

Driving better company performance through clear and effective whistleblowing practices

1. Introduction

- 1.1. It is welcome that Ofwat has set out its proposed expectations for water companies to establish, implement and operate appropriate and effective whistleblowing arrangements. The 10 good practice expectations provide a helpful summary of the key areas that water companies should, as a minimum, address in their whistleblowing arrangements.
- 1.2. Part A of this consultation response makes general observations and recommendations on the overall approach proposed by Ofwat. Part B provides specific comments on how what is proposed should be strengthened and on omissions that Ofwat should address.

PART A: GENERAL OBSERVATIONS

2. Role of the Environment Agency, Natural Resources Wales and Drinking Water Inspectorate

- 2.1. Ofwat, the Environment Agency, Natural Resources Wales and the Drinking Water Inspectorate are each prescribed persons in England and Wales under whistleblowing legislation for the prescribed matters set out below.

Prescribed Person	Prescribed matters
Ofwat	the supply of water and the provision of sewerage services
Environment Agency / Natural Resources Wales	acts and omissions which have an actual or potential effect on the environment or the management or regulation of the environment, including pollution, and abstraction of water
Drinking Water Inspectorate	<ul style="list-style-type: none">the quality and sufficiency of water supplied by the water industrythe security of network and information systems within the drinking water supply and distribution sector

- 2.2. Each of these bodies therefore has an important role to play with respect to whistleblowing practices of entities operating in the water industry in England and Wales. It would therefore be appropriate for any good practice expectations for the water companies to be agreed and adopted by all of these bodies.

3. Application of the expectations

- 3.1. The proposed good practice expectations appear only to apply to companies holding an appointment as a water or sewerage undertaker in England and Wales. They should also apply to water supply and sewerage licensees as they retail water and sewerage services to non-household customers, and also to infrastructure providers responsible for the delivery of specified infrastructure projects for the water industry.
- 3.2. Similarly, where largescale water and sewerage infrastructure projects are planned to be built and operated by Direct Procurement for Customers (DPC), the good practice expectations should apply to the Competitively Appointed Provider (CAP) appointed by the water company under DPC. This could be achieved by Ofwat making its consent to the water company

appointing a CAP conditional on the CAP Agreement requiring the CAP to meet Ofwat's good practice expectations.

4. Legal and regulatory effect

- 4.1. Ofwat does not propose to make the good practice expectations mandatory and directly enforceable by way of an appropriate licence condition. Since 2015 the Financial Conduct Authority (FCA) has imposed binding rules about whistleblowing practices for large firms operating in the banking, investment and insurance sectors¹. Given the strong public interest in ensuring companies have in place and operate arrangements that meet the highest standards for whistleblowing, and in order to further the consumer objective, Ofwat should introduce an appropriate licence condition. The observations on the proposed good practice expectations included in this consultation response are therefore made subject to this overall point that the expectations should be directly enforceable by Ofwat.
- 4.2. It is helpful that Ofwat has set out in Section 2 that it will have regard to the expectations when considering the adequacy of a company's whistleblowing arrangements as part of fulfilling its wider regulated activities. It is also helpful to have noted in Section 1 the requirements of Licence Condition P for companies to have in place adequate systems of planning and internal control to carry out their regulated activities, and that having in place an environment and processes that enable staff to speak up through whistleblowing are important internal controls relevant to this obligation.
- 4.3. Ofwat refers to a past enforcement case where it has considered the adequacy of a company's whistleblower culture and processes when finding that company in breach of Licence Condition P. The final published document should be explicit that failing to meet or follow these good practice expectations and, in particular, dismissing a whistleblower or subjecting them to any form of detriment will be considered an aggravating factor when Ofwat considers imposing a financial penalty in respect of any contraventions.

PART B: COMMENTS, CONCERNS, OMISSIONS

5. Development and internal oversight of water company's whistleblowing arrangements

- 5.1. There should be a clear expectation for water companies when establishing their whistleblowing arrangements to consider drawing on relevant resources prepared by whistleblowing charities (such as Protect) or other recognised standards setting organisations. This is in line with the FCA's binding rules for relevant firms.
- 5.2. Again, in line with the FCA's binding rules for relevant firms, water companies should be expected to assign a non-executive director responsibility for overseeing their whistleblowing arrangements. The role of the Whistleblowers' Champion should be to ensure and oversee the integrity, independence and effectiveness of the company's policies and procedures on whistleblowing, including those policies and procedures intended to protect whistleblowers from being victimised because they have raised concerns about wrongdoing.

¹ FCA Handbook: Senior arrangements, Systems and Controls - Chapter 18, Whistleblowing. <https://www.handbook.fca.org.uk/handbook/SYSC/18.pdf>

6. Transparency of whistleblowing arrangements

- 6.1. To provide confidence to consumers and the public, the good practice expectations should include an expectation for companies to be transparent about their arrangements for managing whistleblowing, in particular by publishing their whistleblowing policies and arrangements.
- 6.2. Publication of water companies' whistleblowing arrangements is also critical to ensuring that workers who are contractors have sight of these arrangements, as they do not always have access to the same information and internal communications as employees (e.g. access to the employee intranet).

