



New Zealand  
**DEFENCE  
FORCE**  
Te Ope Kātua O Aotearoa

---

# **PRESIDENT'S AND ASSEMBLING AUTHORITY'S GUIDE**

## **TO COURTS OF INQUIRY**

# CONTACTS

Access the [New Zealand Defence Force Court of Inquiry Office](#) site or email the [Court of Inquiry Office](#) for information on relevant contacts.

The principal functions of the Court of Inquiry Office include providing a DDMS site for each sitting COI, facilitating liaison with external agencies and affected parties on COI and all requests for information relating to COIs, and facilitating requests for an external legal review of significant COI as required.

ROLES		
President and COI members	Assembling Authority (Assy Auth)	Inspector General (IG)
<p>It is mandatory for all COI members to have passed the L1 e-learning before starting a COI.</p> <p>Ensure the COI Office has a copy of the <a href="#">MD 634</a>.</p> <p>On receiving the <a href="#">MD 634</a>, the COI Office will provide a DDMS site for the COI and send the COI members a link.</p> <p>The entire ROP must be stored on the DDMS site, as this will be the official record of the COI for archiving.</p> <p>Once the COI Report is completed and signed, forward to the Assy Auth to add Assy Auth comments.</p>	<p>Send the <a href="#">MD 634</a> to the COI Office.</p> <p>On receipt of the COI Report the Assy Auth adds comments—assigning responsibility and indicating timelines for implementing recommendations.</p> <p>Add Assy Auth comments to the library on the COI DDMS site.</p>	<p>On behalf of the Service Chiefs and COMJFNZ, manage the recording of recommendations, monitor trends and the status of action taken to implement agreed recommendations.</p>

This guide contains hyperlinks to the [DM 69 \(2 ed\) Volume 1](#) and [DM 69 \(2 ed\) Volume 3](#). See also [Section Eight – Forms and Links](#).

You will need to view this document from a location that has access to the NZDF intranet in order for these hyperlinks to function.

# CONTENTS

<b>CONTACTS</b>	<b>2</b>
<b>CONTENTS</b>	<b>3</b>
<b>GLOSSARY</b>	<b>8</b>
<b>FOREWORD</b>	<b>12</b>
<b>SECTION ONE – INTRODUCTION</b>	<b>13</b>
Who is this for?	13
How to use this guide	14
<b>SECTION TWO – OVERVIEW OF A COURT OF INQUIRY</b>	<b>15</b>
What's in a name?	15
Purpose of a Court of Inquiry	16
Special statutory rights and protections under a Court of Inquiry	16
Summary	17
<b>Annex 2-A</b> – Defence Force Investigations: Cause and Accountability	18
<b>Annex 2-B</b> – Defence Force Investigations Process Map	20
<b>Annex 2-C</b> – Courts of Inquiry DDMS Process Map	21
<b>SECTION THREE – THE ROLE OF THE PRESIDENT</b>	<b>22</b>
Appointment to a Court of Inquiry	22
Functions of the President	23
<b>Annex 3-A</b> – Checklist of Some Key Actions/Resources for a Court of Inquiry	24
<b>SECTION FOUR – COURTS OF INQUIRY</b>	<b>30</b>
<b>Module A: Plan a Court of Inquiry</b>	<b>31</b>
<b>Part 1</b> – Assembling Authority	32
General requirements	32
Timeliness	32
Legal advice	32
Composition of the Court	33
Directorate of Safety and Defence Health Directorate representatives	34
Training	34
Mandatory Court of Inquiry	34
Aircraft accidents	35

Counsel Assisting	35
External Legal Review	35
Assembling Authority Comments	35
Reporting	35
Control of the Record of Proceedings	35
<b>Part 2 – General Planning Requirements</b>	36
Timeliness	36
Resources	36
Evidence management	36
Media enquiries	36
Counsel Assisting	37
External agencies	37
<b>Part 3 – Analyse Terms of Reference</b>	38
<b>Part 4 – Analyse Sources of Evidence</b>	39
<b>Part 5 – Sequence and Schedule Witnesses</b>	40
<b>Part 6 – Review the Plan</b>	41
<b>Annex 4-A – Planning Principles and Tools</b>	42
Recognising and avoiding decision-making biases	42
Individual factors	43
Group factors	44
<b>Annex 4-B – Summary of Principles and Best Practice in Planning a Court of Inquiry</b>	49
<b>Module B: Conduct a Court of Inquiry</b>	<b>52</b>
<b>Part 1 – Different Types of Witnesses</b>	53
<b>Part 2 – Expert Witnesses</b>	54
<b>Part 3 – Obtaining Evidence</b>	55
<b>Part 4 – Calling a Witness and Administering the Oath and Caution</b>	56
<b>Part 5 – Recording the Evidence</b>	57
<b>Part 6 – Questioning Techniques</b>	58
<b>Part 7 – Recognising Evidential Privilege</b>	59
<b>Part 8 – Analysing the Evidence</b>	62
<b>Part 9 – Criticism of Superior Officers</b>	63
<b>Part 10 – Natural Justice Rights</b>	64

<b>Part 11 – Legal Representation</b>	<b>66</b>
<b>Annex 4-C – Flowchart for Conduct of a Court of Inquiry</b>	<b>67</b>
<b>Annex 4-D – President’s Aide-mémoire for Calling a Witness</b>	<b>68</b>
<b>Annex 4-E – Witness Caution</b>	<b>70</b>
<b>Annex 4-F – Example Format for Witness Interview</b>	<b>71</b>
<b>Annex 4-G – Example Witness Statement</b>	<b>72</b>
<b>Annex 4-H – Example Witness Statement Where a Photograph is Produced</b>	<b>73</b>
<b>Annex 4-I – Exhibit Certification of an Object that Has Been Photographed for Production as an Exhibit</b>	<b>74</b>
<b>Annex 4-J – Exhibit Certification – Certified True Copy of a Document</b>	<b>75</b>
<b>Annex 4-K – Rights of Person Who May be Affected by Inquiry</b>	<b>76</b>
<b>Annex 4-L – Legal Representation by a Person Affected by Inquiry</b>	<b>77</b>
<b>Module C: Write a Court of Inquiry Report</b>	<b>78</b>
<b>Part 1 – Why is Good Writing Important?</b>	<b>79</b>
<b>Part 2 – What does Good Writing Mean?</b>	<b>80</b>
Plain English	80
Evidence-based	80
Comprehensive	81
Where can I get help?	81
<b>Part 3 – Examples of Good and Bad Report Writing</b>	<b>82</b>
The bad	82
The good	83
<b>SECTION FIVE – TOPIC-SPECIFIC MODULES</b>	<b>84</b>
<b>Module D: Death and Serious Injury Inquiries</b>	<b>85</b>
<b>Part 1 – Engagement with External Agencies</b>	<b>86</b>
Best practice when dealing with a coroner	87
<b>Part 2 – Engagement with Whānau/Family</b>	<b>88</b>
Who is the whānau/family?	89
What rights does the whānau/family have?	90
Findings	90
Publication of a Court of Inquiry Report	90
<b>Part 3 – Miscellaneous</b>	<b>92</b>
Wellbeing of a Court, witnesses and affected personnel	92

