

To: Assistant Attorney General Cindy Maguire, Office of the Attorney General
From: Laura Ziegler
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Unsolicited and by no means comprehensive comments on LEAB proposed recommendations on CEWs

Given the time frame, the comments of others -- especially Jeff Dworkin's invitation to review the report of the Montpelier City Council's Committee on Tasers, which I would urge LEAB to accept* -- my comments will be limited to a few points.

1. It's encouraging that the issue of use of CEWs is being given some consideration by the Law Enforcement Advisory Board. But what LEAB refers to as a draft policy is actually a draft recommendation -- one which the myriad law Vermont enforcement agencies can take or leave. Unlike proposed legislation (H.225) currently in House Government Operations Committee, it would not fill the present vacuum of statewide standards. Nor would it address the problems with current standards and practice.
2. Even if LEAB had authority to promulgate rules or set policy or otherwise create standards, there is another vacuum: the absence of effective remedies (other than private lawsuits) when law enforcement violate their own policies. To meaningfully address taser use or misuse by adopting a policy there must be some mechanism to make law enforcement accountable for not adhering to it.
3. Deployment of CEWs should be reasonably related to the degree of threat posed to public safety. The LEAW draft recommends a threshold that accommodates disproportionate use of force. "Active resistance" covers a very broad array of behaviors and allows CEWs to be used on people who are posing no actual threat. An "assaultive" threshold still allows CEWs to be used on people who are posing no actual threat of significant injury to officers or the public. CEWs have significant potential for causing injury (and occasionally death), and routinely inflict excruciating pain. I believe their use cannot be justified absent assaultive behavior posing an imminent* risk of serious bodily injury to an officer or member of the public. The best articulation of an appropriate threshold that I've come across is this:

"The proper test... for the use of Taser is that its use will be lawful where it is immediately necessary to prevent or reduce the likelihood of recourse to lethal force (e.g.: conventional firearms).

IX. This is a test that is just below that for the use of lethal force (such as conventional firearms), but a much stricter test than that which applies for other uses of non-lethal force. It means that Taser can be used in circumstances where there is a threat to life or a threat of serious injury, but that threat has not quite reached the threshold where lethal force (such as conventional firearms) could be justified."

--p. 3, *The PSNI's [Police Service of Northern Ireland's] Proposed Introduction of Taser: Human Rights Advice*, Keir Starmer, QC, and Jane Gordon, 2007
(the report can be downloaded at http://www.communitylaw.org.au/cb_pages/taser_trap_.php)

4. Meaningful consideration of heightened vulnerability to CEWs or impaired or non-existent ability to understand and comply with commands requires clear and comprehensive language and actual prohibitions. I'd like to flag some unequivocal language in the Miami Beach Police Standard Operating Procedure on Use of Force (posted at <http://cbsmiami.files.wordpress.com/2013/08/use-of-force.pdf>), which requires that CEWs "not be used when the subject is known or appears to be;
- (1) A pregnant woman (unless the use of deadly force is justified);
 - (2) A child under the age of 13 (unless the use of deadly force is justified);
 - (3) An elderly person (unless the use of deadly force is justified)

The above list, like the LEAB's, falls short; it imposes no restrictions on using CEWs on people with cognitive impairment, other mental or physical disability or medical conditions (e.g. postictal or hypoglycemic confusion), people who are deaf or people who are intoxicated. But aside from the lack of a definition for "elderly" its wording provides **clear prohibitions** absent a high threshold of justification. The LEAB's draft language only requires officers to "give special consideration." It does not take into account the full spectrum of disabilities or conditions that might prevent or seriously impair a person's understanding of, or ability to comply with, an officer's commands (or to see or recognize that the officer is an officer). Nor is "special consideration", as defined in the draft, particularly special: it requires assessing additional risk of harm from CEW deployment and considering other forms of reasonably available uses of force to effect control. But these would be reasonable requirements for all but the most exigent/dangerous circumstances under which CEWs could be deployed.

The Miami Beach Police Standard Operating Procedure on Use of Force also requires that "[v]erbal warnings shall be issued to the subject prior to deploying the ECD to allow him the opportunity to comply with the officer's commands, unless the warning would provide a tactical advantage to the subject being taken into custody." The LEAB's suggests pre-deployment warning "whenever feasible." The LEAB draft repeatedly employs this kind of weak wording.

Re: "elderly persons," which LEAB's draft also fails to define: age related risk from CEWs include fractures as a result of falls or muscle contractions. In its 12/9/11 report SHOCKING: The Lack of Responsible Taser Policy in Minnesota (posted at https://www.aclu.org/files/assets/aclu_report_on_taser_policy_12_2011.pdf), ACLU of Minnesota reports that according to CDC, NIH and the National Osteoporosis Foundation it's estimated that over 50% of Americans over age 50 have osteoporosis or osteopenia, which increases risk of fractures. At what point are people "elderly"?

