

Corporal punishment of children in Botswana

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Child population 856,000 (UNICEF, 2015)



GLOBAL INITIATIVE TO

**End All Corporal
Punishment of Children**

Summary of necessary legal reform to achieve full prohibition

Prohibition is still to be achieved in the home, alternative care settings, day care, schools, penal institutions and as a sentence for crime.

Article 61 of the Children's Act prohibits only "unreasonable" correction of a child by parents, thereby allowing "reasonable" correction; articles 27 and article 61 expressly state that the legal provisions protecting a child's dignity and prohibiting cruel treatment do not preclude the use of corporal punishment. These articles should be repealed and replaced by prohibition of all corporal punishment and other cruel and degrading treatment of children.

Alternative care settings – Prohibition of corporal punishment and other cruel and degrading treatment of children should be enacted in relation to all alternative care settings (foster care, institutions, orphanages, places of safety, emergency care, etc).

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

Schools – Provisions for corporal punishment in the Education Act 1967, the Education (Corporal Punishment) Regulations 1968, the Education (Government and Aided Secondary Schools) Regulations 1978, the Education (Primary Schools) Regulations 1980 and the Education (Private Primary Schools) Regulations 1991 should be repealed and corporal punishment prohibited in all schools.

Penal institutions – Provisions for corporal punishment in the Prisons Act 1980 and the Prisons Regulations 1965 should be repealed and corporal punishment prohibited as a "disciplinary" measure in all institutions accommodating children in conflict with the law.

Sentence for crime – Provisions for corporal punishment in the Penal Code 1964, the Magistrates' Courts Act 1974, the Customary Courts Act 1961, the Criminal Procedure and Evidence Act 1939, the Criminal Procedures (Corporal Punishment) Regulations 1969, the Corporal Punishment (Designation of Places for Administering) Order 1982 and the Customary Courts (Corporal Punishment) Rules 1972 should be repealed and all judicial corporal punishment explicitly prohibited.

Current legality of corporal punishment

Home

Corporal punishment is lawful in the home. Article 27(3)(h) of the Children’s Act 2009 states that every parent has a duty to “respect the child’s dignity and refrain from administering discipline which violates such dignity or adversely affects the physical, emotional or psychological well-being of the child or any other child living in the household”. But article 27(5) states that this “shall not be construed as prohibiting the corporal punishment of a child in such circumstances or manner as may be set out in this Act, the Penal Code or any other law”.

There is a similar provision in article 61 of the Act, which prohibits “unreasonable” correction of a child – thereby allowing “reasonable” correction – and explicitly states that the article does not prohibit corporal punishment that is carried out lawfully. It puts a duty on the Minister to ensure parent education for “appropriate” discipline, but does not state that this should be non-violent. Article 61 in its entirety states: “(1) No person shall subject a child to torture or other cruel, inhuman or degrading treatment or punishment. (2) No person shall subject a child to correction which is unreasonable in kind or in degree relative to the age, physical and mental condition of the child and which, if the child by reason of tender age or otherwise is incapable of understanding the purpose and fairness thereof. (3) The provisions of this section shall not be construed as prohibiting the corporal punishment of children in such circumstances or manner as may be set out in this Act or any other law. (4) The Minister shall cause to be put in place parental guidance programmes aimed at developing the capacity of parents to discipline and guide their children appropriately.”

At the Universal Periodic Review (UPR) of Botswana in 2008, the Government rejected recommendations to prohibit all corporal punishment of children.¹ Following the second UPR in 2013, the Government again rejected recommendations to prohibit, stating that it would undertake awareness raising campaigns before considering prohibition in all settings.² A 2017 report to the Committee on the Rights of the Child referred to “public debates” being carried out on the issue of prohibition and alternative methods of discipline, but ultimately seemed to defend its use in homes, schools and as a sentence for a crime.³ Botswana’s 2017 national report to the UPR highlighted the Children’s Act as prohibiting “harmful social, cultural and religious practices which are detrimental to a child’s well-being” but noted that the Act allowed corporal punishment as prescribed by law.⁴ The Government noted recommendations to prohibit in all settings.⁵

Alternative care settings

Corporal punishment is lawful in alternative care settings under articles 27 and 61 of the Children’s Act 2009 (see under “Home”).

