



19 November 2024

Tēnā koe

### **Official Information Act Request**

Thank you for your email of 24 September 2024, requesting information about the standard against which the Ministry tests allegations of torture in a historic claims context and whether the Ministry has considered a Human Rights Review Tribunal's findings on sexual assault.

I have considered your request under the Official Information Act 1982 (the Act). Please find my decision set out below.

- *Information about the "internal processes in place" described in the above paragraph, including who carries out the reviews (including any peer review processes)*

Please refer to the previous response to you dated 4 September 2023 in which the Ministry provided information on the process of assessing a claim for allegations of torture. I have also linked the response here:  
[www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2023/september/04092023-request-for-all-information-relating-to-steps-taken-by-the-ministry-to-ensure-that-rpf-does-not-create-a-risk-to-safety-and-legal-obligations.pdf](http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/official-information-responses/2023/september/04092023-request-for-all-information-relating-to-steps-taken-by-the-ministry-to-ensure-that-rpf-does-not-create-a-risk-to-safety-and-legal-obligations.pdf)

In addition, for individualised assessments, the allegation review is carried out by the legal representative who is considering the claim as part of the consistency panel process.

For rapid payments, allegations are initially reviewed and categorised by a member of the Strategy team within Historic Claims and then this is reviewed by the Ministry's legal team.

- *Copies of any guidance, policies, templates, meeting notes or correspondence (anonymised if necessary) related to these reviews.*

I have attached a copy of the practice guidance for Ministry staff on the United Nations Convention on Torture (UNCAT) obligations and also a flow chart of these obligations. Both documents are utilised by Ministry staff when assessing a claim for allegations of torture.

- *Any advice including legal advice as to how these reviews should be carried out and in particular what is required to meet the "high threshold".*

This section of your request is refused in full section 9(2)(h) of the Act in order to maintain legal professional privilege. The greater public interest is in ensuring that government agencies can continue to obtain confidential legal advice.

- *Whether this is the standard against which the Ministry of Social Development, the Ministry of Education, and/or Crown Law test allegations of torture,*

I can confirm that the three elements of torture which are outlined in the UNCAT are considered by the Ministry when assessing whether an allegation of historic abuse may be a potential breach of Article one.

- *Whether sexual assault is considered by each organisation to qualify as meeting the requirement of being intentionally inflicted for the purpose of discrimination, in line with the Human Rights Review Tribunal's findings that sexual assault amounts to sexual harassment (and therefore discrimination) under section 62 of the Human Rights Act 1993*

I consider this aspect of your request is asking the Ministry to form an opinion or provide comment. For the Act to apply, the information must already be held at the time the request is received. There is no obligation on an agency to form an opinion or create new information to answer a request, except when providing a statement of reasons explaining a decision that has affected the requester. The Ministry is therefore not obliged to answer this question under the Act, as it is not asking for information that is already held.

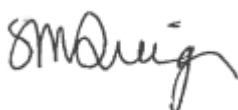
However, you have asked for an explanation and I will respond to this question separately, rather than as part of your official information request.

I will be publishing this decision letter, with your personal details deleted, on the Ministry's website in due course.

If you wish to discuss this response with us, please feel free to contact [OIA\\_Requests@msd.govt.nz](mailto:OIA_Requests@msd.govt.nz).

If you are not satisfied with my decision on your request, you have the right to seek an investigation and review by the Ombudsman. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or 0800 802 602.

Ngā mihi nui

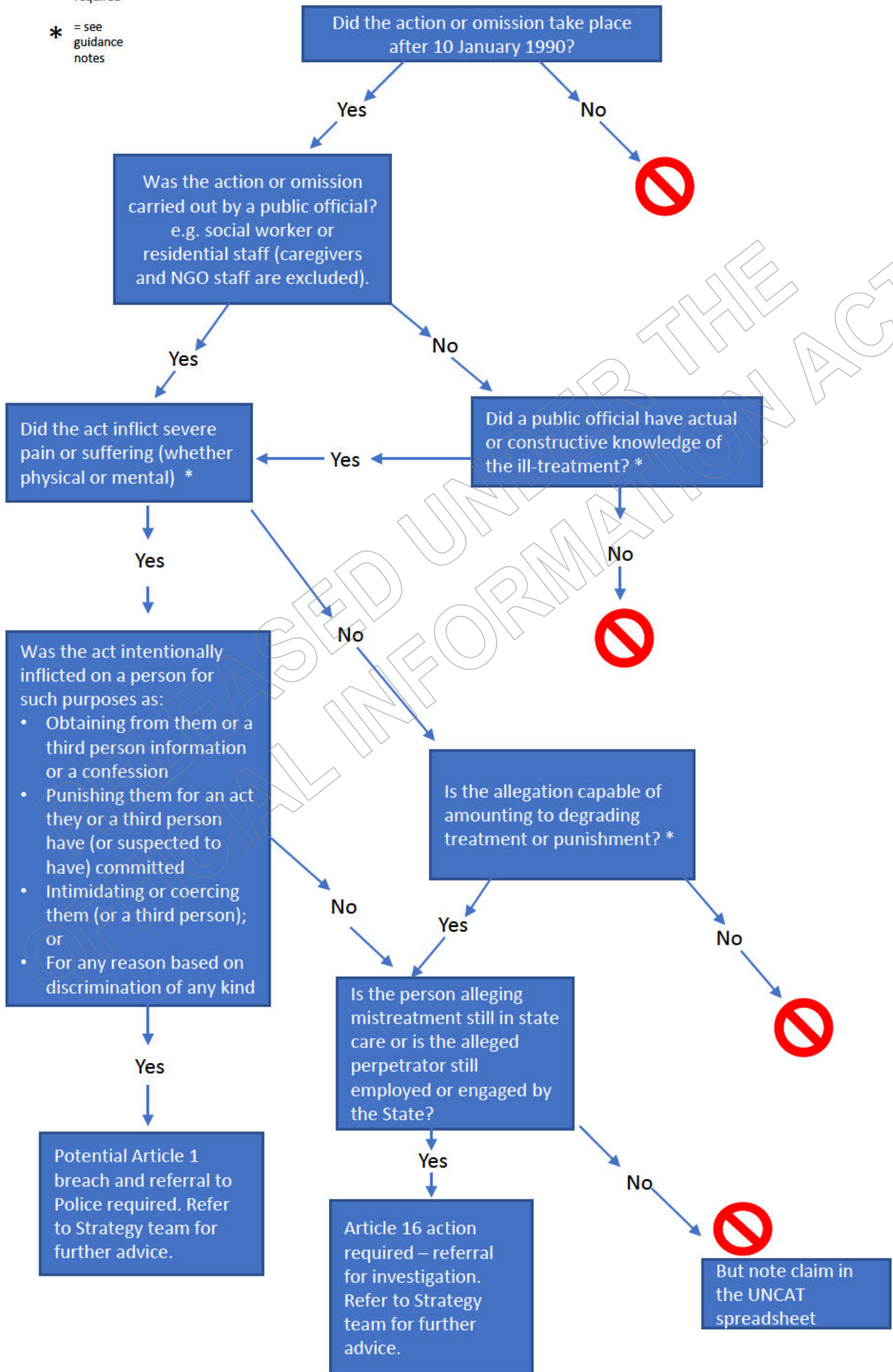
pp. 