5. Any electronic control device used by law enforcement officers should be required to be equipped with functioning camera and recording equipment, and all incidents of use be recorded. Such documentation is critical to understanding just how CEWs are actually being used.

When CEWs are deployed the recordings should be public record and accessible to the public in keeping with the Access to Public Records Act (see H.126, introduced last year by Representative Lippert).

6. If LEAB wants input -- especially from populations disproportionately subjected to or at risk from CEWs, and their advocates -- it could attempt to communicate directly with those constituencies. There has been no apparent public notice or public comment period concerning the draft recommendations. Nor was the A.G.'s Act 80 Advisory Committee, a cross disability forum that includes representatives from law enforcement and advocates concerned about law enforcement training and practice, notified. Nor were people who testified or commented at the A.G.'s public forum notified. On Nov. 26 I was provided with the draft policy by A.J. Ruben of Disability Rights Vermont, who forwarded me a Nov. 13 e-mail from the AG's office to Disability Rights Vermont, ACLU, The League of Towns and Cities (already represented on the LEAB) and two legislators chosen by the AG's office for their Taser Review panel.

There is no indication of how the public input which was solicited by the A.G. back in March -- including from A.J. Ruben, Robert Appel, and Jeff Dworkin, who were invited to present at the forum, and members of the public, who testified or submitted written comments -- was incorporated or rejected by LEAB in its draft, or reviewed by it at all. (The comments are public record, and if LEAB wishes to review the proceedings a video recording by ORCA Media is posted at <http://vp.telvue.com/preview?id=T01221&video=148839>).

As difficult as it may be to address issues surrounding the use of CEWs through legislation, that process would seem to be more transparent, accessible to all stake holders and capable of resulting in some kind of actual statewide standard. While the LEAB recommendations should inform that process it would be unfortunate if they were promoted as a substitute.

*In the event that LEAB declines to review the report Montpelier City Council Committee on Tasers, I'm flagging its list of vulnerable populations and some of its concluding recommendations:

http://acluvt.org/issues/tasers/mont_taser_rpt.pdf

(excerpt, pp. 9 and 10)

Every report on the Taser, whether from law enforcement interests or from civil and human rights organizations or from the Taser company itself, recognizes the dangerousness of Tasers, and proscribes its use in certain situations and locations, against certain classes of individuals ("vulnerable populations" or "at risk" individuals), and on certain parts of the body. Barring an emergency where there is not other way to prevent death or serious bodily injury, it is forbidden to use a Taser on these individuals:²⁴

- elderly
- children

- physically frail or infirm
- alcohol- or drug-intoxicated
- serious mental disturbance
- hearing impairment or cognitive disability²⁵
- cardiac condition, pacemaker, seizures, sickle cell, pulmonary disease, or other significant disease; also osteopenia, osteoporosis, spinal injury, previous muscle, disc, ligament, joint, bone or tendon damage or surgery
- pregnant
- thin physique
- highly agitated (“excited delirium”)²⁶

Forbidden circumstances regarding a subject include:

- flight or running
- operating a motor vehicle or machinery
- near flammable substance
- in water or mud
- standing on a height (ledge, roof, etc.)
- restrained, handcuffed, incapacitated or immobilized

And most of the frontal area of the body is forbidden for targeting, including:

- head
- face
- neck
- chest
- groin and genitals

24 This list of limitations is culled from the major studies of Tasers and from the company’s own warnings.

25 The intoxicated and mentally ill are widely recognized among the populations especially vulnerable to death or serious bodily injury from Tasers. Tina Wood, a representative of Disability Rights Vermont, a non-profit designated by the governor of Vermont to assure compliance with the federal disability rights acts, made the important point to the Committee that many of the disabled are similarly vulnerable, due to conditions such as cognitive impairment, deafness, and language processing problems. The Committee agrees with the Coalition, and so includes the disabled among the categories of vulnerable populations.

26 The American Medical Association describes “excited delirium” as follows: “Although not a validated diagnostic entity . . . , ‘excited delirium’ is a widely accepted entity in forensic pathology and is cited by medical examiners to explain the sudden in-custody deaths of individuals who are combative and in a highly agitated state. Excited delirium is broadly defined as a state of agitation, excitability, paranoia, aggression, and apparent immunity to pain, often associated with stimulant use and certain psychiatric disorders. The signs and symptoms typically ascribed to “excited delirium” include bizarre or violent behavior, hyperactivity, hyperthermia, confusion, great strength, sweating and removal of clothing, and imperviousness to pain. Speculation about triggering factors includes sudden and intense activation of the sympathetic nervous system, with hyperthermia, and/or acidosis, which could trigger life-threatening arrhythmias in susceptible individuals. . . The intense pain associated with [Taser] exposure, the psychological distress of incapacitation, and hazards associated with various restraint methods also could

contribute.” “Use of Tasers by Law Enforcement Agencies” (2009), pp. 6-7, available at http://www.policeone.com/policeone/data/pdfs/Taser_eed_resolution.pdf excerpted from pp. 36-42

Should the Council approve the purchase of Tasers notwithstanding the Committee’s recommendation, it is critical that high standards, strict safety measures, extensive training, and vehicles for heightened police accountability be implemented before such purchase and deployment. The Committee believes the following, culled from the major studies of Tasers, are essential preconditions to Taser acquisition by the Montpelier Police Department.

