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Chair

Mr. Tom Lukiwski

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● (1715)

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi (Don Valley East, Lib.)): Members of the committee, we are beginning.

Professor Brown, this is Yasmin Ratansi. I'm standing in today for our regular chair, who is absent.

Do you have any opening remarks after what you said the last time?

Professor A.J. Brown (Professor, Griffith University, As an Individual): No, Madam Chair. It's a pleasure to be back with you again. I think I'd be happy just to get back to further questions from the committee, however I can help.

The Vice-Chair (Ms. Yasmin Ratansi): Okay, perfect. That will give our committee more time to ask questions.

The first round of seven minutes is for Monsieur Drouin.

Mr. Francis Drouin (Glengarry—Prescott—Russell, Lib.): Thank you, Madam Chair.

I just want to touch on a couple of points that we've heard from a few other witnesses. First, I want to ask if you think the following is a good idea. Within departments there are disclosure officers for whistle-blowers, and then we have separate third-party offices. I haven't made up my mind. I'm still trying to understand if it's a good idea to have an internal office, let's say. For example, at Health Canada, they have their own office that whistle-blowers can go to, or, should they choose, they can go to the other office. Do you think that's a good idea? In your experience in other jurisdictions, say in Australia, are there examples like that?

Prof. A.J. Brown: Yes, there certainly are, and it certainly is a good idea. There are actually four different layers or levels of players, if you like, in the disclosure process and the protection process. The first layer is actually line management and line supervisors as a disclosure option. The second is the internal audit, internal disclosure system, the agency's centralized system, which for a lot of employees is as challenging to go to as it is necessarily even to go outside.

Then you have other regulators. They might be the police, the auditor general, or any external independent agency that could be receiving disclosures and investigating. Then you have the agency who's responsible for ensuring there's protection. It's not so important that they're a disclosure channel, but typically they will be a disclosure channel as well, but they're certainly there as an independent agency to protect whistle-blowers. So you actually have four different actors or players, and that's without talking about the media, obviously, and third-party disclosures.

It's actually very important that there be multiple reporting avenues, because in any given situation you can't predict who can be trusted and who will be trusted by either the agency, or by the discloser or whistle-blower. There basically has to be a choice, and then it's important that all those players in the game know their role and be coordinated. That's why it's complex, but there's no other way around it. As soon as you start limiting it and saying that you only have one disclosure option, then you immediately make the whole system much less feasible, because it's very hard for people to go outside their normal chain of command very often. It's just not natural, and they just won't do it. But in other situations, you really have to provide for that because they simply won't trust either their line management or even the internal disclosure or internal audit unit. At this point they won't trust them either, and sometimes for good reason. That's why you must have multiple reporting channels.

Mr. Francis Drouin: In your experience, within those reporting channels, has one ever impeded the process of another? We were given an example two weeks ago where a decision was still awaited because it was stuck, essentially, between two processes. One organization doesn't want to move until the other organization moves, and now it's creating a bit of a kerfuffle between those two organizations and, unfortunately, the whistle-blower pays the price.

Prof. A.J. Brown: Yes, that will certainly happen if the processes aren't coordinated and if there isn't an oversight agency that has the authority and is in a position to clear those logjams and sort things out quickly. If those two things aren't in place, then, of course, you'll have confusion and conflict, and there will be interference or impedance, but that's no different from any other part of public administration where you have multiple processes. It's important that it be professional and not be left to chance.

● (1720)

Mr. Francis Drouin: The other question I wanted to ask about your experience in dealing with other jurisdictions is how we ensure that whistle-blowers are protected during this process and are paid. Some testimony has indicated that perhaps we should give them the option to go home with pay until the process is resolved. We've heard from certain witnesses that we want to ensure that perhaps they should get priority staffing in another department if the whistle-blower disclosure warrants an investigation. Do you have any opinion on that, on whether or not we should provide payment if they go home or give them staffing priority to get them out of the organization where they are whistle-blowing?

Prof. A.J. Brown: I think either of those things should be available as options. Certainly, whistle-blowers shouldn't be sent home without pay. And this is where the Australian systems have more of a track record and a history in the prevention and assessment of reprisal risk or detrimental action risk, and the management of that as a real priority, over and above any other country, I think.

What's crucial is that it be part of the process of both the agency and the oversight agency, either at the outset of the disclosure process or very early in it. It's actually somebody's job to say, "Okay, what is the best strategy for managing this situation?" That's needed because the situation will always vary.

If you have a situation where it's a largely confidential disclosure and there's a fraud investigation going on, you don't want to be moving people around, because that will just alert people that there's an investigation going on. You can manage the person in the workplace as more or less a confidential informant in a very discreet way until such time as the investigation opens up, and then you have to reassess the options. If people are going to accuse that person or rightly suspect that person of being the whistle-blower, you have to assess the options then. What are the risks they face? What's the best way of dealing with it? It's a completely different situation from where you have a one-on-one type of disclosure by a whistle-blower against somebody else in the workplace. It's known. The conflict has broken out. It's a completely different situation. How you handle the whistle-blower will be seen by the rest of the organization and other employees in relation to how—

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Brown, thank you. We have to go to the next questioner, Mr. McCauley.

