

Corporal punishment of children in Malaysia: Briefing for the Universal Periodic Review, 31st session, November 2018

*From the Global Initiative to End All Corporal Punishment of
Children, March 2018*



Global Initiative to
**End All Corporal Punishment
of Children**

The legality and practice of corporal punishment of children violates their fundamental human rights to respect for human dignity and physical integrity and to equal protection under the law. Under international human rights law – the Convention on the Rights of the Child and other human rights instruments – states have an obligation to enact legislation to prohibit corporal punishment in all settings, including the home.

In Malaysia, corporal punishment of children is still lawful in all settings, including as a sentence for a crime, despite recommendations to prohibit it by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women.

We hope the Working Group will note with concern the legality of corporal punishment of children in Malaysia. We hope states will raise the issue during the review in 2018 and make a specific recommendation that Malaysia draft and enact legislation as a matter of priority to clearly prohibit all corporal punishment of children in every setting of their lives, including in the home, as a sentence for a crime and under religious law, and repeal all legal defences and authorisations for its use.

1 Review of Malaysia in the 2nd cycle UPR (2013) and progress since

- 1.1 Malaysia was reviewed in the second cycle of the Universal Periodic Review in 2013 (session 17). The issue of corporal punishment of children was raised in the summary of stakeholders' information.¹ The Government rejected several recommendations on the prohibition of corporal punishment,² stating in relation to judicial corporal punishment: "Corporal punishment is a form of punishment provided for under existing laws in Malaysia. It is only imposed on serious offences and is only carried pursuant to the order of the courts. Malaysia is unable to support this recommendation as it equates torture, cruel, inhuman or degrading treatment and punishment with corporal punishment which is a valid and legal form of punishment in Malaysia."³
- 1.2 Since the review, there has been no change in the legality of corporal punishment of children. 2016 amendments to the Child Act 2001 removed its references to whipping, but it did not amend the Criminal Procedure Code 1976 which still allows for whipping of juveniles and did not prohibit the corporal punishment of children as a sentence for a crime under religious law.

¹ 25 July 2013, A/HRC/WG.6/17/MYS/3, Summary of stakeholders' views, para. 42

² 4 March 2014, A/HRC/25/10/Add.1, Report of the working group: Addendum, para. 9

³ 4 March 2014, A/HRC/25/10/Add.1, Report of the working group: Addendum

- 1.3 **We hope the Working Group will note with concern the legality of corporal punishment of children in Malaysia. We hope states will raise the issue during the review in 2018 and make a specific recommendation that Malaysia draft and enact legislation as a matter of priority to clearly prohibit all corporal punishment of children in every setting of their lives, including in the home, as a sentence for a crime and under religious law, and repeal all legal defences and authorisations for its use.**

2 Legality of corporal punishment in Malaysia

Summary of current law and reforms needed to achieve prohibition

Corporal punishment of children in Malaysia is lawful in all settings of children's lives, including in the home and as a sentence for a crime. Legislation should be enacted to explicitly prohibit corporal punishment in all settings, including under traditional/religious law, and repeal all legal defences and authorisations for its use.

- 2.1 ***Home (lawful)***: Corporal punishment is lawful in the home. Article 89 of the Penal Code 1936 states: "Nothing, which is done in good faith for the benefit of a person under twelve years of age ... by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person: Provided that this exception shall not extend to (a) the intentional causing of death, or to the attempting to cause death; (b) the doing of anything which the person doing it knows to be likely to cause death for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity; (c) the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity; (d) the abetment of any offence, to the committing of which offence it would not extend." Article 350 prohibits criminal force but states by way of illustration that caning of a scholar by a headteacher does not amount to criminal force. Article 499 confirms that a schoolmaster's authority is derived from a parent. Children have limited protection from violence and abuse under the Child Act 2001, the Penal Code 1936, the Guardianship of Infants Act 1961, the Domestic Violence Act 1994 (amended 2017) and the Islamic Family Law (Federal Territories) 1984.
- 2.2 ***Alternative care settings (lawful)***: Corporal punishment is lawful under articles 89 and 350 of the Penal Code 1936, as in the home. The Child Care Centre Act 1984 is silent on the issue.
- 2.3 ***Day care (lawful)***: Corporal punishment is lawful under articles 89 and 350 of the Penal Code 1936.
- 2.4 ***Schools (lawful)***: Corporal punishment of boys is lawful in schools, regulated by the Education Regulations (Student Discipline) 2006 under the Education Act 1996. Article 350 of the Penal Code 1936 confirms that caning of a scholar by a headteacher does not amount to criminal force.
- 2.5 ***Penal institutions (lawful)***: Corporal punishment is lawful as a disciplinary measure in penal institutions. The Prison Act 1995 allows for punishment with a rattan for disciplinary offences (art. 50).

