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Chair

Mr. Tom Lukiwski

Standing Committee on Government Operations and Estimates

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● (1745)

[*English*]

The Chair (Mr. Tom Lukiwski (Moose Jaw—Lake Centre—Lanigan, CPC)): Colleagues, it's 5:45 p.m., our designated meeting start time, so I think we'll get going.

I have one announcement, colleagues. As you all know we have votes tonight. The bells will start ringing at 6:45 p.m., which only gives us 15 minutes. I'd like to adjourn a little earlier than 6:45 p.m., just to ensure that everyone has enough time to get over to the House of Commons for votes. I'm thinking about 6:35 p.m. I'll play that by ear, but we'll give adequate time, so everyone can get out of here and either walk or catch a bus.

With that brief introduction to our colleagues, Professor Brown from Melbourne, Australia, welcome to our committee. I understand you have an opening statement, and with that, we will begin. You have probably been briefed by our officials, but after your opening statement, we'll have a series of questions from our committee members. This section will last about 50 minutes.

Professor, the floor is yours.

Professor A.J. Brown (Professor, Griffith University, As an Individual): Thank you very much, Mr. Chairman. I'd like to thank the committee for holding its hearing late in the day, which is morning our time, obviously, but it's certainly better than if you were hearing from me at about midnight. Thank you very much for your co-operation with that.

It's a very great honour to address the committee, because the legislation you're reviewing is, obviously, very important for Canada and for public sector integrity.

Here's a bit of background on me. I have a mixture of having worked in government, and worked with all levels of government here in Australia. Obviously, being a federal system, we think that our systems are quite comparable in many ways, and obviously, we share lots of political traditions. From my own visits to Canada, and having met with the Integrity Commissioner and other stakeholders in Canada, I certainly think there's an enormous amount we can both learn from but also possibly contribute to the questions you need to resolve.

My own background is both having worked in government and as a researcher at Griffith University here in Australia. I conduct large-scale research in partnership with all the government agencies that have responsibility for whistle-blowing oversight here, both at a federal level but also at a provincial level. I work very closely with those who have responsibility for overseeing the whistle-blowing processes here over many years now.

I have five main reflections about your legislation, and I might just run through them really quickly. Then I'll come back to them if they're not touched on further in questions.

One is that I often get to advise governments here when they've inherited a piece of legislation that is substandard, shall we say, not doing the job as well as it should be. There's often a choice between whether to simply try to amend the legislation and improve it, or to go back to square one and replace it with something that would be simpler and easier for everybody to operate.

The answer to that varies, depending on the circumstances, but here in Australia, as a result of my recommendations, governments have done both, both amended or replaced the entire piece of legislation. Quite clearly, in my view, based on my experience and observations of your current federal legislation, I would replace it. I would go back to square one because of its complexity and because of its tortuous expression. That's the first thing I would say.

Whether you're replacing it or simply amending it, the second thing is that there are a large number of technical improvements that I think are pretty obvious, vital but easy improvements. They include some of the things the Integrity Commissioner is clearly recommending, as well as everybody else, such as the removal of unnecessary good faith requirements and thresholds, and the ability of whoever is administering the act or conducting the investigations to take information from beyond simply the public sector.

These are the sorts of things that should be what we call in Australia no-brainers. There are a wide range of other provisions of the legislation that I would regard as substandard by comparison with best practice drafting in our legislation, or any other legislation. The fact that there are so many of those is partly what leads me to the conclusion that you would be better off doing a wholescale rewrite, rather than having to have so many amendments.

The third thing is that there's a fundamental problem with the legislation in terms of the clarity and combination of roles of the Integrity Commissioner. I've met two of your integrity commissioners, including the founding commissioner, Madam Ouimet.

● (1750)

It has always perplexed me that the roles of investigating disclosures and having responsibility for protecting whistle-blowers are combined and loaded onto the same Integrity Commissioner in the way that they are. Not only are both roles loaded on, but they're loaded on in a very confused way. The roles are not distinct. I think that's a very fundamental issue for the design of your whole regime.

