

**SUBMISSION TO THE PARLIAMENTARY JOINT AD-HOC  
COMMITTEE ON SOCIO-ECONOMIC DEVELOPMENT**

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**Submitted by:**

**The National Working Group on the Sexual Offences Bill.**

## **SUBMISSION TO THE PARLIAMENTARY JOINT AD-HOC COMMITTEE ON SOCIO-ECONOMIC DEVELOPMENT**

We thank the Parliamentary Joint Ad-hoc Committee on Socio-economic Development for the opportunity to participate in the African Peer Review Mechanism process. This submission to the Committee has been prepared by the National Working Group on the Sexual Offences Bill, a group consisting of 18 organisations from around the country which, in one form or another, are attempting to combat and address the problem of sexual violence. The 18 different organisations comprising the National Working Group on the Sexual Offences Bill include:

Aids Law Project; Childline SA; Centre for Applied Legal Studies (CALS); Centre for the Study of Violence and Reconciliation (CSVR); Concerned People Against Abuse; Lawyers for Human Rights; Ngata Safety and Health Promotion; Nisaa Institute for Women's Development; People Opposing Woman Abuse (POWA); Port Elizabeth Rape Crisis Centre; Rape Crisis Cape Town Trust; Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN); Save the Children Sweden; Sex Worker Education and Advocacy Taskforce (SWEAT); Thohoyandou Victim Empowerment Programme; Tshwaranang Legal Advocacy Centre; Western Cape Network on Violence against Women; Women's Legal Centre.

This submission begins by explaining why violence against women is an obstacle to the socio-economic development of South Africa. It then provides statistics on the extent of the problem before setting out the policies and laws which have been developed to address violence against women, or gender-based violence. Thereafter, the submission presents research findings reporting on the implementation of the Domestic Violence Act (hereafter the Act or DVA). This section places strong emphasis on the budgets provided to implement the Act, based on the understanding that budgets reflect a government's policy priorities and are a useful barometer of the extent to which political commitments are translated into fiscal commitments. The submission as a whole concludes with an overview of the progress and contents of the draft Sexual Offences Bill.

### **1. VIOLENCE AGAINST WOMEN AS OBSTACLE TO DEVELOPMENT**

Given that women form slightly more than half of South Africa's population, it is crucial that development activities tap into women's skills and capacities if they are to be effective. However, women who have been abused or violated can be seen as a 'wasted resource' because violence jeopardises women's health and thus constrains their participation in the labour force (Sen 10: 1998).

The direct and indirect financial costs of violence against women both to individuals and the state also represents an inefficient use of resources. A survey of 1 306 women conducted in the three provinces of Mpumalanga, Eastern Cape and Limpopo noted that between 63% to 92% of the sample had sought medical attention for physical injuries in the year prior to the study (Jewkes *et al*, 1999). Treating women who have been injured by their partners costs the Department of Health a considerable amount of money, with Jewkes *et al* estimating that

approximately R29 million was spent by the Eastern Cape, Mpumalanga and Limpopo provinces in 1997 treating women injured by their partners.

*Violence as an obstacle or barrier to participation*

Women's participation in development projects, including those aimed at poverty alleviation or income generation, may be hindered or prevented altogether by actual or threatened violence. Indeed, their engagement in such activities outside of the home, or their earning of a separate income may trigger or worsen violence (Sen, 1997).

Women also cannot contribute fully when their psychological and physical well-being is undermined by the psychological and physical scars of violence. South African research identifies just some of the following scars on women's health as a result of gender violence. Between 5% to 9% of women in the provinces of Eastern Cape, Mpumalanga and Limpopo were physically abused during a pregnancy (Jewkes *et al*, 1999). The same survey found that between 35% to 60% of women had been injured in the year prior to the study.

Research undertaken to investigate the feasibility of a victims' compensation scheme gives a glimpse of some of the injuries sustained during domestic violence. Five hundred and twenty-two closed police dockets from the Randburg and Mamelodi police stations were analysed for the period April - June 1998. At both sites women were more likely than men to be the victims of assault with intent to cause grievous bodily harm, as well as being more likely than men to sustain some form of injury during the assault. At the Randburg site, injuries sustained as a result of domestic violence were confined to cuts and bruises. In Mamelodi however, 45% of victims of domestic violence sustained cuts and bruises, with an additional 31% being stabbed in the course of the assault (South African Law Commission 2001: 109.) No data is available quantifying how many women become disabled in one form or another as a result of abuse.

