



ACLU of Oregon Recommendations Regarding Police Use of Conducted Energy Devices

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Introduction

“Stun guns,” or conducted energy devices (CEDs) are weapons used to fire an electrical charge to subdue a subject. Taser International markets the most commonly used CEDs. There are now more than 100,000 CEDs in use by more than 8,000 law enforcement agencies in the United States, promoted by a multimillion-dollar industry.¹

Tasers designed for law enforcement agencies can be discharged in two modes. The first fires two darts into the subject and then delivers a charge of up to 50,000 volts.² The second, known as “stun mode,” applies a similar charge by direct contact with the skin.

Most dart-fired CEDs have a range of approximately 20 feet, but Taser International is now advertising a model with a range of 35 feet and is reportedly developing a model with a range of 100 feet.³

It is self-evident that an instrument that would enable police to subdue violent persons without injuring them is highly desirable.⁴

¹ See, e.g., Eric Lipton, Security Nominee got Rich on Tasers: Kerik's Relationship With Stun-Gun Firm Earned Him Millions, S.F. Chron., Dec. 10, 2004, at A-8.

² Police Executive Research Forum (PERF), Critical Issues in Policing Series: Strategies for Resolving Conflict and Minimizing Use of Force, Ch. 5, Conducted Energy Devices: PERF's National Studies and Guidelines for Consideration, at p. 99 (April 2007).

³ It seems likely that longer range CEDs may lead to a greater risk of injuries to both target subjects and innocent bystanders.

⁴ See, for example, Michael D. White and Justin Ready, The TASER as a Less Lethal Force Alternative, Police Quarterly, Vol. 10, No. 2, 170-191 (2007).

However, two problems have accompanied the rapid, profit-driven proliferation of CEDs: First, they have not been established through independent testing to be safe; and second, they have been misused by police in many jurisdictions to compel compliance rather than being reserved for situations where an officer's or another person's safety is at risk.

While manufacturers and police contend that CEDs are generally "less lethal" weapons, there have been many examples of persons dying after being subjected to the use of such devices. The manufacturers maintain there have been no examples of deaths that were the direct result of proper use of the devices.⁵ However, few independent studies have been performed and there is no medical consensus regarding either the short-term or long-term medical effects of CEDs.⁶

It is particularly troublesome that many of the reports of death and serious physical injuries appear to involve individuals in crisis – those who are mentally

⁵ Many of the reported deaths involved persons who were intoxicated by cocaine or other substances. Many have been attributed by medical examiners to "excited delirium." According to a February 27, 2007, National Public Radio report, "Taser International spokesman Steve Tuttle acknowledges that each year his company sends hundreds of pamphlets to medical examiners explaining how to detect 'excited delirium.'"

Yet an article in *Police Chief* magazine (June 1996), "'Excited Delirium': A Two-Fold Problem," by Lt. Alan W. Benner, Ph.D., Department Psychologist of the San Francisco Police Department, and S. Marshall Isaacs, M.D., of the San Francisco Department of Health, Paramedic Division, states flatly, "'Excited delirium' is not a recognized medical or psychiatric condition." This remains true today, see February 26, 2007, National Public Radio report, "excited delirium is not recognized by professional medical associations, and you won't find it listed in the chief psychiatric reference book."

⁶ For one example of a medical study which we deem to be inconclusive, see Ho, Dawes, Bultman, et al.; "Respiratory effect of prolonged electrical weapon application on human volunteers," *Academic Emergency Medicine*, 14(3), pp. 197-201, March 2007. Also available at: http://www.ncbi.nlm.nih.gov/sites/entrez?cmd=Retrieve&db=PubMed&dopt=Citation&list_uids=17284465&db=PubMed&dopt=Citation&list_uids=17284465.

The White and Ready report in the June 2007 issue of *Police Quarterly* (see note 4 above for citation) also points out the lack of independent medical research as well as the need for additional evaluative research before any "definitive" conclusions can be drawn about the use and effectiveness of Tasers.

disturbed or under the influence of drugs⁷ – the very groups on which the police seem most inclined to use Tasers.