Cultural and religious factors	92
<b>Annex 5-A – Example Letter to Whānau of a Deceased, Releasing Draft Report for Comment</b>	<b>93</b>
<b>Module E: Maritime Safety Events</b>	<b>95</b>
<b>Part 1 – Expert Witnesses in an Inquiry into a Maritime Safety Event</b>	<b>96</b>
<b>Part 2 – Securing and Obtaining Evidence</b>	<b>98</b>
Securing evidence at the scene	98
Obtaining evidence remotely	98
<b>Part 3 – Event Chronology and Causative Factors</b>	<b>99</b>
Event chronology	99
Possible causative factors	100
<b>Part 4 – Interim Reporting</b>	<b>101</b>
<b>Module F: Aircraft Accident Inquiries</b>	<b>102</b>
<b>Part 1 – Relationship with the Accident Investigation Team and the         Transport Accident Investigation Commission</b>	<b>103</b>
<b>Part 2 – Composition of the Court and Expert Witnesses in an Aircraft Inquiry</b>	<b>104</b>
<b>Part 3 – Obtaining Evidence Remotely</b>	<b>106</b>
<b>Part 4 – Event Chronology, Causes and Factors</b>	<b>107</b>
Event chronology	108
Possible causative factors	109
<b>Part 5 – Interim Reporting</b>	<b>110</b>
<b>Module G: Inquiries Relating to Munitions</b>	<b>111</b>
<b>Part 1 – The Ammunition Technical Investigation and Expert Witnesses         in an Inquiry Relating to Munitions</b>	<b>112</b>
<b>Part 2 – Obtaining Evidence Remotely</b>	<b>114</b>
<b>Part 3 – Event/Munition Chronologies and Causative Factors</b>	<b>115</b>
Chronologies	115
Causative factors	115
Possible causative factors	116
<b>Part 4 – Interim Reporting</b>	<b>117</b>
<b>SECTION SIX – COMMON CONCERNS IN COURTS OF INQUIRY</b>	<b>118</b>
Checklist of common concerns	118
Concepts to improve your Court of Inquiry	119

<b>SECTION SEVEN – EXTERNAL LEGAL REVIEW</b>	<b>120</b>
Circumstances warranting a Court of Inquiry Report review	120
<b>SECTION EIGHT – FORMS AND LINKS</b>	<b>122</b>
Acts and Regulations	122
New Zealand Defence Force publications	122
Forms	123

# GLOSSARY

The following terms and acronyms are relevant to the Courts of Inquiry and this Guide—

Title	Acronym	Definition
Accident Investigation Team	AIT	
Ammunition Technical Investigation	ATI	
Armed Forces Discipline Act 1971	AFDA	The legislation relating to the discipline of the New Zealand Armed Forces, which provides for the discipline and administration of justice within those Forces.
Assembling Authority	Assy Auth	CDF or the officer in command of a part of the Armed Forces involved in the matter. The Assy Auth appoints the Court, details the time and place a COI must commence, and the TOR that must be addressed by the Court.
Casualty Liason Officer	CLO	
Chief of Air Force	CAF	
Chief of Army	CA	
Chief of Defence Force	CDF	
Chief of Navy	CN	
Command Investigation	CI	A simple informal investigation into matters, without statutory powers or privileges of a COI.
Commander Joint Forces New Zealand	COMJFNZ	Commander responsible to CDF for the command of NZDF military operations and exercises and NZDF contributions to domestic security tasks.
Commanding Officer	CO	
Composition of a Court of Inquiry (COI)		A COI must consist of no less than two members, of whom at least one must be an officer who is the President and the other(s) must be officers, warrant officers or members of NZDF Civil Staff of equivalent standing.
Counsel Assisting		An officer who is a barrister and solicitor of the High Court appointed by the Assy Auth to the inquiry to assist and advise the Court.



Title	Acronym	Definition
Court of Inquiry	COI	<p>A Court established under section 200A of the AFDA. Its purpose is to provide an officer in command with an expeditious fact-finding procedure so that a matter can be promptly investigated and, if necessary, prompt, remedial action can be taken. The procedure of a COI is provided for in Part 11 of the AFDA. A COI can be conducted into any matter that an Assy Auth directs.</p> <p>There are certain incidents where it is mandatory to conduct a COI. A COI must occur when a service person dies or is seriously injured in the course of their duties (unless the death or injury occurred during armed conflict, or where an incident is investigated as a disciplinary matter). COIs have greater status in law than CIs and, therefore, offer certain protections that CIs do not.</p>
Cross-Service court		Members appointed to a Court from different Services.
Defence Aviation Safety Bureau (previously Directorate of Air Force Safety and Health (DASH))	DASB	
Defence Force Order	DFO	
Defence Legal Services	DLS	
Defence Document Management System	DDMS	
Director of Defence Legal Services	D DLS	Head of Defence Legal Services.
Defence Public Affairs	DPA	
Executive Officer	EO	
Exhibit		Any document or real item produced in evidence to the Court.
External Legal Review	ELR	
External Legal Review Panel	ELR Panel	A panel of members comprising Queen's Counsel, appointed by the Judge Advocate General to provide an independent legal assurance of significant COI, upon request of the Superior Commander.
Family Liason Officer	FLO	

Title	Acronym	Definition
Headquarters Joint Forces New Zealand	HQ JFNZ	
Headquarters Defence Force New Zealand	HQNZDF	
High profile inquiry		An inquiry that may be the subject of significant or sustained public interest.
Inspector General	IG	
Judge Advocate General	JAG	Judge Advocate General of the Armed Forces.
Legal advisor		NZDF legal officer.
Member		A member of a COI, including the President.
Memorandum of Understanding	MOU	
New Zealand Defence Force	NZDF	
Next of kin	NOK	The term is not a legal construct, but concerns those nominated relative(s) or immediate family representative(s) appointed as the point of contact with a COI/command.
Non-commissioned officer	NCO	
Officer in Charge	OIC	
Official Information Act 1982	OIA	
Operational Order	OPORD	
Preliminary inquiry		A disciplinary investigation that precedes the recording of a charge under the AFDA to determine whether the allegation is well-founded.
President		The President of a COI is the most senior officer and member of the COI, with responsibility for directing the procedures of the Court and ensuring the COI addresses its TOR.
Queen's Counsel	QC	
Record of Proceedings	ROP	The record of the evidence collected by a COI and any Court report or comment of findings and recommendations.

