including:

- Living wholly or in part off the proceeds of sex work (criminalising sex workers and their families or pimps);

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<sup>10</sup> S a legal abbreviation for the word ‘section’.

- Keeping a brothel (criminalising pimps: management in escort agencies/massage parlours; residents of brothel, family members of brothel owner);
- Procurement of persons (for the purpose of pimping them to a third party).

Two further aspects of the amendments of 1988 are noteworthy:

- The inclusion of a new amendment specifically prohibiting soliciting
- The continued exclusion of any reference to criminalising clients for using the services of sex workers.

This meant therefore that it is a crime to sell sex, or to make a profit from somebody else selling sex, or to live off the earnings of a sex worker (Milton 1993). The penalty of violation is imprisonment for a period not exceeding 3 years ‘with or without a fine not exceeding R6000 in addition to such imprisonment’.

There are various other pieces of legislation that are also aimed at regulating commercial sex work related activities. These include the National Health Act No 61 of 2003, National Roads Act No. 7 of 1998, Aliens Control Act No. 96 of 1991, Child Care Act No. 38 of 2005 and various municipality by-laws prohibiting designated activities if performed in public.

It is important to note however that S20(1)(aA) was enacted amidst a cloud of controversy. The South African Parliament passed the section despite recommendations by the Ad Hoc Committee of the State President’s Council, which was appointed to make recommendations on the effectiveness and efficiency of the Immorality Act. In its report to the State President, the committee highlighted that sex work can never be eradicated by measures under criminal law, and therefore criminal law is not an appropriate mechanism to addressing issues related to commercial sex-work in particular. It submitted that it had evidence to prove that penal provisions under criminal law in actual fact do little to prohibit commercial sex work.

S20(1)(aA) has received much criticisms for various reasons. Proponents of decriminalization have argued that sex work can never be eradicated by measures under criminal law, and therefore criminal law is not an appropriate mechanism to addressing issues related to commercial sex-work in particular (Milton 1993). Penal provisions under criminal law in actual fact do little to prohibit commercial sex work.

Secondly, the current legal framework is seen as having unintended negative consequences particularly on the well-being of sex workers. It is said to criminalising sex workers, who are merely victims of socio-economic disadvantage; encouraging stigmatization and discrimination against sex workers, which limits their access to social justice, public healthcare, general social security and basic human rights; undermining public health outcomes and initiatives; setting the conditions for police corruption and control of local industries; failing to regulate working conditions, particularly in relation to occupational health and safety issues; as well as forcing sectors of the sex industry underground, and encouraging the proliferation of undated organized crime. Criminalisation of sex work is also purported to violating a number of constitutional rights i.e. fair labour practice (S23(1)).

Thirdly, it is seen as representing a double standard in the policing of commercial sex work by failing to create an offence against clients of sex workers. It is important to note, however that the Sexual Offences Act was amended in 2007 as a corrective measure and now includes the prosecution of the client as well.

The philosophy underpinning criminal law against sex work is also perceived as being motivated largely by moral justifications whereas morality is understood generally as not absolute. Proponents of decriminalization of sex work have argued that the various rationales for prohibiting commercial sex work by law makers are largely based on traditional concepts of morality, and that none of the rationales take into account the experiences of commercial sex workers or various feminist perspectives on commercial sex work (Malepe 2000).

Police enforcement S20(1)(aA) of the Sexual Offences Act No. 32 of 2007 is also inconsistent and/or indifferent. Though criminal prohibitions are formally in place, these are not often enforced by police or the prosecuting authorities (Luiz et al 2000). Escort agencies have, for example, successfully circumvented the law, and sex workers have in actual fact used these agencies to build up their own client-base whilst operating from their apartments, which has made policing almost impossible. This is compounded by the fact that it is often very difficult to use the Act to successfully convict people as it is often you would have to catch perpetrators in the act of carnal sexual intercourse' (Vanwesenbeeck 2001). Police or law enforcement officers tend to rely therefore more heavily on municipal by-laws, charging street sex workers under municipal by-laws for activities such as loitering, public indecency and being a public nuisance. So laws are selectively enforced, and primarily against street-based sex workers who are more visible than out-door sex workers. So it is the poorest of the sex-workers who bear the brunt of such harassment.

Regardless of the above legal constraints, criminal law in South Africa continues criminalises sex work. The act of criminalisation is seen as a social mechanism that is used to coerce members of society, through the threat of pain and suffering, to abstain from conduct which is harmful to various interests of society (Milton 1993). Its object is to promote the welfare of society and its members by establishing and maintaining peace and order. It is generally argued that criminalisation of sex-work is necessary as the primary function of criminal law is to preserve public order and decency, to protect citizens from what is injurious or offensive and to provide safeguards against the exploitation and corruption of others. Law makers have advanced various rationales for prohibiting commercial sex work, most of which have found basis on traditional concepts of morality which include (i) prevention of sexually transmitted diseases; (ii) immorality; (iii) the prevention of public nuisances; (iv) and crime prevention. Those who have advocated for the criminalisation of commercial sex work often express the moralistic and feminist position on sex-work (Artz 2000). Arguing mainly:

- on the basis of health and safety concerns; it is alleged that sex-work encourages the spread of sexually transmitted infections, the increase of drug use, child exploitation, moral decay and the rise of crime levels generally;
- that sex-work, through its violence and coercive practices, is a negative expression of sex and represents social deviance;
- that sex-work is inherently exploitative and degrading, subjecting women often to sexual subordination, irrespective of whether sex-work is forced or voluntary;
- that it is associated with sexual abuse, rape and physical violence;
- that decriminalisation ignores that sex workers may not necessarily have a choice and even control over their own sexual practices and individual agency; and
- that it is dehumanising as it puts a market or economic value on sex and on women i.e. commodifies sex and women.

There is a view by the British Wolfenden Committee on Homosexual Offences and Sex work, however, that “it is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular behaviour beyond what is necessary to carry out the functions outlined” (cited SALRC 2002: p. 36). The Committee asserts otherwise that the function of the criminal law should be limited to preserving public order and decency, to protect citizens from what is ‘offensive or injurious’ and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable, which would include sex workers. The Committee even refers to the importance that society and the law should give to individual freedom of choice in matters of private morality stating that “Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”

Lord Devlin, (cited SALRC 2002), gives a counter-argument affirming that the ‘loosening of moral bonds’ is often the first stage of disintegration of a society, and therefore society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions: “The suppression of vice is as much the law’s

business as the suppression of subversive activities...”. His argument however is criticized for its lack of empirical evidence and as making the assumption that ‘a change in morality is tantamount to the destruction of society’. The criminalisation of sex work is seen in the same light as the criminalization of homosexuality, merely as the criminalization of conduct which fails to conform to the moral or religious views of a section of society. It has been argued by Almodovar, cited in the Commission’s report, that societal disapproval of certain activities or practices should not necessarily mean that these activities should also be criminalized, penalised or prohibited.

Ackerman and Goldstone<sup>11</sup> (cited SALRC 2002: p. 38), on the other hand, commenting on a Constitutional Court judgment (*S v Jordan and others*), emphasize that the Constitution does not debar the state from enforcing morality. However, he does add the following cautionary note:

“What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.”

The Constitutional Court (Ackermann et al cited SALRC 2002) also posits that under common law and S39(2) of the Constitution policy decisions and value judgments have to reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people. However, a balance has to be struck between the interests of the parties and the conflicting interests of the community according to the court’s perceptions of what justice demanded. They suggest that the above concepts should be replaced, or supplemented and/or enriched by the appropriate norms of the objective value system embodied by the Constitution of the Republic.

### ***The Law-Making Process of South Africa***

The process of making law in South Africa is an extensive one, involving a number of structures and consultative processes with various interest groups, civil society in

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<sup>11</sup> Constitutional Court judges

particular. The Constitution attempts to protect the continued involvement of the public and civil society in governance in various ways. It is committed to access to information and just administrative action (Jagwanth 2003). It dedicates a chapter to the basic values and principles of public administration in South Africa, including transparency and the right of the public to participate in policy-making. Several state institutions supporting constitutional democracy are also set up in terms of the Constitution. These are independent, and ‘subject only to the Constitution and the law’ (S181(2)). They are accountable to the National Assembly and must present a report on their activities and performance of their functions annually (S181(5)). Among these institutions are the Human Rights Commission, the Commission on Gender Equality and the Public Protector (a type of ombudsperson). Legislatures at national and provincial level are also constitutionally required to facilitate public involvement in their processes. To illustrate, S59 of the Constitution provides as follows:

‘(1) The National Assembly must

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner and hold its sittings, and those of its committees in public

(2) The National Assembly may not exclude the public, including the media, from sittings of its committee unless it is reasonable and justifiable to do so in an open and democratic society.’

Similar provisions are contained for the National Council of Provinces (the Upper House of Parliament loosely based on the German Bundesrat) and the provincial legislatures. It is clear from the above that the Constitution appears to envisage a continued relationship of cooperation between state and civil society. This relationship is premised on civil society having a crucial role to play in service delivery and policy-making with the state, where similar goals of transformation and change are shared. Seen in this light, a relationship of cooperation may have many advantages, and can greatly assist in socioeconomic delivery in South Africa.

Normally, by the time the draft legislation reaches parliament (from government departments), where it is tabled as a Bill, it would have gone through a lengthy consultative process. The process generally begins with a discussion document, called a Green Paper. This will be drafted by the Ministry or Department of Justice, with an aim to demonstrate the way that the ministry or department is thinking on a particular policy. The Green Paper will then be published so that interest groups can further make comments, suggestions and ideas. The Green Paper process will be followed by a more refined discussion document, called a White Paper, which is a broad statement of government policy. Comment may again be invited. The relevant parliamentary committees may also propose amendments or other proposals and then send the policy paper back to the ministry for further discussion and final decisions. Once approved by the Law Commission and Cabinet, the White Paper will be sent to the State Law Advisers who will assess the legal and technical implications of the draft law. Only after all these processes will the White Paper be introduced in parliament as a Bill. Departments are required to submit an explanatory memorandum to indicate the extent to which interest groups were consulted and public commentary was considered. Although the law is passed by parliament in sittings of the two houses, i.e. the National Assembly and the National Council of Provinces, it is only at Cabinet level and its committees and clusters where the details of the draft law will really be examined. Outside the state umbrella, there are also a number of institutions, bodies and agencies that are active role-players in policy making processes. The National Economic Development and Labour Council (NEDLAC) is one body through which government comes together with organized business, labour and community groupings at a national level to discuss and try to reach consensus on issues of social and economic policy.

Parliament, however, through its two houses, plays a critical role in determining policy outcomes. At the highest level, like in many countries, the national legislative authority in SA is vested with Parliament which consists of two houses: the National Assembly (NA) and the National Council of Provinces (NCOP). The Constitution of South Africa describes the National Assembly as a body elected to represent the people and to ensure

government by the people. Whilst, its other functions include holding the executive accountable, fulfilling a judicial role; functions relating to its own activities, and considering public petitions from the members of the public; the most important function of the NA is to pass legislation with regard to any matter. In exercising its legislative power, traditionally the National Assembly may consider, pass, amend or reject any legislation before the Assembly; and/or initiate or prepare legislation. The National Assembly is required to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation; as well as that of any organ of state. As provided for by the Constitution, the NA is also required to facilitate public involvement in the legislative and other processes of the Assembly and its committees; and to conduct its business in an open manner, and hold its sittings and those of its committees in public. It is however said that reasonable measures may be taken to regulate public access, including access of the media. On the other hand, the National Council of Provinces (NCOP) represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. The NCOP carries out this mandate by participating in the national legislative processes and providing a national forum for public consideration of issues affecting the provinces. In exercising its legislative power, traditionally the NCOP may also consider, pass, amend, propose amendments to or reject any legislation before the Council, and initiate or prepare legislation falling within a functional area, but may not initiate or prepare Money Bills. As in the case of the NA, the NCOP is required by law to facilitate public involvement in the legislative and other processes of the Council and its committees in a regulated manner.

It is hard to gauge the role of parliament in policy making, with sufficient certainty. With regards to legislation, parliament plays a leading role, even to the point of drafting legislation<sup>12</sup>. Parliament has numerous committees and sub-committees that oversee policy matters in relation to each government department. There is no documented evidence on how that works in practice and what its outcomes have been. From personal

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<sup>12</sup>The most recent (2008) significant examples include the legislation dissolving the Directorate of Special Operations and the legislation setting up the National Youth Development Agency as well as the *Draft Money Bill Procedure and Related Matters Bill*

and professional experience, an observation can be made that such committees and sub-committees do indeed play an important oversight role in the policy making processes or in policies that government departments pursue as well as their implementation. There are examples of parliamentary discussions on a number of critical areas, such as the millennium development goals, which culminate to parliament taking decisions on its role on such matters at least in relation to programmes/projects in respective members' constituencies. However, decision-making powers seem to be located largely at a political level. For instance, all parliamentarians on the side of the ruling party get involved in most policy discussions in various platforms of the ruling party – traditionally, since 1994 or so, there are policy discussions in the ruling party which inform policy thinking in government in South Africa. Overall, however, many are of the view that parliamentarians, researchers/academic scholars, traditional leaders and others that can inform policy are not systematically involved in the policy making processes and implementation as well as in monitoring and evaluation.

#### *SALRC Public Policy Process and Group Participation - Major Concerns*

##### *(i) Absence of Voices from Rural Communities*

There are a number of key groups that have raised other concerns about the role of some interest groups in the public policy process as led by the SALRC. As is often the case, a number of interest groups (i.e. traditional leadership), allege that suburbia South Africa continues to be overly represented in public policy processes. Rural or traditional networks continue to be marginalized. Rural or traditional voices of local communities are often not heard, unless they are organised by and have views that are endorsed by South Africa's political and economic elite. The fact that only the 1st 100 RSVP would be considered eligible to participate also meant that only those with access to electronic and print media (fax, email, telephones) would have easy access to contribute towards shaping policy outcomes. It is often the educated or the earned who have access to public information (particularly print and electronic media), public spaces and who dominate public domains and policy outcomes. It is not surprising therefore that the traditional leaders in the Eastern Cape's Umthatha have expressed grievance about the extent to

which traditional South Africa has been given due regard and space to influence policy outcomes.

The South African Law Reform Commission has been accused by traditional leaders of marginalizing traditional/rural voices. CONTRALESA and the National House of Traditional Leadership both hold that the role of traditional communities has been undermined, despite their constitutional rights to participate in public policy processes to influence outcomes. The SALRC consultative forums have also been criticized by CONTRALESA for their top-down approach, the use of technocratic or overly legalistic language, as well as for their sole use of English as a means of communication. Both organizations account to not having received formal invitation to participate in SARLC workshops. Debates of consultations were heard merely as hear-say and as debates evolved in forums organized by national broadcasters. Consequently, neither of these 2 groups participated in the workshops. Neither did they make paper submissions to help shape policy outcomes. This is a serious concern bearing in mind that rural poor communities are the most affected by and most vulnerable to the problems of sex work. “That is why the voices of the rural peasantry will continue unheard and unabated”, argues the Chairman.

The extent to which the SALRC interfaced with local communities and rural networks must receive due attention. Broader local forums for more inclusive and participative social dialogue (i.e. Izimbizo, community forums, local wards) should have been used to bring the debate to where people are, particularly those likely and most affected because of their levels of vulnerability due to their low socio-economic status. One of important advantages of Izimbizo is that government gets to better understand the realities of each locality, and also of various households. Government learns of different pressing issues that different localities face. In a nutshell, the Commission needed to take the debate (government) to the people. However, at the admission of the SALRC, there are issues of financial and human resource constraints that prohibited otherwise. The modified version of Izimbizo could have been adapted as envisioned and seen in the recently (2008) launched anti-poverty campaigns. These campaigns used door-to-door methodology to

gather the views and experiences of affected communities and households, and how government could intervene to ease the pain that many distressed households endure. The anti-poverty campaigns are conceptualized as social mobilization tools, to get communities and households more involved in expanding their human capabilities. It has been used as a short-term intervention, whilst the anti-poverty strategy is being finalized. Izimbizo and community forums need to be utilised in future as a way of bringing public policy issues to ordinary South Africans. And in the words of the NHTL; “These are our problems. No one else will iron them out but us. Everyone should be invited to engage robustly in the debate...Go listen to the People. Collective wisdom resides there”

*(ii) Absence of Labour, Business, and Civic society’s Umbrella Body*

The absence of critical non-state players (COSATU<sup>13</sup>/BUSA<sup>14</sup>/SANCO<sup>15</sup>) in this particular phase of the public policy also needs to be interrogated. There are critical interest groups, for instance, who were generally inoperative, though not restricted nor forbidden from participated in public consultations. There was no existence for them, let alone a question of access. This is either by circumstance and/or passivity and/or inability to interact/engage with the policy process. The labour movement, for example, had not participated in the SALRC public consultations nor passed any official policy resolutions (through national congress) on questions of adult commercial sex work. Though much public commentary could be heard from various quarters of the labour movement (i.e. COSATU), there is little evidence of formal participation by the federation movement in SALRC public consultations. The position of rural networks, the ruling party as well as the South African National Civic Organisation (SANCO) are also noteworthy in this context. Also noticeable in this regards was the absence of official submissions from and participation of government departments (excluding Health, Labour and Justice), major political parties and business from the consultative process despite having received invitations to participate.

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<sup>13</sup> The biggest trade union federation in South Africa.

<sup>14</sup> A business lobby group in South. BUSA represents South African business on macro-economic and high-level issues that affect it at the national and international levels.

<sup>15</sup> The biggest umbrella body of civic organisations in South Africa.

COSATU has defended their absence from the SALRC public consultations by quoting organizational protocol in issues of policy decision-making. Reportedly, COSATU is still in the process of internal debates and will allow its national conference to make a firm determination on the matter. The spokesperson of COSATU (the largest labour federation) confirms that various federation programmes and policy structures (i.e. 2009 May Day rally; Gender Conference, June 2009; COSATU National Conference, September 2009) and organizational leadership have made due consideration to the matter at hand. The labour federation indicated in interviews that there were internal consultative processes that needed to be adhered to first before they could participate in the law making processes as led by the SALRC. The Labour federation would make use of the plethora of foras over available to them, only once they had resolved on the matter of sex work internally first. The tensions in the positions of the federation labour strongly suggest and are indicative of the divisions on the issue. Evidently, COSATU has found it difficult to apply its minds to this complex issue.

The loud silence of business leaders (i.e. Business Unity of South Africa (BUSA)), particularly those indirectly implicated in the sex trade itself (i.e. FIFA during the 2010 World Cup) has been marked to say the least. Many of those that prepared submissions, as well as those interviewed, chose to participate on the basis of anonymity. Brothel owners and pimps have chosen instead to finance decriminalization campaigns and efforts more in line with their own business interests. BUSA, as a business leader, confessed that they had not yet applied their minds to questions of sex work and legal reforms. This is not surprising, bearing in mind the conservative nature of business clientele and that sex (let alone sex work) is generally a taboo subject in South Africa. Though South Africa has been lauded internationally for its liberal constitution that upholds the fundamental freedoms of all its citizens, South Africans are generally conservative, with strong religious and traditional values underpinning its social values (Artz 2000). The fact that BUSA has no official representation or official membership from the illegal trade can also explain why questions of sex work have been low on business priorities. BUSA affirms, however, that if one were to apply principles of business leadership on the issue, big business would likely moved in favour of legal reforms that maintained business integrity

and that disincentivised harmful forms or other illegal forms of business (i.e. drug syndicates, human trafficking for sex, gangsterism and organised crime etc).

SANCO (the broad-based umbrella of civil society organisations) has also opted to maintain a silent posture on the question of sex work. While SANCO's ability to engage in and influence policy has been of marginal significance, affiliated civic organisations have made a noticeable contribution to the policy process by mobilising grassroots support and being the 'voices' of their constituencies. There are several independent civic organisations that have been engaging with the public policy process (i.e. Port Elizabeth Church Net, The Family Policy Institute, SWEAT, Genderlinks, Sisonke, Women's Legal Centre, The Godly Governance Institute, Church of Traditional Leaders etc).

*(iii) Absence of the Ruling Party (ANC) and other major Political Parties*

The loud absence of major political parties (i.e. ANC, IFP, UDM, and COPE) in the consultations also raises grave concerns around the prospects of resolving the contradictions and questions on the problem(s) of sex work. The lack of political pressure and/or will by political agents to tackle the legal and socio-economic questions is likely reflective of the contentious nature and sensitivity of the subject matter at hand. The constituency base of most political parties in South Africa is largely conservative, religious and traditional, whereas political parties also have a responsibility to uphold minority rights as entrenched in South Africa's constitution. The ruling party, for instance, has been silent on questions of sex work decriminalization, even amidst rigorous public debate on the matter. The last the ANC spoke about the possibilities of decriminalisation was at its national conference in Mafikeng in 1997, where the African National Congress resolved that government should take appropriate measures to remove all legislation that makes 'commercial sex work' a criminal offence. Despite the strong lobby group in favour of decriminalisation, however, the ANC at national level decided not to finalize its support in 1998, unable to make a unified statement.

Since then, the issue of adult commercial sex work has not featured in policy discussions of the ANC neither has it been recorded as a priority of the ANC, not even after former

police Commissioner Jackie Selebi made legislative suggestions in parliament about it in light of the 2010 World Cup. Even when ANC MP George Lekgetho supported the call for sex work to be legalised during the tournament in January 2010, telling parliament that it would make the FIFA World Cup a success and even help cut incidences of rape, his suggestion was met with derision by other ANC MPs.

Over the years, the ANC's manifesto has committed government and ANC parliamentarians to a number of policy areas, namely employment creation and decent work, building sustainable livelihoods, education, health, rural development, food security and land reform, the fight against crime and corruption and building cohesive and sustainable communities. Cabinet, Parliament and government's public policy institutions have largely focusing on other priority Bills (e.g. Amendment Bills on the Scorpions, new Ministries, on name changes, on national health insurance etc). Adult commercial sex work does not even feature as a priority area in the resolutions of the Polokwane Conference 2007, the ANC's manifesto nor Government's Program of Action for 2008 – 2012. Adult commercial sex work does not even appear in the agendas of official meetings of the ANC. This is demonstrated by its absence in ANC press statements, summated NWC/NEC minutes and general debate within its ranks (National Conference, National General Council, National Working Committee, National Executive Committee etc).

Bearing in mind that the ruling party enjoys serious hegemony of power over agenda setting and determining public policy, it is not surprising that the public policy process on adult commercial sex work has been not moved much. There are some who suggested that the ANC is likely to make a decisive stance on the matter only if there is sustained campaign and pressure by critical interest groups or if the Constitutional Court issued a bidding order for parliament to enact legislative reforms. The laws on the death penalty, abortion and civil unions demonstrate this in concrete and anecdotal ways. Many interviewed have speculated that the passive posture adopted by the ANC is likely a conscious one, and in the interest of defending its popular support of its conservative and traditional support bases. The African National Congress's traditional electoral base is predominantly comprised of African culturalists and religious lobby groupings that are

reported to yield serious power in the ANC. It is possible that the ANC would prefer not to alienate its support base, particularly bearing in mind that the ANC has long been accused by these sectors for imposing foreign neo-liberal policies on South Africa, distinctly removed from the conservative social norms of the majority of black South Africans. It is important to highlight, however, that the ANC has in the past imposed policy decisions that went against popular demand. Though public surveys confirm that the majority of South Africans are opposed to decriminalization of the adult trade, the ANC still yields enough power to adopt otherwise.

According to some political parties, the absence of major political players is more indicative of competing demands or priorities of the day. The issue of sex work is not deemed as urgent as issues of macro-economic and labour market policies, international trade policy, crime, health, and growing poverty and unemployment etc. Political commentator, Prince Mashele, presupposes that the reason a large number of political parties have remained silent on the matter is largely because the question of adult commercial sex work is not an important political question at all whatsoever. Bearing in mind that political parties enjoy some levels of influence over agenda setting and shaping public policy outcomes, it is not surprising that the public policy process on adult commercial sex work has been pushed at snail's pace. There are opposition parties (i.e. DA/IFP youth), however, that have boldly interacted with the public debate on the prospects of legal reforms. The main opposition Democratic Alliance, the African Nazareth Democratic Movement (ANDM) and the youth wing of the Inkatha Freedom Party (IFP), for instance, have condemned the suggestion of legal reforms. Leader Helen Zille argues that South Africa is not yet ready to deal with the menace that will be caused by an unregulated sex trade and, unlike Western countries, South Africa has serious institutional and human resources constraints that it must still contend with. Most political actors, however, have opted to engage with the debate in the public domain, as opposed to using SALRC public consultations to influence policy outcomes. Some political parties opposed to decriminalization fear, for instance, if the debate was taken seriously and introduced in political corridors, legal reforms could become permanent (BBC 2008).