Day care

Corporal punishment is lawful in day care under articles 27 and 61 of the Children’s Act 2009 (see under “Home”).

¹ 17 March 2009, A/HRC/10/69/Add.1, Report of the working group: Addendum

² 23 May 2013, A/HRC/23/7/Add.1, Report of the working group: Addendum, para. 30

³ [September 2017], CRC/C/BWA/2-3, Second-third report, paras. 85 and 94

⁴ 6 November 2017, A/HRC/WG.6/29/BWA/1, National report, para. 50

⁵ 11 April 2018, A/HRC/38/8, Report of the working group, paras. 129(41), 129(42), 129(43) and 129(44)

Schools

Corporal punishment is lawful in schools. Article 29 of the Education Act 1967 provides for the Minister to make regulations to prescribe “the conditions for the administration of corporal punishment”. Article 2 of the Education (Corporal Punishment) Regulations 1968 states: “No corporal punishment shall be administered to any pupil (a) at any school; or (b) by any school teacher for anything done by the pupil at school or in respect of his schooling, unless the following conditions are complied with: (i) the punishment shall be administered either by the headmaster or by some other teacher in the presence of the headmaster; (ii) no instrument of punishment other than a light cane shall be used and no punishment shall exceed 10 strokes with the cane; (iii) no male teacher may inflict corporal punishment upon any girl whom he has grounds for believing is over the age of 10 years; (iv) no punishment shall be administered except for offences of a serious or repeated nature.” Article 3 states that records must be kept of “the nature of the offence committed by the pupil, the number of strokes administered, the date of the punishment and the name of the person administering the punishment”; article 4 provides for a fine or imprisonment for contravention of the Regulations.

The above mentioned regulations do not apply to secondary schools which are Government schools or aided schools. In these schools, corporal punishment is regulated by the Education (Government and Aided Secondary Schools) Regulations 1978. Corporal punishment shall be administered “only on reasonable grounds and only where it appears that other disciplinary measures would be inadequate or ineffective in the circumstances of the case” (art. 21); it shall be administered by “the headmaster, a teacher or boarding master or matron or parent to whom authority to administer corporal punishment has been delegated by the headmaster; or such other person as the Permanent Secretary may, in writing, in special circumstances, authorize” and, where practicable, in the presence of another member of staff (art. 22). According to article 23: “(1) Corporal punishment shall be moderate and reasonable in nature and shall be administered only on the palms of the hands or across the buttocks with a light cane not more than 1 m long and at the thickest end not more than 1 cm in diameter or with a suitable strap, and no punishment shall exceed five strokes with the cane or strap. (2) No male teacher, except the headmaster, shall inflict corporal punishment upon a female pupil.” A record of the punishment must be kept (art. 24) and contravention of the regulations is punishable with a fine or imprisonment (art. 25).

In primary schools, corporal punishment is regulated by the Education (Primary Schools) Regulations 1980. Here corporal punishment may be administered “for a breach of good order or discipline by the pupil” but not for “backwardness, lack of understanding or inability to do school work or to do it properly” (art. 26) and with the restrictions set out in article 27: “No headteacher or other teacher shall administer corporal punishment to a pupil unless each of the following conditions is observed- (a) the punishment will, in the opinion of the person administering it, tend to reform the pupil; (b) the person administering the punishment shall be satisfied that it will not worsen any mental or physical disability from which he has reason to believe the pupil suffers; (c) the punishment shall not be administered with any instrument other than a light thupa; (d) the punishment shall not be administered with such severity as to break the skin of the pupil; (e) the punishment shall not be administered to any part of the pupil's body other than, in the case of a boy, his palms or buttocks or the back of his legs or, in the case of a girl, her palms or calves; (f) the punishment shall not exceed three strokes.” In addition, under article 28 “where, in the opinion of the headteacher, a pupil is guilty of a serious breach of good order or discipline, the headteacher may administer corporal punishment to the pupil not exceeding five strokes or cause such punishment to be administered to the pupil in his presence by some other teacher”. When the punishment exceeds three strokes it must be recorded in the Punishments Register (art. 29). Contravention of the regulations is

