



## AFAP COUNTER-TERRORISM POLICY

### 1. Background

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In the wake of the September 11, 2001 terrorist attacks in the United States, the United Nations Security Council adopted Resolution 1373 (2001) imposing a series of obligations on UN Member States to combat terrorism. The Australian Government has consequently introduced a range of measures, including legal reforms, to strengthen Australia's counter-terrorism capabilities.

It is incumbent upon all those involved in managing and implementing Australia's overseas aid program to make all reasonable efforts to ensure that aid funds and resources are not being used to support terrorist activity.

Given the risks and the broad range of development activities we are involved with in partner countries through the Australian aid program, it is essential that all working in development are aware of their legal obligations and adopt strategies to avoid any associations with terrorism.

The Australia Foundation for the Peoples of Asia and the Pacific Ltd (AFAP) Counter-Terrorism Policy is drawn from the "*Guidelines for Strengthening Counter-Terrorism Measures in the Australian Aid Program*, Australian Government, September 2004.

The Australian Government has enacted legislation with a number of international counter-terrorism treaties designed to combat terrorism, including by starving individuals and organisations associated with terrorism of funds and resources. There are two separate legislative mechanisms directly prohibiting activities in relation to individuals and organisations associated with terrorism. They are:

- Part 5.3 of the Criminal Code Act 1995 ('the Criminal Code'; and
- Part 4 of the Charter of the United Nations Act 1945 ('the UN Charter Act').

Under the Criminal Code there are stringent penalties for, amongst other things, intentionally or recklessly 'getting funds to or from a terrorist organisation' (Code s102.6), 'providing support to a terrorist organisation' (Code s102.7) and 'financing terrorism' (Code s103.1). A list of terrorist

organisations' for the purposes of the Criminal Code is available on the National Security Australia website: [www.nationalsecurity.gov.au](http://www.nationalsecurity.gov.au) (at 'Listing of Terrorist Organisations').

Under the **UN Charter Act**, it is an offence to "directly or indirectly make any asset available to a proscribed person or entity". An asset is very broadly defined as "asset of any kind, or property of any kind, whether tangible or intangible, movable or immovable". While the UN Charter Act applies less stringent penalties, it has a much broader application capability in the aid context due to its very wide definition of asset. A list of proscribed persons and entities is available from DFAT at: [www.dfat.gov.au/icat/freezing\\_terrorist\\_assets.html](http://www.dfat.gov.au/icat/freezing_terrorist_assets.html). Australia's Minister for Foreign Affairs has the authority to suspend the provisions of this Act to allow the dealing with a proscribed person or entity in certain circumstances. For example, AusAID could seek the Minister's written permission to make assets available to a proscribed person or entity for the purposes of engaging in peace initiatives.

It should be remembered that, irrespective of the existence of an AusAID agreement or contract, any suspected terrorism related activity should be immediately notified to the national security hotline 1800 123 400.

## 2. Definitions and Interpretation

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2.1 The following definitions apply unless the context requires otherwise.

**AFAP** means Australian Foundation for the Peoples of Asia and the Pacific Limited (ACN 002 568 005).

**AFAP Counter Terrorism Policy** means this policy, active from the Board approval date displayed in the footer and at the end of this policy.

**DFAT** means the Department of Foreign Affairs and Trade, Australia.

**Government** means Australian Government

**Government List** means the Australian Government list of terrorist organisations.

**Laws** means any relevant Australian laws, foreign laws, regulations and conventions designed and targeting terrorist cells and terrorism. [In Australia those Laws include but are not limited to, *Commonwealth Criminal Code Act 1995*, the *Anti Money Laundering and Counter Terrorism Financing Act 2006 (Cth)*].

**Lists** means Department of Foreign Affairs and Trade, Government List and National Security lists regarding potential terrorist threats.

## 3. AFAP

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AFAP is involved in a broad range of development activities overseas. As such, AFAP recognises that it is essential that all AFAP staff, and anyone

associated with AFAP in any capacity are aware of their legal obligations and adopt strategies to avoid any associations with terrorism.

AFAP Acknowledges that the Australian Government has adopted a policy and laws consistent with the relevant international counter-terrorism Treaties and UN Security Council Resolution 1373 (2001) of not providing direct or indirect support or resources to organisations and individuals associated with terrorism.

## 4. AFAP's Commitment

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4.1 AFAP will use its best endeavours to ensure that funding provided under any agreement is expended in a manner consistent with the UN Security Council Resolution and related Australia laws.

4.2 Explicit references to the law will be included in all AFAP contracts and agreements by Annexing this Counter-Terrorism Policy. It is important to remember that the legal obligation to comply with the law exists independently of the clause in the contract/agreement. The existence of the clause does not release individuals or organisations from their legal obligations under Australian laws.

This Policy and the following clauses are applicable to agreements and contracts with AFAP and require compliance by all AFAP's partner organisations:

### 4.2.1 Commercial Contracts for implementation activities:

The Contractor must when providing any Services and procuring the Supplies have regard to and comply with, and use their best endeavours to ensure that all sub-contractors comply with, relevant and applicable laws, regulations and policies, both in Australia and in the Partner Country, including:

- (a) Those in relation to organisations and individuals associated with terrorism, including 'terrorist organisations' as defined in Division 102 of the Commonwealth Criminal Code Act 1995 and listed in regulations made under that Act and regulations made under the *Chapter of the UN Act (Cth) 1945*.