7. Protecting whistleblowers against victimisation

- 7.1. The All Party Parliamentary Group for Whistleblowing carried out a survey in October 2018 to gather evidence on whistleblowing practices. The survey identified that 77.8% of respondent whistleblowers reported their organisation retaliated against them for raising their concerns and that in the worst cases this took the form of a cycle of abuse including personal attacks, attempts to discredit the whistleblower, bullying, disciplinary action, dismissal or forced resignation².
- 7.2. Ofwat has a critical role in seeking to ensure that individuals do not suffer victimisation when they raise a concern about wrongdoing. If other workers see that a whistleblower is being mistreated it makes it a lot less likely that those workers will cooperate openly with any investigation or that they will raise any concerns they may have in the future. Or they may choose to raise issues anonymously, resulting in water companies treating the matters less seriously or making it more difficult for the issues to be investigated. Victimisation will therefore damage the public interest by discouraging future disclosures from being made.
- 7.3. The FCA's binding rules require relevant firms to establish, implement and maintain appropriate and effective whistleblowing arrangements. These arrangements must include reasonable measures to ensure that where a concern about wrongdoing is raised by a whistleblower no person under the control of the firm engages in victimisation of that whistleblower. The FCA has taken enforcement action where there has been a failure in this regard³.
- 7.4. Ofwat should therefore follow the FCA's lead and include an explicit expectation that workers (including contractors) will not be victimised for raising a concern about wrongdoing and that water companies' whistleblowing arrangements should identify a range of practical arrangements that will be considered to ensure appropriate protection. This might include, for example, providing an effective buddying system so that the whistleblower feels supported and has someone senior to talk to about any concerns about their treatment, and ensuring that the whistleblower's line of reporting does not put them at risk of victimisation or retaliation. Protect has published a practical guide for employers setting out advice on how

² Whistleblowing; The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it. (July 2019). https://www.appgwhistleblowing.co.uk/files/ugd/88d04c_9754e54bc641443db902cd963687cb55.pdf

³ <https://www.fca.org.uk/publication/final-notice/mr-james-edward-staley-2018.pdf>

to protect whistleblowers from victimisation.⁴

8. Investigating concerns raised by whistleblowers

- 8.1. Ofwat should set a clear expectation that concerns raised about potential wrongdoing are thoroughly and independently investigated. In appropriate cases companies should consider appointing a third party to investigate the concerns raised, particularly where the alleged wrongdoing is very serious, or involves directors or senior executives.
- 8.2. Where a third party is appointed to investigate concerns about wrongdoing they should be truly independent and not have an existing relationship with the water company, its directors or shareholders. This will avoid the risk of a partisan approach from established relationships undermining the objectivity of their investigation⁵.

9. Confidentiality provisions in agreements with staff and workers

- 9.1. In line with the FCA's binding rules for relevant firms, the proposed expectations should require water companies to include a term in any settlement agreement stipulating that workers are not prevented from making a protected disclosure to a regulator. Further, water companies must not request that workers provide warranties in settlement agreements that they have made a protected disclosure; nor that they are not aware of any information which could form the basis of a protected disclosure.
- 9.2. There should also be an expectation that water companies will not use non-disclosure obligations which seek to prevent workers from raising concerns with regulators about matters relevant to companies' regulated activities.

10. Reporting by water companies

- 10.1. As part of its ongoing monitoring of the effectiveness of water companies' whistleblowing practices, Ofwat should require companies to report annually on how they are meeting Ofwat's expectations for maintaining and operating clear and effective whistleblowing practices. This requirement should be reflected in Ofwat's expectations and should include, as a minimum, reporting on the number of whistleblowing concerns raised and investigated, (including identifying the number raised anonymously).
- 10.2. Water companies should report transparently on these matters, either as part of their annual statutory and regulatory reports or as a separate publication on their websites. This will help to instil public confidence in the effectiveness of their whistleblowing arrangements.
- 10.3. Ofwat should also include an explicit expectation for companies to report to Ofwat as soon as is practicable any matters arising from an allegation of wrongdoing that is likely to be of significant concern to consumers or the public. The expectation to report should be regardless of whether it materially affects the water company's ability to carry out its regulated activities (and is therefore required to be reported under Licence Condition P).

⁴ Preventing Whistleblowing Victimisation: A practical guide for employers. <https://protect-advice.org.uk/preventing-whistleblower-victimisation-guide-2022/#:~:text=%E2%80%9CPreventing%20Whistleblower%20Victimisation%E2%80%9D%20guide%20by%20Protect&text=%E2%80%9CPreventing%20Whistleblowing%20Victimisation%3A%20A%20practical,against%20whistleblowers%20in%20their%20organisations>

⁵ 2021 Independent Review into the events that took place at RICS following the commissioning of a Treasury Management audit in 2018: [https://www.rics.org/content/dam/ricsglobal/documents/about-rics/210907-rics-independent-review-open-version%20\(221222\).pdf](https://www.rics.org/content/dam/ricsglobal/documents/about-rics/210907-rics-independent-review-open-version%20(221222).pdf) . Page 388 in particular.

- 10.4. Ofwat should also set an expectation that water companies provide to Ofwat on request copies of any internal or external investigation reports. This will allow Ofwat to verify that appropriate steps have been taken to investigate concerns that have been raised and to verify the appropriateness of any findings, recommendations and actions taken.
- 10.5. The FCA's binding rules for relevant firms require them to inform the FCA of cases where an employment tribunal finds in favour of a whistleblower when the finding related to a claim that the whistleblower was victimised. This should also form part of Ofwat's good practice expectations for water companies so that Ofwat is able to take this information into account is assessing the effectiveness of a company's whistleblowing procedures in preventing victimisation of whistleblowers.

11. Conclusion

- 11.1. It is hoped that this consultation response provides a valuable contribution to Ofwat's work to ensure that water companies have in place effective whistleblowing arrangements so that: (i) water industry workers are encouraged and know how to raise concerns about wrongdoing; (ii) there are appropriate arrangements in place to investigate their concerns when they do; and (iii) water companies have robust measures in place to prevent any victimisation of whistleblowers.

**Water company former employee
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