Domestic violence may also increase women's vulnerability to HIV infection. One South African study found that women in abusive or controlling relationships were twice as likely to be infected with HIV than women in non-violent relationships (Dunkle *et al*, 2003).

Sexual violence also imposes significant suffering upon women. Fifteen per cent of one hundred and eleven women interviewed around the outcomes of sexual abuse said they had contracted a sexually transmitted infection (STI), 6% said they had contracted HIV, and 14% reported becoming pregnant. Four percent of the group became infertile as a result of the abuse (Bollen *et al* 1999).

Another consequence of rape is the development of Rape Trauma Syndrome (RTS). Manifestations of RTS include shock, sleeping problems, eating problems and changes in appetite, changes in energy levels, problems with concentration and memory, changes in mood, neglect of one's self or others, increased washing or bathing, anger, anxiety and fear, depression and loss of interest in life. Difficulties may also be experienced in sexual relationships as well as other relationships. Rape survivors may also make dramatic changes in their lives, such as dropping out of school, changing jobs or moving house. Some rape survivors may also begin or increase their usage of alcohol, cigarettes or drugs as a means of coping with what has happened.

### *Violence as a contradiction to human development*

If we adopt the UNDP's definition of human development as a concern with the enlargement of people's choices, a process which weaves people around development, not people around development, then gender violence radically undermines human development. One of the consequences of rape and domestic violence is the diminishment - even eradication - of choices that many of us routinely make. Abusive relationships are marked by patterns of coercive behaviour in which the abusive partner attempts to control the woman's movements; her contact with family and friends; her access to her own, as well as the household income; her ability to seek and maintain employment; and her diet and appearance, amongst other things.

For women who have been raped, the consequent fear may cause them to move, drop out of education institutions, and change their jobs. For many women, even the fear of being raped causes them to constrain their behaviour, affecting their choice of employment, mode of transport, as well as how they interact with others (particularly men).

Gender violence is therefore not only a problem for the police and courts but also for those engaged in development work, including poverty alleviation or job creation programmes. By recognising such violence as an obstacle to development and taking steps to counter it, development initiatives will not only be contributing to South Africa's overall social and economic goals, but also contributing to the realisation of women's potential.

## **2. THE EXTENT OF VIOLENCE AGAINST WOMEN IN SOUTH AFRICA**

Estimates as to the extent of violence against women in South Africa vary. One study surveying 1 306 women in three South African provinces found that 27% of women in the Eastern Cape, 28% of women in Mpumalanga and 19% of women in the Northern Province had been physically abused in their lifetimes by a current or ex-partner. The same study investigated the prevalence of emotional and financial abuse experienced by women in the year prior to the study and found that 51% of women in the Eastern Cape, 50% in Mpumalanga and 40% in Northern Province were subjected to these types of abuse (Jewkes et al, 1999). Another study, undertaken with a sample of 168 women drawn from 15 rural communities in the Southern Cape, estimated that on average 80% of rural women are victims of domestic violence. Interviews conducted with 1 394 men working for three Cape Town municipalities found that approximately 44% of the men were willing to admit that they abused their female partners (Abrahams et al, 1999). National figures for intimate femicide (men's killing of their intimate female partners) suggest that this most lethal form of domestic violence is prevalent in South Africa. In 1999 8.8 per 100 000 of the female population aged 14 years and older died at the hands of their partners - the highest rate ever reported in research anywhere in the world (Mathews et al, 2004).

