

PE1367/LL

Ms. Anne Peat
Clerk to the Public Petitions Committee
The Scottish Parliament
Edinburgh
EH99 1SP



18 April 2013

Dear Ms Peat,

I welcome, as ever, the opportunity to submit evidence on the petition. As explained in my previous correspondence and in my appearance in front of the committee, the following submission is intended to address the issues raised by the Minister for Community Safety in her evidence to the committee, and examine the reasons the Minister gave for taking no further action on the Mosquito device.

The reasons as I understood them, were three fold - the Scottish Government do not feel that there is sufficient support amongst young people for a ban, that there is insufficient evidence of the number of devices in operation, and that it is felt that the Mosquito device does not contravene the European Convention on Human Rights. I will address each in turn.

Support Amongst Young People

The Minister indicated that she was not persuaded that there was sufficient support for a ban amongst young people to merit action, and that young people might not be sufficiently concerned by the device to make such action appropriate. The evidence (or at least one piece of evidence) for this that was given was an absence of correspondence from young constituents of the Minister on the subject.

If the Minister suspects that the young people of her constituency were unconcerned by the Mosquito device, the Member of the Scottish Youth Parliament who represents the very same constituency came to a different conclusion. At the session on the 1st of March, Jonathan Ainslie MSYP said the following:

“I am the MSYP for South Perthshire and Kinross. I represent the same constituency as Roseanna Cunningham, and I was incredibly disappointed to learn that she does not think that the issue is a concern for the young people in her constituency. Not only have I yet to meet a young person who is not horrified by the notion of the devices being used in their community, but I have had conversations with at least two young people who have experienced them and are horrified that they are allowed. I look forward to following up those conversations so that I can contribute to the quantitative evidence that will be presented to the committee. However, I do not think that the Government can argue that the issue is of no concern to young people.”

It would appear to be clear from Mr. Ainslie's evidence that the suggestion that young people in Perthshire South and Kinross-shire were not concerned about the Mosquito device or supportive of a ban was not based on any discussion with those in the area who represent the views of those young people. Furthermore, I do wonder how much correspondence MSPs receive from children and young people on *any* issue. In particular, I wonder how many babies and toddlers, who will also be affected by these devices, routinely pop an email into their elected member's parliamentary inbox with their pressing concerns. It is submitted that when assessing interest, concern or support in such an issue, the Scottish Government should look further afield than correspondence that they have received personally.

The background of the petition itself is filled with demonstrations of young people's concern about the Mosquito device and support for a ban. It was brought by myself, a young person elected to represent young people, as a Member's Motion to the Scottish Youth Parliament, in March 2010. In order to secure the motion, the topic had to be selected by the group of SYP Subject Committee Conveners, another group of young people elected to represent young people. The criteria for selecting topics to debate includes consideration of the importance of the issue to young people - the Conveners Group were of the opinion that this was an important enough issue to merit a debate at a Sitting of the Parliament. When that debate came, over a hundred young people, representing young people from across Scotland, overwhelmingly backed the call for a ban, with 88% of MSYPs voting in favour.

Between that point and the lodging of the petition, there was an even more important and telling development. The policy was one of just under 200 submitted as potential policies for the Scottish Youth Parliament's 2011 manifesto. The SYP Conveners Group was tasked with selecting 100 of these which were considered to be the most important to Scotland's young people. The statement "The Mosquito", a device which emits an unpleasant high-pitched noise that only those under 25 can hear, should be banned" was selected. At SYP's 2010 June sitting, MSYPs had to select 50 of these 100 issues which we felt were the 50 most important issues for Scotland's young people over the next 5 years. Banning the Mosquito devices was, once again, considered a sufficiently important issue to form part of our manifesto consultation.