Nor is there any federal agency that has the authority to regulate or evaluate the safety of so-called “less lethal” weapons or their use. For these reasons, the National ACLU and Amnesty International both oppose the use of CEDs.⁸

A recent study by the Police Executive Research Forum (PERF) reported that in a survey of law enforcement agencies, only 6% reported restricting Tasers to situations where the officer faced “deadly aggression.” 59% permitted use against “severe” aggression (usually a weapon). But one-third of the agencies surveyed were unreasonably permissive: 22% permitted use of a Taser if the officer was dealing with any “active aggression,” defined to include bracing, tensing, or verbally resisting; and 14% allowed Taser use for non-compliance with an officer’s orders, including verbal “resistance.”⁹

ACLU of Oregon Recommendations

Given the available evidence – or lack of it – regarding the safety of CEDs, the ACLU of Oregon urges that if law enforcement agencies are going to use CEDs, their use should be subject to strict limitations appropriate for a weapon that may result in unintended fatalities. In addition, law enforcement agencies should emphasize training in non-violent techniques to de-escalate potentially violent situations, and thus minimize the circumstances in which they might otherwise regard it necessary to use CEDs.

⁷ See PERF Conducted Energy Device Policy and Training Guidelines For Consideration, Guideline 50: http://www.policeforum.org/upload/PERF-CED-Guidelines-Updated-10-25-05%5B1%5D_715866088_1230200514040.pdf

⁸ ACLU Policy provides in part that unless and until “non-lethal” weapons are certified as safe and effective following rigorous independent testing, “they must not be used.” The Amnesty International policy is available at: http://www.amnestyusa.org/countries/usa/Taser_report.pdf

⁹ PERF Report, note 2, above, at p. 114.

There are numerous factors that go into police department policies regulating CEDs, such as when medical assistance should be provided to a tasered subject, factors that go into assessing the level of threat posed by a subject (including the number of police officers on hand, and the comparative size of a police officer to the subject, etc.). We will not attempt here to make recommendations on all such factors.¹⁰ Rather, we set forth the main policy issues related to the use of CEDs that we think are critical decision points.

I. RESTRICTIONS ON USE

A. General Restrictions

CEDs should be used only by authorized trained personnel to subdue or control a person whom the officer reasonably believes:

- i) Creates an immediate, credible threat to the physical safety of the officer, another person, or the individual himself/herself; AND
- ii) Unless prompt action is taken to immobilize the person, there is a substantial likelihood the situation could lead to the death or physical injury¹¹ of the officer, another person, or the individual himself/herself.

We note several key factors in this standard:

First, the standard applies as the officer sees the situation. At the same time, the officer's perceptions must be objectively reasonable.

¹⁰ For examples of more detailed recommendations of best practices, see the report and recommendations of the ACLU of Northern California in their report, "Stun Gun Fallacy: How The Lack of Taser Regulation Endangers Lives (September 2005), at http://www.aclunc.org/issues/criminal_justice/police_practices/special_report_stun_gun_fallacy.shtml

¹¹ The term "physical injury" is used here as that term is defined in Oregon law. ORS 161.015(7) provides that "'Physical injury' means impairment of physical condition or substantial pain."

Second, both parts of the standard, (i) and (ii), must be met. That is, there must be an immediate, credible threat, AND there must be a “substantial likelihood” that the situation could lead to death or significant injury. (The use of the term “substantial likelihood” means that the outcome cannot merely be speculative; it must be based on articulable facts and prior experience.)

Third, the requirement of a “substantial likelihood” is intended to limit the use of CEDs to situations that might otherwise lead to the use of deadly force by an officer.

Fourth, the phrase “the situation could lead to” means that the officer does not have to wait until lethal force would be justified. We recognize that CEDs are not always effective in subduing persons who are intoxicated or for other reasons are non-responsive to verbal de-escalation techniques and that the option of using deadly force must always remain as a last resort if the CED and other alternatives are not effective.

At the same time, it is important that law enforcement agencies monitor this section of the standard closely to ensure that it is not allowed to be so elastic as to undermine the purpose of restricting the use of CEDs.

Fifth, the consequences that would warrant the use of the CED are potential “death or physical injury.” The potential “physical injury” must be serious, as suggested by the standard linking it with “death” – it cannot be something as minor as an officer’s fears that an individual might slap, push or scratch a much larger officer or another person. This part of the standard must be monitored most closely of all, in order to avoid misuse by an officer seeking to justify the deployment of a CED merely to compel compliance.

