

DEFENCE ARTICLE 36 REVIEWS OF NEW WEAPONS GUIDE

(May 2020)

INTRODUCTION

1. This Instruction Guide must be read in conjunction with Defence Instruction Administrative Policy (ADMINPOL), dated 8 August 2019. This guide describes the process to initiate an Article 36 review of weapons and the information required to be provided in support of the review. It also describes the process and substantive law that Defence Legal applies in conducting the Article 36 review of new weapons.

ROLES AND RESPONSIBILITIES

2. The Directorate of Operations and International Law (DOIL) within the Defence Legal Division has responsibility for the Article 36 review of weapons, pursuant to a specific exemption granted under the *Legal Services Directions 2005* as delegated by Director General Military Legal Service (DGMLS).

DEFINITIONS

3. Weapon: Any device, whether tangible or intangible, designed or intended to be used in warfare to cause:
- a. injury to, or death of, persons; or
 - b. damage to, or destruction of, objects.
4. Means of warfare: Weapons or weapon systems.
5. Methods of warfare: The way or manner in which weapons and weapon systems are to be used.

PROTOCOL I LEGAL OBLIGATIONS

6. Article 36 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) requires that:

“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

7. As a party to Protocol I, Australia is committed to upholding its treaty obligations. To achieve this, all new weapons, means or methods of warfare that the Australian Defence Force (ADF) intends to use in warfare must undergo an Article 36 review upon commencing the study, development, acquisition or adoption of a new weapon. Consistent with the definition above, the formal Article 36 review process does not review methods of warfare independent of a new weapon or weapon system. Therefore, weapons, means and methods of warfare, shall hereinafter be collectively described as weapons.

ARTICLE 36 REVIEW PROCESS

8. Pursuant to Protocol I, an Article 36 review must be requested in the study, development, acquisition or adoption of a weapon. Optimal timing of this request varies depending on the nature of the project, attributes of the weapon, or the availability of information.

Requesting the Article 36 Review

- a. An Article 36 review is initiated by completing the form at Annex A and forwarding it to defencelegal.DOSL@defence.gov.au (or if known - the designated Article 36 Reviewer) along with any other relevant information.
- b. When completing the form at Annex A, the Requester should provide as much detail as possible in addition to any supporting evidence or documentation (i.e. acquisition reports, test data, contractor product manuals, etc.)
- c. DOIL regularly works with the Capability Acquisition and Sustainment Group (CASG) and other personnel responsible for the acquisition or study of weapons across each of the ADF Services, to ensure they are aware of the Article 36 review requirement and understand how to request the review.
- d. Legal advice must be sought from DOIL if there are any doubts as to whether an Article 36 Review is required. Early engagement with DOIL is encouraged.

Article 36 Reviewer Identification & Initial Coordination Requirements

- e. DOIL, in conjunction with relevant services, identify and appoint an Article 36 reviewer from within Defence Legal to conduct the Article 36 review. All Article 36 reviews must be submitted to DOIL for approval.
- f. The appointed reviewer makes a preliminary determination as to whether sufficient information has been provided. If information is lacking, the reviewer identifies what further information is required from the Requester. The reviewer also makes a preliminary determination as to whether the device is a weapon.
- g. If the reviewer determines the device is not a weapon pursuant to paragraph 3 of this guide, this conclusion is provided to the Requester in writing. In such cases, a formal written legal review, as described below, is not required.
- h. At the discretion of the DGMLS, a multi-disciplinary review committee may be established to review highly complex or novel weapon systems. In such cases the review committee will include relevant subject matter experts to assist the Article 36 reviewer in drafting a review that accurately considers the weapon's function and effects. DGMLS has discretion on selecting relevant experts and establishing committee processes.

ARTICLE 36 REVIEW CRITERIA

9. The Article 36 review assesses all new weapons against applicable international law, but not against Australian or foreign domestic law. All new weapons are considered in the context of normal, anticipated use only.¹ Consideration of how a weapon will operate under a specific scenario is addressed through applicable rules of engagement and targeting protocols.² Unless necessary based on the unique performance characteristics of a given weapon, the Article 36 review should not be tied to the weapon's use on or deployment from any particular platform to the greatest extent possible (i.e. type of aircraft or vessel). If the reviewer determines that the use of a weapon cannot be separated from the platform, the reviewer must explicitly identify the components of the platform necessary to complete the review.

