HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 026 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Thursday, September 29, 2016

Chair

Mr. Anthony Housefather

Standing Committee on Justice and Human Rights

Thursday, September 29, 2016

● (1105)

[*English*]

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

[*Translation*]

Welcome everyone. It's a pleasure to have you here today.

[*English*]

We are continuing our study of Bill C-242, an act to amend the Criminal Code (inflicting torture).

Before we begin, I'd like to call members' attention to the fact that we have received our submission from Global Affairs Canada in writing, and it's in front of members. We can talk about that afterward in our closed session as well as the draft letter which is also in front of you.

It's with great pleasure that we welcome Mr. Michael Spratt from the Criminal Lawyers' Association.

Mr. Spratt, the floor is yours.

Mr. Michael Spratt (Member, Former Director and Member of the Legislative Committee, Criminal Lawyers' Association): Thank you very much. It's an honour, and a privilege to appear before this committee.

I notice that I'm here alone in the hot seat with no one beside me, which is good because I don't have any written submission. I would welcome any oral questions, and I'll try to be as detailed as possible in my answers. It's a typical criminal lawyer thing to rely on oral submissions.

I would like to introduce myself. I'm a criminal defence lawyer. I'm a partner at Abergel Goldstein & Partners here in Ottawa. I'm also a member and former board member of the Criminal Lawyers' Association, and I'm here on that organization's behalf today.

For those of you who don't know, the Criminal Lawyers' Association is a non-profit organization that was founded in 1971. We're comprised of criminal lawyers, mostly in Ontario but also from across Canada. Our association has routinely been consulted by committees, such as this committee, and has offered submissions to some very important government consultations, and intervened quite often at the Supreme Court of Canada. The Criminal Lawyers' Association supports criminal legislation that's fair, modest, and constitutional.

I'm here today to talk about the very important issue of torture and Bill C-242. Although we agree with the aims and purposes of Bill C-242, and recognize the egregious nature of the acts that this bill captures, there are some significant problems from our perspective with the bill, both in the way that it's drafted and its potential application on how it would play out in our criminal justice system.

There are some areas that I don't feel I have the expertise to talk about, but I'm sure have been flagged for this committee, issues that deal with international law, conflicts between the definition of torture and how that might play out on the international stage. I would urge, and I expect the committee will hear, some expert evidence on that point.

Before I get to the practical implications of the bill, one of our main issues is the ever-expansion of the Criminal Code. Individuals are presumed to know the law. It's not a defence to be ignorant of the law, and over the last number of years we've seen an expansion of complexity, duplication, and volume in our criminal law. That is something which should be avoided because there's a cost to that as well.

One has to recognize that the acts sought to be captured under this legislation are already criminal and are covered by offences such as aggravated assault, unlawful confinement, and kidnapping. Kidnapping has a maximum penalty of life. The other offences, including aggravated assault, have maximum penalties of up to 14 years in jail. Of course, there could be other charges that would be captured by the acts contemplated in this bill.

As is the case with most topics in criminal law, there are always cases that seem unusual, cases where sentences seem too low. The Criminal Lawyers' Association is troubled by legislation that is aimed at particular cases or particular circumstances. Our system has a system of appeals, of prosecutorial discretion, and a robust common law history that is able to deal with cases where the sentence at first blush to outside observers might seem inappropriate. One has to recognize there are opportunity costs that are lost when we have complex legislation, and I'll speak about that in a moment.

From our perspective, the measures in the Criminal Code are sufficient to deal with the issues addressed through this legislation.

Looking at the legislation itself, there should be some initial cause for concern because it is both broader and more narrow than the existing torture provisions that apply to state actors. Obviously, the first difference between this new proposed legislation and the current legislation that applies to state actors is the penalty itself. I'm sure the committee is well aware that a prosecution under current section 269.1 carries a maximum penalty of 14 years, and the conflict between the life sentence proposed here and that 14-year sentence may cause some issues in court with respect to the application and indeed send a confusing message to the public.

Diving into the text of this very short bill, the definition of torture is slightly different between these two sections.

Under this bill, torture is defined, but the acts defined as torture have to be for a specific purpose, and that is for intimidating or coercing an individual. That definition also exists in the current state torture provisions, but the current state torture provisions have an additional list of factors that would be considered over and above an intimidating or coercing purpose. Those are listed in section 269.1(2)(a) under the definition of torture, and they include obtaining from the person or from a third person information or a statement, punishing a person for their act or the act of a third party, and importantly, for any reason based on discrimination of any kind.

Those further purposes are not present in this proposed legislation. In that respect, the definition of torture, the application of torture, will be more narrow. That conflict leads to some statutory interpretation problems and some application problems in our courts. At the same time, the definition of torture in the proposed legislation can be read more broadly than the current legislation. Under the current legislation where we're dealing with state actors, torture includes not only physical harm that leads to severe pain or suffering, but severe pain or suffering can be either physical or mental.

The current bill also contemplates mental injuries as a result of torturous behaviour but goes on to narrowly define that criteria, stating that the mental damage must be “prolonged mental pain and suffering...leading to a visibly evident and significant change in intellectual capacity”. I don't know what that means, and that would be the subject of much litigation before our courts. I don't know if that means there has to be a cognitive issue supported by evidence where there's a diminished capacity. I don't know if PTSD or other forms of mental health issues arising from torturous acts would be covered here. It seems that they would be covered if a state actor was involved. Those are some of the conflicts that could lead to some problems in application and litigation.

