

# **Corporal punishment of children in Malawi: Briefing for the Universal Periodic Review, 36<sup>th</sup> session, May 2020**



GLOBAL INITIATIVE TO  
**End All Corporal  
Punishment of Children**

*From the Global Initiative to End All Corporal Punishment of Children, October 2019*

**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 Malawi, corporal punishment of children is still lawful despite repeated recommendations to prohibit it by the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child.**

**We hope the Working Group will note with concern the legality of corporal punishment of children in Malawi. We hope states will raise the issue during the review in 2020 and make a specific recommendation that Malawi draft and enact legislation as a matter of priority to explicitly prohibit all corporal punishment of children, however light, in all settings including the home.**

## Summary of necessary legal reform to achieve full prohibition

Prohibition is still to be achieved in the home, alternative care settings, day care and schools.

We have been unable to establish whether or not a “right” to administer “reasonable punishment” or similar is confirmed in written legislation, but legal provisions against violence and abuse are not interpreted as prohibiting all corporal punishment in childrearing. However, it was not until 1964 that Malawi achieved independence from Britain and therefore it can be assumed that the right to “reasonably chastise” children is socially and legally accepted. The near universal acceptance of corporal punishment in childrearing necessitates clarity in law that all such punishment is unacceptable and unlawful. Prohibition should be enacted of all forms of corporal punishment, however light, together with repeal of any legal provisions which provide a defence for its use in childrearing.

*Alternative care settings* – Prohibition should also be enacted in relation to all alternative care settings (foster care, institutions, places of safety, emergency care, etc).

*Day care* – Corporal punishment should be prohibited in all early childhood care (nurseries, crèches, kindergartens, preschools, family centres, etc) and in all day care for older children (day centres, after-school childcare, childminding, etc).

*Schools* – Prohibition should be enacted in relation to all educational settings, including public and private, full and part time, and including religious institutions.

## Current legality of corporal punishment

### Home

Corporal punishment is lawful in the home. We have been unable to establish whether or not a “right” to administer “reasonable punishment” or similar is confirmed in written legislation, but legal provisions against violence and abuse are not interpreted as prohibiting all corporal punishment in childrearing. However, it was not until 1964 that Malawi achieved independence from Britain and therefore it can be assumed that the right to “reasonably chastise” children is socially and legally accepted. Provisions against violence and abuse in the Constitution 1994 and the Penal Code 1929 (amended 2009) are not interpreted as prohibiting corporal punishment in childrearing.

The Child Care, Protection and Justice Act 2010, which defines a child as under 16 (art. 2), states that parents have the responsibility to “protect the child from neglect, discrimination, violence, abuse, exploitation, oppression and exposure to physical, mental, social and moral hazards” and “provide proper guidance, care, assistance and maintenance for the child to ensure his or her survival and development” (art. 3), but it does not prohibit corporal punishment. Article 80 of the Act states that “no person shall subject a child to a social or customary practice that is harmful to the health or general development of the child” but this is not interpreted as prohibiting all corporal punishment in childrearing. The rights of the child are set out in the Third Schedule to the Act, including the right “to exercise, in addition to all rights states [sic] this Schedule and this Act, all the rights set out in the United Nations Convention on the Rights of the Child and the Organization of African Union Charter on the Rights and Welfare of the African Child with appropriate modifications to suit the circumstances in Malawi that are not specifically mentioned in this Act”. Although the Government has previously stated that corporal punishment was prohibited under the Child Care, Protection and

Justice Act 2010,<sup>1</sup> it is not clear that this or any other article in the Act would be interpreted as prohibiting corporal punishment in all settings, including the home.

Article 23(4) of the Constitution 1994 states that children “are entitled to be protected from ... treatment, work or punishment that is, or is likely to ... (b) interfere with their education; or (c) be harmful to their health or to their physical, mental or spiritual or social development”. This is not interpreted as prohibiting all corporal punishment in childrearing. In reporting to the Human Rights Committee in 2014, the Government stated that article 19 prohibits corporal punishment, including in the home and alternative care settings.<sup>2</sup> However, this provision specifically prohibits corporal punishment “in connection with any judicial proceedings or any other proceedings before any organ of the state” (see below): it is difficult to see how this could be interpreted as prohibiting all corporal punishment by parents in childrearing.

