

## **Inhuman sentencing of children in Tonga**

Briefing for the 29th Session of the Universal Periodic Review in January 2018. Submitted by the Child Rights International Network - CRIN ([www.crin.org](http://www.crin.org)), June 2017.

### **Inhuman sentencing of children in Tonga**

1. Child offenders may lawfully be sentenced to death, life imprisonment or corporal punishment in Tonga.
2. The main laws governing juvenile justice are the Criminal Offences Act 1926 and the Magistrates Court Act 1919. There is no distinct juvenile justice law. The minimum age of criminal responsibility is seven.<sup>1</sup>

### **Legality of inhuman sentencing**

#### ***Death penalty***

3. Child offenders may be sentenced to capital punishment. The Criminal Offences Act provides for the death penalty for treason and murder.<sup>2</sup> Execution is by hanging.<sup>3</sup> A death sentence may not be pronounced on a pregnant woman.<sup>4</sup> In the case of murder, the death sentence cannot be applied to any person under the age of 15.<sup>5</sup> It is not clear whether this limit applies to age at the time of the offence or at the time of sentencing. No age restriction applies in the case of treason.

#### ***Life imprisonment***

4. The Criminal Offences Act provides for life imprisonment for offences relating to the demolition of buildings, murder and inciting or assisting suicide.<sup>6</sup> No limitations exist in relation to the age of the offender.
5. Any person under the age of 15 who would be sentenced to death for murder, must be sentenced to be “detained during His Majesty’s pleasure”.<sup>7</sup> Pregnant women convicted of a capital offence must be sentenced to life imprisonment in lieu of capital punishment.<sup>8</sup>

#### ***Corporal punishment***

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<sup>1</sup> Criminal Offences Act, Section 16.

<sup>2</sup> Criminal Offences Act, Sections, 24, 44 and 91. Consolidated legislation from 1988 available at: [https://www.unodc.org/res/cld/document/ton/1926/criminal\\_offences\\_act\\_html/Criminal\\_Offences\\_Act.pdf](https://www.unodc.org/res/cld/document/ton/1926/criminal_offences_act_html/Criminal_Offences_Act.pdf). Full texts of subsequent amending legislation available at: [http://www.paclii.org/to/indices/legis/Sessional\\_Chrono.html](http://www.paclii.org/to/indices/legis/Sessional_Chrono.html).

<sup>3</sup> Criminal Offences Act, Section 33. See also Criminal Offences (Sentence of Death) Regulations 1955.

<sup>4</sup> Criminal Offences Act, Section 40.

<sup>5</sup> Criminal Offences Act, Section 91(1).

<sup>6</sup> Criminal Offences Act, Sections 77, 91 and 101.

<sup>7</sup> Criminal Offences Act, Section 91.

<sup>8</sup> Criminal Offences Act, Section 40.

6. Whipping is a lawful sentence for males under the Criminal Offences Act.<sup>9</sup> Boys under 16 may be whipped up to 20 strokes “with a light rod or cane composed of tamarind or other twigs”. Older males may be whipped up to 26 strokes “with a cat of a pattern approved by the cabinet”.<sup>10</sup> The punishment must be administered in one or two instalments, as specified by the Court, and must be inflicted by the gaoler in the presence of a magistrate, following certification that the offender is medically fit to undergo the punishment.<sup>11</sup>

7. For males convicted of certain sexual offences, theft or robbery, the Criminal Offences Act states that whipping may be ordered at the discretion of the court in lieu of or in addition to imprisonment.<sup>12</sup> For boys under 16, whipping may be ordered in lieu of imprisonment for certain sexual offences.<sup>13</sup> The Magistrates’ Courts Act allows a magistrate to impose whipping on a boy aged seven to 14 in lieu of any other punishment, to be inflicted by a constable or police sergeant and administered in one or two instalments, not exceeding 10 strokes each, with “a light rod or cane composed of several tamarind or other twigs”.<sup>14</sup>

### **Inhuman sentencing in practice**

8. We have been unable to obtain official statistical information relating to the sentencing of children to life imprisonment, corporal punishment or capital punishment.

9. In 2010, the Appeal Court overturned sentences of judicial whipping that had been imposed on two 17 year olds and noted that this was the first time sentences of whipping had been handed down in 30 years.<sup>15</sup> The judgment referred to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and stated that “interpreted in the light of international conventions and decisions of this Court ... it might be argued that the whipping provision [in criminal law] is now unconstitutional”. The judgment also questioned the role of a doctor in certifying that an offender is fit for whipping, stating: “It is arguable that for a doctor to provide such certification would be contrary to various Medical Association declarations and codes and principles of medical ethics which taken together would appear to prevent a doctor from participating in the infliction of a whipping sentence.”

10. No executions have been carried out in the country since 1982.<sup>16</sup> Sentencing for murder was considered by the Supreme COurt in 2005, though not specifically in relation to child offenders.<sup>17</sup> The Court concluded that the norm for sentencing should be life imprisonment, with capital punishment reserved for especially heinous crimes. The Court noted that this was the first verdict of murder in Tongatapu for over 20 years.

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<sup>9</sup> Criminal Offences Act, Section 24.

<sup>10</sup> Criminal Offences Act, Section 31(5).

<sup>11</sup> Criminal Offences Act, Section 31(4)-(6).

<sup>12</sup> Criminal Offences Act, Section 142.

<sup>13</sup> Criminal Offences Act, Section 130.

<sup>14</sup> Criminal Offences Act, Section 30.

<sup>15</sup> *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009.

<sup>16</sup> *Report of the Working Group on the Universal Periodic Review: Tonga, A/HRC/8/48*, 5 June 2008, para. 34. See also Hood, R. & Hoyle, C. (2008), *The Death Penalty: A Worldwide Perspective*, Oxford: Oxford University Press

<sup>17</sup> *Rex v Vola* [2005] TOSC 31; CR 065 2005.

### **The review of Tonga by the Human Rights Council**

11. In light of the clear international human rights consensus against the imposition of the death penalty, life imprisonment and corporal punishment on child offenders and the specific recommendations made to Tonga during the first and second cycle of the Universal Periodic Review, we urge members of the Human Rights Council to recommend that Tonga:

- Explicitly prohibit the death penalty, all forms of life imprisonment and corporal punishment for offences committed by persons under the age of 18;
- Amend the sentence of any person currently serving a sentence of life imprisonment or detention during His Majesty's pleasure for an offence committed while they were a child;
- Raise the minimum age of criminal responsibility.

For more information, see CRIN's full report, available at: [www.crin.org/node/30672](http://www.crin.org/node/30672).