In retrospect, I had very interesting conversations with Madam Ouimet. I talked to her about the importance of the other integrity agencies in the system, especially the Auditor General. Little did I know that the Auditor General was investigating her conduct at the time. It just brought home to me that the system as a whole does not seem to be well organized. That, then, obviously creates enormous problems for these particular roles.

The fourth thing is that I think the avenues under the act for achieving remedies for whistle-blowers who do suffer detrimental action are certainly not international best practice. They really fall short of international best practice in at least three ways.

One, it's not clear to me why you need to have the commissioner act as a gateway to people being able to secure their legal remedies, or their entitlements to legal remedies, from a tribunal or from whoever the independent umpire would be, and why you wouldn't enable people to just go straight to that umpire and test out their claims there, if necessary, and preserve the role of the commissioner as being more administrative but also more proactive in putting more effort into those cases that clearly are deserving, while not preventing people from being able to test their own claims. That's unclear to me. In other jurisdictions that simply doesn't occur.

The second problem in relation to the remedies is that there are so many restrictions on when the commissioner can act in the first place. The requirement under subsection 23(1), that the commissioner is not permitted to take an interest in cases that anybody else is already involved in, is a pretty retrograde provision, in my view. In other jurisdictions it can certainly be a discretion not to get involved if other agencies or remedial avenues are already involved, but there shouldn't be a blanket prohibition on that. The commissioner can then go wherever they need to in order to sort out whatever the problems are.

The third issue in relation to remedies is a very general problem. It's an international problem. Many of the adverse impacts suffered by whistle-blowers will not ever be the types of adverse impacts that can be tracked back to a deliberate reprisal. Many of them are the result of agency incompetence. Many of them are the result of agencies simply having not good procedures for protecting whistle-blowers, or not following procedures. Very often those mistakes, or the failure to deliver support, are not the result of active reprisals or active decisions of any kind. They're omissions that are negligent in retrospect. Really, the whole framing of reprisals as being the trigger for achieving remedies actually misses the point in possibly 90% or more of the cases where whistle-blowers suffer detriment.

Here in Australia, the most recent law reform that is now under way is framed quite differently. It's framed not only in terms of direct and deliberate reprisals but also in terms of where there is a failure on the part of somebody to fulfill a duty to protect and support, or to control others who are meant to protect and support, and then damage occurs to the whistle-blower, a liability will arise, and an entitlement to remedies and damages will arise. That's quite different from this focus on direct and deliberate reprisals.

Those are three things in relation to remedies.

● (1755)

The fifth and final overall point I want to make is that, from what I know of the situation there for the federal government in Canada, the commissioner's role is very, very reactive. This is a problem for agencies everywhere in the world that are charged with whistle-blower oversight and protection: many are simply reactive. If they're reactive, then you can't expect the systems to work.

The front-line responsibility for whistle-blower protection, in the lion's share of cases, will lie with CEOs, with agencies, and with what they do internally. The only way the system will work is if the Integrity Commissioner or the oversight agency has a very active role in making sure that those systems and procedures at the agency level are in place, that they're working, and that the discretions being applied by CEOs and their staff are actually fair and reasonable. That's where all the prevention efforts lie to actually make sure the system is working properly and that there can be confidence in it.

Without knowing all the details of the Integrity Commissioner's role, I would say that the Canadian system, even compared with our systems, which are more reactive than they should be, does seem to be very reactive, driven simply by complaints rather than by a proactive approach to implementing the scheme and making sure that it's properly embedded at the agency level and actually working.

Mr. Chairman, those are my five overall opinions about your legislation, from the other side of the world. I'm happy to help the committee however I can.

The Chair: Thank you very much, Professor Brown. I know that your testimony has given rise, probably, to many questions around this table.

We'll start, for seven minutes, with Mr. Peterson, please.

Mr. Kyle Peterson (Newmarket—Aurora, Lib.): Thank you, Mr. Chair.

Thank you, Professor Brown, for your insight and your input, and for taking the time, early in your day and late in our day, to be here. We appreciate your efforts in that regard.

I have a few questions. I just want to get into a little bit of your background and experience, and I have some questions about the Australian model. There's obviously a federal piece of legislation. Does every state and territory have one as well?

Prof. A.J. Brown: Yes, every state and territory has one.