In 2007, the Constitution was reviewed: recommendations made by the Malawi Law Commission did not include prohibition of corporal punishment in the home.<sup>3</sup> In February 2017, the Parliament voted to amend article 23(6) of the Constitution to state: “A child shall be a person under the age of eighteen”. Domestic legislation, including the Child Care, Protection and Justice Act 2010, is still to be amended to reflect this change.

The Prevention of Domestic Violence Act 2006 defines “domestic violence” as “includes physical, sexual, emotional or psychological or financial abuse committed by a person against a spouse, child, any other person who is a member of the household, dependant or parent of a child of that household”.<sup>4</sup> It does not prohibit all corporal punishment of children. The Marriage, Divorce and Family Relation Act was passed by the National Assembly in February 2015: it does not prohibit corporal punishment. The Prevention of Domestic Violence Act 2006 is being reviewed.<sup>5</sup>

### **Alternative care settings**

Corporal punishment is unlawful in state institutions under article 19 of the Constitution 1994, but there is no explicit prohibition in other legislation and corporal punishment would appear to be lawful in private institutions and in non-institutional forms of care. In reporting to the Human Rights Committee in 2014, the Government stated that article 19 prohibits corporal punishment, including in alternative care settings:<sup>6</sup> we are making further enquiries but it is difficult to see how the Constitutional prohibition of corporal punishment “in connection with any judicial proceedings or any other proceedings before any organ of the state” could apply to privately-arranged care settings.

There is no explicit prohibition of corporal punishment in the Child Care, Protection and Justice Act 2010: article 179(1) states: “A person to whose care a child is committed under this Act shall, whilst the order is in force, have the like control over the child as if he were the parent of the child responsible for the maintenance of the child....”

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<sup>1</sup> 3 February 2017, CRC/C/SR.2185, Summary records of 2185<sup>th</sup> meeting, para. 3

<sup>2</sup> 26 June 2014, CCPR/C/MWI/Q/1/Add.2, Reply to list of issues, paras. 45 and 46

<sup>3</sup> Malawi Law Commission (2007), *Report of the Law Commission on the Review of the Constitution*

<sup>4</sup> [http://www1.chr.up.ac.za/undp/domestic/docs/legislation\\_13.pdf](http://www1.chr.up.ac.za/undp/domestic/docs/legislation_13.pdf), accessed 23 September 2015

<sup>5</sup> 20 July 2015, CEDAW/C/MWI/Q/7/Add.1, Reply to list of issues, para. 23

<sup>6</sup> 26 June 2014, CCPR/C/MWI/Q/1/Add.2, Reply to list of issues, paras. 45 and 46

## **Day care**

Corporal punishment is unlawful in state-run day care under article 19 of the Constitution 1994, but there is no explicit prohibition in other legislation and corporal punishment would appear to be lawful in privately arranged early childhood care and day care for older children. There is no explicit prohibition of corporal punishment in the Child Care, Protection and Justice Act 2010: article 179(1) states: “A person to whose care a child is committed under this Act shall, whilst the order is in force, have the like control over the child as if he were the parent of the child responsible for the maintenance of the child....”

## **Schools**

Corporal punishment is unlawful in schools under article 19 of the Constitution, which prohibits corporal punishment “in connection with any judicial proceedings or any other proceedings before any organ of the state”. It is unclear whether the prohibition applies to private schools. Following a review of the Education Act 1962 in 2009, the Government had recommended that the revised Act include explicit prohibition of corporal punishment. However, the Education Act 2012 is silent on the issue of corporal punishment.

The 2015 National Education Standards for primary and secondary education prohibit the use of corporal punishment. It is unclear whether this also applies to private schools.

## **Penal institutions**

Corporal punishment is unlawful as a disciplinary measure in penal institutions under article 19 of the Constitution. There is no provision for it in the Child Care, Protection and Justice Act 2010, though it is not explicitly prohibited. The Act, applicable to children under 16, provides for the manager of a reformatory centre or safety home to “make rules not repugnant to, or inconsistent with, this Act for the maintenance of discipline at the centre or home” (art. 176). The Prisons Act is under review.<sup>7</sup> In August 2017, the Prisons Bill 2003 had not yet been submitted to Parliament.<sup>8</sup> We have no further information.

