

November 2023

# **Decision document – Driving better company performance through clear and effective whistleblowing practices**

## About this document

This document summarises the responses we received to our [consultation on driving better company performance through clear and effective whistleblowing practices](#). We published our consultation on 18 September 2023, and the consultation period closed on 13 October 2023. This document sets out our consideration of the consultation responses we received and our final decision on our good practice whistleblowing expectations. This document should be read alongside those [expectations](#).

[Section 1](#) provides some background to our good practice whistleblowing expectations.

[Section 2](#) provides a summary of the comments we received to our consultation, our response to those comments and our decision on our good practice whistleblowing expectations.

## Contents

1. Background	3
2. Consultation responses	4

## 1. Background

Whistleblowing is when a worker (which includes direct employees and indirect employees such as contractors) raises concerns about improper practices in their workplace – also known as making a disclosure in the public interest. Workers typically have the option of raising their concern either directly with their employer or with a relevant regulator or professional body which is prescribed by legislation to hear concerns about particular sectors or issues, otherwise known as a prescribed person. Ofwat is a prescribed person for disclosures in the water and wastewater services sector, alongside several other bodies that may be relevant, depending on the nature of the concern.

A National Audit Office (**NAO**) report from 2015 recommended that prescribed persons (such as Ofwat) should share expectations of what good whistleblowing policies and procedures look like with the bodies they oversee. Our [strategy for the sector](#) sets out our goal of transforming water companies' performance for customers. Whistleblowing can play an important role in enabling companies and regulators to identify and tackle areas of company performance that need improvement, and in building trust and confidence in how companies are delivering for their customers and the environment.

To inform the good practice expectations we set out in this document, we have researched what is considered to be good practice with respect to whistleblowing, in general and in other regulated sectors, alongside gathering information from water companies and new appointees on their current approach to whistleblowing. This process has demonstrated that there are a range of approaches to whistleblowing and there are some gaps and opportunities for more consistency in approach within the water sector. Our aim is that sharing our good practice expectations will enable companies to reflect on the value of whistleblowing and whether their approach to it is driving the best outcomes for their company and customers

## 2. Consultation responses

We publicly [consulted](#) on our good practice whistleblowing expectations between 18 September and 13 October 2023. We asked the following questions:

- Do you have any comments or concerns about our proposed good practice expectations?
- Is there anything that our expectations do not cover that you consider would be relevant to enabling effective whistleblowing arrangements in water companies?

We received 14 responses to our consultation. Ten of these were from water and sewerage companies. We also received responses from the [Consumer Council for Water](#), [Crimestoppers](#) (an independent charity), a new appointee and an independent person.

Below we summarise the comments we received and our responses to those comments.

Having considered the responses we received to our consultation, we have now published our final good practice whistleblowing expectations on our [website](#).

## 2.1 General comments on the expectations

**Comment:** In addition to water companies and new appointees, the expectations should also apply to retail suppliers (who operate in the business retail market), infrastructure providers, and competitively appointed providers (appointed under direct procurement for customers).

**Response:** Our good practice expectations are drawn from wider practice across many sectors, and are therefore relevant for most companies, inside or outside the water sector. We consider our good practice expectations should apply to all companies that we regulate, and we have now made this clearer in our expectations document. For clarity, we do not directly regulate competitively appointed providers, but we do regulate those companies who contract them.

**Comment:** There is a risk that an overly prescriptive approach to the whistleblowing expectations may impose steps that do not fit the way a company works.

**Response:** We agree that we do not want impose an approach that would restrict the approach a company takes to whistleblowing where this delivers the best outcomes for the company and its customers. We consider the expectations to provide sufficient flexibility for companies to approach whistleblowing in the manner they see fit whilst also being clear on good practice standards.

**Comment:** The expectations of water companies should also be adopted by the Environment Agency (**EA**), Natural Resources Wales (**NRW**), and the Drinking Water Inspectorate (**DWI**).

**Response:** The EA, NRW and DWI are, alongside Ofwat, regulators of the water and sewerage industry in England and Wales. They are also prescribed persons under the Employment Act 1996 which means they have a role to provide workers with a mechanism to make a public interest disclosure to an independent body, where the worker does not feel able to disclose it directly to their employer, and the body may be able to take some form of further action on the disclosure. The EA, DWI, and NRW each have their own arrangements in place for receiving whistleblower complaints. We will notify these organisations of the publication of our expectations document.

