

# 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 is part of the AFP's professional standards framework. The [AFP Commissioner's Order on professional standards \(CO2\)](#) outlines the conduct expected of AFP appointees. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards 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 International using power under s. 37(1) of the [Australian Federal Police Act 1979](#) (Cth), as delegated by the Commissioner under s. 69C of the Act.

## 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 substantial 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 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 substantial 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 substantial grounds for believing the person would be in danger of being subjected to TCIDTP

- where judicial corporal punishment is a likely court outcome.

Substantial 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 law enforcement agencies in accordance with the [AFP Act 1979](#) (Cth) and its [Ministerial Direction](#). Additionally, a number of United Nations Conventions, to which Australia is a signatory, further support the processes of conducting 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.

#### 5. Assisting and cooperating with foreign authorities

If an AFP appointee has considered a TCIDTP situation in accordance with this guideline and has determined that it is not likely the provision of assistance to, or cooperation with, a foreign law enforcement agency will result in an identified person/s, regardless of nationality, being subject to TCIDTP, the appointee must make an accountable AFP record of that decision.

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

AFP appointees who in the course of carrying out AFP functions become aware of credible information that an identified person detained by a foreign authority offshore has been, or is likely to be, subject to TCIDTP must:

- advise the relevant AFP Post and the International Operational Engagement Team as soon as practicable
- complete and submit a TCIDTP Reporting and/or Request to Release Information (TCIDTP-R) for consideration by the delegate
- where information and/or approval by the delegate is provided verbally, submit a TCIDTP-R as soon as practicable
- record the details of the alleged TCIDTP and related AFP actions and determinations in PROMIS as a decision case note entry (CNE).

If the identified person/s is an Australian citizen, the AFP Senior Officer 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.

## 5.2. Involvement in interviews

This guideline applies to any AFP appointee who conducts or participates in an interview offshore, whether or not Part IC of the [Crimes Act 1914](#) (Cth) applies.

AFP appointees considering conducting an interview where there is a substantial ground for believing an identified person/s has been, or is likely to be, subject to TCIDTP must:

- notify the International Operational Engagement Team as soon as practicable
- complete and submit a TCIDTP-R for consideration by the delegate
- record details of the request and management determinations 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 are substantial grounds for believing the person would be in danger of being subjected to TCIDTP must:

- complete and submit a TCIDTP-R for consideration by the delegate
- record details of the request and management determinations on PROMIS as a decision CNE
- suspend any involvement in the interview until a decision is made by the delegate.

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 TCIDTP-R.

## 5.3. Disclosure of information to foreign authorities

The [AFP National Guideline on information management](#) sets out the framework for all disclosures of information by the AFP.

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.

## 5.4 Information disclosure considerations and 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 through 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.

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AFP appointees must complete and submit a TCIDTP-R for consideration by the delegate where there are substantial grounds for believing the person would be in danger of being subjected to TCIDTP.

## 6. TCIDTP risk categories and authorised approving delegate

The authorised approving delegate, as determined by the TCIDTP risk category, must consider the TCIDTP-R against relevant factors as per s. 5.4 and determine whether the AFP will provide assistance or cooperate with a foreign authority in situations where there are substantial 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.

Commander International Engagement is the authorised approving delegate for TCIDTP-R assessed as low risk.

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 substantial grounds for believing the person would be in danger of being subjected to TCIDTP.

Commander International Engagement, in consultation with the relevant Specialised Command/Regional Commander, is the authorised approving delegate for TCIDTP-R assessed as medium risk.

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 substantial grounds for believing the person would be in danger of being subjected to torture.

In some instances, the AFP will release information that is 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.

Assistant Commissioner International, in consultation with Commander International Engagement and the relevant Specialised Command/Regional Commander, is the authorised approving delegate for TCIDTP-R assessed as high risk.

The delegate must:

- determine whether such assistance should be provided and any limitations or restrictions that may apply
- record the decision and reasons in PROMIS as a decision CNE.

## 7. Caveats

Following approval to disclose information to a foreign authority, subject to any limitations or restrictions that may apply under section 6 of this guideline and the provisions of the [AFP Better Practice Guide on applying protective markings](#), the AFP appointee must include a caveat on all information disclosed. The caveat must include instructions on the use of information and its releasability, 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.

## 8. Further advice

Enquiries in relation to the content of this guideline should be referred to the International Command - Operational Engagement Team.

## 9. References

### Legislation

- [Australian Federal Police Act 1979](#) (Cth)
- [Crimes Act 1914](#) (Cth)
- [Criminal Code Act 1995](#)(Cth)

### AFP governance instruments

- [AFP National Guideline on information management](#)
- [AFP National Guideline on international police-to-police assistance in death penalty situations](#)
- [AFP Better Practice Guide on applying protective markings](#)

## 10. Shortened forms

<b>AFP</b>	Australian Federal Police
<b>CNE</b>	case note entry
<b>PROMIS</b>	Police Real-time Online Management Information System
<b>TCIDTP</b>	torture or cruel, inhuman or degrading treatment or punishment
<b>TCIDTP-R</b>	TCIDTP reporting and/or request to release information

## 11. Definitions

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

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

(See s. 4 of the AFP Act.)

**Commissioner** means the commissioner of police of the AFP, as defined in s. 4 of the AFP Act.

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

**Delegate** means the AFP appointee authorised as an approving officer as detailed in section 6 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.

**Substantial 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; or 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.

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