



THE LAW SOCIETY
OF NEW SOUTH WALES

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5 OCT 2012

LEGISLATIVE
COUNCIL

Our Ref: rbg647544

2 October 2012

The Director
Select Committee on the Partial Defence of Provocation
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Director,

Inquiry into the partial defence of provocation – options paper

The Law Society's Criminal Law Committee (Committee) welcomes the opportunity to make a supplementary submission commenting on the reform options contained in the Select Committee's Options Paper.

The Committee maintains its support for the retention of the partial defence of provocation as provided in section 23 of the *Crimes Act 1900* and maintaining the 'ordinary person test'. The Committee strongly believes that the ordinary person test best allows the community, through the jury, to determine the issue of provocation.

The Committee also wishes to express its concern regarding the number of models that propose a reversal of the burden of proof. It is common in cases that involve a defence of provocation for other defences such as self defence or excessive self defence to be run, and having different standards of proof will cause considerable difficulties for the jury.

Whilst the Committee believes that the test as currently defined in section 23 is the best option to allow the defence to be justly determined by a jury, it is not resistant to legislative reform. The Committee submits that the best way to achieve reform of the law regarding provocation is by carefully considered and drafted exclusions to the availability of the defence. By way of example, having considered and appreciated the concerns of the Select Committee, the Committee would not object to 'non-violent sexual advances' being such an exclusion.

Yours sincerely,

Justin Dowd
President