Australian Government

Australia's initial comments on the Zero Draft of the first annual progress report of the UN Open-Ended Working Group in the field of information and telecommunications in the context of international security 2021-2025 (OEWG).

This feedback is not exhaustive and the right to provide further comment is reserved. Feedback focuses on areas of potential agreement in the text, as well as providing suggestions to strengthen and streamline recommendations.

Overarching Comments

- Australia supports the Chair's intention and efforts to agree a **substantive Annual Report** and provides these preliminary comments in the spirit of identifying areas of confluence and consensus.

- Australia welcomes the ambition and objectives of the Zero Draft. That is, to consolidate practical proposals made by some States, and identify consensus recommendations which could provide a roadmap for the OEWG's future work.

- The report sets out a selection of observations, references to previous agreements, proposals, and recommendations, the status of and support for which is unclear on the face of the Zero Draft. Australia proposes **clarity** is brought to these elements through precise construction:

  - Those **proposals** made by one or several States should be identified as such; reflecting the ongoing status of discussion of that proposal. Specifically, the opening paragraph of each Chapter should begin "*Some* States made concrete, action-oriented proposals….". Each subparagraph under this opening paragraph should begin "*Some States proposed*…".

  - Readers of the report would benefit from clarity on whether **observations** in the text are drawn from previous agreements (for example, the 2021 OEWG report and/or 2010, 2013, 2015, or 2021 GGE reports).

  - **Recommendations** reflect the consensus agreement of the OEWG; therefore the language of "States" rather than "some States" is appropriate. Australia suggests that this can be clarified by amending the recommendations heading from "Recommended next steps" to "*The OEWG recommends*:"

- Recalling the extensive discussions to date on the role of the multistakeholder community, the importance of meaningful **stakeholder** participation in the OEWG ought to be a key focus of the Annual Report.

- Several proposals and recommendations in the Zero Draft would significantly expand and reshape the role of the OEWG **Secretariat**. Many of these proposals have not been discussed in detail by the formal sessions of the OEWG and warrant further examination and elaboration. Australia suggests paragraphs which impact the role of the Secretariat are included under 'proposals' that warrant further discussion, and are not, at this stage, included as consensus recommendations of the OEWG.

- While recalling the breadth of this OEWG's focus, the Annual Report must remain cognisant of the scope and mandates of other UN processes and ensure the OEWG does not **duplicate**, contradict, or undermine the work of complementary fora. This is particularly the case for proposals related to combatting cybercrime and law enforcement measures, which are currently under consideration by the *Ad Hoc Committee Elaborating a Comprehensive Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes*.

- Suggest the Annual Report could accurately reflect references to **gender equality** made by some States, particularly regarding the differentiated threats posed to women and girls in international security, and the importance of eliminating the gender digital divide. This would also align with the 2021 OEWG report, which specifically recognised the high participation rates and the contributions of women throughout the OEWG process.

A   Introduction

1. Australia welcomes reference to, and reaffirmation of, the acquis, developed and agreed through consensus GGE and OEWG reports, into a framework of responsible state behaviour (A.1). Australia would welcome explicit reference to the acquis and the framework as the starting point for the work of the 2021-25 OEWG.

    Australia welcomes the acknowledgement of the challenging geopolitical environment under which the OEWG has met (A.1) and suggests the Annual Report could include a more explicit reference to the ongoing conflict in Ukraine, and its threats to and effects on ICTs. This could be drawn from Under-Secretary-General and High Representative Izumi Nakamitsu's opening statement to the second session of the OEWG, which articulated how the politics of the moment demonstrate the critical importance of the common norms and why we must continue our efforts and further collaboration.

B   Existing and Potential Threats

3. Throughout the acquis, the *Threats* chapter sets out a picture of the landscape that underpins those proposals and recommendations in subsequent chapters, and the context of the discussions taking place. Australia recommends the Annual Report does not deviate from this approach.