At present the true extent of sexual violence in South Africa is unknown. StatsSA found that one in two rape survivors reported being raped to the police (Hirschowitz, Worku and Orkin, 2000), while the Medical Research Council (MRC) found that one in nine women reported being raped (Jewkes and Abrahams, 2002). Both studies clearly find rape to be under-reported although their findings differ as to the extent of such under-reporting. On the basis of the above studies it can be extrapolated that the 52 733 rapes reported by the SAPS in their

2003/04 released data is more accurately calculated as falling somewhere between the region of 104 000 and 470 000 actual rapes having taken place. Statistics regarding rape by multiple perpetrators are scant. Analysis of all 591 rapes reported at Yeoville, Hillbrow, Jeppe, Booyens, Central Johannesburg and Brixton police stations during 1999 found that over 1 in 4 of these cases involved two or more perpetrators (Vetten and Haffejee, 2005). More recent data are not available. By comparison, approximately one in ten sexual assaults reported in the USA involve multiple perpetrators (Greenfeld, undated in Krug et al., 2002).

### **3. POLICY RESPONSES TO THE PROBLEM**

The statistics cited in the previous section have prompted many national public debates and galvanized community-based activism and NGO intervention. The extent of the problem was also recognised by the ANC government from relatively early in its tenure. The National Crime Prevention Strategy (NCPS) of 1996 established crimes of violence against women and children as a national priority (a status such crimes have continued to enjoy in subsequent national policing strategy documents) and a number of legislative reforms have also been instituted in this area. These include mandatory minimum sentences for certain rapes (the Criminal Law Amendment Act, no 105 of 1997); tightening bail conditions for those charged with rape through the Criminal Procedure Second Amendment Act (no 85 of 1997); and passing, in 1998, the *Domestic Violence Act* (DVA) (no. 118 of 1998). *National Policy Guidelines for the Handling of Victims of Sexual Offences* were also finalised in 1998<sup>1</sup> and the *Policy Framework and Strategy for Shelters for Victims of Domestic Violence in South Africa* in 2003 (Department of Social Development, 2003). Specialist facilities have also been set up such as family courts<sup>2</sup>, specialist sexual offences courts and Thuthuzela centres.<sup>3</sup> Thus a number of important policies and laws have been put in place to address violence against women.

The next section reviews the implementation of one such law, the Domestic Violence Act (hereafter the Act or DVA), taking as its starting point, the cost of enforcing the Act.

#### **3.1. The Domestic Violence Act**

One study has calculated that each protection order, in terms of staff costs alone costs, on average, R245.03. This cost will be shared amongst both the SAPS and the Department of Justice and Constitutional Development, the two departments directly responsible for putting the Act into effect.<sup>4</sup> If we apply this cost to the 157 391 protection orders granted in

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<sup>1</sup>These guidelines are applicable to police officers, health workers, prosecutors, social workers and lay counsellors, as well as parole boards and institution committees of the Department of Correctional Services.

<sup>2</sup>Family court centres include a divorce court, a maintenance court, Children's court and family violence court. Five such pilot projects have been established in four provinces in South Africa.

<sup>3</sup> These centres act as a 'one-stop shop' for rape-care management, streamlining a network of existing investigative, prosecutorial, medical and psychological services in the hospital where they are located.

<sup>4</sup>This ignores a range of other costs, including stationery, rental, and support staff of various sorts. It also assumes that the lowest level of employee possible deals with each step.

2004, then at least R38 565 517 was spent on protection orders by the state in that year<sup>5</sup> (Vetten, Budlender and Schneider, 2005).

*How does expenditure on the DVA compare to expenditure on other legislation?*

- In 2000 the SAPS budget vote earmarked new allocations of R35 million, R51 million and R36 million, in addition to existing allocations, in preparation for the implementation of firearms legislation due in parliament before the end of 2000 (National Expenditure Survey 2000: 185).
- In his 2004 budget vote address, the Minister of Safety and Security committed R63.2 million to the firearms control project (covering expenditure on 458 vehicles, 1 153 desktops, 728 scanners and 573 printers, amongst other things).
- Justice allocated R36 million in 2004/5 to the re-demarcation of magisterial districts, increasing to R40 million in 2005/06 and R44 million in 2006/07.
- Justice allocated R23 million towards security at the courts in 2002, allowing the department to secure the houses of 32 judges in the Western Cape. Cash in transit services from private security companies was provided to 184 offices at a cost of R8 million. A further R9 million was spent on the installation of security fencing and lighting. In 2003, R45 million was allocated for security services, which then-Minister Maduna described as still insufficient (see his 2003 budget speech).

