Privacy Commissioner
Te Mana Mātāpono Matatapu

Privacy regulation of biometrics in Aotearoa New Zealand: Consultation paper

August 2022

About this consultation

Biometric information is personal information. This consultation paper seeks the views of stakeholders, Māori Tiriti partners and the general public about how biometrics (including facial recognition technology) should be regulated to protect privacy in Aotearoa New Zealand. Background information (including more detail about what we mean by 'biometrics') is provided in the main part of the paper.

The paper has been published by the Office of the Privacy Commissioner (OPC). The Privacy Commissioner is responsible for regulation under the Privacy Act 2020 and is independent of the Government. This consultation will inform OPC's own thinking and regulatory action. The paper does not represent the views or policies of the Government.

How you can take part

Submissions on this consultation paper

OPC wants to hear a range of perspectives on biometrics. This includes views from vendors of biometric technologies; users or potential users of such technologies in both the public and private sectors; Māori organisations and individuals; community organisations; civil society organisations representing privacy, human rights, legal, consumer, worker and other interests; technical and legal experts; and the general public.

We encourage as many people as possible to respond to the questions in this paper. Please feel free to share the paper with others you think might be interested or who could bring a different perspective to bear. You can answer as many or as few questions as you like, or you can just tell us what you think about biometrics and privacy without directly responding to the questions. You can also choose to focus on a particular type of biometrics, such as facial recognition technology.

Please send submissions on the consultation paper to **biometrics@privacy.org.nz** or by mail to **Biometrics submission, Office of the Privacy Commissioner, PO Box 10 094, Wellington 6143.**

If there's a way in which OPC can make it easier for you to access the information in the consultation paper or to provide your feedback, you can ring and let us know what we can do to help on 0800 803 909. **Submissions on the consultation paper are due by Friday 30 September 2022.**

Release of information

OPC may choose to make submissions on the consultation paper public or may be asked to release them under the Official Information Act 1982. We will not release your contact details, or your name if you are an individual submitting in a private capacity. If you don't want your submission, or part of your submission, to be released publicly, please let us know and explain why you don't want it published.

If you make a submission, you have a right under the Privacy Act to request the information OPC holds about you and to ask for that information to be corrected. Please see the information on our website about this.

Meeting with stakeholders

OPC will be organising some meetings with stakeholders. If you would like to meet to discuss biometrics, please get in touch. However, keep in mind that we are a small office, so we may not be able to meet with everyone who has an interest in this issue.

Further engagement in future

One of the options discussed in this paper is the development of a code of practice for biometrics under the Privacy Act. There are legal requirements for the Privacy Commissioner to consult on a draft of any such code. If the Privacy Commissioner decides to develop a code, it will be consulted on separately in 2023 – this consultation paper is **not** the code consultation.

How to use this paper

We've organised this paper around a series of topics, with questions about each topic.

The first part of the paper seeks your views on:

- what we're looking at in our biometrics review and why we're looking at it
- our key assumptions and what we're trying to achieve
- uses of, concerns about and risks relating to biometrics
- Māori perspectives and other cultural perspectives on biometrics.

The second part of the paper is about regulation of biometrics. It asks about:

- what people think of the position paper on biometrics that OPC published in 2021
- what other regulatory action might be needed.

You can use these topics and questions to guide your submission. Remember, you don't need to answer all of the questions or even to respond to the questions at all. The most important thing is to tell us what you think, in a way that works for you.

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About the Privacy Act 2020

The Privacy Act 2020 is New Zealand's main law governing the collection, storage, use and disclosure of personal information. It's based around 13 privacy principles that deal with how organisations should handle people's personal information. The Act covers organisations in both the public and private sectors. As well as covering New Zealand organisations, it applies to overseas organisations that carry on business in New Zealand. It also applies to individuals in most circumstances.

If you'd like to learn more about the Privacy Act, you can find an introduction to the Act and the privacy principles here.

Acronyms

FRT: facial recognition technology

OPC: Office of the Privacy Commissioner

PIA: privacy impact assessment

Background

The use of biometric technologies, including facial recognition technology (FRT), is becoming more common in Aotearoa New Zealand. Biometrics can have significant benefits for organisations and individuals – including convenience, efficiency and security benefits – but can also create privacy risks. In October 2021, OPC published its position on the regulation of biometrics. The position paper is available here. The aims of the position paper were to:

- inform organisations using biometrics, or thinking of doing so, about the Privacy Act's coverage of biometrics
- set out OPC's approach to regulation of biometrics under the Privacy Act and its regulatory expectations
- contribute to public discussion about the adequacy of current regulatory frameworks for biometrics.

