MINNESOTA
OFFICE OF THE OMBUDS
FOR CORRECTIONS

COVID-19 Report

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Introduction

The SARS-CoV-2 pandemic is unlike anything we have experienced in over 100 years. Responding has created particularly intense challenges for our corrections system, where some of the most dangerous conditions for a highly infectious virus overlap unique safety and security issues. It also requires us to examine how we protect people who are incarcerated, some of our most vulnerable and marginalized community members, as well as front-line essential workers put at risk on our behalf, in a time of crisis for all.

Although this pandemic is not yet over and only more time and analysis will tell the full story, by some measures one could argue that our corrections response has been appropriate. The Ombuds for Corrections certainly has not found any evidence of malfeasance and has observed corrections staff and leadership working incredibly hard to respond to the best of their ability to this unprecedented and constantly evolving situation. However, by other measures, our corrections *system,*[1] and we as a State, have clearly failed to protect those who are incarcerated on our behalf from harm and consequences beyond what was contemplated in their sentencing. Consequently, those who work with them, and their communities, have also been disparately affected.

This report is not a complete accounting of Minnesota's corrections response to the pandemic. As noted above, it is not yet over and there is still much to learn, and this office only has so much capacity to consider and analyze the many factors at play. However it is being provided now to share what the Office of the Ombuds has learned so far - as a call to take action that can still be taken, and to begin taking steps to ensure that the lessons we learn are not lost, so that we do not find ourselves in the same situation in the future, when what we face could be even worse.

The OBFC Role and Response

Minnesota statutes grant the Office of the Ombuds for Corrections (OBFC) authority to take complaints about and investigate the actions and polices of Minnesota's corrections agencies. The OBFC can investigate individual complaints and systemic issues that the Ombuds determines need review, work to resolve them, conduct investigations, make recommendations to agency leadership and the Governor and legislature, and publish reports. The office is a separate and independent entity from the Department of Corrections (DOC). Details on the authority and responsibilities of the OBFC can be found in Minnesota Statutes, Chapter 241, sections 90-95; and more information at mn.gov/obfc/.

Although the OBFC had only recently been reinstated, and was not yet fully operational, efforts were made to fulfill its duties to the extent possible to assist in the response to the pandemic. These efforts included reviewing over 2000 COVID-19 complaint emails from incarcerated individuals, communicating concerns and assisting when needed, monitoring and investigating corrections COVID-19 responses, conducting and sharing research on the situation and mitigation efforts in other states, and making recommendations to the Department of Corrections, the Department of Health, the Governor, and the legislature. A complete description of this response can be found in the OBFC 2020 Annual Report available at https://mn.gov/obfc/reports/.

[1] The interconnecting laws, policies, practices, infrastructure, and resources that comprise our overall system of incarceration.

Conclusions

Failure to Protect

As a State, we failed to prevent the disparate spread and impact of SARS-CoV-2 in State Correctional Facilities.

If infection rates in prisons[2] were similar to those in the general population, we could conclude that corrections populations were exposed to the same level of risk or provided with commensurate mitigation measures as the general population. That does not appear to be the case.

Although comparisons can be difficult due to different rates of testing, different demographics, and different measurements, it is possible to make some telling comparisons. [3] As of February 25, 2021, approximately 10% of Minnesota's adult population is presumed or confirmed to have had the virus. In three of 11 State Correctional Facilities over 70% of incarcerated adults tested positive for the virus, and over 60% in a fourth.[4] Even if the CDC's estimate that only 1 in 4.6 general population infections nationwide were reported in 2020 is factored in,[5] these prison rates are far higher.[6] Additionally, the DOC has calculated the positivity rate (positive tests per number tested) in prisons at more than 2.5 times as high as that of the general population.

Fortunately, this disparately high infection rate seems not to have translated into an equally disparate fatality rate, although the comparison is incomplete at this time. One death is too many, but the death rate for people in Minnesota prisons appears to be lower than the general population. As of February 25, 2021, 11 incarcerated individuals have died from COVID-19. This is a rate of approximately .1%. The state death rate for adults is slightly over .1%. However, a major caveat is required in this comparison – the age demographics, which we know are so impactful for death rates, are not considered, other than limiting it to adult populations. The percentage of individuals over 65 is much higher in Minnesota's overall population than in the prison population, and the ages of the individuals who have died is not part of the comparison. More analysis is needed.

