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Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

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● (1105)

[*English*]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I would like to welcome everyone to this meeting of the Standing Committee on Justice and Human Rights.

We are continuing to study Bill C-242, an act to amend the Criminal Code, inflicting of private acts of torture. I am very pleased to welcome our witnesses from the Department of Justice who are here today.

We have Donald Piragoff, who is the senior assistant deputy minister in the policy sector, and Laurie Wright, who is the assistant deputy minister of the public law sector. We're also joined by Glenn Gilmore and Dan Moore.

Thank you so much, to all of you, for coming to testify before our committee.

[*Translation*]

Since we are studying a private member's bill, there will be no testimony from departmental officials. They will simply answer questions.

We will now begin our first round of questions.

[*English*]

We're going to start with Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Mr. Chairman, I, too, want to thank the witnesses from Justice for attending committee this morning, and perhaps shedding some more light on some of the implications and intents and maybe ramifications of the proposed private member's bill, Bill C-242.

I have a few questions. Mr. Piragoff, are you taking the lead on these and going to distribute the questions as they come in, or do we need to address particular...?

Mr. Donald Piragoff (Senior Assistant Deputy Minister, Policy Sector, Department of Justice): It depends on the nature of the question. Either Ms. Wright or I will take the lead on the question.

Mr. Ted Falk: Very good. Thank you.

My first question would be this. In your opinion, is there a gap in our current laws surrounding the matter of private torture that you believe might be remedied with Bill C-242?

Mr. Donald Piragoff: I think Mr. Casey in the second reading speech gave quite a long list of offences that could apply to this type of conduct. The one most applicable would be aggravated assault, which is assault causing maiming, wounding, etc.

In terms of legally, there is no gap. The conduct can be prosecuted. From what I understand from the sponsor of the bill, those who support the bill wish to actually denounce a specific type of aggravated assault, and that is the kind where there is actually an intentional commission of causing serious pain or suffering, and not just simply the intentional causation of assault which causes maiming or suffering, but actually that the injury be intentional, that there be an intentional assault, plus an intentional causing of pain or suffering.

Of course, the current law doesn't require intent on both sides. One simply needs to intend the assault. If the assault is to such an extent that it causes maiming or wounding because the person is reckless as to the consequences, that is sufficient under the law.

It's more of a denunciatory purpose, I understand, in this bill, as opposed to actually plugging a real legal gap.

Mr. Ted Falk: Okay. From the research that I've conducted and the reading, it would appear that the current legislation that we have before us as far as aggravated sexual assault is concerned, and kidnapping which would also fall under the purview of this law, I suppose, if it were ever to be enacted, actually carries with it minimum mandatory sentences which this particular private member's bill doesn't address at all. What would your thoughts be on that?

Mr. Donald Piragoff: Some offences, such as you have mentioned, aggravated sexual assault, in certain circumstances do carry a mandatory minimum penalty. Aggravated sexual assault, aggravated assault, kidnapping would all be offences applicable to the type of conduct that the bill is trying to address.

Mr. Ted Falk: Just for clarification, if this were to become law and someone were to be convicted under Bill C-242 as it is right now, there actually wouldn't be any mandatory minimum sentence. Whereas if the conviction were under existing legislation, like aggravated sexual assault, there would be, in certain instances, as you've identified, a mandatory minimum sentence, but this particular legislation wouldn't have it.

Do you see any other areas like that where there's potential conflict? Would there be a situation that could arise where someone being cross-prosecuted would admit to what could be now under this legislation perceived as a less onerous punishment than under the existing laws that we have?

● (1110)

Mr. Donald Piragoff: Let me turn that question around. If this offence were to exist, and it's called “inflicting torture”, and there is an existing offence in the Criminal Code called “torture“, which torture are you talking about if a person is prosecuted?

If you give the prosecutor one of two offences to prosecute, the existing torture offence, which is about state-sponsored torture, or this inflicting torture offence, and both are called torture, then it can cause two problems.

If there is a situation where there are Canadian officials, either police officers in Canada or military personnel outside of Canada, who inflict torture and should be prosecuted under existing section 269.1 on the basis that it's state-sponsored torture because they are officials, then the prosecutor could say, “I don't want to have to prove all those elements of the offence, so I'll instead prosecute this other offence, this new offence.”

In that case, we would not be abiding by our international obligations, because the international obligation is that we should be holding our officials accountable under international law.

The existing offence of torture is not an offence about causing pain and suffering; it's to ensure that states abide by their obligations to protect their citizens and other people on their territory, and to ensure that either they or their officials do not commit serious pain or injury to other individuals. It's not necessarily protecting the individual, it's an obligation to go after the state.

It's important that if that conduct meets 269.1, then it should be prosecuted as such, and that there not be some other offence called torture that one could prosecute instead, which would be considered to be a lesser offence. Then the question is, are we abiding by our international obligations if the prosecutor were to prosecute the lesser offence as opposed to the offence that complies with the convention?

It also causes all kinds of confusion with respect to our international obligations, as to whether we are abiding and how we implement. It also causes confusion to other countries that may be trying to find ways to get out of the convention by saying that if other countries have lesser offences of torture, then why can't they have lesser offences of torture, so then they won't have to prosecute their officials directly for the torture they commit in certain countries.

Mr. Wright can speak more to the international implications, if you'd like.

The Chair: Thank you very much. I do want to note that the proposer of the bill has come forward with a proposed amendment that would make the definition in 269.1 and the definition of this type of torture identical, which I think may remedy those problems.

We'll pass it on to Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): I'll follow up, Mr. Chair, on that question. Have you had an opportunity to see the proposed amendment? Does that address your concern?

Mr. Donald Piragoff: It would probably exacerbate the concern because the proposed amendment simply removes the word “official”, but all the other elements of section 269.1, at a state torture offence, are reproduced in the proposed amendment. Now one is really confused as to what exactly Canada is trying to achieve here by simply taking away the word “official”.