On the state's own account, the approximately R38.5 million spent on the Act in 2004 would not appear to be sufficient.

The first reported indication of the budget being insufficient came in 2001 during Justice's briefing on the budget to the portfolio committee. Justice representatives stated that the implementation of new legislation such as the DVA had placed "severe pressure" on its offices; that in fact, the 2001/02 budget for personnel "appears to be less than that required for the number of approved posts; fewer persons can therefore be employed" (Briefing to the Portfolio Committee on Justice Budget 2001: 16 of printout). Magistrates have also pointed to an increase in all components of legal work without receiving any corresponding increase in staff numbers (Artz, 2003). In 2001 police commissioner Jackie Selebi was quoted as saying that the DVA was "made for a country like Sweden, not South Africa" and was not practical or implementable (Louis Oelofse and Siyabona Mkhwanazi, "Well-meaning laws can't be policed – Selebi", *The Star*, 14 August 2001; Jeremy Michaels, "Selebi summoned for domestic violence remarks", *The Mercury*, 22 August 2001). Under-resourcing of police stations and courts in the form of too few personnel and a lack of police vehicles, fax machines and photo-copiers was also found by three studies investigating implementation of the DVA in the Western Cape (Mathews and Abrahams, 2001; Parenzee et al, 2001; Artz, 2003). One of only two ICD reports to parliament states that a shortage of police vehicles and the refusal of the Sheriffs to assist the police in serving protection orders had left these orders piling up in the Community Service Centres of police stations visited in Gauteng, KwaZulu-Natal and the Eastern Cape (ICD Domestic Violence Report to Parliament, March 2001).

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<sup>5</sup>It should be noted that this number of applications, a total provided by Justice, is reflective of only 70% of courts nationally (personal communication Lorraine Glanz, 23 September 2005).

Review of the budget votes contained in the *Estimates of National Expenditure* (ENE) tabled between 1998, the year of the Act's introduction, and 2005/06 finds little reference to the DVA. In the case of the police budget, the DVA is clearly under-prioritised and less planned-for in comparison with legislation around firearms control. Training also appears to constitute the police's primary response to the Act. Within the Justice budget, sexual offences enjoy far greater prominence than domestic violence does, suggesting that it is also under-prioritised. In relation to the ICD budget, their monitoring function has been located in the smallest and least-funded of its sub-programmes (Vetten, 2005).

A number of possible consequences flow from the under-resourcing of the Act. First, protection orders only come into effect once served on the respondent. Thus any delay in service may jeopardise the applicant's safety. Second, where the state has not provided an adequate budget, the costs of financing the Act's implementation have been carried by civil society and donors. The organisation Mosaic in the Western Cape is a case in point.<sup>6</sup> Between April 2000 to February 2001, Mosaic assisted 15 142 applicants to obtain protection orders. From January 2001 to November 2001, Mosaic spent a total of R373 364.15 providing this service to women (Vetten and Khan 2002a: 23). At a practical level it makes some sense for NGOs to step in and provide those urgent and necessary services the state appears incapable of. However, as long as organisations can be relied upon to plug the gaps, the state is absolved of financing its constitutional mandate to protect everyone from private or domestic violence.<sup>7</sup>

Third, under-resourcing shifts additional costs onto women applying for protection orders. Too few clerks to deal with the number of applications made daily will inevitably result in long waits. Some women may not be attended to on the same day they arrive, necessitating their return to court. At the least, this results in additional travel costs, childcare costs, loss of income and time off work, costs some women cannot afford.

Fourth, as former Chief Justice Arthur Chaskalson has pointed out, shabby working conditions and forced under-staffing have a discouraging effect on court staff morale ("Courts must not suffer as 'apartheid' debts are paid", *De Rebus*, August 2004). Pressured work environments also increase the likelihood of women being seen as burdensome and demanding sources of resentment, rather than citizens with a legitimate claim to protection. In relation to the DVA, this may translate into impatient, dismissive and brusque treatment of women seeking court orders.