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[2] The term "prisons" is used throughout as a short version of the official term, "Minnesota Correctional Facility". These are 11 facilities operated throughout the State by the Minnesota Department of Corrections, and do not include the many municipal and county jails and detention centers referred to as "local facilities".
[3] The OBFC has more information on available data for comparisons between the prison population and overall Minnesota population that can be provided upon request.
[4] These rates are approximate and were calculated by looking at periods of 4 weeks, rather than over a longer period of time, to account for population turnover. Infection rates at the other six State facilities stayed comparatively low, even compared to community spread when considering the high prison testing rate, and the reasons for these low rates need more analysis.
[5] Centers for Disease Control and Prevention, Estimated Disease Burden of COVID-19, Updated Jan. 19, 2021. https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/burden.html.
[6] Although testing rate in Minnesota's prisons was ultimately much higher than in the general population, some cases would have also gone unreported, especially early in the pandemic when testing was not yet online, making the actual prison infection rate higher as well.

Staff in State prisons have also had disparate rates of infection. As of February 24, 2021, 1003 of approximately 3,700 facility staff have been confirmed positive, approximately 27%.[7] At one facility, over 40% of the staff have been confirmed positive.[8] No corrections staff in Minnesota are known to have died from COVID-19. According to The Marshall Project, there have been at least 189 deaths from coronavirus publicly reported among prison staff nationwide.[9]

We also need to consider the unique indirect impacts of the pandemic in the correctional setting. Mitigation measures result in repeated weeks-long "lock-down" periods when people are locked in their cells up to 23 hours a day; personal hygiene activities, programming, exercise, outdoor time, religious activities, and visiting are suspended or restricted; and these conditions are exacerbated by staffing shortages when staff become ill. In-person visiting has been suspended for many months in total at some facilities over the course of the pandemic,[10] and video visiting is limited.[11] When outbreaks occur, facilities often are not able to separate those who test positive from others due to multi-occupancy cells/rooms and lack of additional space for separation, leaving people feeling as if they are just being left waiting to get the disease. These impacts, unique to correctional settings, take a heavy toll on physical and mental health, and incarcerated populations already experience a much higher rate of mental health conditions than the general population. The level of stress from these conditions also takes a toll on staff.

It is also important to note that, in addition to these impacts on incarcerated people and corrections staff, higher infection rates in these populations appear to have an impact on surrounding communities where staff live and incarcerated people return. More research on this topic is needed to better understand the full impact.[12]

While the exact numbers and comparisons need additional analysis and monitoring, one conclusion is clear - **if an equally transmissible but more virulent disease were to enter our prisons, the impact would be devastating, much more so than in the general population.**

Infection and Death Rate Comparisons to other states.

Comparison to other states needs to be interpreted cautiously because of differences in things such as state testing rates, reporting, and community spread, and the inherent success or shortcomings of those efforts need

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[7] Testing rates for staff have not been analyzed, but they are likely lower than for inmates. It should also be noted that the staff numbers do not distinguish staff who have regular contact with inmates and work in living areas from those who do not.
[8] Ibid.
[9] See https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons.
[10] The DOC follows MDH guidance in closing in-person visiting whenever two or more individuals at a facility test positive.
[11] The DOC has provided one free video visit per week, additional visits require payment. Technology and connectivity issues have made the visits difficult for some.
[12] Preliminary analysis by the Prison Policy Initiative found a correlation between corrections populations and community spread. https://www.prisonpolicy.org/reports/covidspread.html.

to be considered. However, there may be some value in ascertaining best practices based on reasonable comparisons.

According to tracking conducted by The Marshall Project, as of February 19, 2021, Minnesota had the 12th highest rate of prisoner coronavirus cases in the United States, and the 37th highest prisoner death rate from COVID-19. Because of limited data on staff infection rates in many states, comparisons are not available.

Local Facilities

Infection rates in local (municipal and county) correctional facilities have been lower than in State prisons, but more information is needed.