    - Many States have identified emerging threats and articulated the threat landscape in which we operate, which could be reflected in this chapter (including, inter alia, the continued increase in state sponsored malicious cyber activity; the disproportionate threat to women and girls, the threat posed by ransomware when it rises to a level that impacts on international peace and security; the threat posed by malicious cyber activity targeting critical infrastructure; the threat posed by malicious cyber activity targeting humanitarian organisations).

a) We would welcome further clarity that the subsequent chapters of the Annual Report provide recommendations to address the threats so discussed. The actions listed under 'technical and cooperative measures' (listed at B.3.a. i-x) should, where they find consensus, be moved to the relevant chapter to which they relate, rather than remaining in the *Threats* chapter:

    - (iv) (viii) (x) are actions relevant to agreed norms of responsible state behaviour

    - (iii) is an action relevant to confidence building measures

    - (i) (ii) (vii) are actions relevant to capacity building and cooperative measures

    - (v) (vi) are duplicative of an ongoing UN cybercrime process and should be removed.

c) Strongly support the references to the role of stakeholders in combatting existing and potential threats, but query inadvertent restriction to the 'protection of CI and CII'.

    Recommended next steps

    Welcome the recommendations listed in the *Threats* chapter. Suggest the proposal to engage in focused discussions and invite experts to make presentations (rec 3) should not be restricted only to threats to critical infrastructure.

C   Rules, Norms and Principles of Responsible State Behaviour

4.   Noting the action-oriented perspective of the Annual Report, the opening paragraph of the *Norms* chapter presupposes a depth of understanding of the norms which would benefit from further reference or reiteration, including: this chapter relates specifically to the set of norms agreed by the 2015 GGE and endorsed by the General Assembly, 2021 OEWG and 2021 GGE; norms are voluntary and non-binding; and, norms do not replace or alter States' obligations under international law, which are binding, but rather provide additional specific guidance on what constitutes responsible State behaviour in cyberspace.

a)   Support references to 'building upon the conclusions and recommendations agreed to in previous OEWG and GGE reports', and the proposal to develop 'additional guidance'. Our collective aim should be to better understand each other, and thereby build trust and confidence, rather than impose a top-down framework, and as such, suggest the final clause of this paragraph ('developing common understandings on technical ICT terms') is unlikely to find consensus. Similar concern applies *vis* Recommended next step 2.

c)   Welcome the references to information exchange on agreed norms (vulnerability disclosure, critical infrastructure protection and CERT cooperation) but query inadvertent restriction to only some of the agreed norms. Query the meaning of the reference to, and relevance of 'innovation' and suggest removing without further clarity on what this means in the context of international peace and security.

d)   Warmly welcome the reference to the National Survey of Implementation and updates to the Secretary-General pursuant to the invitation in General Assembly resolution 76/19.

   Recommended next steps

   1.   For clarity, suggest this sentence should read '…best practices ~~in this regard~~ for implementation…'. Recognising that many States want to discuss a range of proposals contained in the Chair's Summary (Annex II) of the 2021 OEWG Report, suggest inclusion of the status of those proposals. That is, that the Chair's Summary may not reflect the full contributions of all delegations and should not be seen as reflecting the consensus views of States on any specific points covered in it.

   2.   Suggest removal of 'common understanding on technical ICT terms'.

   3.   Welcome reference to the National Survey of Implementation and updates to the Secretary General.

D   International Law

5.   The opening paragraph of the *International Law* chapter would benefit from a brief reaffirmation of the context of the proposals and recommendations that follow. That is, that all States have agreed that existing international law, and in particular the Charter of the United Nations, is applicable and essential for maintaining peace and stability and for promoting an open, secure, stable, accessible and peaceful ICT environment.

a)   Welcome the proposal for expert briefings including from the ICRC. Welcome also the inclusion of the four tenets of international law proposed for future OEWG consideration in the joint Canada-Swiss proposal (UN Charter; State responsibility; Peaceful settlement of disputes; and International Humanitarian Law). Note that the latter should be referenced by name rather than its constituent legal elements (as it was for example in the 2021 GGE Report at Para IV 71 (f)). Welcome the inclusion of International Human Rights Law to the list of discussion topics. Acknowledging some States have an interest in additional legally binding obligations, Australia

considers that States must first understand how existing international law applies in the use of ICTs, which is already binding.

b) Warmly welcome the proposal to continue sharing views on how international law applies in cyberspace as a contribution to building common understandings, increasing transparency, and decreasing the risk of escalation to conflict.

c) Welcome the focus on capacity building for international law. Recalling the proposal in paragraph 5(a) to convene discussions on topics related to international law, suggest the reference to developing "common understanding of criteria for unlawful ICT activities by different States" be removed from the Annual Report as pre-empting those discussions. Australia suggests any future focus of the OEWG should be on encouraging States to spell out, and transparently discuss, how they consider various tenets of international law apply to state behaviour in cyberspace. Separately, suggest removing any reference to mutual legal assistance which conflates law enforcement issues (relating to the behaviour of individuals and criminal groups) with those of international peace and security (relating to the behaviour of States).