Finally, understaffing may encourage personnel to find ways of reducing the amount of time spent on cases. Some clerks, for example, did not assist applicants to complete the application forms. The consequences of this may be particularly adverse for women with low levels of

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<sup>6</sup>Mosaic is a community-based organisation addressing domestic violence in and around Cape Town and Paarl. The organisation offers a range of services to women including counselling, training and legal support. Mosaic Court Support Desks at Wynberg, Goodwood, Belville, Cape Town, Simons Town, Kuilsriver and Paarl courts help applicants, mainly women, complete applications for protection orders. They are not charged by Justice for the use of these courts.

<sup>7</sup>See *S v Baloyi* 2000 (1) BCLR 86 (CC)

literacy, or whose first language is not English or Afrikaans. (Form 2 is only available in these languages.) Where forms are completed incorrectly or sketchily, this may result in the applicant receiving inadequate protection, her application being delayed, or not being approved at all.

The Constitutional Court best captures the sum total of these various consequences for women:

*The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated. (S v Baloyi 2000 (1) BCLR 86 (CC) at para 12)*

#### *Oversight of SAPS implementation of the DVA*

The DVA has attempted to provide for statutory oversight of the police's implementation of the DVA, with failure to comply with either the Act or the regulations constituting misconduct. The National Commissioner of the SAPS is required to submit six-monthly reports to Parliament detailing the number and nature of complaints against the police for failing to adhere to their statutory obligations; disciplinary proceedings instituted; and steps taken as a result of recommendations made by the ICD. Such failure on the part of the police to uphold either the Act or regulations must also be reported to the ICD, the civilian oversight body established in terms of the 1995 South African Police Service Act. Section 18(5)(c) of the DVA mandates the ICD to monitor the police's compliance with the Act and obliges the police to institute disciplinary proceedings against recalcitrant officers, unless the ICD directs otherwise. The ICD is also required to submit six-monthly reports to parliament recording the number and nature of complaints received against the police, as well as the recommendations made around such complaints. In the 2003/04 financial year, monitoring the Municipal Police Services' (MPS) implementation of the Act was also added to the ICD's mandate.

These statutory obligations are not being fully met. At the time of writing this submission, there is no evidence in minutes that the portfolio committee for Safety and Security has regularly requested the six-monthly reports required of both the ICD and SAPS. Only two reports would appear to have been submitted by the ICD and none by the police.

In conclusion, the DVA is an important piece of legislation which promotes women's rights to safety and security. However, its effectiveness has been diluted by the absence of resources and the ineffective and limited exercise of oversight.

### **3.2. The Sexual Offences Bill**

Recognising the inadequate and discriminatory nature of current sexual offences law and procedure, the Department of Justice initiated a process of legal reform in 1998. Seven years later, the proposed legislation has yet to be passed. The timeline below provides a chronological overview of the Sexual Offences Bill's progress to date. We have described this process in some detail to allow readers to understand the source of the delays, as well as the uneven nature of public participation in the development and finalisation of this Bill:

1998 South African Law Reform Commission (SALRC) requested to investigate sexual offences by and against children and to make recommendations to the Minister of

Justice for reform of the criminal law. An expert Project Committee is appointed by the Minister to work on this project

1999 SALRC mandate extended to include sexual offences committed against adults and the mandate is expanded to include proposals relating to regulations and policy

Dec. 2002 After extensive consultation with all sectors, including victims/survivors of sexual offences, and research, the SALRC issues its final report. The report contains a **draft Bill** that embodies some progressive recommendations for the reform of the substantive law relating to sexual offences, as well as proposals relating to the Criminal Procedure Act regarding the management of sexual offences and an extensive list of policy recommendations to all sectors involved in the management of sexual offences. (See South African Law Reform Commission, Discussion Paper 85, Project 107: Sexual Offences: The Substantive Law.)

July 2003 SALRC report and draft law are considered by the Minister of Justice and other members of Cabinet. Thereafter, Bill 50-03 is introduced in the National Assembly. The bill is referred to the Portfolio Committee on Justice and Constitutional Development of the National Assembly (Justice Committee) for further review. Bill 50-03 was published in Government Gazette, No. 25282, on 30 July 2003.

September 2003 Public comments are invited on the Bill and public hearings are announced, giving one working day's notice for attendance.