Title	Acronym	Definition
Redaction		The separation of disclosable from non-disclosable information by blocking out individual words, sentences or paragraphs, or the removal of whole pages or sections (normally for privacy or security reasons) before any release of the document.
Royal New Zealand Navy	RNZN	
Royal New Zealand Air Force	RNZAF	
Secret Information Environment	SIE	
Senior non-commissioned officer	SNCO	
Summons		A legal notice issued by the President to compel a civilian witness to attend an inquiry and produce or provide a document or thing (item). Members of the Armed Forces are ordered to do so.
Superior Commander		CDF, VCDF, CN, CA, CAF and COMJFNZ. The Superior Commander is responsible for approving any release of a COI.
Terms of Reference	TOR	The direction from the Assy Auth to the Court, stating the purpose and requirements of the inquiry that must be addressed.
Transport Accident Investigation Commission	TAIC	
Vice Chief of Defence	VCDF	
Video Telephone Conference	VTC	

# FOREWORD

---

The New Zealand Defence Force is a modern, professional military force designed for combat, yet capable of responding across the full spectrum of operations. As such we recognise that we will at times be required to undertake inherently dangerous tasks on operations and in training, ensuring delivery of our mission and being a force for New Zealand.

Despite our excellent training and systems, experience tells us that sometimes things will go wrong. When this happens, it is vital that we find out what happened so that lessons can be applied in a timely manner to enable our Defence Force to continue to conduct operations in the safest way for our people. That is why there is so much importance placed on our Courts of Inquiry system.

Courts of Inquiry provide our Defence Force with an expeditious fact-finding process to get to the heart of issues, so that we might stop similar events happening again. Indeed, Parliament has given us a responsibility to investigate the cause of incidents by empowering us to assemble Courts of Inquiry. Its role is not to determine guilt—that's a matter for the military justice system. Courts of Inquiry are a tool for understanding the cause of incidents, and how we might do better.

As a consequence, Courts of Inquiry have some special features. As it is vital that witnesses are forthcoming and provide free and frank evidence, a Court of Inquiry provides almost unparalleled statutory powers, rights and protections that are not available to other Defence Force investigations. For example, the evidence given by people cannot be used against anyone in disciplinary or criminal proceedings. Evidence for disciplinary proceedings must be collected separately. In addition, Courts of Inquiry also ensure that anyone whose reputation may be at stake has natural justice rights. That's an important protection, and something that our lower level command investigations can't do.

All of this means it is the Court of Inquiry process that is generally conducted into our more complex, serious or systemic matters, or where these special protections must be provided. This is why as a Defence Force we place so much importance on the effective conduct of Courts of Inquiry. When you are appointed to a Court of Inquiry, this must be your priority as it is essential that Courts of Inquiry are conducted in a timely and effective manner.

A Court of Inquiry is a powerful tool, but we need to use it properly. In recent times we have reviewed and strengthened the training and support we provide to those involved in Courts of Inquiry. This Guide is part of that. It is a practical tool to complement our Courts of Inquiry training. This recognises that Presidents and other personnel involved with Courts of Inquiry are vital to ensuring our Courts of Inquiry system is robust and delivers as intended.

# SECTION ONE – INTRODUCTION

## Consider this scenario

A New Zealand Army truck, driving on base at Blenheim, gets into an accident. The Corporal driving is injured, as well as some of the passengers from various Services in the back.

What happened?

Can an accident like this be prevented in the future if policies are instituted or changed?

A COI is a way for the NZDF to identify the cause of an incident and any action required to prevent a recurrence.

## Who is this for?

The purpose of this guide is to provide practical guidance for Presidents and Assy Auths of COIs. Other members of a COI will also find it helpful, as may Commanders.

## This guide does not supersede the law or orders on COIs.

The primary references are contained in [DM 69 \(2 ed\) Volume 3](#) —

- [Armed Forces Discipline Act 1971](#) (AFDA) ss 200 to 200T.
- [Armed Forces Discipline Rules of Procedure 2008](#) (RP) part 6.
- [Defence Regulations 1990](#) principally regs 12 and 13.

[DM 69 \(2 ed\) Volume 1](#) *The Commander's Handbook on Military Law*, Chapter 11, Section 1 addresses the three types of inquiry in the NZDF. Chapter 11, s 2 addresses COIs, their assembly, conduct, use and access. Single Service Orders in [AFGO](#), [NZAP 201](#), [DFO\(A\) Volume 3](#) Chapter 23 and [NFGO](#), provide orders relevant to Service-specific issues.

It is important for COIs to be conducted in a timely manner. Consequently, it is mandatory for all COI members to have passed the COI Level 1 e-learning before starting a COI, and to have a sound understanding of COI. Not having done so could invalidate the Court's findings. The Level 2 briefs directed by the Assy Auth build on this e-learning and form part of the planning process at the outset of a COI.

This guide is designed to be read alongside the law and orders, and to complement this training. It provides practical aides-mémoire and tools designed to assist Presidents, Assy Auths and personnel in how to plan, conduct and report on a COI.

## How to use this guide

The guide is divided into sections and includes helpful checklists and aides-mémoire.

**All Presidents should read Sections One, Two, Three, Four, Six, Seven and Eight. Section Five need only be referred to if the COI concerns that specific issue. Specific guidance for Assy Auths is at Section Four, Module A, [Part 1 – Assembling Authority](#).**

**Section One** – Introduction

**Section Two** – Overview of the Court of Inquiry

**Section Three** – The Role of the President

**Section Four** – Court of Inquiry General Modules

- Module A – Plan a Court of Inquiry
- Module B – Conduct a Court of Inquiry
- Module C – Write a Court of Inquiry Report

**Section Five** – Courts of Inquiry Topic-specific Modules

- Module D – Death and Serious Injury Inquiries
- Module E – Maritime Safety Events
- Module F – Aircraft Accident Inquiries
- Module G – Inquiries Relating to Munitions

**Section Six** – Common Concerns in a Court of Inquiry

**Section Seven** – Protocol for External Legal Review

**Section Eight** – Forms and Links

Where reference is made to excerpts of the AFDA, DFOs, relevant forms and MOUs, these can be accessed electronically on the NZDF intranet, including through the Directorate of DLS or NZDF COI Office sites.

Public information on COIs can be found on the external NZDF website.

For further information, please speak with the NZDF COI Office, appointed Counsel Assisting or your legal officer.

## SECTION TWO – OVERVIEW OF A COURT OF INQUIRY

### Consider this scenario

Corporal (CPL) Collins witnesses a truck accident at the RNZAF Base in Woodbourne. Collins was out late the night before with CPL McLaren, the driver of the truck.

*Oh no, he thinks. Am I responsible for this accident? I kept McLaren out late last night...*

A COI into the accident calls on CPL Collins as a witness. He's nervous.

