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## Implementation of diversion in case resolution children to realize protection law against children

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**Abstract:** The substance of the law of Law No. 11 of 2012 on the Juvenile Criminal Justice System determines that in the settlement of child criminal cases must be carried out diversion by law enforcement officials. The implementation of diversion is carried out at every level of the child criminal justice process. However, in the SPSA Act, not all cases done by children can be implemented diversion. In this case the law determines the limits of the qualifications of crimes that can be carried out diversionary in the settlement of child cases. The problems in this study, concerning the factors that influence the implementation of diversion and how the qualifications of criminal acts committed by children, as well as efforts to protect children in the settlement of child cases through the implementation of diversion. This type of research is empirical normative juridical research, by conducting research at the Medan Resort Police. This research is descriptive analysis, using primary and secondary sources. Data analysis used in this research is qualitative data analysis. The implementation of diversion is influenced by law enforcement factors and the legal culture of the community. From the aspect of law enforcement, human resources law enforcement apparatus still does not support the implementation of diversion through restorative justice approach. In addition, the implementation of diversion is also influenced by the difficulty of reaching a peace agreement between the victim and the perpetrator, due to the attitude of the perpetrator who is less cooperative and the victim or family who demands compensation outside the limits of the perpetrator's ability. The limitation of the qualification of crimes that can be implemented diversion in the child criminal justice system is, the crime is threatened with imprisonment of under 7 (seven) years and is not a repeat of the crime. The implementation of diversion in the resolution of ABH cases through restorative justice approach will provide protection to children. The implementation of diversion in the settlement of ABH cases will prevent children from formal criminal justice proceedings and also prevent children from the bad stigma that arises in the community towards children, as a result of the punishment by the court against the child.

**Keywords:** Restorative, Protective, Child Facing The Law.

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### INTRODUCTION

The Government of the Republic of Indonesia has made comprehensive efforts in realizing the protection of children, especially children facing the law (abbreviated ABH), by issuing and legalizing Law No. 23 of 2002 on Child Protection jo Law No. 1 of 2016 on the Second Amendment to Law No. 23 of 2002 on Child Protection. Furthermore, in the settlement of ABH cases, the government has also issued Law No. 3 of 1997 on Children's Courts, which was later replaced by the issuance of Law No. 11 of 2012 on the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law).

The legal substance of the SPSA Act puts forward more protection efforts against ABH. This can be seen from the efforts to keep children away from the criminal justice process through the implementation of diversi.

Maidin Gultom stated that diversion is part of efforts to protect children's human rights in accordance with the Convention on the Rights of the Child. One of the mandates of the Convention on the Rights of the Child is to provide opportunities for the process of diversion by law enforcement officials, ranging from the Police and Public Prosecutors as well as other authorized officials.

The settlement of ABH cases according to the child criminal justice system, the process of examination of cases against children is no longer based on the *ordeel de onderscheid*, but rather prioritizes aspects of education accompanied by the provision of more appropriate sanctions against children, namely criminal acts.

The SPPA Law, determines that at every level of the child criminal justice process, namely from investigation, prosecution, and examination in advance of the child criminal justice trial must be carried out *Diversi*. Diversion is the transfer of settlement of a child's case from the criminal justice process to a process outside of

criminal justice. From this provision, it is understood that Diversion is an attempt to divert the ABH case resolution process from a judicial process to a non-judicial process.

The obligation to implement diversion in the settlement of ABH cases at every level of the child criminal justice process has legal consequences, that the formal criminal justice process in the settlement of ABH cases is the last resort that can be taken in dealing with child cases that conflict with the law.

The implementation of Diversion is carried out by conducting deliberations to reach an agreement between the victim and his/her parents/guardians with the perpetrator or his/her parents/guardians, community supervisors, and social workers based on restorative justice. Restorative justice, which is a concept applied in the resolution of ABH cases involving various parties, ranging from perpetrators and their parents/guardians, victims and their parents/guardians, law enforcement, government apparatus and also the community.

The implementation of diversion is carried out using a restorative justice approach, requiring the approval of the victim and his/her parents/guardians as well as the recognition or apology from the child and his/her parents/guardians. In addition, the SPSA Law also provides limits on the qualifications of criminal acts that can be implemented diversionary. So in the settlement of the ABH case, it can not always be implemented diversion.