Mr. Kyle Peterson: Have you been involved in the legislative processes at the state and territorial levels as well, either through review or—

Prof. A.J. Brown: Most of them to varying degrees [*Technical difficulty—Editor*] formation.

Mr. Kyle Peterson: Would you say there are vast differences among them, or are they all similar and you could classify them as similar pieces of legislation?

● (1800)

Prof. A.J. Brown: There are a lot of differences among them. If the committee wants to look to the best piece of legislation in Australia, then it would actually be the Public Interest Disclosure Act 2012 of the Australian Capital Territory. Although that's our smallest jurisdiction, it's often the jurisdiction used by governments to innovate and to form a template for legislation for all the provinces, and indeed for the commonwealth as well, for the federal government. In fact, for a whole variety of reasons, it's the single most simple, straightforward, but also comprehensive whistle-blower protection legislation for the public sector in Australia. It also covers more than just the public sector, but it's the single best piece of legislation in Australia.

Mr. Kyle Peterson: Okay, that's helpful, because I was going to ask next whether there was one you would commend to us as one of the best. That appears to be the answer to that question, so I appreciate that.

We as a committee have been reviewing this for a few sessions now, and we've heard a lot of testimony and a lot of opinions, suggestions, and actually, experiences. Some whistle-blowers have come and testified. The biggest surprise reaction I've seen so far has been your suggestion that this legislation should be replaced and we should go back to square one. We certainly appreciate the candour of that opinion.

If that were the case, should we base it, maybe, on the Australian Capital Territory legislation, as you said, or are there four or five components that you think are fundamental to having an effective piece of whistle-blower legislation?

Prof. A.J. Brown: I think with any piece of legislation, it begins as a very good statement of legislative intent and very good objects. In all of the Australian legislation more or less, and certainly the ACT and the federal legislation, you will find very good, clear, and comprehensive objects. I think some of them have been repeated for the committee from the federal public interest disclosure act.

If all of those key objects are honoured in a clear and systematic way, which is intelligible for most whistle-blowers as well as for those administering the scheme, then it almost doesn't matter what the legislation looks like; it should work. That's one of the advantages of the ACT legislation. It's one of the great disadvantages of your legislation that it doesn't have very comprehensive objects, as well as all the tortuous complexity that it has.

I think it's good to be clear on the objects. The objects really need to be an overall object of supporting public integrity and accountability; facilitating disclosures at all levels through the system; ensuring that disclosures are properly dealt with, and investigated or responded to, at all levels of the system; and a clear object of protecting and supporting whistle-blowers.

I think if those are carried through properly in a simple and straightforward way by good draftspeople, then.... I'm not a big fan of copying other people's legislation. One of the beauties of the ACT legislation is that it happens to be well drafted by very competent draftspeople who went back to square one and designed a very good scheme.

I know you automatically look at the federal legislation, so you looked at our Public Interest Disclosure Act 2013. It's a very complex and pretty poorly drafted piece of legislation.

The committee should be aware that it was reviewed last year as part of the statutory review, similar to the one that you're performing now. There's a very comprehensive report in existence by a gentleman called Mr. Philip Moss, who was engaged by the government to conduct that review. He made specific recommendations for improving the act—many recommendations—but he also recommended that the government look at stripping the entire piece of legislation back to a simpler, more principle-based approach, like the best state or provincial legislation we have.

It's those sorts of assessments that make me come around to thinking you're in a situation where stripping it back to first principles is something you should be considering.

Mr. Kyle Peterson: I appreciate that.

I have less than a minute left, so I want to briefly delve into some of the.... I think it's fair to say that you classified them, and many witnesses have classified them, as technical shortcomings, including the presence of the good faith threshold and the lack of ability to gather evidence during the investigation.

Do you see this as a problem? I know it's a technical problem in our legislation, but do you think it prevents us from meeting the objects of what the legislation should be? Are there ways to have those technical goals met without stripping it right down to square one, as you mentioned?

● (1805)

The Chair: If you can, Professor, give a very brief answer, please.

Prof. A.J. Brown: Certainly you can do better. I think you could muddle through many of those technical difficulties. Where there's a will, there's a way.

Good oversight agencies have done wonders with very poor legislation, if they really have the will and are of the mind to do so. That's why it's crucial.