France did something similar by going with an offence that applied equally to both officials and non-officials, and they've been criticized by the committee on torture in the sense that they've now confused the situation as to when state torture has been charged and prosecuted and when it has not been prosecuted.

If the committee wants to address the situation of intentional infliction of serious bodily harm or intentional mental or physical suffering in situations that do not involve the state, it may be advisable to try to avoid any of the attributes of the state torture offence as much as possible. There are things in the state torture offence that only apply and make sense if one is dealing with state torture; for example, the notion that the conduct be at the acquiescence or consent of another person. That makes sense in the state torture because you're trying to somehow link a private person's misconduct to the state, and the way you link it to the state is that a state official has acquiesced or consented to somebody else doing something. So it brings the state back.

Also, the provision that deals with superior orders is no defence. It's not a defence that you followed orders. That only makes sense in the hierarchical state system where you have a hierarchical chain of command as in the military or the police or government. It makes no sense to have that in a private offence.

The proposed amendment actually brings the two offences even closer together and creates more confusion. It's better to try to keep the two offences separate or apart as much as possible in the definition, and also don't call both torture. If you're going to create a new offence, call it something else. Call it grievous aggravated assault or torturous aggravated assault, but to call it torture really confuses both the law domestically, but more importantly, our position internationally.

● (1115)

Mr. Chris Bittle: You mentioned there was criticism of France. Can you provide the committee who proffered that criticism?

Mr. Glenn Gilmour (Counsel, Criminal Law Policy Section, Department of Justice): Yes, under the commitments made by states to combat torture, states are required to report on a periodic basis to the United Nations Convention against Torture. Sessions are held by the UN Committee against Torture when they examine a state party's report, and at the end, they issue the concluding observations on that particular state party.

In 2010 in particular, the UN Committee against Torture was critical of the fact that France has just one general definition of torture on the basis that it was unclear whether or not the definition of torture contained therein the specific definition of torture that's found in the United Nations Convention against Torture. They have suggested to France that they, presumably in addition to the general offence of torture, have a specific offence of state torture where the definition is modelled precisely on the definition of torture found in the United Nations Convention against Torture.

They were critical of a country that had in its domestic regime just the mention of the word "torture"—there was no definition of the word—and they wanted to ensure that state torture was distinguished from other kinds of acts that France wanted to call torture. This would certainly help in reporting back to the United Nations Committee against Torture on information that the state has with regard to how many instances of torture, as defined by the United Nations Convention against Torture, have occurred during the reporting period.

Mr. Chris Bittle: Is it the position of the Government of Canada that France, the United States, and Australia—Australia and the United States have jurisdictions that have similar pieces of legislation—are not in compliance with international obligations?

Mr. Glenn Gilmour: That's not the position we're putting forward. The position we're putting forward here is that there be just one general offence of torture, where everything is called torture under one offence. As I recall, during the committee hearings last week, there was some suggestion that possibly one amendment that could be made was simply to get rid of the term "state official" in section 269.1. At least, that question was asked. It remained unclear to me whether or not that was something that was being considered.

The Chair: The proposal from the sponsor, just to be clear so that we all have that for the future rounds of questions, is to have two separate sections. One would be to continue to have the same section 269.1 and add a new section 268.1, that would have the non-state actors; remove the requirement that it be a state actor. You would have a separate definition.

● (1120)

Mr. Glenn Gilmour: Thank you for that clarification.

[*Translation*]

The Chair: We will move on to Mr. Dusseault now.

Mr. Pierre-Luc Dusseault (Sherbrooke, NDP): Thank you, Mr. Chair.

I would like to thank the witnesses for being here today.

Given the new definition of torture committed by a non-state entity, and since there is a burden of proof to be established before a judge in order to get a conviction, do you think the risk of not getting a conviction is a problem?

[*English*]

Mr. Donald Piragoff: Police and prosecutors are going to try to take what I would call the quickest direct route to a conviction, and the quickest direct route to a conviction is going to be a charge of aggravated assault. All you have to prove is that there was an intentional commission of assault and the person was reckless as to the consequences. You don't have to prove that the person actually intended the consequences, that there was severe mental pain or suffering. You only have to simply prove the person intended to beat the person up and was reckless as to the consequences. That would be the quickest direct route to a conviction, and that's what most police would investigate, and most prosecutors would charge.

That's why I said earlier it's confusing to have another offence which says any person who inflicts torture will have two torture offences because, one, that creates confusion. Two, the Chair indicated that the proposed amendment, which is not on the table yet, understand, would simply replicate all of 269.1 except for the word "official".

The concern that exists with respect to that type of procedure is that there still is a lot of other indicia in that proposed amendment which only refer to states. Words like "at the consent", "acquiescence of", that's language that refers to states; it's how to make a state actor to maybe acquiesce to someone else's torture who is not a state official and make the state responsible. To actually talk about it's not a defence of superiority only makes sense in the state context. Why would you put that in a provision that deals with private misconduct?

Also, the provision that talks about evidence being inadmissible, we don't have the provision...any other assault provision in the Criminal Code for assault or misconduct via misconduct by other individuals. It's there particularly for the state situation, because you do not want the state, on one hand, to abuse a person and then turn around and use the evidence they obtained from the abuse against the person. That's not the same situation in a private context, because we're not talking about obtaining evidence and then the person prosecuting the—

[*Translation*]

Mr. Pierre-Luc Dusseault: Thank you.

[*English*]

Mr. Donald Piragoff: There are a number of indicia that even in the proposed amendment really don't make any sense for a private offence, and only make sense for a state-sponsored offence.

[*Translation*]

Mr. Pierre-Luc Dusseault: Thank you.

Considering this new definition of the offence set out in the bill, would you say that the chances of the Crown deciding to prosecute for torture are slim to non-existent?