*(iv) Absence of the Gender Machinery*

A more serious concern, however, has been the absence of the gender machinery (Commission on Gender Equity, Office of the Status of Women, Ministry of Women, Youth and Persons with Disabilities) in shaping the policy discourse and influencing policy outcomes on a critical issue that predominantly affects South African women. The Office of the Status of Women acknowledged upfront that the Office of the Presidency had not yet applied its mind to the debate at hand, and had been waiting for the SALRC to conclude its investigations before committing to a position on the matter. The Office also acknowledged that it had been constrained by financial and human resource limitations, and had been committed to more pressing priorities (i.e. New Bill to establish the new ministry on women, youth and persons with disability). This is rather concerning as the gender machinery is mandated to look at the relationship between policy instruments and how they give rise to gender inequality in society in general. Ideally, the issue of sex work should receive attention, as much as issues of girl-child marriages, virginity testing, polygamy, female genital mutilation, male initiation rapes should be. Issues of sex work are intimately connected to questions of gender roles, sex roles, sexual exploitation and stereotyping/socialisation. The gender machinery should not only have used the opportunity to shape policy outcomes, but to evaluate the extent to which South Africa complied with international policy instruments on the matter, as well developed its own programme of action to deal with the problems of sex work. The gender machinery has a constitutional responsibility to engage in advocacy and advisory work on issues facing vulnerable women in South Africa. The Office of the Status of Women (OSW), however, speculates that the new Ministry will give direction to the Law Commission's work and set the debate in motion.

Absence of these groupings in the consultation processes, however, does not necessarily mean absence in shaping public discourse on the matter and absence from influencing policy outcomes. *To the contrary, absence from the SALRC is likely indicative of 2 things; of the controversial, divisive and taboo nature of the issue of adult commercial sex work; that sites of decision-making power on this issue largely reside outside of the SALRC processes.* The two issues are explored in more depth in chapter 7.

## Chapter 5: Key Debates and Emergent Themes

The SALRC-led public policy consultations contained examples of varieties of policy actors, which held various policy positions on questions of legal reforms and made demands for concessions which rebound to their own benefit. The actors constitute what is commonly known as interest groups, which is commonly defined known as a group of persons with shared interests working together on a common cause, such as an item of legislation, an industry, or a special segment of society (Ranchord 2007).

These actors can be categorized into various sub-groups, namely human rights lobby<sup>16</sup>, religious lobby<sup>17</sup>, traditional lobby<sup>18</sup>, gender-based lobby<sup>19</sup>.

Interest groups carried varied policy positions on the question of sex work and legal reforms. As ideological perspectives have carried relative weight in determining policy positions of various interest groups, this chapter gives a synthesis of the key policy perspectives that have emerged in policy discourse on adult commercial sex work. Both primary and secondary data have been used to give due credence to each thematic area, namely: (i) sex work as an infringement of human rights; (ii) sex work as work; sex work as sexual exploitation versus sexual freedom; (iii) sex work as a health hazard; sex work as unethical; (iv) sex work as undermining majority sentiments versus minority rights; and (v) sex work as promoting organised crime.

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<sup>16</sup> Comprised of Human Rights organisations, which use the constitution and law as an instruments of advocacy for social justice for vulnerable and marginalised groups (e.g. SWEAT, Legal Resource Centre, The Rape Crisis)

<sup>17</sup> Comprised of faith-based community organisations (Christian/Muslim/Jewish) advancing religious and family-centred world-views on issues of public policy in South Africa's public domains (e.g. The Family Policy Institute, Godly Governance Network, and South African Council of Churches).

<sup>18</sup> Comprised of traditional leaders, which advance cultural perspectives on policy matters. They advise, for instance, on questions of prostitution and customary law affecting South Africans living in communities living under traditional and law (e.g. Congress of Traditional Leaders of South Africa, National House of Traditional Leaders)

<sup>19</sup> Comprised of organizations that are dealing primarily with women or gender issues (e.g. Women's Legal Centre, Women's Net, Tshwaranang Legal and Advocacy Centre)

### ***Sex Work and Infringement of Human Rights***

Those who advocate for the decriminalisation of commercial sex work emphasize the individual right to equal protection under the law, the right to privacy and autonomy. From the point of view of some groups, such as SWEAT, it is the laws against sex work that constitute the violation of human rights, rather than the sex work itself<sup>20</sup>. It has been alleged that there are also a number of benefits of constitutional provisions that are systematically infringed by the current legal regime on of sex-work (Vanwesenbeeck 2001). The systemic nature of these infringements results in a denial of the right to equal protection and benefit of the law for sex workers and is therefore inconsistent with S9(1) of the Constitution. The constitutionally protected rights identified by SWEAT which are systematically infringed as a result of the criminalisation of adult commercial sex work include:

- Unfair discrimination on the basis of sex (S9(3));
- Fair labour practice (S23(1));
- Privacy (S14);
- Human dignity (S10);
- Access to health care services, including reproductive health care (S27(1)(a));
- Freedom and security of the person; including the right to be free from all forms of violence from either public or private sources (S12(1)) and the right to have control over one's body (S12(2)); and
- Freedom of trade, occupation and profession (S22).

The Human Rights Coalition<sup>20</sup> has agitated that against the current legislation, arguing that a criminalised environment has unintended consequences on the well-being of sex-

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<sup>20</sup> Comprised of SWAR, Women's Legal Centre, Sisonke, ASWA, SANAC, POWA, Women's Net, Tshwaranang Legal and Advocacy Centre, Genderlinks, Gender DymaniX, Building Women's Leadership (BWL), Reproductive Health and HIV Research Unit, Women and HIV/Aids Gauge, Health Systems Trust, Wits Writing Centre, Lesbians, Gays, Bi-Sexual, Transgendered (LGBTI) sector, SACCAWU, Aids

workers. The Tshwaranang Legal Advocacy Centre (TLAC), for instance, has supported the decriminalization campaign and primarily to promote women's access to justice (particularly it's vulnerable), and to enforce women's rights to violent free societies. The TLAC believes that criminal law should not be used to regulate consensual sexual relations between adults. Secondly, that the current criminalized environment perpetuates crime against the sex worker and encourages police abuses. The lack of international and local protection is seen as rendering sex workers more vulnerable to exploitation, and to harassment or violence at the hands of employers, law enforcement officials, clients and the public. The need for worker protection, including occupational safety provisions, is seen of particular relevance in the current context of HIV/AIDS. They argue that sex-work is a reality that society must learn to deal with and that decriminalisation is central in reducing the ills of the industry, and in particular in developing suitable working standards and conditions for sex-workers.

The Human Rights coalition argues that sex workers are exposed to violence and intimidation from their clients and the police due to the criminalisation of sex work. Because of the stigma attached to sex work, sex workers are often unable to secure the services of the justice system to ensure protection from violence that other citizens enjoy. They continue to be subjects of routine harassment, intimidation and assaults from criminal justice officers (e.g. the police). Secondly, that indoor sex workers specifically are denied the right to fair labour practices and have no recourse to legislative mechanisms to secure such rights and in particular their rights to protection against unfair dismissal and basic conditions of employment. Thirdly, that making sex work illegal stigmatises sex workers. This presents a barrier to accessing the range of health care services available to other citizens, exacerbated by the health risks associated with sex work (increased vulnerability to HIV/Aids). Make sex work a criminal offense also denies sex workers the right to access social support including maternity benefits and disability insurance provided for by labour legislation.

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Consortium, World Aids Campaign, Good Hope Metropolitan Community Church, Institute for Security Studies, Centre for the Study of Violence and Reconciliation, including world-renowned researchers and policy-makers (i.e. Chesa Bodin and Marlise Richter)

### ***Sex Work as Work***

At a May Day rally in 2009, the COSATU Western Cape provincial secretary Tony Ehrenreich, gave full and unambiguous support to the decriminalization campaign stating uncategorically that: “The union federation supported the sex workers’ demands for labour rights. It’s not our place to make a moral judgment on sex work. It’s a reality in South Africa today”.

The recent 2009 COSATU Gender Policy Conference also made resolutions in favour of decriminalization, resolving to mobilise support to organizing sex workers as workers as part of the bid to represent the interest of vulnerable workers everywhere despite their legal status.

Though COSATU (as the dominant labour federation) remains divided on the issue and is yet to pass official policy resolutions on the matter, the spokesperson of COSATU affirms that there is broad discussions of sex work as an unconventional form of work. Some union members have even argued that decriminalization would fare well as part of the campaign to create more jobs in South Africa. Evidently, there is a definite lobby in the trade union movement that sees sex-work as legitimate employment or compare it to wage labour.

According to Luiz and Roetz (2000), sex work can be compared to the trading activities of both the commodity and labour market (Luiz et al 2000). They sex workers as contracting out the sale of sexual services (labour) in exchange for money. A cash value is attached to them either by the sex-worker and the customer through negotiation, just as a cash value is attached to a person's labour power in the labour market or to commercial objects in economic markets. Fundamentally therefore, in the trading business of sex, sex does act as a commodity like any other and, as such, can be said to fall within the ambit of standard economic theory. This exchange is not seen as anything different to that of other workers who supply their services or labour in the market place. Sex-work is seen like any ordinary business transaction or sale of service, and as a consensual contract between two individuals of equal power. It is constructed as a form of commodity exchange. Sex-

workers are seen as having the right to exploit the value of their sexual labour in an effort to make a livelihood.

Luiz et al (2000) go even further to conceptualize sex-work into conventional neoclassical demand and supply analysis, and to model sexual behaviour through economic analysis. They assert that sex yields utility at a diminishing rate in a given time period and obeys the rules of utility maximization. As such, the quantity demanded of sex is an inverse function of price. They too assert that a sex-worker therefore needs to be aware of these basic economic fundamentals in order to maximize his or her revenue. According to this neo-classical analysis of sex-work, increasing the price for sex, for example, would reduce the quantity demanded and potentially also the revenue of sex-workers, depending on the elasticity of demand. For her business to remain viable, the sex-worker has to remain an astute business person. To further substantiate an economic analysis of the sex-industry, it is said that the sex-work market is a fairly competitive one. What is meant by this is that there are a large number of participants offering a fairly homogeneous ‘product’, with the option of specializing in niche markets. And although legal barriers to entry exist, they are largely ineffectual. As such, sex-workers have a rather limited control over their prices as this tends to largely be dictated by ‘the market’. And in a world where pimps and syndicates exist, things become more complicated and the market starts resembling an oligopolistic or monopolistic one.

This same model is also used against as well as for regulated decriminalisation or legalization of sex-work. It is argued that if tax, for example, is imposed on sex-work, the effect would be the shift of the supply curve backwards (a decrease in supply) by the tax amount. The price paid by consumers would therefore increase and the price received by suppliers would decrease. The quantity consumed would also fall, and the government would equally be able to raise revenue, which could be used to make law enforcement more effective or to run a more effective education campaign on Aids. It is also noted, however, that if the tax rate is too high, then illegal trade in sex-work would be the more viable option, and operating outside the legal framework would be more attractive.

Proponents of decriminalization (e.g. The Police and Prisons Civil Rights Union (POPCRU), South African Municipal Workers (SAMWU), COSATU Gender Desk) insist that policy makers should therefore to recognise sex work as legitimate employment based on choice, and that decriminalisation of sex work is an intrinsic component of the drive of promoting human rights for all. These unionists argue that if the laws criminalising sex work were removed, sex workers would have the protection of the law against unfair labour practices. Labour market regulation is seen as playing an important role in protecting the interests and/or rights of sex workers, particularly when it comes to ensuring, employment-related security (wages, medical aid, pension funds), equal treatment, and the imposition of minimum conditions of work (i.e. laws regulating hours of work, periods of leave, the termination of employment and occupational health and safety) (Justice 2008).

Since sex work is illegal under the Sexual Offences Act No. 32 of 2007, the scope of including sex workers under the protection of general labour law is limited. Labour law does not and cannot sanction illegal activities (Labour Court 2008). It is a fundamental principle of law that a thing that is done in contrary to the direct prohibition of the law is void and of no effect. This principle is reflected in a number of common laws (i.e. *ex turpi causa non oritur action* rule, *in pari delicto potior condition defenditis*, and the *condictio ob turpem iniustum causum* commonly referred to as the unjust enrichment remedy). This means therefore that basic conditions of sex work are not regulated and often are unfavourable to sex workers. Indoor sex workers, for example, are often required to work long hours, are under house rules and exploitative fine systems, they work under duress, and are generally not legally entitled to medical aid or pension fund, paid annual leave and sick leave, maternity leave, overtime pay, paid public holidays etc (CCMA 2006). Neither do they have legal recourse for unfair dismissals nor unfair labour practices. Bargaining power and bargaining rights are located largely within the realm of management.

There is also a high degree of divergence between the fair labour standards set out in the BCEA and the LRA and the unchallenged business practices operating in the sex industry. Initiatively, this divergence acts in the interests of brothel owners and management only

and the sex workers have little powers of negotiation. Consequently, sex workers find themselves in positions where they have to rely exclusively upon their employer to provide fair and reasonable conditions of employment. Even payment for ‘services provided’ is dependent on the honesty of agency owners who ultimately need to make this payment to the sex worker as agreed. It is submitted that labour laws are required to enforce the rights of those in employment, often in circumstances of great vulnerability and exploitation.

The fact that adult commercial sex work is currently illegal, however, has not prevented efforts aimed at setting industry standards (SALRC 2002). In October 1999, for example, a code of conduct was drafted for male escort agencies in Cape Town. This code set out standards agreed to by agency management, sex workers and SWEAT. These include provisions such as (i) sex workers must practice safer sex at all times and must always use condoms, even for oral sex; (ii) core working hours will be established and masseurs will be given time off from work; (iii) and minimum prices will be explored so that reasonable prices will be paid for services offered.

No regulatory body exists, however, to deal with violations of this code of conduct. The establishment of such is highly unlikely due to the illegal status of the Industry.

Opponents of sex work (e.g. The Family Policy Institute<sup>21</sup>, The Rape Crisis Centre<sup>22</sup>), however, refute the notion that sex work is a valid employment opportunity for women, and that women freely choose to enter the sex industry. They argue that most women are

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<sup>21</sup> The Family Policy Institute is a non-profit research and educational organization dedicated to defending the Christian faith, family and marriage, articulating and advancing a family-centred philosophy of public life. In addition to providing policy research and analysis for the legislative, executive and judicial branches of the national government, it seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

<sup>22</sup> The Rape Crisis Centre is a South African women's non-governmental organisation that deals with rape victims by providing counseling and public education. The organisation undertakes research on the area of rape, sexual abuse and on the direct experience of survivors and of rape as a crime of sexual violence and an abuse of power.

coerced or physically forced into a life of 'sex for sale' and cannot escape. This coercion comes either in the forms of 'direct' coercion, or may consist in the economic marginalisation of women through educational deprivation and job discrimination, which ultimately renders them vulnerable to recruitment into the industry. The economic marginalisation that forces' women into sex work constitutes a more subtle form of coercion, which ultimately implies that even where women appear to freely choose sex work as the only or the most lucrative form of employment available to her, this choice is not really made voluntarily (SARC 2002). Opponents also make the firm assertion that the choices women make as free agents are eroded by the nature of industry itself.

### *Sex Work as Violence*

Opponents of decriminalization have challenged the perspective that sex work is a victimless act of service, relying on studies and interviews with current and former sex workers, documenting the fear and violence they experienced while in the sex trade (SARLC 2002). Studies on the experience of sex work seem to indicate strong correlations between the experiences of violence and personal violation and adult commercial sex work. Studies have also identified strong correlations between mental health, anxiety and depression with sex work (Surratt, Kurtz, Weaver, and Inciardi nd).

Studies have long revealed that early sexual and physical abuse, child neglect and victimisation, slavery and debt-bondage, poverty and unemployment are the biggest factors that shape and influence decisions to join the sex trade (May 1999). Studies have shown that the vast majority of sex workers both coming from economically developed and underdeveloped countries have been forced into sex-work due to a combination of the above-mentioned factors. The decision to join the sex industry therefore is shaped and influence by earlier experiences of violation, which persist in the experience of sex work, often resulting in negative consequences on the personal welfare of most sex workers.

Sex work at its worst is said to involve the repeated experience of violence and personal violation, physical threat and disease, emotional pain and degradation. Carter and Giobbe, cited by the SALC, p 60 adds: "Then there are the ancillary harms: the rapes, the robberies

and the inevitable beatings punctuated by shouts of ‘bitch’ and ‘whore’ and ‘slut’, gratuitously meted out by pimps, by johns and by the police. These are the commonplace insults to injury that are directed at sex workers simply because they are sex workers.”

A study conducted by Farley (1998) for example, which inquired about current and lifetime history of physical and sexual violence, and current symptoms of post-traumatic stress disorder), found that violence characterized the lives of sex workers persons. Across the 5 countries, 73 percent of the participants reported physical assault in sex work, 62 percent reported having been raped since entering the Industry, and 67 percent met criteria for a diagnosis of PTSD. On average, 92 percent stated that they wanted to leave sex work. Despite limitations of sample selection, their findings suggest that the harm of sex work is not culture bound.

South African literature also reveals that the South Africa’s outdoor sex industry particularly has become synonymous with violence and personal violation (i.e. police and client harassment), physical threat and disease, emotional pain and addiction, discrimination and inequality (Sloan 2000).

Proponents who view sex work as sexual violence and exploitation have argued rigorously that the physical and sexual abuse inherent in sex work does indeed results in many health complications and lasting damage, ranging from physical injuries such as gunshot wounds, knife wounds and broken bones to depression and post-traumatic stress disorder. Carter and Giobbe, cited by the SALC, p 60, adds:

‘Then there are the ancillary harms: the rapes, the robberies and the inevitable beatings punctuated by shouts of “bitch” and “whore” and “slut”, gratuitously meted out by pimps, by johns and by the police. These are the commonplace insults to injury that are directed at sex workers simply because they are sex workers.’

Kaplan (2001) paints the same picture of the sex trade describing sex worker as being victims of constant violence. He says that sex workers are far too often forced to engage in unprotected sex, and even robbed of compensation by clients who threaten their lives

instead. Clients often behave violently during sexual intercourse, and largely because they feel they've paid for the service and therefore 'own' them. They often do not consider sex workers as human beings (Kaplan 2001).

Sex work is seen by some therefore as a repeated violation of human rights. It is seen as an act of violence against women, which is intrinsically traumatizing to the person being sex workers. It is seen as inherently exploitative, discriminatory, violent, and as creating opportunity for sexual violence against and exploitation of women therefore.

Other researchers (e.g. Davidson et al ((1995); Fick (2006); Chapman (2005)), however, have maintained that sex workers remain vulnerable and exploited as a result of criminalisation, which denies sex workers social protections. They argue that criminalisation exacerbates such appalling conditions as it pushes the industry underground beyond the 'regulatory eye' of the state. Fick (2006) argues that criminal laws against sex work are what render sex workers easy prey for violence and exploitation. She argues that the physical safety of sex workers is threatened and/or exacerbated by the criminal sphere in which they are forced to operate. She supports Chapman's (2005, p. 5) argument that 'hookers tend to be surrounded by felonious confederates because what they do is illegal. The enterprise attracts violent people because violence is often useful in a business that can't expect protection from the cops. It is said that the retail liquor trade used to be that way too, during prohibition. Since repeal, it has been about as violent as the dairy industry'.

They also point out that this possibility of exploitation and abuse also applies to other forms of labour (i.e. low-paid manual labour in the agriculture industry) and is therefore not unique to sex work (SALRC 2002). They argue that exploitation in sex work must therefore be dealt with in the same ways that exploitation is dealt with in other industries.

Proponents of decriminalization also argue that this would in turn reduce the risk of police harassment and brutality, and would place sex workers within the ambit of protective labour mechanisms. Decriminalisation will, for example, give sex workers ready access to institutions of justice, without the fear of marginalization, discrimination and judgment.

Under a new legal environment sex workers would be able to report violations of the law to the police without fear that they themselves will be subjected to criminal prosecution.

So when faced with decisions on legislative reforms therefore, legislators must take cognisance of the pressing realities and general trends of violence, exploitation and varying ecology of risk that currently characterize the sex-industry. Sex workers also have a right to enjoy the full protection of the law, and therefore legal reforms must ensure that the necessary environments are created.

There are no clear answers, but what is evident from the above is that the state can no longer ‘turn a blind eye’ to the shocking realities of the industry. The ills that characterise the industry persist despite the imperatives of criminal law. Policy-makers are obliged therefore to take cognisance of the gross issues of exploitation, violence and inequalities that characterize the sex industry. Whatever the policy approach to the sex industry, policy-makers are obliged to introduce measures that will deal decisively and strategically with the challenges of sex workers.

### ***Sex Work as Sexual exploitation vs. Sexual Freedom***

The Gender-posed lobby groups have also been divided on the question of sex work and legal reforms. Whereas the one group has agitated for decriminalization on the grounds of sexual freed, freedom of choice, freedom of trade and profession, freedom from violence (i.e. police harassment), the other has argued that sex work represents sexual exploitation of and sexual violence against women, women with little to no real choices at all.

Those who hold the latter view see sex-work as part of a system of gender-based domination and as having its roots in the imbalance of power between women and men in society (Bromberg 1997). They oppose sex-work on the grounds that it degrades and dehumanizes women by objectifying them and imposing a commercial value on the women’s body. According to those who fully subscribe to this thinking, sex-work allows men to consciously oppress and coerce women to satisfy their own fantasies of full control and domination by using economic and political power (Luiz et al 2000). The Rape Crisis,

for instance, sees sex work as abuse against women rendered vulnerable and powerless by breakdown of family, sexual abuse, poverty, misogyny, unemployment, a poor education system, lack of opportunity, among other things. They hold that sex-work reinforces and extends power inequalities between men and women as demonstrated by the objectification of women and commodification of their bodies. Its very nature is seen as degrading and as undermining the worth and dignity of women.

Decriminalisation of sex-work therefore is seen as the sanctioning of the power politics that govern social interactions generally between men and women. It is seen as reducing sex-workers in moral stature in the same way as it is charged that men objectify and reduce women. Its very nature is seen as degrading and as undermining the worth and dignity of women, and as perpetuating the climate of oppression (Luiz et al 2000). It is seen as sanctions that extend and reinforce the patriarchal thinking about the value and of a woman, and serves largely the interest of men.

Proponents of decriminalisation (i.e. SWEAT) however, argue that sex work serves a useful social function and does not merely debase women. That sex work is in itself an assertion of sexual freedom and independence, and does not represent sexual colonization and male privilege. This view sees sex-workers as free agents and not victims, with equal bargaining power as the client. They argue the contrary that legal provisions prohibiting sex work have the effect of disempowering individuals and disabling them from defining their own terms and conditions or contract.

Rape Crisis gives a counter-argument by arguing that the sexual freedom debate is a flawed argument “that ignores the right of every person to enjoy not only protection from any activity that is hazardous and destructive to the individual , but also the basic human right to meaningful employment” (Anne Mayne, Founder). Mayne further contests and argues “because police brutality is a policing problem and a symptom of the violence endemic in society, decriminalising sex work will not change that, it will only fuel the violence.”

The Human Rights Coalition advocate also believe that commercial sex work falls ‘within the private sphere of human existence and any state interference into the private lives of individuals should be kept to a minimum’(Milton 1993). The sex-worker is seen as an agent and not a victim, with equal bargaining power as the client. Sex-work therefore is seen like any ordinary business transaction or sale of service, and as a consensual contract between two individuals of equal power. They argue that legal provisions prohibiting sex work have the effect of disempowering individuals and disabling them from defining their own terms and conditions or contract. It follows from this therefore that there is also a difference in views on whether sex-workers are victims—and should be protected by eliminating the source of sex-work—or free agents pursuing their legitimate economic interests, perceiving sex-work as a form of liberation for women.

Academics such as O’Connell Davidson (1998, p.5 cited Luiz et al 2000), also recognises the role criminalisation of the industry plays in creating the space for exploitation:

“...the relationship between sex worker and third party, as well as that between sex worker and client, takes place in a specific legal, institutional, social, political and ideological context, and that this represents another set of constraints upon relationships....”