The position paper was partly a response to concerns about the use of FRT and other biometric technologies in New Zealand. Individuals and organisations have called for greater regulation of FRT.[1] OPC was also aware that privacy regulators in other countries already have specific regulatory requirements for biometrics or are looking at such requirements.

OPC's position paper made a number of key points:

- Biometric information is personal information and is regulated under the Privacy Act.
- Biometric information is **sensitive** personal information, so it needs to be treated with extra care.
- OPC considered that the Privacy Act provides adequate protection for biometric information from a privacy perspective but said it would keep the need for further regulation under review.
- OPC's key regulatory expectation is that organisations will carry out a Privacy Impact Assessment (PIA) for all projects in which the use of biometrics is being considered.

The position paper also set out OPC's view on how the privacy principles apply to biometric information, and some questions that PIAs for projects involving biometrics should address.OPC said it would continue to monitor the use of biometrics and to consider whether further regulatory measures are needed. OPC also acknowledged the need to work with Māori partners to further develop OPC's position on biometrics in relation to Te Tiriti o Waitangi and perspectives from Te Ao Māori.

OPC undertook to review the position paper to assess its impact and whether any further steps are needed. OPC has now started its review, which this consultation will contribute to. This paper refers to the position paper in several places.

[1] For example, Nessa Lynch, Liz Campbell, Joe Purshouse and Marcin Betkier, *Facial Recognition Technology in New Zealand: Towards a Legal and Ethical Framework* (report funded by the Law Foundation, 2020).

The case for further action

As you'll see from the questions we ask in this paper, OPC is thinking about more than just a rewrite of the position paper. We're not jumping to conclusions, but our starting point is that there's a strong case for further action to ensure that the use of biometrics is subject to appropriate privacy protections. The following factors have contributed to our preliminary view that the approach outlined in the position paper is not enough on its own:

- Use of biometric technologies is increasing and diversifying in New Zealand and internationally.
- There is a growing level of concern in New Zealand about the adequacy of current regulation for FRT in particular and biometrics in general.
- Specific concerns are being raised about the implications of FRT and other biometric technologies for Māori: for example, concerns about bias and profiling, accuracy and the collection and use of images that may include moko (traditional tattooing).
- Clearer regulatory expectations about biometrics would benefit both users and subjects of biometric information.
- Greater clarity would allow organisations to innovate and make safe and effective use of biometrics when they have a good reason to do so, knowing the kinds of safeguards they need to have in place.
- Regulatory clarity would assure the public that their biometric information should be processed only if it's appropriate and safe to do so in the circumstances. It would help individuals to know what they should expect of organisations using biometrics and to hold organisations to account if they don't meet those expectations.
- A clear set of regulatory expectations would empower OPC as the regulator under the Privacy Act to take compliance action in relation to biometrics.
- Other countries with which we commonly compare ourselves have implemented tighter controls on biometrics than New Zealand has. While taking account of our specific context, New Zealand needs to remain broadly in line with comparable jurisdictions so that we maintain our global privacy and human rights reputation. Compatible privacy rules also facilitate international trade.

Q1: Do you have any comments on the case for more regulatory action set out above?

What this review covers

In this consultation paper and our review, OPC is taking a broad look at privacy regulation of biometrics. We want to understand more about how biometric technologies are being used or may be used in New Zealand, what people's concerns are about biometrics, whether existing regulatory settings are adequate and what additional regulatory measures (if any) may be needed.

Page 2 of OPC's biometrics position paper sets out our understanding of some key terms:

> **Biometric recognition**, or **biometrics**, is the fully or partially automated recognition of individuals based on biological or behavioural characteristics. These characteristics can include a person's face, fingerprints, voice, eyes (iris or retina), signature, hand geometry, gait, keystroke pattern or odour.
>
> **Biometric information** is information about an individual's biological or behavioural characteristics: for example, a facial image, a fingerprint pattern or a digital template of that image or pattern.