[*English*]

Mr. Donald Piragoff: If it was a normal situation, I would think most police officers would take the more direct route. But if you had a situation where a Canadian police officer or military person or some other Canadian official actually caused intentional and serious bodily harm and intentional pain or suffering, Canada would want that prosecution to be conducted under section 269.1 in compliance with our obligations. We would not want to prosecute some other offence also called torture, which might be considered a lesser crime. That would signal to our allies and other countries which maybe are not our allies which actually torture people that it's all right to have some lesser offence and call it torture. We're trying to hold people's feet to the fire and get them to abide by their international obligations, to implement the torture convention definition, to implement the offence, and to prosecute it. Don't prosecute something else so that you don't have to prosecute your officials and label them as torturers.

● (1125)

[*Translation*]

Mr. Pierre-Luc Dusseault: My next question is more technical.

If the bill is passed, could the Crown press charges for both aggravated assault and torture?

Moreover, if the person is found not guilty of torture, for instance, could they be found guilty of aggravated assault?

[*English*]

Mr. Donald Piragoff: You can always charge a number of counts on an indictment. It depends on the evidence and the seriousness of the charge. It is possible to charge more than one offence on an indictment.

[*Translation*]

Mr. Pierre-Luc Dusseault: Okay.

Do I still have some time left, Mr. Chair?

The Chair: You have enough time for another brief question.

Mr. Pierre-Luc Dusseault: As I understand it, you think it would not be ideal to have the same definition for state torture and non-state torture. I can imagine this could cause some confusion among our international partners. France, which has been the subject of criticism, is one example.

Would there be a way of doing it? For example, it might perhaps not be the exact definition chosen by the bill's sponsor. We could make a distinction. It is the word "torture" that is problematic. Perhaps we should consider another term for this new offence.

[*English*]

Ms. Laurie Wright (Assistant Deputy Minister, Public Law Sector, Department of Justice): I think it's probably a joint answer between the two of us.

Certainly, the origin of the Convention against Torture was to recognize that there's something particularly heinous about a state and its officials undertaking deliberate infliction of suffering on citizens or non-citizens in order to dissuade them from certain political ends, to get information out of them, those kinds of things.

There certainly was an element around recognizing the pain and suffering being suffered, but the direction was toward calling states to account for bringing the power of the state in inflicting these kinds of injuries, both mental and physical, against individuals.

Our colleagues at Global Affairs are very active in the international community in terms of working with partners and others to make sure that this basic international standard is being respected. From the perspective of international law and international relations, it's certainly far preferable to keep the torture definition related to where there is state activity involved in it.

I would defer to Don on the question of different ways that this particular kind of deliberate causing of pain and suffering by a private actor could be accommodated in the Criminal Code .

The Chair: Thank you very much.

We're going to move now to Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): You speak of needing this existing differentiation in order to hold states to account, but states are not charged under the current act, only individuals are. So I'm not sure how that holds states to account.

I'm also wondering if there have been any convictions under section 269.1 in Canada.

Ms. Laurie Wright: The way in which states are called to account under the Convention against Torture is that the convention establishes a committee, and states are required to appear before the committee on a periodic basis to report to the committee as to whether their domestic laws and practices bring the state into conformity with the convention. There is a public airing before the committee of every state that is a party to the convention on how they're doing with the compliance.

There is also what's called an optional protocol to the convention. Not everybody who is a party to the convention has signed up for the optional protocol, but those who have are required to allow international investigators to visit their places of detention, for example, prisons and penitentiaries, in order to make sure the kinds of things that would meet the torture definition are not occurring.

Dan, I don't know if there's anything you wanted to add to that.

● (1130)

Mr. Dan Moore (Counsel, Human Rights Law Section, Department of Justice): Under the Convention against Torture, states have international responsibilities and obligations to take measures to prevent torture. The direct criminalization of torture by individuals is an important part of states' obligations to ensure that we prevent and punish for torture. States are held accountable on a higher level through the reporting process and through discussion about how we're implementing that.

Individual accountability, especially for state actors, is a core part of the convention. We see section 269.1 ensuring that individuals, especially those with ties to the state, have responsibility and criminal accountability if they engage in acts that meet the article on definition of torture under the convention.

Mr. Ron McKinnon: You say that 269.1 is for individuals with ties to the state. It seems to me that it only applies to those with ties to the state and not private individuals at all.

Ms. Laurie Wright: It could apply to someone who is under the direction of a state official. The definition is such that the primary target is state officials, but state officials cannot get themselves out of the situation by saying that they told somebody else to do it. Similarly, somebody who accepts the direction of a state official to commit these kinds of acts could be charged and it could be argued that they fall under it.

Mr. Ron McKinnon: That would still be a tie to the state.

Do we have any data on Canadian convictions?

Mr. Dan Moore: We are not aware of any convictions under this provision at the current time.

I think our view of the effectiveness of the provision is based on the message it sends and its clear denunciation within the Criminal Code of the heinous crime of torture.

Mr. Ron McKinnon: Okay.

I believe I heard testimony that if there are two charges, then prosecutors or law enforcement officials would choose the one that's easier to prove. It seems to me that would be the case without a second charge of torture and with just aggravated assault. Why would people choose to prosecute under state-sanctioned torture when they could prosecute under aggravated assault? I wonder if part of that answer might be that there is extraterritoriality regarding aggravated assault.

Mr. Donald Piragoff: The issue of extraterritoriality applies only to the state torture, because the convention is trying to create an international regime. If the state does not abide by its obligations, does not prosecute someone who committed torture in its territory, and that person comes to, say, Canada, then Canada can undertake the prosecution and ensure that internationally there's no impunity. That is why within the convention there is this element of extraterritoriality.

For private conduct, we don't have extraterritorial jurisdiction, except in limited circumstances where there is an international treaty that requires it, or there's clearly a customary international law with a requirement or permission for a state to have that.

If I assault someone as a private individual in France and I come back to Canada, then I can't be prosecuted for assaulting someone in France. However, if an official in a foreign country tortures someone, and that official is not prosecuted in that country, then other countries are entitled to step into the shoes of that country and say that just because they are going to grant impunity doesn't mean the international community will grant impunity.

