

11 March 2025

Office of the Privacy Commissioner  
By email: [biometrics@privacy.org.nz](mailto:biometrics@privacy.org.nz)

## SUBMISSION on Draft Biometric Processing Privacy Code

### 1. Introduction

Thank you for the opportunity to make a submission on the Office of the Privacy Commissioner's (OPC) draft of the *Biometric Processing Privacy Code* (Code).

This submission is from Consumer NZ, an independent, non-profit organisation dedicated to championing and empowering consumers in Aotearoa. Consumer has a reputation for being fair, impartial and providing comprehensive consumer information and advice.

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### 2. General comments

As noted in an earlier submission on the exposure draft code, we strongly support the decision to introduce specific rules on the collection of biometric information. Currently, Aotearoa New Zealand is lacking a robust framework to regulate biometrics, a special type of personal information, which is urgently needed. We support the decision to frame this as a code of practice under the Privacy Act 2020 (the Act).

We consider the amendments made to the exposure draft simplify the Code and ensure it remains technically specific, but not confusing. We also think the

decision to remove several terms from the interpretation section streamlines the Code successfully.

### **3. Responses to specific questions in the Consultation Paper**

We have responded to selected questions in the Consultation Paper below.

**Questions about rule 1:**

*Do you agree that as a part of assessing whether using biometrics is necessary, the organisation must examine its effectiveness and check if there are alternatives?*

We have previously expressed concerns about a lack of clarity on what it means to be 'necessary'. We are pleased to see this has been addressed in the current draft. We agree that by adding specific examples (effectiveness and no alternative means), this provides useful criteria for agencies covered by the Code to ensure stricter compliance with the rules. This ensures a more objective assessment and overall makes the decision to use biometric processing technology easier to navigate.

Consumer NZ has closely followed the recent facial recognition technology (FRT) trial by Foodstuffs North Island (FSNI). FSNI claims the use of FRT in supermarkets has been successful in reducing crime in store. However, we are concerned these figures may be misleading.<sup>1</sup> Whilst effectiveness is an important consideration, agencies can be deceptive in the way they present their findings.

We agree that effectiveness is not the only benchmark to assess necessity. The inclusion of 'no alternative means' is a welcomed addition. We have previously expressed our view that agencies may be enticed by the availability of biometric processing technology and forget to assess other options which may reasonably achieve similar results.

*Do you agree with the requirement to adopt reasonable safeguards? Do you agree with our decision to list safeguards in guidance as opposed to the Code?*

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<sup>1</sup> <https://www.consumer.org.nz/articles/foodstuffs-north-island-s-facial-recognition-trial-do-the-numbers-add-up>

Yes, we agree with the requirement to adopt reasonable safeguards. However, we do not support the decision to list safeguards in guidance, as opposed to the Code. In our view, the Code sends a strong message that the rules need to be complied with.

We are concerned the first privacy safeguard in the exposure draft (authorisation based on an informed decision and the ability to opt out) has been removed. This safeguard reinforces the importance of consent. In our previous submission, we highlighted concerns that individuals may lack understanding of the technology used in biometric processing which impacts their ability to provide genuine consent. This provision bolstered the requirement of not only awareness of the collection, but explicit consent to it. We recommend this safeguard is reinstated.

By including the privacy safeguards in the Code, agencies are made aware of ways they should reduce privacy risks, not simply ones they might like to take. However, we also note the importance of not creating an exhaustive list of privacy safeguards.

In the guidance document, we support the recognition of the power imbalance between the agency and the individual as an important consideration when assessing the privacy risk. We are concerned the more this technology is deployed, the more individuals will be left with no choice but to accept it. This is especially true where the agency provides a vital public service, such as supermarkets.

***Do you agree that organisations must consider whether processing is proportionate to the impact? Do you agree with the factors that go into this assessment?***

We agree that proportionality is an essential component when justifying the use of biometric processing capabilities.

The factors listed under the privacy risk definition appropriately capture the problems around biometric processing. We have repeatedly expressed concern about the possible racial bias of facial recognition technology.<sup>2</sup> Therefore, we support the inclusion of the consideration of the cultural impacts and effects on Māori. We also note the decision to remove the cultural impacts and effects on

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<sup>2</sup> <https://www.consumer.org.nz/articles/facial-recognition-at-29-foodstuffs-north-island-stores>

any other New Zealand demographic group as a consideration of proportionality. It has been well documented that artificial intelligence systems are continuously found to be biased against individuals who are not white.

***Do you agree with the new trial provision? Can you see any risks or benefits of this provision? Do you agree that the rest of the rules should apply while it is being conducted?***

Given the recent supermarket FRT trials, we are not surprised to see the addition of this provision. Overall, we agree the rules under the Code should apply whilst trials are being conducted. If not, there is a high likelihood that agencies will abuse their powers under this rule to exploit individual's biometric information for their own gain.

The decision to impose an initial trial period of six months is reasonable enough. However, as mentioned above, we are concerned agencies may misrepresent their findings which would lead to a longer period than necessary to collect biometric information. There will need to be strong monitoring of any trials.

**Questions about rule 3:**

***Do you agree with the new minimum notification rule, that requires, at minimum, clear and conspicuous notice of a few key matters?***

In line with our views on consent, it is vital that individuals have clear notice of the fact their biometric information is being collected. This is a necessary prerequisite to being able to genuinely consent. We believe the inclusion of "due particularity" when specifying the purpose of collection adds a better layer of protection given the possibility of agencies to mislead. It is promising to see the addition of the "clear and conspicuous" requirement.

***Do you agree with the additional matters for notification?***

The final matter for notification under rule 10, the location of the agency's assessment of proportionality is important to ensure transparency. However, there is no requirement to publish this assessment publicly. We have been made aware of the distrust amongst individuals, particularly when it comes to private companies, around the use of their data. We believe that to regain this trust, there

should be a requirement that the proportionality assessment is made available to the public without the need to request it.

#### **Questions on limits on uses of biometrics in rule 10**

*Do you agree there should be limited around using biometric emotion recognition?*

We continue to oppose the use of biometric processing for the purpose of collecting information about a person's inner state (emotions, personality or mental state). We believe this does not serve any reasonable purpose.

*ENDS*