

Unauthorised use of a trade mark guidelines

Response to consultation

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August 2021

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Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to this consultation and to the judges and magistrates who took part in research during the development of the guidelines. Consultation and research are always a vital part of the process of producing sentencing guidelines and in this particular instance consultation responses and the research findings caused us to make some significant changes to the guidelines.

Unauthorised use of a trade mark is an offence that most judges and magistrates will sentence only rarely and this makes it all the more important that the guidelines provide sentencers with a clear but detailed framework for sentencing this unfamiliar offence. It is an offence that most members of the Council had little previous knowledge of and so we were particularly grateful to those with expertise in the investigation and prosecution of the offence who responded to the consultation and provided information and insight which contributed greatly to the development of the guidelines.

Lord Justice Holroyde
Chairman, Sentencing Council

Introduction

From 8 July to 30 September 2020 the Sentencing Council consulted on two proposed guidelines for the offence of unauthorised use of a trade mark contrary to section 92 of the Trade Marks Act 1994; one for sentencing individuals and one for sentencing organisations.

Unauthorised use of a trade mark is an either way offence (one that can be dealt with in magistrates' courts or in the Crown Court). The maximum sentence allowed by law is 10 years' imprisonment and an unlimited fine. There was previously a guideline for sentencing individuals convicted of the offence for use in magistrates' courts, produced by the Sentencing Guidelines Council (SGC)¹ in 2008 but there was no guideline for sentencing organisations and no guidelines for use in the Crown Court.

This is a relatively low volume offence with around 370 adults and 40 organisations sentenced in 2019. It is an offence that sentencers are unlikely to have much experience of sentencing and the Council considered that comprehensive guidelines would therefore be of great assistance.

In developing these guidelines, the Council has had regard to the purposes of sentencing and aims to provide sentencers with a structured approach to sentencing unauthorised use of a trade mark that will ensure that sentences are proportionate to the offence committed and in relation to other offences.

¹ The Sentencing Guidelines Council (SGC) was the predecessor body to the Sentencing Council. SGC guidelines have a different format to Sentencing Council guidelines.

Summary of analysis and research

During the consultation period, 18 interviews were conducted with sentencers (11 magistrates and seven Crown Court judges), with the aim of testing the draft guidelines for individuals and organisations. Sentencers were asked to sentence hypothetical scenarios as they would now and with the draft guidelines.

The research provided valuable information on how the guidelines might work in practice. However, there are limitations to the work (the sample size was small and not necessarily representative, and the scenarios used contained limited information) and as a result the research findings were treated as indicative only and not conclusive.

The research drew attention to some difficulties with applying the draft guidelines but also highlighted the difficulties sentencers face dealing with these cases without a guideline. Overall magistrates preferred the draft guideline for individuals to the existing guideline. In instances where sentencers used the organisations guideline, there was particular emphasis on how it was a significant improvement in the absence of an existing guideline, especially since the cases are sentenced infrequently.

The particular findings that the Council considered in finalising the guidelines post-consultation are set out in the discussion on each guideline below.

Summary of responses

There were 41 responses to the consultation from a wide range of interested parties including those representing magistrates, district judges (MC) and circuit judges; those who investigate and prosecute these offences; academics; legal professionals; trade mark holders from industry and the charitable sector; and anti-smoking organisations.

Breakdown of respondents

Type of respondent	Number of responses
Academic	1
Charity / not for profit organisations	3
Government	2
Judiciary	3
Legal professional	3
Magistrate	22
Member of the public/ unknown	3
Police/ Law enforcement	1
Prosecutor	1
Industry	2

Overview

Most responses were broadly in support of the proposals while suggesting changes. Details of the responses are set out below.

Guideline for individuals

Culpability

In the responses to consultation there was general agreement with the culpability factors, with several respondents approving of the similarity to the fraud culpability factors. However, a significant minority of respondents made suggestions for changes and in road testing a few magistrates and several judges commented on difficulties with the culpability factors.