There are significant differences between the levels of conduct. Domestic conduct is about protecting the victim. It's all about saying that this person suffered harm and that we want to protect that person from harm. The international offence says that yes, we want to protect people from harm, but we also want to hold states accountable in that they should not let this happen, and that if they do let this happen, we're still going to ensure that justice is done by ensuring that we will prosecute. It's serving two different purposes.

● (1135)

Mr. Ron McKinnon: It is certainly that. However, for actions performed in Canada, for example, would it not be more likely that charges would be laid under aggravated assault than state-sanctioned torture?

Mr. Donald Piragoff: That would be a decision of the prosecutor.

Clearly as a policy statement, if it involved officials, the Parliament of Canada has indicated in order to abide by our obligations, we'd prefer that the prosecutors would prosecute under section 269.1, but again, it really depends on the question of evidence. Does the prosecutor have enough evidence to satisfy all of those elements of section 269.1? There are a lot of elements there, all those purposes that you have to prove, for example. It's not simply causing severe pain or suffering; they have to do it for certain purposes, so you have to get the evidence that the purpose existed. If you don't have a confession from the accused, it's difficult to establish purposes.

[*Translation*]

The Chair: Thank you.

We will move on to the second round of questions now.

Mr. Fraser, please go ahead.

Mr. Colin Fraser (West Nova, Lib.): Thank you very much, Mr. Chair.

[*English*]

Thank you very much for your presence today and for answering our questions.

I want to pick up on something that was discussed earlier, which is that one can be charged with more than one offence on an indictment. I presume from that you're saying somebody could be charged with aggravated assault and this proposed private torture. Is that correct?

Mr. Donald Piragoff: Yes, they could.

Mr. Colin Fraser: Help me to understand then the difficulty you would have that prosecutors would go with the aggravated assault, for example. Why wouldn't they try to prosecute on both?

Mr. Donald Piragoff: For aggravated assault, the prosecutor would have to prove that the assault was intentionally committed and that the consequences were simply reckless, that they were reckless that the person was wounded, maimed, or disfigured. That's what would have to be proven.

Under the offence in the bill, first, you have to show a purpose. If it were for the purpose of intimidating or coercing that person, for what purpose? That's one more element you'd have to try to get evidence of. Also, the definition of torture is not just simply that there was maiming, but there has to have been severe, prolonged pain or suffering, whether physical or mental, and it was intentionally and repeatedly inflicted on a person. For aggravated assault you don't have to prove that the consequences, that the harm was intentional; you just have to prove that the assault was intentional. Under this offence you have to prove both that the person intended the conduct and intended the consequences; so, it's more to prove.

Mr. Colin Fraser: Okay, it would be harder to prove, but it wouldn't prevent the prosecution from bringing both charges. If they don't get it on the private torture, they may get it on the aggravated assault.

Mr. Donald Piragoff: That's true.

Mr. Colin Fraser: What are your comments with respect to the principle in Kienapple? That's the 1975 Supreme Court of Canada decision that said you cannot be convicted of two offences where they both arise out of substantially the same facts. Wouldn't that apply and you wouldn't be able to convict on both? If you convicted on private torture, then you couldn't do aggravated assault. Isn't that true?

Mr. Donald Piragoff: That's true. You could only register one conviction, not two convictions. You could be found guilty of both offences, but you could have a conviction only registered with respect to one of them.

Mr. Colin Fraser: Doesn't that respond to your concern that prosecutors or police officers would be turning their minds to just aggravated assault because it's too hard to prove private torture, or it's a higher burden? How does that happen if the system would allow for both to proceed? If you don't get on the higher threshold, at least you're getting, in effect, the lesser included offence.

Mr. Donald Piragoff: No, the concern that is expressed in particular by officials at Global Affairs Canada is that if you have another offence called torture and you prosecute that as torture, then how are we abiding by our obligations to prosecute torture when we already have section 269.1 which says that torture is defined in section 269.1, and we have another offence in proposed new section 268.1 which says inflicting torture is torture? What torture are you talking about? How do you go to the committee and say, “Well, no, we didn't prosecute the person for torture. We prosecuted the person for torture.” That's why I said earlier in my comments that if you want to make a domestic offence that addresses the intentional causation of pain or suffering as a consequence as well as the intentional assault, Parliament is free to do that. It's a policy issue.

What we're saying is it would be much clearer not to call that offence torture and not to use the word “torture” anywhere in that offence, so it doesn't cause confusion with section 269.1. It would have been much better to call it grievous aggravated assault, which also requires an intentional element to cause the consequences and not just simply to cause the harm.

● (1140)

Mr. Colin Fraser: Would you be satisfied, then, if it was changed from “torture” to “grievous aggravated assault”? Would that answer all your concerns?

Mr. Donald Piragoff: That would help answer the concerns with respect to not confusing this with state torture, because there would only be one torture offence, and that would be in 269.1. If Parliament wishes to create another offence that is more serious in terms of its denunciation than aggravated assault, it can do so. As I said, if Parliament wants to say that it wants to make an offence of intentionally causing conduct and intentionally causing serious pain and suffering, Parliament can do that. The existing law of the land simply says you intentionally caused the conduct and if you're reckless as to the consequences, you're guilty. That's a choice for Parliament.

Mr. Colin Fraser: Thank you.

We heard in the presentation from the proposer of the bill that victims may be more willing to come forward if you're actually acknowledging what had taken place, you're actually acknowledging that this set of circumstances may, in fact, have been torture. What can you say about the willingness of victims to come forward if this bill was passed? Do you think it would improve the willingness?

Mr. Donald Piragoff: I would just be guessing. I can't say whether a more serious offence is going to make victims come forward. We have assault. We have sexual assault. We have aggravated sexual assault. I don't think the fact that we have three types of sexual assault makes victims more willing to come forward. There are other factors at play as to whether people are willing to want to go to court, want to go to the police, and want to go into a public courtroom and talk about very intimate and personal things that happened to them. I don't think those deal necessarily with the offence, because other things are at play that motivate victims to testify or not to testify.

Mr. Colin Fraser: Thank you, sir.

