



Sunset Advisory Commission  
PO Box 13066  
Austin, Texas 78711

November 12, 2024

*Via electronic submission*

Dear Sunset Commission:

FAMM respectfully writes to submit the following recommendations as the Texas Department of Criminal Justice (TDCJ) undergoes Sunset Review.

FAMM is a national nonpartisan, nonprofit organization that advocates for sentencing and prison policies that are individualized and fair, protect public safety, and preserve families.

The Texas Department of Criminal Justice has long struggled to adequately staff prisons. TDCJ notes in their own assessment that it cannot serve all their functions adequately with the current staff to population ratios. This chronic challenge is a nexus to nearly every other issue within the Department identified by the Sunset Report. Without effective change to policies, public safety and the mission of TDCJ are, and will remain, compromised.

TDCJ has attempted a number of strategies to remedy chronic staff shortage without success.<sup>1</sup> Additionally, in April 2022, the Legislature enacted a 15% pay increase for correctional staff.<sup>2</sup> In the 2023 legislative session, TDCJ's appropriation for fiscal year 2024-2025 included \$374.8 million to continue funding the raise.<sup>3</sup> As of December 2023, approximately 6,000 positions remain vacant.<sup>4</sup> It is clear that Texas cannot simply pay their way out of this problem.

While Texas continues to work to recruit and retain correctional staff, the legislature should pursue policies to safely reduce the prison population. Second look and medical release laws can restore the staff to incarcerated persons ratio to optimal levels by identifying and releasing people whose continued incarceration no longer serves the interest of justice. The very essence of the Sunset Commission is to re-evaluate programs and agencies and determine if their need is still merited. The same process can and should be applied to excessive prison sentences. We recommend that this Commission prioritize expanding compassionate release and adopting second look mechanisms to alleviate the staffing crisis.

Additionally, Texas can work towards safer and healthier environment in its prison for both staff and correctional staff by adopting independent prison oversight legislation that allows for regular inspections of state prisons and investigations of complaints from both staff and incarcerated individuals into issues impacting the health, safety, and wellbeing of people who live and work in Texas' prisons.

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<sup>1</sup> Molly Petchenik. Abolitionist Prison Litigation. 133 Yale L. J. Forum (Nov. 22, 2023), <https://www.yalelawjournal.org/forum/abolitionist-prison-litigation-1>

<sup>2</sup> Correctional Officer Pay Increase, Effective April 1, 2022, TEX. DEP'T OF CRIM. JUST., [https://www.tdcj.texas.gov/news/co\\_pay\\_increase.html](https://www.tdcj.texas.gov/news/co_pay_increase.html).

<sup>3</sup> FY2024-25 Exceptional Items, TEX. DEP'T OF CRIM. JUST., [https://www.tdcj.texas.gov/documents/bfd/LAR\\_2024-25\\_Exceptional\\_Item\\_Listing.pdf](https://www.tdcj.texas.gov/documents/bfd/LAR_2024-25_Exceptional_Item_Listing.pdf).

<sup>4</sup> 16 Legislative Budget Board. Texas Department of Criminal Justice. Adult and Juvenile Corrections Monthly Population Report. (Jan. 30, 2024), <https://www.lbb.texas.gov/CJDA/site/TDCJ.html>

## **Expanding Medically Recommended Intensive Supervision Program:**

In 2022, FAMM released report cards grading medical release policies in all 50 states, including Texas' Medically Recommended Intensive Supervision Program (MRIS). The MRIS program allows the Texas Board of Pardons and Parole to place certain people with serious and terminal health issues on supervision. While the MRIS received a B grade, scoring 86/100 we have identified three key areas of improvement to allow Texas to safely release more people whose continued incarceration is no longer justified due to their medical conditions.<sup>5</sup>

First, the MRIS program defines terminally ill as someone who is expected to die within six months. Using a prognosis of no more than six months to live is a disservice to both the patient and the physician. Physicians say that accurately predicting how much time a person has left to live is elusive; the science is inexact, and predictions are unreliable. Furthermore, physicians are often reluctant to prognosticate and, when they do, they more often than not significantly overestimate the time left to live.<sup>6</sup> This in turn leaves the patient, physician, TDCJ, and the Texas Board of Pardons and Parole with much less time to act than they believe. Ideally, the program would define terminally ill patients as those on an "end of life trajectory" although increasing that definition to people where death is expected within 18 or 2 months would be an improvement.

