

Ideal Formulation of Diversion in the Indonesian Child Criminal System

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Abstract

The settlement of cases of children in conflict with the law in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System has undergone changes in fundamentals. The change lies in the adoption of the concept of diversion in the settlement of children's cases. However, diversion is not fully in favor of all Indonesian children. The existence of categorization in the application of diversion in Article 7 paragraph (2) creates discriminatory treatment for children in conflict with the law and is inconsistent with the provisions of Article 2 letter c of Law Number 11 of 2012. The issues to be discussed are related to the legal politics of determining diversion in the Act. Law Number 11 of 2012, the current implementation of diversion, and the formulation of diversion in Law Number 11 of 2012. The research method uses a normative juridical approach. Based on the discussion, it is concluded that diversion is the will of the community. Currently, mandatory diversion is applied at every level of examination of child cases. However, the categorization of diversion in Article 7 paragraph (2) is still discriminatory, therefore the current application of diversion is not fully in favor of the best interests of the child. The ideal formulation of diversion includes (1) mandatory diversion for every criminal act committed by a child because the child who commits a crime is influenced by external factors or not purely his will. (2) Punishment of a child must prioritize the best interests of the child. (3) punishment of children that prioritizes rehabilitation, education, and resocialization.

Keywords

children; diversion; reformulation



I. Introduction

The issuance of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System provides confirmation related to child protection in Indonesia (Tarigan, 2015). Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law) also brings about fundamental changes in the juvenile justice system in Indonesia. This fundamental change can be seen from the adoption of the concept of diversion in the settlement of children's cases. In essence, diversion requires the settlement of children's cases outside the criminal justice system, the goal is none other than achieving peace between victims and perpetrators and avoiding the bad stigma of criminal justice. The concept of diversion is an alternative form of settlement of criminal acts that are directed to informal settlements by involving all parties involved in the crime that occurred (Marlina, 2009).

Until now diversion is still glorified both among academics and legal practitioners. This principle is considered to be able to resolve children's cases by accommodating the best interests of victims and perpetrators and avoiding deprivation of liberty to protect the future of children. However, the current application of diversion is not as described in legal theories. The desired diversion in the SPPA Law is only for children who commit criminal acts with certain categories, in other words, diversion has not been in favor of all the nation's children and is still discriminatory. The categorization of diversion can be seen in the provisions of Article 7 of the SPPA Law which essentially states that diversion can only be applied to criminal acts with a threat of under seven years and not repetition. The diversion provision is contrary to the mandate of Article 2 letter c of the SPPA Law and paragraph 1 of the Convention on the Rights of the Child (Fahlevi, 2015), that the juvenile criminal justice system is implemented based on the principle of non-discrimination without discriminating against the legal status of children. On the other hand, diversion in the SPPA Law is not yet fully in line with restorative justice which requires recovery, especially for children who have committed crimes. Although in its development the retributive system has begun to shift towards expediency (Sambas, 2012), In handling cases of children in conflict with the law, the retributive system is still heavily used by law enforcement officers. The act of detaining children is still a "must" paradigm, this is based on data from the Jakarta Legal Aid Institute, namely as many as 57% of children in conflict with the law receive detention from the police (Tiara, 2018).

The problem of diversion is like an iceberg and is still a problem that has not been resolved until now. So it is not surprising that many studies have examined this diversion. One of them is in Nevey Varida Ariani's article which examines the implementation of the SPPA Law in an effort to protect the interests of children. The article published in the legal media journal discusses the implementation of the juvenile criminal justice system and the government's efforts to protect children in conflict with the law, namely the application of diversion. Meanwhile, this research does not only examine the implementation of diversion, but also examines the ideal formulation of diversion in the future.

II. Review of Literature

Legal Politics on Diversion Determination in Law Number 11 of 2012

According to Padmo Wahjono, legal politics is a policy of state administrators that is fundamental in determining the direction, form and content of the law to be formed and about what criteria will be used to punish something. According to Satjipto Rahardjo, legal politics is an activity and method to be used to achieve a social and legal goal in society. According to Pratiwi (2020) in social life, law and society are two interrelated things that can never be separated. Through instruments, unlawful behavior is prevented and repressive measures are pursued (Tumanggor, 2019). From the aforementioned provisions, it proves the existence of new developments regulated in this Law (Purba, 2019). Teuku Mohammad Radhie (1973) stated that legal politics is a statement of the will of the ruler regarding the applicable law in his area and the direction of legal development.