The culpability assessment consulted on was:

The level of culpability is determined by weighing up all the factors of the case to determine the offender's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

A – High culpability

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Sophisticated nature of offence/significant planning

B – Medium culpability

- A significant role where offending is part of a group activity
- Some degree of organisation/planning involved
- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out **and/or**
 - The offender's culpability falls between the factors as described in A and C

C – Lesser culpability

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of the offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

The Magistrates' Association (MA), the Council of Her Majesty's Circuit Judges (HMCJ) and City of London Police (CLP) all suggested adding a factor relating to the length of time offending had been carried out. The MA and HMCJ both proposed 'activity conducted over a sustained period of time' as a high culpability factor, whereas CLP suggested that this could be a factor even for those in low culpability. In road testing, a judge suggested an aggravating factor relating to the offending having gone on for a long period of time which would indicate that it was 'endemic'. The Council felt there was merit in reflecting that the

length of time over which the offending had taken place could be an indicator of sophistication or planning.

The Association of Chief Trading Standards Officers (ACTSO) were concerned that high and medium culpability appear to assume that the offender is operating as part of a group and noted that 'many counterfeiters [] fall within the category of lone individuals rather than operating within a group.' They suggest adding 'where the offending is conducted independently or as part of a group activity' to the leading role and significant role factors. They were concerned that it would be argued that higher culpability is 'reserved for organised group activities and not the lone individual.' In road testing some magistrates made a similar point noting that the explicit mention of group activity in the factors for category A felt as though it limited their ability to put a sole trader into that category.

The Council noted that the only high culpability factor that did not relate to group offending was 'Sophisticated nature of offence/significant planning'.

The Chief Magistrate suggested that there should be a high culpability factor to cover the offender who trades in goods, knowing that are not manufactured by the trademark holder, and is reckless as to safety, with an even higher penalty if the offender knew that the goods were unsafe. The Council saw the merit of ensuring that offending relating to unsafe goods should be adequately reflected in the sentence but decided that to include this as part of the culpability assessment would risk double counting with the harm assessment. See the discussion on harm below.

Several of the judges in road testing perceived the culpability factors to be very 'general' across both guidelines and lacking specific features that related to trade mark offences - there was a feeling from some that this made it difficult to differentiate between the category levels. The Council recognised that in the context of offences that most sentencers see only very rarely, this can be a particular issue as they have no experience on which to base an assessment of what constitutes 'significant planning' as opposed to 'some planning'.

Several respondents suggested that the forum in which the counterfeit goods were sold was a relevant factor. However, there was little agreement as to whether, for example, it was worse to sell counterfeit goods from a market stall or through a website. One issue that was highlighted by Trading Standards was the use of websites designed to deceive purchasers into thinking that they were buying from a reputable trader.

The Council considered all the suggestions and comments and agreed changes to the high culpability factors. It was decided to reorder the factors so that the factor relating to sophistication and planning comes first. This would make it clearer that high culpability is not reserved for cases of group offending. It was decided to add some non-exhaustive examples of what could indicate a sophisticated offence or significant planning to assist sentencers to identify which cases are captured by this factor. One of the examples is 'offending over a sustained period of time' and another is 'the use of a website that mimics that of the trade mark owner or a legitimate trader'.

The redrafted culpability assessment is:

The level of culpability is determined by weighing up all the factors of the case to determine the offender's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

A – High culpability

- Sophisticated nature of offence/significant planning (examples **may** include but are not limited to: the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, the use of a website that mimics that of the trade mark owner or a legitimate trader, offending over a sustained period of time)
- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation

B – Medium culpability

- Some degree of organisation/planning involved
- A significant role where offending is part of a group activity
- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out **and/or**
 - The offender's culpability falls between the factors as described in A and C

C – Lesser culpability

- Little or no organisation/planning
- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Limited awareness or understanding of the offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm

The Council recognised in the consultation document that the harm model consulted on was 'somewhat complex and nuanced'. Most respondents to the consultation broadly supported the approach but there were various suggestions as to how the model could be improved.

The West London Bench (WLB) suggested that more guidance or examples could be given to assist sentencers in the assessment of harm. They also suggested that the guideline should provide more guidance on what is covered by the term 'general harm' in the harm assessment to enable sentencers to identify what amounts to 'significant additional harm' and that the guideline should provide further examples of significant additional harm. The Council considered that these points were well-made, bearing in mind the fact that most sentencers are unfamiliar with the offence.