The Chair: Thank you very much.

Mr. McCauley, you have seven minutes, please.

Mr. Kelly McCauley (Edmonton West, CPC): Good morning, Professor. Thanks for joining us today.

I appreciate your input. I almost wish we had heard from you first rather than all these other witnesses. It would have saved us some time. From almost every single witness we've spoken to, they have all said we need to have reverse onus for reprisals. However, we notice in the documentation we have that Australia and New Zealand do not actually afford that.

Is that something you would recommend, or is that something Australia has not gotten around to? Were there issues with it that you're aware of?

Prof. A.J. Brown: It's a very good question.

The reason some jurisdictions in Australia do have a reverse onus.... Where the reverse onus appears, it usually appears in relation to the criminal offence of reprisal and proving that. Many of us don't focus on that because it's almost impossible to prove criminal reprisals in any circumstances anyway. Also, criminalized reprisals are a distraction from the real issue, which is achieving remedies for people who suffer adverse outcomes from all the things that are not deliberate and not criminal, but are detrimental actions, both acts and omissions, deliberate and undeliberate.

When it comes to the broader test of liability or if an entitlement to remedies is raised, generally speaking in Australia, the wording is very broad. If there was any detrimental action and there was a public interest disclosure involved, then the language is already very broad to say that the detrimental action is compensable, so that it doesn't have to deteriorate into the question of proving that there was any detriment or that the detriment was caused by intention to cause a reprisal.

That's one reason why it's been less of a focus here. The thresholds would be automatically more liberal, but that doesn't mean that it hasn't been a problem and there are some quite strong views that there needs to be a clearer reversal of that onus.

I guess the reason why I don't focus on it so much is that it really is a question that arises in relation to that criminal or disciplinary liability for reprisals. In my view, that's substantially a distraction from the main gain, which is making sure that civil remedies are available.

Mr. Kelly McCauley: Yes. What we're hearing from our public service is that there's a genuine fear of coming forward. We actually had some witnesses appear before us and we've had documentation of their lives basically being ruined for doing the right thing in coming forward. When we've done surveys with our public service —and I'm going to be non-partisan here, it happened under my government and it's still continuing currently—well over 50% of our public servants state clearly that they're afraid to come forward, it's just not worth it, their lives will be ruined, their jobs will be gone. We've actually seen evidence of that, which is why I think we, all around the committee here, are very committed to having very clear protection in a reverse onus.

However, you're saying that wasn't as much of an issue or did I misunderstand?

Prof. A.J. Brown: No. It's a question of how much a reverse onus will be effective in achieving that result. I'm not saying that it's not important, but it's just one part of the mix for an effective regime. Certainly, there need to be clear rules that if there's a disclosure involved and detrimental action is shown, then certainly the onus should shift onto the respondent or onto the agency to be able to demonstrate that the adverse action that was taken was not taken as a result of or in connection with the disclosure.

There's no problem with that principle and it should certainly help, so that principle can be put in place as part of evidentiary procedure, as well as being legislation. If that can be entrenched, that can be a good thing. However, in and of itself, it's not going to necessarily make sure that the remedial provisions are actually well-calibrated to deal with the problem because the problems are very often almost like a no-fault issue.

Most of the problems that end up causing whistle-blowers' careers to go into decline are very often not caused by any intention or deliberate omission in relation to their treatment. It's caused by a failure of support. It's caused by unmanaged stress and it's caused by simple errors in the way that people are handled and managed. Those cumulative impacts are the ones that, in most cases, then end up causing that sort of detriment. In those sorts of cases, the evidentiary questions are quite different and the fundamental question then becomes whether the process should be intended to hold individuals to account or whether it should just recognize the organization or the responsibility to compensate that person irrespective of individual fault.

I think all the evidence is now showing that the law needs to be calibrated to deal with that broader organizational responsibility, almost like workplace health and safety responsibility, rather than it being a question of hunting down the individual who supposedly set out to cause some kind of a reprisal.

● (1810)

Mr. Kelly McCauley: I just have half a minute. What other countries would you recommend for us to benchmark against?

There's Australia, obviously, and we've heard about New Zealand and Ireland. Do you agree with that? Is there any one that we should look at?