Prof. A.J. Brown: Certainly.

Mr. Kelly McCauley (Edmonton West, CPC): Welcome back. Thank you again for your help.

I just want to follow up on Mr. Drouin's comment about our internal mechanisms, where which every single one of our departments has resources for people to "go to", for lack of a better word, to whistle-blow, but the problem is that those people report to the deputy minister or the assistant deputy minister. That almost creates a conflict of interest. One of the things you read is that their role is not to protect the whistle-blower but rather to clean up the mess before it gets out of control.

What I've been asking, and maybe Mr. Drouin was asking questions about it too, is whether those people inside the department should be embedded in the department but be completely independent of the department and reporting to an outside agency, whether it's an ombudsman, the Auditor General's office, or to PSIC itself. What are your thoughts on that, please?

Prof. A.J. Brown: Certainly the internal audit unit or the internal ethics unit should be functioning with a level of independence from line management, anyway, as part of their job. They won't ever function totally independently of the agency's interest; they still have to answer to the minister or to the head of the department. I forget your structure there or title of the head of a department.

But what is crucial is that there be a mandatory reporting relationship with the oversight agency, with the Integrity Commissioner or whoever it is.

Mr. Kelly McCauley: And by that, do you mean on reporting...?

Prof. A.J. Brown: Basically, it's just so that the Integrity Commissioner knows what's going on. Very often, all that's needed for an agency to resolve that conflict of interest, to a large degree, and to realize that they can and should protect the whistle-blower is to know that somebody else is looking over their shoulder and that it will be known how they handle this situation. Typically, agencies handle things quite differently if they know that's the case, and that in specific situations....

Sorry.

● (1725)

Mr. Kelly McCauley: I appreciate that. Our current system is set up so there is a general report once a year, but it's not specific. There is no real follow-up, so we have some work to do on that.

I want to touch on your views on anonymous reporting, protecting the confidence of the whistle-blower, and then I'll ask you to give me a couple of the top ideas you think we need to follow up on.

Some countries do it and others do not, so I'd like to hear your opinion on it and how best to implement that, because we have a very strong culture of fear of retaliation among the people coming forward. I'm wondering if having this would allow more people to come forward, or strengthen their confidence that they can come forward and report issues.

Prof. A.J. Brown: It's a very basic issue and it should be there. All the legislation needs to do is to provide that person with protections that will apply even if the person doesn't identify themself. The presumption there, which can be made explicit, is that if they are later identified, then the protections will apply to them and they can avail themselves of the protection.

It's absolutely vital not to encourage anonymous reporting, because it will encourage confidential reporting and, typically, people will then approach a disclosure channel anonymously in the third instance. But when it's explained to them what the process is, they will reveal their identity to the appropriate people.

Mr. Kelly McCauley: In my final three minutes, I'm wondering if you break out quick bullet points or ideas of where we should focus and what we should concentrate on in changing our current system and amendments?

Do you have any top-of-mind suggestions?

Prof. A.J. Brown: I think I said it last time that I would go back to square one in rethinking the legislation in its basic elements and how you implement it, because you have so many problems throughout the legislation and throughout the system.

Overall, I think the crucial thing is to be clear on whether the Integrity Commissioner is there to protect whistle-blowers or to investigate disclosures, and to properly embed the whistle-blower protection regime, both in agency governance and the integrity systems of the agencies and the departments, and also in the system as a whole so that it doesn't just rely on the Integrity Commissioner and the Auditor General. Any of the investigative agencies that operate throughout the Canadian public sector have a role in this legislation. You shouldn't put all your eggs in one basket with one Integrity Commissioner to try to handle everything, because it simply won't work.

Mr. Kelly McCauley: It's not working.

We mentioned earlier that we have a culture issue within our public service. There's a fear of coming forward, one that continues from the last government and hasn't changed over the years.

What's the best thing we can do moving forward to help create a culture without the the fear of whistle-blowing? Here I refer not just to the fear of reprisal, but also to the need to encourage people to come forward to do the right thing when they see waste and corruption.

Prof. A.J. Brown: I think you identified the departments that are already doing it better than others. Even if no one is doing it very well, some departments will be doing it better than others, and you can use them as demonstration cases for how a healthy culture of disclosure can be created.

My impression is that you'll find it in the departments rather than through the Integrity Commissioner's office, because of the track record of how difficult it's been and how poorly designed the system has been, frankly.

The Vice-Chair (Ms. Yasmin Ratansi): You have 45 seconds if you want to use it.

Mr. Kelly McCauley: Very quickly, in the mandatory reporting in Australia, is a file opened on every whistle-blower who comes forward? Is your version of the Integrity Commissioner aware of that?

