

Guidelines for Strengthening Counter-Terrorism Measures in the Australian Aid Program

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Australian Government
AusAID

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Introduction

In the wake of the September 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. In addition to the threat posed by terrorism itself and our legal obligations, the discovery of any links between aid funds and organisations associated with terrorism poses significant risks to continued community support for overseas aid in general, and to an organisation's reputation specifically. This applies equally to the Australian aid program as well as other organisations working in international aid delivery.

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. These guidelines provide a brief outline of the relevant laws and describe how they affect operations. The guidelines also provide some basic guidance on what strategies you should consider employing.

Relevant Australian laws

The Australian government has enacted legislation consistent 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 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' (section 102.6), 'providing support to a terrorist organisation' (section 102.7) and 'financing terrorism' (section 103.1). A list of 'terrorist organisations' for the purposes of the Criminal Code is available on the National Security Australia website: www.nationalsecurity.gov.au (at 'Listing of Terrorist Organisations'). As of 19 February 2004 there were 16 organisations listed as 'terrorist organisations' for the purposes of the Criminal Code.

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 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. As of 19 February there were 500 proscribed persons or entities (including aliases) for the purposes of the UN Charter Act.

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 also 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.

AusAID agreements and contracts

To ensure that both AusAID officers and the organisations receiving AusAID funding are aware of their responsibilities, explicit references to the law will be included in all our contracts and agreements (see Attachment 1 for clauses in the various types of contracts and agreements). 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.

The contract/agreement clauses have two key components. Firstly, they require the other party (be they contractor, 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.

The phrase “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 the organisation AusAID is providing funding to and the ultimate beneficiaries. The phrase 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 AusAID 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 lists 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.

AusAID does not warrant that these actions would meet a legal test in all circumstances.

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

Neither law is retrospective¹. 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 AusAID must be advised immediately.

¹ There has only been one retrospective listing of a terrorist organisation for the purposes of the Criminal Code. The regulation ‘listing’ Hizballah was made on the 17 July 2003 but took effect from 5 June 2003. This retrospective listing was due to specific historical circumstances which are very unlikely to be repeated and which cannot be repeated without the Criminal Code Act being amended by the Parliament.

Direct and indirect funding

The greatest risk to AusAID 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.

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

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 the risk could include, but may not be limited to:

- Checking the two lists on the DFAT and National Security websites and ensuring updates to the website are taken into account.
- Before providing direct funding, support or resources, ensuring that the beneficiary is not included on either list.
- Ensuring that organisations to whom funding, support or resources are being provided and who are themselves further distributing assets, know of, understand and comply with the legal and contractual requirements.
 - Providing them with the lists and updates as required;
 - Ensuring systems are in place to ensure compliance and immediate notification if necessary.
- 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.
- Informing AusAID, if 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 assessments and strategies for their management must be regularly updated.

The objective of the Australian aid program is to advance Australia's national interests by assisting developing countries to reduce poverty and achieve sustainable development. Terrorism is against the law, against Australia's national interests and undermines sustainable development.

Attachment 1: Clauses for AusAID Contracts, Agreements and Guidelines

Commercial Contracts for implementation activities

36. COMPLIANCE WITH LAWS AND POLICIES

36.1 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:

...

- (g) 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 *Charter 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 AusAID immediately.

Further information about listed persons and entities is available from DFAT at www.dfat.gov.au/icat/persons_entities/explanatory_note.html. A full list of listed persons and entities is available from DFAT at: www.dfat.gov.au/icat/freezing_terrorist_assets.html. A list of listed 'terrorist organisations' for the purposes of the Commonwealth Criminal Code is available from National Security Australia at: www.nationalsecurity.gov.au.

NGO Umbrella Contracts and Guidelines

Umbrella Contract

Obligations of the Organisation insert new 3.2 (current 3.2 becomes 3.3)

"The Organisation must use their 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 AusAID 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 UN Act (Cth)* 1945; and
- those in relation to corrupt practices, in particular the bribery of public and foreign officials.

If, during the course of this Contract the Organisation discovers any link whatsoever with any organisation or individual listed by the Australian Government as associated with terrorism, it must inform AusAID immediately. Further information on anti-terrorist laws, listed terrorist organisations and individuals is available from www.dfat.au/icat/freezing_terrorist_assets.html and www.nationalsecurity.gov.au.

New 3.5

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.

ANCP guidelines

4. Role of NGOs add following dot point

NGOs must use their best endeavours to ensure that all activities (including those carried out by their in-country implementing partner) comply with relevant Australian and Partner Government laws and regulations as well as AusAID 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.

Further information on AusAID's Counter Terrorism Policy can be found in the Counter Terrorism Guidelines.

Accreditation

Accreditation Criteria B3 requires a Full agency to demonstrate it has the capacity to deliver its projects/program objectives in a way that meets its contractual obligations to AusAID. The indicators will be strengthened to include a specific mention of the systems/mechanisms in place to meet the requirements.

Suggested wording for inclusion in agreements with multilateral organisations:

The **Organisation** acknowledges that the Australian Government has adopted a policy and laws consistent with 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.

The **Organisation** must use its best endeavours to ensure that funding provided under this Agreement is expended in a manner consistent with the UN Security Council Resolution and related Australian laws. If, during the course of this Agreement, the **Organisation** discovers any link whatsoever with any organisation or individual associated with terrorism it must inform AusAID immediately.