

# Civil liability for autonomous military systems in Australia

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**The identification of the boundaries of lawful military conduct is important for both the Australian Defence Force (ADF) in educating its soldiers and officers on their legal obligations. In this policy brief, it will be established that a duty of care will apply to Australian troops using autonomous military systems (AMS) both domestically and overseas when they are not engaged in actual attacks against the enemy.**

## Sources of the duty of care

The ADF, its officers and personnel will owe any person (or class of persons) a duty of care if the ADF could have reasonably foreseen that — if they did not apply a certain standard of care to their conduct — then that person (or class of persons) would suffer personal injury, death or damage to their property.

There are several reasons why this duty of care will apply.

The first is that a significant power imbalance exists between the ADF (with its large amount of resources and personnel) and any possible defendants, who are likely to be civilians or non-combatants. Australian courts have previously considered that such imbalances require a duty of care to take reasonable precautions against foreseeable harms.

A duty of care is also considered to be a fair, just and reasonable obligation that should apply to the ADF, its officers and personnel. This is because the ADF is an organ of the Australian nation, and has a wide array of powers and force not available to the average citizen (whether inside or outside Australia). The ADF is therefore expected to spend its resources to affect the bare minimum of safe and responsible use of AMS.

Finally, there are both international and Australian laws which will be drawn upon when the ADF formulates its Rules of Engagement (ROE). Because ROE are a lawful order — and



non-compliance with ROE is a service offence — there is the possibility that ROE might create a duty of care in situations where Australian troops are using AMS but not as part of armed conflict, such as part of or constituting a stabilising force (particularly regions where humanitarian or security forces have difficulties operating) or during peacekeeping, law enforcement or ‘aid to the civil power’ type deployments.

Under these various forms of a duty of care, any military personnel who utilise an AMS in an unnecessarily dangerous, reckless or malicious manner would attract civil liability for the act concerned and be open for a judgment awarding damages against both themselves and the Commonwealth. Only actions taken during ‘actual operations against the enemy’ are likely to be considered outside the scope of such a duty of care.

### Reasonable foreseeability and AMS

Under Australian law, foreseeability is a prerequisite of negligence. A person cannot sue the ADF or its personnel if they are alleging a failure to take precautions against a risk that was not reasonably predictable based upon the circumstances.

However, the major difference with reasonable foreseeability in the use of AMS is that such foreseeability can be assessed by different parameters. AMS are becoming more complicated and more complex — in various ways and by various mechanisms — to subsume and displace the human involvement in military decision-making.

The result is that acts might occur which alter the boundaries of what is considered to be “reasonably foreseeable”. An act by an AMS might lack reasonableness, in the sense that a reasonable human could never have taken the same state of affairs as an AMS and made the same decisions. On the other hand, it might lack foreseeability, in that a human being could not possibly have foreseen that the conduct in question would have resulted in the harm that did, in fact, result.

### Standard of care in the use of AMS

To avoid the occurrence of such foreseeable risks, the ADF and its personnel would be expected to take ‘reasonable care’. This idea of reasonable care in the profession of arms is assessed at an objectively higher level because of the skills and training which members of the ADF go through (especially those expected to operate AMS).

For individual defendants of the ADF, the level of training, skills and knowledge imputed to them will likely be the same as a reasonable ADF member with that level of training, skills or

knowledge. The Commonwealth and the ADF will then be held to a higher standard of care as they possess greater knowledge about how the AMS works, and greater resources to address any dangers that AMS might pose.

### How are the Commonwealth or its agents liable?

The obligation in using AMS is to exercise reasonable care — not to prevent all potentially harmful conduct. This means the ADF must take reasonable precautions in the deployment of AMS based on the correct identification of the relevant risk of injuries if something goes wrong. Commanders who authorise the acquisition (through procurement) or deployment (through activation) of AMS should also consider the precautions that should be attendant with the use of such devices.

If an individual soldier, sailor, airman or officer is deemed negligent, it is highly likely the Commonwealth will be held vicariously liable. Even when AMS are capable to making near-human decisions or decisions analogous to a human, they are not currently recognised by the law as breaking the chain of events in a negligent event.

Thus, in determining whether there was tortious conduct that breached a duty of care, the court will likely no longer ask ‘what would the reasonable person do?’ in the position of an AMS, as a human person in that position will be very unlikely to identify either the reasonable or foreseeable outcomes.

Instead, Australian courts are more likely to ask ‘what did the ADF or designer intend for this AMS to do, and to what extent?’ By examining the documents surrounding AMS procurement, a court may be in a better position to determine what (if any) outcomes were deemed acceptable by the ADF at the point of purchase.

### Conclusion

At its highest, the duty of care imposed upon the ADF will require that the contractual and technical basis for using AMS will be attendant by a proper and considered assessment of the foreseeable risks arising from any malicious or negligent use of that system.

Far distant from combat, time must be taken to perform this assessment properly and prevent foreclosing the observation of those same precautions by military commanders which may be made years or even decades into the future. Humanly-controllable issues of design capability, functionality, and operational and performance review are well within the purview and control of the ADF and should not be paid lip service. ●



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