## 2.2 Specific comments on the detail of the expectations

**Comment:** The expectations should emphasise both the importance of alternative routes for staff to discuss concerns and the importance of anonymity.

**Response:** We agree that is important that companies have alternative routes in place for staff to raise concerns and we consider Expectation 3 is clear that companies are expected to have in place multiple and alternative channels for staff to speak up. We also agree on the

importance of anonymity as an option for staff when raising concerns. Expectation 4 makes it clear that companies should have a whistleblowing policy that provides clear details on anonymity.

**Comment:** The expectations should make it clearer that whistleblowing policies apply to all employees and other workers.

**Response:** We agree that whistleblowing policies apply to all of a company's workers. We have inserted additional working into the expectations document to make it even more explicit that whistleblowing policies should apply to all employees and other workers including agency workers, contractors, people on work experience or training contracts. We have amended Expectation 4 to draw this out.

**Comment:** The expectations should include companies being transparent about their whistleblowing arrangements such as externally publishing their whistleblowing policies (which would help contractors who may not have the same level of access to internal resources).

**Response:** We agree that companies should be transparent about their whistleblowing arrangements. To this end, we make it clear in Expectation 4 that we expect companies to have in place an accessible whistleblowing policy. This should be accessible to all workers who might have reason to use it. We also make it clear in Expectation 10 that we expect companies to reinforce a culture of "doing the right thing" within their organisation, including by putting in place regular training, communications, and awareness raising for all workers (including contractors) on the importance of whistleblowing. Companies externally publishing their whistleblowing policies may increase accessibility, in particular for staff such as contractors, however, we consider companies should decide how best to make their policy accessible to all their workers. As such, we have not made any further amendments to our expectations to reflect this comment.

**Comment:** The expectations should make it clear 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.

**Response:** We agree that concerns raised about potential wrongdoing should be subject to a thorough and independent investigation. Expectation 6 makes it clear we expect companies to have a clear, simple, process in place to ensure that any disclosures are considered for investigation in an appropriate, sensitive, and effective way; any accompanying concerns are addressed; and feedback is provided.

**Comment:** The expectations should include 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.

**Response:** We agree that it is important that workers will not be victimised for raising a concern about potential wrongdoing. Expectation 2 sets out that we expect companies to have an open and honest culture that includes making it clear that any concerns will be welcomed and providing assurance that they will take concerns seriously and not penalise any worker raising a concern if that concern turns out not to be true. That expectation also sets out that companies should make it clear to workers that it is safe and acceptable for them to raise a concern about malpractice and that disciplinary action will be taken against anyone found to have victimised a whistleblower for raising concerns.

**Comment:** There should be an expectation that water companies draw on relevant resources prepared by whistleblowing charities or other recognised standards setting organisations.

**Response:** We agree that whistleblowing charities, or other recognised standards setting organisations, can provide useful resources. We would expect such resources to be relevant for consideration in how companies, and their Boards, satisfy themselves that their policies and procedures are fit for purpose. Whilst we do not consider it necessary to explicitly state that companies should draw on particular bodies, they can, and do, reach out to those organisations should they wish to, and we signpost such external bodies on our website.

**Comment:** The expectations should include water companies having to assign a non-executive director who is responsible for overseeing their whistleblowing arrangements.

**Response:** We recognise the importance of company Boards providing appropriate scrutiny and oversight of the company's whistleblowing policies and practices, as reflected in in Expectation 8. We also consider, however, that companies should have flexibility in how their Board's decide to do this. As such, we have not made any further amendments to our expectations to reflect this point.

**Comment:** Taking into consideration insight from KPMGs [Whistleblower report](#) from 2022, Expectation 8 should include an expectation that "the Board understands how to act if a concern is leaked to the public. The Board is prepared to handle such a contingency in a way that stands up to regulatory scrutiny and public opinion."

**Response:** It is for companies and their Boards to decide how they handle the leak of any confidential information from their business on a case-by-case basis. Expectation 4 sets a clear expectation that companies should have a comprehensive, accessible, written policy which should include details on how they will handle the confidentiality of whistleblower complaints. Expectation 8 is also clear on what is expected from companies' Boards and Executive teams.



**Comment:** The expectations should require water companies to include a term in any settlement agreement stipulating that workers are not prevented from making a disclosure to a regulator. There should also be an expectation that 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.