At the outset of 2020 the combined average daily population (ADP) of Minnesota's local adult correctional facilities was 6729.[13] This number does not account for the many additional thousands of people who have been held in these facilities over the course of the pandemic due to the normal rapid population turnover.[14] According to Minnesota Department of Health (MDH) data, from March 2020 through January 22, 2021, 756 people held at local facilities and 555 staff tested positive. Testing rates at these facilities are not readily available, so comparison is difficult, but the numbers appear to be more consistent overall with community infection rates. MDH data indicates that some of the largest facilities, with high population turnover rates, had significant numbers of staff and inmates who tested positive. Additionally, some facilities that serve as regional centers, holding people for other jurisdictions, or near communities disproportionally impacted by the virus, had higher numbers of positive tests at certain points in time.

These relatively low infection rates may be due in part to reduced facility population sizes, driven by successful efforts to quickly reduce local facility populations and keep them down (although they have been rising recently), and reduced caseloads. The combined January 2020 ADP of 6729 dropped to a low of 3809 by May (a decrease of 44%). Subsequently, monthly populations increased to just over 4400 in Sept, Oct, and Nov, and ended the year with an ADP of 4157 in December 2020 (a decrease of 30% from the March ADP). Since each local jurisdiction operates independently there is not a clear or concise set of policies or actions that were implemented. Courts, law enforcement and prosecutors took steps to reduce the number of persons arrested, charged, and confined but there is not a uniform set of policies or actions that were implemented statewide. Local facilities also made efforts to follow the guidance provided by state and local health authorities with respect to masking, sanitation, testing, social distancing, and isolation (to the extent physical plant and resources allowed), although the OBFC was not able to monitor these efforts.

[13] Minnesota's local jails, Adult Detention Centers, and Adult Correctional Facilities have an approved capacity of 10,332 beds and an operational capacity of 9,354 beds.
[14] Local correctional facilities are used to provide for initial detention to allow for booking and release, pre-trial detention, and incarcerate sentenced persons for less than a year. Some of these facilities hold prisoners for other counties in the region or may contract to hold inmates for the DOC, US Marshalls, or Immigration and Customs Enforcement (ICE). Consequently, the turnover of inmates in these facilities is extremely high with many tens of thousands of intakes and releases each year.

Due to the above information, and the limited ability of the OBFC to monitor and investigate local facility response to the coronavirus, this report focuses on State Correctional Facilities (prisons).

Department of Corrections Actions

Based on the observations and investigations of the Office of the Ombuds, the *overall* actions of the Department of Corrections in responding to the coronavirus were not deemed to be objectively unreasonable, contrary to law, or otherwise deficient. [15] Like everyone, Department authorities were reacting as able in real time to an entirely new situation within the constraints of existing law and the information and resources available at the time. Therefore, nothing in this report is intended to be a criticism of the Department.[16]

This does not mean that what was done was necessarily sufficient, that every action taken was the right one, nor that the Ombuds agreed with every action taken. This report is meant to provide perspective on overall response. In specific instances when Department actions were questioned by the Ombuds, recommendations were made and responded to, or a dialogue occurred to better understand the reasons for the decision. More information about this can be found in the OBFC annual report at mn.gov/obfc/reports. When it came to discretionary decisions on specific cases, such as COVID medical release, the Ombuds determined that it was not appropriate to try to substitute their judgment for that of the Commissioner.

Inadequate Systems

Current systems- policies, resources, and infrastructure, fell short in dealing with an infectious disease of this nature in our prisons and would be even more lacking in the face of a more dangerous disease.

Based on the conclusions regarding efforts to mitigate the virus, in order to understand why prison infection rates have been so relatively high despite those efforts, we need to look at the systems in which corrections authorities operate. We divide this analysis into two categories, population reduction efforts, and other mitigation efforts.

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[15] This is not meant to be used or interpreted as a legal determination. Minnesota Statute ch. 241.93 subd. 3 articulates the following: (a) In selecting matters for attention, the ombudsperson should particularly address actions of an administrative agency that may be: (1) contrary to law or rule; (2) unreasonable, unfair, oppressive, or inconsistent with any policy or judgment of an administrative agency; (3) mistaken in law or arbitrary in the ascertainment of facts; (4) unclear or inadequately explained when reasons should have been revealed; or (5) inefficiently performed. (b) The ombudsperson may also be concerned with strengthening procedures and practices that lessen the risk that objectionable actions of the administrative agency will occur.

