

**BRIEFING ON MALAWI FOR THE COMMITTEE AGAINST TORTURE PRESESSIONAL WORKING GROUP, 62nd session (Nov/Dec 2017)**

*From the Global Initiative to End All Corporal Punishment of Children,* [*June*](mailto:info@endcorporalpunishment.org) *2017*

**This briefing describes the legality of corporal punishment of children in Malawi. In light of the obligation under international human rights law to prohibit all corporal punishment of children, the recommendations of the UN Secretary General’s Study on Violence against Children, the relevant recommendations made to Malawi during the UPR, as well as by the Committee on the Rights of the Child in 2002, 2009, and 2017 and the new global commitment to ending all violence against children in the context of the 2030 Agenda for Sustainable Development, we hope the Committee Against Torture will:**

* **raise the issue of corporal punishment of children in its List of Issues Prior to Reporting for Malawi, in particular asking what measures are being taken to explicitly prohibit all corporal punishment of children, including in the private spheres of their lives, and**
* **recommend, in the concluding observations on the initial state party report, that Malawi enact legislation as a matter of priority which clearly prohibits corporal punishment in the home and all other settings.**

**1 The legality of corporal punishment of children in Malawi**

1.1 ***Summary:***Corporal punishment of children is lawful in the home, some alternative care and day care settings, and private schools. It is unlawful in the penal system and public schools.

1.2 ***Home (******lawful):*** 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 in the Constitution 1994, the Child Care, Protection and Justice Act 2010, the Prevention of Domestic Violence Act 2006 and the Penal Code 1929 (amended 2009) 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.

1.3 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.[[1]](#footnote-1) 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.

1.4 In 2007, the Constitution was reviewed: recommendations made by the Malawi Law Commission did not include prohibition of corporal punishment in the home.[[2]](#footnote-2) In February 2017, the Parliament voted on amendments to the Constitution which included raising the age of majority to 18 – we are waiting for the publication of the text to establish whether that definition will apply to all domestic laws including the Child Care, Protection and Justice Act 2010 (which currently defines children as under 16).

1.5 ***Alternative care settings (partially unlawful):***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:[[3]](#footnote-3) 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.

1.6 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…”.

1.7 ***Day care (partially unlawful):***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…”.

1.8 ***Schools (partially unlawful):***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.

1.9 ***Penal institutions (unlawful):*** 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).

1.10 ***Sentence for crime (unlawful):*** 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.

**2 Recommendations by human rights treaty bodies and during the UPR**

2.1 ***CRC:*** 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 its concluding observations on the state party’s initial report in 2002,[[4]](#footnote-4) on the second report in 2009[[5]](#footnote-5) and on the third/fifth report in 2017.[[6]](#footnote-6)

2.2 ***UPR***: During the Universal Periodic Review of Malawi in 2010, a recommendation was made to completely prohibit corporal punishment: the Government did not respond.[[7]](#footnote-7) No recommendations on corporal punishment were made during the second cycle UPR of Malawi in 2015, but the Government accepted recommendations to harmonise its laws with international human rights instruments and to increase promotion and protection of child rights.[[8]](#footnote-8)

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

[*www.endcorporalpunishment.org*](http://www.endcorporalpunishment.org)*;* [*info@endcorporalpunishment.org*](mailto:info@endcorporalpunishment.org)

1. 26 June 2014, CCPR/C/MWI/Q/1/Add.2, Reply to list of issues, paras. 45 and 46 [↑](#footnote-ref-1)
2. Malawi Law Commission (2007), *Report of the Law Commission on the Review of the Constitution* [↑](#footnote-ref-2)
3. 26 June 2014, CCPR/C/MWI/Q/1/Add.2, Reply to list of issues, paras. 45 and 46 [↑](#footnote-ref-3)
4. 1 February 2002, CRC/C/15/Add.174, Concluding observations on initial report, paras. 33 and 34 [↑](#footnote-ref-4)
5. 27 March 2009, CRC/C/MWI/CO/2, Concluding observations on second report, paras. 38 and 39 [↑](#footnote-ref-5)
6. 3 February 2017, CRC/C/MWI/CO/3-5, Concluding observations on third/fifth report, Advance unedited version, para. 19 [↑](#footnote-ref-6)
7. 4 January 2011, A/HRC/16/4, Report of the working group, para. 104(22) [↑](#footnote-ref-7)
8. 20 July 2015, A/HRC/30/5, Report of the working group, paras. 110(12) and 110(42) [↑](#footnote-ref-8)