Though he is not a protagonist for sex worker rights, he asserts that because sex-work is legally regulated in ways which heavily penalises independent sex-workers, law enforcement effectively operates as a pressure on them to enter and remain in third party control no matter how exploitative the third party may be. O’Connell Davidson (1998) also concludes that sex-work laws and law-enforcement practice typically discriminates against sex-workers, and in so doing directly or indirectly enhances brothel owners’ powers over them (Luiz et al 2000). Thus, while decriminalising the sex industry may not shift social power relations, it would make it safer for women who have to do this type of work to survive

The Women's net, for instance, though did not participate independently through formal submissions, for instance, have endorsed the above view as presented in SWEAT's submission to the SALRC. They hold that legal protections are needed to give power back to vulnerable women and to address the conditions of subjugation and coercion that are prominent in the sex industry. They do not believe that a criminalized legal regime assists to address the plight of vulnerable women in the sector, particularly in light of increasing police harassment and abuses. However, they hold that government must run a parallel process to address the pull-factors that limit women's options (i.e. poverty and unemployment) and provide exit options for women who want to leave the industry.

Research conducted by the South African Law Reform Commission also makes the firm assertion that the law against adult sex-work acts as a further constraint on the ability of sex workers to determine and control the nature of their relationships with clients and brothel owners (Gould and Fick 2007). Their status as criminals makes them vulnerable to abuse and exploitation because they do not have recourse to the law. Even though legal change is not expected to change the social power relations nor seen necessarily to mean that sex workers will no longer be exploited or abused, but such a change is seen as necessary to empower sex workers by giving them legal power to negotiate their contracts with third parties (whether that is clients or brothel owners). The mere fact that clients are aware that sex workers are unlikely to report them to the police if they do not pay them or if they physically hurt them, reduces the power sex workers have to negotiate the transaction. And that even if they do the report is also unlikely to result in legal sanction.

Some opponents, however, make the firm assertion that the choices women make as free agents are eroded by the nature of industry itself.

The gender inequalities that play themselves out in the industry, particular between the sex worker and the client, raise serious questions therefore about the extent to which a legal response can change these. They also raise questions about the appropriateness of mere legal changes, that are not accompanied by clear strategies and programs that can change the attitudes and experiences of sex workers on the ground.

### ***Sex Work as a Health Hazard***

Sex work is seen by some groups (e.g. The Family Policy Institute) as a way of life that exposes sex workers to various risks to their person and health and precludes a normal family life, and therefore cannot be considered as legitimate employment. Opponents of decriminalization have challenged the perspective that sex work is a victimless act of service, relying on studies and interviews with current and former sex workers, documenting the fear and violence they experienced while in the Sex Trade (SALRC 2002). According to this perspective, the sexual acts of sex work per se constitutes violence and therefore a violation of human rights, even where the sex worker ‘consents’ to such acts.

Proponents of the sex work-as-exploitation view also argue that “the physical and sexual abuse inherent in sex work results in many health complications and lasting damage, ranging from physical injuries such as gunshot wounds, knife wounds and broken bones to depression and post-traumatic stress disorder.” (Carter and Giobbe, cited by the SALC, p 60).

To compound matters, UNAIDS Inter-Agency Task-team on Gender and HIV/Aids confirms that sex work continues to have high correlations with HIV/Aids transmissions in most parts of the globe, despite the fact that the existence of a number of studies that have focused on best practice for HIV/Aids prevention for the sex industry (UNAID nd).

According to the South African Law Commission, however, studies conducted amongst sex workers report relatively high degrees of condom use with clients, whilst they note that negotiation of condom use was often more difficult with regular clients (SALRC 2002). Legget studies and Pauw and Brener’s study are points in reference in which respondents reported always using condoms, particularly with regular clients (Legget 1999). Respondents in research conducted at a KwaZulu-Natal truck stop, however, report that condom use was responsible for client loss and more frequent non-payment. They also said that condom use also led to physical abuse by clients, and clients insisted on paying less for sex when a condom was used.

Research also confirms that most South African sex-workers do not even have adequate access to programmes related to STDs and HIV/Aids nor basic healthcare (Luiz et al 2000). The reasons for the above include amongst other things the discriminatory attitudes of health workers towards sex-workers, the social stigma attached to sex-work, and the costs involved in accessing health-care, both direct and opportunity costs. This is rather unfortunate, as recent systematic reviews of effective interventions to prevent HIV and other STI's amongst sex workers in resource poor settings suggests that the combination of sexual risk reduction, condom promotion and improved access to STI treatment reduces HIV and STI acquisition in sex workers receiving the intervention (Richter 2008). Richer (2008) particularly notes the importance of structural interventions, policy change and the empowerment of sex workers in reducing HIV and STI prevalence.

In response to the above, proponents of decriminalisation (e.g. South African Natal Aids Council, World Aids Campaign, SWEAT, Women's Legal Centre, and Sisonke) have argued that decriminalization will deal more effectively with the challenges of sex work. Decriminalisation will, for example, create opportunities for enhanced monitoring and enforcement of occupational health and safety standards (as sex work will no longer be an underground industry), whilst promoting HIV/Aids or regular health testing. They argue that criminal law often compounds the risks associated with the sex industry as it pushes sex trade underground, and therefore denies sex workers social protections, and renders them vulnerable to abuse and exploitation.

So whereas on one hand, substantive correlations between HIV/Aids and sex work in most parts of the globe do raise serious questions about the appropriateness of full decriminalisation (which simply removes all criminal laws against sex work, without the obligation to impose health standards or any other set of necessary regulations), counter-arguments also raise questions about the appropriateness of criminalisation. It is an undisputed fact that a criminalised environment makes it impossible to enforce health standards and practices amongst sex workers. HIV/Aids prevalence raises strong questions on the appropriateness and effectiveness of criminal law in dealing with the increased

risks of HIV/Aids and STI's in the sex industry. There is therefore a strong case for the dismantling the discriminatory legal environment, and particularly in the interest of extending much-needed health and social services to sex workers, and safeguarding their basic human rights.

### ***Sex Work and the Moral High-Ground***

The religious lobby<sup>23</sup> generally hold the view that sex work was detrimental on society in general and ate away at society's social fibre. Its theoretical lenses emphasized and leveraged society over the individual sex worker. The lobby group hold the view that sex belongs in the ambit of loving relationships, that the body is the temple of God and should be used in more dignified ways, that sex work poses as a threat to family/marriage (the seduction and enticement of no-strings-attached sex often leads to adultery leading to broken families). The religious or faith-based groups believe that decriminalizing sex work would sanction the seductions or enticement of no-strings-attached sex, which would lead to adultery and eventually leads to broken families and the demolition of the faiths (i.e. Christian/Jewish/Muslim faiths). The religious lobby typically holds orthodox notions about sex and its role in society. It is not surprising therefore that most supported the call for a criminalized legal environment. Religious groups generally contend that “by decriminalising sex work, one is rewarding immorality, and creating a nation of lawlessness” (Mr. Naidoo, Family Policy Institute). The proponents of criminalization therefore argue that decriminalization would lead to moral decay, and very often the ‘loosening of moral bonds’ is often the first stage of disintegration of a society. They therefore believe that society is justified to take some steps to preserve its moral code as it does to preserve its government and other essential institutions.

The Congress of Traditional Leaders (CONTRALESA) and the National House of Traditional Leaders have also adopted moral/values-based lenses in favour of criminalization. The Chairman Khosi Kutama asserts “Sex work is not part of our culture. It's a foreign concept. Our culture provides for vulnerable women to be taken care of

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<sup>23</sup> Largely comprised of networks of churches and mosques, faith-based community organizations and associations, individuals and family representatives from the Christian/Muslim and Jewish faiths.

(under the auspices of polygamy). It's better to be in a polygamous marriage than to be a sex worker, (at least you're with one man and still taken care of)"

The Chairman also holds the view that sex work thrives because of the love for money. "Something is wrong with us. We love money more than we love ourselves...Those who sell their bodies, ubuntu has gone out of them...Sex work has done damage to African values"

When questioned about the role of men as accomplices of sex work, the Chairman reiterates "Men, you can never satisfy them. Women are the keys to their own padlocks. They can lock and unlock them. But women are participating in sex work. They should be the first to say no. But they are at the forefront of campaigns in favour of decriminalization" SANAC women's sector is cited as case in point. The NHTL urges government to provide viable alternatives to vulnerable women.

Though the Church differs much with traditional leadership on a number of issues, both share a common policy position; the notion of ubuntu (common humanity). The only difference, NHTL argues, is that theirs is more Eurocentric and is written in the manuscript Bible, whereas that of traditional communities is written in communal/collectivist living arrangements.

The ethics-driven lobby is not homogenous in its views, however. The religious lobby group, for instance, is said to be constantly engaged in heated conversations about sex, its role, morally acceptable norms and deviance. Sex work is one of many issues, alongside gay rights, abortion, condom use, pre-marital sex etc. There exists the extreme or radical (that advocate for total decriminalization as represented by the GGN and ) and moderate groups (that advocate for partial criminalization on the part of the client, seeing sex workers as mere victims of circumstances) as well as those who advocate for decriminalization on pragmatic and compassionate grounds. This group can be said to be represented by the aggregate views of South African Council of Churches, by way of compromise and accommodation.

The South African Council of Churches (SACC), for instance, has opted for a more empathetic policy position, opting to look at the problem of sex work through humanitarian eyes. Police brutality, the nature of illegal environments and socio-economic conditions have been considered in coming up with support for decriminalization. As the Church, the SACC does not promote sex work as sees it as dehumanizing. Sex work is not seen as intended for commercial activity. However, the SACC does not condemn sex workers as they understand the socio-economic circumstances they come from. SACC advocate for a decriminalized environment as a way of pushing the illegal industry into the light. The President of SACC notes “Sex work is not just a question of loose women running around the streets looking for it. These people are human beings too created in God’s image. Their human dignity and human rights therefore need to be affirmed”. Men are culpable as they are and must also be seen as part of the problem in finding a solution. The SACC holds that the law should seek to protect the dignity of vulnerable women and therefore should be crafted in ways, not to condemn, but to create viable alternatives. The state should be neither pimp nor tyrant in this regard.

Interesting, however, was the shift in thinking by the religious sector to move beyond the moral-lenses by which they saw the problem of sex work, to ‘seeing the person first’. The campaign led by the religious sector was one based on a common humanity and rallying social partners to support government initiatives that sought to assist sex workers to exit the industry and to expand safety networks to the vulnerable.

According to Taylor and Davidson (1995), the stigma attached amongst religious communities highly likely accounts, at least in part, for views in favour of criminalisation of sex-work. According to them, the religious community (e.g. Dutch Reformed churches has promoted (and still does promote) a deeply conservative ideology which pivots upon notions of 'natural' difference and inequality between the sexes. The church and the ancient states have committed themselves to an extremely repressive sexual ideology, one which sanctifies heterosexual intercourse within marriage. The views propagated by both the cultural and religious sectors is that sex work is immoral, that it is a negative

expression of sex and represents social deviance, and that, by condoning it through legalization or decriminalisation, society would in actual fact be demeaning itself (Anon 2004). This view permeates from the old Immorality Act that reinforced the view that sexual intercourse should take place ‘in the ambit of lawful marriage’, and therefore by definition it rendered sex-work immoral.

According to Scrutin (2006), on the other hand, sex-work is seen particularly by religious women as immoral possibly because sex-work threatens the bargaining power of a woman’s sex, by offering cheaply what other women are trying to offer at the highest possible price, namely marriage (Scrutin 2006). Female sex-workers in particular are seen as devoid of morality, and not because she satisfies the masculine urge to ‘sow wild oats’. They are seen as immoral because they compromise the status of women, as priceless gems and companions who cannot be purchased for an hour, but only for a lifetime. Sex-workers are therefore seen as devaluing the worth of a woman’s spirit and body, and as reducing sex to a financial transaction. It is apparent however that views on sex and marriage have changed over the centuries as signalled by shifts in law towards contraceptives and abortions, and in social norms regarding virginity, sexuality, marriage and divorce (Luiz et al 2000). According to Scrutin (2006), on the other hand, a significant portion of liberal feminists have argued that the difference between sex-work and marriage in a world of gender inequality is no more but a difference in degrees. Sex-work therefore might no longer look like a threat to the moral order, but, at worst, as a threat to the woman who puts herself at the mercy of strangers whilst simultaneously removing any motive they might have to respect her.

The morality argument, however, has been criticized by the legal advocacy centres (i.e. Tshwaranang Legal Advocacy Centre, Legal Resource Centre) for its lack of empirical evidence and for assuming that a change in morality is tantamount to the destruction of society. The criminalisation of sex work is seen in the same light as the criminalization of homosexuality, merely as the criminalization of conduct which fails to conform to the moral or religious views of a section of society. The Human Rights lobby contends that it is not the function of the law to intervene in the private lives of citizens, or to seek to

enforce any particular behaviour beyond what is necessary to carry out the functions outlined. The function of the criminal law is seen only in the context of preserving public order and decency, to protect citizens from what is ‘offensive or injurious’ and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable, which would include sex workers (SALRC 2002). The Human Rights lobby group(s) have gone further to say that it is immoral in and of itself to judge a sex worker for wanting to put food on her family’s table and to sustain her livelihood. Sex workers have been heralded by activist groups as courageous for the hard choices and sacrifices they have to make in order to survive. Proponents of decriminalization have argued that society and the law should give to individuals’ freedom of choice in matters of private morality.

Almodovar, cited in the Commission’s report, supports the above view and argues that societal disapproval of certain activities or practices should not necessarily mean that these activities should also be criminalized, penalised or prohibited. Lord Devlin, a British legal expert (cited SALRC, 2002: p. 38), however, contends that “The suppression of vice is as much the law’s business as the suppression of subversive activities...” Constitutional Court judge, Ackerman J, also supports the above, view and emphasizes that the Constitution does not debar the state from enforcing morality. However, he does add the following cautionary note: “What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.”

### ***Sex Work as undermining Public Sentiment versus Minority rights***

The traditional<sup>24</sup> and religious lobby groups have expressed political concern that since 1994, the ANC-led government as shifted its policy direction when dealing with the social transformation challenges of the country. Though public surveys (i.e. OmniCheck 2007 Survey, Market Research Africa 1999/2009 surveys) confirm that the majority of people in South Africa believe that sex-work should not be decriminalized, the government is

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<sup>24</sup> Comprised of the Eastern Cape House of Traditional Leaders (ECHTL), Congress of Traditional Leaders of South Africa (CONTRALESA), Imbumba Yamakhosikazi Akomkhulu (forum for the Queen and wives of traditional leaders), Godly Governance Network, and the Eastern Cape Provincial Council of Churches

accused of undermining the will of the majority by reviewing the legal status of sex work. The lobby groups allege that government has bought into Euro-centric notions of human rights, and have allowed the world powers (i.e. United Nations, World Trade Organisations) to impose foreign ideals on unsuspecting citizens, which has undermined the will of the majority. This is seen in policy reforms on abortion, gay marriages, death penalty, school discipline, school prayers to mention but a few. The religious and traditional lobby groups generally contend that legislative reforms should reflect the will of the majority, and decriminalizing adult commercial sex work goes against the will of ordinary South Africans.

There is a case to be made, however, that legal reforms can be instituted in favour of minority rights, despite the view of citizens and general public resistance. The Constitutional Court (Ackermann J and Goldstone J) argues that though under common law and S39(2) of the Constitution ‘policy decisions’ and value judgments’, have to reflect ‘the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people’, a balance has to be struck between the interests of the parties and the conflicting interests of the community according to the court’s perceptions of what justice demanded (SALRC 2002). They suggest that the above concepts should be replaced, or supplemented and/or enriched by the appropriate norms of the objective value system embodied by the Constitution of the Republic.

It is therefore important to note that minority rights are also protected under our Constitutional framework, and that the will of the majority cannot deny minority groups access to these constitutional rights.

### ***Sex Work encouraging organized crime***

Decriminalisation of sex-work is seen by some as encouraging other forms of crime. Cases in point are the cases of Netherlands, State of Victoria (Australia) and Germany that have reported increases in human trafficking as a result of decriminalisation of sex work (Hilton 2007). Proponents of criminalisations argue that this is largely because the distinction between sex work and human trafficking is often meaningless to women and

children in positions of trafficking, as clients do not distinguish between voluntary versus trafficked sex workers. At the end of the day, the demand that leads to human trafficking is exactly the same as demand for sex work.

Pauw and Brener's study affirms the above assertions, and highlights the role that the drug trade plays in sex work (Pauw et al 1997). Studies suggested that drugs relieve stress and help sex workers cope with their work. Leggett's research indicates that this is not the case in South Africa. He also points out that there is currently insufficient information on the 'direction of causation', i.e. whether drugs are leading women and men into sex work, or whether sex work causes persons to use drugs.

Proponents of decriminalization on the other hand argue that problems of ancillary crime arise from the conditions created by the criminalised status of sex work (Levick 1996). They argue that in situations where there is a substantial demand for criminalised activities and a concomitant potential for economic profitability (as is the case with sex work), criminalisation serves to drive the industry underground and encourages the involvement of organised crime. A study by Davis affirms the above view, and reports that studies have found no direct link between sex work and 'crime, drugs and urban decay'. The study reports that, on the contrary, the connection between urban decay, crime and sex work resulted from the fact that sex work was only allowed in areas 'the city had already written off'. By contrast, where small brothels were integrated into 'healthy' neighbourhoods in Holland, for example, such a decline did not take place.

### ***Sex Work and International Best Practice***

The South African Law Reform Commission reports that none of the conventions/protocols that South Africa is signatory to compels South Africa to decriminalise adult commercial sex work. The Commission has in its report, however, indicated that it is possible to assess individual protocols and conventions and to determine which policy response it leans towards.

The South African Law Reform Commission makes reference to a number of international protocols (i.e. Convention on the Elimination of Discrimination Against Women 1979, Beijing Declaration 1995) and makes the assertion that a large majority of them would most likely rule in favour of a decriminalised legal environment, and in an attempt to extend protections to vulnerable sex workers, whose physical, economic and social conditions are exacerbated by a criminalised environment.

The SALRC report also affirms that there is a great variety of legal responses in different parts of the globe. It cites, for example, that in Muslim countries it is most often a criminal offence for any person to be involved in adult commercial sex work, and is punishable by means of the death penalty. Sex work is also criminalised in Norway, Thailand, Namibia, Nigeria, Swaziland, Uganda, Tanzania, Zambia, Cote d'Ivoire and in 49 of the states of the United States of America. In the 1840s Sweden had legalized and regulated sex work, but since the 1990s Sweden has criminalised sex work on the grounds of sexual exploitation of women and gender violence.

At the other extreme of the spectrum, as in the case of Netherlands, sex work is decriminalised, sex workers are taxpaying citizens, are unionized, and brothels operate like any other legal business. New Zealand has also opted for the decriminalization approach on the grounds of minimizing harm to sex workers, whilst emphasizing that this is not intended to endorse or sanction it morally.

On some parts of the globe, sex work is legal and regulated i.e. Australian state of Victoria, Germany, Senegal, and Turkey. In such cases, sex workers are obliged to register as sex workers, must work in brothels, and undertake regular HIV/Aids testing.

In some parts of the globe sex work is partially criminalised. In Japan, for example, only vaginal sex work is illegal. In Canada and Bulgaria sex work is legal but it is illegal for parties to negotiate a sexual contract in public space, including bars. In Denmark, Brazil and Costa Rica only profiting from sex work by others is illegal.

The variation in legal responses therefore affords South Africa the opportunity to assess best practice, and to assess empirical evidence in its policy formulation processes. A quick analysis, however, suggests that legislative practice in African countries is not in favour of public policy which legislates in favour of adult commercial sex work. The South Africa government, as a member and leader of the African community, needs to bear this in mind therefore. There are clear cultural considerations to be made on questions of adult commercial sex work and legal reforms.

## Chapter 6: Modes of Civic Engagement - Strategies and Tactics of Influencing Policy Outcomes

Chapters 6 to 8 focus on the critical aspects of the dissertation addressing questions of interest group participation and power relations in the law-making process on adult commercial sex work. Unlike chapter 4, these chapters are based on *primary findings*, some of which are compared and contrasted to secondary data. Chapter 6 in particular presents the main findings, as well as analysis on interest group participation and modes of civic engagement. It gives due consideration to questions of civic engagement, particularly to understand how interest groups attempt to influence policy outcomes in their favour.

In this regards, modes of civic engagements are defined as the strategies and tactics employed by competing interest groups in a bid to influence policy outcomes, as well as how these interface with the policy process. Strategy in this regards refers to a plan of action designed to achieve a particular goal. According to Ranchod (2007), strategy is distinct from tactics, which are concerned more with the conduct of an engagement, while strategy is concerned with how different engagements are linked. Strategies and tactics are critical components of civic attempts to influence policy outcomes in their favour. These allow interest groups to identify the objectives of policy engagement, methods of influence, and motive agents to swing policy outcomes in their favour.

The most dominant forms of strategies and tactics employed by interest groups in this regard come in tandem with and as a direct function of the new age of human rights, as well the age of rapid technological advancement. Whereas the most predominant *strategies* include *inter alia* the use of social media, litigation or court action, constitutional or human rights jargon, the predominant *tactics* of engagements with the policy process comprise both formal and informal methods and include *inter alia* common agency, group collusion and cooperation, and group competition. An analysis of group behaviour by strategies can also be used to determine ‘insider’ versus ‘outsider’ groups, which helps explain group choices of strategies and tactics.

### *Modes of Civic engagement*

Strategic and tactical engagement with public policy in regards to sex work has largely encompassed formal as well as informal methods (Ranchod 2007). *Formal methods* have incorporated legislative methods, constitutional mechanisms, as well as statutory mechanisms. Groups participation largely took place in workshops, wherein interest groups participated as stakeholders, some advising the Commission as consultants (i.e. legal centres and constitutional law experts), per invitation to workshops and per special request. Many of the activist groups that were interviewed, for instance, report having done extensive preparatory work in preparation of the SALRC workshops. SWEAT and allies, as well as the Family Policy Institute and its allies, for example, undertook extensive research in preparation for workshops (workshops in Cape Town, Johannesburg, Pretoria, and Port Elizabeth). Both have gathered extensive work on existing models, looking at the effects of the New Zealand, Netherlands and Australia models on the status of sex workers, choosing to highlight arguments that work in their favour. Official submissions, by way of inputs into the SALRC Discussion Paper 0001/2009 on Sexual Offences, were made to the Commission. Allies were also encouraged to make separate submissions, though most opted to endorse, by way of signatures, submissions made by the lead organizations respectively. Both groups report having dedicated significant organizational resources to work gather case evidence and to motivate why sex work should be decriminalized or criminalized respectively.

Though workshop participation constituted the dominant mode of official engagement with the policy process, there were a number of interest groups who worked to pressure policy outcomes through their own informal initiatives. SWEAT and the Family Policy Institute must be acknowledged in this regard, particularly for their extended informal in attempts to influence policy outcomes inside as well as outside of the terrains of consultative workshops. Both have engaged in extensive advocacy and lobby work to raise the voices of their constituencies in attempts to see favourable outcomes. Several informal methods used, for instance, included *inter alia* negotiations, behind the scenes interactions with policy-makers, lobby work, petitions, public policy debates, as well as unofficial discussions with government officials.

SWEAT and Allies', for instance, used the following tactics inter alia in efforts to shape policy outcomes in their favour:

- Information-sharing sessions (i.e. Sep 2009 Conference – Sex Work, Fifa World Cup, Health and Human Rights – 2010 and Beyond);
- Grassroots mobilization and recruitment drives (VCT talks and condom-distribution);
- Advocacy and campaigns (i.e. writing letters and memorandums to senior officials such as Fifa LOC and the Ministers of Justice and Police);
- Peer education and training initiatives (i.e. Sex worker workshop with the Wits writing Centre);
- Media work (radio/TV/magazines/newspapers/conference press releases/public talks);
- Telling sex work stories, documenting and mapping abuses;
- Alliance-building and forging strategic partnerships (i.e. with the legal fraternity, academic institutions, regional associations, and with the media);
- Strategic lobby work. (SACCAWU/POPCRU/COSATU/MP's/World Aids Campaign); and
- Putting legal pressure on the state and individuals to change laws (i.e. Sweat Interdict, Complaints to Independent Complaints Directorate, High Court SA v Jordan and others case, CCMA/LC and LAC CCMA v Kylie case).

