

**Considering (again) the Age of Criminal Responsibility:
a Comparative Discussion between the Queensland
Youth Justice Act 1992 and the Indonesian
*Juvenile Court Act No. 3 1997***

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ABSTRAK

Kapankah seseorang disebut anak? Pertanyaan yang sederhana ini akan menjadi sangat penting ketika Negara harus menangani anak yang melakukan kejahatan. Anak harus diperlakukan berbeda dengan orang dewasa. Tidak adanya kesepakatan secara formal di tingkat internasional tentang batasan umur kapankah seseorang digolongkan sebagai anak, dirasakan telah menciptakan ketidakadilan. Seorang yang berumur 12 tahun sudah dianggap mampu menanggung pertanggung jawaban pidana menurut Negara tertentu, tapi tidak di Negara lain. Sama halnya dengan seorang yang berumur 17 tahun sudah digolongkan dewasa menurut Negara tertentu, tapi Negara lain masih menggolongkannya sebagai anak. Tulisan ini akan membahas tentang penentuan umur anak yang bisa dibebani pertanggung jawaban pidana menurut peraturan di Queensland dan Indonesia. Queensland menetapkan bahwa seseorang yang berumur 17 tahun sudah dianggap sebagai orang dewasa. Indonesia juga menentukan bahwa seseorang yang berumur 16 tahun telah dianggap sebagai dewasa jika sudah menikah.

ABSTRACT

When a person can be called a child? This simple question will become significant when State is treating juvenile delinquents. They must be treated differently from adults. The absence of international guidance to determine when someone can be categorized as a child, seems generating injustice for juvenile delinquents. A 12 year olds child may legally be able to bear criminal responsibility in certain State, but this may be not in other States. Similarly, a person who reaches 17 year olds might be classified as an adult in certain State, but other State may put him as a child. This paper will discuss the legislations in Queensland and Indonesia, that determine when a child can bear criminal responsibility. Queensland treats a 17 year olds child as an adult by the criminal justice system. Indonesia also categorises an individual that is 16 year olds and married as an adult.

Keywords: criminal responsibility, juvenile, criminal justice system

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Almost 70 per cent of juvenile delinquents are later involved with the adult criminal justice system,² which means that dealing with juvenile delinquents should be different from adult criminals. Many nations are attempting to formulate new and better solutions for dealing with juvenile delinquents and realising that the solution is multidimensional.³ The disposition of justice for children can be demonstrated in the varying models of policy in different jurisdictions, because there is a difference in the philosophic bases of juvenile justice system approaches.⁴ Common law and civil law as the law system applied by the majority of jurisdictions in the world, might have their own models and differ from each other in dealing with juvenile delinquents. Moreover, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) are the fundamental principles in creating regulation with regard to juvenile delinquents in many countries under the UN. Australia and Indonesia as common law and civil law countries, are appropriate examples to identify whether both countries have implemented the basic principles of administration of justice for juvenile in the Beijing Rules.

²Shuling Chen, Tania Matruggio, Don Weatherburn and Jiuzhao Hua, 'Transition from Juvenile to Adult Criminal Careers', *Crime and justice bulletin* (online), May 2005, 10 <<http://search.informit.com.au.ezp01.library.qut.edu.au/fullText;dn=030836974645486;res=IELHSS>>

³Anthony N. Doob and Michael Tonry, 'Varieties of Youth Justice' (2004) 31 *Crime and Justice: A Review of Research* 1.

⁴Allison Morris and Loraine Gelsthorpe, 'Towards Good Practice in Juvenile Justice Policy in the Commonwealth' (2006) 32 *Commonwealth Law Bulletin* 27

In both countries, all children may hold criminal responsibility, unless a child is under a particular age and cannot be charged with criminal offence or brought before the court. In Australia, a child who between 10-14 years old can bear criminal responsibility if it can be proved that the child understood the wrongfulness of what they were doing.⁵ This is called *doli incapax*. In contrast, *doli incapax* is unknown in the Indonesian youth justice system. The justifiability of the methods of determining criminal responsibility to children by age level and test of knowledge of wrong, are matters of serious concern.⁶ This paper will examine these matters in both countries by referring to the Beijing Rules.

