

## **Transition to Adulthood Alliance response to the Sentencing Council's consultation on the revised Drugs Offences Guidelines, May 2020**

The Transition to Adulthood Alliance appreciates the opportunity to respond to this consultation.

The Transition to Adulthood (T2A) Alliance evidences and promotes effective approaches for young adults (18-25) throughout the criminal justice process. It is an alliance of 12 leading criminal justice, health and youth organisations: Addaction, Care Leavers' Association, Black Training and Enterprise Group, Catch22, Centre for Crime and Justice Studies, Clinks, Criminal Justice Alliance, the Howard League for Penal Reform, Nacro, Prisoners Education Trust, Prison Reform Trust, Police Foundation, Revolving Doors Agency, Together for Mental Wellbeing. T2A is convened and funded by the Barrow Cadbury Trust. T2A has contributed to positive change in policy and practice and at central and local levels, its evidence has informed service redesign and delivery nationally and internationally.

We focus our response on questions 24-26.

### **24. Do you consider that there are any ways in which the factors in the draft guidelines, or the ways in which they are expressed could risk being interpreted in ways which could lead to discrimination against particular groups? 25. Are there any other equality and diversity issues the guidelines should consider?**

We have examined with interest the statistical bulletin published alongside the revised guideline and the separate assessment of impact and implementation of the current guideline published in 2018. We were disappointed to see that there is no analysis by age included in either of these documents, although we welcome the fact that some data is available in both the related tables and in the additional research conducted by the Council on sex and ethnicity. Given the findings of ethnic disproportionality in sentencing outcomes in the latter and the potentially confusing array of assessments of the guideline, we suggest it would be helpful to cross-reference the sex and ethnicity research in the statistical bulletin and on webpages where the impact and implementation assessment can be accessed.

One of the Sentencing Council's statutory duties under the Coroners and Justice Act 2009 is to monitor the operation and effect of its sentencing guidelines and to draw conclusions from this information. We believe that this duty should be undertaken with reference to the Equalities Act 2010 to ensure that the guidelines do not inadvertently contribute to disproportionality in sentencing related to protected characteristics. While we welcome the additional research on sex and ethnicity it is regrettable that such analysis is not undertaken about the impact of guidelines as a matter of course and that there is no equivalent analysis related to the protected characteristic of age. The Council states in the assessment of impact and implementation that

"It should be noted that this is a high-level analysis which focuses on offenders as an aggregate group, rather than looking at separate demographic subgroups (because the guideline did not aim to change sentencing practice for any particular demographic group)."

We do not consider that that the aim of the guideline should be the sole reason for conducting additional analysis and that as a public body it should seek actively to monitor the impact of guidelines on demographic groups with protected characteristics.

In its consultation on revising the guidelines, the Council asks specifically "whether any of the factors in the draft drug offences guidelines, or the language used, could impact disproportionately on different social groups".

In relation to age, T2A is concerned that the way in which the data is presented in the statistical tables accompanying the statistical bulletin means that it is not possible to break data down according to the Council's own definition of young adulthood as specified in the *General guideline: overarching principles*. That Guideline --under the mitigating factor of age and/or lack of maturity-- defines young adults as typically aged between 18 and 25. The data included in the statistical tables differentiates between 18-21 and 22-29 year olds. (An analysis by Revolving Doors Agency has identified different sentencing patterns for 18 to 24 year olds, attached as Annex A).

Without such data it will not be possible to monitor the impact of guidance on the young adult cohort which the Council itself has acknowledged is distinct on the basis of neurological maturational development. We propose that this group should therefore be given dedicated consideration in line with the protected characteristic of age under the Equality Act 2010. Young adults represent a significant proportion of people sentenced for drug offences; accounting for 33% (4,534) of those sentenced for drugs offences in 2018. Almost half (5,997) of those sentenced for cannabis possession offences are under the age of 24. In 2018, 258 people were given a short-term prison sentence of six months or less for cannabis possession. Of those, 40% were aged between 10-24 years old<sup>1</sup> (5 people =10-17yrs, 99 people =18-24 yrs).

The Council states on page 9 that it has used the evaluation and other sources of research evidence to analyse which factors in the existing guideline are currently being used as expected, and whether any factors are causing problems for sentencers given the nature of drug offending that comes before them in the courts today. As there is no mention in the consultation of whether the use of the mitigating factor of 'age and/or lack of maturity' was problematic, it is not clear whether the use of this factor was explored as part of the research for the revisions to this guideline. We presume not. Neither is it clear from the evaluation how that factor is being used by sentencers for drugs offences. We propose that the Council undertakes further research on the use of this factor in these guidelines and others as recommended by the Justice Select Committee in its report *The treatment of young adults in the criminal justice system* in 2016.