The Family Policy Institute and Allies, on the other hand, focused on grassroots mobilisation and information sharing strategies. They are deemed to have been at the forefront of garnering the support of the religious community, running an extensive e-media campaign to “Stop Sex work in SA” in defense of faith, family and fundamental freedoms. This often took the form of facebook group invites, twitter and you-tube to create consciousness and awareness about issues, and to build case evidence in support of their positions. Other strategies included:

- Radio and television interviews;
- Expert panel interviews;

- Email alerts to respective databases to inform membership/allies of new developments;
- Written articles in mainstream newspapers (i.e. Mail and Guardian, The Times);
- Book reviews of book publications;
- Distribution of flyers/booklets i.e. street-based campaigns; and
- Workshops/conferences.

The tactics of the traditional/black church groups, however, have been limited only to traditional modes of lobby work, namely workshop attendance and paper submissions. The South African Council of Churches (SACC), for instance, has primarily used its parliamentary and gender desk to monitor policy developments and to try to influence outcomes. The SACC has also used church teachings and out-reach programmes to influence public discourse on sex work. SACC generally enjoys a captive audience with larger society (every Sunday, every Christmas, every Good Friday), a parliamentary audience, with political leadership (President, Cabinet Ministers, ANC and alliance partners) albeit the relationship may be ad hoc sometimes.

From the evidence above, one can easily deduce that much strategic and tactical work has gone into the policy process on adult commercial sex work. The Human Rights Coalition is comparably more organized, focused, strategy-orientated and engaged in protracted tactics to influence policy outcomes. Despite their efforts, however, it is questionable the extent to which they have succeeded in infiltrating and displacing the ideological hegemony of the religious and traditional communities in mainstream society. The views of these communities are mirror images of mainstream South African society. Their ideals and ideas permeate in the everyday language of ordinary people. They enjoy captive audiences every Sunday and Good Friday, every cattle-herding session, in every taxi conversation and in most family dinner conversation across South Africa. They enjoy ideological and cultural, their voices echoing in the conscious of South African citizenry even in the dead of the night.

Empirical evidence suggests that the choice of strategies and tactics of civic engagement were largely influenced by the level of tensions in the policy environment as a consequence of group polarization or divergence; perceived effectiveness of chosen tools; organizational resources available to finance policy campaigns; character and strength of group leadership, as well as membership. The above determinant factors are in line with Walker's (1991) analysis of organizational behaviour. Walker (1991), cited by Elliot-Teague (2006), argues that the organizational choice between different types of strategies and tactics, as well as organizational behaviour, depends on the level of conflict in the political environment, organizational resources, the character of the group's membership, the sources of financial support, and the focus of the group (professional versus citizen, for example). These components are explored in length in the section that follows.

#### *Social Media and the Public policy process*

Noticeable in the policy process, was increasing use of social media to garner public support for respective views, as well as the use of human rights (versus moral jargon) in the language of discourse.

A number of interest groups have made use of media as a means to lobby public support for their respective positions on sex work and legal reforms. Most popular of the social mediums has been facebook and twitter, as well as the use of electronic notifications by use of emails and sms. Some proponents of criminalization, for instance, have used a sign up Facebook group page (People against the legalisation of Sex work and Human Trafficking in SA), which was launched in May 2009. This group was created for people who believe that sex work should not be legalised. This group has cautioned against decriminalization, arguing that that the first victims of legal reforms will be sex workers themselves, young women and children (who'll be more vulnerable to human trafficking), and families; once again *presenting human faces and victims of 'the evils of sex work'*.

The Women's Net has also reported that it has been working with SWEAT to provide ICT support to their campaign for decriminalization. Sex workers are often unseen, unheard, existing only in the domains of private spaces. That is why the Women's net embarked on

a Joint-programme “Digital stories project” has entailed using technologies (e-scripts, digital cameras, audio/visual recordings, computerized moving pictures) to assist sex workers in telling their stories (i.e. pull-factors, on violence, police harassment and legal reforms), to increase their presence and fair representations on cyberspace. This project is intended to teach people to value the experiences of sex workers, valuing what they have to say, and listening to them. The digital project has also been used to *tell their stories* and to present human faces. Below are 3 examples of the typical scripts used to *tell their stories*.

Script 1:

“There are sex workers living in those shacks over there,” says Nomsa\*, pointing towards roughly 30 shacks built on sandy uneven terrain, a few metres from the road, near the township of Mfuleni. “That car parked in the bushes – a sex worker.” Nomsa is the only working member of a household of four adults and five children. She has to care for her three young daughters, as well as her three siblings and their offspring who all share a house in a township 40 kilometres outside Cape Town. “I want my children to finish school, I don’t want them to suffer,” she says. “It’s difficult. It’s not nice to be a sex worker,” Nomsa adds. “I’m 30 now. I always thought that when I’m 30 I won’t be a sex worker, life will change,” Nomsa says. “It’s a big challenge to take care of kids.”

Script 2:

“Amilia and Beyonce\* are Cape Town sex workers. They get R100 for a “mcembi” (jump in isiXhosa) but admit to being open to lowering their rates<sup>25</sup>. The threat of violence is constant and the women often get hurt by clients who demand rough sex, often beat them up. Some clients drop them off far from their pick up points, robbing or even raping them” (Butcher, 2007). Both women, like many other sex workers, have also repeatedly experienced violence at the hands of police. Nomsa still lives with the trauma of having been raped by a policeman inside the Tygerberg morgue. “We’re targets for the police,

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<sup>25</sup> Nathalie Bucher (2007). Legal victory offers Little relief for Sex Workers. Found in <http://ipsnews.net/>

pimps and clients," explains Beyonce\*, another sex worker and peer educator. "I was abused in a police cell three years ago."

Script 3:

Fadeelah\*, another peer educator interviewed, was raped by two policemen who stepped into her cell with condoms and their nametags off. "I'm too scared to lay charges," she says. "We don't steal, we work. I vote and I'm on the street committee where I live but I'm not proud of being South African. I never got anything but promises about houses and work but South Africa never did anything for me. I've done something for government but we don't have free education. I still pay school fees and for books," Fadeelah concludes.

SWEAT and allies have done extensive work in efforts to present human faces to target audiences. They've even gone as far as invitation SALRC officials to private meetings and guided tours, making attempts to forge strategic partnerships with the media, using publications and digital electronics to *tell their stories* of violence and police brutality. Mickey, the national coordinator of African Sex Workers Alliance ASWA), for instance, repeatedly says when interviewed

"A sex worker is human too. She is a mother, daughter, sister, cousin, student, and teacher. She's human too just like you. Sex work is not the person. It's just her occupation" (Mickey, ASWA).

These sentiments are shared by the South African Council of Churches. When interviewed, the President emphasizes that "Sex workers are human beings before they are sex workers. And remain human beings afterwards. Society collaborates with them and is intimately implicated as accomplices in the problem of sex work. Sex workers are part of society and are merely symptoms of social ills and societal inadequacies" (SACC President)

*Litigation, Constitutionalism, and the Use of the Courts in Shaping Policy outcomes*

The Legal Resource Centre and Women's Legal Centre has been critical in providing legal litigation<sup>26</sup> against the state, as well as supporting calls on the state to place a moratorium on all arrests of sex workers, particularly for the duration of the world cup, until the conclusion of the SALRC review process. Litigation is a powerful instrument because of the shifting burden of costs on those found in contempt of court once a restriction order has been issued. There are always consequences of a criminal nature (i.e. exorbitant fines). It costs millions of rands to cover the legal costs of advocates, attorneys, state prosecutors, millions state institutions (i.e. police) and/or individuals can't afford on limited budgets. Andrews, Legal Resources Centre, asserts

“No one likes to be sued, so litigation and name-and-shame media tactics give marginalized groups bargaining power...it's about shifting power dynamics”.

The Women's Legal Centre, the Tshwaranang Legal and Advocacy Centre, and the Legal Resource Centre, for instance, have entered into agent/client relationships with SWEAT and allies providing pro bono or public interest litigation and court support, and acting as legal watchdogs. They simply provide legal services to clients, prioritizing work in public interest, doing what can be justifiable under donor funding, at the expectation and instruction of clients. TLAC also provided research support, advocacy and paralegal advice to SWEAT and allies, whereas WLC support also included litigation and court support on issues of sex work violence, police harassment and abuse. Their joint programme with Sweat “Every Sex Worker a Human Rights Defender” assists to empower sex workers to challenge human rights abuses, to document these, and to monitor and map out types in perpetrators of human right abuses. The WLC also holds weekly Wednesday clinics at SWEAT premises, giving individual advice, as well as training sex workers to be peer educators.

All three legal centres have opted to use their legal expertise to exert pressure on dominant interest groups (i.e. vocal residential associations and state institutions like the SAPS) and

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<sup>26</sup> Litigation refers to a process of engaging in legal proceedings or taking a case through court. It is legal action more commonly used civil lawsuits.

to deal with the rogue elements (i.e. individuals and institutional culture) that prejudice against and continue to abuse/exploit sex workers. These centres are generally of the view that the issue of sex work needs to be looked at through pragmatic lenses beyond moral ones. Policy makers need to understand the interconnectedness between a sex worker and the society that gives rise to her (i.e. poverty, unemployment, homelessness, cultures of sexual violence and crime). The reality is that most often than not, the sex work terrain is the point of contact between psychopathic men and vulnerable desperate women. The power of the courts must be used to increase the bargaining power and to extend much needed social protections. LRC and Tshwaranang, however, assert that the legal fraternity does not have a unified position on issues of sex work. However, they maintain that legal activists do have a responsibility to ensure equal access to justice for all, particularly of vulnerable and marginalized groups.

Through their efforts, SWEAT and allies can boast of two successive legal victories. The one refers the interdict by the High-Court (20 April 2009) to stop arresting sex workers unlawfully. The second refers to the recent May judgment by the Labour Appeal Court on the Kylie case, which granted sex workers the right to protections of the Labour Relations Act.

Earlier this year, SWEAT took the Minister of Safety and Security and seven others to court in attempts to end unlawful and frequent arrests of sex workers and the abuse by police from Woodstock, Claremont and Sea Point police stations, as well as the City of Cape Town. The case was prompted by enduring police brutality against sex workers, in which sex workers were arrested and detained, but with any intention of prosecution. Police have simply used overnight detainment as opportunity to “steal from, rape, and harass” sex workers, after which sex workers are released without being prosecuted. In April, the Cape Town High Court ruled in favour of SWEAT’s application, stating that “the members of the South African Police Service in the Cape Metropolitan area and of the Cape Town City Police, are interdicted and restrained from arresting sex workers for a purpose other than to bring the arrestees before a court of law, there to face due prosecution.” More than several months after the Cape High Court ruling, however, sex

workers have continued being subjected to police harassment and criminal elements on the streets. Seemingly, the interdict led to no improvement of the situation of sex workers. Instead, the City of Cape Town has taken targeted approach with a newly established special unit, commonly known as “the vice squad” by local media, conducting targeted arrests in several areas where sex workers operate. Reportedly, fines have been set at \$70, and doubling, and then tripled if sex workers are caught for repeated offense.

The Godly Governance Network and the Family Policy Institute allege that the coalition lead by SWEAT have used human rights jargon deceptively as a way of winning public empathy in favour of decriminalization. They accuse the Human rights coalition of abusing the human rights framework to further their cause. They argue that there is no evidence that supports the view that sex work as a trade inherently affords human dignity to women and their families. Their research affirms to the contrary, that sex work leads to broken women; women who are addicted to drugs and other substances, with multiple stress-related and personality disorders, abused and exploited by pimps and brothels, victims of human trafficking etc. The President of the institute asserts “SWEAT and allies used deceptive arguments, which are not supported by as case-based evidence proves that sex work inherently takes away their fundamental freedoms by virtue of the nature of the trade. Only exit strategies will given women their dignity back, as well as fundamental human freedoms”

Secondly, religious and traditional lobby groups accuse Human Rights coalitions as being part of a neo-liberal or secular humanist agenda to break or redefine families and societies in relative terms; part of an agenda to break social norms and values, building lawless and valueless societies. The case of gay-marriages, abortion, rod-discipline in schools, disbandment of school prayers, death penalty are cited as cases in point of protracted struggles to redefine African and developing countries in neo-liberal and euro-centric terms. The extent to which interest groups can contend with the ideological fibre of new-age constitutionalism remains questionable, particularly amidst global political and economic pressures.

Thirdly, they allege that constitutionalism or legalism has been used as the prime instrument to subvert popular perspectives in favour of minority views. Put differently through constitutionalism, individual rights are leveraged over and beyond collective rights. The individual, “his lusts and desires”, is esteemed above whole societies. It has been used to undermine “the popular vote” bypassing democratic grassroots participation. The new-Age agenda disguises itself as an agent of human rights, a defender of the defenseless, a man of the people; the people’s choice. And that is way social policies often prove to be ineffectual, because they do not represent the social values of ordinary people. These views are shared by the traditional leadership. The Chairman of the National House of Traditional Leaders, Hnr. Khosi Kutama, asserts “Our people are no longer dreaming their own dreams. The political elite dream up dreams of New York and pose these as our own for the sake of political expedience”. This case is made in context of South Africa’s seemingly fixed constitutional democracy.

It is true indeed that the Human rights coalition has made concerted efforts to promote the belief that sex work rights are human rights. Sally Shackleton (Women’s Net) confesses that often it’s been necessary to disguise feminist views in protectionist language because of the hegemony of conservative spaces/views. So arguments motivating for decriminalization have been couched in ways that protect women and children’s rights. This has proven successful at the level of gaining audiences. The WLC also confesses that a counter-strategy has been to use the human-rights framework and to say “Even sex workers have human rights, regardless of the crime”. The direction of the courts is increasingly moving in this light (i.e. take the recent Labour Appeal Court judgment on Kylie).

When questioned about constitutionalism and human rights, the National House of Traditional Leaders is of the view that people do not understand human rights. S36 clearly spells out that there are limitations of, and rights and responsibilities when it comes to human rights. People are not and cannot be given leverage to corrupt the nation under the auspices of human rights. He argues that sex work should not be covered by human rights. To the contrary, the nature of sex work goes against the concept of human rights.

The National House of Traditional Leaders also asserts that the ANC-led government is afraid of the human rights lobby groups because they speak of democracy. They do not understand that African governance actually endorses democracy albeit a more direct democracy than currently practiced. He asserts that “The democracy of the United Nations is one that elects a few to make decisions on behalf of the majority that are not even liked by the majority”.

*Interest group Collusion, Corporation, Common Agency and Group Competition*

Noticeable about the public policy process has also been the role of group cooperation and collusion, competition and agency to try and influence policy outcomes. Engagements with the policy process, particularly at the level of consultative workshops, has to a large extent been characterized by alliance groups and partnership networks, highly-charged contestation between groups, and commendable group agency at the level of advocacy and lobby work in particular. It's important to distinguish between group cooperation and collusion; the one is a passive indecisive form of the other (Braun and Gilardi 2006). Group cooperation, in this regard, commonly refers to interest groups often working together, sharing some members, whereas group collusion refers to formal arrangements to amalgamate and channel group resources towards joint programmes and shared campaigns. Group interdependence, in this regard, accrues the benefits of establishing common policy positions amongst interest groups, by establishing common cause, common standards, common traditions, common value systems, common funding purse etc). This strategy often leads to some interest groups adopting policy positions of more dominant interests groups. Interest groups may even share common views about policy alternatives. More ever, these tactical arrangements produce and are maintained by ‘agents of socialisation’, who promote and consolidate common norms. In this instance, interest groups who adopt policy stances that are congruent with the normative environment are rewarded through group inclusion. Interest groups with counter positions suffer the consequence of group alienation/marginalisation. This evident in comments like ‘those ones don’t belong to this group, ‘these other ones are not with us’, ‘them’.

Group cooperation and collusion can definitely be said to be phenomena that characterised a lot of the public consultation workshop pre, tea-break sessions, and post workshop sessions. Groups generally tended to regroup on the basis of shared perspectives and shared values. They differed based on differences in views on the best legal response to deal with the legal challenges of sex work. Interviews with researchers of the SALRC confirm that the human rights and religious sector led leading public campaign through extensive lobby work agitating against the decriminalisation of sex work in South Africa. The Family Policy Institute and SWEAT, for instance, have been singled out as lead coalescers, having mobilised their respective sectors to participate in policy consultations.

The Family Policy Institute is said to have played a critical role in organizing the religious community (represented by a collusion between Christian/Muslim/Hindu/Jewish churches and associations) to take their stand on the issue. Since the call for public participation in the SALRC, the institute has been reported as having actively mobilised its constituency through the use of update alerts to church networks and membership on its database, radio station interviews and other public debates, petitions, email and sms notifications encouraging Christians to send their inputs to the SALRC, as well as participating in e-blogs set up by their contenders (i.e. SWEAT). The SALRC reports to have received over 900 emails from the religious sector nation-wide. The Godly Government Institute even colluded with the Church of Traditional Leadership in support of the campaign to decriminalise.

Eastern Cape traditional and church leaders also forged alliance to opposing plans to legalise or regulate sex work in South Africa. The ‘unholy’ Alliance comprised of the Eastern Cape House of Traditional Leaders (ECHTL), Congress of Traditional Leaders of South Africa (CONTRALESA), Imbumba Yamakhosikazi Akomkhulu (forum for the Queen and wives of traditional leaders), Godly Governance Network, as well as the Eastern Cape Provincial Council of Churches. This group met independently with the SALRC in over the matter. The meeting took place in Umthatha in 2009.

The SWEAT alliance, on the other hand, proved to be the most organized of all alliances, having engaged in protracted struggle to shift policy outcomes in their favour. SWEAT has been at helm of the coalition of Human Rights activist calling for decriminalization of sex work in South Africa. Alliance partners have ranged from legal experts, gender/feminist NGO's, to practitioners and peer educators, to brothel-owners and pimps, academic institutions, researchers and policy makers, community churches, health officials and government councils. SWEAT has even formed alliances with regional associations across Africa (i.e. Path Find (Mozambique), Bar Hospices (Kenya), WONETHA (Uganda)) in efforts to consolidate the SISONKE agenda of forming a continental women's movement for decriminalization of sex work. Alliance partners included; Women's Legal Centre, Sisonke, ASWA, SANAC, POWA, Women's Net, Tshwaranang Legal and Advocacy Centre, Genderlinks, Gender DymaniX, Building Women's Leadership (BWL), Reproductive Health and HIV Research Unit, Women and HIV/Aids Gauge, Health Systems Trust, Wits Writing Centre, Lesbians, Gays, Bi-Sexual, Transgendered (LGBTI) sector, SACCAWU, Aids Consortium, World Aids Campaign, Good Hope Metropolitan Community Church, Institute for Security Studies, Centre for the Study of Violence and Reconciliation, including world-renowned researchers and policy-makers (i.e. Chesa Bodin and Marlise Richter). These groups have joined forces with SWEAT, providing strategic support in areas of competence and geographic prudence. Reportedly, cooperation and collusion arrangements have assisted in strategy development, in the delegation of tasks by competence, ensuring that efforts are not duplicated and to pool resources together. Though some individual groups did not participate in actual workshop discussions, they were represented by the coalition of SWEAT as well as made a submission to SWEAT so their views could be represented in the final submission.

Groups have been meeting regularly to discuss strategies for influencing policy. SWEAT and allies, for instance, recently strategized and sent letters to the Ministries of Police and Justice requesting them to place a moratorium on arrests, and to develop a plan of action to deal with the foreseen challenges of the 2010 Fifa World Cup<sup>27</sup>. These, however,

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<sup>27</sup> These included the challenges of human trafficking, child prostitution and so on.

remained unacknowledged and unanswered. SWEAT, as surrogate mother of a sex worker movement called SISONKE, also provided research and information support, administrative support, education and peer training on health issues (VCT and condom-use), hotline services, and skills development opportunities to the organization. Sisonke was formed specifically to unite all sex workers, to challenge laws against sex work, to fight for human rights for all sex workers, to improve their living and working conditions. The Sweat alliance also ran extensive literary campaigns (comprised of research partnerships, opinion articles, book launches and symposiums) that tried to debunk the myths around sex work. For example, the Institute for Security Studies (ISS) and the SWEAT co-authored the book “Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City.” The book reports on the results of a two-year study jointly conducted by the two organisations. Reportedly, it is the first complete survey and analysis of the sex work industry in a South African city, Cape Town. The Mail & Guardian, ISS and SWEAT also hosted a debate around the issue of sex work or ‘sex work’ as they refer to it at the Castle in Cape Town recently. ISS Book Launch/Panel Discussion invited public engagement on questions around Gender and Sex work.

For both groups, group cooperation and collusion has led groups to greater engagement and consultation with the public as they tried to further demonstrate the soundness of their claims. Both these tactics, seemingly, have given individual groups greater clout or perceived legitimacy, enabling them to speak with unified voices on issues of mutual interest. Groups have been able to share resources and expertise in networks, dividing the advocacy work by the strengths of the members. Group cooperation, however, has not always been easy, as the political tool depends on persuasion, negotiation and intimidation, according on the strengths and resources of the network (Ranchod, 2007). If the network is large and influential, it may threaten to upset the policy process if the government does not incorporate its concerns in the policies. The interplay of actors facing similar views and constraints in the policy process allows for mutual benefit at the expense of other parties. It’s important to note, however, that policy reforms are not adopted as a consequence to these mechanisms, but only if payoffs associated with policy reforms are considerably larger than associated effectiveness.

Though interest groups in South Africa have tended to be organised along racial lines, bearing in mind South Africa's history, interest groups in the policy process have largely been grouped along ideological/perspective lines. Observable tensions often depicted the traditional power struggles between liberal and conservative interest groups. Because of the contentiousness of the policy issues, the public policy process has definitely, therefore, been characterized by heightened tensions between contending lobby groups. According to the SALC, at the onset of most workshop debates there tended to be marked distinctions and sharp demarcations of enemy lines. Group Competition was evident in this process as tensions lifted high as either/or groups debated towards either extremities. Tensions between contending groups can be decoded from the following accounts of group behaviour in the policy process.

The Family Policy Institute of South, for instance, alleges that SWEAT and allies often arrived at debates already convinced that sex work must be decriminalized. In its criticism, the Family Policy Institute points out that research conducted by the human rights lobby group fails to mention the role of criminal syndicates and gangs in sex work and went to great pains to glamorize and romanticize this sordid trade.

\*Lucy, ASWA representative, on the other hand asserts religious and traditional lobby groups are their biggest threats and stumbling blocks. "But we are a rainbow nation, so they should not hinder our progress" Another sex worker affirms the above in saying; "The religious people don't give people choices. They say we must leave the industry despite our circumstances. Sometimes they empathies with our plight but they don't often change their views. Church people in particular are always judgmental. They want to pray our problems away. Is it immoral to try to put food on the table and to educate your children?"

According to and Gilardi (2006) group cohesion and tolerance are important pillars of policy-making. Group competition, in this regard, can compromise the policy process, and render decision-making improbable, if not ineffectual. They suggest that policy

administrators should make attempts to foster group cohesion in public policy processes. This can be done through a number of learning mechanisms; namely through the acquisition of relevant information that permits the updating of beliefs, through learning from the experiences of others or learning policy protocol (that that is deemed correct for the purposes of effective policy-making). Pluralist and Marxist scholars, on the other hand, contend that dialectics, group competition and conflict are precursors of policy formulation process. Pluralists and Marxists contend that conflict and dialogue are critical pillars to policy formulation as these can lead to definition and subsequent realisation of the common good. This school of thought suggests that the scope and content of the common good can only be found in pluralistic policy environments and after processes of conflict, as well as negotiation amongst interest groups.

#### *Organisational behaviour and Interest Group Analysis*

Elliot-Teague (2006) holds that organizational behaviour of interest groups in trying to influence the content of social policy can also be divided into two types, frequently referred to as “insider” and “outsider” group strategies. According to him, insider strategies include ‘conventional’ lobbying activities like holding private meetings with policy-makers, while outsider activities consist of those oriented toward mobilizing citizens to influence public opinion (Walker 1991 cited in Teague, 2006). Insider groups are generally regarded as legitimate by government or policy-makers and are most often consulted on a regular basis, while outsider groups are those that “do not wish to become enmeshed in a consultative relationship with officials” (Grant 2000, p. 19, cited in Teague, 2006). Insider groups meet regularly and privately with policy- makers to voice their policy interests, while outsider groups rely on trying to influence public opinion. For both, groups are assumed to rely on one strategy, not regularly engaging in the other.