Prof. A.J. Brown: It varies very much from state to state and among the different public sector jurisdictions. Most of the jurisdictions are moving toward more real time disclosure, more continuous disclosure at some level. So at some level every disclosure that falls within the legislation gets notified to the oversight agency, so they can at least monitor and audit what happened.

● (1730)

Mr. Kelly McCauley: Would you make that a recommendation for us?

Prof. A.J. Brown: Yes, I certainly would.

Mr. Kelly McCauley: Great. Thank you. I appreciate your time.

The Vice-Chair (Ms. Yasmin Ratansi): Mr. Weir for seven minutes.

Mr. Erin Weir (Regina—Lewvan, NDP): Thanks very much. We really appreciate your reappearance before our committee.

I'd like to pick up on this theme of mandatory reporting. Of course, one of the questions is mandatory reporting to whom? In Canada the reporting from departments and agencies is to the Treasury Board, which is the federal government agency serving as the federal government's employer. So the reporting is not to the Public Sector Integrity Commissioner or any other independent agency.

I'm less familiar with the Australian system, but I wonder if you could speak to where that mandatory reporting should be going. Should it be to a central employer authority in the government or to some more independent entity, such as the commissioner?

Prof. A.J. Brown: I think the short answer is that it should be the independent agency like the commissioner who has the responsibility. With the reporting should go not just the responsibility to file the statistics, but a responsibility to use that information to identify which cases need intervention. It's what we call the “intervention challenge”. It's a policy challenge, being able to monitor and then identify that, okay, here's a case that has commenced where we need to take an active role in overseeing how the agency is handling it, and possibly ensuring an effective investigation, but more importantly ensuring that the risks of reprisal or detrimental—

Oops, I think I've lost you.

The Vice-Chair (Ms. Yasmin Ratansi): We can hear you.

Prof. A.J. Brown: You can hear me. Okay. We've just lost the video.

What I was saying was that the important thing is that the oversight agency be able to intervene. For that to be a bigger case, it really needs to be the oversight agency rather than just the general public sector management agency or the Treasury Board, in my view.

Mr. Erin Weir: Okay. So without putting words in your mouth, what you would like to see in Canada would be to increase the resources for the commissioner to allow him to administer the whistle-blower protection system and oversee it among the various departments and agencies.

Prof. A.J. Brown: I think I missed the first bit of your question there.

Mr. Erin Weir: No problem. I'm trying to translate your testimony into a recommendation for Canada. Our commissioner currently has very few resources. I take it that your sense would be that we need to invest more in the Office of the Public Sector Integrity Commissioner so that it has the capacity to oversee and administer the whistle-blower protection system between and among the different departments and agencies?

Prof. A.J. Brown: Yes, certainly. The resources are crucial. In Australia in the public sector there were or are an existing range of integrity agencies, like the state ombudsman or the Commonwealth Ombudsman's Office, in addition to others, including anti-corruption agencies, and the decision has usually been made to give the whistle-blowing oversight role to one of those existing agencies, so that they do have the resources and the critical mass and are not just a small fledgling office.

Sometimes that's contentious, but at least there's a logic to it in terms of the resources. Even then it has got to be a properly resourced function that at least is supported by a bigger agency, but there is a strong case for having a totally independent agency that just deals with the whistle-blowing, but it has to remain very well coordinated with the other integrity agencies, otherwise there will be conflict and the system won't work properly.

Mr. Erin Weir: I think that's one of the challenges in Canada, that currently Treasury Board definitely has the resources to run the system, but it's not independent. The commissioner is independent, but doesn't have the resources to run the system.

I'd also like to return to a line of questioning by Mr. Drouin about the placement of whistle-blowers. You talked about different options, having the whistle-blowers being paid at home, or having them put to work in different departments or at least different parts of the department they're in. I wonder if you could comment a little bit more on that. Specifically, should the whistle-blowers themselves be able to choose where they're sent or how they're treated in that respect?

● (1735)

Prof. A.J. Brown: The whistle-blower's perspective on it will always be a crucial consideration, if only to manage their expectations actively. In some situations, their consent to a particular strategy will be required, and legally required, I would think. In other situations, they wouldn't have the final say, in effect, but you would certainly want them to be agreeable to it.

The other thing is that in some situations, the best thing that can happen is for everybody to just confront the conflict that's in the workplace or in the organization. If it's a low-level conflict that can be confronted by management just telling everybody to, as we would say, “pull their head in”, and understand that the agency won't tolerate any lack of respect for the due process, then everybody may just get on with their lives. Simply with support-type protection, a whistle-blower may be able to just survive in that workplace, and that may be the healthiest thing.

It's very context dependent. There just needs to be a full suite of options available for managing the situation and the right people put in place to make those decisions in consultation with the whistle-blower, definitely.

Mr. Erin Weir: For sure. We've heard from a whistle-blower who is in a situation wherein the labour relations board has not yet ruled on whether it has jurisdiction to hear her case. The Public Sector Integrity Commissioner won't consider her case because it's under consideration by the labour relations board.