punishable by fine or imprisonment (art. 30). There are similar provisions in the Education (Private Primary Schools) Regulations 1991 (arts. 11-12).

Article 61 of the Children's Act (see under "Home") also applies in schools.

The Education Act is under review, with the new Education Bill under consultations. It has been proposed to prohibit corporal punishment in schools, but it was reported that most stakeholders consulted were against prohibition.⁶ In August 2018, delegates of the Botswana Sectors of Educators Trade Union rejected a motion to prohibit corporal punishment in schools, reportedly arguing that it was an effective and adequately regulated means of discipline.⁷

Penal institutions

Corporal punishment is lawful as a disciplinary measure in penal institutions under the Prisons Act 1980 (arts. 109, 114 and 115), the Prisons Regulations 1965 (art. 18) and article 61 of the Children's Act 2009 (see under "Home"). The Prisons Act is under review.⁸

Sentence for crime

Corporal punishment is lawful as a sentence for crime for males. The Penal Code 1964 punishes a number of crimes with corporal punishment, including sexual offences and offences relating to murder, assault, robbery and travelling by train without a ticket (arts. 25, 28, 29, 142, 143, 146, 147, 148, 149, 155, 218, 225, 229, 247, 292, 293, 300, 301, 302, 303 and 316); for persons aged 14 and over, corporal punishment can be ordered in addition to or in lieu of imprisonment (art. 28(4)). The Magistrates' Courts Act 1974 authorises all magistrates to impose a sentence of whipping (art. 60). The Customary Courts Act 1961 authorises customary courts to order corporal punishment, and they may, at their discretion, order this in addition to or in lieu of any other punishment (art. 18). Females may not be sentenced to corporal punishment (Penal Code, art. 28(3), Customary Courts Act, art. 18(2)). Under the Criminal Procedure and Evidence Act 1939, a court which convicts a person under 18 of an offence may in lieu of the stated punishment order him to be placed in the custody of a suitable person and to receive corporal punishment (art. 304(1)).

Boys may be sentenced to receive up to six strokes (Penal Code, art. 28). They must be certified fit to receive the punishment by a medical officer, and the punishment should be inflicted in the presence of a medical officer who must intervene if he considers the boy is not fit to continue (Criminal Procedure and Evidence Act, art. 305). Under the Criminal Procedure (Corporal Punishment) Regulations 1969, the implement used for males under 18 must be 0.914m long and 9.525mm diameter (art. 2). The caning should be administered on the bare buttocks (art. 3). It must not be carried out in instalments, and must be inflicted privately in a prison or in a customary court (Criminal procedure and Evidence Act, article 305; Corporal Punishment (Designation of Places for Administering) Order 1982, art. 2); for a person under 18, the court may direct where the punishment should take place and who should administer it, and the parent/guardian has a right to be present (Criminal procedure and Evidence Act, art. 305). In a customary court, the law states that corporal punishment should be inflicted with a cane or a thupa and on the buttocks only, with protection placed over the kidneys (Customary Courts (Corporal Punishment) Rules 1972, arts. 2 and 3).