An individual respondent queried how the harm categorisation would work in the 'case of small number of products, not necessarily of high value, where there is potential physical harm to an end user unaware that goods are counterfeit'. They also wanted clarification

that 'Purchasers put at risk of significant physical harm from counterfeit items' would cover other end users.

City of London Police were concerned about the burden of proving 'significant' harm and argued that it would be preferable to ask whether the offender had taken steps to satisfy themselves that the items they were selling were safe or not.

ACTSO noted 'It can be difficult to assess retail value of genuine goods in some cases. This may be if there is no retail "equivalent" or where there are large mixed counterfeit goods seizures, including multiple brands and multiple types of items.' They suggested adding wording to the harm assessment 'to specifically mention situations where the value cannot be determined for any reason and in those cases permit the court to make an assessment and assign an equivalent value'.

In road testing the harm model generally met with approval as it was felt to be tailored to the offence. There were some inconsistencies in the harm categorisation, but this was probably due to the way the scenarios were presented rather than to a difficulty in interpreting the guideline. One judge felt that there should be a greater distinction between the types of counterfeit goods: 'When you're dealing with medicines, brake pads, where people can die...that needs to be represented better.'

Another issue that was raised by one judge in road testing and has been noted in a case example provided by Trading Standards is the situation where an offender is selling counterfeit items at a small profit at a price that is a tiny fraction of the retail price of a genuine product. The example seen was a market stall holder selling a watch bearing a high-end logo for £25, where a genuine watch of that brand would retail for £25,000. This would lead to a disproportionately high harm categorisation under the draft guideline consulted on.

As noted above in the discussion on culpability, there were other concerns that the risk of harm from a disregard for safety was not adequately covered by the guideline.

The Council gave considerable thought to how best to ensure that the issues raised were reflected in the guideline. In order to understand better the practicalities of how cases are investigated and prosecuted, the Council drew on the experience of two trading standards experts put forward by ACTSO. They explained that evidence of safety risks would be before the court either in the form of independent testing against safety standards commissioned by Trading Standards; or testing carried out in-house or commissioned by the rights holder which may or may not reference specific safety regulations. Additional charges may be brought for breach of safety regulations but this evidence is often treated as an aggravating feature of the trade mark offence.

The Council concluded that the guideline should reflect the very serious risks to safety that can arise in some cases and that where this is the case even relatively low value cases should normally result in a custodial sentence.

Taking all of the above into account the harm factors were revised as follows:

Harm

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **retail value of equivalent genuine goods** and assessing **any significant additional harm** suffered by the trade mark owner or purchasers/ end users of the counterfeit goods:

1. Where there is evidence of the volume of counterfeit goods sold or possessed:
 - a. the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending.
 - b. Where it would be impractical to assign an equivalent retail value of legitimate versions, an estimate should be used.
2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
 - a. In the case of labels or packaging, harm should be assessed by taking the **equivalent retail value of legitimate goods** to which the labels or packaging could reasonably be applied, taking an average price of the relevant products.
 - b. In the case of equipment or articles for the making of copies of trade marks, the court will have to make an assessment of the scale of the operation and assign an equivalent value from the table below.

Note: the equivalent retail value is likely to be considerably higher than the actual value of the counterfeit items and this is accounted for in the sentence levels. However, in **exceptional** cases where the equivalent retail value is grossly disproportionate to the actual value, an adjustment **may** be made.

The general harm caused to purchasers/ end users (by being provided with counterfeit goods), to legitimate businesses (through loss of business) and to the owners of the trade mark (through loss of revenue and reputational damage) is reflected in the sentence levels at step 2.

Examples of **significant additional harm** may include but are not limited to:

- Substantial damage to the legitimate business of the trade mark owner (taking into account the size of the business)
- Purchasers/ end users put at risk of physical harm from counterfeit goods

Where purchasers/ end users are put at **risk of death or serious physical harm** from counterfeit goods, harm should be **at least category 3** even if the equivalent retail value of the goods falls below £50,000.

