

**National Security (Legislative Provisions) Bill :**  
**“Instigating” or “inciting” an armed invasion**

This paper discusses whether the word “instigates” in the proposed section 2(1)(b) of the Crimes Ordinance (treason) should be replaced by “incites”, “encourages” or “provokes”.

2. It has been suggested that “instigate” and “incite” have the same meaning, but the word “incite” has been the subject of many decided cases whereas “instigate” has not. It has therefore been argued that it would be preferable to use the former word.

**Use of instigate**

3. Although there does not appear to be case law on the word “instigate”, it is found in 12 provisions in the Laws of Hong Kong. These include –

- (1) section 3(2) of the Crimes (Torture) Ordinance (Cap 427) – offence of instigating torture;
- (2) Article 2(1)(xxxvi) of the Fugitive Offenders (Malaysia) Order (Schedule to Cap 503D) – surrender possible in respect of a person who instigated any offence for which surrender may be granted under the Agreement;
- (3) Article 4 of the International Convention Against the Taking of Hostages (Schedule 2 of Cap 503H) – obligation to co-operate to prevent the instigation of acts of taking hostages;
- (4) Articles 1 and 16 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Schedule to Cap 503I) – obligation to prevent such conduct committed by or at the instigation of a public official.

4. In addition, the word “instigate” is used in respect of armed invasions in the current law of treason, and in the Australian law of treason.

5. The use in legislation of “instigate” is not, therefore, unusual.

**Any difference?**

6. It is clear from well-established common law principles that a person may be guilty of inciting an offence even if he did not succeed in

persuading another to commit the offence, and even if he was unlikely to succeed.

7. According to Webster's New Dictionary of Synonyms –  
“Instigate, in contrast with incite, unequivocally implies prompting and responsibility for the initiation of the action.”
8. The Concise Oxford Dictionary defines to “instigate” as to –  
“urge on, incite, (person *to* action, *to* do esp. something evil); ***bring about*** (revolt, murder, etc)” [emphasis added]

Its definition of “incite” does not, however, include “bring about”.

9. It would therefore seem that the substitution of “instigates” by “incites” would broaden the offence. For example, if foreign armed forces invaded the PRC, it is arguable that a person would only be liable for instigating that invasion if he or she was responsible for the initiation of that invasion. However, many others who may have called for such an invasion, but without having had any impact, might be liable for inciting the invasion.

### **“Encourage” or “Provoke”?**

10. According to Homes JA in *Nkosiya* 1966 (4) SA 655 at 658, –  
“The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.”
11. Encouragement and provocation are two of the many ways in which a person might try to approach another's mind. However, there is no reason why any one particular type of approach should be singled out.
12. It is therefore considered that the word “instigates” should not be replaced by a word such as “encourages” or “provokes”.

Department of Justice  
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