Those are my questions, thanks.

The Chair: Thank you very much.

Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you to the witnesses.

I want to ask questions related to Canada's international obligations under the UN Convention against Torture. Certainly, when I look at, for example, proposed section 268.1, it makes sense to me to make the argument that that could undercut our international obligations in the sense that it is a narrower definition than the definition provided in section 269.1 of the Criminal Code and therefore could undermine or compromise the exclusive jurisdiction of section 269.1 with respect to state torture.

Mr. Fragiskatos has put forward an amendment that basically replicates section 269.1 in non-state circumstances. I still am not fully clear as to how that undercuts Canada's international obligations or the Convention against Torture to simply apply the same test, the same standard, but to expand it to non-state circumstances.

I do understand your point about the appropriateness of that test or the problems with that test in non-state circumstances, but just from the standpoint of undercutting or compromising our commitment to the UN Convention against Torture, I'm still a little unclear. Perhaps you could elaborate.

● (1145)

Ms. Laurie Wright: Sure. Thank you very much for your question.

I think the first thing to say is that no one here is suggesting that having a separate offence for torture with respect to private actors somehow puts us not in conformity with our Convention against Torture obligations. As long as the existing offence stays as it is, and as long as we continue to undertake the actions that we are to take in order to prevent and discourage torture, we are domestically in conformity.

I would say that not every country around the world that engages in torture prefers to be held, or to have its officials held, to the very high standard of conduct that's required in the convention. The international concern is that there would be from some avenues an argument made that, if there is more than one way of defining torture, they could also water down their own provisions in terms of what they're criminalizing, and therefore not actually be meeting their obligations. That's part of it.

The other part is, as the committee against torture undertakes its functions to ask questions of states, one of the things it likes to rely on is statistics that come in, for example, about the times that torture has been charged and convicted. If you have more than one torture offence, it can make things difficult in terms of the clarity of the information that's being put forward internationally about what kind of conduct is being charged and prosecuted.

Mr. Michael Cooper: But here we have, with 269.1 and proposed 269.2 the same definition, the same test, the same punishment. The evidentiary basis of obtaining a conviction would be the same. The only distinction would be whether it was done by an official or whether it was done by a private individual. That would seem to address at least those concerns about inconsistencies in Canada's international obligations with respect to the convention against torture, leaving aside the issues of the appropriateness, questions about the test, and how practically that could be used in a domestic context.

Ms. Laurie Wright: We would not be going against our obligations under the convention by creating a second torture offence that applied only to private actors. It's less a question around our legal obligations and whether we're fulfilling them. It's more at the policy level with the object of the convention being around stopping states from torturing. What we would like to see as an international position is a consistency in the definition that allows other states where torture does occur much more regularly than in Canada to be held to account for those kinds of offences.

Mr. Michael Cooper: Could you comment on, for example, eliminating subsection 269.1 and simply having one section that applies both to state and non-state officials?

Mr. Donald Piragoff: That's what France did, and they were criticized by the committee for having a general offence that applied to both situations. The committee said that if there's a conviction, they don't know whether the conviction was of a person who fits under the convention or does not fit under the convention, so now they've muddied the waters. They've convicted someone of torture, but we really don't know if it was state torture or not. That's the point that Ms. Wright is trying to get across. The committee wants to know, if there was state torture, that there was state torture and that it was prosecuted as state torture, not prosecuted as something else to hide the fact that there was state involvement.

If you have an offence that you can prosecute and call torture and not have to prove the state's involvement, you could say you had a prosecution and that there was no state involvement, because the prosecutor never proved state involvement or it was never charged that there was state involvement. You see, that's the issue.

It's not a direct violation of our international obligations. It's a way of skirting them if countries have other ways to say they'll deal with this situation by other means, as opposed to our holding countries' feet to the fire and saying that, if there is state-sponsored torture, deal with it as state-sponsored torture and don't deal with it as some lesser offence. If we start creating lesser offences, then that gives an excuse to other countries to say that Canada has lesser offences, so they can have lesser offences too.

That's the issue at the international level, and that's the concern of Global Affairs Canada.

● (1150)

The Chair: Thank you very much.

Ms. Khalid, go ahead.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you very much for coming in today and sharing your views with us.

I want to talk a bit about the actual intent behind this proposed law. We heard last week from the sponsor and some witnesses that the intent behind this proposed legislation is to give the victims a name as to what they have suffered and what their experience was.

Do you think the proposed law as it stands meets that intent of providing victims with having that experience named, and having the impact of the word “torture” applied to their experience?

Mr. Donald Piragoff: As I said at the beginning in response to the first question, there is no gap in the law. If there is a gap, it is a public relations denunciatory gap, to say that we want to denounce another type of conduct, which is already covered legally by the law, but we want to give more denunciation for conduct where there are two intents, an intent to cause the conduct and an intent to cause the severe pain and suffering.

Parliament can do that. Parliament can call that anything it wants. As opposed to aggravated assault, it could call it grievous aggravated assault, but once it calls it torture, that causes all the complications we have been trying to explain with respect to the implications of 269.1, our international obligations, and the global fight against torture. By having confusion of numerous offences called torture, it gives other states the ability to say, "You know what, we'll do the same thing. We'll have a confusing law, and we can skirt our international obligations because we won't have to prosecute our officials for state torture. We'll prosecute them for something else, and then we won't have to announce to the world that we had state torture in our country."

As I said, if Parliament wants to create a new offence, it is the freedom of Parliament to do so, but Parliament should not call it torture because that has implications. We already have an offence of torture. Call it something else.

Ms. Iqra Khalid: Just to clarify, what you are saying is that the name does have an impact on victims who go through this experience. The negative of that would be to confuse the definition of torture internationally.

Mr. Donald Piragoff: Yes. As I said, call it grievous aggravated assault, or call it torturous assault, but don't call it torture, because we already have an offence of torture, which is understood and well defined in international law. We should not be creating any doubts that there is only one definition of torture in the world internationally, and that is the one in 269.1.