September - December 2003 A number of revisions are made to the Bill, substantially altering a number of provisions. No further public hearings are held on the substantially changed Bill.

Feb. 2004 Justice Committee considers changes to Bill 50-03. The committee recesses for national elections before finalizing their work. The changes the committee proposes are contained in a "Working Group Document." This is the most recent yet **unofficial draft** of the bill.

June 2005 The Deputy Minister of Justice appears before the Portfolio Committee on Correctional Services on 3 June and says that the new Minister of Justice Bridgette Mabandla had wanted to be involved in the process of reviewing the bills and their principles. Given the extent to which the Portfolio Committee had proposed revising both bills, the Minister wanted to take the extensively revised Bills to Cabinet before the process in Parliament was continued in the second half of this year starting in August.<sup>8</sup> It is unclear when the newly constituted, post-election Justice Committee will re-consider the unofficial draft and make further changes.

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<sup>8</sup>See the minutes of 3 June 2005 of the Correctional Services Committee  
<http://www.pmg.org.za/viewminute.php?id=5944>

Only some of the substantial changes made to the Bill over the course of time promote the principle of improving access to justice for victims of sexual offences. We have briefly and selectively highlighted only some issues below, mindful that this is not a call for recommendations around law reform.

We support the creation of a new definition of rape that includes the sexual violation of men and boys and is inclusive of the different avenues of penetration as well as different methods of penetration used by perpetrators. This acknowledges that the trauma experienced by victims of these different types of sexual violation is as serious as that suffered by women penetrated vaginally by a penis.

We are concerned by proposals to create an offence through which people will become guilty of “criminal exposure of another to HIV” if they unlawfully and intentionally fail to disclose their HIV status to their sexual partner in circumstances where there is a significant risk of HIV transmission. (In other words, a person must know their HIV status, and must intentionally engage in a high risk activity (e.g. vaginal or anal sex without a condom), without informing their partner of their HIV status.)

The Bill also states that such an offence can only be prosecuted with specific authorisation of the National Director of Public Prosecutions, who must consider:

- whether prosecution will be in the public interest or in the interests of justice
- All the circumstances surrounding the commission of the alleged offence
- The personal circumstances of the people involved

There are serious policy questions about the creation of this new statutory offence. It may serve to reinforce negative stereotypes of people with HIV and may contribute to stigma and prejudice against people with HIV. It may also lead to fewer people willing to be tested to avoid knowledge of their HIV status. There are existing common law offences that already criminalise the deliberate transmission – these have rarely been used and give rise to difficult questions of evidence and proof. A new offence will not change this in any way.

There are serious concerns that the provision will have a disproportionately negative impact on women who are often less able and less likely to disclose their HIV status for fear of violence, economic hardship and/or social abandonment. Although the provision does state that the personal circumstances of both parties should be considered when deciding whether to prosecute, the inability to disclose has not been created as a specific defence.

We also recommend that any legislation ultimately enacted:

- Establish, as a legislative principle, the need for comprehensive and holistic health and counselling services for rape victims/survivors
- Establish inter-sectoral co-ordinating frameworks that will encourage the Departments of Health, Social Development, Justice and Constitutional Development, Correctional Services and the SAPS to work in partnership with each other, as well as civil society at all levels, to draw up policies and guidelines around sexual offences, as well as monitor the implementation of such law and policies
- Uphold as a policy priority the establishment of specialist sexual offences courts and health facilities

- Set out procedures for ensuring that court and evidentiary processes do not further traumatise rape victims/survivors
- Establish as a principle the need to manage and treat sex offenders.

In conclusion, we understand that the Bill has been so substantially revised that it needs to be sent back to Cabinet for discussion. We therefore recommend that as is usual with most draft legislation, parliament once again allows for public consultation and participation around the Bill. We also recommend that once the contents of the Bill have been agreed upon through a process of public consultation, that the Bill is then enacted as a matter of priority. Finally we also recommend that the various government departments as well as civil society organisations tasked with the implementing sexual offences legislation be adequately resourced to do so. The example of the DVA illustrates how good legislation may be weakened when too few resources are allocated towards its implementation. As with public participation around the contents of the Bill, there needs to be, as a matter of policy, public participation around such budgetary processes.

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