

# AFP National Guideline on offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment

## 1. Disclosure and compliance

This document is classified **OFFICIAL** and is intended for internal AFP use.

Disclosing any content must comply with Commonwealth law and the [AFP National Guideline on information management](#).

This instrument forms part of the AFP Governance Instrument Framework (GIF) as defined in the [AFP Commissioner's Order on governance \(CO1\)](#). The [AFP Commissioner's Order on professional standards \(CO2\)](#) and [AFP Commissioner's Order on security \(CO9\)](#) set the framework for the conduct expected of AFP appointees through obligations and best practice to help maintain the safety and security of AFP information, operations, assets and people. Inappropriate departures from the provisions outlined within AFP governance instruments may constitute a breach and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

## 2. Guideline authority

This guideline was issued by Assistant Commissioner Americas, Africa, Middle-East and Europe using power under Section 37(1) of the [AFP Act](#) as delegated by the Commissioner under s. 69C.

## 3. Introduction

The AFP's primary aim is to enforce Commonwealth criminal law and contribute to combating complex, transnational, serious and organised crime that impacts on the Australian community and Australia's national interests. The AFP collaborates with national and international partners to enhance safety and provide a secure regional and global environment.

This guideline governs police-to-police assistance and cooperation, including sharing information, in situations where reasonable grounds for believing an identified person/s, regardless of nationality, may be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment (TCIDTP). This guideline exists within broader national and international legal and policy frameworks which impose general prohibitions on TCIDTP, including in relation to accessory forms of individual and state responsibility (e.g. aiding and abetting). This guideline also helps control AFP [Enterprise risks](#) (2, 3, 4 and 5).

This guideline is only intended to provide specific operational guidance to AFP appointees and outline their obligations and the framework for dealing with foreign authorities:

- where an AFP appointee becomes aware an identified person/s detained offshore has been, or is likely to be, subject to TCIDTP
- where an AFP appointee is involved in interviews of a detained person offshore in situations where there are reasonable grounds for believing the person would be in danger of being subjected to TCIDTP
- when disclosing information about a person to foreign authorities where there are reasonable grounds for believing the person would be in danger of being subjected to TCIDTP
- where judicial corporal punishment is a likely court outcome.

Reasonable grounds for believing an identified person would be in danger of being subjected to TCIDTP are established in circumstances where there is a foreseeable, real and personal risk to the particular individual.

#### 4. Authority to provide information to foreign authorities

The AFP is authorised to provide police services and police support services for the purpose of assisting or cooperating with foreign authorities in accordance with the [AFP Act](#) and the [Ministerial Direction](#). Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of international police cooperation.

This guideline applies only to assistance, including the sharing of information and cooperation which can be provided on a police-to-police basis. This guideline does not apply to the provision of assistance that requires a mutual assistance request. In such cases, s. 8(1A) and s. 8(1B) of the [Mutual Assistance in Criminal Matters Act 1987](#) (Cth) apply. That Act is administered by the Attorney General's Department.

The [AFP National Guideline on international police-to-police assistance in death penalty situations](#) sets out additional considerations in situations where the death penalty may apply.

#### 5. Role of the Sensitive Investigations Oversight Board (SIOB) for TCIDTP situations

Matters involving the TCIDTP situations are deemed *sensitive* as per the [AFP National Guideline on sensitive investigations](#).

The SIOB is a strategic oversight body for AFP investigations determined to be sensitive investigations, as defined within that guideline.

All TCIDTP situations require SIOB oversight and decision by the relevant Deputy Commissioner as the appropriate delegate.

(For further details on sensitive investigations and related considerations, refer to the [AFP National Guideline on sensitive investigations](#) and the [SIOB Terms of Reference](#).)

#### 6. Provision of assistance and cooperation

## 6.1 Reporting TCIDTP of an identified person/s detained offshore

AFP appointees who become aware that the provision of assistance to, or cooperation with, a foreign authority may result in an identified person/s, regardless of nationality, being the subject of TCIDTP must complete and submit an [Offshore situations involving potential TCIDTP Reporting and/or Request to Release Information](#) (TCIDTP-R) for consideration by Commander International Engagement (CIE).

CIE must provide initial advice and determine the risk category after taking into account the relevant factors detailed in section 6.2 of this guideline. The TCIDTP-R must then be progressed by CIE to the SIOB via the relevant International Assistant Commissioner.