I do want to talk about some of the practical implications that this could have in our courts.

I have testified over the last number of years on a number of occasions, more than I would have liked to, about mandatory minimum sentences. Thankfully, there's no minimum sentence in this bill, but some of the same problems that we have with minimum sentences can carry over, and that is the use of either police or prosecutorial discretion with respect to laying and proceeding of a charge.

One can imagine a situation where an individual is charged with an aggravated assault, a forcible confinement or a kidnapping, and additionally torture. That individual may have a criminal record with offences of violence on it already. One can see a perverse and insidious inducement for that individual to plead guilty to offences in exchange for the crown not proceeding on the torture charge. That sort of prosecutorial discretion is something we have seen and something which my organization has complained about and flagged as an issue with mandatory minimum sentences. That problem is present here as well.

I should say, when I'm talking about the practical issues, and I spoke a little bit about opportunity costs and problems in that regard, that court time is valuable. Court time is becoming more and more valuable as our Criminal Code expands and as there are more prosecutions.

● (1110)

Ironically, as crime rates are decreasing, court time used to litigate these conflicts that I've indicated, constitutionality issues, proportionality issues, differentiating past precedent, that court time, in our opinion, could be much better spent dealing with the problem of over-incarcerated individuals who are awaiting trial, the scarcity of trial time. Those resources, quite frankly, could be deployed to better effect in other areas that do need real action to see an improvement.

I'm not a criminologist and I can't give you expert evidence on criminological factors or considerations, but I do have some experience. I've been speaking recently with pre-eminent criminologist Anthony Doob, who has testified many times before these committees on the issue of deterrence and how that plays with the criminalization of certain acts.

It seems unlikely, from my experience dealing with the practical realities in court and accused people, and from a review of the evidence in this context and in the context of mandatory minimum sentences, that the criminalization of an act, naming torture and having a specific provision in the code, will achieve any additional deterrence. The evidence is quite clear on this point that it's the likelihood of being apprehended, the likelihood of being caught, that provides deterrence. Additional penalties generally don't provide deterrence.

If someone were going to engage in acts that are already tantamount to aggravated assault, to forcible confinement, to kidnapping, to manslaughter, to murder, to attempted murder, merely having another section in the Criminal Code called torture would not likely deter the individual from committing those acts.

I don't want to minimize the conduct that's captured by this, and I hope my comments, critiques, and criticisms of this bill aren't taken to minimize the experience of anyone who's suffered at the hands of an offender. These are indeed egregious acts that should be treated very seriously.

The other justification that one could see being advanced in support of this legislation is that by somehow naming an offence specifically, reporting of that offence might be increased, so it might be more likely to attend a police station. I would be highly skeptical of that claim. I'd be very interested to see evidence in support of that.

At the end of the day, we have a Criminal Code that has a robust set of laws that deal with these types of very egregious situations. The cost weighed against the benefits of this specific bill, although laudable, in our opinion, simply don't pass the scrutiny that one should direct at Criminal Code provisions when we're legislating very important laws that impact our justice system and ultimately the potential liberties of people who are charged with contravening those acts.

● (1115)

The Chair: Thank you so much, Mr. Spratt, for your very clear testimony. I do want to mention that Mr. Fragiskatos, the sponsor of the bill, would have liked to be here, but he's speaking in the House right now. Perhaps he'll be able to come by a little later.

In the meantime, we're going to start with questions and I'm going to go to Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much, Mr. Spratt, for that analysis of the bill.

One of the issues you talked about is actually something that we have discussed. The author of the bill has talked about it. It was the sentencing. You pointed out that having a life sentence for this is somewhat inconsistent with other provisions of the Criminal Code.

Just for your information, I believe the honourable member who submitted the bill is prepared to move an amendment to bring it down to 14 years. Would that change much in your analysis of this bill, if it was brought down to the same as aggravated assault?

Mr. Michael Spratt: It wouldn't. It would remove one of those conflicts between the existing provision and this bill. It wouldn't address the other legal and statutory interpretation conflicts that I've identified.

My understanding is that one of the reasons this bill was put forward was specifically because a life sentence was necessary because some of the other offences, not kidnapping, but some of the other offences that are often charged in these situations, don't carry a life sentence, and those maximum sentences were too low.

It seems that an amendment of that nature wouldn't cure all of the ills and would be contrary to the purposes that perhaps started the process of this bill down the road in the first place.

Hon. Rob Nicholson: It would make it a little more consistent with other provisions of the Criminal Code.

● (1120)

Mr. Michael Spratt: I couldn't disagree that it would make it somewhat more consistent with the other measures.

Hon. Rob Nicholson: One of the things you indicated, and quite rightly so, is that this bill could result in more litigation, more complications for the courts to try to sort out. Was that part of your testimony, that you believe that's what will happen if this bill is enacted?

Mr. Michael Spratt: Yes, and I don't want to overstate that point. This isn't a charge that I expect would be laid disproportionately in a large number of cases. We're not dealing with a theft under...or impaired driving, or something like that. These are sort of extraordinary occurrences that aren't all that frequent within the larger picture of offence patterns in Canada. So, yes, litigating these issues would take up court time, but at the same time, if you recognize that maybe not as much court time would be taken up litigating under this bill as would be if we were dealing with charges of impaired driving or something of that nature, one wonders if, since the prevalence of these sorts of offences might not necessarily be as great as that of other offences, whether the amendment is necessary in the first place.

