

Corporal punishment of children in Tonga

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Child population 46,000 (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, as a sentence for crime and possibly in penal institutions.

There appears to be no confirmation in written law of a “right” to administer “reasonable chastisement”, but this defence would be applicable under English common law. The near universal acceptance of corporal punishment in childrearing necessitates clarity in law that no degree or kind of corporal punishment of children is lawful or acceptable, however light and whoever inflicts it. Prohibition should be enacted of all corporal punishment, including in the family home.

Alternative care settings – Prohibition should be enacted of all corporal punishment in all alternative care settings (foster care, institutions, places of safety, emergency care, etc).

Day care – Corporal punishment should be explicitly 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).

Penal institutions – Corporal punishment should be explicitly prohibited in all institutions accommodating children in conflict with the law.

Sentence for crime – Provisions for whipping in the Criminal Offences Act and the Magistrates Courts Act should be repealed and judicial corporal punishment explicitly prohibited.

Current legality of corporal punishment

Home

Corporal punishment is lawful in the home. Article 3 of the Civil Law Act 1966 (as amended 1983) states that English common law applies: this would include the “reasonable chastisement” defence. Children have limited protection from violence and abuse under the Criminal Offences Act 1926.

The Family Protection Act 2013 (in force July 2014) defines domestic violence, including against a child, as an act or omission or threat thereof which causes injury or harm “beyond the reasonable expectations and acceptances of family and domestic life” (art. 4). It does not prohibit corporal punishment in childrearing.

Alternative care settings

Corporal punishment is lawful in alternative care settings under the English common law defence of “reasonable chastisement”.

Day care

Corporal punishment is prohibited in preschool education institutions under article 40 of the Education (Schools and General Provisions) Regulations 2002 (see under “Schools”) but is lawful in other day care settings under the English common law defence of “reasonable chastisement”.

Schools

Corporal punishment is prohibited in schools in article 40 of the Education (Schools and General Provisions) Regulations 2002: “(4) Under no circumstances shall a teacher inflict corporal punishment on any student. (5) Under no circumstances shall staff in any school direct students to administer corporal punishment on another student... (9) A principal teacher or teacher who inflicts corporal punishment on any student or causes any student to inflict corporal punishment on another student shall be reported for action to the Director or their nongovernment Managing Authority. Details of the incident shall be entered in the schools’ staff discipline register.”

The prohibition is reiterated in the Education Act 2013 (in force February 2014), article 37: “(1) A person in a school or on any school premise shall not – (a) verbally abuse any student; or (b) use force (whether by way of correction or punishment) against any student. (2) A person referred to in subsection (1) shall include an employee, agent, or volunteer of the Ministry, Managing Authority or school.”

Penal institutions

Corporal punishment is prohibited as a disciplinary measure in prisons in article 66 of the Prisons Act 2010: “The following punishments are prohibited: ... (b) subjecting a prisoner to corporal punishment, torture or cruel, inhumane or degrading treatment.” We have yet to confirm that this effectively prohibits corporal punishment in all institutions accommodating children in conflict with the law. It

appears that, as at May 2017, provisions in the Prison Rules 1947 (articles 45, 163, 164 and 165) are still to be formally repealed.¹

Sentence for crime

Corporal punishment is lawful as a sentence for crime under article 24 of the Criminal Offences Act 1926. 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” (art. 31). The punishment must be administered in one or two instalments, as specified by the Court; it is inflicted by the gaoler, in the presence of a magistrate, following certification that the offender is medically fit to undergo the punishment (art. 31). For certain sexual offences, theft or robbery, whipping may be ordered at the discretion of the court in lieu of or in addition to imprisonment (art. 142); for boys under 16, whipping may be ordered in lieu of imprisonment for certain sexual offences (art. 130). Article 30 of the Magistrates’ Courts Act 1919 allows a magistrate to impose whipping on a boy aged 7-15 in lieu of any other punishment, to be inflicted by a constable or police sergeant and administered in one or two instalments, up to 10 strokes each, with “a light rod or cane composed of several tamarind or other twigs”.

In 1992, in a case concerning school corporal punishment, the Supreme Court concluded that “there is no constitutional objection or barrier to corporal punishment”.² However, in 2010, the Appeal Court overturned sentences of judicial whipping that had been imposed on two 17 year olds,³ stating that in light of international convention and decisions of the court “it might be argued” that the provisions for whipping are now unconstitutional. The judgment also questioned the doctor’s role in certifying an offender fit for whipping.

In 2010, MP and former Minister for Police Clive Edwards announced his intention to support a private members bill to abolish judicial whipping,⁴ but there appears to have been no progress in this regard. In 2007, the Justice Minister was reportedly involved in discussions on developing youth justice laws in Tonga similar to New Zealand’s model of restorative justice;⁵ we have no information on further developments. In the Universal Periodic Review of Tonga in 2013, the Government accepted a recommendation to abolish laws authorising judicial corporal punishment of children.⁶ However, more recently the Government announced that it would retain judicial whipping “as a deterrent”.⁷

Tonga is still considering ratifying the UN Convention Against Torture; in this light amendments are being discussed to the “Constitution of Tonga, Criminal Offences Act, Tonga Police Act 2010, Prison Act 2010, Extradition Act, Royal Tonga Armed Forces and others” in order to implement the Convention’s provisions.⁸

¹ http://crownlaw.gov.to/cms/images/LEGISLATION/SUBORDINATE/1947/1947-0045/PrisonRules_1.pdf, accessed 25 May 2017

² *Uhila v Kingdom of Tonga* [1992] TOSC 4; CC 145 1991 (19 October 1992)

³ *Fangupo v Rex; Fa’aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (14 7 2010)