The Assistant Commissioner cleared TCIDTP-R, should contain pertinent information for the SIOB to consider, meaningfully discuss, and assess the relevant factors when determining if the AFP should disclose the information. Requests must be submitted to the SIOB Secretariat via s 47E(d)

## 6.2 Relevant factors

Where the disclosure of information relates to a person who is detained, or is likely to be detained, by a foreign authority, AFP appointees must consider:

- the purpose of the information or assistance
- the seriousness of the criminal activity
- equivalent Australian offence(s) – if any
- whether the assistance is exculpatory in nature
- the reliability of any information to be released
- the nature of the AFP's relationship with the relevant foreign country and level of confidence in the foreign authority using the assistance only for the purpose for which the assistance was sought and/or provided
- the age and personal circumstances of the person/s who is/are the target of the investigation
- the level of risk for the person in providing the information, including the likelihood TCIDTP will be imposed
- the level of risk to any potential victim/s in providing or not providing the assistance
- the level of risk to other persons in providing or not providing the assistance, including the public safety risk
- laws, practices and human rights record of the foreign authority involved (if known)
- whether the country involved is a signatory to the UN Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (signatory status of country: <https://indicators.ohchr.org/>)

- evidence of past significant harm or past activity which may give rise to such harm
- pattern of conduct shown by the receiving country in similar cases
- consequences of lawfully disclosing information, including the likelihood that the person could be detained by a foreign authority (if the person is not already in detention)
- whether it is possible to mitigate the risk of TCIDTP occurring by requesting and evaluating assurances on detainee treatment
- consequences of withholding the information, including the potential impact on AFP relationships with foreign authorities
- Australia's interest in promoting and securing cooperation from the foreign authority in combating crime.

### 6.3 TCIDTP Request Risk Category and Authorised Approving Delegate

The SIOB considers the TCIDTP Request against relevant factors as per section 6.2 of this guideline in conjunction with the considerations of CIE to determine if the AFP will provide assistance or cooperate with a foreign law enforcement agency in situations where there are reasonable grounds for believing an identified person is at risk of TCIDTP:

#### **Low Risk Category**

Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency where the nature of the investigation is such that there are few confirmed facts or details about the suspected criminal conduct. The provision of assistance in such matters is generally for the purpose of identifying possible lines of inquiry to assist investigations in Australia and/or in other countries, or to promote the commencement of an investigation overseas.

#### **Medium Risk Category**

Involves the provision of assistance to, including the release of information, or cooperation with, a foreign law enforcement agency which is likely to result in the identification of an offender who may be detained, arrested, charged or prosecuted for an offence subject to judicial corporal punishment as a sentencing option or there are reasonable grounds for believing the person would be in danger of being subjected to TCIDTP.

#### **High Risk Category**

Involves the release of significant inculpatory information or the provision of assistance to a foreign law enforcement agency which is likely to be used in or to lead to the detention, arrest, charge or prosecution of an identified person/s for an offence subject to judicial corporal punishment as a sentencing option or there are reasonable grounds for believing the person would be in danger of being subjected to torture.

In some instances, the AFP may release information assessed as 'high risk' to a foreign law enforcement agency because the delegate considers the release necessary to prevent a serious offence to a person, to protect an innocent agent, or to prevent significant harm to society.

#### 6.4. Disclosure of information to foreign authorities process

AFP appointee, once becoming aware of credible information that an identified person detained by a foreign authority offshore has been, or is likely to be, subject to TCIDTP, the following steps must be followed:

<b>Step 1</b>	Advise the relevant AFP Post and the International Operational Engagement Team via <u>IC-OET</u> as soon as practicable.
<b>Step 2</b>	Complete the <a href="#">Offshore situations involving potential TCIDTP Reporting and/or Request to Release Information</a> (TCIDTP-R) in consultation with IC-OET via <span style="background-color: #cccccc; color: red;">s 47E(d)</span>
<b>Step 3</b>	Regional Superintendent or Senior Officer (SO) (for requests originating from Post) endorses the TCIDTP-R through the relevant specialised commander/regional commander and submits to <span style="background-color: #cccccc; color: red;">s 47E(d)</span>
<b>Step 4</b>	IC-OET reviews the TCIDTP-R, liaises with the relevant Command and submits to Superintendent International Operations Centre (SIOC).
<b>Step 5</b>	SIOC reviews the TCIDTP-R and submits to CIE for review.
<b>Step 6</b>	CIE must provide initial advice.
<b>Step 7</b>	CIE must provide the TCIDTP-R to the relevant International Assistant Commissioner.
<b>Step 8</b>	Once cleared by the relevant International Assistant Commissioner, the TCIDTP-R is submitted to SIOB via <span style="background-color: #cccccc; color: red;">s 47E(d)</span> . The SIOB considers the TCIDTP-R and makes the decision.
<b>Step 9</b>	Documentation for the approved TCIDTP-R is returned to the relevant Command for actioning in conjunction with the relevant AFP Post.  Non-approved TCIDTP-Rs are returned to the relevant Command.

If the identified person/s is an Australian citizen, the AFP SO or Mission Commander at Post must, as soon as practicable, report the likelihood of an Australian detained offshore being subject to TCIDTP to the Department of Foreign Affairs and Trade Head of Mission in-country.

#### 6.5. Involvement in interviews

This guideline applies to any AFP appointee who conducts or participates in an interview offshore, regardless if Part IC of the [Crimes Act 1914](#) (Cth) applies.

AFP appointees considering conducting an interview where there is reasonable grounds for believing an identified person/s has been, or is likely to be, subject to TCIDTP must follow the steps in section 6.3 and have a SIOB decision before the interview occurs.