*Will I be in trouble? Should I tell them we were out late?*

In brief, the answer is that a COI is **NOT** a disciplinary court. It is a fact-finding one. Potential witnesses like CPL Collins need to be assured of this.

### What's in a name?

In some other military jurisdictions, the equivalent of a COI is often called a Board of Inquiry. In New Zealand, it is the [Inquiries Act 2013](#) that details civil inquiries, such as Commissions of Inquiry. A COI falls outside the Inquiries Act, with COI prescribed by the [AFDA](#).

It is a common misconception that, because of the word 'Court' in 'Court of Inquiry', a COI is a disciplinary body. This is not correct. It is vital to dispel this misconception when introducing yourself to witnesses and conducting your duties, and that in the Court's Report you do not make any finding about whether any person is guilty of an offence.

A COI is a fact-finding exercise used to uncover the truth. A COI will routinely, in discovering the truth, apportion blame for events, however, a COI cannot perform disciplinary functions where blame is found, such as finding a person guilty of an offence. A COI may make recommendations such as, to conduct a disciplinary investigation, which could lead to a summary trial or Court Martial with disciplinary outcomes.

The distinction between a COI and a disciplinary investigation is vital for participants in a COI to understand. Where a suspect in a disciplinary investigation has a right to refrain from making any statement and to remain silent, witnesses in a COI have no such right. Witnesses in a COI are compellable and can be charged or held in contempt if they refuse to answer a question (except in the case of self-incrimination) and can be charged for perjury if they lie. It is preferable if witnesses in a COI can be encouraged to provide evidence, rather than be required to provide evidence.

To assist in explaining the various investigation processes, [Annex 2-A](#) shows the forms of NZDF investigations and a process map can be found at [Annex 2-B](#).

Where the evidence indicates some criminal offending by any person, it should be referred to the person's CO for investigation.

**A COI is established to collect and report facts, NOT to determine guilt or apportion blame.**

Furthermore, as above, a COI cannot be used for evidence in any other proceedings, except in exceptional statutory circumstances, such as where a Court is required to make a declaration under [AFDA s 201](#) that a member is absent without leave ([MD 635 Declaration by Court of Inquiry on Absence of a Member of the Armed Forces](#)).

Nevertheless, administrative consequences can flow from a COI, including an administrative censure, or an offer of amends where there has been organisational wrongdoing. Consequently, in all such cases, legal advice should be obtained and natural justice rights must be afforded.

## **Purpose of a Court of Inquiry**

The COI has a statutory basis under the [AFDA s 200A](#). Therefore, the Assy Auth, President and members have statutory powers when conducting their duties.

The role of a COI is similar to that of a Commission of Inquiry or a Coroner's Court.

The Court's role is to expeditiously inquire, collect facts and, if required, to report or comment upon the matter under investigation, as directed by the Assy Auth in form [MD 634 Order for the Assembly of a Court of Inquiry](#).

It is particularly important in the NZDF to quickly determine the cause of the incident, and for witnesses to be free and frank in order to avoid unnecessary operational impact and to prevent a reoccurrence.

## **Special statutory rights and protections under a Court of Inquiry**

A COI provides special statutory rights and protections as follows—

1. A witness has special protections. Evidence is taken on oath (sworn on the Bible) or affirmed at the outset of each witness testimony ([Annex 4-D](#)).
2. A witness is cautioned ([Annex 4-E](#)).
3. Statutory protections are afforded, such as [AFDA s 200N](#) rights (Section four, Module B, [Part 10 – Natural Justice Rights](#) and [Annex 4-K](#), and the checklist overview [Annex 3-A](#) to afford rights to personnel whose character or reputation may be affected.
4. There are statutory constraints on the disclosure and use of a COI. The record of a COI must not be disclosed to—
  - (a) People who are not members of the NZDF (within the meaning of the [Defence Act 1990 s 2\(1\)](#)) unless the disclosure is authorised by a Superior Commander of the Service concerned; or
  - (b) Members of the NZDF unless—
    - (i) the members need to be aware of the contents of the record to enable them to perform their Service or employment duties,
    - (ii) the members are entitled to a copy of the record under the rules of procedure; or
    - (iii) the disclosure is authorised by a Superior Commander of the Service concerned.
  - (c) The evidence collected is not defined as official information under the [OIA](#) and, therefore, is not subject to disclosure under the [OIA](#).
  - (d) The Report is subject to the [OIA](#) but can only be released with the approval of the Superior Commander (under [AFDA s 200T](#)), decided on a case-by-case basis (largely due to an overriding public interest), and redacted to protect privacy and security.



- (e) A COI cannot be used in evidence against any person in any other proceedings<sup>1</sup> (R v Neave), but if a person is charged, they are entitled to a copy of the COI Report upon request to a Superior Commander ([RP 144](#)).

This does not mean that a COI will never be disclosed. The Superior Commander will balance the competing factors and, in nearly all cases, the evidence (witness testimony and exhibits) will be withheld. However, in limited circumstances, the Superior Commander may authorise disclosure of the COI Report (and the Order for Assembly and TOR), but it will generally be redacted for privacy and security purposes.

The statutory protections on disclosure and use, however, reflect the paramount importance of quickly determining what happened. For this to occur, witnesses must have confidence and trust in the process.

## Summary

- A COI collects and records evidence on the TOR prescribed in form [MD 634](#) and, as required, reports or comments upon the matter under investigation. This informs the Assy Auth about what happened and why, so that the Assy Auth can determine what, if any, action needs to be taken.
- A COI is a fact-finding exercise. It can apportion blame although it cannot perform disciplinary functions such as finding a person guilty of an offence.
- A COI has many protections to ensure that witnesses have the confidence to provide free and frank evidence.
- A COI cannot be used in evidence in any other proceedings.
- The Assy Auth, President and members have statutory powers and authority under Defence Force Orders when conducting their duties ([AFDA 1971](#) s 200A).
- The Assy Auth can direct that action be taken to remedy the issue, if required. This could include the following—
  - » amending policies or procedures to prevent such a recurrence, or
  - » it may be clear that on this occasion, despite sound training and practices, someone simply did the wrong thing or made an error of judgement. Even in these cases, there are often lessons to be learned to prevent a recurrence.

---

1 [AFDA](#) s 200S and R v Neave (1995) 1 NZCMAR 230, 248 (CMAC).

## Annex 2-A

### Defence Force Investigations: Cause and Accountability

#### UNDERSTANDING THE CAUSE OF THE ACCIDENT

A COI is designed to provide an officer in command with an expeditious fact-finding procedure so that a matter can be promptly investigated and, if necessary, prompt remedial action can be taken. It does not determine guilt. A COI may be assembled to collect and record evidence on any matters referred to the Court.

A COI is mandatory where a member of the Armed Forces dies or is seriously injured in the course of their duties, unless the death or injury occurred during armed conflict/armed combat operations, or where it is investigated as a disciplinary matter.