Each of the 50 policies was then subjected to an extensive consultation process - so extensive that the consultation was, at the time, the largest consultation of young people in Scotland. 42,804 responses were received in total in the process, and there was 67% support for banning the Mosquito device (with almost half of the rest of respondents selecting the 'not sure' option - possibly because of a lack of knowledge of what the Mosquito device is or that that is what it is called). As a result, the statement is one of 49 included in our current youth manifesto, 'Change the Picture', which enjoys a strong mandate from Scotland's young people.

In response to the Minister's concerns, SYP conducted a small-scale survey in March to find out whether there was any change in young people's views on the issue. Despite the relatively small sample size, there was strong opposition to the Mosquito from the young people who participated.

- 35 (65%) of the young people that took part in the survey think that the Scottish Government should take action to ban the device. Interestingly, the overall figures were extremely similar to the views given in SYP's Change the Picture youth manifesto mass consultation (42,804 responses) where 67% supported a ban.
- Almost three-quarters of participants (40) said that the Mosquito device makes them feel that their rights are not being respected
- Two-thirds of respondents (36) also claimed that it makes them feel unwelcome in their own community

These figures are evidence that young people still feel that the Mosquito device should be banned, and that it is worth the Scottish Government taking action to prevent their use and protect our rights. Time after time, both Scotland's young people and the young people that represent them have indicated that this issue is important to them and that the Scottish Government should look toward a ban.

In the time that I have been involved with this issue, I have yet to meet a group of young people where the prevailing opinion was that the Mosquito device was not a problem, or that it was not worth acting on. I have yet to meet an MSYP, a youth worker or indeed any other person who has met such a group.

I do not understand on what basis the Minister makes the claim that young people are not concerned about the use of these devices and interested in seeing action from government, and I do not believe that the evidence points to this being the case. Indeed, I am of the belief that the evidence points firmly to a continued and consistently expressed desire for the Scottish Government to stand up for young people on this issue and ban the Mosquito device.

Prevalence of Use

Another issue identified by the Minister was the lack of knowledge about the number of Mosquito devices currently in operation. It is worth pointing out that the existence of a large number of devices has never been a central plank of our argument - we are of the strong belief that as long as any of these devices are in operation in Scotland, and Scotland's young people have no proper recourse to protect their rights, there is an important role for government and parliament to play in providing that recourse. Nevertheless, appreciating that the Scottish Government considers this to be an important point, I will try to address it.

It is extremely difficult to establish how many devices are in operation - because of the way they are distributed, the manufacturer can't know for sure; most of the population cannot hear them to identify them; a significant proportion of the population who can hear, and are affected by, the devices are not in a position to report them due to age and/or a lack of knowledge about who to report them to and how; there has been no significant study or survey to establish the prevalence, and SYP is not in a position to resource any such effort.

The evidence base that does exist is small.

Fortunately, it all points in more or less the same direction.

The information kindly provided by the manufacturer indicated that their best guess is that one hundred devices have been sold for use in Scotland, excluding those bought by the police and local authorities between 2006 and 2008.

As part of the survey that we conducted, respondents were asked on how many occasions they had encountered the Mosquito device. 31 of the respondents (57%) had encountered the device, with 19 (35%) of saying they had encountered the device “many times”. Again, the sample number is small, but does include (as will become apparent) young people from all across Scotland, the majority of whom had personally encountered a Mosquito device on at least one occasion.

Respondents were also asked to identify any Mosquito devices they were aware of or believed to be in operation. Fifteen separate locations were identified:

- Spar, High Street, Carnoustie
- Zara, Eastgate Shopping Centre, Inverness
- Zara, Union Square, Aberdeen
- Ticket Office, Aberdeen Train Station
- Glasgow Central Station
- St James’ Centre, Edinburgh
- Robin Chapel at the Thistle Foundation, Niddrie Mains Road, Edinburgh
- Corner shop, Tulloch Terrace, Perth
- Coral bookmakers, Clarkwell Street, Hamilton
- Spar, Westwood Square, East Kilbride
- Unique, Bank Street, Kilmarnock
- Cedars School of Excellence, Ardgowan Square, Greenock
- Kings Road, Stonehaven
- Unspecified corner shop, Towerlands, Irvine
- Additional unspecified location in South Lanarkshire

It is unclear whether a Mosquito device is currently in operation in each of these locations, or whether its use has ceased. What is striking however, is that a survey of 54 young people received reports from 15 different locations. It is submitted that this demonstrates that encountering a Mosquito device is not an uncommon occurrence for young people, and that there is use is (geographically at least) widespread. If 54 young people can identify 15 locations, it is far from implausible that 100 Mosquito devices are in operation.