Group behaviour at SALRC workshops can also be categorized into insider versus outsider group strategies. During the early stages of each process, some groups (human rights lobby groups) sought out government officials individually to influence policy provisions, acting as lobbyists. SWEAT, for instance, organised separate for a between the Commission and sex workers themselves as a way of encouraging sex workers to air their

views on questions of legal revision. The SALRC also went on police-guided tours of Gauteng's hot-spots (i.e. Hillbrow) speaking to street-based sex workers. Other groups (e.g. DA, EC House of Traditional leaders, Godly Governance Framework and other church leaders) made private requests to be addressed on the matter. During workshops themselves, groups contacted each other and formed policy alliances to strengthen their positions. Then, as a last resort, a few groups became challengers, changing the location of influence and seeking additional support from parliamentarians or citizens to pressure the government to move with policy outcomes of their interests.

Similarly, interest groups who participated in the SALRC-led consultative process tended to do so in five ways, namely as stakeholders, consultants, lobbyists, networkers and challengers. Almost all groups participated as stakeholders, having responded to invitations to participate in stakeholder workshops. Those who filled the consultant role tended to be the experts working in the human rights and legal fraternities (i.e. Women's Legal Centre, Lawyer for Human Rights, and Legal Resource Centre, as well as judicial and constitutional experts). The lobbyists, networkers and challengers tended to be the church groups and faith-based CBOs, as well as human-rights and feminist/gender-based NGOs. In fulfilling the roles, Elliot-Teague (2006) contends that interest groups therefore engage in three forms of influence: persuasion, negotiation and intimidation. Stakeholder, consultant and lobbyist behavior in this regard may be considered as "insider" behavior, while networker and challenger behavior may be characterized as "outsider" (Elliot-Teague, 2006).

Generally, however, groups tended to use persuasion to achieve favourable policy outcomes. The dominant ones tried to convince others of the correctness and importance of the policy positions they hold and namely through sharing information that represent one's interests, giving critique of the Discussion paper, whilst offering alternatives, and expressing why particular legal arrangements were appropriate or inappropriate over others.

There were little negotiations between contending groups, as these held polarized and divergent policy positions. The Sweat Director, for instance, gives the following account of the Cape Town workshop:

“The Cape Town workshop was very tense and hostile...People tended to be on opposite sides, with the human rights groups on one side, and religious groups on the other, with few to none taking the middle-ground positions...some groups would send counter-people to opposing groups deliberately to cause confusion and to interfere with group discussions....in this debate people take polar decisions....you’re either for it or against it. The area of sex work is not an area where people are willing to be swayed, to negotiate or compromise or where rationale, emotive-free and systemic discussions can take place.” (Eric, SWEAT).

This view is in line with that of the legal centres, which hold that South Africa has not yet reached the advanced stages of public discourse wherein rationale, systematic and evidence-based approaches are used to come up with policy decisions. “We’re a polarized country of hard-liners. If it’s wrong, it’s wrong for everyone” (Meerkotter; Tshwaranang Legal Advocacy Centre).

The Godly Governance Institute puts it less mildly and quotes scripture to defend the reluctance to negotiate in the policy process; “What fellowship can light and darkness have together. We have been called out of darkness into light”?

It is not surprising at all therefore that interest groups were unable to negotiate on policy outcomes. At the end of the day, negotiations require that contending interests groups have something to trade. It is often impossible to negotiate when groups values one outcome very highly over others or when groups have limited to no interests to trade.

The SALRC, however, reported some levels of negation in the policy process. Though from the onset, workshops tended to be dominated by heightened tension, reportedly, however, the SALRC witnessed marked shifts in the thinking of opposing groups as the

SALRC facilitated towards shared goals, group cooperation and consensus-making in approaching the debate at hand. The SALRC reports that opposing interest groups (i.e. religious sector and human rights sector) tended to make necessary compromises, particularly when it came to discussions around adopting policy stances in the interest of vulnerable women in the industry and based on securing their well-being. Opposing groups neared towards common consensus only on calls by stakeholders to think more compassionately, and to consider the ‘problem of sex work’ through human eyes. Of most workshops, there was general consensus around the need for a comprehensive national strategy to respond to the problems of sex work, and the need for poverty alleviation strategies as well as exit strategies for sex workers who wanted to leave the trade. Workshops also agreed that business, labour and civil society needed to partner up with government and as unified force acting in the interest of vulnerable sex workers. There is general agreement that sex work is a societal problem, not just government’s problem, and therefore a multi-stakeholder approach is required to deal with it.

Groups must also be commended for the reported minimum to no use of intimidation tactics. Intimidation is commonly understood to mean the opposite of negotiation, involving not two positive goods but one negative and one positive. No group has been reported as having made threats to or challenging the position or resources of the opposite contending group. To the contrary interests groups have opted to lobbying tactics in efforts to influence the content of legislation. The dominant lobby groups (i.e. SWEAT and The Family Policy Institute, and their allies) report having done extensive lobby work in the earlier stages of policy development. They report having pressed for greater influence over policy content and even for greater opportunity to participate in the policy process. These groups, for example, report having contacted government officials with letters and phone calls to get government’s ear on the matter, as well as having invited SALRC officials to their own strategy and information meetings. Most of this type of participation, however, has been informal and has largely been dependent on the relationships built between interest groups and government’s policy-makers. Smaller groups, however, have used networking as a tactic to build alliance with more dominant groups. In workshops, one could clearly observe interest groups initiating or making

advances to work together, particularly when they perceived threat from contending groups or perceived that officials were not making due considerations or moving discussions in their favour.

Not all groups engaged in the above types of behavior, however. Business, political parties and alliance partners, for example, were largely absent from SALRC workshops, played the roles of observer, often deliberating on issues outside of the policy consultative process, if at all. COSATU, for example, opted to refrain from the SALRC workshop, opting to use internal and alliance structures to get a sense of policy issue regarding sex work. Rather than mobilising massive support through public action, COSATU has opted to engage its membership on the issue, working through its channels of influence, discreetly, and without allowing undue tension to unravel between partners as a consequence of contentiousness. This is in line with Elliot-Teague (2006) assertions that interest groups with good relationships with officials, tend to make this the dominant form of interaction between that particular group and government, and that groups can rely on this relationship to press for changes with other officials. While “Lobbyist” participation is not passive, it is largely diplomatic, with groups relying on the good will of officials to listen to their concerns and consider them. Government responds in kind, usually accommodating groups’ requests for greater involvement, although they do not necessarily respond to requests for changes in policy content. Groups try to persuade officials to their point of view, occasionally trying to negotiate for concessions in return for help in promoting the policy’s provisions in local communities.

#### *Effective versus ineffective tools*

It is difficult to ascertain at this point, which of the above strategies and tactics have been most successful because consultative outcomes are still to be concluded by the SALRC. However, there are definite suggestions of tools that have proven less successful. To date these have included letters to the relevant Ministers and an attempt to meet with them, as well attempts to meet with the chairperson of the Portfolio Committee on Justice and other parliamentarians. SWEAT and the Women’s Legal Centre, for instance, who have been at the helm of the call on the state to place a moratorium on all arrests for the duration of the

world cup and until the conclusion of the SALRC review process, admit that these calls have heeded deaf ears. The Minister of Justice and the Minister of Police have chosen not to respond to this call months later, failing even to acknowledge receipt of the memorandum. SWEAT and allies have also admitted finding difficulty to accessing parliamentarians on the issue, reporting of failed attempts to getting access to legislative decision-makers. The Women's Legal Centre has consequently expressed reservation about the extent to which the human rights lobby group has successfully influenced policy outcomes. The centre contends that the moral arguments, from both the religious and traditional sector, continue to enjoy powerful voice, particularly amongst parliamentarians. This is likely because "parliamentarians and government officials do not want to be associated with decisions perceived to be immoral, even if they too possibly make use of the services of sex workers" (WLC, Stacey).

The responses by Ministers and Parliament do, therefore, affirm Grant's (2000) analysis of group or organizational behaviour. Grant (2000), cited in Teague (2006) contests Walker (1991), Kihato and Rapoo's itemization of organizational strategies. He contends that none of the mentioned factors are critical in distinguishing insider/outsider group strategies. Instead, Grant (2000) argues that the willingness of a group to abide by the rules and policy perspectives of government is the predominant critical factor in shaping policy outcomes and determining in insider/outsider group behaviour. This is seconded or affirmed by the acceptability of the group's cause to the ruling government and the willingness of that government to recognize the group.

## Chapter 7: Sites of Power in the Public Policy Process

Undoubtedly, the policy space for civic engagement in South Africa has widened since 1994. Participation of all forms of interest groups has been sanctioned by means of constitutional law, and as a precondition for amending old and endorsing new legislation. Some interest groups (i.e. traditional lobby group and some segments of the religious community) have continued to confine their demand-making tactics to the traditional sites of power i.e. bureaucracy. Some have definitely failed to take advantage of the various sites of power that resides *outside* of the SALRC policy process but is nonetheless accessible to strengthen efforts to influence policy outcomes. These include the formal (corporatist) structures outside the scheduled government workshops, submissions on proposed policy and legislation through the green and white paper processes. Arguably, more effective strategies and tactics now include the more informal tactics of lobbying parliamentarians, using the courts and mobilising public opinion through social media.

In light of the above, chapter 7 focuses on the sites of hegemonic power that interact with the SALRC policy process on adult commercial sex work. This chapter presents and gives analysis of *primary and secondary data* on power to affirm the finding that the state, the political elite, media, funding agencies and the judiciary are strategic sites of power when it comes to shaping policy outcomes on adult commercial sex work. The chapter also makes reference to relevant case studies be known to South Africa's legal and policy fraternity to strengthen its argument on the matter. In summary, an analyses of interview scripts and literary work on power and public policy affirms that power in regards to questions of adult sex work is concentrated at the intersections between the government (as represented by the SALRC), the political elite, media spaces, donor agencies and the judiciary.

Power is largely concentrated at 6 main levels; at the level of the state, political elite, judiciary, media, funding agencies and certain civil society groupings (i.e. traditional groups, religious groups, and human rights lobby groups). Whereas power over the policy process is largely dominated by civil society groups; power of policy outcomes, however,

is concentrated at the level of the ruling state/political elite and the judiciary. Chapter 7 and chapter 8 give this analysis, dealing with the respective components in more depth.

Power over the policy process has been determined by modes of policy engagement, group size as well as hegemonic or cultural power of ideas. In this regard, the human rights lobby group has a growing advantage of legal culture (human rights culture), as well as the use of more innovative modes of civic engagement (i.e. court litigation, social networks, strategic partnerships, group collusions and common agency) in waging an offensive against the status quo. The religious and traditional lobby groups, on the other hand, have had the advantage of group size<sup>28</sup>, political allegiance and cultural power, enjoying captive audiences on questions of identity, morality and traditional custodianship. The ideological hegemony of these groups is demonstrated in public opinion surveys, which often mirror each other.

Power over policy outcomes, however, is determined by the extent to which interest groups can make decisions over policy outcomes. In this regard, the ruling state/political elite have the greatest advantage. The ruling political party (ANC), for instance, has the advantage of political power to oblige state bureaucrats and policy-makers, commonly known as deployees, to make policy decisions that are in line with the manifesto or policy documents of the ruling party. The ruling party, through its deployment policy, enjoys majority in the critical policy-making institutions of the Republic i.e. in the executive and parliament. The state bureaucracy, on the other hand, has the advantage of legislative, executive and administrative powers to determine national policies.

The judiciary, on the other hand, has the advantage of constitutional supremacy or judicial powers to nullify policy decisions of government or to force government to review policy positions deemed contrary to the letter and law of South Africa's constitution.

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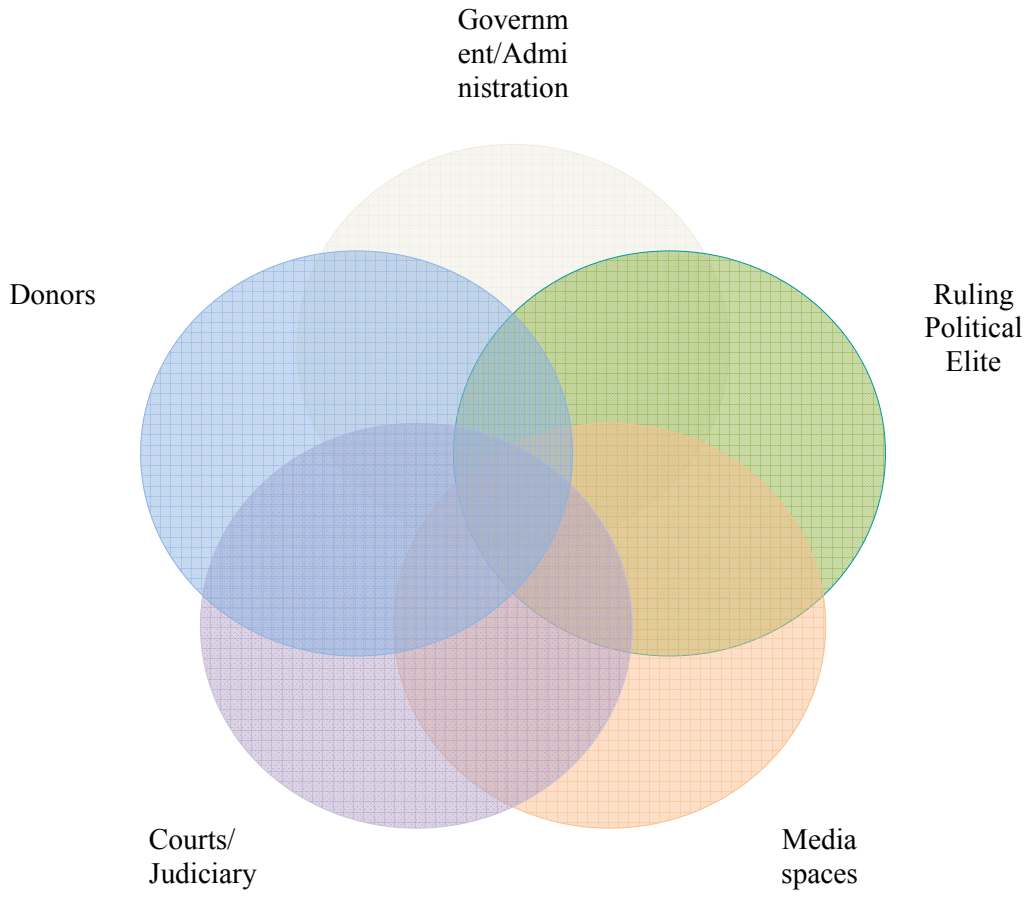
<sup>28</sup> Though the SALRC could not give absolute numbers yet as it was still to conclude on compilation work, the SALRC confirms that the religious lobby dominated SALRC workshops in terms of numbers.

Media, on the other hand, has the advantage of a massive and highly centralised communication medium that can shape and reconstruct public opinion on key policy issues. Because media ownership is concentrated in very few hands, it is often seen of being the political expression of an unrepresentative conglomerate of unelected neo-liberals.

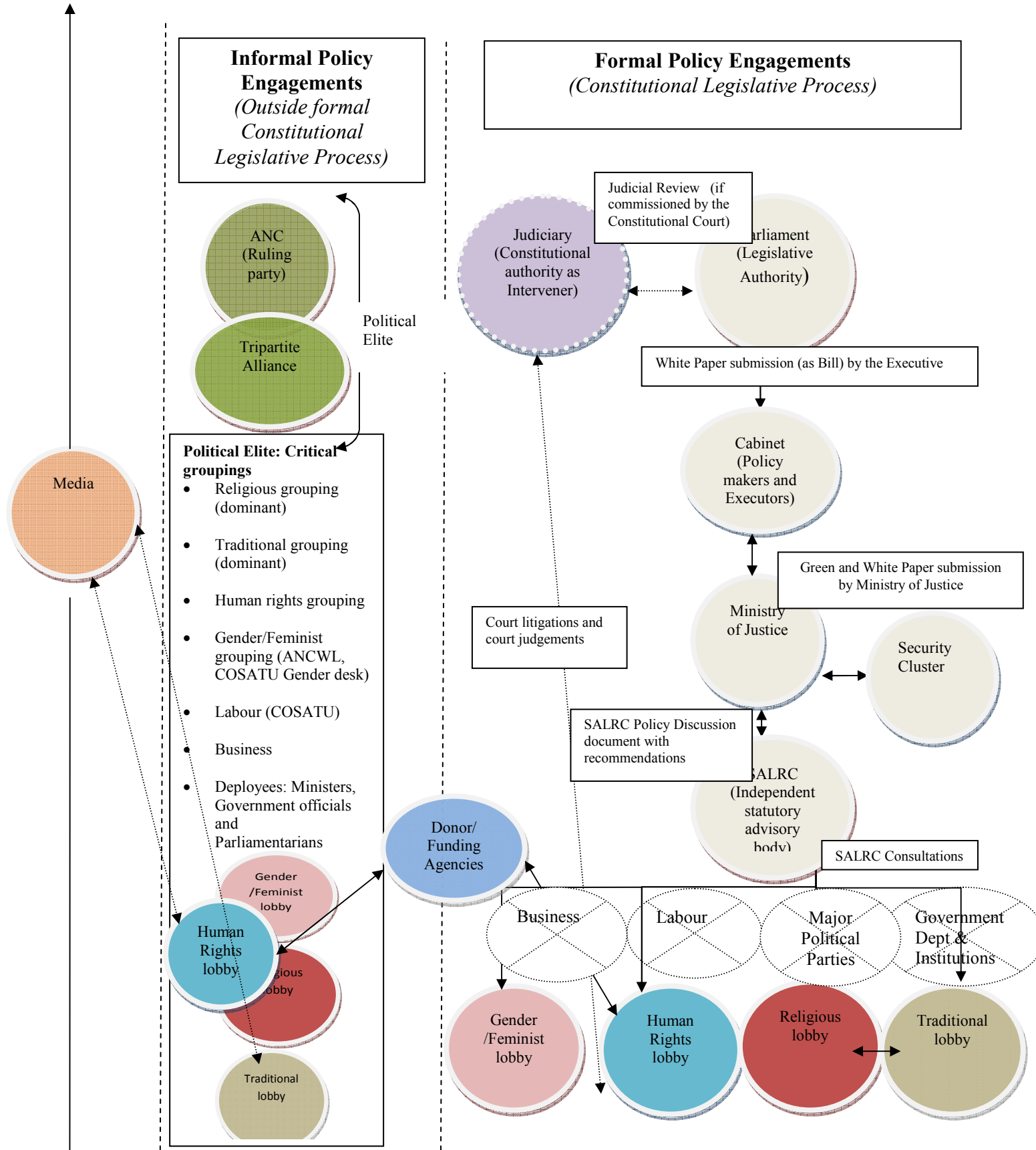
International funding agencies have also begun to play an increasingly important role in the policy process, particularly in terms of determining the policy agenda of NGOs and CBOs in Africa. This can be attributed to the relationship between donor funding, organizational resourcefulness and agenda setting in public policy in South Africa.

The above is typified by Figure 1 and 2 below.

Figure 1: Major Sites of Power



**Figure 2: Sites of Power in Public Policy Processes**



## *The State*

The state, in this regard, commonly refers to a set of institutions that possess the authority to make the rules that govern the people in one or more societies, having internal and external sovereignty over a definite territory (Benjamin 2005). The use of state power can take all forms of deliberate influence, to describing all forms of social control or influence of the public policy process by various interest groups, including those that are not derived from the state. This covers legislative, administrative and judicial actions which interact with regulated institutions, beneficiary organisations and individuals to achieve a favourable legislative response. State power can be used either to restrict behavior or to prevent the occurrence of certain undesirable activities (a 'red light' concept), or as enabling or facilitative ('green light') in the public policy process (Erma nd).

What is evident in analysis is that power is generally concentrated at the level of the state. This state apparatus in this regards *is represented by the South African Law Reform Commission, the Executive, Parliament with the exception of the Judiciary*. However, because the dissertation has focused on the *initial phase of the public policy process*, this section will focus only on the South African Law Reform Commission, which is a critical component of the policy process in this regards.

The SALRC generally has advantage of the following sources of power; bureaucratic power, knowledge and expert power, as well as gate-keeping power.

It can indeed be argued that the state (i.e. South African Law Reform Commission, Ministry of Justice and Constitutional Affairs) also has the advantage of bureaucratic power. Officials in the state bureaucracy are able, through their power, to administrate advice and decide on, as well as implement policies and laws made by the legislature.

State officials, like the South African Law Reform commission, also have the advantage of expertise, as well as knowledge power. Expert power refers to a group, organization or an individual's power that is derived from rare skills sets and expertise, whereas knowledge power refers to the power over knowledge or information (et al; 1959 cited

Roskins 2008). Unlike the others, this type of power is usually highly specific and limited to the particular area in which has knowledge, is trained and qualified in. According to Alvin Toffler, these sets of constitute the most powerful and dominant forms of power, particularly in knowledge-based economies and public policy processes. The SALRC, in this regard, has the power to influence what knowledge is provided to interest groups (by way of their discussion paper). Knowledge can be used either positively (sharing it), negatively (by withdrawing it) and in ways that transform public policy processes.

Undisputed, is the fact that the SALRC, in consultation with the Minister of Justice and Constitutional Development, has been given leeway to decide on the content of discussion documents, sets of recommendation, policy positions, policy postures etc. The SALRC, at this phase of the policy process, definitely has gate-keeping powers, when can be used in defense of either of the policy proposals they have put to the fore. Undoubtedly, the SALRC has the powers/jurisdiction to reject views that are not identical to its most preferred legislation. It also enjoys legal sanctions to do so, and only has to prove due consultations with interest groups. Gate keeping powers of the SALRC are likely binding, and may constraint the influence of interest groups on policy outcomes. The extent to which interest groups influence policy outcomes does, therefore, depend on the extent to which SALRC officials buy into the arguments of contending groups, the extent to which arguments are in line with preliminary views on the matter. According to French et al (1959 cited Roskins 2008), the extent to which interest group submissions are considered, however, also depend on the extent to which views are in line with the thinking of government on the issue. In the opening addresses of consultative workshops, the SALRC made it very clear that policy discourse should consider and should be in line with the type of society South Africa is building i.e. inclusive, non-racist, democratic, prosperous; constitutional rights; international instruments and international obligations; as well as the thinking about the role of law, limitations and obligations of the law to protecting vulnerable groups. The SALRC therefore had a clear framework within which to approach policy discourse in consultative workshops. Their role, which was clearly articulated in policy workshops, was to make policy recommendations to the Ministry of Justice and on the basis of law and constitutionality, whilst bearing in mind the views of interest groups

as expressed in public consultations. Primarily, however, theirs was a legal pursuit or the pursuit of appropriate legal measures with regards to adult commercial sex work.

It's also important to note that the interdependence of the SALRC and the various interest groups. The policy recommendations of SALRC can and has been influenced by the views of dominant interest groups, and conversely, the policy positions/choices of interest groups are influenced by the views SALRC. This is commonly known as 'policy diffusion' (Braun et al 2006). The reason why policy views of interest groups can have influence over the collective views of the SALRC is largely as follows. Interest groups (proponent or opponent) may raise policy externalities that must be taken into account. And most importantly, they can increase legitimacy/credibility of the regulatory strategy as well as of the public policy process or public consultations. The SALRC would, in this case, desire to protect itself from negative public criticism, and may want to be seen as having acted right, by conforming to socially valued models. The views of contending/alternative interest groups can also be taken into account if the SALRC values the participation of social actors in the public policy process. This gives great incentive for interest groups to engage with and to participate unreservedly in the public policy processes. Most importantly, if the SALRC shares similar interests with social partners, then regulation closer to common ideal points may be attainable.

It's important to note, however, that political decisions still have to be made. Political principles (serving in the executive and parliament) will ultimately decide on policy outcomes. If the SALRC is not free to make independent recommendations before submitting it to the Minister of Justice, it also reads that interest groups have less degree of power over policy outcomes.