*A COI does not replace other inquiries, such as those conducted by the: Police; Ministry of Business, Innovation and Employment; and Coroners.*

*A COI must consist of not less than two members, of whom at least one must be an officer and the other(s) must be officers, warrant officers or members of NZDF Civil Staff of equivalent standing. The Assy Auth must appoint one of the members who is an officer to be President. The Assy Auth may appoint a barrister or solicitor of the High Court to assist the COI, and must appoint Counsel Assisting if the inquiry is complex or serious or likely to affect the character or reputation of any person.*

*The ROP and any evidence is not admissible in evidence against any person in any other proceedings, judicial or otherwise, unless they are charged with a specific offence of making a false statement or perjury; or where a declaration has been made of desertion/absence without leave.*

##### ASSEMBLE A COI

An Assy Auth orders the assembly of a COI. The Assy Auth is normally the officer in command of that part of the Defence Force involved in the matter. The composition of the COI, the place and time at which the Court is to assemble and the TOR of the Court are all specified. For a mandatory COI, the TOR must be drafted by a legal officer.



##### RECORD EVIDENCE OF WITNESSES

A COI sits in private and records the evidence of every witness. The COI can require production of evidence and compel witnesses to attend; evidence is given on oath. Witnesses have statutory privileges and protection, and natural justice must be accorded where adverse findings may result.



##### INITIAL FINDINGS OF THE COI

The COI must address all TOR in the findings. The COI cannot determine guilt or innocence. The COI can make recommendations. The ROP must, at the conclusion of the inquiry, be signed by each member.



##### NATURAL JUSTICE PROCESS

The draft of the COI report is discussed with relevant interested parties and their feedback is then considered by the Assy Auth.



##### ASSY AUTH COMMENTS

The President must forward the ROP to the Assy Auth who must put on the record their opinion of the findings, sign the record and, if necessary, forward the record to a Superior Commander.



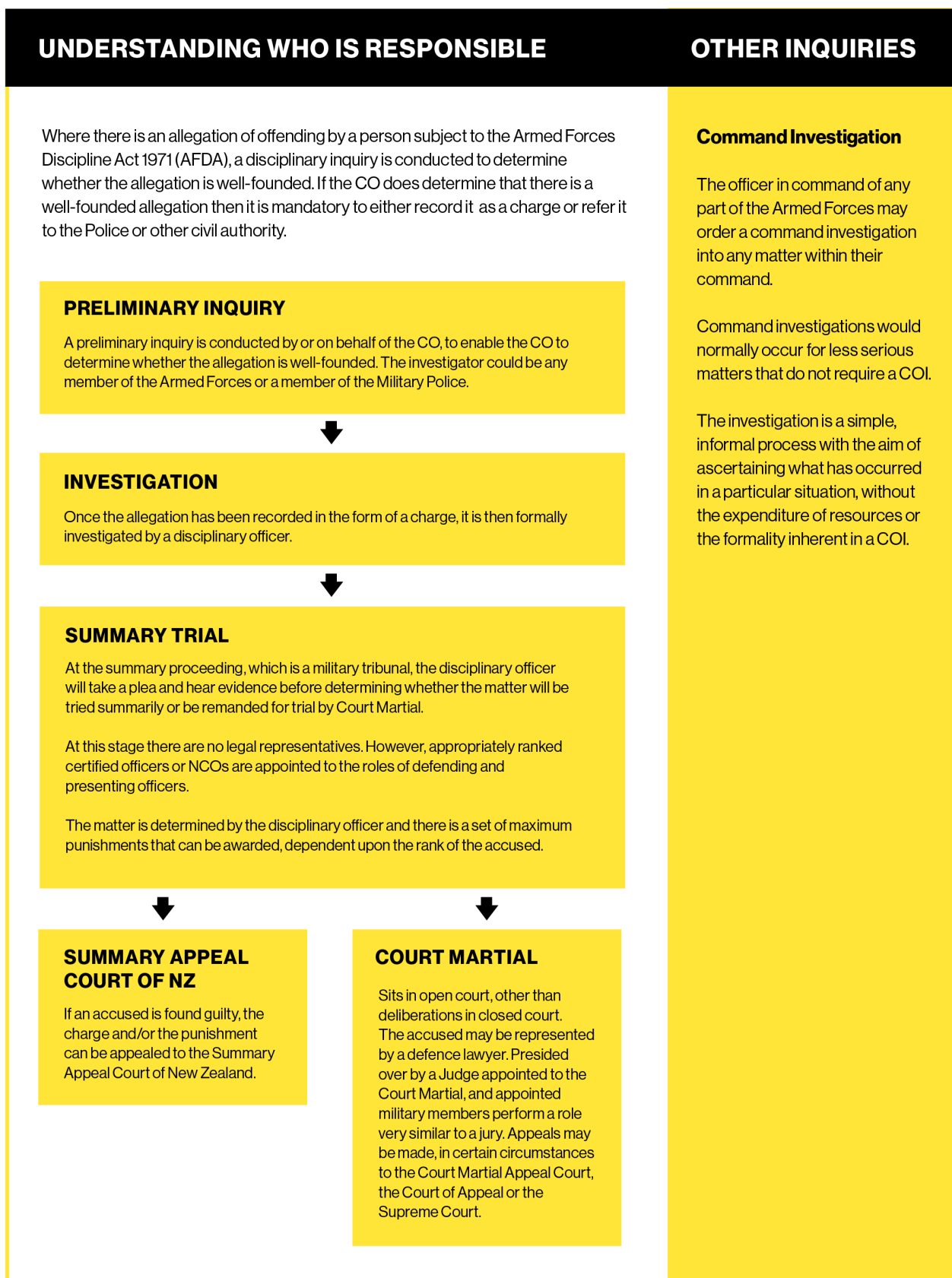
##### THE COI CONCLUDES

Only then is the Report of the COI considered complete.