The contractor must use their best endeavours to ensure that funds provided under this Contract, including sub-contracts, do not provide direct or indirect support or resources to organisations and individuals associated with terrorism. If during the course of this Contract, the Contractor discovers any link whatsoever with any organisation or individual associated with terrorism it must inform AFAP immediately.

### 4.2.2 AusAID funded activities:

The Organisation must use its best endeavours to ensure that all Activities (including those carried out by a Delivery organisation) comply with relevant Australian and Partner Government laws and regulations as well as AFAP Policies, including but not limited to:

- Those in relation to the proscription against providing direct or indirect support or resources to organisations and individuals associated with terrorism, including 'terrorist organisations' as defined in Division 102 of the *Commonwealth Criminal Code Act 1995* and listed in regulations under the Act and regulations made under the *Charter of the United Nations Act 1945 (Cth)*; and
- those in relation to corrupt practices, in particular the bribery of public and foreign officials; and

If, during the course of the agreement and/or contract, the Organisation discovers any link whatsoever with any organisation or individual listed by the Australian Government as associated with terrorism, it must inform AFAP immediately.

Organisations must use their best endeavours to ensure that the Delivery Organisations for the approved Activity have the appropriate capacity to undertake the task and are in no way linked, directly or indirectly, to organisations and individuals associated with terrorism.

#### **4.2.3 AFAP funded activities:**

The Organisation must use its best endeavours to ensure that all Activities (including those carried out by a in-country implementing partners) comply with relevant Australian and Partner Government laws and regulations as well as AFAP Policies, including but not limited to:

- Those in relation to the proscription against providing direct or indirect support or resources to organisations and individuals associated with terrorism; and
- those in relation to corrupt practices, in particular the bribery of public and foreign officials; and

Organisations must use their best endeavours to ensure that the Delivery Organisations for the approved Activity have the appropriate capacity to undertake the task and are in no way linked, directly or indirectly, to organisations and individuals associated with terrorism.

- 4.3 The Counter-Terrorism contract/agreement clauses have two key components. Firstly, they require the other party (be they contractor, partner NGO, or multilateral organisation) to use their "best endeavours" to comply with the law. Secondly, they require that the other party inform AusAID immediately if, during the course of the agreement, any link whatsoever to a proscribed person or entity is discovered.
- 4.4 The phase "best endeavours" is used in recognition of the difficulties that may be encountered in ensuring that indirect support is not provided, particularly when there are multiple layers of decision-making between organisation AFAP is providing funding to and the ultimate beneficiaries. The phase denotes a positive obligation to act. The test of whether or not best endeavours have been used will be specific to the circumstances including the degree of risk in the particular operating environment. By way of a general guide AFAP would expect all development partners at a minimum:

- To know the persons/organisations that are being directly assisted
- To make sure that people/organisations being directly assisted are not on either of the list before assistance is provided
- To make sure that directly funded persons/organisations are aware of and obliged to comply with these laws, and that they in turn are obliged to make sure that their distribution of the funds or support is made on the same basis.

4.5 The second aspect of the clause is the requirement to notify AusAID immediately if any link whatsoever between AusAID funds or an AusAID assisted organisation and a terrorist organisation is discovered.

For the purposes of this requirement, a “link” between AFAP and persons/entities associated with terrorism, is understood in its broadest terms. The obligation to notify AFAP does not however confer an active intelligence-gathering responsibility. It requires that AFAP be informed as soon as information is discovered. AFAP will then determine, in consultation with the funded organisation what, if any, actions are necessary.

4.6 Neither law is retrospective. If a new organisation or individual is included on the list subsequent to funds being released, no breach of the laws will have been committed. However, if notified that an organisation or individual has been subsequently added to the list, all assistance to that organisation or individual must cease and AFAP must be advised immediately.

## **5. Direct and Indirect Funding**

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5.1 The greatest risk to AFAP’s activities rests in complying with the UN Charter Act because of the large number of proscribed persons and entities, the broad definition of asset, and the prohibition against both direct and indirect support.

5.2 Direct funding is easily understood. Appropriate checking of the lists by AFAP and our partners at appraisal and during implementation stages is a simple way to avoid providing direct funding, support or resources.

5.3 Guarding against indirect support is more difficult but the risk of indirectly providing support or resources must be adequately assessed and managed in ways that are appropriate to the operating environment in all cases.

The actions required to satisfy the legal and contractual obligations may differ in each case depending on the particular circumstances.

Suggested strategies for managing risk could include, but may not be limited to:

- (a) Checking the two lists on the DFAT and National Security websites and ensuring updates to the website are taken into account;
- (b) Before providing direct funding, support or resources, ensuring that the beneficiary is not included on either list;
- (c) Ensuring that organisations to whom funding, support **OR** resources are provided and who are themselves further distributing assets, know of, understand and comply with the legal and contractual requirements;
  - (i) AFAP will provide them with the lists and updates as required;
  - (ii) AFAP will ensure systems are in place to ensure compliance and immediate notification if necessary.
- (d) Conducting spot checks or regular monitoring visits to ensure organisations to whom funding, support or resources are being provided downstream are not on either list; and .
- (e) Informing AFAP, and where appropriate the National Security hotline and the Australian Federal Police (**AFP**) whether in Australia or through their liaison officers in-Country located in the Australian embassies immediately if any credible information becomes available suggesting any links.

Proposals for AusAID funding should include an assessment of the risks and an outline of the strategies proposed to manage the risks of support for proscribed entities/persons. Risk assessment and strategies for their management must be regularly updated.

**Adopted by the AFAP Board on 22<sup>nd</sup> August 2005**

**Adopted by the AFAP Board on 28<sup>th</sup> January 2009**

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