You've spoken about the importance of having multiple avenues that whistle-blowers can pursue, but I'm wondering if you can address the problem of having multiple authorities consider, or refuse to consider, the same case at the same time.

The Vice-Chair (Ms. Yasmin Ratansi): You have about 10 seconds to respond.

Prof. A.J. Brown: Certainly the problem is having the law framed in a way where matters fall through the cracks. It's less of a problem to have duplication or redundancy in the system. What's important is that the oversight agency, in this case the Integrity Commissioner, has the power to continue to act and to make recommendations to clear those sorts of logjams. That's one of the clear defects in your legislation, currently.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We now go to Mr. Ayoub.

[*Translation*]

Will you be speaking in English or French?

Mr. Ramez Ayoub (Thérèse-De Blainville, Lib.): In French, if he can understand me and hear the translation of my remarks.

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): Do you have translation, Professor Brown, or do you speak French?

Mr. Ramez Ayoub: No, no, he should hear the translation.

[*Translation*]

Thank you, Madam Chair.

Mr. Brown, my questions pertain to specific cases.

We have heard from countless witnesses, and specific cases were brought to our attention. Individuals came forward as whistle-blowers. They suffered reprisals or experienced problems in terms of their career progression afterwards. In some cases, the individuals even went bankrupt. Are there any cases in Australia that stand out? What incentives were introduced to counter the adverse effects that whistle-blowing triggers? Have you experienced any such cases?

[*English*]

Prof. A.J. Brown: I would say that in Australia, our compensation systems are largely untested and probably not best practice internationally. It's very important that the law provide really accessible and effective compensation systems. Because we've put a lot of effort into prevention of reprisals and detriment, and limiting reprisals and detriment, we're still not sure whether enough cases are going through. Probably not enough cases are going through. We haven't tested our law well enough.

Some of the precedents from the U.K. and from the United States for better compensation systems, whether it's through the labour board or through the courts, probably provide some of the better lessons about how to make those compensation systems more effective. Ours are largely untested.

● (1740)

[*Translation*]

Mr. Ramez Ayoub: You said that your system was largely untested, in terms of cases, and that we need to rebuild our system, start from scratch, to avoid specific problems and cases like the ones we've seen. Without any practical cases on your end, do you have any incentives or guidelines that would prevent specific cases in which individuals are the subject of reprisals?

What are the broad strokes? How would you recommend the Canadian government move forward? What corrective measures should it take first?

[*English*]

Prof. A.J. Brown: If I understand you correctly, we do have quite a lot of guidelines at the state and federal levels for helping agencies assess and prevent reprisals from happening. We have fewer guidelines on how to investigate and resolve detrimental action or reprisals if they happen. That is a weakness of the implementation of our system so far. That also relates to the problem that our compensation mechanisms are probably not as strong in the law as they should be.

That's why having the good compensation mechanisms.... If you look at the United Kingdom precedents, there's good evidence there of when they work and when they don't work, and then working back from that. I am not sure if that answers your question.

[*Translation*]

Mr. Ramez Ayoub: Starting over again, building an entire legal framework for whistle-blowers, starting from scratch, all of that takes a huge amount of time.

I'm trying to figure out what interim steps we could take. Rather than start over again, I am trying to identify certain changes that would shed light on the problems so we could fix them in the short term, without having to wait.

I am more interested in this approach because I don't know how long it would take to rebuild a system from scratch.

[*English*]

Prof. A.J. Brown: Certainly. It's difficult for me to advise you on how to best fix all of your legislation to make it better fit with your existing institutions, but I think you can focus on clarifying the objectives of the legislation so that they're clear, and then deal systematically with ensuring that disclosure channels are open, that responsibilities are clear on the agencies, that the oversight agency has its clear responsibilities, that the compensation provisions work, that you don't have the kind of double-up roles placed on the Integrity Commissioner, and that they're not a gateway that restricts people accessing their legal rights.

I think the issue is that most of the stakeholders whom I've seen, including the Integrity Commissioner, have put on the table things that need to be fixed. They are all valid issues. It's just that it's such a long list of issues that it's a very major amendment job to do it by way of a piece of legislation. That's the only thing that then makes me think that sometimes, rather than having that many amendments, it's easier to do a redraft. As a lawyer, that's why I say it looks like a piece of legislation for which it's worth starting again rather than doing a lot of surgery via amendments—but, of course, lots of surgery can be done.

The Vice-Chair (Ms. Yasmin Ratansi): You have 30 seconds for a question and answer.

Mr. Ramez Ayoub: It won't be enough, I don't think.

The Vice-Chair (Ms. Yasmin Ratansi): It doesn't matter. You can still ask the question.

[*Translation*]

Mr. Ramez Ayoub: I think the government or minister notified of the wrongdoing should bear the responsibility of initiating legal proceedings. That should not fall on the whistle-blower. Would you agree?

● (1745)

[*English*]

The Vice-Chair (Ms. Yasmin Ratansi): Professor, can you give a quick response?

Did we lose you?

No, we've lost him.