Parliament is free to create other offences, but it should not create any confusion by creating another offence that somehow overlaps with torture or is a lesser form of torture.

Ms. Iqra Khalid: Continuing with victim impact, we heard testimony last week as well that there are a lot of people who experience torture but don't come forward to press charges because there is no charge for what they have gone through. In that way, the justice system is not available to them in getting justice for what they have undergone.

Do you agree with that?

Mr. Donald Piragoff: As I said, there are existing offences that apply already. Aggravated assault applies, and aggravated sexual assault applies. If Parliament wants to create an offence of intentional infliction of mental pain or suffering or physical pain or suffering, Parliament is free to do so, but don't confuse it with the existing offence of torture.

● (1155)

Ms. Iqra Khalid: Would this proposed bill, as it stands right now, create more accessibility to the justice system for victims who would otherwise not come forward?

Mr. Donald Piragoff: As I indicated earlier, we have an offence of sexual assault, and we have an offence of aggravated sexual assault. Whether we have three levels of sexual assault or four levels of sexual assault, the issue as to why victims don't come forward isn't the name of the offence or the elements of the offence. There are other things at play as to whether victims are willing to come forward to talk about very private matters that happened to them.

I think what the victims are saying is that they would really like to have an offence that actually describes exactly what happened to them; that is, the maiming, the wounding wasn't just recklessly caused to us, but it was intentionally inflicted on us. That's what they want.

As I said, Parliament is free to craft that type of offence, but I am not sure that's what this bill does, because this bill tries to create a second offence of torture, as opposed to creating a new offence of intentional infliction of pain or suffering on an individual.

Ms. Iqra Khalid: Do I have time for—

The Chair: —one more quick question? Yes.

Ms. Iqra Khalid: We know that domestic violence is something that often women, men, or children can relate to being a torturous way of living.

How do you think this proposed bill would impact those who have gone through domestic violence?

Mr. Donald Piragoff: I'm not sure that it would.

We have aggravated sexual assault. Does that make victims feel better than simply having one offence of sexual assault?

The issue, as I said in my previous answer, is that if victims want a certain recognition that intentional infliction of harm is different from a reckless infliction of harm, then Parliament is free to create a new offence of intentionally causing assault which intentionally causes physical or mental harm.

In creating that offence, they should not confuse it with the offence of torture, which has a well-defined understanding in international law.

The Chair: Thank you very much.

Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much for coming here and setting that out.

I have one quick question. We had a discussion at the last meeting about the penalties associated with aggravated assault, with life imprisonment.

Mr. Piragoff, on this possible new offence of grievous aggravated assault, which is the name that you suggested here, what would you suggest would be the penalty for that?

Mr. Donald Piragoff: I have no suggestion, Mr. Nicholson.

Hon. Rob Nicholson: Well, if aggravated assault is 14 years, and if this, in your words, is a more grievous crime, would we have to increase the penalty at some—?

Mr. Donald Piragoff: That's one avenue. Another avenue is to simply put an aggravating circumstance into the existing offence of aggravated assault, such that as a sentencing factor, if the harm that was caused was intentionally caused and not just recklessly caused, that could be an aggravating factor for the sentence which would be imposed to the existing offence of aggravated assault.

That's another way Parliament can show its denunciation for this type of conduct, not by creating a new offence, but by creating a specific aggravating sentencing factor for the existing offence of aggravated assault. You could create a new aggravating circumstance.

Hon. Rob Nicholson: Would you recommend that route, as opposed to a completely separate—

Mr. Donald Piragoff: Mr. Nicholson, I'm employed to give recommendations to the Government of Canada—

Hon. Rob Nicholson: Oh, I see. That's good.

Thank you very much. Those are my questions.

The Chair: Thank you very much.

Mr. Dusseault.

[*Translation*]

Mr. Pierre-Luc Dusseault: Thank you. I will pick up on what Mr. Nicholson said.

Can you tell me what the maximum penalty for state torture is currently under subsection 269.1(1) of the Criminal Code?

● (1200)

[*English*]

Mr. Glenn Gilmour: Under the existing torture offence in subsection 269.1(1), it's a maximum penalty of 14 years' imprisonment.

[*Translation*]

Mr. Pierre-Luc Dusseault: And what would the maximum penalty for this offence be as set out in the bill? I have not found the answer. I think it would also be 14 years, is that correct?

The Chair: In the initial version put forward by Mr. Fragiskatos, it was a life sentence. When he appeared before us on Thursday, however, he said he would accept the same 14-year sentence.

Mr. Pierre-Luc Dusseault: For aggravated assault, would it also be a maximum sentence of 14 years?

[*English*]

Mr. Glenn Gilmour: Yes.

[*Translation*]

Mr. Pierre-Luc Dusseault: These offences are not equally serious. The noble intent expressed by the bill's sponsor and, of course, by the victims' groups, is that this crime should be called something other than "aggravated assault". This crime would of course be considered more serious if it were called torture or some other name. The victims' groups would like the crime to have a more appropriate name to reflect what they have endured, rather than simply "aggravated assault". I understand their intent and I think we might be able to find a solution.

Moreover, do you think we should adopt a maximum sentence that is harsher than the one for aggravated assault? Since we want to give this crime a different name, would it not be appropriate to impose a harsher sentence as well for this more serious type of crime?

[*English*]

Mr. Donald Piragoff: You'd have to look at the elements of the offence, if you were creating your offence, and see how it relates to the range of other offences because after 14 years, the only other offence that Parliament has ever imposed is life imprisonment. It's a jump from 14 to life. That's why I said another option to consider is not to create a new offence but to create an aggravating circumstance under the existing offence such that if the aggravating circumstances exist, it indicates to judges that they should go to the high end, toward 14 years, as opposed to the lower end. Parliament can signal its intention to the courts to treat certain types of aggravated assault more seriously than others if the aggravating circumstances exist and then tell the judges that they shouldn't impose a higher sentence in these circumstances.