⁶ [September 2017], CRC/C/BWA/2-3, Second-third report, paras. 89, 94 and 218

⁷ See <https://thevoicebw.com/bosetu-rejects-abolition-of-corporal-punishment/>, accessed 10 August 2018

⁸ 6 November 2017, A/HRC/WG.6/29/BWA/1, National report, para. 102

The Children's Act 2009 states that every magistrate's court is a children's court and shall hear and determine charges against children aged between 14 and 16 (article 36). Article 61 of the Act applies (see under "Home") and article 85 states that a children's court may sentence a child to corporal punishment. According to article 90, it should be not more than six strokes and must be inflicted in accordance with article 305 of the Criminal Procedure and Evidence Act and article 28 of the Penal Code (see above). The Children's Act makes no reference to customary courts. According to one media report, corporal punishment is reportedly not allowed on juveniles under customary law but it is used nonetheless.⁹

Article 7 of the Constitution 1965 protects every person from inhuman or degrading punishment or treatment but states that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution".

Universal Periodic Review of Botswana's human rights record

Botswana was reviewed in the first cycle of the Universal Periodic Review in 2008 (session 3). The following recommendations were made:¹⁰

"Continue to incorporate the provisions of the Convention on the Rights of the Child into domestic legislation, especially article 19(1), in relation to deep concerns about the corporal punishment of children (Chile); consider changing legislation to expressly prohibit all forms of corporal punishment in all settings (at home, in schools and in other institutions) and conduct awareness-raising efforts to change the public's attitude to corporal punishment (Slovenia); to continue efforts to eliminate corporal punishment (Brazil, Sweden), especially in schools (Sweden); to put an end, de jure and de facto, to the practice of corporal punishments in traditional judicial systems (France)"

The Government rejected these recommendations, stating: "The Government ... has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act."¹¹

However, the Government accepted the following recommendations:¹²

"Continue to incorporate the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child into national legislation (Cuba); take further measures to adopt legislation ensuring the implementation of the Convention, in particular in the area of violence prevention and sexual exploitation of children (Czech Republic, Argentina) and ensure girls are protected from sexual abuse (Argentina)"

During the review the Government drew attention to draft legislation (the Children's Bill) which, it said, would incorporate all the provisions of the Convention on the Rights of the Child – but at the

⁹ *The Monitor*, 24 August 2011, cited in African Child Policy Forum & Defence for Children International (2012), *Achieving Child Friendly Justice in Africa*

¹⁰ 13 January 2009, A/HRC/10/69, Report of the working group, para. 92(20)

¹¹ 17 March 2009, A/HRC/10/69/Add.1, Report of the working group: Addendum

¹² 13 January 2009, A/HRC/10/69, Report of the working group, para. 92(13)

same time reaffirmed and defended the legality of corporal punishment in homes, schools and the penal system.¹³ (As noted above, the Children’s Act 2009 failed to prohibit corporal punishment.)

The second cycle review took place in 2013 (session 15). During the review, the Government stated its commitment to comply with its treaty obligations regarding “cultural sensitivities that have a bearing on existing legislation” and in this regard would undertake educational awareness campaigns, including on corporal punishment; however, to date there is public support for the retention of corporal punishment.¹⁴

The following recommendations were made:¹⁵

“Review the inconsistencies between the Children’s Act of 2009 and international obligations under the Convention on the Rights of the Child, such as the prohibition of corporal punishment of children in all settings (Liechtenstein);

“Apply strict measures to stamp out corporal punishment in school and home settings (Timor-Leste);

“Take measures to eliminate corporal punishment that could lead to torture and cruel, inhuman or degrading treatment for victims, mainly children (Costa Rica);

“Continue to combat corporal punishment of children in all circumstances (Djibouti);

“Prohibit corporal punishment of children (Slovenia)”

The Government immediately rejected all but the first of these¹⁶ and at a later date the remaining one, stating: “Botswana does not accept the recommendation. Public consultations have so far confirmed that Botswana still prefer the retention of corporal punishment. However, Government is committed to undertake educational awareness campaign before it can consider prohibition of corporal punishment of children in all settings.”¹⁷