### *The Realms of Political Elite*

In South Africa's policy experience, there is no doubt that the ruling party's and Tripartite Alliance machinery has captured the machinery of government, and therefore exerts sizeable influence over policy outcomes. Though interest groups have been invited to participate in public consultations, there is no guarantee that participation will inform policy outcomes. Policy decision-making powers ultimately lie with ANC/Tripartite Alliance cadres, deployed to lead in various levers of the state i.e. in the Executive and the Legislature. The ANC as ruling party, and broader alliance, enjoy hegemonic political power, both in terms of numbers and ideas, as demonstrated by policy and legislative enactments. Ultimately, the ruling party, in broad consultation with the Tripartite Alliance, enjoys the most influence in terms of determining public policy outcomes. This is particularly the case under the Jacob Zuma regime, in which decisions of the national general council (highest decision-making body) as well as the National Working Committee (in between conferences) bind ANC deployed government officials and parliamentarians to executing party mandate. The example of gay marriages, abortion, the death penalty, and the disbandment of the Scorpions must be seen as cases in point. Moreover, most political parties depend upon an inner "ethos" which serves as a cohesive force. Norms must inevitably be established which, independent of any formal machinery or constitution, serve as a set of rules of conduct acceptable to all members.

It is also undeniable that religious and traditional political groups enjoy serious power within the ranks of politics. According to an ANC stalwart, who has chosen to remain anonymous, these groups form the leading strata of the party, and provide the party with its framework, its unity and its general lines of policy; that its influence is dominant in the Party Congresses, in its Executive Committees, and over its leaders. For example, the Catholic/Dutch Reformed Church and its subordinate committees as well as organisations like the Jewish and Muslim blocs, and the Xhosa/Zulu traditional leaders' bloc, are highly influential. These groups constitute what is commonly known as the Old Boys-Club or the Establishment, and dominate the upper ranks of the Church, the Bench, the City, the Cabinet and Legislature. Establishment, Christopher Hollis, cited by Harris, defines the Establishment or political elite as "a body of people acting, consciously or unconsciously,

together, holding no official posts through which they exercise their power, but nevertheless exercising a great influence on national policy”. These constitute the power elites, who frequently place traditional ethics and values above the mere pursuit of power and/or monetary reward. The existence of a political elite leads suggestion that Government may sometimes make policy concessions, in the interests of political allies.

The political elite derive its strength from legitimate power, referent power, and possibly coercive power, depending on whether or not it is exercised. Legitimate power commonly refers to formal authority delegated to the holder of the position by means of elections or appointment (French and Raven 1959 cited Roskins 2008). This is the most obvious and also the most important kind of power. Referent power, on the one hand, refers to the power or ability of groups, organizations or individuals to attract others and build loyalty. It's based on the charisma and interpersonal skills of power holders. Loyalty towards the ANC definitely counts towards an intangible sort of referent power. According to French et al (1959 cited Roskins 2008), this is the second least obvious power, but the most effective. Coercive power, on the other hand, refers to the application of negative influences. It is commonly defined as ‘a bargaining strategy of reinforcement by reward...in exchange for compliance’. Coercion is a regarded as a process in which powerful actors use carrots and sticks to impose policy change. This is commonly the case when it comes to political elites (i.e. trade union affiliates). It includes the power to demote or to withhold rewards, where be these material or by means of services. The desire for valued rewards or the fear of having them withheld that ensures the obedience of those under power. Coercive power tends to be the most obvious but least effective form of power as it builds resentment and resistance from the people who experience it.

In regards to questions of sex work, a large number of respondents are generally of the view that final policy outcomes will inevitably be determined by the ruling party. Annica Meerkotter “Final policy outcomes depends on the views of the ANC Parliamentary caucus and Justice portfolio Committee, however, it is hoped that they would give due regard to the views of divergent interest groups”. Most interest groups assert that political leadership/elites inevitably carry the biggest weight in determining policy outcomes and

“not the people”. This is largely because they have the political muscle and strategic opportunity to do so. The political elite have often been accused of using public policy processes for legal procedural purposes, and often to co-opt interest groups on a view already held by them. In this case, however, it is unlikely the case. The ANC is still to adopt a post-1998 policy on the matter. The labour movement is also divided on the best approach to deal with the problems of sex work. Moreover the greater alliance (labour movement/SACP and the ANC does not always see eye to eye.

The fact that the issue of sex work has received minimal discourse in the ranks of the ANC, however, should send alarming bells to the coalition in favour of decriminalization. This should give sufficient indication of the due credence given to the ‘problem of sex work’. This issue does not to date feature in any of the ANC’s post 1998 policy documents (i.e. ANC strategies and tactics, ANC Policy Conference documents, ANC media statements) neither has it featured seriously in Government’s (i.e. state of the Nation address, Medium Term Strategic Framework) either than in the 2007 National Strategic Plan for HIV/Aids and STI. Saying that the ANC has been silent on the issue is a gross understatement.

Some interests groups are of the view that the ANC is unlikely to ‘rock the boat’ because of fears of fall-outs with its electorate. It is broadly believed, however, that the ANC is likely to maintain its silence on the matter or will maintain the status quo, with minor amendments that extend protections to vulnerable women and children, and increase alternatives for sex workers to exit the industry (i.e. national exit strategy). A radical move in favour of total decriminalization is seen as an unlikely possibility, though there are those hopeful activists (i.e. Ms Meji, AZAW Coordinator) who believe that activist work will win the day. The Domestic Partnership Draft Bill (wherein property rights are extended to co-habiting partners) is a case in point wherein the ANC-led government parked the issue in favour of electoral interests. Though both the SALRC and the Dept of Home Affairs moved in favour of this, the Department of Home Affairs made a decision to halt the legislative process until post 2009 elections. The draft Bill has been parked since then. However, what appeases some groups is that the issue has received much

credence in the ranks of the biggest and most powerful labour federation (COSATU). In the recent COSATU conference in 2009, POPCRU, SAMWU and the Women's desk vehemently raised that COSATU should make a call for decriminalization of sex work. However, having failed to reach consensus on the matter, the conference resolved to deter the matter to the Central Executive Committee for further deliberations.

### *The Media*

As already discussed in Chapter 6, noticeable in this policy process has been the use of media, particular electronic and social media to garner support for respective policy views on sex work. Media (in particular television, radio and print media) shapes public attitudes and behaviours by painting very specific pictures of the world, interpreting the world, relaying constant and consistent messages about the world, all the time, everywhere and anywhere. The media not only determines what issues are important enough to dominate public space, through its hegemonic control over the climate of opinion, but also how the citizenry should think about these issues. Because of the mass media's hegemonic role over the communications space, interest groups (i.e. government officials, national leaders, challenging groups and social movements) often compete for media attention and access in order to get their issues on the agenda and promote a favourable climate of opinion in favour of their own interests (Omsk nd).

The increasing use of social media (Facebook, Twitter, Mxit, and YouTube) emerges as a critical issue in this respect, particularly in terms of its use as an instrument to shape wider public opinion on critical policy matters. Social media, affectionately called 'Power of the People', particularly is seen not only seen as a communication channel, but as the biggest growing resource since the Internet and the World Wide Web started, symbolizing rapid advancements of the communication revolution. According to the recent Universal McCann's annual social media tracker Wave, which maps key changes in consumer uptake and usage of social media platforms for the past four years, 1.4 million have a social network profile. The tracker puts South Africa's internet penetration figure at 9.4%. The figure is expected to grow exponentially over the next two years. From the overall data, it is very clear that consumer generated content is rapidly

becoming the norm. According to a recent TNS Research survey, commissioned by MWEB and conducted in 2009, Social networking (74%) is rated six on the list of online activities after reading the news (76%), searching for information (76%) and online banking (75%). 74% of South Africans make use of social media (i.e. Facebook, Twitter, Mxit, YouTube). The majority of people, however, are using these services to communicate real life activities such as sharing personal news, gossiping and arranging to meet socially.

Gramsci's (1971 cited Wikipedia 2010) elaboration of power can be used to explain the increasing use of media in South Africa's public policy processes. The increasing use of media can be attributed to Gramsci's perceived derivation of Cultural power. Cultural or ideological hegemonic power represents the more classic, material image of power. Power through coercion and brute force, be it physical or economic, as well as project power through consent and projecting the human face. Foucault (1960 cited Wikipedia 2010), also refers to this type of power, outlining a form of covert power through people rather than just on them. He alleges that belief systems gain momentum (and hence power) as more people come to accept the particular views associated with that belief as common knowledge, hence hegemony. Within these belief systems or discourse, ideas crystallise as what is right or wrong, what is normal or deviant. And within these systems, certain views, thoughts, actions become unthinkable. These define the ways in which whole societies see the world. Foucault also claims that power is only possible through power. Put differently, without resistance/defiance, power is inevitably absent. His is an analysis of power at the level of on-going uninterrupted subjugation and how they are constituted (i.e. through a uni or multiplicity of forces). Luke (1974 cited Wikipedia 2010) also refers to values, norms and ideologies as important factors of power (3-dimensional view on power). He asserts, for example, that political ideologies or religious ideals inform policy-making without being explicit e.g. neo-conservatism.

With the understanding of media's source(s) of power, it is understandable how the media can and is often used for the purposes of agenda-setting and in attempts to influencing public opinion and hence policy outcomes McInnis-Dittrich (1994 cited Arnold 2008), for example, argues that the media has the single most dominant impact in

shaping public opinion and hence the policy agenda. It has the advantages of resource, ubiquity, a passive audience and its ability to reach millions in a relatively short time. Through the media, the public can be educated and even indoctrinated on policy issues (McInnis-Dittrich 1994:89 cited Arnold 2008). Kingdon (2008 cited Arnold 2008), concedes that the media may have an indirect influence on the policy agenda, however, argues that the media report what is going on in government, by and large, rather than having an independent effect on government agendas. He argues that:

“the media’s tendency to give prominence to the most newsworthy or dramatic story actually diminishes their impact on governmental policy agendas because such stories tend to come toward the end of a policy-making process, rather than at the beginning...(that) it's the administration that sets the agenda, and - surprise - interest groups that are well equipped with resources.” (Arnold 2008)

Kingdon (2008) does acknowledge, however, that the state does pay more attention to issues raised in the media. Secondly, that policy decision makers consider the “mood of the nation” when making policy decisions. The perception of the mood is often shaped by, among other things, newspaper editorials and issue coverage in general and specialized media. He therefore resolves that the media shape and influence policy issues that the state has authority to set as an agenda, however, the media cannot enforce these on the state as policy agenda. Besley and Burgess (nd cited Arnold 2008), found in their study that governments are more responsive to policy preferences of the public citizenry in areas where newspaper circulation is higher, and therefore government accountability is greater. Media reporting therefore has indirect effect on policy outcomes (Arnold 2008). From the above, one can undoubtedly deduce therefore that the media space is a key and critical site of power, wherein interest groups can and often contend to influence public opinion on critical policy matters. This is often done by creating impressions of crisis proportions, by establishing emotive links between the subject matter and the public audience, as well as to leverage issues by creating impressions that issues at hand have wider societal impact.

It must be noted, however, that the use of media power has its own sets of limitations, particularly in regards to issues of diversity and transformation. The ownership of South Africa's media remains a highly contentious issue as media space is said to be owned and controlled by very few players. This continues to be the main topic of discussion in political, media, civil society and academic circles, with some calling for an urgent intervention to regulate what they see as a 'selfish' and 'slow-transforming' industry. Critics argue that the media space is controlled by an oligarchy of white liberals, and therefore inaccessible to interest groups who wish to contest its space. Critics contend that private and foreign ownership of huge stakes of media enterprise continues to hurt South Africa's growing democracy, stifling black voices and failing to create business and employment opportunities for the black majority. According to the MDDA 2009 report, Caxton, Avusa, Media24 and foreign-owned Independent Newspapers own 95% or so of SA print media, while 42% of radio is owned by the government-controlled public broadcaster SABC. There are stakeholders who continue to make calls for foreign ownership to be curtailed, saying it stifles local opportunities and diversity of local views. Other stakeholders, however, agitate for and argue for current restrictions on ownership to be reduced for the purposes of encouraging foreign direct injections into the sector should local investors run out of money. Currently the law prohibits foreigners from owning more than a 20% stake in broadcasting services. The Independent Communications Authority of South Africa (ICASA), in its position paper published on 13 January 2004, affirmed the need for to liberalise the broadcasting sector specifically, however, intended to ensure that broadcasting services, when viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in SA. MDDA is reported as holding the view that "Diversity of views and opinions would be enhanced by diverse ownership and control, by diverse languages, diverse formats, diverse news and programming, diverse sources of news and information".

There are other key limitations facing the media. Key issues include the role of the press in a fledgling democracy, illiteracy, and the attraction and retention of advertising revenue. South Africa, comparable to other developing countries, continues to have a low literacy rate, with a considerable portion of the population unable to read. However,

bearing in mind the high volume newspaper sales, the media space definitely remains a critical site of power and ideological contestation.

### *Donor Funding Agencies*

Undoubtedly, donor funding plays an important role in interest group participation in public policy processes. It has provided much-needed sources of support to civil society organisations (i.e. NGOs and CBOs), particularly bearing in mind limited access to material resources to engage in civic policy work (Friedman and Reitzes 2001). The proliferation of NGOs and CBOs in South Africa has not only paved way for increasing donor funding, but has also played a critical role in improving governmental accountability, as well as improved civil society's institutional capacity to intervene between governments and their constituencies (Kelechi 2004). There are a wide variety of funding sources that offer support to development civic organisations. Donor organizations usually take the forms of Official Development Assistance (ODA) Agencies, United Nations Agencies, Multilateral Development Banks, International Foundations, Global Corporations, International Nongovernmental Organizations, International Church-Based or Religious Organizations, as well as Service Clubs and Membership Associations.

Research affirms that a considerable number donors and external funders play an important role in policy making in South Africa and Africa broadly (Friedman and Reitzes 2001, Oloka-Onyango, Friedman, and Gyimah-Boadi 2002, Kelechi 2004). In fact, interest groups concede that they often depend on foreign funding, particularly to run their operations and to finance programmatic. The Women's Net concede, for example, that dependence on donor funding dictates which programmes they can run or support, particularly in regards to the operations of women's organizations. As a consequence or trade off, therefore, foreign funding institutions will often set organizational agendas, and even prescribe particular programmes that are in line with their own areas of interest. Civil society organisations that lack mass-based membership or the capacity to generate their own resources are therefore often more reliant on donor funding, and consequently more vulnerable to agenda-setting from the outside. Financial dependence often erodes organisational independence, autonomy and credibility and

autonomy, particularly in the absence of mechanisms to ensure internal accountability and strengthen resource mobilisation. Donor funding therefore, remains an equally important site of strategic power. Though donor funding is considerably an important site of power, Friedman et al (2001) point out, however, that donor funding for civil society has not always made major impact, regardless of how well-organised and well funded NGOs have been. Whereas donor funding can facilitate access to the policy process and strengthen organisational, it is not the most critical determinant of successful policy engagement. Friedman et al (2001) assert that it is rather the character of interest groups, its internal governance model, its ability to mobilise its membership and garner public sympathy, as well as its specific relationship to the state and the political realm, that are the most decisive factors in influencing policy outcomes in ones favour. Donor funding therefore might not be the best possible route to influence policy outcomes because this largely depends on factors beyond the donor's immediate control.

Moreover, in regards to questions of access and inclusion to policy-making processes, it is important to highlight that donor assistance programmes have often and primarily benefited a small number of urban-based organisations, with middle class technocratic leadership (Oloka-Onyango et al 2002). Civic organisations with mass-based membership and those based rural areas have received limited attention and assistance comparatively. It is not surprising therefore that rural-based organisations are in the periphery of public policy. Due to budget constraints, struggling civic organisations have had to contend with the realities of focusing on core-business i.e. supporting democratic governance either through direct provision of more tangible social services to underprivileged community members. These organisations have limited capacity, both financial and organisational, to influence public policy and effect desired changes in legislation. Participation in public policy processes have often been seen as an add-on or extra function and a luxury of organisations that can afford to run public campaigns, as well as perform research, policy analysis, and policy coordination functions. They therefore have not been able to constitute an integral part of the country's policy making and service delivery landscape, and when able to, policy work has often been carried out under conditions of abject remuneration. Despite the firm recognition of the importance of civic engagement in

public policy processes, what is evident is that only the urban-based and medium-sized civil organisations have been able to demonstrate a consistent level of direct involvement in the SALRC policy process, and even fewer have been able to make significant contributions to policy outcomes. Moreover, donor assistance has merely strengthened the influence of civic organisations with privileged access to the policy-making process, as well as policymakers by virtue of their political acceptability and support for party-specific policy priorities (Oloka-Onyango et al 2002).

### *The Judiciary*

The form of constitutional democracy chosen by post-apartheid South Africa is constitutional supremacy with judicial review (Jagwanth 2003). South Africa has adopted a system of constitutional supremacy with judicial review. This gives powers to the courts to decide matters often placed on the legislative agenda. As stressed above, the South African Constitution is the cornerstone of our democracy and envisages large-scale egalitarian social transformation. According to Smithey (2006), the use of judicial power in policy process can be seen when in use of judicial review to nullify policy choices of government or the legislature, and we often use the rate of such judicial vetoes to operationalise the concept of judicial power. Constitutional supremacy gives judges immense power to decide matters normally placed on the legislative agenda and final say over issues as varied as the death penalty, abortion, gay rights, and the distribution of benefits in society and criminal justice matters (Jagwanth 2003). In both South Africa and elsewhere commentators have described this constitutional arrangement as the ‘legalization of politics’ and have explored ways in which to constrain the untrammelled exercise of judicial power. What has become increasingly evident over the years is that the Courts have become important sites of struggle as well – and initiation and intervention in litigation may help to reduce some of the perils of judicial review identified above. This has been the case particularly in relation to cases on HIV/Aids (the TAC case), abortion, gay rights, and death penalty.

In the light of the supremacy of the Constitution, there are scholars who question the extent to which civic society meaningfully participates in structures of governance in

post-apartheid South Africa. In light of the global shift towards entrenched rights discourse, scholars contend that civic participation has been undermined by the consequent and increasing transfer of power to the judiciary, alleging that the judiciary exercise greater power in determining matters of social policy (UNESCO 2002). Indeed one can quote a number of case wherein the state was obliged to make by the Courts to amend social policy, and in ways that give expression to constitutional rights, particularly for minority groups (e.g. death penalty, abortion, gay marriages). Many therefore see judicial review as anti-democratic because it is conducted by unelected and unaccountable judges (largely composed of white minorities), who have the power to overturn the will of a democratically elected Parliament (composed of the black majority). In the South African context this question takes on added importance because of its segregated history and racialised modus operandus of society in general. The broad socio-economic transformation agenda is therefore seen as being subject to sabotage or compromise because it is susceptible to review by the courts. Skeptics of judicial review argue that by their very nature, judges are likely to come from the elite groups in society and will exercise their subjective discretionary powers in favour of vested interests rather than disadvantaged groups. Thus, gains in the courts are more likely to be for privileged groups at their expense as courts show preferences for some policy choices over others. This view is strengthened by findings of reviews of constitutional litigation. Notwithstanding the content of the Constitution, a review of constitutional litigation in the past seven years suggests inescapably that it is the more privileged groups in society that are seeking the protection of the Bill of Rights in the courts (Jagwanth, 1999: 200). Indeed there are few instances of the more disadvantaged groups in society – the very groups the Constitution was designed to protect – using constitutional litigation as a way of articulating and protecting their rights. In addition, “the jurisprudence of the courts has often not yielded the protection for vulnerable groups which the Constitution appears to envisage. Given that in a constitutional democracy, courts are the primary protectors and final arbiters of constitutional rights, this trend is a disturbing one” (Jagwanth 2003, p15).

Some lobby groups express the concern that a court sitting in judgment of democratic policy outcomes would result in a breach of the separation of powers doctrine. A crucial

function of the South African constitution - and one of the classic features of democracies - is the division of power among the three pillars of government. The constitution, in this regard, protects the state by separating state power into three arms; the legislature (parliament, the provincial legislatures and local councils) makes the laws and monitors the executive, the executive (the president, deputy president and ministers) makes policy, proposes laws and implements laws passed by the legislature, and the judiciary tries cases and administers justice. The judiciary is also unique in that it is not elected, but is independent. In practice this means each arm of the state keeps watch over the power of the others. "The courts can judge the actions of the legislature and the executive but cannot pass laws. The legislature can make laws but cannot hand down judgments or take executive action".

Commenting on the judgment of the Constitutional Court on *Treatment Action Campaign v Minister of Health* (case no 21182/ 2001), the Minister of Health expressed concern that the judgment that reviewed government policy gave the wrong answer to the question of who makes policy (Jagwanth, 1999: 200). The Minister also expressed concern that government planning could become fragmented and government spending priorities undermined and disrupted. The difficult balance government had to strike between contending service priorities would also become difficult to achieve. A judgment such as this, she argues, could 'throw executive policy in disarray and create confusion about the principle of separation of powers, which is a cornerstone of our democracy' (Tshabalala-Msimang 2001 cited Jagwanth, 1999: 200). The Minister went on to state the following:

"If this judgment is allowed to stand it creates a precedent that could be used by a wide variety of interest groups wishing to exercise quite specific influences on government policy in the area of socio-economic rights. It could open the way for a spate of court applications and "policy judgments" not only relating to health care but also to other service areas, such as education, housing and social services. What happens to public policy if it begins to be formulated piecemeal fashion through unrelated court judgments?"

The courts, however, disagreed with the above assertions and held that ‘where the court, being a part of the judicial arm of government, sits in judgment on the reasonableness of steps taken by the executive in the fulfillment of its constitutional obligations, it is exactly a perfect example of how the separation of powers should work’. In doing so, Jagwanath (2003) argues that the court does not take over the functions of the executive, it merely pronounces on constitutional obligations. Some argue have gone further to argue that the courts on the new order have a critical role to play, particular in terms of protecting minority rights and ‘justice for all’. Whereas the old order saw a Bill of Rights enforced by an independent judiciary as a way of safeguarding minority and group rights, the new order has made attempts to use its judicial strength in the interests of vulnerable groups. This is made possible, arguably, due to a shift away from partial minority-rule democracy, namely parliamentary sovereignty.

However, Jagwanath (2003) also points out that judgments of the Constitutional Courts on cases such as these are crucial to understanding the role of subjectivity and judicial power in the context of South Africa’s constitutional democracy. She contends, for example, that “The concern about the tension between entrenched and justifiable rights and democracy goes beyond the question of the legitimacy of unelected, unrepresentative and unaccountable judges deciding matters of social policy normally left to the elected branches of government. The concern is also that the process of constitutional interpretation is an inherently and unavoidably subjective one, which is open to a number of different outcomes depending on the personal and moral convictions of the interpreter. The meaning of statements of abstract rights is imprecise, uncertain and incoherent. Thus, in seeking to find the meaning of the words of the Constitution, it is necessary to go beyond the words of the text and to engage in a form of political and moral reasoning. In other words, judges, like all of us, have personal and subjective viewpoints which they will bring into the process of constitutional interpretation. Allowing judges to exercise this power and influence matters of policy is clearly problematic (Jagwanath 2003, p18). She, however, disagrees with skeptics who hold that courts inherently use judicial power to protect and promote elite interests. In other parts of the world, she argues, the subjective nature of constitutional interpretation has led to cases in which important gains made for

women and other disadvantaged groups at the legislative level have been successfully challenged in the courts as violating other constitutional rights – affirmative action being the prime example.

Relating the principle of judicial review in the case of sex work, undoubtedly, a look at the recent LAC and Kylie's case suggests increasing tension between popular consent as enshrined in criminal law and its ability to extend constitutional rights to sex workers. Kylie's case poses serious questions about the constitutionality of a criminalized legal regime. Kylie, for example, was dismissed from Brigitte's, a brothel at which she worked on the 27 April 2006 (<http://www.legalinfo.co.za/includes/whatsnew/CA10.08.htm>). After her dismissal, Kylie referred her dispute to the CCMA for an alleged unfair dismissal. When the matter proceeded to arbitration, the Commissioner raised questions of jurisdiction of the CCMA to deal with the matter, in the light of the legal status of the work which Kylie performed. The Commissioner therefore ruled that the CCMA does not have jurisdiction to hear the matter as Kylie's work was unlawful. When Kylie brought the application to the Labour Court (LC) to review the jurisdictional ruling, the Labour court upheld the CCMA's ruling and the review was rendered unsuccessful. The basis of the Labour Court's decision to dismiss the review application was the common law principle that Courts ought not to sanction or encourage illegal activity. However, when the Labour Appeal Court (LAC) considered the appeal against the LC ruling, the LAC ruled that Kylie also had rights to protections of labour law as one of the fundamental rights which are enshrined in the Constitution (at least from an employment law perspective) is that at S23(1) namely that "everyone has the right to fair labour practices". The LAC departed from the rationale of the Labour Court insofar as the protection and scope of the rights in terms of S23 the Bill of Rights is involved. The LAC referred to the judgment in the criminal law case of *S v Jordan and others* which in summary held that the very character of the work that a sex worker undertakes devalues the respect that the Constitution regards as inherent in the human body. But that is not to say that as sex workers they should be stripped of the right to be treated with respect. Consequently the activity of a sex worker does not in itself prevent the sex worker from enjoying a range of constitutional rights. This factor should be distinguished from, for instance, foreign and

child workers (who are prohibited from assuming certain forms of employment not because of the nature of the work that they do but as a result of who is required to do the work). Having accepted that S23 of the Constitution affords protection to sex workers, the LAC proceeded to analyse the appropriate relief to be afforded to an unfairly dismissed sex worker. The LAC agreed with the Labour Court that an order of reinstatement would be against public policy but that should not prohibit relief to sex workers entirely. There is still a discretion in terms of S193(2) read with S194 to order just and equitable compensation as consolation independent of the loss of illegal employment. The jurisdictional ruling was accordingly reviewed and set aside and an order was issued that the CCMA has jurisdiction to determine the dispute between Kylie and Brigitte's. A number of questions arise in relation to the scope of the judgment but ultimately it remains an important one insofar as it reaffirms constitutional imperatives, particularly the rights of workers.