OPC's focus in the position paper is on the use of biometric information in technological systems that conduct **automated recognition** of individuals. There are a couple of things to say about this focus:

- Under the Privacy Act, OPC can only regulate information, not technologies. But we do regulate the ways in which agencies use technological systems to process people's information, which can include requiring those systems to meet relevant industry standards (for example, security standards).
- All biometric information is sensitive and requires careful protection. Many of the same principles will apply to biometric information regardless of how it's used. But we've focused on automated processing of biometric information because we think the growth in biometric technologies creates new or increased privacy risks.

We're excluding from this review issues relating to genetic (DNA) analysis and profiling. While genetic analysis is a form of biometrics, it involves quite distinct legal and ethical issues that are best considered separately.

Also outside this review's scope are concerns about biometrics that can't be addressed through privacy regulation's focus on personal information. For example, there may be human rights concerns about discrimination that can't be fully addressed within a privacy framework.

We don't want to get into a technical debate about terminology or the exact scope of biometrics. More precise definitions of key terms and scope will be needed if we move to a more prescriptive form of regulation, such as a privacy code, but not at this stage.

We do welcome comments from a policy perspective on the scope of our review. For example, do you agree or disagree that the review should focus on uses of biometric information that involve automated recognition of individuals?

Q2: Do you have any comments on the scope and focus of OPC's review of the privacy regulation of biometrics?

Assumptions

Key assumptions of this review are:

- Biometric information is personal information because it's information about an identifiable individual. This is true both of the original biometric characteristic and of a biometric template created from the raw biometric data (see page 4 of the position paper). Therefore, biometric information is regulated under the Privacy Act.
- Biometric information is sensitive information because it's directly connected to an individual's sense of identity and personhood, and because biometric characteristics are very difficult to change (see page 5 of the position paper). Sensitivities in relation to biometric information can also differ between cultures.
- Use of biometric technologies can have major benefits but can also create significant risks (see pages 3-7 of the position paper).

Q3: Do you have any comments on these assumptions?

Objectives

OPC's review of biometrics has the following objectives, which will be used in assessing regulatory options. Privacy regulation of biometrics should:

- preserve the benefits while protecting against the risks of using biometrics
- provide regulatory clarity for current or potential users of biometrics and for people whose information is being collected, stored, used or disclosed
- be relevant to the context of Aotearoa New Zealand, while remaining broadly in line with regulation in other comparable jurisdictions
- take account of responsibilities under Te Tiriti o Waitangi and perspectives on biometrics from Te Ao Māori
- be proportionate to the scale of the risk, in terms of the restrictions and compliance burden for regulated organisations.

Q4: Do you have any comments on these objectives?

Uses of biometrics

Some examples of uses of biometrics are given on page 3 of the position paper. OPC is keen to hear from organisations that use biometrics about the range of current and planned uses of biometrics in New Zealand. If information about your organisation's use of biometrics is provided in confidence due to commercial or other sensitivity, please note this confidentiality in your submission.

Q5: If your organisation is a user, potential user or vendor of biometric technologies: how do you or your customers use these technologies (or how might you or your customers use them in future)?

Concerns about biometrics

Concerns about the use of biometrics are discussed at pages 4-7 of the position paper. Key concerns relate to:

- technical challenges, including accuracy (e.g. wrongly identifying someone) and security (e.g. biometric data being stolen or otherwise compromised)
- the sensitivity of biometric information, which is unique to the individual, directly connected to their identity and personhood and very difficult to change
- risks of mass surveillance and profiling, particularly when biometric information is collected without people's knowledge or consent, is combined with other information or is used in ways that could have significant adverse impacts on people
- function creep, when biometric information collected for one purpose is used for another (which means it could be used without appropriate safeguards and without the knowledge of the individual concerned)
- lack of transparency and control for people who are subject to biometric recognition, making it more difficult to challenge decisions that are based on biometrics
- bias and discrimination in the operation of biometric systems, including risks that they may be less accurate for some groups or may entrench existing biases if some groups are over-represented in biometric databases.

These concerns can take on a further dimension when we consider that New Zealanders' biometric information may sometimes be transferred overseas for storage or processing (although agencies transferring personal information overseas still need to ensure there are appropriate protections in place).