Third cycle examination took place in 2018 (session 29). Although consultations held with civil society during the drafting of the national report highlighted corporal punishment as “being of paramount importance to CSOs”,¹⁸ the national report very parsimoniously addressed the legality of corporal punishment. During the interactive dialogue, the delegation stated: “Botswana had retained corporal punishment in its 2009 Children’s Act because communities had insisted that the practice should not be abolished. Measures were being explored to change the mindset of those communities.”¹⁹ The Government ‘noted’ (did not support) the following recommendations:²⁰

“Abolish practice of corporal punishment by introducing appropriate changes to the legislation (Russian Federation);

“Explicitly prohibit corporal punishment of children in all settings, including in the home, school and in penal institutions (Estonia);

¹³ 13 January 2009, A/HRC/10/69, Report of the working group, paras. 12 and 41, cf paras. 9, 13 and 46

¹⁴ 22 March 2013, A/HRC/23/7, Report of the working group, para. 92

¹⁵ 22 March 2013, A/HRC/23/7, Report of the working group, paras. 116(30), 117(22), 117(23), 117(24) and 117(25)

¹⁶ 22 March 2013, A/HRC/23/7, Report of the working group, paras. 116 and 117

¹⁷ 23 May 2013, A/HRC/23/7/Add.1, Report of the working group: Addendum, para. 30

¹⁸ 6 November 2017, A/HRC/WG.6/29/BWA/1, National report, para. 7

¹⁹ 11 April 2018, A/HRC/38/8, Report of the working group, para. 122

²⁰ 11 April 2018, A/HRC/38/8, Report of the working group, paras. 129(41), 129(42), 129(43) and 129(44)

“Outlaw corporal punishment in all settings (Kenya);

“Take legislative measures to prohibit all forms of corporal punishment against children and to conduct awareness-raising campaigns to ensure that non-violent forms of discipline are administered in a manner consistent with the child’s dignity (Liechtenstein)”

The Government of Botswana clarified that “‘noted’ recommendations are those Botswana has taken some steps in but not fully implemented the recommendations or is unable to implement the recommendation within this reporting period.”²¹

Recommendations by human rights treaty bodies

Committee on the Rights of the Child

(3 November 2004, CRC/C/15/Add.242, Concluding observations on initial report, paras. 36 and 37)

“The Committee notes with deep concern that corporal punishment is permissible under the State party laws and is used as a way of disciplining children at home, as a disciplinary measure by schools as stipulated in the Education Act and as a sanction in the juvenile justice system.

“The Committee strongly recommends that the State party take legislative measures to expressly prohibit corporal punishment in the family, schools and other institutions and to conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child’s human dignity and in conformity with the Convention, especially article 28, paragraph 2, as an alternative to corporal punishment at all levels of society.”

Human Rights Committee

(24 April 2008, CCPR/C/BWA/CO/1, Concluding observations on initial report, para. 19)

“The Committee is concerned about the existence in law and in practice of penal corporal punishment in the State party, in violation of article 7 of the Covenant (art. 7).

The State party should abolish all forms of penal corporal punishment.”

Committee on the Elimination of Discrimination Against Women

(26 March 2010, CEDAW/C/BOT/CO/3, Concluding observations on initial to third report, paras. 31 and 32)

“... The Committee is ... concerned that corporal punishment is accepted in both school and home settings and constitutes a form of violence against children, including the girl child.

“... The Committee recommends that the State party explicitly prohibit corporal punishment in all settings, including through awareness-raising campaigns aimed at families, the school system and other educational settings.”

²¹ 2 May 2018, A/HRC/38/8/Add.1, Report of the working group: Addendum

Prevalence/attitudinal research in the last ten years

In June 2007, the Education Secretary for Ngami region reported a Baseline Study which found that 92% of students had been beaten in school and that this was supported by 67% of parents.

(Reported in *Daily News*, 13 June 2007)

In survey research by DITSHWANELO on corporal punishment in schools, about 90% of respondents said they used corporal punishment on children.

(Reported in correspondence with the Global Initiative, February 2006)