For those of us who have been involved in talking to young people about the Mosquito device, the above comes as no surprise. I don’t recall having spoken to a group of young people where none reported having heard a Mosquito device. I often hear stories from SYP’s outreach team that when they explain what a Mosquito device is to the groups of young people they work with, it dawns on the young people that they have encountered the device before, and simply didn’t know what it was other than an annoying sound outside their local shop. Many MSYPs have told me the same thing. MSYPs from all over Scotland are interested in this issue because they know from their constituents that the devices are being used in their area - not in huge numbers, but in significant numbers.

This is all the evidence that there is on the issue - but it does all indicate significant use of Mosquito devices across Scotland. I wonder how many devices the Scottish Government feels ought to be in operation before action would be warranted. I wonder how many young people's rights ought to be disregarded by private individuals with no recourse before the issue should be taken forward. I accept that the Scottish Government feels that there ought to be evidence of prevalence before they act. I feel that the evidence is there, and that it is clear that young people in various parts of Scotland are being affected by Mosquito devices. The Scottish Government should act to protect those young people.

ECHR Compatibility

In her evidence, the Minister indicated that the Scottish Government was not of the belief that the Mosquito device contravened any of the provisions of the European Convention on Human Rights. The Minister admitted that this position was not based on legal advice. It is a shame that given the length of time this petition has been open and given the repeated concerns both from myself and other groups that ECHR rights were being infringed, the Scottish Government did not see fit to take such legal advice.

Thankfully, the UK Government did seek advice from the Equality and Human Rights Commission on the legality of the Mosquito device. The Equality and Human Rights Commission even sought their own legal advice on the matter. Their response was as follows¹:

“Having taken legal advice, the Commission considers that the use of mosquito devices (at the higher frequency which can only be heard by children and young people) will be unlawful in most instances as they discriminate against young people in violation of their rights under Article 11 ECHR (where they are used in a public place) and Article 14, taken with Articles 8 and 11, as incorporated in UK law by the Human Rights Act 1998. The purported justification for the interference with the rights of children and young people will only be proportionate if the use of Mosquitos is restricted solely to particular situations where there is evidence that they will prevent actual behaviour that has occurred in the past recurring and where the use is a proportionate response to the behaviour it is intended to prevent. For this reason the Commission considers that indiscriminate and uncontrolled use of the devices is not lawful.”

The Commission then considered in more detail what situations use of the device might be proportionate under the ECHR, before advising the government of their own responsibility:

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http://www.equalityhumanrights.com/uploaded_files/humanrights/letter_tim_loughton_mosquitos.pdf

“It is for the government not the Commission to determine what action needs to be taken to ensure that the use of the Mosquitos is limited to situations where their use is proportionate. However, we suggest that consideration be given to whether some kind of regulatory regime is needed to ensure their proper use which provides a clear legal framework identifying the circumstances in which their use could be lawful and when not. In the absence of such a framework the government may be in breach of the positive obligations inherent in Articles 8, 11 and 14 to ensure that, in Convention terms, their use is justified. If it is the government’s view that such a regime would be unworkable in practice, then a straightforward alternative would be a ban on their use.”