We make a few other observations about the changes to the guidelines and how they might affect young adults.

- We note that there are significant changes to the assessment of culpability in relation to whether perpetrators have played a leading role, significant role, lesser role. We welcome this and the recent significant shift in understanding of the nature of such criminality and the role of exploitation in the commission of drug related offences involving others, typically those who are younger and more vulnerable. We hope that, where appropriate, sentencers will apply these to young adults who may be more susceptible to intimidation and coercion by virtue of their psycho-social maturity. It should be borne in mind that some young adults involved in such offending may not be significantly more mature than under 18s who may be

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<sup>1</sup> The Ministry of Justice. (2019) [Criminal Justice System statistics quarterly: December 2018 – Outcome by offence data tool](#).

more likely to be considered vulnerable (or indeed victims of modern slavery under s.45 of the Modern Slavery Act 2015) by virtue of their age. In addition, young adults may themselves have been exploited before this became a policy priority and may not now have reached the current position they occupy within the supply chain, in which they might be seen as a significant or leading role, had they been identified as having been exploited at a younger age. Understanding these dynamics fully in the context of individual cases will not be straightforward and may be challenging to evidence satisfactorily to enable a sentencer to make an accurate judgment. In this regard, sentencers would benefit from receiving assessments for maturity, which should be a mandatory requirement for pre-sentence report drafted by probation services for all young adults. We hope that the new guideline will be accompanied by additional training for sentencers which would reflect some of the complexities they may encounter in adopting such a change in approach. Case studies are included in some guidelines which might prove beneficial in this instance. In addition, T2A proposes that the Sentencing Council should therefore monitor the impact of this change in approach especially carefully, with a particular focus on age and ethnicity.

- In relation to consideration of mitigating or aggravating factors for the commission of offences in prison we propose that the court should take into account both whether or not those involved have had their maturity levels assessed and whether or not they have received developmentally appropriate provision to address their offending (including their drug use, if relevant) in custody.
- In relation to calculating harm by financial disadvantage, legitimate opportunities are not easily available for some groups of young adults. Young adults typically have access to lower levels of legitimate income due to lower wages, including the minimum wage, and lower levels of benefit entitlements. This is noted in the Equal Treatment Bench Book which could be usefully cross-referenced in the guideline.
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- T2A welcomes the proposition of the use of community sentences for people who are out of custody seeking treatment for their own substance misuse problems. Giving custodial sentences to those who have already begun treatment voluntarily could do more harm than good. Prison offers greater exposure to poorer health outcomes and increased availability of synthetic cannabinoids within prisons with the added risk of getting into debt. There is also an increased risk of an opioid overdose during the immediate post-release period due to reduced tolerance levels. As Her Majesty's Chief Inspector of Prisons found in his 2018/19 Annual Report 'the appalling impact of illicit drugs, particularly new psychoactive substances (NPS) had been underestimated and as a result many prisons were still suffering from the debt, bullying and violence they generated'<sup>2</sup>. Nevertheless, we note that there is a lack of access to community-based treatment due to reductions in funding, which has fallen by a quarter since 2015, including specific services for younger people<sup>3</sup>. We are concerned that where drug treatment is not available to the court this is likely to affect sentencing outcomes and could potentially disproportionately impact different groups. We call on the Sentencing Council to pay particular attention to monitoring this aspect of the

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<sup>2</sup> HMI Prisons. (2019) [HM Chief Inspector of prisons for England and Wales: Annual report 2018-2019](#).

<sup>3</sup> Finch, D., Bibby, J., and Elwell-Sutton, T. (2018) [Briefing: Taking our health for granted – plugging the public health grant funding gap](#), *The Health Foundation*.

implementation of the guidelines for drug offences, where relevant, and to publish the results at the earliest opportunity.