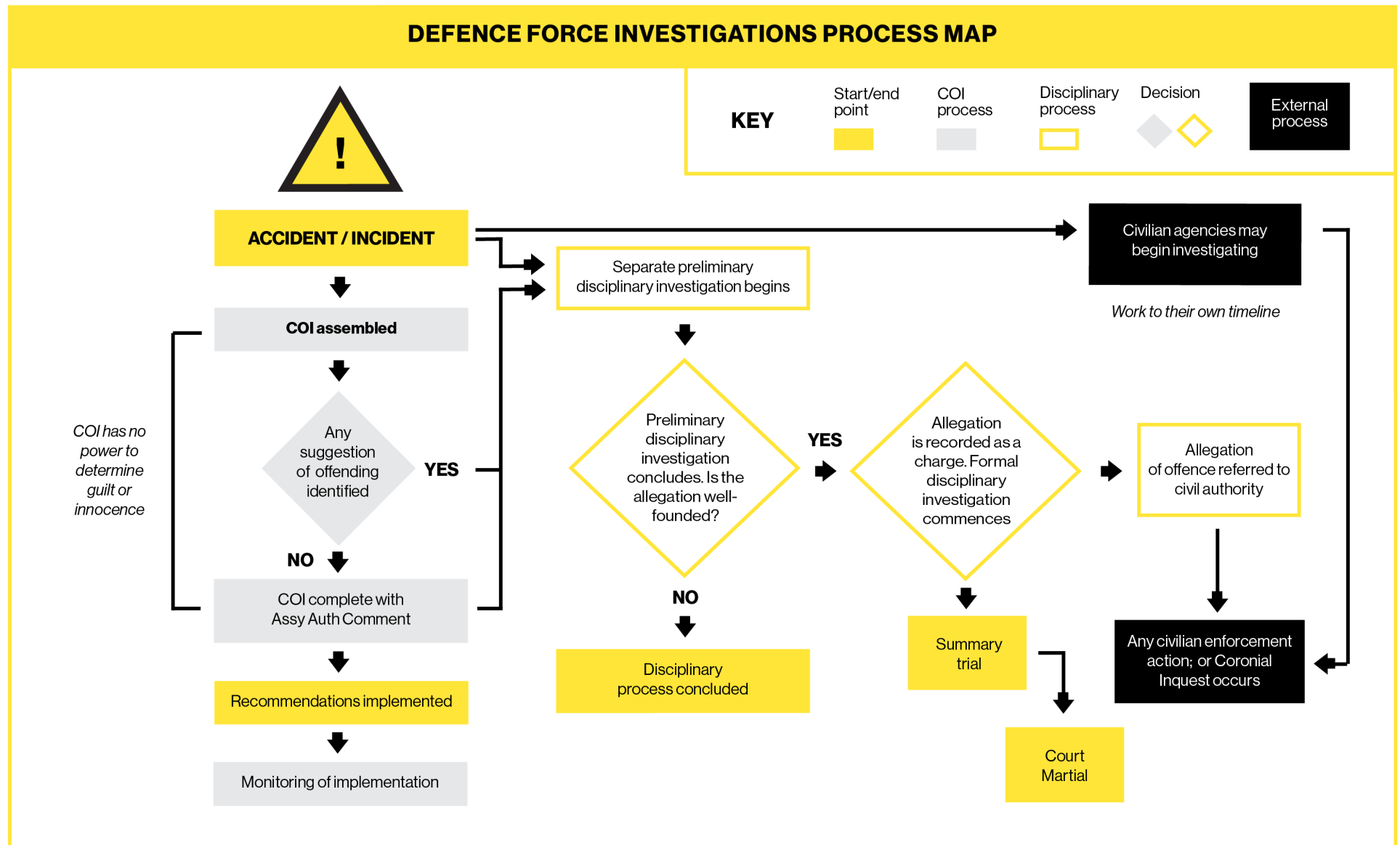
## Annex 2-A

### Defence Force Investigations: Cause and Accountability Continued



## Annex 2-B

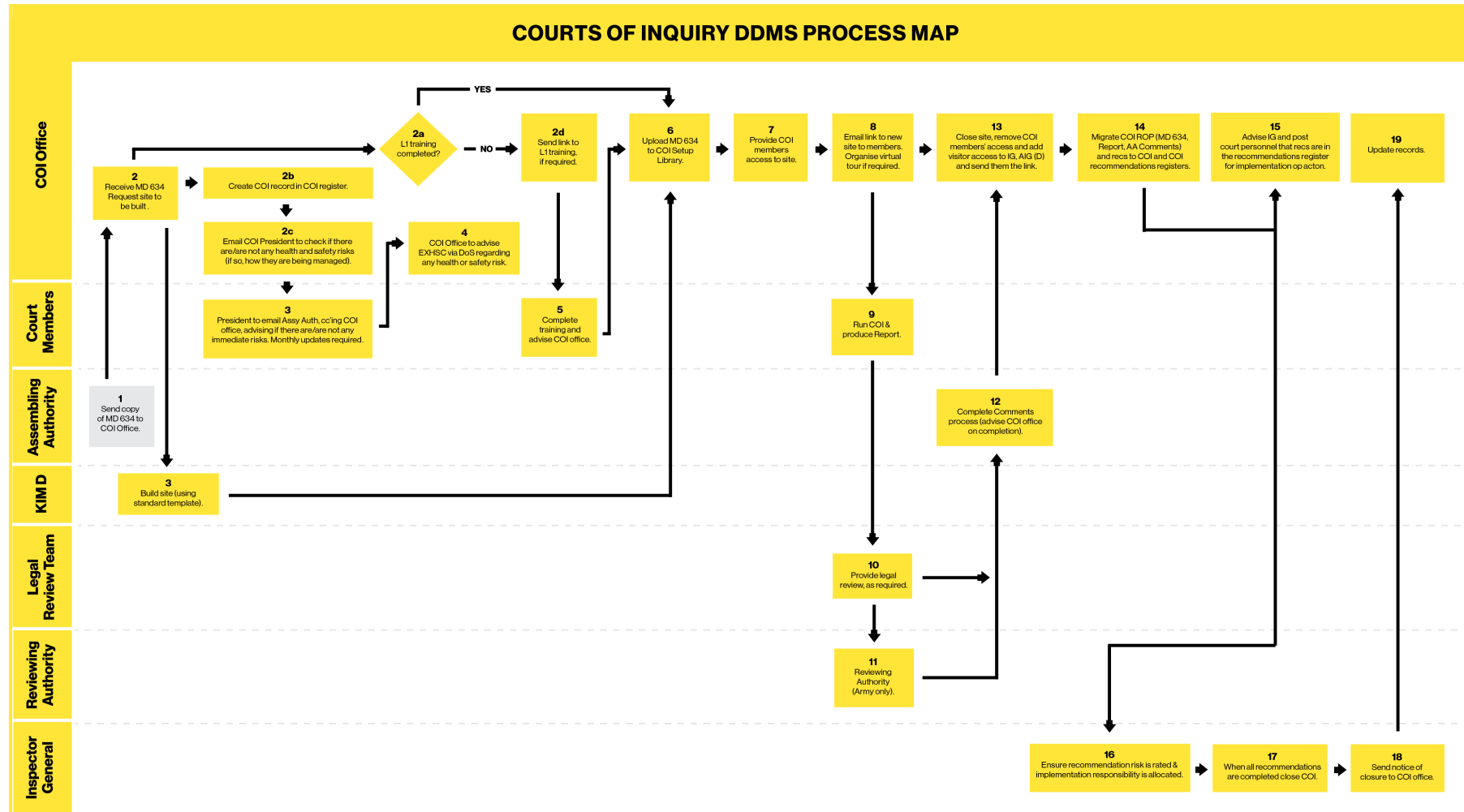
### Defence Force Investigations: Process Map



## Annex 2-C

### Courts of Inquiry DDMS Process Map

The COI office receives the MD634 and arranges a secure DDMS site for storing and capturing information during the COI, this will be the official ROP for archiving. The site will be closed after the Assy Auth has added their Assy Auth Comments and the Court has concluded. Recommendations will be added to the DDMS recommendations Register to track implementation. When recommendations are completed and the COI is closed, a closure minute is sent to COI office and the DDMS records are noted.