We're not saying that these concerns apply to all uses or types of biometrics, or that all are equally risky. But it's because of these concerns that regulation of biometrics is important. Effective regulation that addresses privacy concerns will build public trust and enable the benefits of biometric technologies to be realised. OPC would like to know if you agree with the concerns outlined in the position paper or have any other concerns you'd like to raise.

Q6: Do you have any comments on the concerns about the use of biometrics discussed in the position paper?

Q7: Are there concerns about biometrics that can't be addressed through privacy regulation (because they don't involve control over personal information)?

Assessment of risk

Different biometric technologies and different uses of these technologies create different types and levels of privacy risks. Regulatory responses should be proportionate to the level of risk. OPC would like to hear about how risk should be assessed and what types of uses and technologies people see as involving more or less risk.[2]

Assessing risk involves thinking about both **probability** (how likely is it that something of concern will happen?) and **impact** (if something of concern does happen, how widespread and serious will any harm be?) Risk also always needs to be considered in relation to expected benefit. **Not** using biometrics could also increase risk, or opportunities for public benefit could be missed.

Some factors to consider in assessing risk in relation to biometrics might include:

- Do people have a genuine choice about whether their biometric information is collected and used?
- What is the purpose of collecting and using biometric information and what results can it have for the individual concerned?
- How accurate is the technology involved, including for different population groups?
- How much information is being collected and about how many people?
- Will some groups of people be more affected than others, and are those groups particularly vulnerable?

[2] In thinking about the issue, you may find the discussion of risk in a recent report on FRT in New Zealand useful: Nessa Lynch, Liz Campbell, Joe Purshouse and Marcin Betkier, *Facial Recognition Technology in New Zealand: Towards a Legal and Ethical Framework* (report funded by the Law Foundation, 2020), pp 7:3-7:4.

An example of a lower-risk use of biometrics might be giving people the option of using FRT to identify themselves (but allowing them to use another form of identification if they prefer), for the purpose of interacting with an organisation online. A higher-risk use might be a law enforcement agency using FRT to identify and locate people of interest in a public place.

Q8: What factors should be considered in assessing the level of risk from particular uses of biometrics?

Q9: What types of uses do you see as low, medium or high risk?

Te Ao Māori perspectives

OPC acknowledged in the position paper (page 2) that it has obligations to partner with Māori, whānau, hapū and iwi to bring Te Ao Māori perspectives to privacy. OPC has started working to meet these obligations but still has a long way to go. In the meantime, OPC wants to hear from Māori about the protections that may need to be put in place for Māori in relation to biometrics. OPC would like to hear from Māori individuals and organisations about the privacy implications of biometrics for Māori. This includes:

- Māori cultural perspectives on identity and privacy that are relevant to biometrics
- ways in which the use of biometrics could affect Māori differently from other people
- actions needed to give effect to Te Tiriti o Waitangi in relation to biometrics.

Q10: If you are a Māori individual or organisation:

- **what privacy implications do you see for Māori in the use of biometrics**
- **what protections would you like to see for the impact of biometrics on Māori**
- **what should happen to give effect to Te Tiriti in the regulation of biometrics?**

Other cultural perspectives

There may also be specific cultural perspectives on biometrics and privacy from other cultural communities in New Zealand, or particular impacts on some communities.

Q11: Are there any other cultural perspectives on biometrics or impacts on particular communities that OPC should be aware of?

Regulatory expectations and understandings in the position paper

OPC's core regulatory expectation (set out on pages 16-17 of the position paper) is that organisations should carry out a PIA for any project in which they are considering the use of biometrics. The PIA should assess whether the use of biometrics is justified and, if so, explain how any privacy impacts will be mitigated. The position paper sets out questions for consideration in PIAs for projects involving biometrics.

The position paper (pages 9-14) also outlines OPC's view on how the privacy principles in the Privacy Act apply to biometrics.

OPC isn't asking for detailed critiques of the position paper. But we would like to know if organisations or individuals have any major concerns about the regulatory expectations or the interpretation of the Privacy Act that the position paper sets out.

We're also interested in whether users of biometrics think the position paper provides enough clarity and whether people think OPC's regulatory expectations would provide enough protection if organisations complied with them.

Q12: Do you have any major concerns about what the biometrics position paper says about OPC's regulatory expectations or how the Privacy Act applies to biometrics?

Q13: If you are a user or potential user of biometrics: does the position paper provide enough clarity about what you need to do to comply with the Privacy Act and with OPC's regulatory expectations? If not, where does it fall short?

