

# SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

## INQUIRY INTO DEFENCE TRADE CONTROLS AMENDMENT BILL 2023

The International Committee of the Red Cross (ICRC) and Australian Red Cross welcome the opportunity to share our views with the Senate Foreign Affairs, Defence and Trade Legislation Committee in its inquiry into the Defence Trade Controls Amendment Bill 2023 (**DTC Bill**). This submission focuses on two specific aspects of the DTC Bill which are within the scope of our mandate and expertise. It recommends: a humanitarian exception in the prohibition of provision of 'DSGL services'; and consideration of how an amended export control regime will fulfil Australia's obligations under international law, including the Arms Trade Treaty.

### INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

The International Red Cross and Red Crescent Movement (**Movement**) is a worldwide humanitarian network guided in its mission by its [Fundamental Principles](#), including humanity, impartiality, neutrality and independence. The Movement is comprised of three components: the ICRC; the International Federation of Red Cross and Red Crescent Societies; and 191 National Red Cross or Red Crescent Societies (including Australian Red Cross). Our work is based on the Geneva Conventions of 1949, their Additional Protocols of 1977, the [Statutes of the Movement](#) and the resolutions of the International Conferences of the Red Cross and Red Crescent.

The ICRC's exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC endeavours to prevent suffering by promoting and strengthening international humanitarian law (IHL) and universal humanitarian principles. The ICRC's global workforce of around 20,000 staff includes a number of Australian citizens and permanent residents.

Australian Red Cross has been a critical part of Australian life since 1914, mandated by the [Royal Charter of 1941](#) as an auxiliary to Australia's public authorities in the humanitarian field, including during emergencies and armed conflict. Its mission is to prevent and alleviate vulnerability, including by championing IHL in Australia. Australian Red Cross deploys Australian staff internationally, including by seconding them to ICRC operations.

### PROVISION OF DSGL SERVICES TO FOREIGN PERSONS

Whereas international law binding on Australia provides for and protects principled humanitarian action, the DTC Bill appears to prohibit Australians from undertaking humanitarian activities to address weapon contamination. Incorporating a humanitarian exception in proposed s 10C would make the DTC Bill more consistent with Australia's international legal obligations and policy intent, and better aligned with like provisions in complementary laws.

IHL and humanitarian principles protect the right of impartial humanitarian organisations including the ICRC and Australian Red Cross to offer their services to carry out humanitarian activities.<sup>1</sup> Under IHL, 'humanitarian activities' broadly covers all activities aimed at preserving the life, security, dignity and physical and mental wellbeing of persons affected by conflict, or seeking to restore that wellbeing if it has been infringed upon.<sup>2</sup> Those activities may change as the needs of affected populations evolve, including in the aftermath of armed conflict. All States are expected to allow and facilitate impartial humanitarian relief activities once agreed by the concerned authorities.<sup>3</sup>

Moreover, restrictions may undermine the humanitarian goals of several weapons treaties to which Australia is a party. These treaties require Australia to "facilitate ... the fullest possible exchange of equipment, material and scientific and technological information" concerning their implementation and not to impose undue restrictions on

<sup>1</sup> Geneva Conventions, common Arts 3 and 9/9/9/10.

<sup>2</sup> ICRC, *Commentary to the Third Geneva Convention of 1949*, paras 848-49; International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986, para. 242. See also ICRC, ["IHL and the Challenges of Contemporary Conflict Report"](#), 2015, pp. 26-30.

<sup>3</sup> Fourth Geneva Convention, Art. 23; Additional Protocol I, Art. 70; [ICRC Customary IHL Study](#), 2005, rule 55.

the provision of mine clearance and other such equipment and related technological information for humanitarian purposes.<sup>4</sup> They also recognise the potential role of the Movement in assisting victims of those weapons or remnants.