**26. Do you have any views on reasons behind the disparities in sentencing highlighted by our published research? Do you consider that these reasons may be different for the disparities between white and ethnic minority offenders and those between men and women?**

The Council states that it has "agreed that, based on the evaluation and evidence from sentencers thus far, there is no evidence to suggest that a change in sentencing practice is required. The Council does not therefore intend the revised guidelines to change sentencing practice overall." David Lammy MP who was commissioned by the Ministry of Justice to undertake a review of disproportionality in the criminal justice system concluded that criminal justice institutions should better monitor disproportionality and where it is present to 'explain' or 'reform'; neither of the latter appears to have happened in this case. The Council's research did not identify reasons for the ethnic disparities in sentencing outcomes and this disproportionality has therefore not been addressed in the revised guideline. It is time to work from the premise that the differences occur due to unintentional biases demonstrated by sentencers. JUSTICE has recently published an updated report on judicial diversity<sup>4</sup> indicating that progress has remained slow and urges large scale structural and cultural change to deliver a more diverse judiciary. We welcome the Council's effort to address differential sentencing in the questions for this consultation. This consultation might reveal reasons which require more research or further revision to the guidelines. It is important that in future the Council monitors this and seeks explanation from the outset of the implementation of the new guidelines.

In addition the analysis by Revolving Doors Agency attached as Annex A shows that there has been a reduction in the use of community sentences and fines with an increase in use of custody for young adults for drug offences. The Council should actively monitor and amend the guidelines should the use of immediate custody disproportionately affect individuals based on their age or race.

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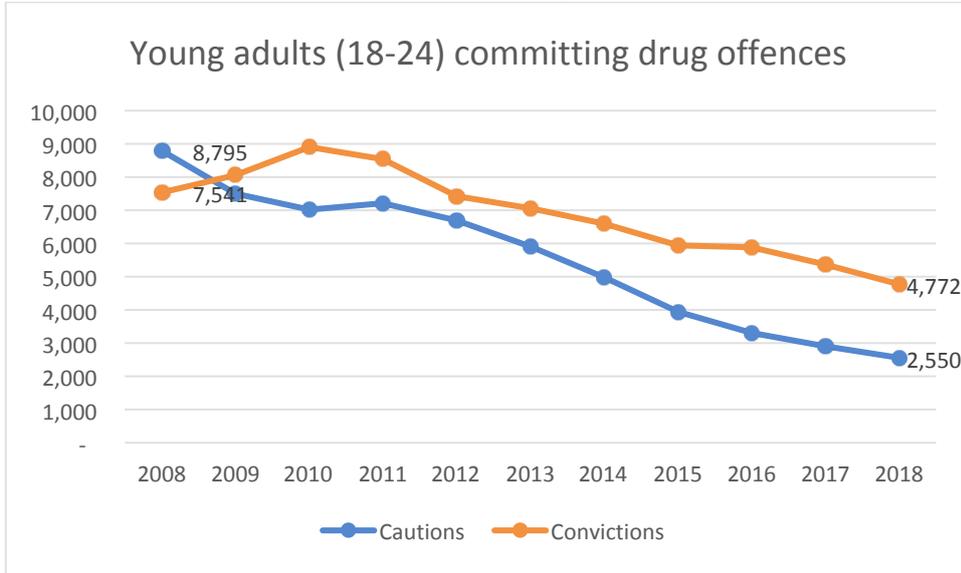
<sup>4</sup> Lieven, N. (2020) [Increasing judicial diversity: An update](#), *Justice*.

**Annex A**

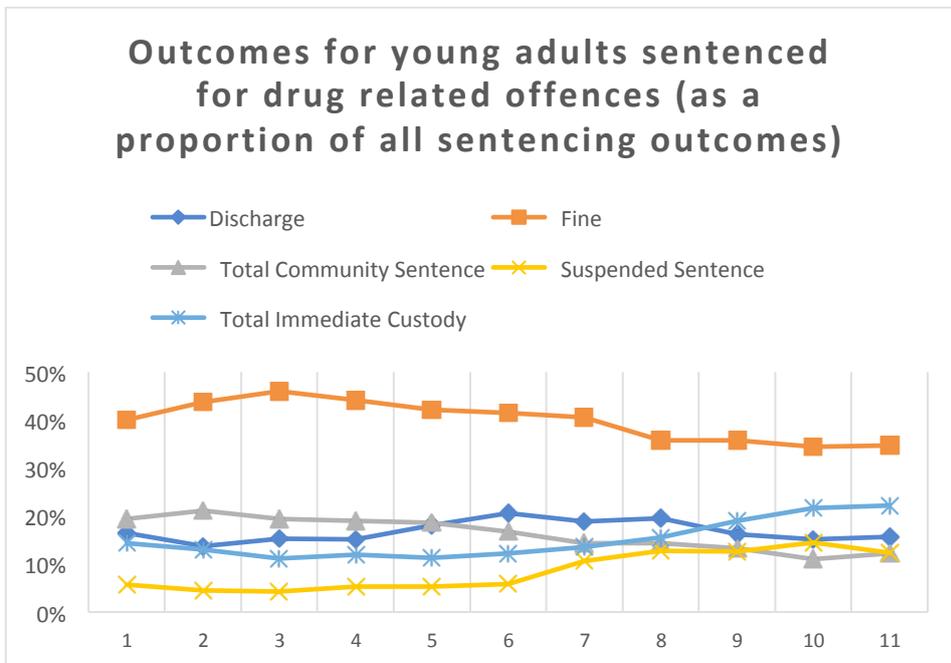
The analysis was developed by the Revolving Doors Agency based on MoJ Outcomes by Offence data tool.