	Equivalent retail value of legitimate goods	Starting point based on
Category 1	£1million or more or category 2 value with significant additional harm	£2 million
Category 2	£300,000 – £1million or category 3 value with significant additional harm	£600,000
Category 3	£50,000 – £300,000 or category 4 value with significant additional harm	£125,000
Category 4	£5,000 – £50,000 or category 5 value with significant additional harm	£30,000
Category 5	Less than £5,000 and little or no significant additional harm	£2,500

Sentence levels

The sentence levels in the draft guideline were set with reference to current sentencing practice and are broadly comparable to the sentences for false accounting in the fraud guideline (which has a statutory maximum of seven years' imprisonment).

In 2019, 36 per cent of adult offenders sentenced received a community sentence, 31 per cent received a fine, 17 per cent received a suspended sentence, four per cent were sentenced to immediate custody and five per cent were given a discharge.² In 2019 the average (mean) immediate custodial sentence length (after any reduction for a guilty plea) was 12 months and no sentences exceeded 36 months.

Consultation responses were generally supportive of the proposed sentence levels but with some comments that sentences were too low and fewer comments that they were too high. In road testing several judges felt that sentence levels seemed high compared to other criminal offences.

The changes to harm and culpability discussed above are intended to increase sentence levels for some cases involving unsafe goods, particularly where the value of goods is relatively low, which would meet the concerns of some respondents. The Council noted that for offences in harm category 1 there was no guidance on how to take account of unsafe goods (or other additional harm) and so the following wording has been added above the sentence table:

'For offences where the equivalent retail value is £1 million or more an upward adjustment within the category range should be made for any significant additional harm.'

In A1 the starting point is 5 years and the range consulted on was 3 to 6 years. The Council considered that this would not leave enough scope to reflect any additional harm and, for example, previous convictions in an appropriate case. The range for A1 has therefore been increased to 3 to 7 years. This higher sentence is likely to apply in very few cases but will provide courts with the ability to sentence very serious cases without going outside the guideline.

Aggravating and mitigating factors

There was general agreement with the aggravating and mitigating factors consulted on with some respondents making suggestions for changes.

One issue that was raised by respondents was that of financial gain. The assessment of harm does not take into account the level of profit that the offender has made or expects to make, though it follows that the potential for gain is higher in cases where the harm level is higher. The Council considered including a reference to this at step 1, but concluded it would be better dealt with as a step 2 factor.

The Council decided to add an aggravating factor of:

'Expectation of substantial financial gain'

² The remaining six per cent were recorded as 'otherwise dealt with'.

And balancing mitigating factor of:

‘Expectation of limited financial gain’

Several respondents commented on the mitigating factor ‘Business otherwise legitimate’, pointing out that this could be an aggravating factor if the legitimate business was used to facilitate or mask unlawful trading. In view of the fact that this factor could aggravate or mitigate depending on circumstances, the Council decided to remove it.

Steps 3 to 8

There was evidence from the research and consultation responses that magistrates often did not understand the difference between confiscation and forfeiture orders at step 6. Respondents variously suggested that the guideline should make it clear that if confiscation is being considered the case must be committed to the Crown Court; that there should be more information about disqualification as a company director and deprivation orders; and that the information on s97 forfeiture order could be re-worded to make it more understandable. Trading Standards also suggested clarifying that the valuation for confiscation purposes will not be the same as the equivalent retail value used in the guideline to assess harm.

Taking these points into account the Council decided to revise step 6 to read:

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

Where, following conviction in a magistrates’ court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates’ court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). Where, but for the prosecutor’s application under s.70, the magistrates’ court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates’ court.

(Note: the valuation of counterfeit goods for the purposes of confiscation proceedings is not the same as the valuation used for the purposes of assessing harm in this sentencing guideline.)

Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order** and must give reasons if it does not do so ([section 55 of the Sentencing Code](#)).

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

Forfeiture – section 97 of the Trade Marks Act 1994

The prosecution may apply for forfeiture of goods or materials bearing a sign likely to be mistaken for a registered trademark or articles designed for making copies of such a sign. The court shall make an order for forfeiture only if it is satisfied that a relevant offence has been committed in relation to the goods, material or articles. A court may infer that such an offence has been committed in relation to any goods, material or

articles if it is satisfied that such an offence has been committed in relation to goods, material or articles which are representative of them (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

The court may also consider whether to make other ancillary orders. These may include a [deprivation order](#) and [disqualification from acting as a company director](#).

