



**Submission to NSW Department of Communities & Justice
Proposed Mandatory Notification of Data Breach Scheme**

I am a barrister of over 12 years standing with a significant practice and expertise in NSW and Commonwealth privacy law.

The proposed amendments impose notification requirements on NSW public sector agencies which are broadly in line with those imposed under Commonwealth law. This is welcome and commendable.

My only specific comment on the proposed legislation concerns the requirement for “immediate” notification to the Privacy Commissioner in proposed section 59L.

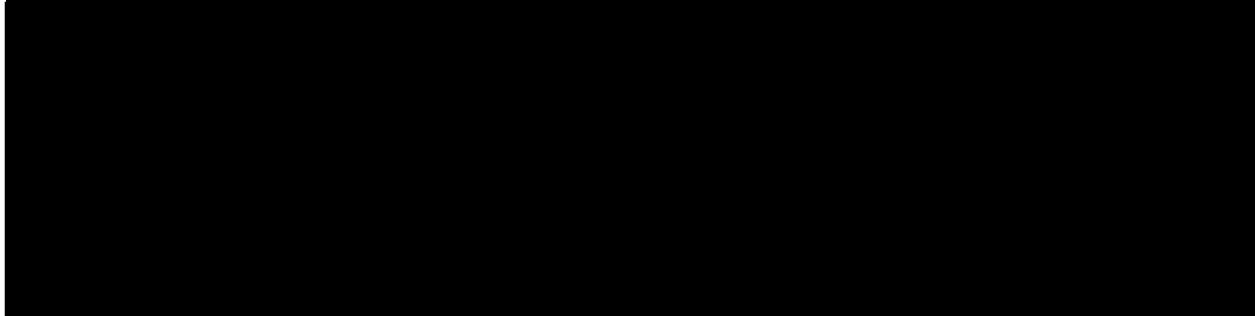
First, it would be useful to clarify what event notification is “immediately” to follow. Although proposed section 59K links proposed Division 3 to a decision by the head of an agency that a data breach is an eligible data breach, it would be appropriate, for greater clarity, if proposed section 59L(1) were amended as follows:

Immediately after the head of a public sector agency decides an eligible data breach has occurred, the head of the public sector agency must, in the approved form, notify the Privacy Commissioner of the eligible data breach.

This would be consistent with the structure of proposed section 59M(1).

Secondly, there is some lack of clarity concerning the word “immediately”. For example, it is not clear whether it would require notification within (say) five minutes of a decision having been made (which is not a practical interpretation), or whether (say) three business would days suffice (which is not obviously “immediate”). It would provide more clarity to either specify a number of business days or to use the language of “as soon as reasonably practicable”.

Specifying a number of business days would provide greatest certainty, and would be appropriate in this context in light of proposed section 59L(3), which would among other things mean that, even if some of the information required by proposed section 59L(2) could not be collated by the deadline, the notification could be made with the information which is available by the deadline. Alternatively, the language of “as soon as reasonably practicable” is consistent with other proposed sections.





18 June 2021



Barrister