**Young adults and drug offences**

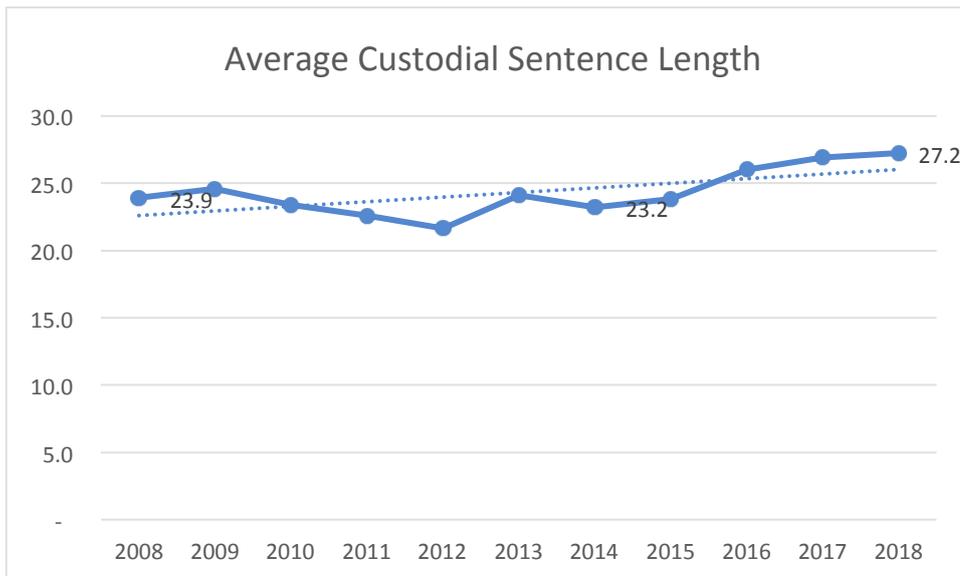
Last year 7,322 cautions and convictions were handed to young adults (18-24) for drug related offences. This is down from 16,336 a decade ago.



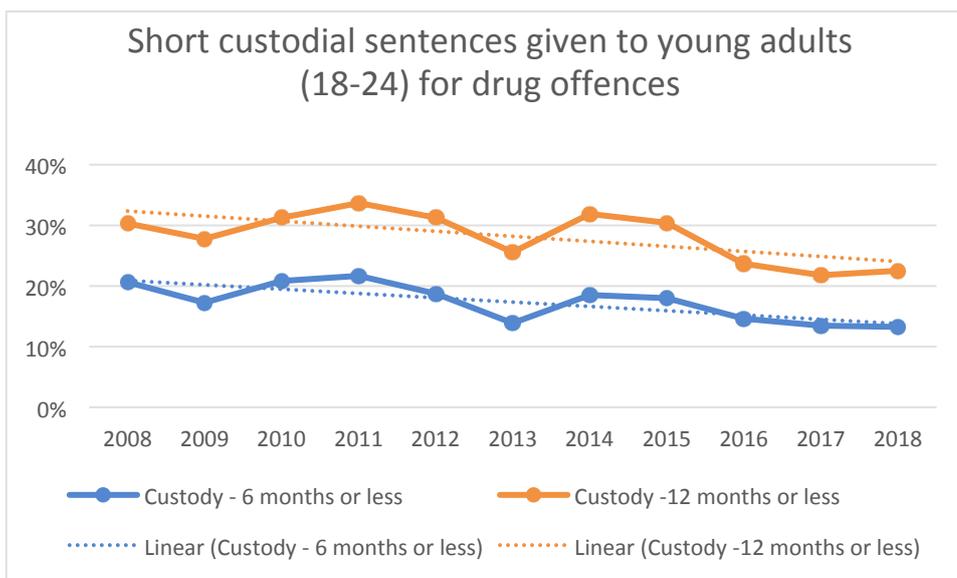
This reduction is consistent with the broader criminal justice trends, and young adults are still over-represented among those who receive a caution or conviction for drug related offences at 14% (i.e. 1.4 times more likely than an adult over 25 to receive a criminal record for drug related offences)