Guideline for organisations

Step 1 – Compensation and Step 2 – Confiscation

There were several comments from respondents and from sentencers in research to the effect that steps 1 and 2 in the guideline for organisations were confusing. Magistrates often misunderstood what was meant by confiscation, thinking that it was the same as forfeiture. One judge commented that these steps seemed to be in the wrong place.

The reason that these steps must be considered first in this guideline is because the penalties for organisations will always be financial and courts must consider financial orders in a particular order. To explain this on the face of the guideline the following wording has been added before step 1:

Note The penalties in this guideline for sentencing organisations are financial. Courts are required to consider financial penalties in the following order:

- compensation (which takes priority over any other payment);
- confiscation (Crown Court only);
- fine

Therefore, in this guideline the court is required to consider compensation and confiscation before going on to determine the fine

As discussed above in relation to step 6 of the guideline for individuals, the Council recognised that the wording relating to confiscation could be clearer and the wording for steps 1 and 2 has been revised as follows:

Step 1 – Compensation

The court must consider making a [compensation order](#) requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

Reasons should be given if a compensation order is not made ([section 55 of the Sentencing Code](#)).

Step 2 – Confiscation

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the **Crown Court**. Confiscation must be considered by the Crown Court if either the prosecutor asks for it or the Crown Court thinks that it may be appropriate.

Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.

(Note: the valuation of counterfeit goods for the purposes of confiscation proceedings will not be the same as the valuation used for the purposes of assessing harm in this sentencing guideline.)

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

(See Proceeds of Crime Act 2002 sections 6 and 13)

Culpability

The culpability factors consulted on were similar to those in the guideline for individuals. In responses to the consultation and in research with sentencers there was some uncertainty about how to assess the level of organisation or planning in order to distinguish between high and medium culpability. Several respondents reiterated the comments made about the culpability factors in the guideline for individuals. As with that guideline, the Council has added examples to the first high culpability factor to address those concerns and assist with the assessment.

Two respondents queried the concept of an organisation being coerced in the low culpability factor 'Involvement through coercion, intimidation or exploitation'. While this would rarely apply (it may be unlikely that a prosecution would be pursued in such circumstances), the factor does appear in other guidelines for organisations and balances out the equivalent high culpability factor. The Council therefore decided to retain it. The revised culpability factors are:

Culpability

The level of culpability is determined by weighing up all the factors of the case to determine the offending organisation's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

A – High culpability

- Organisation plays a leading role in planned unlawful activity, whether acting alone or with others (indicators of planned activity **may** include but are not limited to: the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, the use of a website that mimics that of the trade mark owner or a legitimate trader, offending over a sustained period of time)
- Involving others through pressure or coercion (for example employees or suppliers)

B – Medium culpability

- Organisation plays a significant role in unlawful activity organised by others
- Some degree of organisation/planning involved
- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out and/or
 - The offending organisation's culpability falls between the factors as described in A and C

C – Lesser culpability

- Organisation plays a minor, peripheral role in unlawful activity organised by others
- Involvement through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of the offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm

The harm assessment in the two draft guidelines was identical and therefore the comments about harm factors were the same as those made for the guideline for individuals. Any changes made to the guideline for individuals apply equally to this guideline. This will ensure that if an individual and an organisation are sentenced together the same assessment of harm will be used in both cases.

Sentence levels

Consultation responses were generally supportive of the proposed sentence levels, although some made comments that the sentences seemed low compared with the sentences for individuals. One respondent pointed out some apparent inconsistencies in the sentence table. In summary they suggested changing the starting point for 2C to

£25,000 (from £30,000) and changing the category range for 5A to £5,000 - £25,000 (from £5,000 - £30,000). The Council agreed that these proposed changes were sensible and has adopted them.

Aggravating and mitigating factors

Most respondents to the consultation agreed with the proposed aggravating factors and in research with sentencers they were generally applied consistently and as expected. As with the guideline for individuals the Council decided to remove the mitigating factor 'Business otherwise legitimate' because it could represent either mitigation or aggravation depending upon circumstances.