Hon. Rob Nicholson: That's a good point. This is not something that's going to be litigated every day and everywhere in the country. It would still be fairly rare for something like this—

Mr. Michael Spratt: It would be fairly rare, but you can expect there would likely be a number of challenges to the first charges laid, and I would expect to see this provision, given the conflicts inherent in it and the other section and the issues of statutory interpretation, being brought before our courts of appeal and ultimately the Supreme Court at some point in the future.

Hon. Rob Nicholson: Are there any complications with the interpretation of the existing torture laws? There has been some suggestion to us that if there were two types of torture in the Criminal Code, and somebody was charged with the other one, it would be somewhat confusing in terms of our international obligations, because we do have international obligations with respect to the issue of torture, and we've enacted those. Do you see any problems on that side of it? I know it may be difficult to....

Mr. Michael Spratt: I would expect so, because these are complex issues. These are complex agreements. Even when committees and Parliament are dealing with other criminal law issues, the thing about criminal law changes is that small changes can have tentacles that touch a wide variety of issues, and certainly the international aspect of this offence could cause a problem. There could also be problems with individuals who would qualify to be charged under both sections. It would be a very interesting issue. When I say that an issue is interesting, I mean interesting for me. When I say interesting, you can translate that into costly, messy—

Hon. Rob Nicholson: —and lengthy.

Mr. Michael Spratt: Yes.

Hon. Rob Nicholson: You made a very interesting point about the laying of the charge and the possibility that it might be much more likely that the charges of torture, of this type of torture, would be laid against an individual to encourage them to plead guilty to a lesser charge here. I guess that's one of the issues. I believe you're the first one to have raised that.

You pointed out something towards the end of your testimony with respect to the whole question of deterrence. I would be of the belief that somebody involved with this kind of activity is not going to be deterred one way or the other regardless of how it's classified under the Criminal Code. However, people who are the victims of this would be much more likely to identify it, and you talked about whether they would come forward and bring a charge. Somebody who has gone through this kind of criminal activity is more likely in an everyday lexicon to call it torture than to say that they are a victim of aggravated assault. It might be more likely for the person to say they were tortured by an individual, and that's a crime in Canada.

We do everything we can, obviously, to try to encourage people to report all crimes. I suppose I'm not making the argument for the individual who initiated this bill. However, someone who reports it, who is a victim of torture, would use the common name for this kind of activity rather than saying they were a victim of an aggravated assault. It might make it a little easier for people to understand and to feel more comfortable coming forward. That's just a thought.

● (1125)

Mr. Michael Spratt: I think there is an important educational aspect that can be accomplished, but not necessarily through the Criminal Code. It's much like someone who's going to be engaging in this type of behaviour probably isn't going to be deterred by this extra section. If I were a betting man, I would wager that someone who's going to engage in this type of behaviour isn't going to be even aware that this section exists. I think much the same can be said to the unwitting victims who aren't expecting and not seeking and not deserving of this treatment. I suspect that precisely what you call it... especially when you're not dealing with.... This is not a nuanced issue. If you're charged with torture, you have inflicted severe pain and suffering and damage on an individual, and I think it's more likely that an individual who is at the receiving end of that sort of treatment, whether it's called torture or not, is going to know that laws have been broken, that laws have been contravened, and the police should be alerted.

I would be skeptical about any increased reporting based on that.

Hon. Rob Nicholson: The bottom line is there are at present no gaps in this area in the Criminal Code as it exists today.

Mr. Michael Spratt: I don't think there are.

I think it can be said that some sentences have been pointed out as being at the low end of the spectrum, given some of the treatment, but I don't think increasing the available sentence is going to necessarily cure that, given that there aren't comments from the judiciary saying, "We would give more if we could, but we can't. That's not where we are." There's room to move up, either through the evolution of our common law system, through interventions to the court of appeal, and indeed, through that public education of the judiciary and the public that I spoke about earlier.

The Chair: Thank you very much.

Monsieur Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you, Mr. Spratt, for coming in. I appreciate it. My question follows up on something you said.

You said that this deals with someone inflicting serious suffering, long-term suffering, and damage to an individual. My point is about education.

If you have such a serious crime, and you've said those who commit these kinds of offences are not really aware that they exist.... I'm talking about the victims. When you have a specific criminal offence outlined in the Criminal Code for these kinds of actions that inflict long-term suffering and cause serious damage to individuals, don't you think that would increase awareness and education for victims, increase the public's awareness about this, and then ultimately help us in combatting these kinds of activities.?

Mr. Michael Spratt: Under the most charitable view, I think you could be correct. Given the realities of what people know about the Criminal Code—which I brought with me, and I'm not a strong man; it's heavy in one hand—I think that if you presume that everyone knows what's in here, both the offenders and the victims, and society at large, you may be correct, but I don't think that's an assumption that we can make.

Even if there is some benefit as you've described, I think there is an opportunity cost that's lost when you increase criminal litigation. The Criminal Code is a blunt tool to deal with public education, to deal with change in societal attitudes, to deal with those sorts of situations, and when you evaluate the marginal benefits that may arise in the situation that you've described, if there are marginal benefits, and when you weigh that against the cost, I think there are other ways that we can educate the public.

In Canada, we've just gone through a period where we've been discussing the offence of sexual assault quite a lot. It has been in the news. People have been educated. There has been a robust debate about what should happen in court when a sexual assault complainant testifies. What's appropriate questioning? What's not appropriate questioning? What is sexual assault?