10. Many Article 36 reviews concern conventional weapons and ammunition without unique legal or policy concerns. However, many weapons may require a thorough understanding of relevant treaties, including the history, subsequent state practice and official Australian positions on text interpretation. The Article 36 reviewer must consider the treaties listed in Annex B and fully research and analyse those most relevant to the weapon under review.

11. An Article 36 review **must** consider at a minimum six elements:

- a. Whether the device is a weapon, means or method of warfare under Para. 3 of this guide,
- b. The normal anticipated use of the weapon as identified by the Requester,
- c. The technical details of the weapon, including its composition and effects,
- d. Is the weapon prohibited, or its use restricted by a particular provision of Additional Protocol 1. Application of the two step test from the International Court of Justice's Nuclear Weapons Advisory Opinion (1996). Specifically:
 - (1) Is the weapon prohibited, or is its use restricted by any other treaty to which Australia is a party or other specific applicable rule of (customary) international law?
- e. Whether the weapon is prohibited by general principles of international law,
- f. Whether the weapon is subject to any public policy or other relevant consideration, such as the applicability of the Martens Clause³.

¹ Australia supports the interpretation of the International Committee of the Red Cross (ICRC) on this point. The ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 regarding Article 36 states: 'The determination is to be made on the basis of normal use of the weapon as anticipated at the time of evaluation ... A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.'

² Certain Additional Protocol I requirements, for example Articles 51 and 57, may not be able to be adequately addressed in the Article 36 review and is instead assessed through other ADF operational targeting processes and protocols.

³ Where appropriate consideration should be given as to whether acquiring, developing or adopting the weapon is contrary to the public interest (for instance, is contrary to a legal trend), principles of humanity or the dictates of public conscience. The latter aspect reflects the application of the Marten Clause, of which Australia takes a narrow view

12. In order to be compliant with Additional Protocol 1 (Article 36), a weapon **must:**

- a. Not be prohibited or limited under any international agreement to which Australia is a party, or by customary international law.
- b. Comply and adhere to general principles articulated in any international agreement to which Australia is a party, or customary international law, specifically:

(1) **Not Cause Unnecessary Suffering** (*Additional Protocol 1, Article 35(2)*): A weapon's reasonably foreseeable effects must not be of a nature to cause superfluous injury or unnecessary suffering that can be avoided given the military constraints of the situation.

- (a) This assessment must always be specific to a weapon's effect and utility. The military utility of weapons must be compared with the anticipated wounding or incidental effects. A weapon will be prohibited if the Article 36 reviewer determines the injuries to combatants caused by the weapon are manifestly disproportionate to the military advantage to be gained by its intended use. The weapon is not considered in isolation, and may be compared to existing, lawful weapons in use.

(2) **Not Have Indiscriminate Effects** (*Additional Protocol I, Article 51(4)(b) and (c)*): A weapon must be able to be directed at a specific military objective or the effects of the weapon must be able to be directed at a specific military objective.

- (a) Article 51(4) of Protocol I and customary international law prohibit a weapon if it is of a nature to strike military objectives and civilians or civilian objects without distinction. The test is whether the weapon under review, and its effects, are capable of being directed at a distinct legitimate military target.
- (b) The known accuracy of a weapon should be noted in the legal review. However, the degree of accuracy acceptable for a weapon will depend on the type of weapon, its effects, its purpose, technical design safeguards, and any proposed restrictions on its method of employment.
- (c) Weapon effects occurring for a period after the attack must also be considered. For example, a weapon that renders an area unsafe for civilian use for a period of time may be prohibited. There is no limit to the duration that should be considered, but the review must consider available information regarding the effects of the weapon at the time of operation or any time thereafter. Explosive remnants or other effects do not necessarily mean the weapon is, by its nature, indiscriminate, but it could impose an additional duty.

(3) **Be Used Proportionally** (*Additional Protocol I, Article 51(5)(b) and Article 57(2)(iii)*): A weapon is prohibited if it is expected to cause incidental harm which would be excessive in relation to the concrete and direct military advantage anticipated.