- The most common disposal type for young adults sentenced for drug offences is fines. However, the use of fines for drug offences has decreased in the last decade (from 40% in 2009 to 35% in 2018).
- The use of custodial sentences for this population has been steadily increasing over the last decade (up from 14% to 22%), in contrast the use of community sentences have been decreasing at almost the same rate (19% in 2009 to 12% in 2018).
- The average custodial length given to young adults for drug related offences has increased from 23.9 months to 27.2 months in the last decade. This rate has clearly fluctuated in the last decade - but consistently rising in the past five years.



- The use of short custodial sentences for drug offences have been steadily decreasing among this population over the past decade. Yet still nearly a quarter (23%) serve a short prison sentence of 12 months or less.

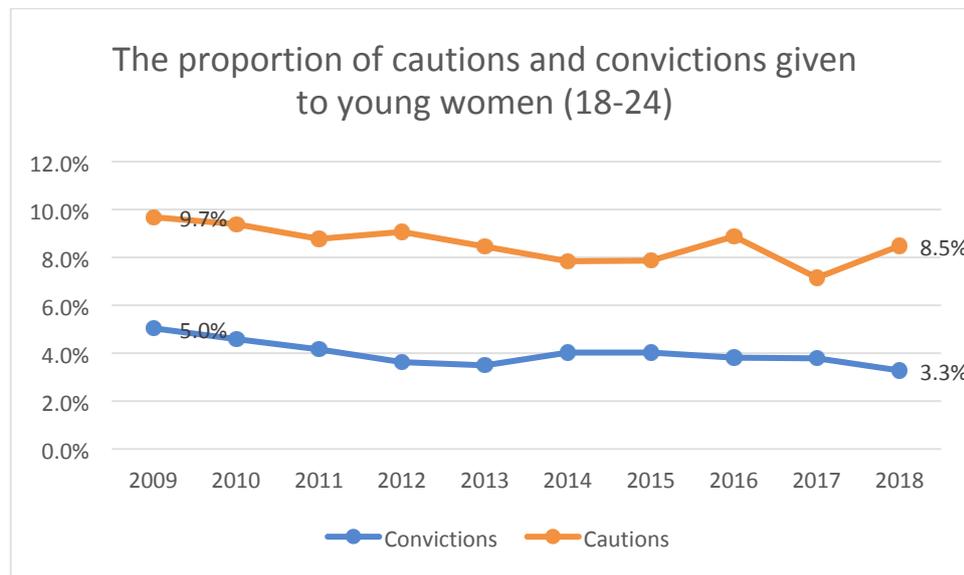


### Ethnic disproportionality in drug offences for young adults

- BAME young adults 4 times and black young adults are 14 times more likely than white young adults to be sentenced for drug offences.
- Over two fifths of young adults given an immediate custodial sentence are BAME. BAME young adults are 5 times more likely than white young adults to be given an immediate custodial sentence.
- A quarter of young adults given an immediate custodial sentence are black. Black young adults are 20 times more likely than white young adults to be given an immediate custodial sentence
- Black young adults tend to serve longer sentences, about 12% higher than average
- Black young adults are twice as likely to serve sentences over 12 months compared to white young adults.
- Proportion of short custodial sentences under 12 months for black young adults constitute 2.7% of all immediate custodial sentences given to young adults.