Prof. A.J. Brown: I can hear you.

The Vice-Chair (Ms. Yasmin Ratansi): Can you give a quick response to Monsieur Ayoub's question, please?

Prof. A.J. Brown: I'm afraid I didn't hear all of the question.

The Vice-Chair (Ms. Yasmin Ratansi): Okay.

Mr. Ayoub, you can probably continue with your question.

Mr. Ramez Ayoub: I will only need 30 seconds.

I said that from my perspective, whistle-blowers should not bear the burden or weight of the *poursuite*. Do you agree with that?

Prof. A.J. Brown: I think if you're saying that they need legal protection from being sued or prosecuted, that's a fundamental part of what the law should already be delivering. It's one of the basic objectives of whistle-blower protection law, that it protects whistle-blowers from exposure to legal risks as a result of doing what is in the public interest.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We now go to the five-minute round, with Mr. Clarke.

[*Translation*]

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Thank you, Madam Chair. It's an honour to have you with us.

[*English*]

Mr. Brown, thank you very much.

In the past few weeks we have begun to see some concrete reforms that could be put forward, for example, eliminating the good faith requirement, instituting a reverse onus on reprisals, increasing the punitive damages threshold, increasing the amount of remuneration for legal assistance against reprisal, and finally extending disclosure protection to former public servants.

I just want to know for now whether you consider these possible reforms as a good start. If yes or if no, what other specific reforms would you recommend?

Prof. A.J. Brown: I would say yes, all of those things should be done. I guess the problem is that doing those things won't necessarily make the system work. If the roles and resources of the Integrity Commissioner aren't clear, if the mandatory reporting of disclosures to the agencies is not clear, if you don't have clear responsibilities on the agencies to implement good whistle-blowing systems, and if the Integrity Commissioner or another agency isn't actually enforcing that or making sure it is occurring, then you still won't have an overall system that works.

I would say yes, those things should definitely happen. It may be that the committee can recommend two tranches of amendment, one being the things that should be done right now and the other a broader review to make those larger, systemic changes that will actually ensure there is a workable system.

My lack of familiarity with your system limits my ability to give you too much more advice on that.

Mr. Alupa Clarke: Okay.

In our previous electronic encounter, you discussed the idea of making the Public Sector Integrity Commissioner more proactive. What does that actually entail?

Prof. A.J. Brown: Well, it entail some of the things that I just mentioned. It entails giving them a responsibility to actually audit and ensure that agencies are implementing good whistle-blowing systems. It includes that mandatory reporting process so that the Integrity Commissioner is monitoring how the agencies are handling those disclosures and, especially, is in a position to intervene and step into the management of particular disclosures. Rather than waiting for the whistle-blower to complain that they have suffered a reprisal later, a lot of the problems can be prevented by somebody stepping in early and saying, “Hey, why don't you handle that differently?” That's really a proactive measure.

Then, if somebody does actually assert that they've suffered a reprisal, there is a choice between just letting that person battle it out in the labour relations board, which is a reactive approach, or having the commissioner actually step in and effectively act for the whistle-blower. That's another option for where the Integrity Commissioner can be more proactive. There are different levels of proactivity in all of those different functions.

● (1750)

Mr. Alupa Clarke: You also commented on the fact that the commissioner is more protective and investigative than anything else.

I would like to know how that is different from Australian best practices. We have 55 seconds.

Prof. A.J. Brown: In Australia, because there's a range of investigation agencies, anti-corruption bodies or the police or the auditor general or the ombudsman, the primary responsibility of the oversight agency is to ensure that those protection systems are working rather than necessarily conducting all of the investigations. There should be a separation between investigation and protection, because there's a potential conflict of interest. If you've investigated something and found no wrongdoing, it's then very hard to carry through and ensure that person is protected.

In Australia, we're still sorting it out. There isn't a perfect model yet, but at least there's a clear recognition that there needs to be that separation. There's a range of investigative agencies that are part of the scheme. It doesn't just all fall to the one, putting all the eggs in one basket, which seems to be the concept in Canada.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We now go to Mr. Whalen for five minutes.

Mr. Nick Whalen (St. John's East, Lib.): Professor Brown, thank you very much for coming again and following up on last week's conversation. Many of us have had a chance now to review the Australian Capital Territory's act.

Sir, I'm trying to work through that act a little, since you've referred to it as one of the best models. I want to get a sense of some of the items there.

Section 21 of that act requires the investigating entity to go to the police if they suspect that there's an offence involved. How come the wrongdoer him or herself is not entitled to go directly to the police in order to maintain the protections under the act?

Prof. A.J. Brown: I think the legislation should work so that if the whistle-blower did go to the police directly, then they would still have the protections under the act. I think it's recognition that very often a whistle-blower will make a disclosure to somebody that involves a range of different things, or won't even understand what it is they're disclosing and that it is a criminal offence. I thinks that's just a minor part of that particular regime.