In respect to the difference in legal systems between Australia and Indonesia, this paper will only examine Queensland territory as a representation of Australia. The reason is because the author is relatively familiar with this territory. Also, in Queensland law, the standard of age for criminal responsibility for a child differs from other states. In Queensland is under 17 years old, while other states are under 18. In terms of jurisdiction, Indonesia, in contrast, has no states and thus applies the *Juvenile Court Act* No. 3 1997 for the entire jurisdiction of Indonesian territory.

⁵Thomas Crofts, 'Doli Incapax: Why Children Deserve its Protection' (2003) 10 (3) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v10n3/crofts103_text.html>

⁶Benjamin Peter Mathews, *Australian laws ascribing criminal responsibility to children: The implications of an internal critique, postmodern insights, and a deconstructive exploration* (PhD Thesis, Queensland University of Technology, Brisbane, 2001) 10 <<http://eprints.qut.edu.au/15805/>>

This paper will briefly explain the differences between juvenile justice systems in Queensland and Indonesia. Next, it will analyse the achievement of implementation of the international standards in both Queensland and Indonesia, as stated in their laws, namely, the *Youth Justice Act 1992* (Qld) and the *Juvenile Court Act No. 3 1997* respectively, in the main key issue of the ages of criminal responsibility. This paper argues that the Beijing Rules, as an international document, does not provide strict provisions to determine a particular age level where children could hold criminal responsibility, and both Queensland and Indonesian Acts have controversial provisions in determining this issue. Queensland regulates that a 17 year old child would be treated as an adult in juvenile justice system. Similarly, in some cases, even Indonesia could treat 16 year old children as adults. Also, the absence of *doli incapax* and determining of a child is above 8 years⁷, might require to be critically reviewed.

Moreover, with respect to the difference in legal systems between Australia and Indonesia, this paper will concentrate to the statutory provisions of both acts and will not further examine in practice area or cases. There are also insufficient facilities related to access in providing references of cases in Indonesia. Furthermore, this paper will not pay major attention to the provisions regulating proceedings of trial which are obviously different due to their legal system.

⁷ The provision that determine 8 year olds as the minimum age of criminal responsibility has been reviewed by Indonesian Constitutional Court Decision No. 1/PUU-VIII/2010 that determines the minimum age of criminal responsibility is 12 year old.

International Instruments on the Juvenile Justice Matters

Discussion on justice for juveniles also is related to many United Nation documents, such as the *International Covenant on Civil and Political Rights* (1966), the *Convention on the Rights of the Child* (1989); the *Rules for the Protection of Juveniles Deprived of their Liberty* (1990); and *Guidelines for the Prevention of Delinquency* (the Riyadh Guidelines) (1990). Although this paper will deeply focus on the Beijing Rules, the other UN documents will not be ignored in order to clarify particular notions that are stated in the Beijing Rules and which might be related to other documents.

Related to international instruments on the juvenile justice administration, Indonesia has ratified the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CROC), while the Beijing Rules have not been ratified. On the other hand, Australia has not directly legislated these three international instruments, although Australia is a signatory of ICCPR and CROC.⁸ However, these instruments have been ratified by the Commonwealth government, and "thus it would seem that all laws of states and territories within the Commonwealth should be applying the rights in the Convention to their citizens".⁹ Therefore, the nonexistence of national legislation of these instruments generates the question whether they are morally justified¹⁰ and thus they can "provide sufficient protection for the rights of the child".¹¹ Despite these instruments would not have domestic impact unless enacted by legislation, they can resolve ambiguities in common law.¹²

The *Convention on the Rights of the Child* (CROC) emphasizes that all state parties must provide priority of the protection of children's interest when dealing with juvenile delinquents. The best interest of children must be the main concern, as stated in article 3 (1): "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Moreover, article 40 (1) explicitly underlines on the protection of the children's rights and the consideration of children's age in criminal justice procedures, as follows:

"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".