One of the efforts to overcome juvenile delinquency is through the policy of the juvenile criminal justice system (Iman, 2013). This policy is stated in the SPPA Law. After the enactment of Law Number 11 of 2012, the juvenile criminal justice system in Indonesia entered a new phase in its development. One form of development in the Indonesian juvenile criminal justice system is the existence of a new perspective in resolving cases of children who violate the law called diversion.

Based on the general explanation of the SPPA Law, it is stated that the most basic substance in the Law is a strict regulation of restorative justice and diversion. This is intended to avoid and keep children away from the stigmatization of the judicial process, so that children can return to their normal social environment. Meanwhile, in the academic text of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, it is explained that diversion is expected to be able to reduce the adverse effects of justice and institutional placement. This explanation is reinforced by the results of research from Muladi, RM Jackson and Barda Nawawi Arief which illustrates that imprisonment results in a prisonization, resulting in recidivism, and even the lower the age of the perpetrator who is sentenced to prison and fostered in LAPAS, the more likely he is to commit another crime. .

Harahap, there are four rationales for the birth of diversion in the juvenile criminal justice system in Indonesia, namely:

1. Philosophical Foundation

The philosophical basis of diversion, namely Pancasila, diversion is in line with the values of Pancasila because:

- a) Precepts in the One Godhead

There is a value of religiosity in every religious teaching in Indonesia. In connection with diversion, in one of the religious teachings, namely Islam, in Q,S As-Shura (42): 40 and Q,S An-Nur (24): 44 which in essence Allah likes everyone who is forgiving and tolerant in dealing with someone else's fault or crime. So here with a diversion solution, there is the possibility of forgiveness values from the victim because the settlement prioritizes deliberation between the perpetrator's family, the victim and the community.

- b) The Precepts of a Just and Civilized Humanity Humanity

values have the essence that they are treated properly while still upholding human rights. In the context of diversion given to children, the value of human rights from children in the form of access to education and access to assistance from parents is very necessary, so that this is a form of harmony.

- c) The Precepts of Indonesian Unity

The value of unity means a sense of mutual need and togetherness. The connection with diversion oriented to a settlement model that involves various parties such as victims, perpetrators and their families and the community is a form of togetherness. So that diversion does not conflict with the Precepts of Indonesian Unity, but rather a manifestation of the realization of these Precepts.

- d) Populist Precepts Led by Wisdom of Wisdom in Representative Deliberations

That these precepts require that in establishing regulations for government agencies take the path of deliberation, besides that it is also necessary to take into account the will of the people. In accommodating diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, it is a reflection of community values as described in the academic text of the Law.

- e) In the Precepts of Social Justice for All Indonesian People. Diversion can be said to be fair for children because diversion is a form of handling children who have problems with different laws from handling adult crimes. This is accommodated in Law Number 11 of 2012 because of the special needs of children.

2. Sociological Basis

The existence of social factors that cause children to commit crimes such as the influence of globalization, the development of science and technology, even the factor of parenting by the family and negative associations, needs to be addressed by involving components of the social environment such as family and society.

3. Juridical Foundation

Article 28 paragraph (2) of the 1945 Constitution, Law Number 39 of 1999 concerning Human Rights, Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014.

4. The Psychopolitical Foundation of Diversified

Society accommodated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System by considering the results of the Commission III DPR hearings with a number of related parties. Not only that, the aspirations of community leaders were also heard through the working visit of Commission III of the DPR to Sulawesi and West Java. Thus, such as the explanation of the academic text, the creation of a legal product of the SPPA Law that accommodates diversion, the involvement of the community can at least reduce the level of community rejection of the results in the form of the product of the Juvenile Criminal Justice System Act.