## SECTION THREE – THE ROLE OF THE PRESIDENT

### Running a timely and careful Court

While the President is a member of the COI, they are the senior member. In addition, the President has some additional specific powers and responsibilities.

Among them, the President ensures that the COI observes the protections afforded witnesses, is run in a timely manner, and provides cautions and encouragement to witnesses.

Unnecessary delay will impact on the ability of the Assy Auth to identify the cause of the incident and to take any remedial action. This may increase risk to personnel, impede operational effectiveness and undermine public confidence.

### Appointment to a Court of Inquiry

A COI must consist of not less than two members, of whom at least one must be an officer and the other(s) must be officers, warrant officers or NZDF Civil Staff members of equivalent standing.

Member appointed President must:	Remaining members of the Court must:
<ul style="list-style-type: none"><li>• be an officer of the rank of Lieutenant in the Navy, Captain in the Army, Flight Lieutenant or above;</li><li>• be the senior member of the Court;</li><li>• be superior in rank to any person likely to be affected by the inquiry;</li><li>• have passed the Level 1 COI e-learning training; and</li><li>• complete any Level 2 modules directed by the Assy Auth on form <a href="#">MD 634</a> once the COI assembles.</li></ul>	<ul style="list-style-type: none"><li>• be of at least the same rank and seniority as any person likely to be affected by the inquiry;</li><li>• have passed Level 1 COI e-learning;</li><li>• complete any Level 2 modules directed by the Assy Auth on form <a href="#">MD 634</a> once the COI assembles;</li><li>• Where practicable and consistent with suitability, expertise and security clearances, be drawn from across the Services (cross-Service Court); and</li><li>• where practicable, and where the matter concerns a part of the Service other than Regular Force, be a member of that part of the Service.</li></ul>

### NOTE

Specific requirements apply for the President and members where a COI is assembled following an aircraft accident or fatality (Section Five, [Module F: Aircraft Accident Inquiries](#)). Further, where there has been any fatality or serious injury, the Assy Auth should consider appointing an officer, warrant officer or an NZDF Civil Staff member of equivalent standing, who is a Health and Safety representative (Section Five, [Module D: Death and Serious Injury Inquiries](#)).

## Functions of the President

The President is, first and foremost, a member of a COI. As a member, they must expeditiously collect and record evidence on the TOR directed by the Assy Auth in form [MD 634 Order for the Assembly of a Court of Inquiry](#) and where required, provide a report. Check the MD 634 to see if a report is required.

The President is required to immediately notify the Assy Auth if the COI receives evidence suggesting any imminent safety risk, and whether or not there are any specific safety recommendations arising from the proceedings that should be implemented immediately to prevent any reoccurrence of the event. This advice should be copied to the COI Office, which is required to forward it to the Executive Health and Safety Committee for risk awareness.

As a member of a COI, the President has the statutory responsibilities of other members of the COI under the [AFDA](#). They also have some additional statutory responsibilities. A checklist for the COI process, highlighting the President's functions is at [Annex 3-A](#).

For details on how to plan and conduct a COI, and how to write a COI Report refer to [Section Four – Courts of Inquiry](#).

### **Further, as the senior member of the COI, it is important that the President—**

- has a clear understanding of the role of a COI, its process, the statutory rights and protections, use of a COI, and access and disclosure;
- has an open mind and encourages open discussion without championing one view or explanation;
- confidently communicates required information to the witnesses and any support personnel (with the support of Counsel Assisting, where appointed);
- encourages witnesses to be free, frank and fully informed;
- considers possible mental harm when witnesses relive potentially traumatic experiences;
- ensures that the witnesses are correctly cautioned and understand the caution, refer to [Annex 4-E Witness Caution](#);
- ensures the COI conducts its inquiry in a timely fashion, so that swift action can be taken to address any issues and prevent any recurrence. This cannot, however, be at the expense of a robust inquiry;
- ensures adequate time is spent on preparation and planning;
- ensures the COI addresses all TOR, that the Court's findings are supported by evidence and attributed to this evidence, and the Report is easy to read and understand. If due care and attention is not paid, the COI may need to be reopened and, in extreme circumstances, could result in a judicial review;
- ensures the COI is the priority for the members. Any issues with availability must, therefore, be addressed with the Assy Auth at the outset and preferably before any formal appointment; and
- after the initial planning phase, once a COI has been scoped, reviews the timeframe and informs the Assy Auth of any issues.

In brief, sound planning, effective conduct and report writing are core features that are addressed in the sections that follow.

## Annex 3-A

### Checklist of Some Key Actions/Resources for a Court of Inquiry

The following checklist serves as a summary of the COI process. Major steps are reinforced with good practice and reminders. However, as circumstances of each COI vary, so do the arrangements you must make. This guide does not replace speaking with your Counsel Assisting.

#### 1. Receive form MD 634 from the Assy Auth.

- Ensure you have passed Level 1 e-learning. Refresh yourself and review DM 69 (2 ed) Volume 1, Chapter 11.
- Ensure you can give priority to the COI.
- Discuss with the Assy Auth any requirement for an external legal review (normally by exception).
- Arrange with appointed Counsel Assisting or regional legal advisor to receive any specific Level 2 e-learning brief at the outset of the COI, as directed by the Assy Auth.
- Ensure the COI Office has also received the MD 634.

[AFDA 1971](#), [RP](#), [DM 69 \(2 ed\) Volume 1](#) Chapter 11.

#### 2. Plan the COI. Read President and Assy Auth's Guide and review relevant aides-mémoire.

- COI Checklist.
- Planning a COI – principles and tools.
- Summary of principles and best practice.
- Conducting a COI.
- Process for calling a witness.
- Oaths format.
- Affirmation format.
- Caution format.
- Natural justice format.
- Summons format.
- Report format.
- Report writing guide.

#### 3. Assemble at time and place in form MD 634.

- If unable to assemble — assemble asap and the President must note the reasons in the ROP.
- COI sits in private unless the witness has AFDA s 200N rights and the President then permits legal representation, or if the President authorises any person (by exception).
- The President must lay form MD 634 and the TOR before the Court.
- The President directs sitting times and places and can adjourn COI.
- The Assy Auth can direct re-assembly.

[AFDA 1971](#) ss 200F–200H, [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.24–11.2.28.