Prof. A.J. Brown: The problem is that almost every country is focusing on a different part of the problem or challenge more heavily than others. Bottom line, I wouldn't look to New Zealand. I wouldn't look to New Zealand, not through its legislation—

Mr. Kelly McCauley: War is declared on New Zealand—

Voices: Oh, oh!

Prof. A.J. Brown: That's right. A cross-Tasman rivalry rules.

I can provide more information about why.

Mr. Kelly McCauley: I appreciate that, because we're out of time.

The Chair: Yes, you are out of time.

Mr. Kelly McCauley: Thank you very much. That was very helpful.

The Chair: If you do have any other jurisdictions that you think would be worthwhile for our committee to contact, please submit them directly to our clerk. We'll give you that information.

Mr. Weir, please, you have seven minutes.

Mr. Erin Weir (Regina—Lewvan, NDP): Thanks very much.

Thanks, Professor, for taking the time to appear before our committee.

The term “whistle-blower” conjures up the image of someone blowing a whistle and provoking people to react to the problem. You made the comment that our whistle-blower regime is overly reactive and should be more proactive. I'm wondering if you could elaborate a little on what that means.

Prof. A.J. Brown: Yes, certainly. The front line really starts with what happens inside the agency, as I said, because the vast of majority of individuals don't even ever contemplate going outside and would see even the Integrity Commissioner as a last resort, let alone going to the media.

There does need to be protection for people who go to the media in reasonable circumstances, and currently that's another area of deficiency in your legislation. Those rules aren't of very high quality either.

The reality is that unless the regime is working in a way that means there is clear guidance, there is support for agencies to be getting it right in the first place internally, and that's being evaluated and monitored, then everything is reactive.

The key ingredients of the more proactive system are ones that are based on a level of mandatory reporting by agencies as to what disclosures they've received and how they're handling them. All our oversight regimes are now moving in the direction of automatic mandatory disclosure in real time, or close to real time, so that the oversight agency actually knows what the agency is handling and then can use their own risk indicators to say, “Okay, here are matters that we need to take a closer interest in right from the word 'go', rather than waiting for it to all be mishandled and then for a complaint of reprisal to come to us later, or for it to go to the tribunal later.”

Part of the skill and the capacity of the oversight agencies here is starting to identify that information, having that information, so that they know what agencies are handling, and then having those risk indicators to be able to say that these are the ones that they want to know more about now or that they will get involved in conciliation now, because it's high risk and high conflict already, or because the confidence of the whistle-blower internally is already falling apart in terms of what's happening in the agency.

Those are some of the ingredients of a more proactive regime, but it requires that sort of automatic mandatory reporting from the agency to the oversight agency. Then it requires the oversight agency to have both the will and the capacity to be able to be both monitoring and stepping in and then proactively intervening in individual cases where there are high-risk cases, where the problems, conflict, and damage will manifest. But if things are done differently early in the piece, it doesn't necessarily have to be that way.

● (1815)

Mr. Erin Weir: Thanks. That's extremely helpful, because one of the questions our committee has been asking of the central whistle-blower protection authorities has been why so few cases actually come to the tribunal. I think you suggest that there may be a lack of direct access to that tribunal, but the response we've often gotten is that these problems are being handled at the agency or departmental level. We really have no way of measuring that, so I think that direct reporting from departments and agencies to some kind of central body seems to be a key part of a better architecture.

I also wanted to ask you about public recognition of whistle-blowers. Is this something that you think is useful? Is it something that you think should be embedded in the Canadian regime?

Prof. A.J. Brown: I'm not sure how you embed it in legislation, but one thing that we know is crucial to making a good whistle-blowing system work in an organization is having the organization use its own history to get a positive message out within the organization about how real cases have been handled, using appropriate cases.

That approach seems crucial to their success. It's not so much public recognition as recognition within the organization, in a demonstration by the organization not only that it promises to protect people but is using its own case history to illustrate how it handles things in that organization. Few things can be more powerful than that. It's a form of recognition, but it's not focused on the individual. It's focused on the benefit of what the individual has done for the organization and for the public interest by being prepared to speak up. Also, it demonstrates that the organization has the capacity to deal with it well.