There are two ways: creating a new offence or creating the aggravated sentencing factor. Those are two ways that Parliament can indicate its level of denunciation and also signal to the courts that they should take certain circumstances more seriously than other circumstances.

[*Translation*]

Mr. Pierre-Luc Dusseault: As to the definition of "torture", my question is whether you think there is a risk that the meaning of the word "torture" could be weakened. This word is currently used for very serious, highly reprehensible crimes that are usually committed by states. Do you think that, if we allow that there is another kind of torture, that could make state torture less serious or significant? Do you think there is a risk of diluting the seriousness of crimes committed by the state by calling other types of crimes "torture"?

[*English*]

Mr. Donald Piragoff: As I think both Ms. Wright and I indicated, Parliament is free to create another offence. If you call it torture, then we'd have two offences of torture in the Criminal Code, and it will cause the problem that Ms. Wright referred to earlier.

Ms. Laurie Wright: If I could just add, comments are not meant to suggest that there aren't horrific and appalling examples of domestic violence, which are important to be treated with the utmost severity in the criminal law system. I think it's less about watering down the concept of torture. I think it's that torture needs to be kept clear with respect to the act that a state is committing. Then we could have a different kind of offence that would cover those kinds of very severe and appalling behaviours that we also want to sanction through the criminal law system.

I don't want it to be suggested that there aren't terrible offences being committed that aren't extremely serious.

● (1205)

The Chair: Thank you very much, Ms. Wright.

[*Translation*]

Do you have another brief question, Mr. Dusseault?

Mr. Pierre-Luc Dusseault: Would you like to add something, sir?

[*English*]

Mr. Dan Moore: Thank you.

I think that's right. The thing to remember is that the Convention against Torture sets out a comprehensive program to prevent a unique problem. It's not necessarily based solely on the seriousness of the offence of torture, but it's based on the fact that when you have serious crimes being committed either by the state or with the consent of the state, it's more likely there's going to be impunity for those crimes, because the people who commit them are going to have the protection of state actors.

The convention sets out a number of unique policy requirements that are meant to eliminate the problem of torture and prevent the impunity. That's why we have the universal jurisdiction, the obligations to prosecute or extradite. That's why we have the prohibition on the admission of these statements into evidence. Those all rely on the very specific definition of torture that's set out in article 1. Once we get into a zone of confusing or enacting multiple definitions of torture, the program that's set out in the convention starts to become incoherent and it becomes difficult to define which incidents of what is defined as torture require the kinds of actions that are set out throughout the convention.

The Chair: Thank you very much.

Now we're going to...I know it's a little unusual, but I think we have consent.

Mr. Fragiskatos, do you have any questions for the folks from Justice, given that you're here and you're the sponsor of the bill?

Mr. Peter Fragiskatos (London North Centre, Lib.): I would just add one point.

During Mr. Fraser's questioning, Mr. Piragoff read from the bill, but an amendment has been put forward which would change the substance of the bill and deal with the concerns that he was raising in that particular comment about a more rigid definition. I think that was the point that Mr. Piragoff raised. I would urge colleagues to look at the amendment again and discuss any thoughts and any ideas during clause-by-clause consideration.

The Chair: Thank you.

We have time for a speed round of quick questions.

Go ahead, Mr. Fraser.

Mr. Colin Fraser: I have a brief question. It's been mentioned a couple of times that we're worried about the confusion. Couldn't we come up with some wording that would make it absolutely clear that this new section would be for non-state actors?

Mr. Donald Piragoff: Are you talking about the bill or the proposed amendment?

Mr. Colin Fraser: The proposed amendment.

Mr. Donald Piragoff: The proposed amendment has brought back all kinds of language from 269.1 which Bill C-242 does not have. The proposed amendment has brought back in all kinds of attributes of state torture. It talks about consent, acquiescence, the defence of superior orders, and the exclusion of evidence. As Mr. Moore said, that is all part of a package that deals with state torture. Why would you want to bring all those attributes of state action into an offence that is supposed to be of domestic application?

As I said, it exacerbates the problem and creates more confusion, because now you have two offences with lots of attributes taken from the convention, stating that you must also punish acquiescence and consent, and you must exclude defence of superior orders, and you must exclude evidence. Why would you have to have that in a domestic offence? That's part of the international....

The proposed amendment actually makes things worse. Bill C-242 is starting to go in the right direction by creating a *sui generis* offence. It doesn't use many elements of 269.1. It uses a few. The most difficult part of the bill, not the proposed amendment, is that it will create two definitions and two offences of torture in the Criminal Code and both will be called torture. That then leads to all the problems that Ms. Wright had indicated.

As I said, Parliament is free to create an offence to directly address the intentional infliction of harm and the intentional causing of pain or suffering, but call it something else other than torture. If you feel that aggravated assault is not enough and you want something more denunciatory, either create a new offence to address exactly what you're trying to denounce or create an aggravated sentencing factor that specifies a reason why the judge should think about it at the higher end rather than the middle. If that's the case, it's a domestic offence.

Don't call it torture, because torture has a meaning in international law and don't confuse that meaning. It'll cause Global Affairs Canada problems when we're trying to hold other countries to account. When we say “torture” to other countries, we know what we mean by torture. It's not well, we mean this offence or we mean that offence. We mean the offence. Torture means what you signed when you signed the convention or we want you to sign the convention. That's the international definition. We don't want to say that there are lesser tortures and greater tortures. There's one offence of torture internationally and that's what Global Affairs wants to say to the rest of the world. That's why it's important not to have two offences of torture in name and not to have the elements of the offences so close together that they actually look like one another.

● (1210)

The Chair: To jump in for one second, I think what happened was that in the original position it was advocated.... Mr. Fragiskatos understood it was coming from the Department of Justice. There was an argument that under international law, having two inconsistent definitions of torture created an international issue, so he tried to synchronize them. It sounds to me that that's not the issue. T

he issue for you, which obviously makes sense, is that you don't have the same elements in the bill where it's a state actor versus a non-state actor. Just taking 269.1 and replicating it, there will be provisions in there that are inconsistent with what a non-state actor would do. If from a policy point of view everybody agreed with that, going back to the original bill, which had different elements, and calling it a "private torturous act" or a different name that did not say "torture" would remove your issue with potential international confusion. Is that correct?