⁸Lisa Bradley, *The Age of Criminal Responsibility Revisited*, (2003) 8 (1) *Deakin Law Review* 73

⁹Terry Hutchinson, 'Being seventeen in Queensland: a human rights perspective on sentencing in Queensland' (2007) 32(2) *Alternative Law Journal* 82

¹⁰Ben Mathews, *Children Criminal Responsibility in Australia: Some Legal, Psychological and Human Rights issues* (2000) 5 (2) *Australia & New Zealand Journal of Law & Education* 37.

¹¹Christopher Darby, *Young Offenders Act 1993 (SA) and the Rights of the Child (1994)* 16 *Adelaide Law Review* 286

¹²Mathews, *loc. cit.*

Accordingly, juvenile justice procedure in the state parties must place the children's rights and interests as the most important considerations in order to promote reintegration of children into society.

As a UN resolution, the Beijing Rules is not binding to all state members.¹³ However, the Beijing Rules as the most important instrument, since 1985 has been enacted by General Assembly as the fundamental principles for UN countries member in dealing with juvenile delinquents.¹⁴ The Beijing Rules contains six parts of principles of juvenile delinquent treatments that embrace everything from determining definitions of a child until treating them as prisoners and conducting research for development and improvement of the juvenile justice system. This comprehensiveness seems that this resolution provides the most detailed provisions for treatment of juvenile justice.¹⁵

Related to the provision of minimum age of criminal responsibility, in contrast, the Beijing Rules provides inadequately the definition of a child and the standard of determining minimum age of criminal responsibility. Article 2(a) of the Beijing Rules states "a juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult". In other words, the Beijing Rules only covers juvenile delinquents who are

¹³Bradley, *op. cit.*, p. 74.

¹⁴*United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules) art 1

¹⁵Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility* (Ashgate Publishing Ltd, 2009) 50

treated differently from adults, but how about those who are treated as adults? In Commonwealth jurisdictions, they may be treated as adults if they commit serious offences.¹⁶ Moreover, article 4.1 states that "in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity". It seems that the provision does not provide a particular age level which must be as standard for state parties to regulate the minimum age of criminal responsibility. It provides only the bare minimum accepted standard for the recognition of the rights of the child.¹⁷ This provision therefore would lead to wide interpretation of the minimum age among state parties. It can be seen in Queensland and Indonesia and it will be discussed further below.

Comparing juvenile legal system in Queensland and Indonesia is strongly related to the differences as common law and civil law countries. These differences could be seen particularly in the trial process, such as the role of court and jury. In the common law system, laws are usually created by judicial decision, and thus laws contained in code are a secondary resource because the legislator provides the main task of courts to create laws.¹⁸ In contrast, in civil law, courts should not perform any interpretations which do not directly refer to statutes as a primary resource¹⁹ because courts should apply the law which is created by the legislator. Moreover, the role of jury has a significant influence in courts in common law tradition.²⁰ On the other hand, jury is unknown in the civil law tradition.²¹

Therefore, the role of judge, for example in Indonesian juvenile court is led by a single judge and is the most significant in establishing a decision.

The Minimum Age of Criminal Responsibility

Defining a child who is covered in juvenile justice system is concerned with the determining of minimum and maximum age level. The minimum age level means the lower level of age that a child could be categorized as able to hold criminal responsibility, whereas the maximum age level means that lower level of age that a person could be categorized as an adult. The minimum age of criminal responsibility in juvenile legal system might differ between common law countries and civil law countries. In Australian jurisdictions, a child under 10 years cannot be guilty of a criminal offence.²² Basically, this age corresponds with standards in common law countries. In England, for example, the standard is under 10, in Scotland it is under eight and,

¹⁶Morris and Gelsthorpe, op. cit, p. 28

¹⁷Darby, op. cit, p. 293

¹⁸Caslav Pejovic, Civil Law and Common Law: Two Different Paths Leading to The Same Goal, *Victoria University of Wellington Law Review* (2001) <<http://www.austlii.edu.au/nz/journals/VUWLRev/2001/42.html>> at 29 April 2010.

