

To: Members, Senate Government Operations Committee
From: Laura Ziegler
Re: H.225

It's difficult to comment on what's left of this bill, as opposed to the version introduced. As passed by the House H.225 is anything but remedial legislation. Instead it defers to law enforcement and codifies a deployment threshold which has accommodated the unwarranted — and in one case, deadly — use of tasers on Vermont citizens.

The debate concerning threshold for taser deployment is not unique to Vermont, or the United States. **It is demonstrably possible to set the bar considerably higher than the nebulous marker of "active resistance" which the Second Circuit applied to the actions of the non violent trespassing protesters in Brattleboro.**

"Central to the debate is the principle that decisions around when to deploy the weapon should be based on the principle of proportionality: the amount of force used should bear some reasonable relationship to the threat the member is facing and its impact on public safety." — *RCMP Use of the Conducted Energy Weapon (CEW)*, Final Report of the Commission for Public Complaints Against the Royal Canadian Mounted Police, 6/12/08 (https://www.cpc-cpp.gc.ca/cnt/tpsp-tmrs/cew-ai/cew_fin_rp-eng.aspx)

Deployment of tasers should be reasonably related to the degree of threat posed to public safety. The LEAB draft recommends a threshold that accommodates disproportionate use of force. "Active resistance" covers a very broad array of behaviors and permits use on people who are posing no actual threat. Even an "assaultive" threshold, while raising the bar, would still allow tasers to be used on people who are posing no actual threat of significant injury to officers or the public.

There is much controversy over the effects and risks of taser devices and the deaths associated with their use. The science behind the safety claims is also controversial. "The studies where the author was affiliated with the TASER International had 18-times higher odds to conclude that the device was safe, suggesting that the literature may be severely biased." Soleimanirahbar & Lee, *The Taser Safety Controversy*, in Expert Review of Medical Devices (<http://www.expert-reviews.com/doi/full/10.1586/erd.11.53>).

Something which gets insufficient emphasis and which is less open to dispute is that "[t]he tasered person also experiences an excruciating pain that radiates throughout the body." *Bryan v. McPherson*, 630 F.3d 805 (9th Cir. 2009). That should be reason enough to rule out using tasers to enforce compliance in a wide range of situations where the state's interest is less than compelling. Coupled with the mounting evidence of potential injury or death from these devices, permitting their use at an officer's discretion in response to any form of "active resistance" is unconscionable.

Attached is information on how some jurisdictions outside the U.S. have approached the question of when to deploy tasers. I would also strongly recommend the report to the Montpelier City Council (http://acluvt.org/issues/tasers/mont_taser_rpt.pdf). The reports

of the Thomas R. Braidwood, Q.C., Commissions of Inquiry Under the Public Inquiry Act, SBC 2007, c. 9, which investigated the use and safety of tasers and the death of Robert Dziekanski at Vancouver Airport in 2007 (<http://www.braidwoodinquiry.ca>) are another resource, as well as a striking example of oversight of law enforcement.

Some additional concerns:

* A policy requiring meaningful consideration of subjects' heightened vulnerability to taser devices or impaired or non-existent ability to understand and comply with officers' commands would include clear and comprehensive language and actual prohibitions. 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 Vermont standard for use of force should not fall short of the "immediate" threat and objective reasonableness required by the US Supreme Court in *Graham v. Connor*.

* 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).

* Without testing, taser devices cannot be presumed to be properly functioning. Failure to require routine testing of the level of electric output of taser devices is inconsistent with ensuring public safety.

* There is a virtual vacuum of effective remedies (other than private lawsuits) when law enforcement violate their own policies. To meaningfully address taser use or misuse there must be mechanisms to make law enforcement accountable for nonadherence.

I urge the Committee to either reject this bill or amend it so that it remedies, rather than reinforces, the status quo.