Additionally, eligibility for consideration based on chronic disability requires substantial functional limitation in three or more major life activities (eating, toileting, grooming, etc.) and the need for lifelong support. While it is important that MRIS includes eligibility for people with diminished capabilities, these criteria are too narrow. Requiring someone to wait until they have lost the ability to carry out multiple activities of daily living may result in needless suffering and is out of step with other jurisdictions' criteria. Eligibility can safely be broadened to identify people earlier in the progression of their illness. For example, Alabama considers people to be eligible if they are unable to complete one or more activities of daily living.<sup>7</sup>

Finally, categorical limitations on eligibility prevent many cases from even being considered. There are several exclusions, of varying severity, depending on sentence or offense type. MRIS should be made available to as many incarcerated people as possible.

Expanding these parameters in the MRIS program would increase its effectiveness. Every year the number of incarcerated people greying into their senior years is growing. This population presents the TDCJ complex and expensive medical challenges. This demographic is the least likely to reoffend and the most costly to continue incarcerating.<sup>8</sup>

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<sup>5</sup> FAMM Compassionate Release Report Card, 2022, [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://fammm.org/wp-content/uploads/2022/10/tx-report-card-final.pdf](https://fammm.org/wp-content/uploads/2022/10/tx-report-card-final.pdf)

<sup>6</sup> Brie Williams et al., For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies, Health Affairs Blog, Health Affairs (Feb. 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170206.058614/full/>

<sup>7</sup> FAMM Compassionate Release Memo: Alabama. [https://fammm.org/wp-content/uploads/2018/06/Alabama\\_Final.pdf](https://fammm.org/wp-content/uploads/2018/06/Alabama_Final.pdf)

<sup>8</sup> See KiDeuk Kim & Bryce Peterson, Aging Behind Bars: Trends and Implications of Graying Prisoners in the Federal Prison System 21-22 (Washington DC: Urban Institute, 2014), <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF>; see also Office of the Inspector General, U.S. Dep't of Justice, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons 38-41 (Feb. 2016), <https://oig.justice.gov/reports/2015/e1505.pdf>.

## **Adopting second look mechanisms:**

As a result of excessive sentencing policies many people are languishing in prison far beyond the needs of rehabilitation and public safety. Second look mechanisms provide an opportunity to reevaluate the original sentence and determine if it is still merited. We advocate for Second Look laws across the country to provide relief from original sentences, when merited, because people can, and do, change. Our laws should change with them. This is the very spirit of the sunset process.

FAMM believes second look considerations should be open to everyone regardless of offense. Every individual has the capacity for rehabilitation and determinations should be made on their record at the time of review. However, we call your attention to two populations for priority consideration: those who were under the age of 25 at the time of their offense and incarcerated people over the age of 55.

Research has shown that, due to their still-developing brains, people under the age of 25 have diminished culpability and greater propensity for rehabilitation and change than is currently reflected in Texas's sentencing laws. Current release opportunities do not reflect the established science on sentencing for emerging adults. Science has established that our brains do not fully develop until the age of 25. Because young people's brains are still developing through their mid-20s, they are more impulsive and susceptible to peer influence than older adults, and less able to inhibit inappropriate behavior, manage intense emotions, and fully consider consequences of their behavior.<sup>9</sup> Consequently, criminal activity peaks during the late teen years and early 20s.

Fortunately, people mature as they age – even those who have committed serious offenses. For example, Washington, D.C. allows judges to resentence individuals who committed an offense before their 25th birthday once the individual has served 15 years of their sentence. As of June 2023, 195 people had been released under this expanded second look law, and only seven people, or 4 percent, had been rearrested.<sup>10</sup>

Research has also shown that elderly individuals are the least likely to reoffend yet the most expensive to incarcerate. American prisons were not designed to serve as gerontology wards, and our communities are not best served by spending finite resources on incarcerating the elderly.

Older adults who return to the community after serving long sentences pose little public safety risk. One study found that only 1 percent of people released at age 55 or older after serving sentences for violent crimes were re-incarcerated for any new crime within three years.<sup>11</sup> Similarly, in Maryland, 200 people were released from prison after a state court found the jury instructions used in their trials to be unconstitutional. Their average age when released was 64, and all had served 30 years or more. As of May 2021, only 3 percent had been re-incarcerated.<sup>12</sup>

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<sup>9</sup> Arain, M., et al. (2013). Maturation of the adolescent brain. *Neuropsychiatric Disease and Treatment*, 9, 449–461. <https://doi.org/10.2147/NDT.S39776>.