¹⁹John Henry Merryman, *The Civil Law Tradition* (Stanford University Press, California, 2nd ed, 1993)

²⁰John Henry Merryman, 'Procedure' in John Henry Merryman, David S. Clark and John O. Haley, *The Civil Law Tradition: Europe, Latin America and East Asia* (Law Publishers, Virginia; 1994) 1013, 1014

²¹James G. Apple and Robert P. Deyling, *A Primer on the Civil-Law System*, Federal Judicial Center USA [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)

India and Singapore it is seven years old. On the other hand, the standard of criminal responsibility for a child who cannot be guilty of a criminal offence in civil law countries is usually higher. In Norway and Denmark, for example it is under 15 and Germany is under 14. However, it is quite different in Indonesia where it is under eight years of age.²³

Although the Beijing Rules does not determine what age should be used as minimum age, the United Nation committee has criticized states that have established minimum age of criminal responsibility under 12.²⁴

The Beijing Rules emphasizes that the determining of the minimum age should be "to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour."²⁵ Moreover, article 40 (3)(a) of the CROC states "the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

Another difference in comparing Queensland and Indonesia, the *Youth Justice Act 1992* (Qld) provides more detail in provisions to regulate young offenders treatment. It can be seen that there are 351 sections in 11 parts of matters. On the other hand, the *Juvenile Court Act No. 3 1997* provides 68 articles in 8 divisions. Although, the quantity of section or article could not determine whether this is better than others, it can be considered to be an indicator that the Queensland act tends to provide more protection to children by covering as many as matters which should be different from adult.

There are many issues which are regulated in the *Youth Justice Act 1992* (Qld) but they do not appear in *Juvenile Court Act No. 3 1997*. The *Youth Justice Act 1992*, for example, regulates certain procedures when children commit a serious offence as stated in division 2 of part 6, while Indonesia does not distinguish a serious offence or not. Moreover, *doli incapax* is unknown in Indonesian youth justice system. *Doli incapax* is a legal presumption that children between the minimum of age of criminal responsibility and a higher age limit are not capable of bearing criminal responsibility.²⁶

In *doli incapax*, children are deemed that "they do not have the capacity to distinguish between right and wrong".²⁷ Bandalli argues that "the presumption of *doli incapax* is not dependent on an ability to tell right from wrong, but on knowing the action to be 'seriously wrong' in the sense of not 'merely naughty or mischievous'".²⁸ On the other hand, Croft criticizes that the presumption of *doli incapax* is outdated and unfair in

²²*Criminal Code Act 1995* (Cth) s7(1); *Crimes Act 1914* (Cth) s4M; *Criminal Code 1899* (Qld) s29(1); *Children (Criminal Proceedings) Act 1987* (NSW) s5; *Criminal Code 1924* (Tas) s18(1); *Young Offenders Act 1993* (SA) s5; *Children and Young People Act 1999* (ACT) s71(1); *Children and Young Persons Act 1989* (Vic) s127; *Criminal Code 1983* (NT) s38(1); *Criminal Code 1913* (WA) s29

²³Before Indonesian Constitutional Court Decision No. 1/PUU-VIII/2010 that determines the minimum age of criminal responsibility is 12 year old.

²⁴Bradley, op. cit, p. 75

²⁵Commentary of article 4 of the Beijing Rules

practice.²⁹ It is out of date because it is assumed that children under 14 cannot differentiate between right or wrong, and need special protection from the harshness of criminal law. It also is unfair in practice because in some cases it may be impossible for the prosecutor to bring the evidence necessary to rebut the presumptions.³⁰

However, in the light of the Indonesian context, *doli incapax* should be adopted. This is because the determining of 8 years as the minimum age is too low. An eight year old child is allowed to be treated as same as a 17 year old child. This is because they are both under the definition of a child. *Doli incapax* seems to promote the protection of children's rights by reducing the number of children who are alleged to have committed a crime in order to not send them to prison. Children who under *doli incapax* are responsible for their act, if the prosecutor could prove beyond reasonable doubt that they knew that they should not have done the act at the time when they committed it.³¹ On the other words, it should be proved that "a child not only possessed *mens rea*, but also knew the act was seriously wrong".³² Children between 8 and 14 years therefore would not automatically be seen to be responsible for their act. Referring to

Indonesian Constitutional Court Decision No. 1/PUU-VIII/2010 that determines the minimum age of criminal responsibility is 12 year old, this has become a new point to reconsider the implementation of *doli incapax* for children between 12-14 year olds.