Based on the brief background above, in this study determined several formulations of problems that become the object of discussion studies, namely:

1. What are the factors that influence the implementation of diversion in the settlement of child cases facing the law?
2. How is the qualification of criminal acts, which can be implemented diversion in the settlement of child cases facing the law?
3. Is the implementation of diversion in the settlement of children's cases facing the law able to provide protection to the Child?

## **RESEARCH METHOD**

Judging from its type, this research is an empirical research supported by normative legal research or better known as field study research that is enhanced with literature law.

Normative or doctrinal legal research equipped or supported by empirical (sociological) research. Normative legal research is research conducted by examining library materials (secondary data) or library law research. While empirical research is research obtained directly from the community or researching primary data. This research uses a statute approach, case approach, so that this research is not limited to research on the applicable law (normative) only, but more than that is how the law should be applied.

The types of data used in this study are primary data and secondary data. Primary data, namely data obtained directly from the results of field research through interviews with several respondents. While secondary data, namely data obtained from legal materials, in the form of primary legal materials, secondary legal materials and tertiary legal materials. Data analysis used in research is qualitative data analysis, by describing the discussion of research through a series of solid and clear sentences.

## **RESEARCH RESULTS**

One of the legal reforms in the juvenile criminal justice system is seen from the new concept in handling ABH cases, namely by transferring the child criminal justice process from the formal judiciary to the informal judiciary called diversion. The implementation of Diversion in handling ABH cases according to Article 5 paragraph (1) of the SPPA Law is carried out through a restorative justice approach.

The settlement of ABH cases through the implementation of diversion in the criminal justice system is carried out using a restorative justice approach, according to the SPPA Law has several objectives to be achieved, namely:

1. Achieving peace between victims and children;
2. Resolve the child's case outside the judicial process;
3. Preventing children from deprivation of independence;
4. Encourage the community to participate; Dan
5. Instill a sense of responsibility to the child.

Realizing the purpose of the implementation of diversion as intended in the SPSA Law is not an easy thing to do. At the practical level, the willingness of the parties, namely the perpetrator and his/her parents/guardians and victims and their parents/guardians to resolve disputes outside the criminal justice process. In addition, there must be readiness and capability of law enforcement as well as understanding of all parties involved in the process of implementing diversion, including support from the community, which is a supporting factor in achieving the objectives of diversionary implementation.

The implementation of diversion in the settlement of ABH, normatively and empirically influenced by various supporting factors and at the same time can be an inhibitory factor, which includes:

**1. Criminal Qualification Factor:** According to Article 7 paragraph (2) of the SPPA Law, the qualification of crimes that can be carried out is diversionary in the settlement of ABH cases, namely against criminal acts that are threatened with imprisonment of under seven years and not a repeat of criminal acts.

**2. Child Age Factor:** The SPPA Law has determined the age limit in claiming criminal liability for children, i.e. has reached or is 12 (twelve) years old, but not until the age of 18 (eighteen) years or more. From this provision, no child under the age of 12 can be held criminally responsible.

**3. Recognition and Remorse Factor from Children:** The implementation of diversion using restorative justice approach requires recognition and misapprobation of the child for his actions. That recognition and remorse should not be forced, but must be based on willingness. Without the recognition and resolution of the child, the implementation of diversion with restorative justice approach cannot be considered.

**4. The willingness factor (consent) of the victim and the support of the victim's family for the implementation of diversion:** The resolution of ABH's case using restorative justice requires the involvement of the victim and his/her parents/guardians. Here law enforcement at every level of criminal justice process that will conduct the diversion is necessary to hear and consider the opinions or wishes of the victim's parents / guardians. So that there is a need for the support of parents / guardians and families to be actively involved in the settlement of cases. However, in the case of crimes committed by children in the form of violations, minor crimes, victimless crimes, or the value of the victim's loss is not more than the value of the local provincial minimum wage, a diversion agreement can be made jointly between the perpetrator and/or his/her family with the victim and/or his/her family.