An aggravating factor of 'Expectation of substantial financial gain' has been added in line with the guideline for individuals. The guideline for organisations already had a mitigating factor 'Little or no actual gain to organisation from offending'. This is different from the wording in the guideline for individuals ('Expectation of limited financial gain') to prevent an organisation that had made an indirect gain, for example where the offending resulted from a lack of training or supervision, relying on this factor in mitigation.

Step 5 – Adjustment of fine

This step was supported by most respondents who commented on it and in research one judge commented:

'I commend Step 5 – I think it is a clear and useful section in the guideline, which is actually very clear in its effect.'

One suggestion from the Council of District Judges (Magistrates' Courts) was that step 5 should include a reminder that the sentence levels at step 4 are based on an offending organisation with an annual turnover of not more than £2 million. The Council agreed and has added the following:

Note the fine levels above assume that the offending organisation has an annual turnover of not more than £2 million. In cases where turnover is higher, adjustment may need to be made including outside the offence range.

Steps 6 to 10

As with the guideline for individuals the wording relating to forfeiture (at step 9 of this guideline) has been revised to make it clearer.

Impact of the changes

Resource impact

Overall, it is expected that the guidelines for individuals and organisations will encourage consistency of approach to sentencing and will not change average sentencing severity for most cases. However, there may be some increases in custodial sentence lengths for individuals sentenced for the most serious types of cases and some increase in the use of custody for cases of low value but high risk of serious harm. This is explored in more detail in a [resource assessment](#) published by the Council.

Equality and diversity

As a public body the Council is subject to the Public Sector Equality Duty (PSED) which means it has a legal duty to have due regard to:

- the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010;
- the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not;
- the need to foster good relations between those who share a “protected characteristic” and those who do not.

Under the PSED the relevant protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

Alongside the draft guidelines the Council published information on the demographic makeup (specifically age, ethnicity and sex) of offenders but as was noted in the consultation document, there are limitations on the reliability of the demographic data and there was very little information recorded on the ethnicity of offenders. This means that there is no evidence one way or the other about sentencing disparity between different demographic groups and so no specific information on this point can be included in the guidelines.

The consultation sought suggestions from respondents as to how any issues of equality and diversity could be addressed by the guidelines but in the absence of any evidence no suggestions were forthcoming.

As noted in the consultation document, all guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Issues of equality and diversity are kept under review by the Council and guidelines may be revised at a later date should evidence emerge of matters that can be addressed.

Conclusion and next steps

As a result of the consultation the Council has made the changes set out in the sections above. The amended versions of the guidelines and explanatory materials are published on the Council's website (<https://www.sentencingcouncil.org.uk>) on 5 August 2021 and come into force on 1 October 2021.

The final resource assessment is published on 5 August 2021 on the Council's website.

Following the implementation of the definitive guidelines, the Council will monitor their impact.

Consultation respondents

Action on Smoking and Health (ASH)

Alan Atkinson

Alistair Borland

Anon

Association of Chief Trading Standards Officers

B A Pimblett

Bert O'Donoghue

Charles Mills

Chris Philp MP, Parliamentary Under Secretary of State, Ministry of Justice

City of London Police

Council of HM Circuit judges

Criminal Law Solicitors Association (CLSA)

David King

Debbie Gibbs

Dogs Trust

E Smithson

Fiona McDougal

Fresh

Gillian Winn

GlaxoSmithKline

Greater Manchester Magistrates Bench

Guy Cecil

Heather Rothwell

HM Council of District Judges (MC)/ The District Judge Magistrates' Courts Bench of England & Wales

Ian Pearson

Insolvency Service

International Trademark Association (INTA)

Jean Watt

Justice Legal Advisers' and Court Officers Service

Law Society

Magistrates' Association

Michael Woodhouse

Nigel Barnes

Oxford Magistrates Bench

Paul Heywood

Robert Merrett

Senior District Judge (Chief Magistrate)

Sentencing Academy

South Derbyshire Magistrates

West London Bench

West Yorkshire Bench