These commitments are relevant to considering the potential impact of the DTC Bill on the efforts of humanitarian organisations to address consequences of landmines, explosive remnants of war (**ERW**) and chemical, biological, radiological and nuclear weapons (**CBRN**) hazards more generally.

Pursuant to its mandate to protect civilians from the effects of armed conflict, the ICRC carries out a range of activities aimed at mitigating the impact of weapon contamination on the civilian population. These seek to reduce the exposure of civilians to explosive, kinetic and incendiary weapons, as well as the dangers arising from CBRN weapons and hazards. Our work, often done in partnership with National Red Cross and Red Crescent Societies, encompasses activities like assessing risks and implementing measures to ensure the safety of Movement workers and the continuity of the Movement's humanitarian operations. It also includes promoting risk awareness and safer behaviours in weapon-contaminated settings, supporting authorities and medical personnel to improve medical responses, and assisting or substituting for authorities in identifying, marking, safely removing, and disposing of weapon hazards in contaminated areas.

Further, the ICRC provides assistance and training to governmental authorities and National Red Cross and Red Crescent Societies on the use of equipment listed in Part 1 of the Defence Strategic Goods List (**DSGL**), such as: equipment for the detection and disposal of landmines and ERW (ML4); and equipment for the detection or identification of, and protective and decontamination equipment for, chemical warfare agents, biological agents, riot control agents or radioactive materials (ML7).

For example, the ICRC has been helping to facilitate the clearance of landmines and ERW in Ukraine by mapping and marking minefields and providing training and equipment. In Yemen, the ICRC provided the Yemen Mine Action Centre with a supply of and training on demining personal protective equipment and metal detectors, allowing humanitarian demining activities in Hodeida. In the DPRK, the ICRC provided training to personnel of the Ministry of Public Security on the use of magnetometer detectors to locate deep buried bombs. The ICRC also works with partners on innovative approaches and equipment, for example its project with Waseda University, Japan, to combine a drone, thermal imaging and artificial intelligence to help locate landmines and other ERW for more efficient humanitarian demining. Australia actively supports similar humanitarian mine action and related technological developments.<sup>5</sup>

On our reading of the DTC Bill, proposed s 10C would prohibit Australians from providing training or other assistance relating to equipment for humanitarian mine action or the management of CBRN hazards in the course of official duties for components of the Movement. By contrast, it would be consistent with Australia's international legal obligations and policy objectives to minimise impediments to humanitarian organisations providing such assistance.

The Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023 (**SAMS Bill**) complements the DTC Bill. The SAMS Bill has exceptions for providing aid of a humanitarian nature and/or performing an official duty for the United Nations or its agencies or the ICRC (proposed s-s 115A(6) and 115B(6) of the *Defence Act 1903* (Cth)). In our [submission](#) to the Parliamentary Joint Committee on Intelligence and Security, we recommended strengthening those humanitarian exceptions by clarifying that the exclusion extends to: the conduct of all humanitarian activities; and performing an official duty for a component of the International Red Cross and Red Crescent Movement.

The two instruments are partly harmonised: per Schedule 2 of the DTC Bill, s 10C would not apply where DSGL services are provided pursuant to a foreign work authorisation as defined in the SAMS Bill. Yet the DTC Bill does not foresee cases where a foreign work authorisation would not be required because there is an exception under s-s 115A(6) or 115B(6) of the *Defence Act*. Therefore, an equivalent exception should be integrated directly into s 10C.

**We recommend that the DTC Bill incorporate a humanitarian exception in s 10C that extends to the conduct of all humanitarian activities and performing an official duty for a component of the International Red Cross and Red Crescent Movement.**

<sup>4</sup> 1997 Anti-Personnel Mine Ban Convention, Art. 6(4); Protocol V on Explosive Remnants of War to the 1980 Convention on Certain Conventional Weapons, Art. 8(4); 2008 Convention on Cluster Munitions, Art. 6(3).