[16] Minnesota Statutes ch 241.95 requires the Ombudsperson to include any agency response in a published report adverse to the agency. Because this report is not considered adverse to the DOC, the Department was not given an opportunity to respond.

Population Reduction

Additional population reduction would likely improve virus mitigation efforts but has been limited by structural impediments such as legal constraints, supportive resources such as housing and treatment availability, and risk assessment based upon these other limitations.

Although it is difficult to measure what impact population reduction has had on reducing virus spread in Minnesota prisons, or what impact additional reduction would have, it is logical to conclude that as population size goes down it enhances other measures known to limit spread, such as social distancing and ability to quarantine.[17] People at some facilities continue to be in multi-person cells.

Minnesota's prison population went from 8857 on March 1, 2020, to 7217 on February 15, 2021, a reduction of 18%. Minnesota's prison population reduction has been slightly above the median population reduction rate for states with reported data,[18] reflecting a meaningful reduction in prison population levels during the pandemic so far. Minnesota's reduction rate is notable in the context of its relatively low incarceration rate, a factor which may make it harder to quickly reduce prison population levels because there are already fewer people serving time for lower-level offenses. Indeed, Minnesota has an incarceration rate lower than all but one state with a higher reported prison population reduction. [19]

The Department of Corrections made efforts to lower the population through several means they determined were available under current law – expanded work release, COVID based medical release, and reduced release revocation. Decisions within these efforts, both regarding the eligibility guidelines and on individual cases, were made based upon an assessment of public safety risk and other relevant factors such as housing availability.

Because of the potential importance of population reduction, the OBFC worked with Management Analysis and Development (MAD), a management consulting practice housed in Minnesota Management and Budget, to conduct in-depth research on the Department of Corrections' population reduction efforts. A detailed summary of this research can be found as Appendix A. Several conclusions can be made:

I. A reduction in ***prisoner intake*** has had a greater impact on state prison population levels during the pandemic than has any policy or program to release prisoners. This reduction in intake has been caused by multiple actors at different stages of the criminal justice system, including declines in arrests, charging

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[17] Population reduction has been widely viewed as a key strategy in mitigating coronavirus spread. The National Academies of Sciences, Engineering, and Medicine recently concluded that reducing the incarcerated population is an "appropriate and necessary mitigation strategy to include in the COVID-19 response in correctional facilities". Most states have taken some steps to reduce corrections populations.

[18] Widra, Emily. "As COVID-19 continues to spread rapidly, state prisons and local jails have failed to mitigate the risk of infection behind bars" Prison Policy Initiative, December 2, 2020. https://www.prisonpolicy.org/blog/2020/12/02/jail-and-prison-covid-populations/

[19] Ibid. Maine, with a lower incarceration rate than Minnesota, had a prison reduction of 22% during the same period. Notably Maine's total prison population prior to the pandemic was 2,205, much smaller than Minnesota's, and a smaller population may have an impact on releases.

decisions, and sentences, and reduced revocation of supervised release[20]. Of the 1640 fewer people in State prisons noted above, as of February 25, 2020, 380 were due to special COVID-19 release efforts.

II. Defining and ***assessing public safety risk*** is a challenge across all COVID release programs, with widely divergent perspectives among stakeholders.

III. The lack of ***available housing*** and beds in the community, a challenge normally, is more of a challenge to increasing use of release mechanisms during a pandemic.

IV. The lack of ***adequate programming*** in both prison and community settings limits and delays reentry into society. Even when interviewees had different perspectives on topics such as assessing public safety risk, they generally agreed that current funding models may not adequately enable or incentivize successful supervision within the community.

Other Mitigation Efforts

The OBFC monitored other mitigation efforts through thousands of communications from incarcerated people, discussions with DOC staff, and monitoring of DOC policy and practice changes throughout the pandemic. Resources did not allow for a thorough investigation and analysis of all these efforts, but some observations and related conclusions merit noting.