The diversion that is accommodated in the SPPA Law is the will of the community. The form of accommodation can be said to be in accordance with the concept of the formation of laws in the politics of criminal law. Sudarto stated that in the formation of a law one should be able to express what is contained in society. In the politics of criminal law, for the formation of criminal legislation, it is necessary to pay attention to aspects of social policy whose adjustment consists of aspects of social defense (public protection) and social welfare (community welfare). Diversion itself can be said to have fulfilled these aspects, the reason being that from the social defense diversion can prevent children in conflict with the law from the negative effects of punishment, even for victims who will get recovery from their original condition and can also create peace. Meanwhile, from social welfare, if the diversion is successful, the child will be spared from the sentencing process, thus it will automatically reduce the state budget in covering the child's NAPI and for prisons it can prevent an overload in prisons.

III. Discussion

3.1 Current Implementation of Diversion

The Indonesian judiciary has actually been oriented towards restorative justice as well as diversion. As explained earlier, diversion is mandatory at every level of examination. The process of implementing diversion at each level in the juvenile criminal justice system is as follows:

1. Diversion in the investigation stage at the Police.

Investigations of children in conflict with the law are carried out in a family atmosphere. The legal basis for the implementation of diversion at the investigation level is Article 7 paragraph (1) Law Number 11 of 2012. The authority given to the Police as investigators to carry out diversion in the settlement of criminal cases committed by children is based more on the position of the police as law enforcement agencies, the first and directly in contact with the community. The police basically have such great potential to change the culture of society.

The diversion process at the investigation level begins after receiving the police report, the investigator makes a written letter asking for advice from the community advisor. The results of the research by the community supervisor must be submitted to the investigators no later than 3 X 24 hours. The investigators seek diversion no later than seven days after the investigation begins. If the perpetrator and the victim agree to carry out diversion, the community advisor and social worker start deliberation by involving the relevant parties. Deliberations are held no later than 30 days after the start of the diversion. If the diversion results in an agreement, the Court will issue a diversion decision no later than 3 days from the

receipt of the diversion agreement. After receiving a decision from the Court, the investigator issues a letter to terminate the investigation. However, the current application of diversion is not as described in legal theories. Based on data from the Jakarta Legal Aid Institute, the application of diversion to child perpetrators of criminal acts has not been maximized. During the investigation process, many children's rights related to diversion were not fulfilled. Of the 229 cases that were entered, only 32 cases were diverted, while 158 cases were not diverted at the investigation stage and 39 cases were empty and no information was given for diversion or not, as shown in the following graph:

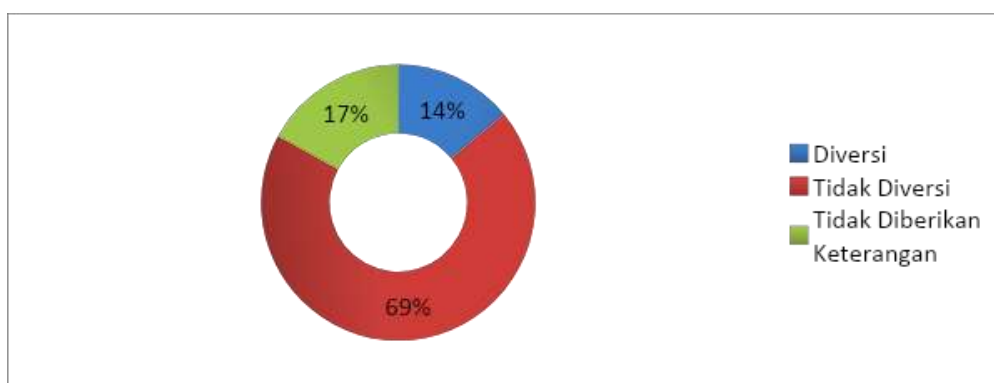


Figure 1. *Diversion of Children in Conflict with the Law at the Investigation Stage*
Source: LBH Jakarta

2. Diversion at the Prosecution Stage at the Prosecutor's Office

Diversion at the prosecution level is carried out after the Prosecutor receives the dossier from the Police. The transfer of files to the Prosecutor's Office was caused because the diversion at the investigation level failed. Diversion is declared failed if no agreement is found and diversion is successful if the parties reach an agreement. Furthermore, after an agreement is reached, the Court issues a decision on the diversion agreement no later than three days from the receipt of the diversion agreement. After receiving the decision from the Court, the Public Prosecutor issues a letter to terminate the prosecution.

