

Hon Andrew Little, Minister of Justice

Privacy Act 2020: Prioritising countries for overseas disclosures

Date	8 October 2020	File reference	PRI 08-01
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Action sought	Timeframe
Agree on the criteria to be applied to determine the order in which the Office of the Privacy Commissioner carries out country assessments for overseas disclosures under the Privacy Act 2020	At your convenience
Agree to a targeted consultation process to seek business and stakeholder views on which countries should be prioritised for assessment, thereby applying one of the criteria	
Agree to proactively release this briefing on the Ministry of Justice website so that the prioritisation criteria and our process for prescribing countries is publicly available	
Share a copy of this briefing with the Ministers of Foreign Affairs, Economic Development, Trade and Export Growth, and Commerce and Consumer Affairs.	

Name	Position	Telephone (work)	Telephone (a/h)	First contact
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584		
Chris Hubscher	Policy Manager, Electoral and Constitutional	04 918 8930		✓

Minister's office to complete

Noted
 Approved
 Overtaken by events
 Referred to: _____
 Seen
 Withdrawn
 Not seen by Minister
Minister's office comments

Purpose

1. The Privacy Act 2020 (the Act) provides that personal information may be disclosed to agencies in countries that have comparable privacy safeguards to those in the Act. The Office of the Privacy Commissioner (OPC) is responsible for assessing whether a country has comparable safeguards.
2. This briefing seeks your agreement:
 - to the proposed criteria to be applied when determining the order in which the OPC will assess countries for comparable privacy safeguards
 - to consult with businesses and other stakeholders on which countries should be prioritised for assessment, and
 - to proactively release this briefing so that the criteria and our process for prescribing countries is publicly available.

The Privacy Act's approach to overseas disclosures

3. The Act was enacted on 30 June 2020 and will come into force on 1 December 2020. Information Privacy Principle 12 requires agencies to ensure that personal information disclosed overseas will be subject to laws that, overall, provide comparable safeguards to New Zealand privacy laws. Along with other mechanisms to allow disclosures overseas, the Act provides for "prescribed countries". These are countries (or a state, province or territory) specified by regulations as providing comparable safeguards to those in New Zealand. This mechanism provides greater certainty for agencies about which countries they can send information to without putting in place additional safeguards (such as contractual clauses) to protect the information.
4. As it will take some time for the OPC to undertake each country assessment, we need to prioritise the countries to be assessed. We propose an annual prioritisation and assessment process to allow changes in the international context to be taken into account. We have previously noted that we are not likely to have more than 1-2 countries prescribed annually. This is not unusual in the international context.

Criteria for prioritising countries for assessment

Purpose of the criteria

5. The criteria provide an objective framework to determine countries' relative priority for assessment.

The criteria

6. We have consulted with MFAT and the OPC on the proposed criteria which cover three broad areas (set out in detail in Appendix One):

- a) *Likelihood of meeting key privacy standards* – countries prioritised for assessment should be able to meet a threshold privacy standard, as we do not want to prioritise countries that are unlikely to be prescribed even on a qualified basis. As part of the privacy standards we have included human rights considerations that are relevant to the protection of personal information. There will be flexibility in meeting the initial threshold considerations. Some countries may not be able to meet all the key privacy standards, but could have mechanisms in place either to create comparable standards, or be able to otherwise demonstrate comparable standards.
- b) *The size of the economic relationship* – the amount of trade and investment flows between New Zealand and given countries should provide a good indicator of cross border information flows. This will allow us to prioritise countries that will be the most beneficial for New Zealand businesses and stakeholders.
- c) *New Zealand business and stakeholder views* – this criterion will help us understand which countries New Zealand businesses and stakeholders would find it most valuable to prioritise and why.

Applying the criteria

7. Applying these criteria will involve weighing sometimes competing considerations. A country with strong privacy protections is likely to meet the privacy criterion. But there is less value in prioritising a country to which New Zealand agencies rarely send personal information. This means that we may want to prioritise a major economic partner whose privacy law meets some, but not all, of the standards over a minor economic partner. In this case, Justice and MFAT would consider whether the country, or sector, is of sufficiently high priority as a current or potential trading partner to justify the effort that would be involved in crafting appropriate limitations in regulation for prescribing that country.