To their shame, the UK Government has failed to act on the matter despite this advice. The advice is nevertheless useful, and make fairly clear that there is a significant ECHR concern for the Scottish Government to think about. Indeed, it is worth pointing out again that the Council of Europe themselves have indicated that they believe the Mosquito devices contravenes both the ECHR and the UN Convention on the Rights of the Child. In Recommendation 1930, the Parliamentary Assembly of the Council of Europe stated the following²:

“The Assembly considers that the use of “Mosquito”-type devices constitutes a disproportionate interference with Article 8 of the European Convention on Human Rights (ETS No. 5), which protects the right to respect for one’s private life, including the right to respect for physical integrity. Even though such interference does not result directly from public authorities’ action, states parties are bound to guarantee this right effectively and adopt, when required, adequate protective measures. The use of these devices may, depending on circumstances, also interfere with Article 11 of the Convention which guarantees the right to freedom of peaceful assembly.

10. For the Assembly, acoustic dispersal devices aimed at adolescents, such as the “Mosquito”, are also inconsistent with the general prohibition of discrimination in the enjoyment of any right set forth by law, as provided for by Article 1 of Protocol No. 12 to the Convention (ETS No. 177), and they are in breach of Article 14 of the Convention, which states that the enjoyment of rights and freedoms protected by the Convention shall be secured without discrimination on any ground such as “birth or other status”. Further to a British national campaign against the discriminatory character of the “Mosquito”, a new version of the device went on sale in November 2008 which allows the user to lower the frequency, therefore enabling its sound to be audible to people of any age. However, as long as the possibility exists to set the frequency at a higher level, and given the scope the device is intended for, it will remain potentially discriminatory.

11. The Assembly emphasises, in addition, that these devices, while inflicting acoustic pain on young people and treating them as if they were unwanted birds or pests, are harmful, highly offensive and may thus result in a degrading treatment prohibited by Article 3 of the Convention. Under

² <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1930.htm>

this provision, children and other vulnerable persons have the right to be protected from serious attacks against their physical and psychical integrity.

12. Moreover, the Assembly notes that the “Mosquito” devices contravene the United Nations Convention on the Rights of the Child, in particular regarding health and safety. This convention binds states parties to “ensure that the child is protected against all forms of discrimination or punishment” (Article 2.2), recognises the right of the child to freedom of peaceful assembly (Article 15) and requires states parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse” (Article 19.1).”

It is submitted that it is abundantly clear that the assertion by the Scottish Government that the Mosquito device does not contravene the ECHR is at the very least not universally held. It is also submitted that had the Scottish Government taken legal advice they might have come to a different conclusion. The evidence from the Equality and Human Rights Commission in particular indicates the Scottish Government should be seriously concerned with the possibility that rather than creating the best place for child to grow up, they are permitting flagrant breaches of fundamental rights by private individuals against those very children. The Scottish Government purports to take children’s rights extremely seriously - inaction on the Mosquito device is simply incompatible with that claim.

Summary

I share the concern that has been expressed on a number of occasions by members of the committee that this petition has been open for a very long time without a satisfactory conclusion. But I am determined to get that satisfactory conclusion. I accept that such a conclusion may be that the Scottish Government does indeed decide not to act on the Mosquito device. But I do not accept that it is a satisfactory conclusion if they do so based on the reasons they have given. Those reasons do not stand up to scrutiny. They are not based on sound evidence. Scotland’s young people deserve better than that. This process deserves better.

I would like the Minister to take the evidence above into account and then decide afresh whether to act or not. I would like her to be invited to explain whatever decision she makes to the Committee. If the decision is still not to act, and the reasons given are sound, I can accept that decision even if I wholeheartedly disagree. But what I hope the Scottish Government finds is that the evidence indicates a real problem, affecting a significant number of young people, that young people care about and that amounts to a breach of at least one, if not more, of their fundamental rights. And I hope that the Scottish Government sees fit to act.

I want Scotland to be the best place for children and young people to be - a safe place where young people feel valued in their communities and by their government. I share that vision. This is very much part of that vision.

Yours sincerely,

Andrew Deans MSYP