The LAC ruling, however, has received much criticism, particularly from the religious and legal fraternities. The Family Policy Institute, for one, has argued that the ruling does not give rises to human rights by to secular humanism (M&G, 2010). To the contrary, by the judgement rewards criminal activity and affirms the view that "crime pays indeed". "By affording rights to criminal elements, it rewards criminality, as opposed to punishing it, creating a nation of criminals". Legal experts have also made assertions that the LAC ruling was the first of its kind and potentially had far reaching implications by extending labour rights even to criminal elements, says Employment law specialist from Cheadle and Thompson, Komeshan Naidoo. SWEAT, the Women's Legal Centre and the Tshwaranang welcomed the court ruling as it affirmed their position that even sex workers are entitled to human rights and human dignity. They further reiterated the call for decriminalization.

The legal and constitutional questions concerning sex work therefore have received much policy deliberation. Whereas the religious community has used moral arguments in efforts to influence the content and outcomes of public policy, the human rights lobby group has evolved to use human rights arguments to influence policy outcomes in their favour.

It is important to note, however, that judicial power does not always trade off in zero-sum ways with that of other policy makers. Firstly, when one looks at the policy-making function of the Judiciary in context, it can also be argued that judicial activism or judicial power has been done in the spirit of law, and used in profitable ways that protect powerless minorities, such as bonded labour, prison inmates, under trial prisoners, sex workers etc. Secondly, the Constitutional Court has also made some significant policy contributions by interpreting the Constitution permissively, giving Parliament or the state opportunity to align social policy to constitutional imperatives. This can be seen in cases already mentioned (i.e. the death penalty, abortion, and civil union marriages). Better yet, the Constitutional Court has even ruled in support of state policy. A relevant example of judicial prudence is the *S v Jordan and others*, wherein Jordan and others contested the constitutionality of criminal law against sex work. In regards to this case, the Constitutional Court (represented by judges Ngcobo J and O'Regan and Sachs JJ for) unanimously upheld that the High Court's finding that the brothel provisions are valid but divides six to five in holding the provision valid. Both judgments make it clear that the decision as to how to regulate sex work is a matter primarily for the Legislature. Open and democratic societies around the world have chosen from a wide range of options to regulate sex work. It is for Parliament, within the constraints of the Constitution, to decide which of these options suits South Africa best. The judges conclude that the sex work provision does not infringe the rights to human dignity and economic activity and that if it does limit the right to privacy, such limitation is justifiable. They do, however, differ on the question of whether the provision constitutes unfair gender discrimination, with O'Regan and Sachs JJ finding that it does by making the sex worker the primary offender and regarding the patron at most as an accomplice, and therefore reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.

Reportedly, it is also not easy to keep the balance when it comes to separation of powers between the three arms of the state. Often the challenge is to ensure that the executive does not wield its authority without being contained by the other branches. The above proves, therefore, that the courts esteem the importance of having the legislature being

the drafters of legislation and will generally defer to its decisions unless those decisions fall outside the scope of constitutionality. Most legislation will not be tampered with by courts even when courts think that the legislation is bad. It is only when the legislation infringes on the fundamental rights of people that the courts will overturn legislation. Even when courts overturn legislation they don't generally replace it with their own vision of what the legislation should look like. Instead a court will generally do this: They will declare the legislation unconstitutional and invalid. But they will suspend the order of invalidity for one or two years (i.e. the legislation keeps operating for 2/1 years). They will also order that parliament corrects the legislation so that it is no longer unconstitutional within the next one or two years and replace the unconstitutional legislation. Thus parliament can then select what legislation they want to use to replace the unconstitutional legislation. In this way the courts try to respect democracy and promote democratic participation. Thus, also public policy/ interests groups can have a great deal of impact on legislation they ultimately can't write whatever legislation they want because the legislation must still be within the constraints of the constitution. The reverse is also true, interests groups can and frequently do use courts to invalidate legislation (e.g. gay rights). But, those interest groups will almost never convince the courts to write new legislation. There the interest groups will have to lobby parliament to convince it to pass legislation they support. Having said that, however, the theoretical question remains: should there not be limits on the powers of courts to decide matters, which properly belong on the agenda of the elected branches of government? (Jagwanath, 2003). The above-mentioned cases show the difficulty of court ability to curtail their power and to defer to the legislative and executive agenda in appropriate circumstances, while at the same time fulfilling and promoting the transformative norms of the Constitution.

## **Chapter 8: Public Policy and the Relationship between the State and key interest groups**

In light of the fact that South Africa's state bureaucracy undoubtedly remains a critical player in public policy processes, as already discussed in chapter 7 above, chapter 8 therefore assesses the relationship between the state and various interest groups, how these interface with and influence public policy. Chapter 8 uses both primary and secondary data to illustrate the relationship between various critical groups, how interests groups interface and in which directions these direct policy preferences.

### *Intra-State Relationship(s) - The Relationship between Government and the SALRC*

The South African Law Reform Commission is an independent statutory body mandated "to do research work with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law" (SALRC, 2009). The Commission investigates matters appearing on a programme approved by the Minister of Justice and Constitutional Development. However, it does not have decision-making authority on legislative matters and can only advise government on issues by way of evidence-based recommendations.

From the onset, the SALRC have made it very clear that their role in the policy process is to enable government to make a policy decision on sex work and on the basis of evidence/research. In terms of the policy process, theirs was to facilitate discussions amongst interest groups on questions of sex work and legal reforms. From observation, the SALRC tended to play the role of info-guide/middle-man/facilitator, bridging the gaps in knowledge, perspective and understanding of individual stakeholders. Its role as an independent statutory body was limited to capturing the views of South Africans and establishing public consent, establishing South Africa's international obligations and international best-practice, establishing the role and parameters of law in addressing 'the problem of sex work' and advising the Minister of Justice accordingly. The SALRC tended to use the forums optimally by ensuring that they serve as information-sharing sessions, dialogue sessions, and networking sessions and so on.

There are some interest groups, however, who hold that the SALRC is merely an extension of Government, and has consequently interfaced with the public policy process with government interests in mind. This is arguably true, particularly bearing in mind that the SALRC is not free to make independent recommendations to Cabinet before submitting it to the Minister of Justice and Constitutional Development. To the contrary, the Minister has greater degrees of power over determining final policy proposals before these are submitted to Government's social clusters and Cabinet.

The Family Policy Institute and the Godly Governance Network allege, for instance, that the SALRC tended favored the views of the Human Rights coalition throughout the public consultations. These groups argue that the manner in which SALRC workshops (i.e. Cape Town workshop) tended to alienate the views of religious and traditional groups. The Commission is also criticized by the GGN for facilitating workshops in ways that led debates, limited discussions, and set workshop agendas, particular in regards to the Cape Town workshop. The HR Coalition, on the other hand, affirm that the SALRC gave due regards to the views of divergent interest groups, giving space for all participants to influence the policy process. Both SWEAT and Tshwaranang Legal Advocacy Centre asserts that though they had tried to lobby support from the SALRC through conference and workshop invitations, they "have no idea how these will be reflected in the final report."

At this point, however, there is no way of assessing the extent to which the SALRC have been influenced by the varied interest groups. The extent to which this is the case will be evidenced in the final report and proposed Bill to be released by March 2011. In this regard, therefore, it is possible that the role of the Commission could have been misconstrued. It is possible that facilitation intended for good (i.e. to establish consensus in group discussions or to find points for negotiation and/or compromise) could have been misinterpreted as interference and agenda setting. The perceived bias of the SALRC is deemed problematic; particularly bearing in mind these groups don't have sufficiently representative constituencies. The mandates they carry often represent minority interests.

From observation, however, what was undeniably evident was that the SALRC tried to maintain its postured itself as observer, facilitator and neutral party. However, there is no doubt that an unofficial position has since evolved as individual researchers have navigated through the consultative workshops, unpacking the policy discourse. Informal discussions with some officials suggest that the SALRC will move in favour of law reform to extend justice to the vulnerable and on the basis of constitutional obligations. SALRC officials are generally of the view that there is a definite need to revise current legal arrangements, and to verify relevance and alignment to constitutional law, as well weigh the policy options in relation to international best-practice and the needs of South African society. Advocate Thuli Madonsela can be recorded as saying; “It’s important for government to respond in a caring, responsive, inclusive, and democratic manner and in ways that will hold it accountable to the law...The measure of a great society is how it treats its most defenseless and vulnerable.” The opening lines of the then Chief of the Commission, on their own, are indeed telling. In this instance, therefore, the state can be read as having set biases in favour of particular perspectives, even favouring certain group positions over others. The state is can be seen as being involved (whether actively or passively) in the public policy process, and in defense of interests of its own

#### *The Relationship between the State and Labour*

The labour federations, particularly COSATU, enjoys close interface with the state machinery’s legislative processes. This is because COSATU enjoys a political relationship with the ANC, the ruling party and political leader of government. Through the historic relationship, commonly known as the Tripartite Alliance, COSATU enjoys consultative privileges on policy matters, both within and outside of formal policy processes, both as an independent interest group and political ally respectively. Though Alliance partners have not contested any election in South Africa, they do field candidates through the ANC. They also hold senior positions in the ANC, and influence party policy and dialogue. Most often than not, policy decisions of the ANC (as ruling party) and broader alliance find legal and programmatic expression through the state’s architecture, including its public policy formulation processes. The public policy experiences in South Africa consequently testify of an ANC and broader Alliance, which enjoy hegemonic power over

public policy outcomes. Because of the relationship, COSATU in particular enjoys significant influence in shaping the content of and outcomes of social policy. According to Ranchod (2007), groups which have the ear of the ANC-led Government are no opposition at all, and these are, consciously or unconsciously, allies of authority. The Chicago Theory of Regulation can best explain the considerable influence enjoyed by COSATU, the religious and traditional lobby groups in public policy consultations. The theory, for instance, recognises that interest groups often compete by offering political support in favour of favourable legislation (Peltzman 1976). It alleges that this is done through the guarantee of votes and provision of resources to politicians. Because of this, Labour can be seen in being in a position to impose costs and rewards on policy outcomes.

The extent to which COSATU influences public policy outcomes, however, remains an issue that is much contested. The labour federation is often reported complaining that despite its alliance with the ruling party, the alliance structures have not been used to provide them with the influence over policy that it had anticipated. Over the years, however, COSATU has still managed to impact significantly on policy content and policy outcomes, particularly labour policy, and through a variety of formal mechanisms such as the National Economic Development and Labour Council (NEDLAC), a parliamentary office to monitor legislation and facilitate consultations with parliamentary committees, and engagement with departments and ministries (Benjamin, 2005). COSATU is regularly consulted by the ruling party, often in advance of other civil society organisations, and frequently provides inputs into government policy documents. Because of its close proximity to government, COSATU is often seen as having significant influence over public policy outcomes. Several parliamentarians and cabinet ministers also come from the ranks of the labour federation and, therefore, also provide a source of influence within the inner sanctums of government.

In the same breadth, however, it must be noted that both the ANC and the broader alliance are politically contested terrains. Neither of the two is homogenous nor cohesive. Both are subject to the political dynamism that manifest in the legislative process itself. This is because the interests at play in legislative processes are often the very same interests that

contest for power and ideological hegemony within the ranks of the congress movement (i.e. religious and traditional lobby). The difference lies only in the site of contestation (the realm of the political elite versus the bureaucracy) and possibly the protocols of engagement. It is in this regards that the interests at play may very well mirror each other. Nonetheless, once consultative processes have been exhausted and political decisions have been made through ANC organizational processes (i.e. National General Council, National Policy Conferences), intra-party interest are expected to tow the party line and to defend the supremacy of the winning ideas. However difficult at times, there are internal measures (i.e. deployment mechanisms, disciplinary measures) that are available to political leadership to ensure discipline both within and outside party ranks.

It is also important to note that the interests of the labour movement have often been compromised at the altar of political expediency. It has increasingly been engendered by a culture of self-interest within its ranks, which threaten its very interests and unity. In a study conducted by Mackay and Mathoho, some union members, for instance, confessed that they would be less willing to stand up to government if they felt it hurt their chances of getting into government positions. This thinking is closely in line with that of the regulatory Capture theory, which asserts that interest groups can come to be captured by industry or the state to meet interests either than their own (Stigler 1971).

What becomes evident from the above is that organisations that are closely linked or aligned to the dominant/ruling party and the state through ideological and historical affinities have the greatest opportunity and ability to exert influence over policy outcomes. However, official patronage does not guarantee successful engagement, particularly in the absence of strong organisational muscle.

#### *The Relationship between the State and Civil Society*

“Where civil society and government appear to be committed to the same goals, and where government is largely made up of longstanding political allies, a relationship of cooperation appears natural. Indeed, this spirit of cooperation has frequently featured in relationships between the state and civil society” (Jagwanth 2003, p 13). However, strong

democracy also needs a vibrant civil society to act independently of and as a watchdog over government – especially in relation to delivery of constitutional goals. They also play a particularly important role in public education campaigns to teach or create public awareness about the work of Parliament, the policy making process and human rights institutions, all of which are directly linked to low levels of participation in South Africa’s public policy process in general (Houston et al 1999). Traditionally and conceptually, civic society has fulfilled the function of watchdog, helping Government understand grassroots challenges, and exerting pressure on Government to provide correctives solutions to address the challenges of ordinary people. Seemingly, however, its proximity to government informally via the tripartite alliance, as well as the newly-formed National Inter-faith Leadership Council, has militated against it supporting policy perspectives alternate to state policy. Rather than mobilising support through public action, for instance, SANCO (the broad-based umbrella of civil society organisations), has opted to maintain a silent posture on the question of sex work. Not only has this strategy proved ineffective, but it has forestalled efforts to do what successful national social movements are renowned for – providing conduits for aggregating and framing local grievances and collective action repertoires (Ranchod, 2007).

The absence of SANCO from the SALRC consultative process therefore should be seen in light of the above, and also in light of or as symptomatic of SANCO’s own organisational inadequacies and dilemmas. Whilst SANCO conceptually seeks to act as a broad-based umbrella for civic organizations, often speaking on behalf of residents in often poor and under-resourced neighbourhoods, in practice SANCO is renowned for its hesitance to act on issues that are deemed to upset its relationship with the ruling party, the African National Congress (ANC). This is in contrast to COSATU, which traditionally has engaged the ANC-led government head-on on controversial issues, despite its alliance with the ruling party and the fact that its officials contest national elections under the ANC banner. It appears that SANCO is perpetually caught between competing interest, namely that of serving the interests of a broad and diverse constituency and maintaining an amicable relationship with the ruling party. Suggestions are that the informal alliance between SANCO and the ruling party has because its leaders to think twice about

representing views that might be at logger heads with the ruling party. If so, their relationship with the ANC-led state (and the patronage that this relationship often offers) could be damaged. This, therefore, gives strong suggestion that proximity to government can act against the interests of the very people that an organisation claims to represent in its interaction with government. Other indicators suggest that SANCO's inability to mobilise a diverse and highly heterogeneous sector can account for its lap-dog posture. Whilst others indicate that SANCO has been compromised by its inability to partner constructively with other, more adversarial, social movements to affect change. Whatever the reasons, what is more evident is that, if SANCO is to maintain its relevance, SANCO will need to clearly come out and take a firm stand on issues affecting its members.

Some quarters also allege that despite the historic commitment to inclusive democracy and 'people's power', organised civic society has yielded declining returns in policy processes, even when it did participate. Some allege that the public policy process is still very much skewed in favour of the rich and powerful and it is the well organized groups such as business and labour whose voices are most frequently heard, at the expense of less organized groups such as the rural poor (CASE report 1999: 48-9 cited in Jagwanath 2003, p14). South African society is still very much skewed in favour of the rich and powerful and it is the well organized groups such as business and labour whose voices are most frequently heard, at the expense of less organized groups such as the rural poor (CASE report 1999:48-9). South African society is still very much skewed in favour of the rich and powerful and it is the well organized groups such as business and labour whose voices are most frequently heard, at the expense of less organized groups such as the rural poor (CASE report 1999: 48-9). South Africa is second only to Brazil in the gap between rich and poor – and both the state and civil society need to deal more effectively with this legacy of inequality. Therefore, the extent to which organized civil society is able to represent disadvantaged and marginalized voices in society, needs to be interrogated. How to make the concerns of these groups heard remains a massive challenge both to state and non-state actors alike. Organised society faces the risk of losing legitimacy and being reduced to being elitist functionaries, far removed from the needs of the most disadvantaged and marginalized groups in society.

The relationship between civil society and the courts, however, tells a better story. The majority of the cases decided by the Court which have made an impact on the lives of disadvantaged South Africans have been brought by organized interest groups, and it is rare to find suits brought by individual litigants in this regard. Institutional obstacles as well as lack of access to resources and lack of knowledge about the content of rights frequently make litigation in the courts virtually impossible for ordinary people. This is made possible through class action litigation. The South African Constitution permits class action litigation – that is litigation on behalf of an entire group of people affected by the subject matter of the case. It also permits interest-group interventions in litigation, which allows organized civil society to intervene in a case and present arguments to the court (Jawanath, 2003). This has led to many successes for human-rights based civil society groups, particularly in the context of fighting off police harassment and fighting for labour rights for sex workers. This has been the case also for other civil society groupings such as the National Coalition of Gay and Lesbian Equality, a voluntary association of gay people in South Africa and 69 organizations and associations representing such people, successfully brought two cases before the Constitutional Court on the basis of discrimination on the ground of sexual orientation. Other groupings, which have successfully initiated or intervened in litigation in the Constitutional Court, have been the Society for the Abolition of the Death Penalty, the Women’s Legal Centre, Christian Education South Africa, the AIDS Law Project and the Community Law Centre.

The historical relationship between the state and civil society in post-apartheid South Africa is a delicate one. Whereas civil society coalesced in opposition to the apartheid-state, civil society now needs to contend with new realities; maintaining a delicate balance between support for its democratic government, whilst maintaining sufficient rigorous interaction with it and independence from it. Criticism of its government and its policies should not be seen as unpatriotic or reactionary, but as part of strengthening government. Strong voices remain critical, particularly in terms of monitoring government efforts and applying due pressure in the interest of service delivery. Civil

society has a crucial role to play in ensuring that the transformative goals to which we committed ourselves are constantly supported *and* monitored. The role of civil society thus becomes paramount, and ensures that judicial rights discourse does not remain the domain of the privileged few in society. It is also important for civil society in modern democracies to ensure that the new forums of decision-making, like the courts, become accessible.

“The measure of civil society’s vibrancy and success will ultimately depend on its role in bringing about socio-economic change. In the final analysis, a number of strategies – collaboration, monitoring, assistance, and even policing of the state – are appropriate for civil society in South Africa if they are needed to achieve that goal.” (Jagwanth 2003, p. 13).

## Chapter 9: Overarching Analysis

Chapter 9 is an attempt to present an overarching analysis of the main findings. It provides a bird's eye-view of emergent issues. It attempts to provide a sophisticated analysis of the theoretical and public policy implications of the main findings, particularly in as far as they relate to the South African public policy experience. What emerges as critical issues are the following:

### *Changing Strategies, Contested environments and Changing Times*

The most dominant forms of strategies and tactics employed by interest groups are a reflection of the changing nature of communications, as well as the changing times of rapid technological advancement. Whereas the most predominant *strategies* include inter alia the use of social media, litigation or court action, constitutional or human rights jargon, the predominant and arguably most effective *tactics* of engagements comprised largely of nuanced methods. These include inter alia common agency, group collusion and cooperation, group competition. These took several forms, namely: behind the scenes inter-group negotiations, interactions with policy-makers, unofficial discussions with government officials, lobby and advocacy work, public petitions and grassroots mobilisation. The multi-dimensional nature of group strategies and tactics can be attributed to the nature of the topic of adult commercial sex work. The topic itself is highly contested, making for a highly charged and highly politicized public policy environment. The multi-throng approach employed by competing interest groups is a good demonstration of the contested nature of the question at hand. Competing interests groups exert and exhaust all possible avenues only in the face of perceived opportunity and threat i.e. that the policy process is in danger of achieving undesirable outcomes. Therefore, the changing nature of the strategies employed is a reflection of the changing times and highly contested policy environments.

### *Where Power lies*

Whereas power over the policy process<sup>29</sup> is largely dominated by civil society groups, power over policy outcomes is dominated by the ruling state/political elite as well as the judiciary (to a certain degree)<sup>30</sup>. Undoubtedly, power over the policy process remains the domain of civil groups and is determined by modes of policy engagement, group size, as well as hegemonic ideas. However, the ruling state/political elite have the greatest advantage. Power over policy outcomes is largely determined by the extent to which interest groups can make decisions on policy outcomes (i.e. political, bureaucratic and judicial power). The ruling political party (ANC), for instance, has the advantage of political power to oblige state bureaucrats and policy-makers, commonly known as deployees, to make policy decisions that are in line with the manifesto or policy documents of the ruling party. The ruling party, through its deployment policy, enjoys majority in the critical policy-making institutions of the republic i.e. in the executive and parliament. The state bureaucracy, in this instance, has the advantage of legislative, executive and administrative powers to determine national policies. The judiciary, on the other hand, has the advantage of constitutional supremacy or judicial powers to nullify policy decisions of government or to force government to review policy positions deemed contrary to the letter and law of South Africa's constitution. In addition, the media, a passive actor, has the advantage of a massive and highly centralised communication medium that can shape and reconstruct public opinion on key policy issues.

### *Multi-plurality and public policy – Fact or Fiction*

Findings affirm that the public policy process in South Africa is indeed multi-layered and is a site of struggle where social actors wrestle for legitimacy and domination, implying cultural pluralism. South Africa's public policy process is indeed open to a number of interest groups and places a premium on civic participation. However, these spaces are the domains of dominant interest groups. The public policy process has been claimed by dominant groups, both inside and outside of formal corporatist structures. Therefore, what is increasingly evident, and contrary to popular pluralist beliefs, is that despite the

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<sup>29</sup> This refers to the nature, character and dynamism of the public policy process

<sup>30</sup> Mainly when judicial reviews have been instituted or court judgements on related cases are made

presence of multiple interest groups, policy decisions are indeed at the behest of powerful blocs comprised of the ruling state/political elite; the judiciary; media; donor funding agencies and civil society groupings. The state/political elite 'alliance' constitutes the most dominant bloc in policy processes. This is so particularly in the case of the political elite, wherein the ruling-party, in consultation with COSATU and the SACP, has sufficient political power to impose legislative decisions, both in government, cabinet, as well as in parliament. Parliamentarians (MP's) are highly dependent on the ruling party (ANC) to maintain their positions and may face removal or expulsion if they dare move outside of party mandate. Very few MP's are willing to risk upsetting the party leaders. Until opposition members increase in numbers enough to challenge the ruling party, MPs are not likely to vote against in favour of legislation that will compromise the party.

So what does this mean really? What do we make of the findings on power and civil participation?

Firstly, what is clear is that not all interest groups have equal access to the policy-making arena. Perfect competition does not exist in the policy environment. The policy environment is not always inclusive. Neither are interest groups always free to organize for political purposes. Take, for instance, business, traditional leadership, and government departments in this regard. Their absence in the public consultations alone speaks volumes. The public policy process can often be fragmented, marginalising vulnerable voices (i.e. of rural networks). The role played by the ruling party (ANC) in determining government's agenda and monitoring service delivery also demystifies the assumption that government is a neutral player in the public policy process.