Seeking New Zealand business and stakeholder views

8. We propose to consult with businesses and other stakeholders (criterion c) over six weeks commencing October 2020. We plan to seek business and stakeholder views through the Ministry of Justice website. This will provide an opportunity for other people and interested groups to give us their views as well.

Timing and next steps

9. Following the consultation, we propose the following annual process for prescribing countries for overseas disclosures.

Table 1: Proposed process for prescribing countries for overseas disclosures

Stage	Steps
Prioritisation	1. Justice and the Ministry of Foreign Affairs and Trade (MFAT), in consultation with the OPC, apply the criteria and propose 1-2 countries to be prioritised for assessment by the OPC each year.
Assessment	2. The Minister of Justice requests the Privacy Commissioner to carry out the assessment of those countries. 3. OPC assesses those countries and provides its independent advice to the Ministry of Justice. 4. Following advice from the Ministry, the Minister of Justice decides whether the test in the Act is met, and whether any limits or qualifications are required.
Order in Council	5. Following cabinet decisions, regulations are made prescribing the countries as providing comparable safeguards.

10. We expect that New Zealand's international partners will be interested in our process for prescribing countries. We therefore recommend that this briefing is proactively released on the Ministry's website along with the countries prioritised for assessment each year, once these are finalised.
11. An indicative timeline for our next steps is as follows:
 - October to November 2020 – seek business and stakeholder views on the countries to be prioritised for assessment
 - December 2020 to January 2021 – Justice and MFAT prioritise 1-2 countries in consultation with the OPC and advise the Minister of Justice
 - January 2021 – Minister of Justice requests the Commissioner carry out assessments of the priority countries
 - Late 2021 – The OPC provides the comparability assessments
 - Early 2022 – initial regulations are made prescribing countries

Recommendations

12. We recommend that you:

1. **Agree** to the proposed prioritisation criteria which will be used to determine the order in which the Office of the Privacy Commissioner will carry out country assessments for overseas disclosures under the Privacy Act 2020 **YES / NO**
2. **Agree** to a consultation process with businesses and other stakeholders to seek views on which countries should be prioritised for assessment, thereby applying one of the criteria **YES / NO**
3. **Agree** to proactively release this briefing on the Ministry of Justice website **YES / NO**
4. **Share** a copy of this briefing with the Ministers of Foreign Affairs, Economic Development, Trade and Export Growth, and Commerce and Consumer Affairs. **YES / NO**

Chris Hubscher
Manager, Electoral and Constitutional Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

Appendix One: Proposed prioritisation criteria

Criteria	Key questions
A: Key privacy standards	<ol style="list-style-type: none"> 1. Is there a privacy law – either general or sectoral? 2. Do the protections cover most personal information? (Includes public and private, breadth of information covered, application to individuals, similar exemptions) 3. Are there purpose limits on the collection, use and disclosure of personal information? 4. Is there regulation around the secure storage, retention and accuracy of personal information? 5. Is there an obligation to notify individuals about serious privacy breaches? 6. Are there rights to seek access to and correction of personal information? 7. Is there regulation of government access to personal information and disclosure of personal information (information sharing)? 8. Is there regulation around the onward transfer of data to foreign countries? 9. Is there an independent privacy regulator (e.g. member of the Global Privacy Assembly)? 10. Is there an independent complaints process and available legal remedies? 11. Is there any constitutional protection for privacy? 12. Is there an independent judiciary with jurisdiction to hear cases relating to breaches of privacy? 13. Is there a legal framework and institutional arrangements that provides oversight of the activities of the country's intelligence and security sector and law enforcement agencies? 14. Are there human rights institutions and legal mechanisms for investigating breaches of privacy? 15. Is the country party to the International Covenant on Civil and Political Rights? 16. What is the country's standing on the rule of law index? 17. What is the country's standing on the corruption perception index (transparency)?
B: The size of the economic relationship	<ol style="list-style-type: none"> 1. What is the value of trade flows between New Zealand and the country? 2. What is the value of investment stocks and flows between New Zealand and the country?
C: New Zealand business and stakeholder views	<ol style="list-style-type: none"> 1. Which countries do New Zealand businesses and stakeholders most want to see prescribed?

RELEASED BY THE MINISTRY OF JUSTICE