<sup>5</sup> Australia, [Australia's engagement in the Convention on Certain Conventional Weapons](#), 20 November 2023, CCW/MSP/2023/WP.3, paras 22-25.

## RESPONSIBLE ARMS TRANSFERS IN A 'LICENCE-FREE ENVIRONMENT'

A stated purpose of the DTC Bill is “to create a licence-free environment for the supply of DSGI goods and technology and the provision of DSGI services from Australia to the United Kingdom and the United States.”<sup>6</sup>

Australia is party to the 2013 Arms Trade Treaty (ATT), which aims to establish the highest possible common international standards for regulating the international trade in conventional arms. The ATT complements other limits on arms transfers stemming from arms control and disarmament treaties and due diligence obligations found in IHL,<sup>7</sup> the Genocide Convention<sup>8</sup> and various international human rights law treaties.<sup>9</sup>

Australia gives effect to the ATT through the DTC Act and the *Customs Act 1901* (Cth) and their respective legislative instruments. The requirement to seek a permit/permission in order to transfer conventional arms and related items is an important control mechanism which enables the Government to assess the potential risks posed by a transfer.

Recognising that the essential component of Australia’s national control regime is the prohibition of arms exports under the Customs (Prohibited Exports) Regulation 2013 (**Customs PE Regulations**), we nonetheless encourage the Committee to consider how Australia’s relevant obligations under international law, including the ATT, would be fulfilled under the export control regime as a whole taking account of all foreseen amendments.

It would be helpful to clarify how the DTC Act, together with the Customs PE Regulation, will fulfil Australia’s obligations under the ATT. The ATT must be implemented in a consistent, objective and non-discriminatory manner through an effective and transparent national control system (Art. 5). Under Art. 6, Australia must deny a proposed transfer if the transfer would violate specific international obligations, or if it has knowledge that the transferred weapons would be used to commit genocide, crimes against humanity or war crimes. Additionally, before authorising the export of conventional arms or items, Australia is required to assess the potential that the arms or items: would contribute to or undermine peace and security; or could be used to commit or facilitate a serious violation of IHL or international human rights law or an act constituting an offence under international conventions or protocols relating to terrorism or transnational organised crime to which Australia is a party (Art. 7(1)). Australia must also take measures to regulate arms brokering taking place under its jurisdiction (Art. 10).

We welcome the inclusion of proposed s 10B to regulate the subsequent re-transfer of DSGI goods to third parties. This could strengthen Australia’s ability to prevent the diversion of conventional arms in accordance with its obligations under the ATT (Arts 1 and 11). We nonetheless recall that the risk that an export of conventional arms may be diverted must be assessed and mitigation measures considered (Art. 11(2)).

**We recommend that the Committee consider whether the creation of a ‘licence-free environment’ and related amendments could affect Australia’s fulfilment of its obligations under international law pertaining to the transfer of conventional arms, including the Arms Trade Treaty. We recommend the Committee take steps to ensure this matter is clarified in explanatory materials.**

## CONCLUSION

The ICRC and Australian Red Cross respectfully share the above views and recommendations for the Committee’s consideration. We take the opportunity to convey our appreciation for Australia’s support and engagement on matters related to the humanitarian consequences of armed conflict, other emergencies and protracted crises, and the protection and assistance of people affected by them.

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International Committee of the Red Cross  
Mission in Australia  
15 National Circuit  
Barton ACT 2600

Australian Red Cross  
Level 3, St Andrews House  
464 Kent Street  
Sydney NSW 2000

<sup>6</sup> Explanatory Memorandum, para. 10.

<sup>7</sup> Geneva Conventions, common Art. 1; Additional Protocol I, Art. 1; [ICRC Customary IHL Study](#), rules 139 and 144.

<sup>8</sup> 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. I. See also International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, 2007, paras 430–31.

<sup>9</sup> See, for example, 1966 International Covenant on Civil and Political Rights, Art. 2(1). See also International Law Commission, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries (2019), Art. 3.