As for public recognition, I think attitudes are changing towards whistle-blowing. I think there's a much broader understanding of the public benefit of whistle-blowing and that whistle-blowers come in all shapes and sizes, but that very few are intending to ever become public figures, let alone martyrs, in the process.

I think, then, that it's really helpful when the government and the Parliament and the Integrity Commissioner can find ways of using those cases to demonstrate to people why whistle-blowing is important, and why it's valued, more importantly.

As for rewards and awards, we've had a great case in Australia in which one of our public health system whistle-blowers was the local hero and received a local hero award on our national Australia Day —the Australian of the Year award, which is very high-profile; it's a great honour. That type of recognition is not specific to whistle-blowing at that level, amongst the other health people, people finding cancer cures and other things. To have that whistle-blowing function recognized in that way was very powerful.

● (1820)

The Chair: Thank you very much. I'm afraid we're out of time.

Mr. Whalen, take seven minutes, please.

Mr. Nick Whalen (St. John's East, Lib.): Thank you, Mr. Chair, and thanks, Dr. Brown, for joining us—this morning, by your time—with your very interesting testimony.

In terms of objects of the act, there's nothing specifically listed in our legislation. There's a bit of a preamble. When talking about reprisal, I take you to mean that you don't believe that reprisal should be an object or a defence or believe in tracking down or punishing reprisal, but rather think we should focus on a duty to protect and support whistle-blowers, that this is what we should focus the legislation on, concerning downstream detriment suffered by whistle-blowers.

Prof. A.J. Brown: That's correct. I wouldn't say don't hunt down those who are responsible for deliberate reprisals or even negligent reprisals, but it's such a hard task. It can also often miss the point of the vast bulk of circumstances in which people suffer detrimental action. We've been criminalizing reprisals in Australia for more than 20 years now, and I think it's one of the most distracting and unproductive things we've done.

Mr. Nick Whalen: Let me follow through concerning the duty to protect and support. If someone felt, or their counsel felt, that they hadn't been receiving the right level of support or the right level of protection from the employer, what type of action would they bring and who would you suggest they bring it to? Would it be the same organization that conducts the reprisal adjudications, or would it be a regular human resources complaint under the labour relations standards?

What view do you take on that?

Prof. A.J. Brown: Under our commonwealth, our federal regime now, under the law partly as it is but also partly as it is likely to be after the next wave of reform goes through, if there has basically been a duty to protect and support but there has been a failure, in that duty and damage has occurred, under normal principles of tort law, for example, they would be entitled to go either to the Fair Work Commission regime, our equivalent of a national employment relations tribunal, which is a lower-cost jurisdiction, or they could go to the federal court directly, straight to a court of law. They couldn't do both, but they could do one or the other and seek their damages, which are uncapped for the federal court here, as they are in the U.K. employment relations tribunal, in recognition that even quite small breaches can lead to enormous damage. Small breaches or small failures in duty to protect and support can lead to the destruction of an entire career. The caps on damages that are in your legislation currently strike me as fairly farcical.

In addition to that, there's a huge problem of legal support and legal costs. In our legislation now, there is a trend towards the public interest costs rule that means a whistle-blower is automatically indemnified against the risk of paying the government's costs or the respondent's costs unless it's vexatious or an abuse of process. However, even then, they still have to come up with their own costs. That's a huge challenge that needs to be directly addressed.

The Queensland state regime, which was recently reviewed, is also recommending an additional administrative remedy that means the oversight agency could either require or force the employing agency to basically step in and mediate and conciliate and come up with an administrative remedy before there's any need to take action in any of those tribunals, simply to—

Mr. Nick Whalen: I'm sorry, Mr. Brown, I only get seven minutes, so I'm going to have to move on to my next question.

You've anticipated my question about legal costs. What about at the stage of disclosure of wrongdoing? Should legal costs or some type of mechanism be put in place there to help the whistle-blowers make their case, or is it really just to make sure they have protection and support downstream?

