

**SUBMISSION BY**



to

**OFFICE OF THE PRIVACY COMMISSIONER**

on

**DRAFT BIOMETRIC PROCESSING PRIVACY CODE**

March 2025

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# **NZTECH SUBMISSION ON DRAFT BIOMETRIC PROCESSING PRIVACY CODE**

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## **INTRODUCTION**

NZTech welcomes the opportunity to comment on OPC's draft code.

While we continue to have concerns on the potential negative impacts of the code on business, innovation and the wider economy – as expressed in our feedback on the exposure draft last year – we appreciate OPC's efforts to engage constructively with members of NZTech and draw upon industry expertise on privacy-enhancing technologies in its development of the code. We look forward to further opportunities for engagement.

## **ABOUT NZTECH**

NZTech is a member-funded, not-for-profit, non-governmental organisation that has multiple tech communities, associations and national initiatives that help create connections, promote tech and enhance New Zealand's ability to benefit from technology.

We bring together the NZ Tech Alliance and represent 24 tech associations such as AgriTechNZ, BioTechNZ, EdTechNZ, FinTechNZ, the AI Forum, the NZ Game Developers Association, Digital Health, Digital Identity NZ and more. We have more than 2,500 members who together employ 10 percent of the New Zealand workforce, comprising startups, local tech firms, multinationals, education providers, financial institutions, major corporations, network providers, hi-tech manufacturers and government agencies that work closely with the tech ecosystem.

## **COMMENTS**

We continue to believe that a Biometrics Code of Practice is unnecessary, will stifle innovation, and requires a level of technological and specialist practice experience and expertise which would prove challenging for OPC to provide. We believe the Privacy Act 2020 is more than capable of providing the necessary guardrails when implementing biometrics, supported by clear guidance from subject-matter experts with real-world operational experience.

This is a view held by many NZTech members, including Digital Identity New Zealand (DINZ), as expressed in its more detailed submission on the draft code.

That said, we support the enhancements to the code's exposure draft which OPC has highlighted in its consultation document, i.e.

- Increasing the commencement period from six to nine months for existing biometric uses.

- Reducing the number of definitions and making them less technical.
- Clarifying key definitions to make clearer the scope of activities covered by the code.
- Simplifying the proposed notification rules.
- Simplifying and clarifying the test for assessing whether biometrics is necessary and proportionate.
- Introducing a new provision for carrying out a trial of whether biometrics will be effective (up to 6 months).

At the same time, we have reservations on key aspects of the draft code – in terms of its definition and scope, its framework for implementation, and its notification requirements.

### 1) Definition and Scope

- (a) The proposed code's definition of “biometric characteristics” potentially encompasses a wider range of attributes than comparable international frameworks. While jurisdictions like the United States typically limit biometric data to unique biological identifiers (such as fingerprints or iris patterns), the draft code extends to non-unique characteristics such as gait and keystroke patterns. This broader scope risks creating regulatory misalignment with international standards.

*We therefore recommend limiting the definition of “biometric characteristics” to typically understood definitions of unique biological patterns or characteristics.*

- (b) In addition, the current definition of "biometric sample" could encompass standard photographs and audio recordings. While the code generally contextualises these within biometric processing requirements, Rule 2's direct reference to "biometric sample" without this context creates potential overreach.

*We therefore recommend modifying Rule 2 to explicitly reference biometric processing purposes.*

### 2) Framework for Implementation

We support a balanced regulatory approach that enables innovation using biometric technologies, while ensuring appropriate safeguards. Given this, we are concerned that the “necessity test” under Rule 1(b) creates a high threshold that does not enable a balanced approach.

Under Rule 1(b), biometric information must not be collected unless the biometric processing is necessary for that purpose. This includes requirements that the biometric processing is effective in achieving the agency’s lawful

purpose, and that the agency's lawful purpose cannot be reasonably achieved by an alternative means that has less privacy risk.

The high threshold under this two-limb necessity test could result in beneficial uses of biometric information not being deployed due to alternative means. While OPC's guidance is helpful (e.g. through the examples of using facial recognition technology to access a secure apartment), this does not provide certainty for organisations.

*We therefore recommend that the language under Rule 1(b) be amended to incorporate the "reasonable grounds" standard under Rule 1(c), thereby allowing for greater flexibility for organisations, while ensuring checks and balances are in place.*

### **3) Notification Requirements**

The current notification obligations exceed standard privacy principles in ways that may create disproportionate burdens.

First, the requirement to inform individuals about all potentially applicable laws [Rule 3(1)(l)] creates an unreasonable compliance burden without corresponding benefits.

Second, the obligation to provide access to assessment summaries [Rule 3(1)(m)] imposes additional administrative requirements without clear privacy protection advantages.

*We therefore recommend removing both requirements to maintain effective privacy protection while ensuring practical implementation.*

## **CONCLUSION**

NZTech thanks OPC for the opportunity to make this submission. We would be happy to provide further information or discuss in person any aspect of our submission with you.



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