The Maximum Age of Criminal Responsibility

The maximum age of criminal responsibility for a child is not explicitly stated in the Beijing Rules. The commentary of Rule 2.2 only indicates that:

"It should be noted that age limits will depend on, and are explicitly made dependent on, each respective legal system, thus fully respecting the economic, social, political, cultural and legal systems of Member States. This makes for a wide variety of ages coming under the definition of "juvenile", ranging from 7 years to 18 years or above".

It seems that the determining of the maximum age depends on every state member after considering their economic, social, political, cultural and legal systems where it is around 7 to 18 years or above.

On the other hand, the determination of maximum age level of child definition under both acts, *Youth Justice Act 1992* (Qld) and Indonesian *Juvenile Court Act* No. 3 1997, generate a controversial issue in terms of the protection of children's rights. Queensland defines a child as a person who has not turned 17 years of age. It means that a person who in 17 years and commits a crime will be treated as an adult. Similarly, Indonesia determines a child based on two circumstances, namely, a child is a person who is under 18 years and has not married. In other words, a person who is 17 or under 17

²⁹Cipriani, op. cit, p. 42

²⁷Morris and Gelsthorpe, op. cit, p. 29

²⁸Sue Bandalli, 'Abolition of the presumption of *doli incapax* and the criminalisation of children' (1998) 37 (2) *Howard Journal of Criminal Justice* 116

²⁹Thomas Crofts, loc. Cit.

³⁰ibid

³¹Mathews, op. cit, p. 11

³²Bradley, op. cit, p. 84

could be classified as an adult if she or he has married. Both these definitions are out of line with international standards.³³

There are at least two international instruments which explicitly state standard of age as the level to determine a child. Article 1 of CROC defines "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".³⁴ Article 11 (a) of the Rules for the Protection of Juveniles Deprived of their Liberty echoes the same definition a child is "every person under the age of 18. The age limit below which it should not be permitted to deprive a child of his or her liberty should be determined by law".³⁵ As it can be seen that these both treaties emphasize that a child means a person below the age of 18. Thus, under 18 years is strongly recommended to all state members. Australia and Indonesia should conform to this standard.

Furthermore, in comparison with statutory provisions in other states in Australia, Queensland juvenile definition is not only out of tune with international standard, but also it might ignore national standards. The Australian Law Reform Commission, in 1997, recommended "the age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions", and "all states and territories that have not already done so should legislate to this effect",³⁶ all states' legislation in Australia are in line with the recommendation. Moreover, in Queensland, a person who

is over 18 years old, is allowed to vote in election,³⁷ marry,³⁸ consume alcohol³⁹ and to have homosexual intercourse.⁴⁰ It can be seen that an 18 year old person could be categorized as an adult.

A child has been enacted that they could hold criminal responsibility between 10 and 18 years in all other states in Australia, with under *doli incapax* who they are between 10 and 14. However, as can be seen in Table 3, Queensland is the only state defining a child is under 17. Hutchinson underlines that The United Nations Committee on the Rights of the Child responded to this condition and recommended that "all 'necessary measures' be taken 'to ensure that persons under 18 who are in conflict with the law are only deprived of liberty as a last resort and detained separately from adults unless it is considered in the child's best interest not to do so' and specifically that in Queensland 'children who are 17 years old' are removed from 'the adult justice system'".⁴¹

In Australia, Paragraph 2 of schedule 3 of the *Human Rights and Equal Opportunity Act 1986* (Cth) adopted from the *Declaration of the Rights of the Child* (1959) emphasizes that "the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop

³⁶Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report 84 (1997) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/84/18.html>>

³⁷*Electoral Act 1992* (Qld) ss 64(1)

³⁸*Marriage Act 1961* (Cth) ss 23(1)(e), 23B(1)(e)

³⁹*Liquor Act 1992* (Qld) s 157(2)(a)