I know my children in school are educated about consent and issues like that. That's not through changes in the Criminal Code. That's through a larger, broader public discussion. I think that is a more effective way than legislation to deal with the public education issues that you described.

Mr. Ahmed Hussen: Following up on that, I could argue that we moved from the word "rape" to "sexual assault" in the Criminal Code precisely for that purpose. The discussions that are occurring now are after the fact. We did go through that process with respect to the language, so language is important, isn't it?

● (1130)

Mr. Michael Spratt: I think language is important. The interesting issue—and of course, this is larger than the scope of my testimony here—when you're dealing with the language and the change from "rape" to "sexual assault", is there's a tremendous lag time between that change and the conversation we're having now. I don't know if that's because there's a change in the code or because there are other changes happening in society because of other very good work being done by members of Parliament, community activists, victim rights advocates, and the legal community.

I would end by saying you make a very good point, but even if that point is correct, there are other ways it can be accomplished other than by amending the Criminal Code in a way that is going to cause conflict, cause some incoherence, and have those other associated costs, such as perverse incentives to plead guilty and fairness implications in that regard, and the costs of litigating and dealing with these issues in court.

I think the point you raise is fair, but it might be broader than I can answer here.

Mr. Ahmed Hussen: Thank you.

The Chair: Thank you very much, Mr. Hussen.

Now we're going to Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): I, too, would like to thank you, Mr. Spratt, for a very lucid presentation. It's very helpful to the committee at this stage of our deliberations, and I'm grateful you came.

You talked just now to Mr. Hussen about sexual assault. That's an offence that covers a wide waterfront, it seems to me, from egregious conduct all the way down to some unwanted touching, if you will. Similarly, aggravated assault covers a huge range of possible conduct.

If the sponsor were here, I think he would be saying to call a spade a spade, to use the words that need to be meant so that people have clarity, and that torture is a totally different category from aggravated assault.

I take your point about not wanting new offences in the Criminal Code. I get that, but it's not that new an offence. We already have one for state actors, so we'd just be trying, particularly with the amendments, to make torture in the private sphere consistent with that for state actors.

There is a last thing I want to ask you on that point, which is on the issue of gender violence particularly in the field of torture. A lot of the motivation and the witnesses for this have come from feminist groups, which say that torture is about the destruction of humanness, personality, and identity of the person being tortured. It's about breaking a person.

Why wouldn't we want to have clarity in our Criminal Code about this category of conduct, which isn't just aggravated assault, but seems to be something quite distinct?

Mr. Michael Spratt: That's a valid point. I think the criminal law doesn't accomplish that already. The example you gave of sexual assault, all offences, really, covers a broad range of behaviours. In the case of sexual assault, it's from an unwanted touch in public to a full-on egregious, serious, violent encounter. It's the same with aggravated assault. It could be a consensual fight, where a punch goes wrong and breaks a nose, or it could be cutting off fingers to achieve a nefarious end. We call it the same thing. It's recorded as the same thing. So it would be somewhat incongruous with how we deal with other offences to start being very specific here.

The thing about our common law system and criminal law specifically is that a general principle is applied to specific cases, taking into account the specific facts of the offence and the offender. It's a bottom-up approach, where you start with the general, and then get specific as you get into the facts and as you get toward the ultimate end. Inverting that pyramid and starting with specifics, and then applying them generally, could lead to problems.

If your point is taken, and this is the direction in which the committee and ultimately this bill progresses, the inconsistencies that you mentioned need to be addressed.

I just noticed another one for the first time. I don't know if I was up too late last night and my eyes got blurry, but I notice that the definition of torture in this bill is repeated infliction of pain and suffering. I don't think the word “repeated”—and I will check, because I don't want to say it if it's not true—is in the state-sponsored or state torture section. Those sorts of incongruities can be damaging and may be counterproductive to the very purpose of your bill.

● (1135)

Mr. Murray Rankin: That can be done by drafting.

You had two sets of concerns. You talked about drafting and you talked about the implementation. The drafting issue is one that we might be able to have addressed. In interests of time, I note that France has a section on torture in its criminal code, its penal code, and the state of Queensland has one, yet they're signatories to international conventions, as is Canada, so that doesn't seem to be a problem.

Could we give this the title that the sponsor of this bill wants by calling it not “torture”, but by saying something like “torturous assault” or something that would take it to another category on a gradient from “assault” to “aggravated assault” to “torturous assault”? Could that be a compromise?

Mr. Michael Spratt: Yes, and thank you for the question, because it reminds me of what I didn't answer on your last question, which I think dovetails perfectly into that. It goes back to my point about legislating generally and applying that specifically.

I'm going to use an example. Again, I'm going to preface this by saying that I am not demeaning or minimizing any of the purposes of this bill, but in the Criminal Code we have theft charges: we have theft over, theft under, theft of clams from clam beds, and theft of cattle. That needs to be changed, and I'd make the same arguments there. To accomplish the goal of calling a spade a spade, to ensure that the judiciary and prosecutors turn their minds to the important issues you've addressed—and it might be beyond the scope of what this committee can do at this point—I think the better way to legislate is statements of principle, of aggravating factors.

We have a list of aggravating factors. This already is an aggravating factor. It already is, but we can make it explicit in the Criminal Code that if an offence of physical harm is repeated, is egregious, or is for certain purposes, it should be explicitly addressed and considered as an aggravating factor. That would direct the judiciary and prosecutors to address it specifically, and it would not lead to some of the problems that I've alluded to earlier. That's the model that I think would be preferable. I think that would accomplish the goals you've mentioned and also the goals that Mr. Hussen mentioned and that are, I think, important to the sponsor of the bill and, indeed, important to society at large.