- 2.6 **Sentence for crime (lawful):** Malaysia has a dual system of secular and Islamic law. The main laws governing juvenile justice are the Child Act 2001 (as amended in 2016), the Penal Code 1936 and the Criminal Procedure Code 1976. For Muslim children, Islamic laws are also applicable – the Sharia Courts (Criminal Jurisdiction) Act 1965, the Sharia Criminal Offences (Federal Territories) Act 1997 and the Sharia Criminal Procedure (Federal Territories) Act 1997. There is no prohibition of cruel, inhuman or degrading treatment or punishment in the Federal Constitution 1957.
- 2.7 Corporal punishment is lawful as a sentence for crime. The Criminal Procedure Code 1976 provides for whipping of a youthful offender up to 10 strokes with a light rattan, “in the way of school discipline” (art. 288), and this may be ordered in cases normally punished by fine or imprisonment (art. 293). No sentence of whipping shall be passed on women or on males sentenced to death (art. 289). Many offences in the Penal Code and other laws are punishable by whipping. Corporal punishment is also lawful as a sentence under Islamic law, and there is no exemption for females. The Sharia Courts (Criminal Jurisdiction) Act 1965, which applies to Muslims in all the States of Peninsular Malaysia (arts. 1 and 2), provides for Islamic courts to order whipping up to six strokes (art. 2). The Sharia Criminal Offences (Federal Territories) Act 1997 applies to Muslims in the Federal Territories of Kuala Lumpur and Labuan (art. 2), and provides for the punishment of whipping up to six strokes for the offences of false doctrine, incest, prostitution, homosexual acts and other sex offences (arts. 4, 20, 21, 22, 23, 25 and 26). The Act applies to children who have attained the age of puberty according to Islamic law (arts. 2 and 51). The Sharia Criminal Procedure (Federal Territories) Act 1997 specifies how whipping should be carried out (arts. 125 and 126).
- 2.8 The Government stated its intention to amend the provisions for caning of boys in the Child Act in 2007.⁴ During the Universal Periodic Review in 2009, the Government stated that abolition of judicial caning and capital punishment for persons under 18 at the time of the offence was an “immediate concern”; it reported that the Child Act was under review and that the Ministry of Women, Family and Community Development was planning to recommend the withdrawal of the sentence of caning for children.⁵ Amendments to the Child Act 2001 passed in 2016 removed the references to whipping previously contained in article 91(g), article 92 and article 95, but it did not amend the Criminal Procedure Code 1976.
- 2.9 There have been no indications of any intention to prohibit corporal punishment under Islamic law. The Government rejected recommendations made during the UPR in 2013 to prohibit corporal punishment of children as a sentence for crime and defended judicial corporal punishment as “a valid and legal form of punishment”.⁶ The Federal Government has declared its readiness to allow implementation of Islamic (*hudud*) punishments, including corporal punishment, at state level. In April 2014, it was reported that the Government in Kelantan state was planning to introduce two private members bills which would allow this by June 2015.⁷ The state Government in Kota Baru stated its intention to enforce its Hudud Syariah Criminal Code.⁸ The 2016 amendments to the Child Act did not prohibit corporal punishment under Islamic law.

⁴ 25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report, para. 48

⁵ 5 October 2009, A/HRC/11/30, Report of the working group, paras. 56 and 59

⁶ 4 March 2014, A/HRC/25/10/Add.1, Report of the working group: Addendum

⁷ Reported in *The Star Online*, 10 April 2014

⁸ Reported in *The Star Online*, 10 April 2014

3 Recommendations by human rights treaty bodies

3.1 **CRC**: The Committee on the Rights of the Child has recommended to Malaysia that legislation be enacted to explicitly prohibit corporal punishment in all settings in 2007.⁹

3.2 **CEDAW**: In 2018, the Committee on the Elimination of Discrimination Against Women expressed concern at the legality of whipping under Shari'a law and recommended its prohibition.¹⁰

Briefing prepared by the Global Initiative to End All Corporal Punishment of Children

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The Global Initiative to End All Corporal Punishment of Children has regularly briefed the Committee on the Rights of the Child on this issue since 2002, since 2004 has similarly briefed the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, and since 2011 the Committee on the Rights of Persons with Disabilities.

⁹ 25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report, paras. 48, 49, 57, 58, 77 and 78

¹⁰ 9 March 2018, CEDAW/C/MYS/CO/3-5 Advance unedited version, Concluding observations on third-fifth report, paras. 23 and 24