Q14: If users or potential users of biometrics were complying with OPC's regulatory expectations in the position paper, would this provide enough privacy protection? If not, where does the position paper fall short?

Further regulatory action

We've said above that OPC currently thinks our position paper on biometrics is no longer enough on its own, and that there's a good case for further regulatory action. Our final view will be informed by feedback from submitters, including your responses about whether the position paper provides enough clarity and protection and whether there are other steps you'd like to see taken.

We've identified a number of broad options for further regulatory action, which we discuss in more detail in the remainder of this paper. They are:

- Non-legislative options:
    - further guidance from OPC
    - biometrics standards and principles
    - directives for government agencies.
- A biometrics code of practice under the Privacy Act.
- Legislative change.

These options need to be compared with the current situation, which is that:

- what organisations do with biometric information, including how they process it using biometric technologies, is regulated under the Privacy Act
- OPC as the regulator under the Privacy Act has set out its high-level regulatory expectations in the biometrics position paper (which can be updated as required)
- there are other legal and ethical frameworks governing biometrics in New Zealand (discussed at pages 7-9 of the position paper), although some of these aren't specific to biometrics.

OPC would like to know if you're comfortable with the current situation or would like to see other regulatory measures put in place.

Q15: Do you think current privacy regulation of biometrics is adequate? Why, or why not?

Q16: Are there any other regulatory options not covered in this paper that you think should be considered for biometrics?

Q17: If you think more regulatory action is needed, which option(s) would you recommend focusing on?

Non-legislative actions

Further guidance from OPC

OPC could provide more detailed guidance for organisations about how the Privacy Act applies to biometrics. For example, such guidance could deal with:

- particular biometric technologies, such as FRT
- biometrics in particular contexts, such as law enforcement
- what should be covered in a PIA for projects involving biometrics.

Privacy regulators in other countries have developed more detailed guidance. For example, the UK Information Commissioner has issued an opinion on the use of live FRT in public places, while privacy regulators in Canada have produced privacy guidance on facial recognition for police agencies.[3]

Advantages of developing further guidance are that:

- OPC can develop such guidance on its own initiative and relatively quickly
- it can be as detailed as is necessary for the topic in question
- it can set clear expectations based on OPC's authority and expertise as regulator.

The key disadvantage of this option is that guidance can't change the requirements of the Privacy Act. It can only explain how OPC sees the Act as applying in particular contexts.

Biometrics standards and principles

There are a range of tools that can be used to specify the standards organisations should meet and the processes and assessments they should undertake in relation to biometrics. Standards are usually voluntary, although they can be made compulsory through legislation. Examples include:

- biometrics standards developed or published by Standards New Zealand[4]
- principles and guidance developed by the Biometrics Institute (an international organisation whose membership includes New Zealand organisations in the public and private sectors)
- Identification Management Standards which are part of the digital oversight role of the Department of Internal Affairs.

OPC could promote existing standards for biometrics or collaborate with other agencies in the development of new standards (for example, a mandated standard for the management of biometric information by government agencies). Advantages of standards and principles are that:

- they can be very specific and provide a high level of technical detail
- users of the standards and technical experts can be involved in their development
- they can deal with measures to protect privacy but can also cover other requirements
- they can be cited in guidance from other organisations or in legislation or regulations.

[3] Information Commissioner's Office (UK), *The Use of Live Facial Recognition Technology in Public Places* (Information Commissioner's Opinion, June 2021); Office of the Privacy Commissioner of Canada and provincial Canadian privacy regulators, *Privacy Guidance on Facial Recognition for Police Agencies* (May 2022).
[4] Peter Campbell, 'Biometrics and the Standardisation of Facial Recognition', Standards New Zealand website, 6 April 2022.

Potential disadvantages of standards and principles are that:

- they are generally voluntary, so organisations can choose to ignore them
- the general public often doesn't have access to them and they can be difficult to understand, so they don't necessarily provide widespread assurance
- they may not be focused on privacy.

Directives or expectations for government departments and public agencies

There are a range of ways in which the Government can direct or set expectations for government departments and other public agencies that use biometrics. For example:

- Ministers can direct the departments they are responsible for
- designated system leaders in the public service can set standards for public service agencies within their area of responsibility.