Testing – Although, like everywhere, it took time to get testing online, as of February 25, 2021, the Minnesota Department of Corrections has conducted 96,328 prisoner coronavirus tests, almost ten times the number of people who have been incarcerated since the pandemic began. This is one of the highest testing rates in the country. While it is laudable, it also demonstrates that for a disease of this nature, in these type of congregate settings, available testing has its limits. Despite this level of testing being online by the summer of 2020, the largest outbreaks in our prisons occurred in the fall of 2020.

Protective Equipment and Sanitation – The lack of personal protective and sanitation supplies, like all sectors experienced, was a problem early on but later improved. Enforcement of mask wearing guidelines for both staff and inmates has been a significant, ongoing challenge, although it too seems to have improved over time.

Social Distancing and Separation - In antiquated facilities, some over 100 years old, social distancing can be impossible to maintain. Correctional facilities are currently designed with operational and staffing efficiencies in mind so mass movement of large numbers of people to dining halls, industry programs, educational, vocational and treatment programs and even sick call results in people being in close proximity to one another throughout the day. Large open cell halls and shared day space in newer facilities and limited open space make adequate separation for isolation purposes impossible. Many facilities have double bunked cells and multi occupancy rooms and even large dormitories for housing which further inhibit the ability to appropriately separate people. Air circulation issues also likely contributed to virus spread.

[20] The exact impact of COVID related release revocation reduction on the population size is difficult to determine because revocations began decreasing prior to COVID-19 with a shift away from technical violation revocations. It likely had an impact though and warrants additional analysis.

Corrections facilities made adjustments such as serving meals in housing units, keeping people separated by living units during movement and activities to the extent possible, and limiting industry, programming and recreation. While necessary to limit virus spread, these actions result in increased stress for both staff and incarcerated people.

Visiting and Programs – In-person visiting, and programming, has been significantly curtailed to prevent virus spread, resulting in further stress for inmates and their loved ones. Some video visits, calls, and emails have been provided free of charge, but technology and cost limit the extent that contact with loved ones and program providers has been available as a substitute for in person visits.

Recommendations and Considerations

In light of what the Office of the Ombuds has learned from research and observation summarized above, the following recommendations and considerations[21] are provided to highlight actions that can still be taken, and to begin taking steps to ensure that the lessons learned are not lost.

Governor

Recommendation: Accelerated Vaccination[22]

All incarcerated people and staff should be given access to COVID-19 vaccine as quickly as possible.[23] Many categories of people are deserving and appropriate for early access to limited supplies of vaccines, and deciding who should be first in line is difficult, but few are at as great of risk or have as few choices in taking preventative measures, and none are subjected to the same collateral consequences.

Although infection rates in prison are currently as low as they have been since early last fall[24], the presence of new variants of the virus present the risk of rapid spread. The state health department in Michigan recently identified 90 cases of the more contagious B.1.1.7 variant of COVID-19 at a prison in West Michigan[25]. By the time these variants are detected in our prisons, vaccination will be too late to prevent their spread.

The ongoing indirect consequences of the disease in corrections settings should be considered as well. As noted previously these include repeated weeks-long "lock-down" periods when people are locked in their cells up to

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[21] Recommendations are clear, as specific as possible, and made with confidence based on all the available information. Considerations are possible actions often based on limited information and/or recognizing multiple factors need to be considered but deemed worth considering based on the information available.
[22] The Ombuds for Corrections highlighted these issues in a December 3rd, 2020 letter to the MN Department of Health and subsequent comments to the Vaccine Allocation Advisory Group. These materials can be found at https://mn.gov/obfc/reports/
[23] In addition to those that have already been vaccinated due to age and vulnerability and as health care workers.
[24] As of 2/29/2021 the DOC reports 39 active inmate cases.
[25] See https://www.abc12.com/2021/02/17/outbreak-of-covid-19-variant-in-michigan-prison-grows-to-90-cases/.

23 hours a day; programming, exercise, outdoor time, religious activities, and visiting suspension or restrictions; limited ability to quarantine; and the resulting mental health impacts.