Mr. Murray Rankin: Mr. Chair, am I out of time?

The Chair: You are, Mr. Rankin, but I'll allow a short question if you still want it.

Mr. Murray Rankin: It's just a quick one, I hope.

In your summary about the practical implications, you talked about one that I thought was really important, if I may say so, and one that was less critical. I thought you made an excellent point about the plea bargaining that would occur and the potential for abuse of the prosecutorial discretion when you plead guilty to a lesser included offence so as not to have the "torture" word on your record when you go to jail.

I don't know that the opportunity cost of having this in the code is that big. After all, it's not going to be used very often, and I take it that the first case would be the subject of a lot of charter and other challenges. After that, and after the parameters are worked out, I can't see the opportunity cost being that high.

Mr. Michael Spratt: Yes, and I hope that I clarified and conceded somewhat that that is a lesser concern. It's a bit of a double-edged sword. If it's not going to be used that often, if it's not going to be employed that often, the costs might not necessarily be—

Mr. Murray Rankin: [*Inaudible—Editor*] very often either, but we see a social need to have a word like that in our Criminal Code, right?

Mr. Michael Spratt: Yes, and that point is well taken.

If I may, I will take this opportunity to make one final point about plea bargaining and the pressure that an accused might face, guilty or not, to accept a plea to a lesser charge. That is injurious in and of itself. It's injurious not only because it can lead to unfairness in specific circumstances, but more broadly, those prosecutorial decisions or police decisions are shielded and immunized from review, from detailed reasons, and from appeal.

Ultimately, at the end of the day—and I'm sure you can hear testimony from victims' rights advocates and victims of this sort of conduct—I don't know how a victim would feel if their attacker, their assailant, was charged with torture and that charge was dropped in exchange for a plea to a lesser count. That might be injurious in and of itself to that individual. There are costs there as well.

The Chair: Thank you so much, Mr. Rankin.

Mr. Bittle is yielding his time to Mr. Fragiskatos.

Mr. Fragiskatos can ask you some questions directly, sir.

● (1140)

Mr. Peter Fragiskatos (London North Centre, Lib.): Thank you very much, Chair.

I will only be here for a few minutes because I'm slated to speak in the House, but I did want to attend.

Mr. Spratt, you and I have spoken on the phone before. It's nice to see you in person.

Mr. Michael Spratt: It's nice to put a face to the name.

Mr. Peter Fragiskatos: Indeed. I know you have concerns with the bill. That's why we had spoken on the phone. Part of the issue you have is that you believe private members have no business putting forward private members' bills with respect to amending the Criminal Code. I know that amendments that have been made in the past, perhaps, are not to your liking.

What is wrong with a private member suggesting a reasonable change to the Criminal Code, a change that would strengthen Canadian law through the enshrinement of human rights principles in the Criminal Code? That is the intent and spirit of what I'm doing. What's wrong with a private member acting in that way? I suppose you would prefer subjects like heritage days, and they have their place, but I prefer to do something a little more ambitious. What's wrong with that?

Mr. Michael Spratt: I hope you don't take my concern with the bill, both in its drafting and potential problems in its application, as a comment on the spirit of the bill as intended, the conduct that it's intended to capture, or the seriousness of this type of action. It's not any of those things.

My concern with private members' bills goes back a number of years. Private members' bills have been used as a vehicle in past criminal matters to advance legislation that really should be government legislation. Private members' bills don't receive the same type of scrutiny, or broad consultation, or review for constitutionality that other bills might. That's one problem.

The other problem I have in general with private members' bills is the subject matter. I'm not expert on this area. I'm not a parliamentarian. If I introduced a bill, I'm sure it would fall down at the first hurdle because I don't know the rules. I believe private members can't introduce legislation that has to do with economic matters, like spending. Criminal justice legislation, even small changes, has incredible costs associated with it.

Mr. Peter Fragiskatos: With all due respect, it's the job of honourable members on a parliamentary committee such as this to scrutinize a bill that's been put forward, and to suggest reasonable changes.

When it comes to law, perspective matters a great deal, and the perspective of lawyers is critical. I wonder if you also believe that the perspective of those who have endured tremendous suffering is also important and should be taken into account when we name crimes. An important part of the rationale for this private member's bill is to call crimes what they are. This applies when someone effectively has been tortured, when someone has endured suffering, when an act, if committed by a state official, would have been called torture but is now called aggravated assault. You can see where I'm coming from.

I ask this question not in a combative spirit, but in a spirit that wants to make sure that you recognize—I know that members of the committee recognize this because I've spoken to them about my view, shouldn't we have in law the perspective of human beings who have endured great suffering and violence. Shouldn't that perspective be reflected? Shouldn't we call crimes what they are?

Mr. Michael Spratt: I've answered the question previously about calling crimes what they are and the utility and costs of that. I personally am well aware of the impact of crimes on individuals. I see it on a daily basis. As part of my job, as part of my role in the justice system of ensuring fairness, I have to read the statements of these individuals. I have to look into their eyes. I have to cross-examine them. I have sat at committees like this, beside victims of horrible, horrible crimes, and heard their stories. Of course that needs to be taken into account.