## **Sentence for crime**

Corporal punishment is unlawful as a sentence for crime under article 19 of the Constitution 1994, which prohibits corporal punishment “in connection with any judicial proceedings or any other proceedings before any organ of the state”. It was previously lawful under the Children and Young Persons Act 1969 (arts. 10 and 16). This Act was repealed by the Children Care, Protection and Justice Act 2010, in which there is no provision for judicial corporal punishment. The Penal Code 1929 also provided for corporal punishment (arts. 25, 28 and others): these provisions were repealed by the Penal Code (Amendment) Act 2009. Provisions relating to judicial corporal punishment in the Criminal Procedure and Evidence Code were repealed in 2010.

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<sup>7</sup> Malawi Law Commission, [http://www.lawcom.mw/index.php?option=com\\_content&view=article&id=38:review-of-the-prisons-act&catid=2:general&Itemid=133](http://www.lawcom.mw/index.php?option=com_content&view=article&id=38:review-of-the-prisons-act&catid=2:general&Itemid=133), accessed 23 September 2015

<sup>8</sup> 20 July 2015, A/HRC/30/5, Report of the working group, para. 110.25; [August 2017], CSO complementary report on the status of ACERWC in Malawi, para. 2(27)

## **Universal Periodic Review of Malawi’s human rights record**

Malawi was examined in the first cycle of the Universal Periodic Review in 2010 (session 9). The following recommendation was made:<sup>9</sup>

“Develop and strengthen appropriate legislative measures to address the issue of sexual abuse and exploitation, ensure prompt prosecution of perpetrators, guarantee that no person under the age of 14 is admitted to employment or work, amend the Constitution to raise the minimum age for engaging in hazardous work to 18 years, and enact and implement legislation to ensure the complete prohibition of corporal punishment (Italy)”

The Government did not respond to the corporal punishment element of the recommendation.

Examination in the second cycle took place in 2015 (session 22). No recommendations specifically on corporal punishment of children were made but the Government accepted recommendations to harmonise its laws with international human rights instruments and to increase promotion and protection of child rights.<sup>10</sup>

## **Recommendations by human rights treaty bodies**

The Committee on the Rights of the Child has on three occasions recommended that legislation be enacted in Malawi to explicitly prohibit corporal punishment in all settings, including the family – in 2002,<sup>11</sup> in 2009<sup>12</sup> and in 2017.<sup>13</sup>

In 2018, the African Committee of Experts on the Rights and Welfare of the Child urged Malawi to enact legislation explicitly prohibiting corporal punishment in all settings.<sup>14</sup>

## **Prevalence/attitudinal research in the last ten years**

According to a 2014 survey, 42.9% of 1–14 year olds were subjected to physical punishment during the month preceding the survey, with 6.4% subjected to severe physical punishment. In contrast, only 5.5% of respondents believed that physical punishment is needed to bring up, raise, or educate a child properly. Over 72% of children were subjected to at least one form of psychological or physical punishment by their parents or other adult household members, while less than 20% of children experienced only non-violent discipline.

(National Statistical Office (2015), *Monitoring the situation of children and women: Malawi MDG Endline Survey 2014*, Zomba, Malawi: National Statistical Office)

A study of the 104 childcare institutions (orphanages, special needs centres, church homes, transit care centres and reformatory centres) in Malawi, which involved interviews with staff in the institutions and focus group discussions with children, documented the use of corporal punishment, including children being whipped, forced to kneel and forced to do hard work.

(UNICEF Malawi & Ministry of Gender, Children and Community Development (2011), *All Children Count: A Baseline Study of Children in Institutional Care in Malawi*, Lilongwe: UNICEF)

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<sup>9</sup> 4 January 2011, A/HRC/16/4, Report of the working group, para. 104(22)

<sup>10</sup> 20 July 2015, A/HRC/30/5, Report of the working group, paras. 110(12) and 110(42)

<sup>11</sup> 1 February 2002, CRC/C/15/Add.174, Concluding observations on initial report, paras. 33 and 34

<sup>12</sup> 27 March 2009, CRC/C/MWI/CO/2, Concluding observations on second report, paras. 38 and 39

<sup>13</sup> 3 February 2017, CRC/C/MWI/CO/3-5, Concluding observations on third/fifth report, para. 19

<sup>14</sup> [August 2018], Concluding observations on initial report, para. 21