AFP appointees must record details of the request and the SIOB decision on PROMIS as a decision CNE.

AFP appointees considering attendance at, and/or involvement in, an interview conducted by another agency of an identified person/s detained offshore where there is reasonable grounds for believing the person has been, or is likely to be, subject to TCIDTP must follow the steps in section 6.3 and have a SIOB decision before attendance at the interview occurs.

If AFP appointee attendance and/or involvement in the interview is permitted, the AFP appointee should monitor the situation closely, withdraw from the interview if the risk of TCIDTP arises and submit a further TCIDTP-R in accordance with section 6.3.

## 7. When SIOB delegation is not required

If an AFP appointee has considered a TCIDTP situation in accordance with this guideline and has determined that it is **not likely** that the provision of assistance to, or cooperation with, a foreign authority will result in an identified person/s, regardless of nationality, being subject to a TCIDTP situation, the appointee must make an accountable AFP record (e.g. diary, email, PROMIS) of that decision. That decision must be reviewed and endorsed by the relevant specialised or regional commander.

## 8. Caveats

Following approval to disclose information to a foreign authority, subject to any limitations or restrictions that may apply under the provisions of the [AFP Better Practice Guide on Applying Protective Markings](#), the AFP appointee must include a caveat on all information disclosed as follows.

"The information contained in this document originates from the Australian Federal Police (AFP) and may be subject to disclosure restrictions under Australian law. This information may only be used for the purposes for which it was requested and provided. This information must not be disclosed to another agency or third party without the prior written consent of the AFP."

## 9. Further advice

Enquiries in relation to the content of this guideline should be referred to IC-OET via [s 47E\(d\)](#)

## 10. References

### Legislation

- [Australian Federal Police Act 1979](#) (Cth)
- [Crimes Act 1914](#) (Cth)
- [Criminal Code Act 1995](#) (Cth)
- [Mutual Assistance in Criminal Matters Act 1987](#) (Cth)

**AFP governance instruments**

- [AFP Commissioner’s Order on governance \(CO1\)](#)
- [AFP Commissioner’s Order on professional standards \(CO2\)](#)
- [AFP Commissioner’s Order on security \(CO9\)](#)
- [AFP National Guideline on international police-to-police assistance in death penalty situations](#)
- [AFP National Guideline on sensitive investigations](#)
- [AFP National Guideline on information management](#)
- [AFP Better Practice Guide on Applying Protective Markings](#)
- AFP [Better Practice Guide on Ministerial Briefings for Investigations](#)

**Other sources**

- [Sensitive Investigations Oversight Board Terms of Reference](#)
- [Assistance in Potential Death Penalty Situations](#)
- [Ministerial Direction](#)
- [Offshore situations involving potential TCIDTP Reporting and/or Request to Release Information](#)

**11. Shortened forms**

<b>AFP</b>	Australian Federal Police
<b>CIE</b>	Commander International Engagement
<b>CNE</b>	Case Note Entry
<b>GIF</b>	Governance Instrument Framework
<b>PROMIS</b>	Police Real-time Online Management Information System
<b>IC - OET</b>	International Command - Operational Engagement Team
<b>SIOB</b>	Sensitive Investigations Oversight Board
<b>SIOC</b>	Superintendent International Operations Centre
<b>SO</b>	Senior Officer
<b>TCIDTP</b>	torture or cruel, inhuman or degrading treatment or punishment
<b>TCIDTP-R</b>	TCIDTP reporting and/or request to release information

\*Relevant International Assistant Commissioner means either Assistant Commissioner Pacific Asia or Assistant Commissioner Americas, Africa, Middle East and Europe

## 12. Definitions

**AFP appointee** means a deputy commissioner, AFP employee, special member or special protective service officer and includes a person:

- engaged under section 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under section 35(2) of the AFP Act to be an AFP appointee
- engaged overseas under section 69A of the AFP Act
- seconded to the AFP under section 69D of the AFP Act.

(See section 4 of [the AFP Act](#).)

**Commissioner** means the Commissioner of Police of the AFP, as defined in s. 4 of the [AFP Act 1979](#).

**Cruel, inhuman or degrading treatment or punishment** – see [Attachment 1](#).

**Delegate** means the AFP appointee authorised as an approving delegate, as detailed in s. 5 of this guideline.

**Foreign authorities** means law enforcement, foreign security agencies, foreign intelligence agencies, foreign military agencies and/or any agent of a foreign government.

**Reasonable grounds** are determined by considering a number of factors that apply to a foreign country that include but are not limited to:

- laws, practices and human rights record of the foreign authority involved (if known)
- evidence of past significant harm or past activity which may give rise to such harm
- a pattern of conduct shown by the receiving country in similar cases.

**Torture** is defined in Division 274 of the Criminal Code (see the [Criminal Code Act 1995](#) (Cth)) and involves conduct that inflicts severe physical or mental pain or suffering on a person.

FREEDOM OF INFORMATION ACT 1982 (COMMONWEALTH)

INFORMATION PUBLICATION SCHEME (IPS)