At the end of the day, when it comes to private members' bills, when legislation is being advanced that can impact liberty, security of the person, the type of punishment we as a society believe an offence deserves, the type of punishment that is reflective of the very important principles you have suggested—all this is of the utmost importance. I agree with you. It is so very important. That's why, in my opinion, the government should be legislating on those very important issues. They should be reviewed and robustly studied because they are, and I agree with you, so important.

● (1145)

Mr. Peter Fragiskatos: Surely, members of Parliament also have a perspective and can put forward meaningful reforms that would strengthen Canadian law. That is the intent and spirit of what I am trying to do.

I have a final question. You mentioned punishment. In your op-ed, where you took a look at my bill for iPolitics, I believe, you talked about punishment and the fact that the life imprisonment I had suggested did not fit and was not appropriate. If you look at the code, subsection 47(1) I believe, treason is punishable with life imprisonment as the applicable punishment. The same is true for aggravated sexual assault. We have offences in the Criminal Code where life imprisonment is what's called for.

If you look at the cases, the sorts of examples I gave in my testimony, those are heinous acts, certainly on par, I think, with treason and aggravated sexual assault. Life imprisonment is the charge there. What is wrong with suggesting it in the sorts of examples that I have put forward?

Mr. Michael Spratt: One of the issues is the incoherence and conflict inherent in that with respect to the state torture in the Criminal Code. The other issue is that when an individual is charged with these offences, there are already mechanisms, if the offence is so egregious, that would result in very severe and lengthy sentences. I think it would be ill-advised to think of the.... One could change almost every section of the Criminal Code to a maximum sentence such as you are suggesting. I don't know why aggravated sexual assault wasn't suggested to be increased to life imprisonment and why other offences could.

It's a cost-benefit analysis, when one looks at the effects this will have and the mischief it may cause. At the end of the day, if this measure isn't going to deter crime or to enhance reporting, if the only objective here is to call something what it is, I think there are other ways this can be accomplished that may not carry some of the costs I have talked about for the last number of minutes.

Mr. Peter Fragiskatos: Do I have one more question?

The Chair: You are really out of time. It has to be very short.

Mr. Peter Fragiskatos: The intent of putting this bill forward is based on my many conversations with victims, namely—I can't say his name because of a publication ban—the victim of Dustin Paxton, who told me, “Peter, what I went through is not aggravated assault. It is torture. Unless it's recognized as torture, I won't be the same person I was prior to the assault, prior to what happened to me, prior to the torture.” That is the intent and spirit of all this.

We've had a respectful dialogue before, and we just had another one, so I appreciate the exchange.

With respect to all members, I have to get back in the House because I am speaking soon.

Thank you very much, Mr. Chair, and thank you to my colleague for giving me time.

The Chair: You are welcome.

I don't know if that needs a response, because there wasn't really a question there, but I am sure you also enjoyed the respectful dialogue, Mr. Spratt.

We are going to move to the second round of questions, and we are going to start with Ms. Khalid.

Ms. Iqra Khalid (Mississauga—Erin Mills, Lib.): Thank you very much, Mr. Spratt, for coming in today to speak about this. I want to continue a little with what the sponsor of the bill was saying.

You mentioned in your opening remarks that the intent and spirit of the bill is more focused on the victims, and that it is a good intention. In your opinion, what amendments specifically could be proposed to this bill that could make it more palatable for the criminal justice system and also for victims?

Mr. Michael Spratt: If you leave aside the concerns of mine that wouldn't be addressed through amendments, if this bill is going to pass, I think there needs to be agreement between the definitions of “torture” in one section and the definitions of “torture” in the other section.

Much like calling a spade a spade, I think having parity between the sections is important, not only to have coherence in the code but to avoid some of those interpretation problems. I think the differences may diminish.... Given the current punishment for state-sponsored torture, torture at the hands of the state or state agents, the difference in punishment may have an adverse effect on how we view the reprehensibleness of individuals acting for the state or directed by the state in engaging in this activity. I think there has to be parity there, not only to correct some of those incongruities that I've talked about, but also not to diminish what is a very serious offence that we currently have of torture at the hands of the state or its agents.

● (1150)

Ms. Iqra Khalid: From my understanding, the proposed bill, as amended, and the current section 269.1 both require 14 years as a maximum sentence.

Does that change your position? Are you looking at the older version of the bill?

Mr. Michael Spratt: That would bring the bills into better harmony and eliminate some of the problems. The other problems and costs that I've talked about with respect to plea bargaining and complexity, and things of that nature, of course wouldn't be cured necessarily by those amendments. It's not my job. It's the committee's job to weigh those pros and cons, and ultimately come to a decision. The short answer is yes.

Ms. Iqra Khalid: We understand, reading the provisions of this proposed bill, that the burden of proof is higher in order to get a conviction. I think that is what the basis is of prosecutors now plea bargaining or offering this as a plea bargain, and going for the more easily provable charge perhaps.

If the burden of proof were reduced in this bill, do you think it would have a negative or positive impact on the concern of plea bargaining?

Mr. Michael Spratt: No, I don't think it's necessarily the burden of proof that leads to plea bargaining. That has to do with larger issues of overcharging, of what would be acceptable for a plea, similar to the mandatory minimum section. I would strongly say that lowering the burden of proof would not be a cure to any of the ills I've suggested.

I'd be very disappointed if that were the cure, because that's a bigger problem, given the stakes that are involved with this sort of charge. There should be a strict and constitutional burden of proof that shouldn't be alleviated, and I wouldn't suggest lowering the burden of proof. I don't suggest that would deal with any of the issues that I've raised.