- (a) Proportionality is not relevant to every Article 36 review.
- (b) This test is heavily dependent on the available information and prevailing circumstances at the time of use. Further, a

proportionality assessment will be relevant when a Commander is considering utilising a particular weapon during armed conflict.

- (4) **Minimise collateral damage** (*Additional Protocol I, Article 57(2)(ii)*): A weapon is prohibited if it is expected to cause incidental harm which would be excessive in relation to the concrete and direct military advantage anticipated.
 - (a) Minimising collateral damage is not relevant to every Article 36 review.
 - (b) This test is heavily dependent on the available information and prevailing circumstances at the time of use.
- (5) **Not Harm the Natural Environment** (*Additional Protocol I, Article 35(3)*): A weapon is prohibited if it is intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

STAGES OF THE ARTICLE 36 REVIEW

13. Pursuant to Paragraph 7, an Article 36 Review is required at the study, development, acquisition or adoption phases of a new weapon. Due to the changing parameters, requirements and test results during the development and acquisition phases of a new weapon, there are two phases of legal review for a weapon:

- a. **Interim Article 36 Review:** Issued during the study, development, and/or acquisition phases of weapon development.
- b. **Final Article 36 Review:** Issued at the weapon adoption for ADF operations phase.

14. Both the Interim and Final reviews apply the Article 36 Review Criteria (see Paragraphs 9-13), however the Interim Article 36 Review provides a legal assessment at that phase of development and is not intended to be the final review of the proposed weapon. An Interim Article 36 Review provides the Reviewer an opportunity to identify any legal concerns early on during weapon development in order to proactively assist the Requester on issues that can be addressed during the development and acquisition phases of the weapon.

15. The Final Article 36 Review serves as the formal Article 36 Review and is completed prior to or at adoption of the weapon for operational use. The Final Article 36 Review should be updated if there are any material changes, modifications, or additions made to a weapon that affect the assessment made in the Final Article 36 Review.

RECORDING OF ARTICLE 36 REVIEWS

16. DOIL maintains a register, electronic copies and the final signed hard copy, of all Article 36 Reviews. Copies are be provided to the original Requester and distributed to units as necessary.

Annex:

- A. Request Form: Review of Weapons, Means or Methods of Warfare
- B. International Agreements to be Considered in the Review of Weapons

REQUEST FORM: REVIEW OF WEAPONS, MEANS OR METHODS OF WARFARE

Defence area seeking review:

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Weapon or Weapon System:

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Technical description of the weapon (or reference to provided documents):

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Test results or other data available on the weapon (or reference to provided documents):

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Purpose of the weapon:

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How will the weapon be used?

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Intended effect of the weapon (blast, fragmentation, etc.):

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Expected injuries to personnel or damage to material:

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Similar weapons in use by the ADF (earlier variants or weapons of similar design/effect):

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Other armed forces or agencies in Australia that use or are considering use of the weapon:

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INTERNATIONAL AGREEMENTS TO BE CONSIDERED IN THE REVIEW OF WEAPONS

1. The international agreements and treaties to be considered in the review of Weapons include:
 - a. *1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.*
 - b. *1899 Hague Declaration (IV, 2) Prohibiting the use of Asphyxiating Gases.*
 - c. *1899 Hague Declaration (IV, 3) Concerning Expanding Bullets.*
 - d. *1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex.*
 - e. *1907 Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines.*
 - f. *1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.*
 - g. *1949 Geneva Conventions.*
 - h. *1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water.*
 - i. *1967 Outer Space Treaty.*
 - j. *1968 Treaty on the Non-Proliferation of Nuclear Weapons.*
 - k. *1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.*
 - l. *1976 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.*
 - m. *1977 Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.*
 - n. *1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects and Protocols I–V.*
 - (1) *1980 Protocol on Non-Detectable Fragments (Protocol I);*
 - (2) *1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) and the 1996 amendment (Protocol II amended);*
 - (3) *1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)*
 - (4) *1995 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention); and*
 - (5) *2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention).*
 - o. *1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons.*
 - p. *1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.*
 - q. *1998 Rome Statute of the International Criminal Court.*
 - r. *2008 Convention on Cluster Munitions.*
 - s. *All other treaty and customary international law requirements binding on the Government of Australia*