⁴ *Radio New Zealand International*, 19 February 2010

⁵ *DCI Juvenile Justice Newsletter 2007*, No. 3, 30 June 2007

⁶ 21 March 2013, A/HRC/23/4, Report of the working group, para. 79(44)

⁷ 3 June 2013, A/HRC/23/4/Add.1, Report of the working group: Addendum, para. 15; [2017], CRC/C/TON/1, Initial report, para. 211

⁸ 3 November 2017, A/HRC/WG.6/29/TON/1, National report, paras. 11 and 138

Universal Periodic Review of Tonga's human rights record

Tonga was reviewed in the first cycle of the Universal Periodic Review in 2008 (session 2). In response to a question about abolition of corporal punishment in all settings, Tonga stated: "... Regarding the abolishment of corporal punishment in all settings, Tonga ratified CRC in 1995, and has since then abolished corporal punishment in schools. The Tongan way of life is based on an extended family that sees children freely move and develop under the influence of extended family members with shared responsibility. Respect and dignity within this family unit are integral to social development. Violence against children is not tolerated in that village society...."⁹ No specific recommendation on corporal punishment was made.

The second cycle review took place in 2013 (session 15). The following recommendations were made:¹⁰

"Abolish any statutory provision which authorizes corporal punishment, in particular when the convicted is a child (Italy);

"Eliminate the use of corporal punishment as criminal punishment (Costa Rica);

"Abrogate the penal provisions envisaging recourse to corporal punishment (France);

"Raise the age of criminal responsibility to 12 years, and prohibit corporal punishment as a sentence of the courts for all persons, but especially those under 18 years old at the time of the offence (Slovenia);

"Raise age of criminal responsibility, in line with the Convention on the Rights of the Child and prohibit corporal punishment in all grounds (Mexico)"

The Government immediately accepted the first of these recommendations, did not respond to the following two and went on to reject the last two, stating: "As for corporal punishment, Tonga adopts the same stance and policy as to the death penalty. Whipping is the only form of corporal punishment that is available under the criminal justice system, but it too will be retained as a deterrent, and used only at the most extreme cases when alternative sentences are not appropriate in the interests of the criminal justice system. The Tongan Courts has briefly considered corporal punishment in Tonga, its constitutionality and the stance of the international community and international law; however, the Tongan Courts have not yet expressly declared that corporal punishment under Tongan law is unlawful and unconstitutional."¹¹

Third cycle examination took place in 2018 (session 29). Tonga's national report referred to the 2010 Court of Appeal decision (see under "Sentence for crime") as having "set aside" the sentence of whipping, and stated that women and children were protected "from abuse and corporal punishment" under the Family Protection Act 2013.¹² The Government supported the following recommendations:¹³

"Abolish the provisions which authorizes corporal punishment (Italy);

"Prohibit all persons, especially children, from receiving lashes as disciplinary sanctions or any other type of corporal punishment, regardless of the offense they committed (Uruguay)"

⁹ 5 June 2008, A/HRC/8/48, Report of the working group, para. 45

¹⁰ 21 March 2013, A/HRC/23/4, Report of the working group, paras. 79(44), 81(23), 81(24), 81(25) and 81(26)

¹¹ 3 June 2013, A/HRC/23/4/Add.1, Report of the working group: Addendum, para. 15

¹² 3 November 2017, A/HRC/WG.6/29/TON/1, National report, paras. 16 and 18

¹³ 16 April 2018, A/HRC/38/5, Report of the working group, paras. 93(47) and 93(48)

We are following up with the Government of Tonga to clarify its intention in supporting these recommendations.

Recommendations by human rights treaty bodies

Committee on the Rights of the Child

(2 July 2019, CRC/C/TON/CO/1, Concluding observations on initial report, paras. 31 and 32)

“The Committee is seriously concerned that, while corporal punishment is prohibited in schools and penal institutions, it is still lawful in the home and in alternative and day-care settings, and that whipping is used as a judicial corporal punishment for a crime.

“Recalling its general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, the Committee urges the State party to:

- (a) Explicitly prohibit corporal punishment in law and in practice in all settings and repeal the right to administer judicial corporal punishment for a crime;
- (b) Strengthen teacher training on alternative, non-violent forms of discipline and ensure it is part of pre-service and in-service training programmes;
- (c) Provide programmes for parents and all professionals that work with and for children to encourage the use of alternative, non-violent forms of discipline;
- (d) Effectively enforce the prohibition against corporal punishment in schools and penal institutions and provide children with a complaints mechanism, especially in schools, so that they can safely and confidentially report teachers and others that continue to use corporal punishment;
- (e) Strengthen awareness-raising programmes, training and other activities to promote attitudinal change, in particular in schools, within the family and at the community level, with regard to corporal punishment.”

Prevalence/attitudinal research in the last ten years

A report by Save the Children Australia in 2019 found violence against children in the Pacific had reached “endemic” levels, particularly in relation to violent discipline in the home, which ranges from 70% to 87%. It found that more than 4 million children across the region experience violent discipline in the home – including an estimated 35,028 children (69%) in Tonga.

(Save the Children Australia (2019), Unseen, Unsafe: The Underinvestment in Ending Violence against Children in the Pacific and Timor-Leste)

A study of 1,170 14-17 year olds found that 14% of boys and 10% of girls had experienced an intentional injury from a teacher in the past year.

(Smith, B. J. et al (2008), “Intentional injury reported by young people in the Federated States of Micronesia, Kingdom of Tonga and Vanuatu”, *BMC Public Health*, 8 (145), 1-8, cited in UNICEF East Asia and Pacific Regional Office (2012), *Child Maltreatment: Prevalence, Incidence and Consequences: A Systematic Review of Research*, Bangkok: UNICEF)