Secondly, the dominant civil society actors (i.e. COSATU, SANCO, card-carrying traditional and religious leaders) are not necessarily independent from the state and neither is government neutral in the policy process. The majority enjoyed by the ANC in government and parliament often demonstrates how democratic institutions and public policy processes can be capsized and used as rubber stamps. The power hegemony of a single party therefore brings in to serious question the extent to which various interest

groups can influence policy outcomes in their favour. Needless to say, however, this does not mean that the ruling party cannot be influenced by outside interest groups. It has long been ANC policy to negotiate, to make necessary compromises, to seek consensus and accommodate to accommodate divergent views, both within its ranks and general society. Neither can one assume homogeneity of thinking within the ANC and broader alliance. However, civic society and the labour federation movement have long raised concerns over the declining activist contributions to the ANC policy agenda setting in particular. Needless to say, the final decisions of the ANC, having been subject to rigorous debate and expert advice within party structures, are often binding and directly determine the outcome of public policy. This is the case because of its sheer numbers and overwhelming majority in key sites of policymaking. In this regards, therefore, it is important to distinguish and balance between rights to public engagement in policy process and actual distributional outcomes.

Thirdly, that the public policy process must be understood as a market place of more or less imperfect competition, with slight deviations in cases wherein democracies are fairly advanced. Undoubtedly, the politics of regulation occurs over a number of levels and power is unevenly dispersed. In this instance, public policy emerges as negotiated outcomes and at the level of political elites. It is also important to note that there is a considerable level of interdependence between the ruling party and various interest groups (i.e. religious and traditional lobby groups). Policy recommendations therefore can be influenced by the views of these groups, and conversely, the policy positions/choices of interest groups are influenced by the views of the ruling party; a process commonly known as 'policy diffusion' (Braun et al 2006). Policy decisions on gay marriage, abortion, death penalty, for example, affirm this in concrete anecdotes. However, the policy positions that often find expression at the level of government and parliament are those that are a result of direct influence by the ruling party and broader alliance.

### *Theoretical Implications*

Undoubtedly, pluralistic theories do not, in all respects, account for the South African experience of public policy. Though public policy involves a number of civic organisation and promotes civic participation, there exist definite groups and political factions/alliances that have hegemonic power over policy outcomes. These groups are powerful enough to determine policy outcomes, as well as dominate other groups. The actions of groups in pursuit of various interests, in this regards, therefore, are less so significant sources of policy formulation, and to a lesser extent, the source of politics in the public policy process.

Findings also affirm that the efficacy of interest group participation in influencing policy outcomes are, by in large, determined the degree to which inputs are considered by policy bureaucrats, as well as the executive and parliament (Davis et al 1985 cited Roskins 2008; Fulcher 1989 cited Bourk 2000). However, it must be emphasized that these groups are, most often than not, deployees of the ruling party and must therefore tow the party hard-line on issues of public policy. It is in this regard that *normative and positivist theories* must be criticized. These schools of thought tend to undermine the role of party politics in public policy by making a superficial distinction between the state bureaucracy/administration and ruling party. *Positive theories* tend to argue that public policy outcomes are either a function of the will of the economic elite or the state (Stigler 1971; Hertog 1999; Christ 2003), as if the state itself is an autonomous or separate entity that is accountable only to itself. Fulcher (1989 cited Bourk 2000), for instance, asserts that the distinction made between policy and implementation is a superficial one and serves political purposes on its own as this carries with it the imposition that governments are in charge and that politicians hold real power. This is definitely not the case in the South African context. In South Africa, the state and ruling party are separate entities by constitutional decree only. The government or state in this regards is often a pseudonym for the interest of the ruling political elite. Contrary to *corporatism theory*, the state therefore is not a neutral player, merely facilitating dialogue in the policy process. The state bureaucracy is an active participant in the policy process, and often serves as a political instrument, monopolized to serve the interest of the ruling political elite. Though

the state bureaucracy does have considerable power over the administrative process, policy outcomes are largely functions of decisions by the political elite.

Contrary to popular belief, however, the influence of interest groups does not necessarily dependant on the organizational strength (i.e. resources, character of membership, strategies and tactics etc) or whether or not interest groups are well organized. Even though modes of civic engagement enhance the degree of influence over the policy process, influence over policy outcomes, to the contrary, is largely dependent on what Grant (2000), cited in Teague (2006), sees as critical in distinguishing insider/outsider group strategies. The willingness of an interest group to abide by the policy perspectives of those with political and cultural hegemony (i.e. the ruling blocs or of the political elite, religious and traditional blocs, ruling party and broader alliance) is the predominant critical factor in shaping policy outcomes. This is seconded or affirmed by the acceptability of group cause to the government and the willingness of that government to recognize various groups. This is the case particularly for so called-insider groups with political allegiance to the ANC-led government.

Contrary to *pluralism group theories*, however, the policy process can and is definitely dominated by a single group or political faction, whose strength is informed by historical power, positional power and strategic control over the public policy process (through its cadre deployment policies). Pluralism group argue that neither individuals nor whole societies are significant political actors in the public policy process. This is definitely not the case in South Africa. The power dialectics and the distribution of power in South Africa's body politic are reflected in its public policy process.

However, similarly with *special interest theory*, there are various other interest groups that serve as a countervailing force to absolute forms of power hegemony. These include *inter alia* the judiciary, media and, increasingly, the human rights lobby group in South Africa. The latter group enjoys serious support, substantively and financially, from the international human rights movement as embodied by the coalition between United Nations (UN) institutions and major NGOs. Group competition definitely exists in the

policy process, and organizational strength can be increased through group collusions and cooperation, and other forms of strategic alliance. However, this has been insufficient in displacing the power hegemony of the political elite and its allies. This can be attributed to the deployment policy, which remains central in ensuring that the state bureaucracy or its policy makers are accountable to the political mandate of the party (i.e. the party manifesto, policy positions etc).

Contrary to *economic theories of regulation*, the economic elites in the case of sex work are not at the centre of policy-making in South Africa. This can be attributed to the lack of business representation in the trade, at least officially, as a consequence of the illegal status of sex work in South Africa. Business therefore has no pressure to engage in public deliberations on the matter, which explains the absence of business in consultations on adult commercial sex work, alongside business fears that decriminalization will encourage other forms of illegal business activity (i.e. drug and human trafficking). Whereas economic theories (i.e. Capture theory) assert that policy outcomes are functions of economic interests, the slow evolution of public policy on the issue affirms the centrality of the state and broader political elite in determining the pace of policy evolution or policy outcomes on issues of adult commercial sex work. The state/political elite bloc in South Africa is indeed a crucial player in the policy process; either playing the role of authoritarian democrat or referee in efforts to transform society. It continues to maintain a hegemonic hold over society.

So what are the main policy implications?

#### *Public Policy Implications*

Despite the fact that the Constitution imposes great responsibility on parliament and local government to involve interest groups and wider-communities in policy-making, the policy institutions simply lack the latitude to capture the voices of weaker and marginalized groups independent of established power blocs. Smaller, weaker and marginal civic groups (i.e. independent rural networks) are easily swallowed up by bigger players, if at all they are able to get a footing in public policy. Given established power

blocs and the limited aptitudes of smaller/marginal groups, merely opening up the policy process is clearly not a sufficient condition for effective popular participation. Formal participation is simply not enough to consolidate inclusive and democratic participation in South Africa's policy processes. Government should strengthen and make better use of institutional arrangements to ensure interface with local communities, rural networks and other marginal groupings.

Secondly, there is great need for stakeholder education on issues of civic participation and institutional culture, particularly when it comes to group rights, roles and duties in the policy environment. For instance, interest groups need to be taught the importance of using multiple lenses (economic, social, cultural and religious) in approaching policy issues as a way of deepening policy discourse and establishing broad consensus. Interest groups also need to understand the value of constitutional parameters that constrain policy decisions, whilst respecting the rights to cultural, religious and/or humanistic rights. The interests of vulnerable groups need to be placed above organizational interests, whether be these political, economic, or ideological. Literacy and education campaigns need to be instituted therefore, whether by the state or civil society, and as a matter of priority.

A different institutional culture also needs to be inculcated to deepen social inclusion and internal democracy in South Africa's public policy process. An institutional culture based on tolerance of diversity, rigour and robustness of debate, evidence-based engagement, consensus building and shared interests; as way of protecting marginal interests and balancing out the hegemony of established powerful blocs.

## Concluding Remarks

This dissertation investigated the role of power and civic participation in South Africa's public policy process on adult commercial sex work. It provides great insights on the limitations of the institutional policy environment, as well as role of group agency in public policy processes on adult commercial sex work. Chapter 4 gave the legal, contextual and legislative backdrop of the South African sex industry. Chapter 5 provided an analytical synthesis of the theoretical perspective on adult commercial sex work. Chapter 6 looked at the strategies and tactics employed by competing interest groups and how these interfaced with the policy process. Whereas chapter 7 located the strategic sites of power, chapter 8 located the relationships between the state and interest groups, and the extent to which these leveraged their influence in policy. The dissertation therefore provides great insights on the intricacies of public policy on issues as controversial as adult commercial sex work. It also provides great insights on the dynamism of interest group interaction and the use of power to influence policy outcomes in their favour.

The dissertation affirms the cultural pluralist perspective of public policy. Undoubtedly, the public policy process in South Africa is a multi-layered and is as a site of power contestations. Despite the presence of a number of interest groups, the distribution of power is generally skewed and unevenly dispersed in favour of the state/political elite power bloc. The strength of the bloc is informed by strategic control over the public policy process. This bloc, however, does not enjoy absolute power of the policy process nor policy outcomes. There are various formidable groups that serve as a countervailing force to supreme forms of power, directly and indirectly, both within and outside the SALRC process (i.e. the judiciary, media, donor funding agencies and civil society groupings). These groups derive their sources of power through legislative, financial and organic means. Power and civic participation are also not the only factors that determine policy outcomes. There are other interdependent factors that affect public policy, which fall beyond the scope of the dissertation. The public policy process therefore remains a dynamic process, which is in a constant state of flux.

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## Annexure

### Annexure A: Interview Schedule (Guide)

#### 1. Views on Adult Commercial Sex Work and Legal Reforms:

- There is a view amongst a number of activist organisations that the current legislative framework which criminalises adult commercial sex work has unintended negative consequences, (i.e. impacting negatively on sex workers' health and safety, undermining public health outcomes and initiatives, setting the conditions for police corruption and control of local industries, failing to regulate working conditions, forcing sectors of the sex industry underground, criminalising sex workers, encouraging discrimination against sex workers, limiting sex workers' access to legal mechanisms to address crimes committed against them and ignoring and denying basic human rights). What is the opinion of the organisation to the above assertions?
- The suspended National police commissioner, Jackie Selebi, recently made public statements in Parliament about sex-work in the light of the coming 2010 Soccer World Cup, advocating for a temporary relaxation of the laws against it particularly during the World Cup in 2010. What is the position of your organisation on temporary legislative proposals?
- The South African Law Commission has embarked on a process of legislative reviews on laws that govern adult commercial sex work since 2000. It published Issue Paper in July 2002. Did you make public comment to the paper? If not, why not?
- The Commission also published its Discussion Paper on adult commercial sex work and hosted public consultation forums from May until July 2009. What, in your opinion, has been the role of interest groups in the public policy process?

#### 2. Interest Groups in the Policy Process

- Which groups participated in the policy process as lead by the SALRC?

- How did the Commission solicit broad public participation? Which methods were used? Were these effective in ensuring broad participation? Why/why not?
- Please describe the policy process as lead by SALRC, what constitutes the different phases, how it was conceptualized to broaden public participation.
- What are the strategies that are employed to influence policy outcomes? Which ones have been most effective? Bully tactics, moral tactics, and tactics of persuasion or negotiation? Why/why not? What is the evidence?
- What strategies and tactics have the different interest groups used, both inside and outside the policy process? What forms did these take?
- Were there any coalitions that were formed? How many? On what basis? Which opposed the other? Which are more effective? Why/why not?
- Which opposed each other? On what grounds? How did these opposition coalitions contend each other?? Which strategies/tactics were used??
- Which constituted the insider/outsider groups in the SA policy process? And why?
- Which interest groups are the challengers/negotiators/persuaders/intimidators??? What is the evidence??
- Is there consensus around what the problems of sex work amongst interest groups? Is there agreement amongst various interest groups (i.e. government, labour, business, civil society) on an appropriate legal response? If not, why not? What are the points of contention amongst differing groups? What informs these?
- Are there areas of agreement/consensus amongst interest groups? What are these? What informs these?
- What guides the thinking of interest groups on particular policy areas? Are they capacitated to engage with the issues (particularly legal and constitutional ones?)
- Do they outsource their intellectual space (through use of specialist consultants), do they consult their constituencies? What informs particular decisions on different policy outcomes?
- How strong are interest groups in the policy process?? To what degree can they influence actual policy outcomes? What are the Opportunities and Threats??
- Do you believe that interest groups are given enough space to be heard and to participate fully in the public policy process? Please motivate.

- Which interests will carry the biggest weight? Will minority interests be taken into consideration in final decision-making?
- On a scale of 1-5 (1-Very high, 2 – High, 3-Average, 4-Low, 5-Very low), to what extent will the 2010 FIFA World Cup influence decisions around legislative reforms? Why or why not?
- On a scale of 1-5, to what extent will the religious community (Christian, Muslim and Jew contingent) influence public policy outcomes? Why or why not? Please motivate.
- On a scale of 1-5, to what extent will the labour movement (i.e. COSATU, FEDUSA) influence public policy outcomes? Why or why not? Please motivate.
- On a scale of 1-5, to what extent will civic society organisations (i.e. SWEAT, Sisonke, and Women's legal Centre) influence public policy outcomes? Why or why not? Please motivate.
- On a scale of 1-5, to what extent will ruling party (ANC) influence public policy outcomes? Why or why not? Please motivate.
- On a scale of 1-5, to what extent will SA gender machinery (OSW, CGE, New Ministry, JMC) influence public policy outcomes? Why or why not? Please motivate.
- On a scale of 1-5, to what extent will government (Ministry of Justice and Constitutional Development, the Executive) influence public policy outcomes? Why or why not? Please motivate.

**Government (12)**

- Department of Justice - The South African Law Reform Commission (3)
- Ministry of Women, Children and Persons with Disability – Minister’s Private Office (1)
- Department of Health (1)
- Department of Labour (1)
- National Persecuting Authorities (NPA) (1)
- Gauteng Premier’s Office (1)
- Gauteng provincial ministry – Safety and Security (1)
- Durban City Manager’s Office (1)
- South African Police Service (1)
- South African National Aids Council (SANAC) (1)

**Labour (3)**

- COSATU – Spokesperson, Gender Desk, Naledi (3)

**Business (1)**

- Business Unity of South Africa (1)

**Civic Society (22)**

*Religious lobby group (4)*

- The Family Policy Institute (1)
- Port Elizabeth Church Net (1)
- Godly Governance Institute (1)
- South African Council of Churches (1)

*Human Rights lobby group (8)*

- Sex Workers Education and Advocacy Taskforce (SWEAT) (2)
- SISONKE (1)
- Rape Crisis (1)
- Genderlinks (1)
- Facebook – People Against the Legislation of Prostitution and Human Trafficking (1)
- African Sex Workers Alliance (ASWA) (1)
- Legal Resource Centre (1)

*Traditional lobby group (2)*

- National House of Traditional Leaders (NHTL) (1)
- Congress of Traditional Leaders of South Africa (CONTRALESAs) (1)

*Feminist/Gender Lobby group (8)*

- Women's Legal Centre (2)
- Commission on Gender Equity (1)
- Office of the Status of Women (2)
- People Opposing Women Abuse (1)
- Women's Net (1)
- Tshwaranang Legal Advocacy Centre (1)

**Political Parties (6)**

- ANC – African National Congress (1)
- DA - Democratic Alliance (1)
- IFP – Inkatha Freedom Party (1)
- ID – Independent Democrats (1)
- UDM – United Democratic Front (1)
- ACDP – African Christian Democratic Party (1)

***Other (6)***

- Joint Committee on the Quality of Life and Status of Women, Parliament (3)
- South Africa's Political Analysts (Prince Mashele, Colleen Morna and Marianne Thamm) (3)

= TOTAL (50 RESPONDENTS)

### **1. Tshwaranang Legal Advocacy Centre**

- The TLAC has called for decriminalization of sex work, and primarily to promote women's access to justice (particularly its vulnerable), and to enforce women's rights to violent free societies.
- The TLAC believes that criminal law should not be used to regulate consensual sexual relations between adults. Secondly, that the current criminalized environment perpetuates crime against the sex worker and encourages police abuses.
- TLAC and provided research support, advocacy and paralegal advice to SWEAT and allies, whereas WLC support also included litigation and court support on issues of sex work violence, police harassment and abuse.
- The TLAC, WLC, Lawyers for Human Rights partnered up with SWEAT (as client) providing strategic support in areas of competence and geographic prudence.
- Partnership arrangements assisted in strategy development, in the delegation of tasks by competence, ensuring that efforts are not duplicated and to pool resources together.
- Though the TLAC did not participate in actual workshop discussions, they were represented by the coalition of SWEAT as well as made a submission to SWEAT to represent its views.
- The TLAC, together with many other groups, are generally of the view that final policy outcomes will inevitably be determined by the ruling party. Annica Meerkotter " Final policy outcomes depends on the views of the ANC Parliamentary caucus and Justice portfolio Committee, however, it is hoped that they would give due regard to the views of divergent interest groups"
- The fact that the issue of prostitution has received minimal discourse in the ranks of the ANC, however, should send alarming bells to the coalition in favour of decriminalization. This should give sufficient indication of the due credence given to the 'problem of prostitution'. This issue does not to date

feature in any of the ANC's post 1998 policy documents (i.e. ANC strategies and tactics, ANC Policy Conference documents, ANC media statements) neither has it featured seriously in Government's (i.e. State of the Nation address, Medium Term Strategic Framework) either than in the 2007 National Strategic Plan for HIV/Aids and STI. Saying that the ANC has been silent on the issue is a gross understatement.

- Some are of the view that the ANC is unlikely to 'rock the boat' because of fears of fall-outs with its electorate.
- The case of the Domestic partnership draft bill (wherein property rights are extended to co-habiting partners) is a case in point wherein the ANC-led government parked the issue in favour of electoral interests. Though both the SALRC and the Dept of Home Affairs moved in favour of this, the Department of Home Affairs made a decision to halt the legislative process until post 2009 elections. The draft Bill has been parked since then.
- However, what is encouraging is that the issue has received much credence in the ranks of the biggest and most powerful labour federation (COSATU). In the recent COSATU conference in 2009, POPCRU, SAMWU and the Women's desk vehemently raised that COSATU should make a call for decriminalization of sex work. However, having failed to reach consensus on the matter, the conference resolved to deter the matter to the Central Executive Committee for further deliberations.
- The legal centres, however, are of the view that South Africa has not yet reached the advanced stages of public discourse wherein rationale, systematic and evidence-based approaches are used to come up with policy decisions. "We're a polarized country of hard-liners. If it's wrong, it's wrong for everyone" (TLAC, 2010).

## 2. Legal Resource Centre

- “No one likes to be sued, so litigation and name-and-shame media tactics give marginalized groups bargaining power...it’s about shifting power dynamics” (Angela Andrews, LRC).
- Litigation is a powerful instrument because of the shifting burden of costs on those found in contempt of court once an order has been issued. There are always consequences of a criminal nature (i.e. exorbitant fines). It costs millions of Rands to cover the legal costs of advocates, attorneys, state prosecutors, millions state institutions (i.e. police) and/or individuals can’t afford on limited budgets
- The LRC has entered into an agent/client relationship with SWEAT and allies providing pro bono or public interest litigation and court support, and acting as legal watchdogs. They simply provide legal services to clients, prioritizing work in public interest, doing what can be justifiable under donor funding, at the expectation and instruction of clients.
- The LRC is of the view that the issue of sex work needs to be looked at through pragmatic lenses beyond moral ones. Policy makers need to understand the interconnectedness between a sex worker and the society that gives rise to her (i.e. poverty, unemployment, homelessness, cultures of sexual violence and crime). The reality is that most often than not, the sex work terrain is the point of contact between psychopathic men and vulnerable desperate women. The power of the courts must be used to increase the bargaining power and to extend much needed social protections.
- The LRC has used its powers to exert pressure on dominant interest groups (i.e. vocal residential associations and state institutions like the SAPS) and to deal with the rogue elements (i.e. individuals and institutional culture) that prejudice against and continue to abuse/exploit sex workers.
- LRC and Tshwaranang, however, assert that the legal fraternity does not have a unified position on issues of sex work. However, they maintain that

legal activists do have a responsibility to ensure equal access to justice for all, particularly of vulnerable and marginalized groups.

### **3. Women's Legal Centre II**

- The centre also wants full decriminalization of sex work so sex workers can be afforded the much needed protections of the law, as well as to combat the scourge of police brutality on sex workers.
- The Women's Legal Centre has been critical in providing legal litigation against the state (i.e. SWEAT interdict). They've also been part of the call on the state to place a moratorium on all arrests for the duration of the world cup and until the conclusion of the SALRC review process. However, these calls have heeded deaf ears. The Minister of Justice, as well as the Minister of Police are still to respond to these months later.
- The WLC also participated in the SALRC workshops (Cape Town, Pretoria, and Johannesburg) and made a submission calling for decriminalization of sex work. Theirs is largely a legal critique that challenges that legal definition of sex work as it stands, emphasized the prosecutorial and enforceability difficulties, the role of criminal law in regulating consensual adult sex, as well as criticized the unintended negative consequences of the criminalized environment.
- Their joint programme with Sweat "Every Sex Worker a Human Rights Defender" assists to empower sex workers to challenge human rights abuses, to document these, and to monitor and map out types in perpetrators of human right abuses.
- The WLC also holds weekly Wednesday clinics at SWEAT premises, giving individual advice, as well as training sex workers to be peer educators.
- The WLC is hesitant to say that their alliance would successfully influence policy outcomes. The moral arguments, from both the religious and traditional sector, continue to enjoy powerful voice, particularly amongst parliamentarians. This is likely because "no parliamentarian or

government official wants to be associated with immorally perceived decisions, even if they too make use of the services of sex workers” (WLC, Stacey)

- The WLC confesses that a counter-strategy has been to use the human-rights framework and to say “Even sex workers have human rights, regardless of the crime”. The direction of the courts is increasingly moving in this light (i.e. take the recent Labour Appeal Court judgment on Kylie).
- Civil society is not necessarily homogenous. Though there’s increasing empathy towards sex workers plights, there is not yet consensus on the best legal response to deal with these. Moreover, the biggest organizations (SANCO) have been silent on the issue. The sex work issue is not necessarily considered high-priority amongst civil society organizations.

Annexure D: Ethical Clearance Statement
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Sep 2009  
 Zukiswa Mqolomba  
 Department of Sociology

<b>Student No:</b>  <i>Please quote this ref on all correspondence</i>	<b>MQLZUK001</b>
<b>Project Title:</b>	<b>The Politics of Regulation and the South African Sex Industry</b>
<b>Researchers Name(s):</b>	<b>Zukiswa Mqolomba</b>
<b>Supervisor(s):</b>	<b>Mr. Shane Godfrey</b>

The University of Cape Town approved this study from an ethical point of view. Please note that where approval was given a department examination panel was delegated to review and endorse Masters Proposals. Approval was given for two years.

The research study was informed and driven by principles of confidentiality, anonymity, voluntarism, dignity, honesty and truthfulness. Under no circumstances was confidentiality and anonymity breached. Permission had always been granted prior from respective respondents. Participants were informed of the rights to voluntary-participation, to anonymity and confidentiality. The research was explained carefully to each interviewee. They were told they were not obliged to participate in the interview. They were told they could refuse to answer any question and could end the interview at any time. Their verbal consent was obtained once this had been explained. Interviewees were all people who are aware of their rights in the situation. They were not vulnerable in any way.

The Department of Sociology has been informed of the completion of the research study. There were no serious adverse events or significant changes which occurred in connection with this study and/or which may have altered its ethical consideration.

Approval was given on the understanding that the guidelines for ethical research practice are adhered to.

Yours sincerely  
**Zukiswa Mqolomba**

Ccs

Supervisor, Mr. Shane Godfrey

**A MASTERS THESIS FOR THE UNIVERSITY OF CAPE TOWN**