**5. Law Enforcement Factors:** Efforts to fulfill the rights of ABH in the implementation of child criminal justice process, very closely related to the legal structure, namely institutions that carry out the provisions stipulated in the SPPA Law. Judging from the institutional aspects (legal structure), in addition to being influenced by the lack of human resources, not the maximum application of restorative justice in the settlement of ABH cases, is also influenced by the lack of coordination carried out by relevant agencies and law enforcement agencies.

**6. Fakror Sarana and Prasana:** Efforts to fulfill children's rights certainly require the availability of adequate facilities and facilities that meet the standards in child protection efforts. One of the mandates of the SPSA Law is the obligation of the government to build LPKA, LPAS and Bapas children in each district / city. This is as stipulated in Article 105 paragraph (1) letter d, and the development of LPKA and LPAS in each province in accordance with the mandate of Article 105 paragraph (1) letter e, which must be formed within 5 years after the formation and issuance of the SPPA Law. However, until 2016 only 71 Bapas, 20 LPKA, and 4 LPAS were formed. So it is still necessary to form 465 Bapas, 14 LPKA and 34 LPAS in each district / city and province in Indonesia. From the above conditions, there is still a lot of infrastructure that needs to be prepared and built by the government. Efforts to prepare the facilities and facilities, of course, must be supported by the availability of budgets to realize it. Unmet infrastructure is needed, is an inhibition factor in the implementation of the SPPA Law, especially in an effort to provide legal protection for ABH.

**7. Community Support Factor:** The settlement of ABH case with the implementation of diversion is carried out by conducting deliberation (mediation) between the victim and his/her parents/guardians with the perpetrator and his/her parents/guardians. In the mediation process, of course, a mediator is needed, namely those who facilitating or as a facilitator. In the resolution of ABH cases through restorative justice approaches also required the support of the community, in this case community leaders or religious leaders who are neutral to be mediators in the deliberation process.

When the above factors are inadequate, new problems will arise which then become obstacles in achieving the objectives of the implementation of diversion. The achievement of the peace agreement in the deliberation process which is the main objective of the implementation of diversion will fail. As a result, the implementation of diversion by law enforcement was not carried out according to its purpose, because there was no peace agreement between the victim and his/her parents/guardians with the child (perpetrator) and his/her parents/guardians.

The legal basis for the implementation of diversion on the settlement of child cases in conflict with the law by investigators refers to the provisions of Article 7 paragraph (1) and (2) of the SPPA Law, which states that at the level of investigation, prosecution and examination of child cases in court, diversion must be pursued.

Based on the provisions of Article 7 paragraph (2) of the SPPA Law, the qualification of criminal acts that can be carried out diversion in the settlement of ABH cases, is a criminal offence that is threatened with imprisonment of under seven years and is not a repeat of a criminal offence.

Judging from the threat of criminality, the criminal acts committed by children are threatened with criminal sanctions under 7 years mandatory to be diversionary. As for the category of crimes that are threatened with imprisonment above 7 (seven) and is a repeat of the crime, it is not mandatory to be diversified with a restorative justice approach.

With regard to the qualifications of criminal acts that can be implemented diversion in the settlement of ABH cases, Marlina identified it as follows:

A. The case is not a case of child delinquency that sacrifices the integrity of the crowd and not the violation of road traffic;

B. The delinquency of the child does not result in loss of human life, severe injury or lifelong disability;

C. The delinquency of the child is not a crime against serious decency concerning honor.

The implementation of diversion through restorative justice approach in the SSPA Law, is essentially aimed at providing legal protection of the rights and best interests of the child. The basis of consideration implemented diversion in the process of child criminal justice is to keep the child away from the formal criminal justice process and prevent the child from the stigma of bad from society, as well as to strive to pay more attention to the best interests of the child. So the formal criminal justice process that boils down to sentencing by the court is as a last resort (*ultimum remedium*).

The restorative justice model departs from the assumption that the presumption or reaction to the behavior of the delinquent child is ineffective without the cooperation and involvement of the victim, the perpetrator and the community. The basic principle is that justice is best served if each party receives fair and balanced attention, actively involved in the judicial process.

Diversion is an update in criminal law in order to provide protection to children in accordance with the mandate of the Child Protection Act. The Child Protection Act defines several principles of child protection, which include:

1. Non-discrimination;
2. The best interests of the child;
3. The right to life, survival and development;
4. Appreciation of children's opinions.

