

## **The Information Commissioner's response to the Department for the Economy public consultation on Miscarriage Leave and Pay**

### **Introduction**

1. The Information Commissioner is pleased to respond to the Department for the Economy (DfE) consultation in relation to Miscarriage Leave and Pay (MLP).
2. The Information Commissioner's role includes the regulation of the Data Protection Act 2018, the UK General Data Protection Regulation (UK GDPR) and the Freedom of Information Act 2000 (FOIA), among other pieces of legislation. Given our role as a regulator, it would not be appropriate for us to respond with a view on the different questions and options proposed within the consultation document. However, there are data protection implications in the proposals which we have raised below for your consideration.
3. The ICO recognises that the proposals seek to expand upon the Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022, and associated regulations. The Act established the right for eligible working parents to take paid statutory parental bereavement leave following the death or stillbirth of a child. By introducing the proposed regulations, workers who experience pregnancy loss as a result of miscarriage will also be entitled to paid statutory parental bereavement leave. Consequently, employees will enjoy further safeguards and support to help start their grieving process without the burden of additional financial concerns.

### **Statutory requirement to consult the ICO**

4. We would like to draw your attention to potential obligations under Article 36(4) of the UK GDPR regarding the need to consult with the ICO when developing policy proposals relating to the processing of personal data.
5. Article 36(4) of the Regulation states: "*Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing.*"

6. If a decision is made to proceed with specific legislation or regulations, DfE may need to initiate the requirement under Article 36(4) to consult with our office. Your Data Protection Officer will be able to guide you on this if it becomes relevant, including providing assistance with regards to completing the Enquiry Form, which can be found [here](#).

## **Involvement of the Data Protection Officer**

7. DfE must seek expert advice from their Data Protection Officer (DPO) during the initial stages of designing the regulations, policies and procedures. Part of the DPO's role under the UK GDPR is to advise and inform their organisation of their obligations under data protection laws.

## **Data protection by design and default**

8. Individuals, and partners of individuals, who experience pregnancy loss as a result of miscarriage will expect their information to be handled with integrity and in a confidential manner. DfE must therefore adhere to obligations under [data protection by design and default](#) outlined in Article 25 of the UK GDPR. Not only would compliance with this provision help ensure that personal information is appropriately safeguarded but it should also assist in building a framework which recognises the importance of trust between employers and employees.

## **Data Protection Impact Assessment (DPIA)**

9. [Data Protection Impact Assessments](#) (DPIAs) are an integral tool to help strengthen data protection compliance. Article 35(1) of the UK GDPR states that a DPIA is only required in certain circumstances, such as where the processing is likely to result in a risk to the rights and freedoms of individuals. However, DPIAs are considered to be 'good practice' when there is not a legal requirement to complete one.
10. In this particular instance, a DPIA would help DfE to assess the personal data processing activities under the proposed regulations and minimise any resulting data protection risk. It will also assist DfE to establish any risks and harms which may be encountered by controllers who will be obliged to process information and whether safeguarding measures should be considered with regards to the

regulations.

## Evidence required for MLP

11. The consultation seeks views on whether there should be an evidential requirement for pregnant individuals and their partner to qualify for MLP. Moreso, views are sought on whether employers should cover costs related to the evidence gathering exercise. With regards to evidential requirements, DfE must consider the application of the [data protection principles](#) as well as a controllers [lawful basis](#) for processing.
12. In particular, consideration must be given to the [data minimisation principle](#) which states that the processing of personal data must be “adequate, relevant and limited to what is necessary” for the purposes of processing. DfE must therefore make the determination as to whether evidence is proportionate and necessary in order to qualify for MLP. In the event that qualifying material is deemed to be necessary then DfE must also consider and/or identify the minimum amount of personal data needed to fulfil this purpose.
13. With regards to individuals potentially having to cover the costs of obtaining relevant evidence, DfE must consider the [lawfulness, fairness and transparency principle](#). Assessing whether the processing of information is [fair](#) partly depends on how the data is obtained. Therefore, when considering whether an individual or employer should cover the costs, DfE will need to assess how this will affect the interests of the people concerned and whether the proposed process may discriminate against any groups or individuals.
14. Proposed regulations must also determine whether legislative measures are required to safeguard the [integrity and confidentiality](#) of personal data processed in relation to MLP.
15. DfE’s determination as to whether there should be an obligation upon individuals to provide evidence will affect an employers potential lawful basis for processing as well as their conditions for processing [special category data](#). You must therefore consider the effects which the basis will have on an individual’s rights and freedoms, including [personal information rights](#).