However, in relation to the Australian Capital Territory legislation, having said that it's good practice in Australia, I think it's important to recognize that it's good practice in terms of its clarity and simplicity. The style of this legislation for this type of purpose or these objectives is very good.

There are specific things that don't translate to federal levels. For example, the Australian Capital Territory is a very small jurisdiction. The independent oversight in that system is different from what we would have for our federal level of government. That would need changing, if you were to adapt it—

Mr. Nick Whalen: Thanks, Professor Brown.

Prof. A.J. Brown: —to the Canadian situation.

Mr. Nick Whalen: Continuing on this line about to whom disclosures may permissibly be made, we've heard from whistle-blowers and other groups that disclosure should be allowed to be made to virtually anyone. At a particular point in time, the person who ends up being a whistle-blower may not understand or appreciate that what they've learned alleges wrongdoing. They may ask co-workers. They may reach out to various people for advice as to whether or not the document or the information they've uncovered discloses wrongdoing.

That level of disclosure, and that sort of sidebar conversation that a person may be having laterally within an organization, isn't protected in any of the Australian acts that I've looked at. Do you think this is an oversight in the Australian legislation? Should we follow the views of the whistle-blowers we've heard from and try to protect those types of disclosures as well?

● (1755)

Prof. A.J. Brown: I think in many of the Australian public sector regimes, most of those types of disclosures would be covered. There's a move here, which I've been recommending for some time and that has been taking place, of recognizing that the disclosure should be protected if it contains evidence of wrongdoing, irrespective of what the whistle-blower or informant's belief is regarding that wrongdoing. That's so that there will be an objective test as well as a subjective test.

You can't necessarily cater for every single conversation that somebody would have. It's just not possible to legislate for or cover every single communication that might occur. Certainly in terms of most of the disclosure activity, in those regimes where there is the double-barrelled test, then I think the protections do apply.

Mr. Nick Whalen: Finally, Professor Brown, I have a question with regard to the notion of confidentiality and the protection of all of the information. In Canada, typically when there is some type of state investigation into conduct, we are of the view that the fruits of the investigation in the possession of the crown are not the property of the crown for use in securing a conviction, but rather the property of the public to ensure that justice is done. I wonder whether or not the fruits of these investigations should be maintained as so confidential. How is the public interest served by these absolute rules of confidentiality found in various Australian legislation?

The Vice-Chair (Ms. Yasmin Ratansi): A very brief answer, please.

Prof. A.J. Brown: I think the protections and confidentiality in the Australian legislation are very often aimed at the integrity of the process, both the integrity of the investigation and the protection process. They're not intended to limit what should be disclosed publicly as a result of an investigation where there's a public interest in that. Also, it comes back to the oversight agencies having both the power and the responsibility in the role of publishing investigation outcomes in due course.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

Mr. McCauley, you have five minutes.

Mr. Kelly McCauley: Thank you.

Professor, I'm not sure if you aware of the Government Accountability Project by one of your, I guess, whistle-blowing colleagues, Tom Devine. He he writes about "'no loopholes' protection for all citizens with disclosures relevant to the public service mission".

We've heard from various witnesses that one of our weaknesses is that we don't protect people outside the public service, either retired public servants or contractors. I'd love to hear some of your thoughts on how we can protect contractors dealing with our government, those who blow the whistle on waste, wrongdoing, etc. How do we protect their employees, but also how do we protect the contractors and their businesses so that they're not blackballed and driven out of business?

Prof. A.J. Brown: In the Australian legislation, there's been a strong trend basically to just treat contractors and the employees of contractors exactly the same as if they were public employees. It is similar with volunteers or interns—basically people within that workplace.

Many of the regimes cover former employees, although there's a sensible move to put a limitation on that, to restrict it to a disclosure that's been made within 12 months or 24 months of leaving the public service, rather than years later. I think that's a relatively simple change that the committee can recommend to expand the scope of whistle-blower protection via that "no loophole" basis.

Mr. Kelly McCauley: Do you have any thoughts or ideas on how any other countries might be doing it a bit better than Australia—ways that we should copy—or do you think it's a simple matter of amending the current legislation to extend protection to people dealing with or doing business with the government?

● (1800)

Prof. A.J. Brown: I think it is a very simple process on that issue. Some of the Australian regimes do extend whistle-blower protection to any person who discloses wrongdoing, including any member of the public, or any ratepayer or taxpayer. That becomes much more problematic because it's very hard for agencies to know how they are supposed to implement that effectively, and particularly to protect those people in situations where very often they don't need any protection anyway. It sort of confuses the scheme.

I think it's important to draw a very clear line between who a whistle-blower is—as in, people who need protection because they are inside or have that kind of employment relationship with the agency—and other citizens, clients, or customers who might need some legal protections if they make disclosures in other ways, but who are not actually whistle-blowers. I think it's important for the committee and the government to have a very clear idea of that dividing line in order to manage what's on either side of that line, rather than assuming it's all one type of disclosure and one type of protection responsibilities.