Magnus O'Neill  
**General Manager**  
**Ministerial and Executive Services**

Key:  = No further action required

\* = see guidance notes

## United Nations Convention Against Torture Flowchart



## **Guidance/Notes for UNCAT Flow Chat**

Actual or constructive knowledge - If the public official did not carry out the mistreatment, the State may still be responsible if there was consent or acquiescence by the public official, which requires actual or constructive knowledge of the ill-treatment.

Consent or actual knowledge applies to situations where the public official authorised the mistreatment or had actual knowledge that it was taking place (or going to take place) and did not take steps to stop it.

Acquiescence or constructive knowledge will usually apply where a public official turned a blind eye to the mistreatment.

Severe pain or suffering – This term is relevant for both articles 1 and 16. It is specifically required for breaches of article 1, but is also the definition of “cruel or inhuman treatment under article 16”. Sexual violence will nearly always qualify as ‘severe pain or suffering’. Other examples could include: severe beatings; forcing a young person to engage in violence towards others could cause mental suffering (e.g. encouraged to beat other boys as member of the flying squad); the fear of imminent death associated with having a firearm pointed at the young person, particularly where it is fired into the air (demonstrating it is loaded); being forced to dig your own grave would also be likely to cause severe mental suffering even if intended as a symbolic gesture; encouragement of a young person to commit suicide. e.g. giving them a noose and telling them to kill themselves; placement on ‘Alcatraz’ would only qualify if the result was likely to be severe mental suffering, which cannot be assumed.

### Degrading treatment or punishment

Degrading treatment or punishment can occur when the infliction of pain or suffering aims at humiliating the victim.

Examples that likely qualify for ‘degrading treatment or punishment’ include:

low level physical abuse or more moderate physical abuse (e.g. isolated punches), strip searches, being forced to run barefoot through the bush/river beds (resulting in cuts to the feet) or being given inadequate food or shelter will not automatically qualify. But if done for the purpose of humiliating or demoralising the young person, then they may qualify.

Placement on ‘Alcatraz’ would only qualify if the result was likely to be severe mental suffering, which can not be assumed.

## Practice Guidance - International Obligation (UNCAT)

Crown Law have recently finalised advice about our international obligations under the United Nations Convention Against Torture (UNCAT), which aims to prevent acts of torture. Under UNCAT, NZ must ensure that it proceeds to a prompt and impartial investigation whenever there are reasonable grounds to believe that an act of torture has been committed. The Police will usually be the appropriate agency to carry out this investigation.

Allegations of torture will come up very rarely in our process. However, it is important that we are able to identify these and take any necessary steps to ensure that we are playing our part to meet NZ's obligations and to prevent any future acts of torture. We need to look out for any post 1990 claims where there is serious or torture like abuse by a responsible adult employed by the state (e.g. social worker or residential staff member, but not caregivers or NGO staff) and has been carried out with a purpose to punish, coerce, intimidate or for reasons of discrimination. It will also apply to events where the staff member knew about the abuse, but did not take action. These cases will be very rare as most of our claims do not meet all of these criteria.

If any staff member (claimant support, assessor, IC) sees any allegation that may meet this torture criteria, please let your team leader know who can make contact with the Strategy team for further assistance. It is important that we try and pick up these allegations as early in the process as we can.

We will also be identifying at Consistency Panel (the legal team will be the primary advisors around this) other less serious cases that we need to include on a list. These cases do not meet the definition of torture as the abuse isn't being carried out for a purpose such as punishment, but still are cruel, inhuman or degrading treatment or punishment (which is the test in the Convention). Crown Law has advised that our obligations are likely to have been met by the Royal Commission investigating, but we will need to review these cases after the Commission has reported to see whether they have generally been investigated, which is why we need to place them on a list.

This note is being placed on confluence so you can check back on this if you need to. We will also be looking to include reference to UNCAT in the next iteration of the Historic Claims Handbook.