● (1825)

Prof. A.J. Brown: It's primarily protection and support downstream, because any process requiring the whistle-blower to put together a case is misplaced in the first place. All these protections should be triggered simply by a reasonable suspicion or a reasonable concern. The onus should pass to the agency or to the Integrity Commissioner to then deal with that properly and to do the investigation. As soon as it becomes a situation where the whistle-blower is responsible for "putting the case", it's almost saying he or she has to investigate it, he or she has to put together all the evidence, and the whole system is far too reactive.

The whole idea is that it becomes the government's problem, the agency's problem, to deal with it responsibly, not for the onus to be on the whistle-blower.

Mr. Nick Whalen: I have a last quick question, Professor. With respect to the whole objective around protecting whistle-blowers based on their disclosure, what scope of disclosure would that be? How far should we go in allowing public disclosures or disclosures to various other agencies or to the police to be also protected under this legislation? Currently our disclosure definition is quite restrictive and it doesn't protect whistle-blowers who don't follow the letter of the act.

Prof. A.J. Brown: A good three-tiered regime will work quite simply. Any reasonable suspicion internally should automatically be protected. Any direct disclosures to a regulator or an integrity agency should be automatically protected, whether they've gone internally or not. Disclosures to third parties, whether they're unions, civil society organizations, or the media, should be protected in any circumstances where either those internal or regulatory disclosures were not adequately dealt with and there are reasonable grounds for concluding that after a reasonable time, or where the court or tribunal can be reasonably satisfied that there was no safe mechanism, either internally or to the regulator, for somebody to disclose.

If a person has reasonable concerns that there was no safe way to disclose internally or to a regulator, that person should be entitled to a public-interest defence if he or she is prosecuted for a breach of confidence or any other remedy. It needs to be quite an expansive regime to actually work.

The Chair: Thank you, Professor Brown. Unfortunately, we have a long way to go, obviously.

Colleagues, I think we'll have enough time for two five-minute interventions before we adjourn.

Mr. Clarke.

[*Translation*]

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Thank you, Mr. Chair.

I am happy to be back with the Standing Committee on Government Operations and Estimates.

Professor, thank you very much for participating in this morning's meeting. You live in an amazing country. I am jealous of your members who still have a true Westminster system of parliamentary supremacy.

With regard to the Public Servants Disclosure Protection Act, there are two potential avenues. That is what we have learned in this committee, or at least what I have learned. The first option available to public servants consists in going through the process within their department. Nearly every department has a unit of a dozen public servants who are responsible for enforcing the act. The second option is to go directly to the Office of the Public Sector Integrity Commissioner of Canada.

Do those two avenues also exist in Australia?

[*English*]

Prof. A.J. Brown: There certainly are, as well as there being entitlements to public disclosure where necessary, where it's reasonable. Generally, under all the Australian regimes there will be both those avenues, and you certainly can go directly to the ombudsman or an anti-corruption commission without necessarily having made the disclosure internally first, but, generally speaking, most people will make a disclosure internally first.

[*Translation*]

Mr. Alupa Clarke: Okay.

My colleague Mr. McCauley and I, and probably other members here, are wondering a bit about the need to have two avenues.

Would it be appropriate and beneficial to put an end to the departmental process, which is an extremely expensive option? When the representatives of those departmental units came to see us, they said they may have two cases a year, at the very most.

Would it be better to have only the avenue that consists in going directly to the commissioner of integrity?

● (1830)

[*English*]

Prof. A.J. Brown: I don't think it would be better and I don't think it would be realistic, because people will always make disclosures internally. One of the good things about your law is that any disclosure to a supervisor automatically triggers the act, and that's as it should be because that's the front line. That's where disclosures are received. The key is then how the organization actually recognizes that those disclosures have been made and then manages them. As soon as you say to people that they can only disclose to a central agency that's outside their own agency, then you shut down the whole system, because most people don't want to go outside their own agency, even when they should.

[*Translation*]

Mr. Alupa Clarke: I understand. Thank you very much.

In your research and your analyses, have you noted that certain disclosures had to do with competition among a department's employees? Some people may have made disclosures in order to advance their career or get some sort of revenge? Have you seen any such cases?

You said that reprisals sometimes stemmed from internal dysfunction. However, have you ever found that a disclosure had to do with a career-related issue?

[*English*]

The Chair: Give a very brief answer if possible, Professor.

