



**Equality and
Human Rights
Commission**

Tim Loughton MP
Minister for Children
Department for Education
Sanctuary Buildings
Great Smith Street
London
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Our ref: JW/CC
Date: 22 June 2011

Dear Mr Loughton MP

Re: Mosquito

I understand that a review of the use of Mosquito devices is currently underway. We write now to give our advice on the legality of such devices.

As you know, the 'Mosquito' is a deterrent device marketed as the most effective tool for dispersing groups of teenagers behaving in an antisocial manner. The device is widely used by police and local authorities, chain stores, independent shops and private individuals to protect their property from the effects of teenage antisocial behaviour.

The device emits a high frequency noise; the frequency emitted can be set at either 8 KHz or 17 KHz. The higher frequency is generally only detected by people under about 25. Above that age the ability to hear higher frequencies diminishes such that older people would not hear the noise. In simple terms, young people find the noise very unpleasant and tend to leave the area. There is no evidence that the Mosquito causes permanent hearing damage, although the sound is sufficiently unpleasant for those who can hear it for them to want to avoid it.

There are currently no specific controls on the manufacture, marketing or use of Mosquitos and, so far as we are aware, no plans to ban them.

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Context

Over the past few years several organisations including Liberty, the Office of the Children's Commissioner for England and Scotland, and the Joint Committee on Human Rights have expressed concerns that Mosquitos discriminate against young people in a way which makes them potentially unlawful.

On 22 March 2010, the Parliamentary Assembly of the Council of Europe voted in support of a report calling for a European ban on Mosquitos. Among other things it said that:

Research so far indicates that there is no danger of hearing loss for adults or young people as a result of exposure to the "Mosquito" sound. However, although there is no indication that other health effects might be associated with this device, further medical tests are required. It is for instance not known what impact high-frequency noise has on unborn children. The "precautionary principle" must therefore apply.

The Assembly considers that the use of "Mosquito" devices constitute a disproportionate interference with Article 8 of the European Convention on Human Rights (the Convention), 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, interfere as well with Article 11 of the ECHR which guarantees the right to freedom of peaceful assembly.

Such devices aimed at adolescents, 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, 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"¹.

¹ Recommendation 1930 (2010)

Local bans on the use of the device

Some local authorities have banned the use of Mosquitos by the authority itself (or on its land) and have committed to using noise control powers to control their inappropriate use. Thus for example, Westminster City Council:

“Agreed (1) that Mosquito devices should not be used in Westminster for reasons set out in the report regarding their appropriateness and effectiveness and (2) to pursue enforcement action, including the provisions of the Control of Pollution Act 1974 and all other and subsequent legislation on the advice of the Director of Legal and Administrative Services, to control the use of Mosquito devices on private and public land.”²

Lancashire County Council undertook an Equality Impact Assessment and concluded that:

“There has been much publicity over the use of the Mosquito, the concerns being raised including potential Human Rights implications, hearing damage, hearing aid implications, effects on young children and animals and the ability of people older than the age of 25 to hear the sound.

The County Secretary and Solicitor has advised that the use of the Mosquito does interfere with an individual’s Human Rights, specifically Article 8 – the right to respect for private and family life – and Article 11 – freedom of assembly. However, both rights are qualified and so in some circumstances interference can be justified but must be proportionate.

It is therefore suggested that to justify interference each individual use of the device would have to be examined on its own facts/merits and it should only be used where there is **actual** anti-social behaviour where the operation is proportionate to the behaviour it is intended to prevent. It is also advised that use of the device should be in accordance with a protocol which would set out the details of each use and provide for regular reviews.

² Decision Ref: no. CMf/CP&L/06/2008 & CMfCS/2008/07

Trials have shown the unit to be very effective and for an individual building owner the Mosquito will deflect youths onto other areas. However, for a large property portfolio owner such as Lancashire County Council with far greater social and community responsibility, this approach may not be appropriate.

The Commission's view

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 recognises the possibility that the circumstances of a particular use of the Mosquito might be such that its deployment was not only a pursuing a legitimate aim but was a proportionate way of doing so. Thus, for example, it might be said that using Mosquitos on school premises at night in circumstances where young people had no lawful or legitimate basis to be there at that time and in circumstances where there was a specific history of (say) criminal damage which had not been deterred by any other means was a proportionate way of pursuing the legitimate aim of tackling the criminality.

But, importantly, it does not follow from the fact that in some narrow instances interference could be justified that all use of the device is justified. Far from it.

An attempt to justify the use of the Mosquito in (say) a shopping centre simply on the basis that children gathered there and that was considered undesirable (particularly where most if not all of the children were behaving entirely properly) would fail. And any such attempt to justify

the use of a Mosquito in a public place would also have to confront the fact of its impact on young people about whom there could be no conceivable proper complaint: children not involved in the “gathering” (if that is what was objected to) or young people working in shops in the area. Moreover, a particular issue arises in relation to very young (and perhaps also some disabled) children who are in the care of adults at the time in circumstances where the children may not appreciate why they are feeling discomfort and the adults (being over 25) may not be aware of it at all.

In the Commission’s view to justify interference each individual use of the device would have to be examined on its own facts/merits and Mosquitos should only be used where there is **actual** anti-social behaviour where the use of the device is proportionate to the behaviour it is intended to prevent.

It is for the government not the Commission to determine what action needs to be taken to ensure that the use of 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.

I am happy to discuss this if that would be of assistance or one of my lawyers would be pleased to meet with someone from your department to advise further.

Yours sincerely,

John Wadham

Group Director, Legal