The Chair: Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): You suggested that one of the problems with having another offence here is that the definitions of torture are different. It seems to me that the nature of torture in the two circumstances is different in any case.

For example, for state torture, part of the definition is the purpose for which these acts are committed, such as attaining from a person or from a third person information or a statement, or coercing them to do something, and so on and so forth. However, in the case of private torture, it seems to me there is much more of a likelihood that the motivations are about revenge or about some sadism, or some other kind of unsavoury thing beyond what the state might use it for.

In that context, are separate definitions legitimate?

Mr. Michael Spratt: Your point is well taken. That is definitely a way to explain those differences. One could definitely be in agreement with your proposition. The short answer is yes. You could very well be correct on that, and that could explain the differences.

The explanation of those differences may not necessarily lead to any additional clarity, or a lack of litigation in the court when we're dealing with statutory interpretation between two different sections. The purpose is important and the differences are important, but the plain wording is important as well.

Although your point is taken, I don't think, necessarily, the very common-sense proposition you've put forward would cure any of the problems that might arise because of the differences.

● (1155)

The Chair: Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Mr. Spratt, for your testimony. I want to ensure that I understand your position.

From my understanding, your position is that there is no gap in the Criminal Code in terms of the sorts of conducts that would encompass what we might broadly characterize as torture, save for the punishment side. In some serious cases, the punishment might be at the lower end of what might seem to be appropriate, given the severity of the circumstances, and perhaps the way of addressing it would be to incorporate an aggravating factor into the Criminal Code, so that those serious cases could be taken into account. Then the message sent in terms of the sentencing would be at the higher end rather than the lower end. Is that a fair characterization?

Mr. Michael Spratt: I think that is a fair characterization, which is one of the reasons that the suggestion of amending the bill to lower the punishment from life to 14 years seems incongruous with the purpose of the bill, when you look at it that way.

That is not only a fair characterization, but expertly demonstrates one of the inherent problems in some of the proposed amendments that are being considered.

Mr. Michael Cooper: One of the concerns you've touched on—perhaps you could elaborate a little more—and it's a concern that has been flagged by others, is that if this bill were to pass, there might be inconsistencies that would arise for how the Criminal Code already addresses torture.

When you look at section 273, which is aggravated assault, it speaks of conduct that includes wounding, maiming, disfiguring, or endangering the life of the victim. All of those things could easily fit into conduct that might amount to torture. For example, if section 273 was applied in the case of someone of who might have severely maimed someone, they might be subject to a 14-year sentence, whereas someone else who may have engaged in conduct that is blameworthy could be subjected to a life sentence under the new torture provision.

It would seem to me there could be some inconsistencies and complications that could arise.

Mr. Michael Spratt: That is an astute point that I didn't raise. Thank you for raising it. I think your question and comment reveal another aspect of this, and that is the definition and the elements of aggravated assault are already very broad, and they're broader than those proposed under this new legislation.

The mental harm that can result from aggravated assault can be a component of the assault itself. That's made clear when we look at sexual assault causing bodily harm and aggravated sexual assault. Those can encompass psychological harms that don't need to result in permanent, cognitive, and visible impairment.

In some ways, the aggravated assault provisions might encompass...and the aggravated assault provisions don't need to have a repeated conduct. There could be one instance. The aggravated assault provisions are arguably broader, and they would capture more conduct than what is proposed to be captured under the new torture provision.

Mr. Michael Cooper: I want to address the issue of the definition proposed in the bill with the definition that applies in the case of state actors, which is under section 269.1 of the Criminal Code and basically adopts the definition provided for in the Convention against Torture. You've raised issues that could apply, practically speaking, in prosecuting an offence, given the inconsistencies in the definitions between the state provision and the non-state provision.

We heard, at our last justice committee meeting, officials from the Department of Justice who said that it would be preferable to have a different definition to avoid any confusion with Canada's obligations under the Convention against Torture. I want to clarify that it's your position that it would be preferable that the definitions be the same if we're going to pass a torture law.

● (1200)

Mr. Michael Spratt: On the practical impacts, unlike the statutory interpretation, I don't think I'm in a position to give you evidence about what would be preferable.

It seems like it's either one of two, either you want them so different that they are easy to tell apart, or so similar that it makes no difference if you tell them apart because they're the same. As it is now, it appears to do neither. I'm sure others can offer testimony with much more expertise and insight on it than I can for those international issues.

Mr. Michael Cooper: Thank you.

The Chair: Thank you very much, Mr. Cooper.

Hon. Rob Nicholson: You made it clear that the aggravated assault is general in nature and it captures everything, and that the torture provisions suggested here are specific. Could you see a situation where somebody, instead of getting charged under aggravated assault, gets charged with the torture, and then they could get off on some of the technicalities because of the definitions, such as the repeated contact? Wouldn't that allow you as a defence counsel to say that the infliction of this pain was not repeated, and so it doesn't come within the definition of torture?

Mr. Michael Spratt: For sure. One could imagine a situation where someone is kidnapped, someone is held hostage, someone is forcibly confined, and one act is inflicted upon them that leads to a number of charges, including the torture charge. Then you could have the perverse inverse of what I was talking about earlier, and one might actually proceed on the torture charge because we're calling an act what it is, and I could only imagine the impact that an acquittal would have because the conduct isn't captured.

Hon. Rob Nicholson: So the crown would be left explaining why they hadn't laid the charge under aggravated assault.