**Response:** We understand the point being raised but settlement agreements are legally binding documents and we do not consider we can instruct any party on particular terms for those agreements. Having said this, given the value whistleblowing can provide for improving company performance, we would also not expect companies' to be preventing workers from raising a legitimate concern with a prescribed person should they wish to do so. If customers need more information on settlement agreements, [Protect](#) (the whistleblowing charity) provide some helpful advice.

**Comment:** There should 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.

**Response:** As set out above, settlement agreements are legally binding documents and we do not consider we can instruct any party on particular terms for those agreements.

## 2.3 Comments on enforcing the expectations

**Comment:** The expectations should provide further details and guidance on what would constitute a licence condition breach.

**Response:** Our good practice expectations for whistleblowing practices will not be, in themselves, a licence condition. However, as set out in our consultation document we do consider whistleblowing practices to be relevant to the internal controls a company has to ensure it can fulfil its regulated activities. We have set out that, once published, we would have regard to the expectations if we needed to consider the adequacy of a company's whistleblowing arrangements as part of how it fulfils its wider regulated activities and relevant legal obligations. As set out in our consultation, there have been previous enforcement cases where we have considered the adequacy of a company's whistleblowing culture and processes.

**Comment:** Ofwat should introduce a specific licence condition on whistleblowing expectations, so they are directly enforceable.

**Response:** We do not have any intentions, at this stage, to introduce a specific licence condition on whistleblowing practices. We consider that having an effective whistleblowing

culture and procedures is relevant to the existing obligations of all companies we regulate. Furthermore, we have previously taken enforcement action where the adequacy of a company's whistleblower culture and processes has been a consideration in finding a company in breach of its licence.

**Comment:** The expectations should make it clear that failing to meet the 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.

**Response:** Our good practice expectations are not enforceable obligations in their own right, albeit once published we would likely consider them if we had any whistleblowing concerns as part of an enforcement investigation. We have separately published guidance on our approach to enforcement and financial penalties, which set out details of the factors we would consider as aggravating and mitigating factors when we consider it appropriate to impose a financial penalty for a breach of an obligation we enforce.

## 2.4 Comments on reporting

**Comment:** The expectations should require companies to report annually on how they are meeting the expectations for maintaining and operating clear and effective whistleblowing practices. This requirement should be reflected in the expectations and should include, as a minimum, reporting on the number of whistleblowing concerns raised and investigated (including identifying the number raised anonymously). 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.

**Response:** We agree that it will be important for us and others to understand how companies are reflecting our expectations with respect to their whistleblowing practices. In 2024 we will follow up with companies to understand how they are reflecting the expectations in their own practices. At this stage, we do not consider that this requires regular formal reporting to Ofwat on the number of whistleblowing concerns raised and investigated, but we will revisit this position going forward if necessary.

**Comment:** There should be 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.

**Response:** In our [approach to enforcement](#) document, we set out that if a company finds a possible contravention or fails to meet statutory standards, we expect it to advise us immediately when it becomes aware of any potential problem. In addition, Expectation 7 sets out our expectation that companies should have processes to ensure that all whistleblower

complaints reach a clear conclusion. This may be through steps to directly address a particular concern raised, and/or to take the insight and learning gained from the complaint to inform future business practices. These outcomes should be followed up. We consider this to be sufficient such that if concerns to the public were to arise from a whistleblowing complaint, companies should deal with this in an appropriate manner.

**Comment:** There should be an expectation that water companies provide to Ofwat, on request, copies of any internal or external investigation reports.

**Response:** We do not consider our expectations need to be this prescriptive. We have information gathering powers where we need information to fulfil our functions, including for enforcement purposes, and if we did require any internal or external investigation reports, then we would approach such requests on a case-by-case basis.

**Comment:** The [Financial Conduct Authority \(FCA\)](#) 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.

**Response:** We understand the point being raised and recognise that the FCA has specific [rules and guidance](#) in place on whistleblowing for the companies it regulates including in relation to employment tribunals, with most rules creating binding obligations on companies. In contrast, as set out above, our good practice expectations are not enforceable obligations in their own right, albeit once published we would consider them if we had any whistleblowing concerns as part of an enforcement investigation. With this in mind, at this stage, we are not exploring introducing a requirement for companies to inform us where an employment tribunal finds in favour of a whistleblower when the finding related to a claim that the whistleblower was victimised.

**Ofwat (The Water Services Regulation Authority)  
is a non-ministerial government department.  
We regulate the water sector in England and Wales.**

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