Prof. A.J. Brown: Certainly there are always some employees who will use whatever processes are available to game the system, or to game their employment, or to get revenge on other people where things have gone wrong. That's no different for whistle-blowing than for any other grievance process or dispute process. It should be no surprise that people will try to use these processes for a range of purposes for which they weren't intended. That certainly happens. The key thing is the capacity of agencies to minimize that and to make the rules such that it's minimized. It's a very small problem from everything we can tell, including the opinions of managers in organizations about their own procedures.

The Chair: Thank you, Professor.

Our final intervention will be from Madam Ratansi.

Ms. Yasmin Ratansi (Don Valley East, Lib.): Thank you, Professor.

I'm going to give you two straight questions so that you can utilize the time to answer them.

You stated that the Canadian model does not meet international standards, or it falls short of international best practices. Is the Australian model more in line with international best practices?

Prof. A.J. Brown: There is no single international best practice, but in many areas, parts of our law are doing better than I think your law is.

Ms. Yasmin Ratansi: Okay.

Prof. A.J. Brown: There is no single, off-the-shelf best-practice model. That's part of the challenge of this.

Ms. Yasmin Ratansi: That's the part of the challenge: we cannot go to square one because it is hard work. However, I am looking at both the models and there was a comparison about how your process works. You stated that our process is reactive rather than proactive, so I'd like to understand how the process becomes more proactive. What is the preventative mechanism? Should the internal mechanism that the agencies and departments are following at the moment, i.e., reporting to the supervisor or CEO, be enhanced? Should there be some strengthening of it? Should it be an audit, or should the Public Service Integrity Commissioner take a more intervening role?

Prof. A.J. Brown: I think all of those things. We need to know what the procedures and processes are. We need good standards for those at the agency level as well as mandatory reporting of what's going on with disclosures received and how they're being handled. We also need a more proactive role for the Integrity Commissioner. These would all be fundamental steps.

● (1835)

Ms. Yasmin Ratansi: You are comfortable, however, that the internal processes have to remain. You would not eliminate those internal processes.

Prof. A.J. Brown: Absolutely not. You never can and you never do.

Ms. Yasmin Ratansi: Okay.

You had some concerns about the term “good faith” and you wanted it eliminated. Perhaps it could be changed. I understand that “good faith” was put in to stop the vendettas or frivolous questions. What would you replace “good faith” with? This is something I'm struggling with. How would you replace “good faith”?

Prof. A.J. Brown: In Australian law, the threshold is simply that there is an honest and reasonable belief, or that the conduct or information actually shows wrongdoing, irrespective of the subjective state of mind of the whistle-blower.

People can disclose information where they really don't understand its own significance. It might be a minor fraud, but this might be evidence of massive corruption that they don't even know about. I think basic tests of an honest and reasonable belief more than do the job. For the same reason, Australia is systematically removing any good faith requirements from its law, as is being done in the U.K. and elsewhere.

Ms. Yasmin Ratansi: With the model you have in Australia, do you think people have more of a speak-up culture in the public service? We don't seem to have the same thing, and we're looking to enhance our law.

Prof. A.J. Brown: I think it's possible. We haven't done the empirical research to really know, but certainly on most of the comparative international research—and I'm sure this is true of Canadians as well—Australians generally come off as a very egalitarian people. There is a general culture of being prepared to say, “There but for the grace of God go I; that could be me”, and this fairness dictates that we value whistle-blowers quite highly, even though we agree that people shouldn't go telling tales on one another for no reason. Nevertheless, it's a great leveller. Australians are happy to challenge authority in all the most constructive and positive ways.

I wouldn't pass judgment on the Canadian people or the Canadian public sector, but I think these are values that we in Australia are pretty proud of, and I think they are one of the reasons we place such value on making sure that we get the whistle-blowing systems right.

The Chair: Professor Brown, thank you very much for your testimony. I think I can honestly say, without fear of reprisal, that your testimony has been most informative and I think it's helped our committee. I'm not sure if it's going to put us back to square one or not, but it certainly has given us cause and pause for thought. I appreciate your taking the time out of your busy schedule.

Colleagues, we have about 20 minutes before our votes start in the House of Commons so we will adjourn now.

Once again, Professor, our thanks to you.

We are adjourned.