Recommended next steps

1. Warmly welcome all avenues for States to continue sharing views on how international law applies in cyberspace; the OEWG is an important forum for continuing this exchange and sharing of views.

2. Welcome focused discussions and briefings from experts on specific topics related to international law.

3. Welcome reference to the National Survey of Implementation and updates to the Secretary General.

4. Welcome the focus on capacity building for international law. Suggest "potential needs and gaps in the area of capacities" be rephrased for clarity: "potential capacity building requirements on the application of international law to the use of ICTs by States". On substance, query how this can be done without duplicating existing efforts or increasing the resource burden on small States and/or developing States.

E   Confidence-Building Measures

6. Noting the action-oriented perspective of the Annual Report, the opening paragraph of the *Confidence-Building Measures* chapter could make reference to the significant number of recommended measures to increase interstate cooperation, transparency, predictability and stability set out in the reports of the GGEs and 2021 OEWG.

a) Query relevance of the reference to being 'politically neutral' in the context of a Point-of Contacts Directory; this reference appears unnecessary in relation to a confidence-building measure intended to build transparency and facilitate open lines of communication.

b) Welcome proposals to increase transparency through sharing of information and policies, and welcome voluntary use of the UNIDIR cyber policy portal for this purpose. Recalling that the acquis has refrained from recommending States list specific types of critical infrastructure, and has noted complications arising from different national priorities and methods of categorisation, suggest the reference to sharing 'national lists of CI' should be removed. Reticence to emphasise the severity of threats to particular categories of critical infrastructure, lest it be seen to implicitly condone malicious activity against a category not specified, should be respected.

c) Warmly welcome the reference to stakeholder participation, and the suggestion that stakeholder points of contact might also be established as appropriate. Noting that the topics

proposed for such cooperation are norms 13(i) and 13(j) rather than confidence-building measures, suggest this part of the proposal be relocated to the *Norms* chapter.

e) Suggest removing references to 'glossary of basic terms' for reasons outlined above (*Norms* para 4(a) and recommended next steps (2)). Suggest removing reference to economic issues, as outside the scope and mandate of the OEWG.

Recommended next steps

6. Warmly welcome the inclusion of recommendations 2, 3, 4, and 7. Welcome the convening of an inter-sessional meeting to explore development and implementation of CBMs. However, as matters listed under this recommendation of supply chain integrity, preventing malicious uses and preventing harmful hidden functions are norms [13(i) and 13(j)] rather than confidence-building measures, suggest either this part of the recommendation be relocated to the *Norms* chapter, or the inter-sessional meeting be focused on CBMs.

F   Capacity Building

7. Welcome recognition of the importance of coordination to the effectiveness of capacity building efforts, promotion of better understanding of the needs of developing States, the role of stakeholders to cyber capacity building, and importance of exchanging views and accessing relevant information on capacity building.

Suggest the proposals listed under this could be streamlined for clarity, and should avoid duplication of existing efforts and, where relevant, clearly identify how they could work and be implemented in practice. The Annual Report could go further in recognising all the other organisations/entities already doing work in these areas, such as regional organisations, GFCE, UNIDIR, ITU, etc.

Recommended next steps

Welcome recommendations 2(c), 5 and 6.

Regarding recommendations 2(b), 4, and 7: query the significantly expanded and reshaped role of the OEWG Secretariat proposed. Suggest these activities warrant further examination and should be relocated to 'proposals' paragraph (7) in the *Capacity Building* chapter. To ensure inclusive consultations for best practice capacity building – civil society, in its diversity, should be explicitly noted.

G   Regular Institutional Dialogue

8. Any reference to the Programme of Action (POA) should not restrict its intended role to capacity building, and ought to more accurately reflect co-sponsors' intentions for a POA that would address and build upon the full breadth of issues considered by past GGEs and OEWGs . The Annual Report might draw for example on the initial paper provided by Egypt, France and co-sponsors in August 2020.

a) Recommend removal of the reference to the 'centrality of the OEWG as the negotiating mechanism' given the range of other entities under the auspices of the UN that discuss and work upon security of ICTs.

b) As above, reference to the **POA** should not restrict its intended role to capacity building.

Recommended next steps

2. The POA is not intended to sit within the OEWG, but in parallel. The role of the POA, as above, should not restrict its intended role to capacity building.