Mr. Donald Piragoff: That would help to rectify the concerns that Global Affairs Canada would have. Making the new offence not look like section 269.1 would be the best situation for us in terms of our lobbying efforts to make countries accountable for torture, that there's only one definition of torture in the world and that's in the convention and there are no other definitions of torture.

If you want to create other offences, call them something else.

The Chair: Understood.

Are there any other short questions?

Mr. Falk.

Mr. Ted Falk: I seek a point of clarification. Under our existing aggravated assault legislation, we can assign status, like dangerous offender or sexual offender, to individuals who are convicted. Under this private member's bill, would we forfeit the ability to assign people that status?

Mr. Donald Piragoff: I believe the bill actually has a provision which would say that this offence would qualify as a predicate offence for a dangerous offender status.

The Chair: Mr. Fragiskatos, do you have one question?

Mr. Peter Fragiskatos: On the points raised with respect to international law, I want to emphasize to colleagues.... I respect the perspective put forward here today, absolutely, and thank you very much for coming in and commenting. I think it was a very reasonable and respectful dialogue.

The committee against torture has recognized that torture in the private realm qualifies as torture. That's absolutely critical to understand. France has taken back the concerns that were raised, that happened in 2013, and acted upon that. The law does not compromise France's international legal obligations in any sense.

Finally, with respect to the apparent concerns raised by Global Affairs Canada, subsequent to appearing before the committee last week, I followed up and consulted with Global Affairs Canada. They have no problem with the amendment that I put forward. That is my understanding at this point. They might have had a problem with the original bill, but they have no problem with the amendment that I've put forward.

The Chair: I don't know if Justice has any comment on that.

Mr. Donald Piragoff: I've no comment.

Our discussion with Global Affairs Canada is what I reiterated to you, their concerns about having two offences of torture. There's only one offence of torture internationally and there should only be one offence of torture and we should not be having multiple offences of torture.

As I said, the closer you create a new offence with elements that look like 269.1, you start to raise the question as to whether we are just starting to skirt our obligations under subsection 269.1 by creating something that looks like subsection 269.1, but is subsection 269.1-like. That's what we don't want to create. That's why I said if Parliament wants to address the problem of intentional infliction of physical or mental pain or suffering to deal with the situation of serious domestic violence, to deal with the situation where people are repetitively abused intentionally, then Parliament can do so. But one should not hide that and confuse the existing offence of torture in subsection 269.1.

● (1215)

Mr. Peter Fragiskatos: I suppose, Mr. Chair, it comes down to when those conversations took place. I spoke with Global Affairs Canada on Friday.

The Chair: I understand, and if Global Affairs Canada wants to come forward, we would be happy to hear their position, I think. Maybe the clerk could reach out to them so they can clarify that for Thursday.

Ms. Khalid, did you have a short question?

Ms. Iqra Khalid: I think you have generally answered it, but I will again clarify. If this crime name were changed, would your department be supportive of it as it stands, just with a different name?

Mr. Donald Piragoff: The name change is one aspect. The other aspect is not to incorporate a number of elements of subsection 269.1 that really only apply to state torture, and then try to apply it in the private conduct realm.

The Chair: As I understand it now, I think I'm clear at least from Justice's perspective. They prefer the original, not the amendment, and they want to change the name in the original, should we decide to actually proceed with anything to do with that from a policy perspective.

I think that is your position. Is that correct?

Ms. Laurie Wright: To be clear, we're not here to put forward a position, so we're not speaking on behalf of the minister or the department. We're here to answer questions.

Mr. Donald Piragoff: Also we're here to provide the committee with options to consider, but we have no position to put forward or preference, because we make recommendations to the minister, as I indicated to Mr. Nicholson. When he was minister, I made recommendations to him. Now that he's an MP, I do not make recommendations to Mr. Nicholson.

The Chair: I appreciate that, but I would like to have clarity for members of the committee, so I'm going to ask some pointed questions.

You've expressed concerns with having a name that is similar to the word “torture”, correct?

Mr. Donald Piragoff: Correct.

The Chair: You've expressed concerns with the amendment, because the amendment replicates 269.1 and there are significant areas of 269.1 that would not involve non-state actors. Correct?

Mr. Donald Piragoff: I'll turn it around. There are significant areas of the proposed amendment that only make sense in the context of 269.1.

The Chair: But just of a state actor.

Mr. Donald Piragoff: Yes.

The Chair: Ergo, from what I understand, the original proposal where there were those nuances taken, where there was a look at what was state and non-state, and they were removed, would not cause the same confusion as if they were left in as the amendment does.

Mr. Donald Piragoff: That's correct. The more you avoid the confusion, then you're simply left with the question of a domestic offence. Then you look at the offence and decide whether the elements are appropriate.

The Chair: Got it.

The final thing I got from you, I think, is that you do not see any area where somebody who could be charged under the new offence couldn't be charged under an existing provision of the Criminal Code. Correct?

Mr. Donald Piragoff: The existing code could apply to this conduct. The proposal for the new offence is really just to have a more specific definition of denunciation. But the existing offences would cover the conduct.

The Chair: Given the proposed new offence would have a higher evidentiary burden than the existing offence of assault, what you would be saying would be in order to have a rationale for proving a higher burden, theoretically, there should be a higher penalty. Otherwise, what would be the point to proving an offence with a higher evidentiary burden? Correct?

Mr. Donald Piragoff: Or it signals to the courts that they should be looking more at the higher end of an existing range of penalty, if you go as an aggravating circumstance.

The Chair: Thank you very much. You've answered my questions.

Is there anything further?

Thank you so much to all four of you for having come before us. We appreciate it very much. I really appreciate your testimony today.

We're going to have an in camera session, which will be brief, as soon as the witnesses leave.

[*Proceedings continue in camera*]