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7. Carry defibrillators in cruisers and require officer training and competency in their use: Tasers are especially dangerous for individuals with heart conditions or who are highly agitated. Such agitation is often seen in incidents involving an intoxicated or mentally unbalanced individual. Heart complications, such as ventricular defibrillation, are a serious concern and a prominent suspect in Taser-related deaths. The Committee and Chief Facos agree with the wisdom of placing a defibrillator in every cruiser. Officers must be trained and shown competent in their use.

11. Prohibit drive stun mode: Some reports on Tasers would recommend allowing the drive stun mode in exigent circumstances to prevent death or serious bodily injury. Other studies recommend this mode never be permitted, because in that mode the device does not immobilize, but only causes excruciating pain, which some subjects can “fight through”, with the result of the aggravation of the already-tense encounter. The Committee recommends the prohibition of the device in drive stun mode, to prevent both the aggravation of an encounter and to make less likely the potential for abusive deployment of the device.

12. Prohibit tasing a fleeing or running subject: All major studies prohibit deploying Tasers on fleeing or running subjects, due to the increased risk of injury or death.

17. Prohibit use of a Taser as a pain compliance weapon or general force tool. The proposed VLCT policy states: “Officers are prohibited from using the device as a punitive measure.” (IV)(F)(b)(xv). This is insufficient, in light of the view of the major reports on Tasers that go beyond punitive use, to also prohibiting use for compliance and as a general force tool.

18. Prohibit multiple shots and continuous or prolonged exposure except where lethal force would be justified: Taser shocks should be as brief as possible. Multiple shots against a subject are significantly associated with Taser-proximate fatalities, particularly if the subject was emotionally disturbed, drug intoxicated or showed continued resistance.⁶²

“An officer should only administer an additional ECW discharge after the initial discharge if the officer has reevaluated and concluded that the subject still poses an imminent threat of significant physical harm and other options are not appropriate. Repeated or prolonged (*i.e.*,

beyond the 5-second standard cycle) discharges should be avoided whenever possible.” (Maryland Report at 71)

19. Prohibit Taser use on subjects in restraints except where lethal force would be justified. (Accord: ACLU of Northern California report at 4). The ability of a subject to cause a threat of harm while in restraints is not eliminated but is greatly reduced. Other forms of control must be used in this circumstance unless the subject poses an ongoing threat of causing imminent serious bodily injury.

20. Avoid impairment of respiration: Given the respiratory complications that are associated with Taser use, an officer must, following use of a Taser, not employ a restraint method that could impair a subject’s respiration.

23. Reporting, supervision and monitoring: All Taser incidents must be reported on a use-of-force form detailing events leading up to and following the discharge. Data to be reported include but are not limited to: a detailed description of the subject’s behavior, the facts and level of aggression presented by the subject, the officer’s reasons for concluding there was a likelihood of imminent harm by the subject, the number of cycles and the duration of shock, the duration between shocks, all witnesses, the range, the mode used, the distance fired, the point of impact on the body, whether there was any indication that the subject was a member of any vulnerable population as described earlier in this report, the time and type of medical care provided, and any injuries suffered by any person.

24. Supervisors should respond to the scene of any Taser deployment as soon as possible: The quick presence at the scene of a deployment by a supervisor would both ensure to officer and the public the seriousness with which the police force and the city regard Taser deployment, and also assure an immediate assessment of the appropriateness of the deployment.

25. Conduct rigorous investigation following each deployment: A supervisory-level or higher inquiry must be conducted to determine the appropriateness of every deployment and whether there was strict adherence to policy and training. Such investigations should include interview of witnesses; review of video, photographic and data evidence, test results on the weapon; and other relevant information. Such investigation must also be conducted externally, by Citizen Review Board or otherwise, when a subject dies or is seriously injured, when there has been a substantial deviation from policy or training, and when the subject is a restrained or a vulnerable person as defined in this report.

26. Monitor Taser use by the agency: The police force should use a tracking database that is capable of maintaining detailed information as to each device and each deployment, can reveal the circumstances of every Taser deployment, and shows the extent to which officers are relying on the device compared to other forms and methods of control. This information and data must be available to the public.