It is also important to consider that corrections populations are more vulnerable than the general population. Incarcerated people have higher rates of asthma, diabetes, heart disease, and other conditions that make them more vulnerable to COVID-19 than the general population.[26] The correctional population is also over-representative of other vulnerable communities. Over 55% of males and 44% of females in our prisons are black, indigenous, and persons of color and most will be returning to communities that have already been hit hard by the pandemic.

A number of other states already began vaccinating or plan to vaccinate their full corrections populations and staff early.[27] Regardless of what other states are doing, early vaccination addresses the vulnerability of these uniquely impacted members of our communities. Our duty to prevent them from disparate harm requires it.

DOC and Legislature

Recommendation: Comprehensive Review and Future Planning

The Department of Corrections should conduct a comprehensive review of all actions taken to prevent and mitigate the spread of the coronavirus; and document lessons learned and actions to be taken to improve future responses to highly transmissible infectious diseases. This information should be published and include any recommendations for funding or statutory changes.

The legislature should thoroughly review this information through dedicated hearings or other means such as a working group or task force and consider any needed statutory or funding changes. Information about local facility response and plans for future prevention/mitigation should be included.

Considerations for Review and Planning

While not an exhaustive list, the following are some things that should be considered for review, planning, and possible implementation.

Continued Population Reduction – The DOC's efforts to reduce the prison population through work release, medical release, and release revocation reduction all present lessons that could help in reducing the prison population outside of a pandemic. This would not only improve the ability to respond to possible future highly contagious viruses but would save resources that could be put to other uses and limit the known harms of incarceration while still providing accountability. The research summarized in Appendix A may provide some insights for this.

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[26] Wilper AP, Woolhandler S, Boyd JW, et al. The health and health care of U.S. prisoners: results of a nationwide survey. *Am J Public Health.* 2009; 99: 666-672. https://doi.org/10.2105/AJPH.2008.144279

[27] States that have begun vaccinating their full incarcerated population or plan to in some of the earliest rounds include CT, IL, KS, MA, NC, OR, and WI. A federal judge recently ordered Oregon to vaccinate their prisoners immediately.

Emergency Release - The DOC's emergency evacuation authority in Minnesota Statutes Chapter 243.57 should be revisited. The OBFC made recommendations for this to the legislature in March 2020.[28] It is not suited to a system-wide pandemic. A component that could be considered is an independent emergency review panel for release decisions to assist in public safety risk assessments.

Community Resources – Funding increases for programming, treatment, and reentry housing should be considered to improve the availability of alternatives to incarceration.

Infrastructure – Current corrections infrastructure clearly played a role in the disparate impact of COVID-19, and should be assessed for adequate social distancing, air circulation, and quarantine space. Infrastructure improvements are likely required, and some policy and procedure changes, such as disallowing double bunking, may be needed.

Communications - The Office of the Ombuds received over 2000 COVID related complaints from incarcerated people and many contacts by their family and loved ones concerned for their welfare. The information provided was useful for assessing implementation of response measures and generating ideas for recommendations. While communicating through the chain of command is important at all times, the Department may want to consider creating its own additional emergency inmate feedback system for situations like this.

Visiting – Efforts should be made to continue and increase free remote visiting and program delivery options without sacrificing in-person options.

Data and Research – As much useful information as possible about all impacts of the virus and the response should be collected and organized to assist learning and planning for the future. Local and national research that can assist in this effort should be monitored.

Conclusion

While the pandemic has been difficult for everyone, those who work and are held in correctional facilities have experienced a uniquely challenging situation. Staff and incarcerated individuals have responded to this pandemic courageously.

Corrections staff have continued to come to work to do their jobs serving Minnesotans each and every day despite great risk to their health. Incarcerated individuals have shown an unmeasured level of care and concern for one another and shown laudable patience in an incredibly traumatic and challenging situation.

We need to do everything in our power to end this as soon as possible and work to ensure that we are prepared for a similar situation in the future.

The objective of this report is to provide some information and perspective not found elsewhere, and above all else help Minnesota to be a leader in improving the future response to a disease of this nature in our corrections system.

[28] The March 2020 OBFC recommendations to the legislature can be found at mn.gov/obfc/reports.