Mr. Kelly McCauley: Professor Brown, we've heard a lot of very valid criticism of our current system: we don't provide enough funds for the legal fees of whistle-blowers who are experiencing reprisals, or others. Do you have any quick thoughts within about 45 seconds? I think we provide $3,000 for legal fees. What are your thoughts on best practices? Is Australia doing it right in that fashion, and could we just copy it?

Prof. A.J. Brown: I don't think Australia is doing it right in that fashion. We don't have a statutory entitlement to legal fees or legal aid the way that you have.

Mr. Kelly McCauley: Sorry, Professor Brown, do you have any thoughts of who is doing it best then?

Prof. A.J. Brown: As far as I'm aware, the entitlement to legal aid that's in your legislation is quite a good precedent. Just the fact that it's in there is one of the things you might try to preserve.

Mr. Kelly McCauley: And maybe top up.

Prof. A.J. Brown: In terms of having a clear legal aid fund that's available, I'm not aware of any country that has a strong legal aid support in place for whistle-blowers. I think you can build from your existing provisions to develop that to be more effective and, possibly, to be the national best practice.

Mr. Kelly McCauley: Wonderful! Thank you again for all your time and efforts.

The Vice-Chair (Ms. Yasmin Ratansi): We'll go to Ms. Ludwig for five minutes. Welcome to the committee.

Ms. Karen Ludwig (New Brunswick Southwest, Lib.): Thank you, I'm very pleased to be here.

Thank you, Professor, for your comments. My questions might be a little different. I'm sitting in this committee for the first time. One of the areas that I'm particularly interested in is research. With your experience with the law in Australia, is there a standardized method for data collection and reporting for found and unfounded cases? Would you be able to comment on that?

Prof. A.J. Brown: Certainly. In terms of the oversight agencies and their collection of statistics, because there are subtle differences between every jurisdiction, there are subtle differences in the statistics collection. They're all tailored to slightly different systems. There are some broad patterns that can be observed across the different jurisdictions, but it's not directly comparable data. It does let you identify when there's a clear under-reporting problem in some jurisdictions, for example. Generally speaking, those statistics confirm the value of disclosures, that there are reasonable substantiation rights, for example, with disclosures.

There's a much broader problem in the research that I'm involved in, which is why we have the participation of so many of the oversight agencies and government regulators in our large-scale collaborative research. That research is aimed at getting a handle on what is making a difference to the handling of cases within agencies on a much broader basis. Certainly what we're doing at the moment is to develop a more systematic research method that can apply across any organization and any jurisdiction, public sector or private sector. The fundamental dynamics of encouraging disclosures and measuring them properly are very similar in terms of the management dynamics and the relationships between internal and external actors. That's been a research need that's been identified, which we're currently addressing with research methods that enable us to do that through research in any government, jurisdiction, and organization and link it all together.

● (1805)

Ms. Karen Ludwig: Thank you very much.

Just pushing that a little bit further and listening to my colleagues' questions and your very detailed responses this afternoon, I'm wondering, within your method of data collection and reporting, if you're also looking at intersectionality of the cases that come forward in terms of diversity. It could be gender or all sorts of different variables, and if at that level, is it looked at across the different departments?

Prof. A.J. Brown: I don't think it's looked at systematically by government in analyzing trends. It's certainly looked at by researchers and has been over a long period of time—looking at gender for example. The seniority of people is considered. What enables some whistle-blowers to survive in situations where others don't? Their employment basis, seniority, and level of experience are clearly factors. Gender is sometimes a factor. That's part of the purpose of the research that many of us are involved in, rather than necessarily currently a direct focus in the statistics that are collected officially by the agencies. Definitely one of the reasons why the oversight agencies invest in our research process is to find out that sort of information. Where should the efforts be targeted? Who's most at risk? What causes those risks and how can those risks be responded to most effectively?

Ms. Karen Ludwig: Thank you. I think I have time for one more question.

Within that and in looking at the longitudinal issue here, for those who come forward and report an issue—essentially the whistle-blower—is there any research or documentation that has looked at the outcomes of that whistle-blowing over a period of time? Also, are there any changes within the employment situation in the public service of those over a period of time?

Prof. A.J. Brown: There's been very little because it's very hard to do, to track people effectively over any long period of time. Some jurisdictions and organizations claim that they do follow up, but very often those claims aren't really very reliable.

The New South Wales police, many years ago now, did quite a systematic study of the people who were supported through their internal witness support program, police who had made disclosures about other police, and of how their welfare panned out over a period of time as compared to other groups within the police service. It certainly can be done, and it should be done, but apart from that study, there haven't been many substantial studies like it that I'm aware of.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We go to the last round, with three minutes for Mr. Weir.

If we have time, if somebody else wants to ask questions, would you please raise your hand so we can give that time to you? Thank you.

Mr. Erin Weir: Thanks very much.

Professor Brown, a previous witness, Mr. Conacher from Democracy Watch, made a written submission that included the suggestion of a minimum fine of $50,000 for retaliation against whistle-blowers and a maximum fine of up $200,000.