Mr. Michael Spratt: That is a reality of how things might play out in court, and I don't think that our justice system—

Hon. Rob Nicholson: What would take place? If they had only charged the person on the torture and it didn't meet all the different specific definitions—that's what you'd argue as a defence lawyer, and say it didn't meet all the criteria—the person walks.

Mr. Michael Spratt: I would think so. Then you could have a person who is responsible for inflicting tremendous harm, and I think that the situation that you described would not do much for the victim or for public confidence in the justice system, and it may lead to some absurd results.

Hon. Rob Nicholson: Thank you very much.

The Chair: Thank you very much.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): I appreciate your testimony. Thanks for being here today.

Picking up on that last point, would you imagine a situation where a prosecutor wouldn't proceed on both? There's nothing that would prevent a prosecutor from charging for both aggravated assault and torture. Wouldn't you see it as something that would, as a norm, happen that way?

Mr. Michael Spratt: I think the more likely scenario is that a number of charges are proceeded on, including the torture charge. The situation as described previously could arise and would be very troubling. It could happen, but I think an equally troubling situation is someone who is charged with assault, assault causing bodily harm, kidnapping, forcible confinement, torture, aggravated assault, attempted murder, and a number of other offences. I think that is probably the more likely scenario, and I've already touched on some of the dangers, risks, and costs with that type of charging.

Mr. Colin Fraser: It would happen quite often if somebody was charged with something, but then, after going through a preliminary hearing or something, it may be that a person would plead on the lesser included offence, if you can use that term in this case. Even if they weren't charged with aggravated assault, there could be a plea deal reached on that charge.

Mr. Michael Spratt: Yes, that's quite possible. That could happen at an early stage or at a late stage. It might happen after a victim has already testified at a preliminary hearing. It might happen before a victim has testified at a preliminary hearing. It may be driven by such factors as the stigma attached to the offence, the offender's status—in custody or out of custody—and other behind closed doors agreements that might be reached between the defence and the crown which again aren't very transparent.

Don't get me wrong. Those sorts of agreements are necessary. They're an essential part of our system, but when you're dealing with a bill that is dealing with a sensitive area specifically to educate the public as one of its main purposes, perhaps that sort of plea negotiation that is essential in other areas may not be best utilized in this case.

● (1205)

Mr. Colin Fraser: I agree with you. One of the other examples, though, would be if the victim had a difficult time testifying, that could be used as a means for the prosecution to not proceed with the torture but accept the plea deal on something less.

Mr. Michael Spratt: That's right. There can be that negative impact, and there is also the risk which I think must always be guarded against, meting out justice and the appropriate penalties based on specific victims. I think there's been a right move to increase victims' rights, informational rights, and to include victims in the process. I think there were some laudable initiatives with respect to that. At the same time, we don't want the same offence but different victims, where one victim suggests and drives the prosecution in one way, and the other victim for whatever reason —fear, embarrassment, mercy—drives the prosecution in the other direction. That can lead to different justice for the same offenders and the same offence.

Mr. Colin Fraser: On that point with regard to victims' rights and victims being in the process, we heard testimony from one of the witnesses that somebody was not allowed to include the word "torture" in their victim impact statement. Does that sound right to you?

Mr. Michael Spratt: It doesn't sound right. There are definitely areas that are inappropriate to be included in the victim impact statement, and there is lots of case law that deals with that. In my experience in court, there is very little if no editing or cross-examination—although it can be done, I've never seen it done—on a victim impact statement. I've seen a lot of things that the courts have said are inappropriate in victim impact statements, but nonetheless, they're included, and then the court does their appropriate job in exercising their discretion in, not condoning, but also not including as factors those comments in the ultimate decision on sentence.

Mr. Colin Fraser: To pick up a point that you raised earlier with regard to private members' bills, they are not subject to mandatory charter compliance. What are your thoughts then on charter issues that may arise with regard to this bill?

Mr. Michael Spratt: There could be issues with respect to the breadth and application of the bill. There aren't the issues that we've seen in the past around cruel and unusual punishment and mandatory minimum sentences, so the charter concerns decrease somewhat in that respect.

Certainly, with respect to the breadth of conduct captured, and perhaps some of the inconsistencies, there might be some charter issues that arise, but I'm less concerned with the charter issues in this case.

I've had no trouble before saying, as I'm going to say again later this afternoon before the public safety committee, "There are unconstitutional sections in here for sure". I'm not saying that here today.

Mr. Colin Fraser: With regard to sentencing, we heard in some earlier evidence that sentences were perhaps too low. You touched on that. Obviously, the maximum sentence is there for the worst circumstances and the worst offender. You touched on it being perhaps better utilized as an aggravating factor. The courts, obviously, would already take this into account in imposing a sentence, the maximum penalty being for the worst offender and worst circumstances. Could you explain how this could be codified as an aggravating factor?

Mr. Michael Spratt: In section 718 of the Criminal Code, there's a list of aggravating circumstances. If indeed the goal of the bill is to drive home a point, to send a message, and to remind the judiciary to make sure that this is not only considered but explicitly recognized, I think aggravating factors are a good way of doing that in that they don't carry some of the other potential costs and issues that I talked about earlier.

Mr. Colin Fraser: Thank you very much.

The Chair: Thank you very much, Mr. Fraser.

Mr. Spratt, I would like to thank you so much for appearing before us today. Your testimony was extremely helpful.

We're going to go to an in camera session. Let's break for a couple of minutes to let the room clear out, and we'll be back.

[*Proceedings continue in camera*]