<sup>10</sup> Testimony of Warren Allen at Hearing on B25-291 before the Committee on the Judiciary and Public Safety of the Council of the District of Columbia (2023). <https://www.sentencingproject.org/app/uploads/2023/06/WarrenAllen-Safer-Stronger-Amendment-Act-2023-Testimony.pdf>.

<sup>11</sup> Prescott, J.J., Pyle, B., and Starr, S.B. (2020). Understanding Violent-Crime Recidivism. *Notre Dame Law Review*, 95:4, 1643-1698. <http://ndlawreview.org/wp-content/uploads/2020/05/9.-Prescott-et-al..pdf>

<sup>12</sup> Millemann, M., Chapman, J.E., and Feder, S.P. (2022). Releasing Older Prisoners Convicted of Violent Crimes: The Unger Story, *U. MD. L.J. RACE, RELIGION, GENDER & CLASS*, 21:2, 185-247, <https://secondchanceslibrary.org/wp-content/uploads/2022/06/Releasing-older-prisoners.pdf>

To that end, we recommend strong consideration for second look opportunities for those under the age of 25 at the time of their offense, and currently incarcerated people over the age of 55.

### **Independent Prison Oversight:**

The Sunset process in Texas provides great insight into the Texas Department of Criminal Justice, along with all of Texas government agencies. While the relatively new Ombudsman for TDCJ can facilitate monitoring and adherence to best practices, we recommend oversight that is fully independent of the TDJC and reports to the legislature. The ongoing staffing crisis in TDJC, and other concerns identified by the Sunset Commission, are better served by a more frequent and responsive independent oversight body which reports to the legislature.

Texas needs to navigate its way out of the current staffing crisis in its correctional system while ensuring the incarcerated population is treated humanely and fair. Oversight conducted by an entity outside of TDCJ would bring needed transparency to the prison system. Frequent inspections allow for monitoring of the health, safety, and wellbeing of the both the incarcerated population and staff, it also ensures TDCJ functions at the highest level. This level of oversight allows for targeted investigation into complaints from both staff and incarcerated population, which is preventative in nature by addressing concerns before they reach critical or systemic levels.

Just this year, two states, Virginia<sup>13</sup> and Maryland<sup>14</sup>, adopted comprehensive independent prison oversight bodies by unanimous votes in the legislature. Both bills create prison oversight committees consisting of legislative and non-legislative members and create Ombudsmen offices with independent inspection powers of all state prison facilities as well as investigation powers into individual complaints to ensure a healthy and safe environment conducive to the mission of rehabilitation.

This summer, the U.S. Congress passed the Federal Prison Oversight Act with a nearly-unanimous vote in the House of Representatives and a unanimous vote in the Senate. This legislation will provide comprehensive oversight of the Federal Bureau of Prisons including frequent inspections of federal prisons as well as the creation of an Ombudsman who will be tasked with carrying out investigations into individual complaints filed by incarcerated individuals, family advocates, correctional staff, representatives of correctional staff, Members of Congress, and Members of the Federal Judiciary.<sup>15</sup> No member of the Texas Congressional Delegation voted against the Federal Prison Oversight Act.<sup>16</sup>

We recommend that Texas adopt independent prison oversight legislation to provide the legislature and the public with more transparency into the Texas prison system. FAMM offers our model independent prison oversight legislation for this commission consideration: <https://famm.org/wp-content/uploads/2024/03/FAMM-Prison-Oversight-Model-Legislation-Summary.pdf>

Thank you for your time and consideration of our views. If you have additional questions or would like to discuss this further, please feel free to contact me at [bwidenhouse@famm.org](mailto:bwidenhouse@famm.org).

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<sup>13</sup> SB 456, 163<sup>rd</sup> General Assembly (V.A. 2024), <https://legacylis.virginia.gov/cgi-bin/legp604.exe?241+sum+SB456>

<sup>14</sup> SB 134, 2024 General Assembly (M.D. 2024), <https://mgaleg.maryland.gov/2024RS/bills/sb/sb0134E.pdf>

<sup>15</sup> Full text of the Federal Prison Oversight Act can be found here: <https://www.congress.gov/118/plaws/publ71/PLAW-118publ71.pdf>

<sup>16</sup> All members of the Texas House Delegation voted yes with the exception of Reps. Crenshaw, Granger, Hunt, and Jackson Lee who did not register a vote. Full roll call found here: <https://clerk.house.gov/Votes/2024220>

Sincerely,

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