In summary, by limiting CED use to situations that pose an imminent risk of death or significant physical injury, the goal is to reduce the use of deadly force by officers while also minimizing unintentional deaths related to the apparent health risks of CEDs.

B. Additional Restrictions

i) Vulnerable Populations and Circumstances

As noted in the introduction, despite the lack of medical consensus on the short-term and long-term health effects—and risks—associated with CEDs, there is a growing consensus among professionals in and outside law enforcement that the use of CEDs on certain vulnerable populations should be avoided.

One example is the current policy of the Portland Police Bureau (PPB), but even it needs improvement. The current PPB policy manual provides (Section 1051.00):

“Unless at least one specific exception is met (see list below), the Taser shall not be used on the following persons:

- a. Children, who are known to be, or are obviously under the age of 12.
- b. Persons, who are known to be, or are obviously older than 60 years of age.
- c. A woman who is known to be, or is obviously pregnant.
- d. A person known to be, or is obviously medically fragile.”

The Portland manual then lists, as exceptions that would permit Taser use, persons: armed with a dangerous weapon; engaging in suicidal behavior; or who cannot safely be controlled without other force options. Portland also restricts the use of Tasers on the face or head, at demonstrations, and on persons near flammable substances. Finally, Portland prohibits the use of Tasers on a handcuffed person unless the person is engaged in “aggressive physical resistance.”

When we say this policy needs improvement, we specifically urge that it be expanded to include persons who are known to have a history of mental health crises, are clearly experiencing mental or emotional distress, or who are visibly intoxicated by

alcohol or drugs. With that addition, we urge that these standards be adopted as minimum additional restrictions.

ii) Duration of Discharge

Most dart-fired CEDs can be set for a standard discharge of five seconds. Longer duration discharges have been more commonly associated with fatalities. Policies must therefore provide for a discharge of no more than five seconds — and require the officer to assess the effectiveness of the discharge prior to initiating a second charge.

In no instance should the CED be discharged for more than three five-second bursts against the same subject. However, as soon as it is clear the CED will not be effective against a particular subject, the officer must use alternative methods.

II. TRAINING TO MINIMIZE THE NEED TO USE CEDs

CEDs should be issued only to officers specially trained and certified in their use AND those officers must also have completed training in practical techniques to put people at ease and de-escalate potentially violent situations. This is especially true for individuals who are experiencing mental or emotional distress, but we believe that such training will be helpful in a myriad of situations encountered by police officers.

The necessity for resorting to the use of CEDs can be reduced by effectively training police officers in such subjects as verbally inducing compliance, how to recognize and deal with persons who are mentally distressed or disabled, or are under the influence of drugs or alcohol.

A recent step in the right direction was the enactment in Oregon of House Bill 2765 (2007), a law requiring all new police officers to receive at least 24 hours of

training in the recognition of “mental illnesses utilizing a crisis intervention model.”¹² Such training also should be mandatory for any officer authorized to use a CED.

In addition, CED training should inform officers that CEDs may lead to unintended fatalities and that there currently is little independent medical research on the short-term or long-term health effects of CEDs. If not already part of the mental health training, officers also should be instructed in the most effective methods for de-escalating potentially violent situations as well as other methods to overcome resistance without the use of CEDs.

III. MONITORING

Detailed reporting of each actual or threatened use of a CED should be required, and such reports should be subject to the same type of review as those applicable to the use of deadly force. In addition, only CEDs equipped with built-in audio and video recording devices that are automatically activated upon any use of the device should be used.

All such records and reports should be publicly available, with no redactions.¹³ We believe that all use of force by police officers should be subject to internal reporting requirements so that command personnel – and the public – can better evaluate short-term and long-term trends – as well as to improve training for officers.

¹² See The Oregonian:

http://blog.oregonlive.com/politics/2007/06/governor_endorses_training_pol.html

¹³ Although we recognize that there are privacy concerns for those who have been subjected to CED use, we believe the need for public oversight and accountability will outweigh that privacy interest in most instances.

CONCLUSION

Unresolved doubts about the safety of CEDs, and their widespread misuse by police departments, suggest that this weapon is still on probation. The ACLU of Oregon therefore urges that the restrictions and practices on the use of CEDs be subject to periodic comprehensive review, with adequate input from community councils, boards and residents.