⁴⁰*Criminal Code* (Qld) ss 1, 208

⁴¹Hutchinson, n 7, 83

³³Hutchinson, op. cit, p. 82

³⁴<http://www2.ohchr.org/english/law/croc.htm>

³⁵http://www2.ohchr.org/english/law/res45_113.htm

Jurisdiction	Cannot be charged with a criminal offence	Doli incapax	Maximum age for appearance in child, juvenile or youth court
Commonwealth	Under 10 <i>Crimes Act 1914</i> s4M; <i>Criminal Code Act 1995</i> s7.1	10 to under 14 <i>Crimes Act 1914</i> s4N; <i>Criminal Code Act 1995</i> s7.2	n/a
Australian Capital Territory	Under 10 <i>Criminal Code 2002</i> s25	10 to under 14 <i>Criminal Code 2002</i> s26	Under 18 <i>Children and Young People Act 1999</i> Part 1.3 ss7 and 8, and s69
New South Wales	Under 10 <i>Children (Criminal Proceedings) Act 1987</i> s5	10 to under 14 Common law <i>doli incapax</i>	Under 18 <i>Children (Criminal Proceedings) Act 1987</i> s3
Northern Territory	Under 10 <i>Criminal Code Act</i> s38(1)	10 to under 14 <i>Criminal Code Act</i> s38(2)	Under 18 <i>Juvenile Justice Act</i> s3
Queensland	Under 10 <i>Criminal Code Act 1899</i> s29(1)	10 to under 14 <i>Criminal Code Act 1899</i> s29(2)	Under 17 <i>Youth Justice Act 1992</i> Schedule 4
South Australia	Under 10 <i>Young Offenders Act 1993</i> s5	10 to under 14 Common law <i>doli incapax</i>	Under 18 <i>Young Offenders Act 1993</i> s4
Tasmania	Under 10 <i>Criminal Code Act 1924</i> s18(1)	10 to under 14 <i>Criminal Code Act 1924</i> s18(2)	Under 18 <i>Youth Justice Act 1997</i> s3
Victoria	Under 10 <i>Children and Young Persons Act 1989</i> s127	10 to under 14 Common law <i>doli incapax</i>	Under 18 <i>Children and Young Persons Act 1989</i> s3
Western Australia	Under 10 <i>Criminal Code Act Compilation Act 1913</i> s29	10 to under 14 <i>Criminal Code Act Compilation Act 1913</i> s29	Under 18 <i>Young Offenders Act 1994</i> s3

Table 1. Ages of criminal responsibility in Australian jurisdictions⁴²

physically, mentally, morally, spiritually and social in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.” Related to this, Mathews states that this is an important recognition of children’s qualitative differences from adults and as a fundamental notion for the future development of children’s rights in Australia.⁴³

The determination of a child based on two circumstances in Indonesia leads to the same problem. A child who is under 18 and married could be treated as an adult. Article 7 of the Indonesia Marriage Act No. 1 1974 allows a woman to marry at 16 years of age. Therefore, a married female child under 18 and having committed a crime could be brought before the court. In fact, female children are married even earlier than 16 years old. Muslim society believes that there is no a provision which regulates any lower limit of age to marry in its scripture. Jones’ research indicates that there are 11.8% women in Indonesia who marry before 15 years old and 33.8% who marry before 17 years old.^{43 4}

Introducing a child to the adult criminal procedure will lead to infringe of the children’s rights. As what has been discussed above that under 18 years old person are a child. Thus, if 16 or 17 years old children are sent to the adult criminal procedure, it means they will obtain all consequences as adult offenders. The significant consequence is that they are

allowed to be sentenced by the capital punishment and the imprisonment without possibility of release. In Indonesia for example, such punishments are still regulated for serious offences. Premeditated murderer shall be punished by the capital punishment or life imprisonment or maximum 25 years imprisonments.⁴⁵

On the other hand, the capital punishment and life imprisonment are not recognised in Indonesian *Juvenile Court Act* No. 3 1997. The act clearly states that if a child committed a crime which is punishable with death penalty and life imprisonment, the maximum punishment for the child is 10 year imprisonment.⁴⁶ The CROC clearly emphasizes that the capital punishment and life imprisonment must be not imposed for offences committed by persons below eighteen years of age.⁴⁷ It means that every state member who imposes the capital punishment and life imprisonment and defines that a child includes under 18 years old, will be out of line with the CROC provision.