The Government therefore has some scope to set standards or parameters for the use of biometrics by government departments and other public sector agencies, without using legislation. This option could be similar to the standards option discussed above. The difference is that standards could be made mandatory, but only for public sector agencies. The main advantage of expectations set by the Government for the public sector is that it's a flexible mechanism that can be implemented without changing the law. Disadvantages of Government expectations are that:

- they will only apply to some users of biometrics (those in the public sector)
- there are limits on the Government's ability to direct or set expectations across the whole public sector
- compared to legislative change, this mechanism may be less transparent, less open to public input and more subject to change when there's a change of Government.

Q18: Do you think OPC should develop more guidance on biometrics? If so, on what specific topics?

Q19: What role do you see for standards and principles for the use of biometrics?

Q20: What role do you see for direction and expectation-setting from Government for government departments and other public sector agencies? Are there any specific areas in which you think Government direction would be helpful?

Code of practice under the Privacy Act

Codes of practice under the Privacy Act are made by the Privacy Commissioner. Unlike guidance, codes have legal effect and can modify the operation of the Act. Codes can apply to particular types of information, organisations, activities, industries or professions. There are currently codes relating to health information and credit information, for example. A code made under the Privacy Act can modify the application of the privacy principles. It can set standards that are tighter or more flexible than under the Act, or spell out in more detail how the privacy principles apply in a particular context.

Codes are issued by the Privacy Commissioner without needing to be approved by the Government, although Parliament does have an opportunity to reject them. The Commissioner needs to consult and take submissions on the proposed code. The Commissioner also has the power to amend or revoke codes, but again needs to consult before doing so.

A code under the Privacy Act could apply to:

- biometric information generally
- biometric information in a particular context, such as facial recognition
- biometric information generally, but with specific requirements for particular contexts or uses.

A number of commentators – including the Law Commission, the Privacy Foundation and the authors of a report on FRT – have recommended a code of practice for biometrics.[5] OPC is giving serious consideration to the creation of a code but we want to hear public and stakeholder views before the Privacy Commissioner makes a decision on this option.

Advantages of a biometrics code of practice are that:

- OPC could develop a code on its own initiative and a code would be comparatively easy to amend in future if necessary
- it would create legal requirements that users of biometric information would have to comply with
- it could set standards that are stricter or more tailored to the type of information and uses covered by the code
- stakeholders and the public would be consulted on its content.

[5] Law Commission, *Review of the Privacy Act 1993* (R123, 2011), pp 272-273; Nessa Lynch, Liz Campbell, Joe Purshouse and Marcin Betkier, *Facial Recognition Technology in New Zealand: Towards a Legal and Ethical Framework* (report funded by the Law Foundation, 2020), p 7:10; Privacy Foundation New Zealand, 'More Oversight and Transparency Needed for Facial Recognition Technology', media release, 21 July 2022.

A disadvantage of a code could be that organisations and individuals might need help to navigate between requirements under the main Privacy Act and under the code.

Q21: Do you think OPC should develop and consult on a code of practice for biometrics? If so, what do you think the code should cover – biometric information in general, or particular types or uses of biometric information?

Legislative change

OPC can advocate for changes to the law, but we don't directly advise Ministers about legislative change. So, while OPC is interested to hear people's views on whether it would be a good idea to have new legislative provisions dealing with biometrics, this isn't something we plan to focus on in the short term. If there is a strong call for legislation from submitters, OPC will report on this response for the information of other policy-makers.

Q22: Do you think there should be any changes to legislation to improve the regulation of biometrics?

What should any new regulatory measures cover?

OPC would like to hear what you think are the most important things for any new regulatory measures to cover, regardless of which regulatory options are chosen. What are the key expectations you'd like to see put in place for the collection, storage, use and disclosure of biometric information (and particularly for automated recognition of individuals using biometric information)?

Q23: What would you like any new regulatory measures to cover and what key expectations should they set?

Q24: Do you have anything else you'd like to say about biometrics and privacy?

Next steps

OPC will analyse and consider the feedback we get through our consultation, including submissions on this consultation paper. We'll then think about what steps we should take in relation to regulation of biometrics. We'll report back on our regulatory approach by the end of this year. If the Privacy Commissioner decides to develop a code of practice under the Privacy Act, we'll consult on a draft code in 2023.