Provision of Article 8 paragraph (1) of the SPPA Law, states that in the implementation of Diversion is carried out by conducting deliberations to reach an agreement between the victim and the parents / guardians with the child / perpetrator or parents / guardians, Bapas, and social workers based on the approach of restorative justice. The provisions of this article affirm that the settlement of children's cases facing the law using a restorative justice approach is carried out based on the implementation of diversion.

Realizing the principles of child protection in the settlement of ABH cases, all parties involved in the child criminal justice process must always pay attention to the best interests of the child. According to Wagiaty Soedtejo, what is meant by the best interest of the child is in all actions related to the child carried out by the government, society, legislature, and judiciary, should be in the best interest of the child should be taken into consideration.

The basic principles of the idea of implementing diversion in the child criminal justice system are:

1. diversion to avoid the negative effects of formal justice and repetition of criminal acts;
2. there must be an agreement/peace between the perpetrator, the victim and the community;
3. parents and children agree and agree to the diversion program, as well as show a sense of responsibility;
4. Crimes committed are not serious crimes or certain serious crimes;
5. Diversion programs in the form of warnings, fines / compensation, skills coaching, coaching by parents, and counseling.

The existence of the SPPA Law has guaranteed the protection of children. The child needs to get special legal treatment, especially when the child is facing the law. The handling of ABH is carried out specifically, in accordance with Article 64 paragraph (2) of the Child Protection Law, which confirms that:

Special protection for children facing the law is implemented through:

1. humane treatment of children in accordance with the dignity and rights of the child;
2. provision of special child assistance officers from an early age;
3. provision of special facilities and infrastructure;
4. the appropriate sanctions for the best interests of the child;
5. continuous monitoring and recording of the development of children facing the law;
6. granting guarantees to maintain relationships with parents or family; Dan
7. protection from identity news through mass media and to avoid labeling.

The specificity of the treatment of children facing the law as intended in Article 64 paragraph (2) of the Child Protection Law, is then introduced as the rights of the child that must be obtained by the child in the criminal justice process of the child as stated in Article 3 of the SPPA Law.

The implementation of diversion using restorative justice approach in the settlement of criminal cases ABH, is believed to provide legal protection to children. This is because, in the settlement of criminal cases ABH with the implementation of diversion through restorative justice approach, aims to transfer the process of settlement of ABH cases from formal criminal justice process to informal. So it will free the child from the bad stigma of society, because the child will be spared the criminal prosecution (verdict) by the criminal justice of the child.

The application of diversion using a restorative justice approach in child settlement not only provides legal protection for ABH, but also provides protection of victims' rights. In the process of applying restorative justice, there will be a dialogue between the victim and the perpetrator, which will ultimately cause satisfaction for all parties, including the victim. Here the measure of justice is no longer based on retaliation from the victim to the perpetrator (whether physical, psychological or punitive), but the painful act is healed by providing support to the victim and requiring the perpetrator to be held accountable, with the help of family and community.

## CONCLUSION

Factors that influence the implementation of diversion in the settlement of ABH cases, including: Criminal Qualification Factor, Child Age Factor, Recognition and Remorse Factor of the Child. Willingness Factor (consent) of victims and support of victims' families for the implementation of diversion, Law Enforcement Factor, Fakror Sarana and Prasana, Community Support Factor.

The implementation of diversion on the settlement of ABH cases by law enforcement refers to Article 7 paragraph (1) and (2) of the SPPA Law, which states that at the level of investigation, prosecution and examination of child cases in court, diversion must be pursued. Based on Article 7 paragraph (2) of the SPPA Law, the qualification of crimes that can be carried out diversionary in the settlement of ABH cases, is a criminal offence that is threatened with imprisonment of under seven years and is not a repeat of a criminal offence.

Implementation of diversion through restorative justice approach in SSPA Law, essentially aims to provide legal protection of the rights and best interests of children. The basis of consideration implemented diversion in the process of child criminal justice is to keep the child away from the formal criminal justice process and prevent the child from the stigma of bad from society, as well as to strive to pay more attention to the best interests of the child. So the formal criminal justice process that boils down to sentencing by the court is as a last resort (ultimum remedium).

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