The retributive system is still very thickly used by law enforcement officers. The act of detaining children is still a "must" paradigm, this is based on data from the Jakarta Legal Aid Institute, namely as many as 57% of children in conflict with the law receive detention from the police. The right to legal aid for children in conflict with the law is still largely ignored. As can be seen from the diagram above, the number of children who do not receive legal assistance is greater than the number of children who receive legal assistance. This is further exacerbated by the fact that after a random check of the data, it turns out that the reported child has received legal assistance but does not actually receive legal assistance. Furthermore, in 80% of the cases examined at the trial, the demands put forward by the Prosecutor were still dominated by demands in the form of imprisonment imposed on 268 children. This shows that the Prosecutor's tendency to use imprisonment is still high compared to other alternative punishments, even though other alternative penalties are actually possible to be imposed. The implication of the high number of prosecutions for imprisonment is the high rate of imprisonment for children.

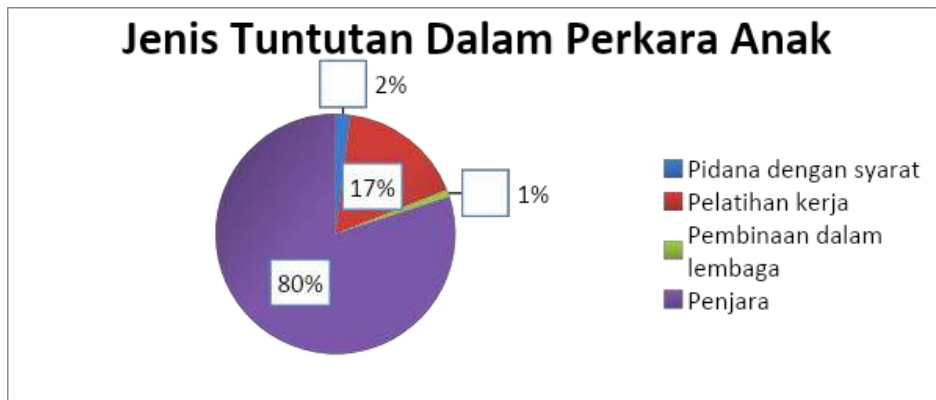


Figure 2. Types of Prosecution in Child Cases
Source: Institute for Criminal Justice Reform (ICJR) 2019.

3. Diversion in the Court Stage

The court is the final institution in determining the fate of a person, including a child who is a criminal. The diversion process at the Court level is carried out in the event that the diversion at the prosecution level by the Prosecutor's Office does not result in an agreement or fails. After receiving the dossier from the Public Prosecutor, the Head of the District Court is obligated to appoint a judge or panel to handle a child's case no later than three days after receiving the case file. Judges who have been appointed are obligated to seek diversion no later than seven days after the stipulation. The diversion process is carried out in the mediation room of the District Court. After the diversion process is complete, the Judge makes a diversion report. The minutes can be in the form of successful diversion and failed diversion. If the diversion reaches an agreement, the Chairperson of the District Court issues a decision no later than three days from the date of its enactment. With the successful diversion, the judge made a decision to terminate the trial.

Although the diversion process in the juvenile criminal justice system is an obligation, not all criminal acts committed by children can be diverted. The seriousness of the crime is a consideration in the application of diversion. Child cases that can be diverted are only child crimes that are punishable by imprisonment of less than seven years and are not a repetition of a crime, this is as stipulated in Article 7 paragraph (2) of the SPPA Law. The diversion process can realize dignified justice for children as the greatest gift from God Almighty, namely justice that humanizes humans, not only perpetrators but also victims. The existence of diversion makes the punishment institution not a way to solve children's problems because it is prone to violations of children's rights. Although the protection of children's rights has been guaranteed de jure, children's de facto rights have not been fulfilled. Based on data from the Institute for Criminal Justice Reform (ICJR) 2019, it was found that imprisonment was imposed on 259 children or reached 86% as shown in the following graph:

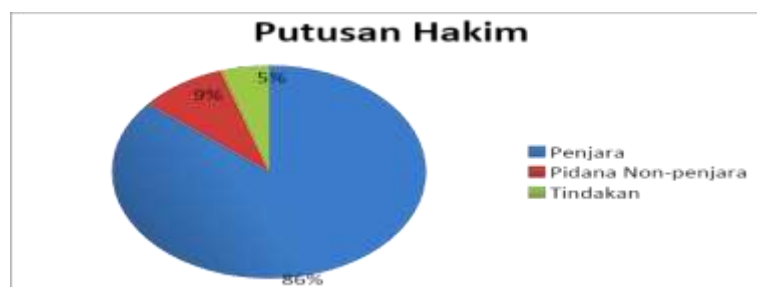


Figure 3. Judges' Decisions in Cases of Children in Conflict with the Law
Source: Institute for Criminal Justice Reform (ICJR) 2019

Based on the graph above, the implementation of diversion in Indonesia currently tends to be punished, especially imprisonment. When compared to other countries, the success of diversion in Indonesia is currently relatively low. The implementation of diversion in Australia, Japan, and China so far has been quite successful when compared to Indonesia, as shown in the following table:

Table 1. Comparison of The Implementation of Diversion

State of	Investigation	Prosecution	Court of Justice The
Australian	police issued an informal warning with a verbal warning and a formal warning carried out by a media conference is a minor crime and an apology victims and damages	None	None
Japan	Police can stop the case if: a) Crime against property and minor crime; b) The suspect is truly sorry; c) The suspect has given compensation; d) The victim has forgiven the suspect. The	prosecutor has the authority to postpone the prosecution (suspension of prosecution) by considering the following factors: a) The characteristics of the age and condition of the perpetrator; b) The severity of the crime; c) Circumstances as a result of the crime	None
China	The police gave a warning or imposed a number of fines, the case was not prosecuted	No	in the future
Indonesia	The police diversified in accordance with Article 9 taking into account the category of offense, crime, age of the child. Community research, support from the community and family.	The Public Prosecutor conducts diversion in accordance with Article 9 by considering the category of crime, the age of the child. Community research, support from the community and family	The judge conducts diversion in accordance with Article 9 taking into account the category of crime, the age of the child. The research community, the support of society and the family

3.2 Ideal Diversion Formulation in Law Number 11 of 2012

The Indonesian criminal law system is entering a new era in its development. Restorative justice is a form of reform in Indonesian criminal law that is oriented towards improving and restoring the situation. or restorative justice is a court that emphasizes the repair of losses caused or related to criminal acts. or restorative justice has been adopted in the policy of legislation regarding the settlement of children's cases in national legal policies. Restorative justice is a concept that animates the birth of diversion in the SPPA Law. This has brought about a fundamental change in juvenile justice in Indonesia.

Diversion based on restorative justice is needed to protect children in conflict with the law, because in self-discovery children are often not aware that their actions are against the law. This kind of child behavior is a violation of social norms and legal norms committed by children at a young age or also called juvenile delinquency . Handling juvenile delinquency must start from the right understanding and a humanistic approach. Even if the child who is the perpetrator of a crime is sanctioned, the sanctions given are not only in the form of punishment but also action sanctions . Juvenile delinquency refers to an act or deed committed by a child, if the act committed by an adult is a crime. Child delinquency occurs because of the natural process of every child who must experience psychological shock in the process of reaching maturity. The causal factors that most influence the criminal acts committed by children are environmental, socio-economic and psychological factors.

Restorative justice that animates the birth of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System has different principles from the conventional justice model, namely as follows:

- a. Requires the offender to be responsible for correcting the situation or loss he incurs.
- b. Involving the victim, parents, family and friends of her age.
- c. Create a forum to work together in problem solving.
- d. Connect directly and clearly between mistakes and formal social reactions.

Diversion for child offenders aims to prevent, reduce recidivism, provide alternative options for perpetrators other than punishment, collect restitution for victims, and reduce the burden of criminal justice. Although the application of diversion has many advantages, the desired diversion in the SPPA Law is only for children who commit criminal acts with certain categories, in other words, diversion is not in favor of all children of the nation and is still discriminatory. The categorization of diversion can be seen in the provisions of Article 7 paragraph (2) of the SPPA Law which essentially states that diversion can only be applied to criminal acts with a threat of under seven years and not repetition. On the other hand, the exception to the application of diversion in the SPPA Law is inconsistent with the basic framework for establishing restorative justice. Bagir Manan stated that according to Kitayarah there are six main principles as a framework for restorative justice , namely:

1. Criminal acts are human events in the form of violations of social relations, both personal and against other parties. Criminal acts are not merely a violation of state law, but are violations against people.
2. The aim of justice is to as far as possible repair the damage and restore relations to both individuals and society to their original state.
3. Victims should have the opportunity to choose to participate in the process. Participation can be in the form of information and dialogue with perpetrators regarding restitution (compensation), reducing fear, increasing a sense of security, growing new hopes and others.
4. Perpetrators are given the opportunity to accept responsibilities and obligations towards victims and society in general.
5. Surrounding communities and their sources must express the various needs of victims and perpetrators, including prevention of violations.
6. The formal criminal justice system must ensure that victims and perpetrators engage in values that bind all participants without coercion, including monitoring.

The existence of exceptions and categorization in the application of diversion is a form of discrimination against children who are in conflict with the law and contrary to the provisions of Article 2 letter c of the SPPA Law which states that the juvenile criminal justice system is carried out on the basis of non-discrimination. The logical consequence of this kind of diversion arrangement illustrates the character of the legislators who have indirectly built a polarization of discriminatory thinking, namely by applying different treatment in dealing

with children in conflict with the law. The application of diversion should refer to the principle of the best interests of children in order to ensure the protection, dignity and welfare of every child in conflict with the law. In order to provide equal treatment to children in conflict with the law, it is necessary to reformulate the provisions of Article 7 paragraph (2), the provisions in Article 7 paragraph (2) should be abolished so that diversion can be carried out for every crime committed by children.

Reformulation of the provisions of Article 7 paragraph (2) which contains categorization in the application of diversion, needs to be carried out so that it is in line with the non-discriminatory principle in Article 2 letter c of the SPPA Law. In addition, not all criminal acts committed by children fully arise from the will of the child's conscience, but are influenced by factors outside themselves such as environmental factors, family education, association, globalization, technological developments and so on. For example, children steal to eat, children who are perpetrators of terrorism have been contaminated with radical ideology by irresponsible people, children who are drug dealers because of the demands and recommendations of adult criminals and so on. In other words, a child who commits a criminal act should not be seen as a criminal, and his actions should not be viewed as a crime only but a juvenile delinquency or delinquency behavior that is carried out by the child in the process of determining his identity. This condition of the child must be seen as a person who needs help, understanding and affection. Actions against children in conflict with the law must pay attention to the sustainability of their lives. However, children are weak, unstable and need assistance. Therefore, every child who is in conflict with the law without exception has the right to obtain diversion in the settlement of his case. Therefore, improvements are needed in the formulation of future diversions. These improvements include, first, that diversion must be sought for every criminal act committed by a child, because as described above that a child who commits a crime is influenced by external factors or not purely his will. Second, the punishment of a child must prioritize the best interests of the child. Third, the punishment of children that prioritizes rehabilitation, education, and resocialization.

Based on the description above, the perspective of children in conflict with the law must be oriented towards protection, protection and equality. Deviations in behavior or unlawful acts committed by children are caused by factors outside of the child. In accordance with its philosophical foundation, that diversion is based on Pancasila. Therefore, the application of diversion should not be selective but in favor of all children who commit criminal acts. Equity in the application of diversion is also in line with restorative justice which animates the birth of diversion and is consistent with the principle of non-discrimination in the implementation of the Indonesian juvenile criminal justice system as stipulated in Article 2 letter c of the SPPA Law.

IV. Conclusion

Diversion which is accommodated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is the will of the community. Although diversion in the juvenile criminal justice system is an obligation, not all criminal acts committed by children can be sought for diversion. The only thing that can be diverted is a child crime which is punishable by imprisonment of less than seven years and is not a repetition of a crime. The existence of categorization of the application of diversion illustrates the character of the legislators which has indirectly built a polarization of discriminatory thinking, namely by applying different treatment in dealing with children in conflict with the law.

The categorization of the application of diversion creates discrimination against children in conflict with the law so that it is contrary to the principle of non-discrimination in Law Number 11 of 2012. Therefore, it is necessary to reformulate the provisions of Article 7

paragraph (2). So that in the future every child who commits a crime must be sought for diversion. This needs to be done in order to eliminate discriminatory treatment of children in conflict with the law.

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