Another difference between juvenile and adult justice system in Indonesia is that in juvenile justice system involves qualified investigators, prosecutors and judges. Qualified here means that all of them, investigators, prosecutors and judges, have met with the particular qualifications which are required by the act before they contact with juveniles. The qualifications are that they must have satisfactory experiences, an interest,

⁴³Australian Institute of Criminology, ‘*The age of criminal responsibility*’ (2005) Crime facts info no. 106 <<http://www.aic.gov.au/publications/current%20series/cfi/101-120/cfi106.aspx>>

⁴³Mathews, op. cit, p. 116

⁴⁴Gavin W. Jones, ‘Which Indonesian Women Marry Youngest, and Why?’ (2001) 32 (1) *Journal of Southeast Asian Studies* 68

⁴⁵*Indonesian Criminal Code* article 340

⁴⁶*Juvenile Court Act* No. 3 1997 article 26 (2)

⁴⁷*Convention on the Rights of the Child* article 37 (a)

attention, dedication, and understanding the problem of child.⁴⁸ It seems that juveniles must be treated by qualified people who are professional and have motivation to promote the children's rights.

Related to sentencing for juvenile, the Indonesian act provides greater concern to the protection of the children's rights. If a young offender is under 12 years old, the punishment which may be imposed are sending the offender back to his or her parents or guardians, or foster parents; or sending the offender to the government for attending an educational program, coaching, and job training; or sending the offender to the Department of Social, or a social organization that engage in education, coaching, and job training.⁴⁹ This provision might limit the number of young offenders who are sent to prison and thus it will reduce the negative effects of imprisonment. Mardite asserts that 84.2% of total juveniles are detained in adult prisons in 2003.⁵⁰ However, during the criminal process they may be detained in custody. It means that they may suffer from mental health problems.⁵¹ Therefore, the change of the minimum age of criminal liability to be 14 or 15 years old as same as other civil law countries, or the adoption of *doli incapax* presumption seem to be better solution to reduce the

number of young offenders who are sent to prisons. Urbas asserts that "the harshness of criminal penalties imposed on convicts made it clear that further protections such as the *doli incapax* presumption were needed".⁵²

Conclusion

From the previous discussion and analysis it can be concluded that Queensland and Indonesia have different standard for determining a particular age limit when a child can hold criminal responsibility. The Beijing Rules may not provide a satisfactory standard to determine what age a child should hold criminal responsibility. However, there is a common standard among other UN documents, as international standard, and other states' regulation in Australia, as national standard, that a child is a person under 18 years of age. It therefore seems that Queensland and Indonesia must review the provisions regulating that people 17 year or younger could be treated as adults in the criminal justice system. Moreover, the minimum age of criminal responsibility in Queensland and Indonesia, must also be reviewed in order to promote the protection of children's rights.

The determination of minimum and maximum age of criminal responsibility which is too low, will be significant obstacles for promoting of the protection of children's rights. The treatment of young offenders which is similar with adults', can lead them to the loss of their privileges. They will not obtain more

⁴⁸Juvenile Court Act No. 3 1997 articles 10, 41(2) and 53(2)

⁴⁹Juvenile Court Act No. 3 1997 article 26 (3)

⁵⁰Harlan Mardite, op. cit, p. 190

⁵¹Elizabeth Cauffman, Sarah H. Scholle, Edward Mulvey, Kelly J. Kelleher, Predicting First Time Involvement in the Juvenile Justice System Among Emotionally Disturbed Youth Receiving Mental Health Services (2005) 2 (1) *Psychological Services* 28

⁵²Gregor Urbas, 'the Age of Criminal Responsibility' (2000) No. 181 *Australian Institute of Criminology* terms and issues in crime and criminal justice 1 <<http://www.psychinaction.com/uimages/81.pdf>>

lenient treatment. Thus, the detention may not be used as the last resort. Moreover, in Indonesia, the capital punishment and life imprisonment might be imposed to them.

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