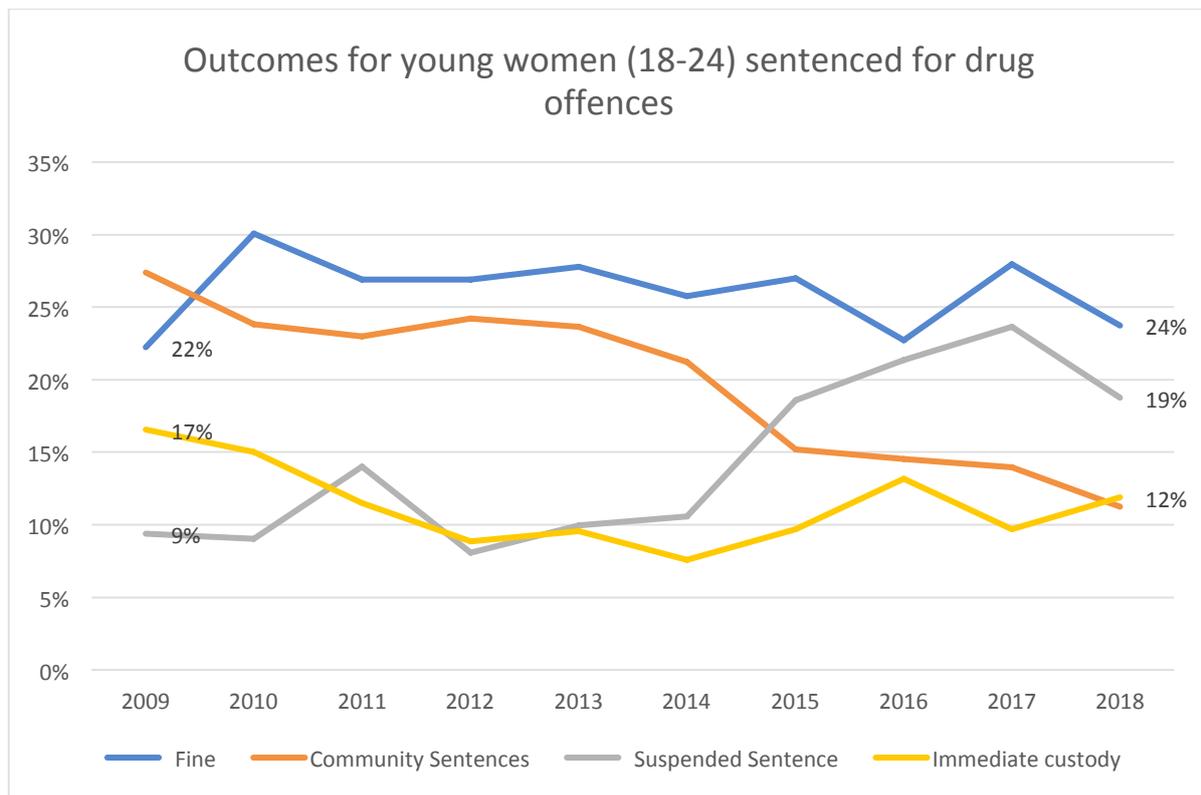
### Gender in drug offences for young adults

- The number of cautions and convictions for drug offences given to young women aged 18-24 have steadily been decreasing in the last decade for which the data is available (Cautions given to young women reduced from 726 in 2009 to 216 in 2018; convictions given to young women reduced from 406 in 2009 to 156 in 2018). This is consistent with the broader trends across population.
- The significant majority of cautions and convictions for drug offences affect young men. Young women (aged 18-24) are less likely to receive a caution or a conviction for drug offences now than they did a decade ago.



## Sentencing outcomes

- The most likely outcome for young women sentenced for drug related offences is receiving a fine. This has remained the most likely outcome over the last decade (from 22% of all sentencing outcomes in 2009 to 24% in 2018).
- The proportion of community sentences given to young women aged 18-24 for drug related offences have more than halved in the last decade (27% in 2009 to 11% in 2018)
- The proportion of suspended sentences given to young women aged 18-24 for drug related offences have more than doubled in the last decade (9% in 2009 to 17% in 2018).



- The proportion of immediate custody as a sentencing outcome for young women aged 18-24 have decreased from 17% to 12% in the last decade.
- In 2018, the average custodial sentence length for women and men in this age bracket were nearly the same (27.3 for men and 27.0 for women). While the average custodial sentence length (and the female/male ratio) has varied quite significantly over the last decade, this is broadly a positive trend for young women (18-24) who used to receive 126% longer sentences than young men (18-24) a decade ago.
- 1 in 10 (11%) young women (aged 18-24) sentenced to immediate custody for drug offences serve short prison sentences for six months or less.
- 1 in 5 (21%) young women (aged 18-24) sentenced to immediate custody for drug offences serve short prison sentences of or under 12 months.
- Young men are slightly more likely to serve short custodial sentences for drug related offences than young women. (23 vs 21 per cent for sentences under 12 months; and 13 vs 11 per cent for sentences under 6 months).