The Canadian dollar is approximately on par with the Australian dollar, so I wonder if you could give us a sense of how that idea fits in with Australian and international best practice.

Prof. A.J. Brown: Yes, certainly.

I don't know where you would set the penalties for a criminal offence of reprisal in Canada, other than probably the appropriate benchmarks of looking at offences relating to perverting the course of justice, jury tampering, and witness intimidation in a legal proceeding. That's really the issue here. That's what whistle-blowing reprisals are about. They're about interfering with the course of justice, so that's where I would look for commensurate offences and commensurate penalties, whatever that [*Technical difficulty—Editor*].

● (1810)

Mr. Erin Weir: [*Technical difficulty—Editor*] the point previously that the problem often is not deliberate retaliation as much as people inadvertently being allowed to fall through the cracks. Do you think that fines and penalties for retaliation are things we should focus on?

Prof. A.J. Brown: They should be part of the law, but they shouldn't be relied on as the mainstay for protecting whistle-blowers, because they simply don't protect whistle-blowers. All that they do is to impose penalties on people who have caused damage to whistle-blowers. In my view, it can be valuable to have that criminalization of reprisals, but it's much more important to have clear responsibilities on people to protect, and then liability that falls on those people if they fail to deliver on those obligations to protect. Those, actually, can be quite separate and very different from any criminalization or penalization of reprisals, which tend to rely on those reprisals being either deliberate, which is actually quite rare but very hard to prove, or criminally negligent, which is also very hard to prove. It needs to be much more along the lines of normal negligence.

Mr. Erin Weir: Right.

We don't have a lot of time left, but you did identify the Australian Capital Territory as the gold standard of whistle-blower protection. I wonder if you could just let us know what you see as the most important features of that system that make it so effective.

Prof. A.J. Brown: I just want to reiterate that I wouldn't just try to copy the Australian Capital Territory's law. It's just an example of a very simple, well-drafted, but comprehensive law covering this sort of field. From that point of view, it provides a very good precedent, because it covers all aspects of what a whistle-blower protection law should be doing. The exact way that it does it in many areas you wouldn't directly copy. It could either be improved upon or you would simply have a different institutional arrangement for Canada, in particular in terms of the stature, the role, and the independence of the oversight agency. The compensation mechanisms would probably be different. The rules on when disclosure is protected if you go to third parties could probably be improved upon.

It's very difficult to pick one law off the shelf and say this is the gold standard. When it comes to the simplicity and the clarity of the law, then with respect to that, I think the Australian Capital Territory law is a very good precedent to look at, but I'm not suggesting that you simply copy that for Canada.

The Vice-Chair (Ms. Yasmin Ratansi): Thank you.

We have one last question, from Mr. Whalen.

Mr. Nick Whalen: Thank you very much, Madam Chair.

Professor Brown, I do very much like the way the Australian Capital Territory's act is drafted, because it allows us to focus in on some of the finer points in our act to see how they might differ so we can ask you some questions.

One of these has to do with the nature of what constitutes disclosable conduct. Our act goes so far as to include failure to live up to the values and ethics codes put forward by each individual department, which are very broad motherhood-based codes. The Australian Capital Territory's act is limited to the very lowest-level conduct, which gives reasonable grounds for disciplinary action against the person. Disciplinary action is defined pretty narrowly to include conduct that could lead to termination.

From your perspective, is the whistle-blower protection legislation the right place to include lower-level human resources complaints, or should we raise the standards so that the whistle-blower protection law focuses in on things that are truly egregious?

Prof. A.J. Brown: I think the short answer to that is that you need to set the standard reasonably high. We're talking about public interest disclosures of wrongdoing. Certainly it should be broader than simply disciplinary action that could lead to termination. It should also include serious maladministration or defective administration, waste of public money, environmental risks, risks to public health, and all of those sorts of things.

Certainly our experience has been that it's a mistake to treat any and every breach of the public service code of conduct as a public interest disclosure. Doing that is basically an unmanageable step for a whole variety of reasons. In our federal jurisdiction, they made every breach of the Australian public service code of conduct potentially or automatically a public interest disclosure, and doing that was a mistake. The recommendations from the most recent review were to wind that back.

If there's a systemic problem with major breaches of codes or employment standards or processes, which would amount to some sort of breach of the law or an offence, and those become really serious, then those could be the subject of a public interest disclosure that triggers the whistle-blowing protection regime that we're talking about here. Certainly looking at every single potential breach simply confuses and overloads the systems. It's like using a sledgehammer to crack tiny nuts.

● (1815)

Mr. Nick Whalen: Thanks, Professor. I think maybe we should consider a similar recommendation.

The Vice-Chair (Ms. Yasmin Ratansi): Professor, on behalf of the committee I'd like to thank you for your time and your thoroughness in giving us insight on our legislation and what can be changed. On behalf of our committee, thank you very much. I know it's Tuesday morning for you and that you woke up early to answer our questions.

Committee members, it being 6:15, the meeting is adjourned.

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