#### 4. Preserve evidence as soon as possible.

- Arrange for scene and potential exhibits, such as wreckage or equipment, to be secured/retained and photographed.

[DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.22.



## 5. Engage with Assy Auth and external agencies.

- Consult with NZDF COI Office/Counsel Assisting regarding engagement with external agencies/ immediate family, and the external legal review panel where relevant.
- You may need to coordinate interviews with those of other agencies.
- Back brief Assy Auth on the plan, expected time frames and any interim reporting requirements, including whether or not there are any health or safety issues that require urgent attention.

## 6. Arrange administrative support to organise the following—

- A cost centre and special purpose code.
- Venue for the Court and any waiting room(s) for the witnesses.
- Signage, Court door 'Court of Inquiry in progress—private' and 'Witness waiting room'.
- Meals, water jugs and glasses.
- Stationery (folders, paper, pens, clear files, white stickers, flip charts, markers, Post-its).
- Computer, printer and copier.
- Recording equipment, batteries, laptop microphone—ensure it satisfies the security classification and test the quality of the recording in conditions.
- Interpreter, typist, recording machine operator (impartial persons appointed by the Assy Auth or President).
- Transcription—
  - » Ensure the software and hardware are compatible with the recorder and satisfies any security classification.
  - » Where an external agency is contracted, ensure a confidentiality agreement is signed and identify the time span between supply and receipt of rolling transcripts, and certify receipt of the product at the end.
- Provide transcriber with—
  - » Format for ROP.
  - » MD 634.
  - » Witness and exhibit list.
  - » Glossary of abbreviations, ranks and specialist terms.
- Bible or other book as necessary.
- Arrange secure storage for large items, if necessary.
- Arrange secure storage and clearances, forms, etc to hold and carry classified material where required.
- Travel and accommodation requirements for Court and witnesses, including any deployment clearances and/or waivers.
- When witness is remote, arrange access to Skype, VTC, ensuring the witness has access to exhibits, a Bible and other relevant material.

[AFDA](#) s 200L, [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.32.

## 7. Identify and schedule witnesses.

- President may direct attendance of witnesses by order/summons (using a personal approach in advance) and direct witnesses to bring exhibits.
- Arrange tentative time for witnesses to return, read and sign transcripts.
- Meet timeframe requirements for witnesses.
- President may compel witnesses to provide evidence and charge them with an offence if they refuse to answer a question (excerpt in the case of self-incrimination). Witnesses may be charged, in certain circumstances, for perjury if they lie.
- **Witness expenses:** Limited witness expenses can be paid, where the witness is not subject to the AFDA, or is subject to but not a member of, the Armed Forces.

[AFDA s 200\(I\)](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.29–11.2.30, [MD 637](#), [RP 154](#), [Witnesses and Interpreters Fees Regulations 1974](#).

## 8. Conduct the Court — Calling witnesses.

- President swears/affirms interpreter, recording machine operator, typist.
- **Call witness:** Set scene.
- **Swear witness:** President swears or affirms each witness.
- **Caution witness:** President must caution the witness and the caution must be recorded.
- **Witness evidence:** Obtain witness evidence and ensure exhibits are produced by the witness.

[AFDA ss 200J, 200L](#); [RP 155–158](#); [RP 162–163](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.31–11.2.41.

## 9. Ensure natural justice rights are afforded according to AFDA s 200N.

- The President must afford the AFDA s 200N rights and record in ROP that rights have been given to a specified person.
- President must record in the ROP if that person does not wish to exercise the rights.
- President is to direct attendance of any witness sought by an affected person and make arrangements for attendance. If impractical, the President must note this in the ROP.
- **Legal representation:** There is no right to legal representation, however, the President can agree to it upon request of the person afforded AFDA s 200N rights. See Part 11, Legal Representation, p 66.

[AFDA ss 200N, 200O, 200P, 200I](#); [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.52–11.2.59; [RP 143](#).

## 10. Handling of witness exhibits.

- Ensure that all exhibits are introduced by a witness. The President is to mark each exhibit sequentially with a letter, sign or attach a marked and signed label, and attach the exhibit to the ROP.
- Generally, copies or extracts of original documents should be taken.
- The President must then endorse the copy of the document, "Certified that I have compared this copy with the original document/book and that it is a true copy," and return the original document (if necessary, securely).
- Large exhibits can be photographed, but the President must ensure their safe custody, pending directions of the Assy Auth for ultimate disposal, after consultation with the Provost Marshal and the Coroner (for all fatalities).
- The President must then certify the photograph or exhibit 'Certified that I have compared the exhibit with the above photograph/digital image and that it is a true likeness.'
- Be alert to the chain of evidence and securely store exhibits and originals, particularly where a disciplinary investigation may arise. The Joint Police Unit can assist.

[AFDA s 200Q](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.46–11.2.48.

## 11. Use of appropriate questioning techniques.

- Ensure that open-ended questions are asked and closed questions are limited.
- Although not bound by the ordinary rules of evidence, try and ensure that where possible the rules of evidence are complied with.

[AFDA s 200K\(1\)](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.42–11.2.43.

## 12. Witness review of evidence.

- At the end of the interview, review the evidence and, if required, question further under oath/caution.
- Confirm a time for the witness to return, check and sign the witness statements.
- Corrections made where necessary and alterations initialled by the witness.
- Witness signs statement on last page.
- Initials bottom right-hand corner of preceding pages.

[AFDA s 200K](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.45.

## 13. Check for issues regarding superior officers' conduct.

- If conduct of an officer of superior rank or seniority to any member (including the President) may be called into question, the President must report to the Assy Auth:
  - » Assy Auth must consider and may dissolve the Court or direct it continue.
  - » President must record the Report and direction on the ROP, and report again as required.

[AFDA s 200M](#), [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.49–11.2.51.

#### 14. Review plan and the draft ROP.

- Ensure the layout of the COI complies with the recommended format.
- Ensure all of the following in your ROP—
  - » All TOR are addressed.
  - » Findings are supported by evidence.
  - » Findings are cross-referenced to witness evidence and exhibits.
- » Court does not make admission of liability or apportion guilt.
- » All the recommendations are clear, and key recommendations are specified and able to be actioned.
- **Natural justice rights:** Check if any further AFDA s 200N and natural justice rights need to be afforded before the COI Report is finalised.

[DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.62–11.2.65; [DM 69 \(2 ed\) Volume 1](#) chapter 11, annex A.

#### 15. Liaise with the Assy Auth in advance of any provisional release of the COI Report.

- Ensure draft is properly redacted including privacy, security and commercial in confidence factors.
- Ensure draft is numbered and watermarked.
- Make sure legal advice is received and a communication plan is in place, if required.
- Write a caveat that the COI Report is not to be disclosed further without the approval of the Superior Commander.

#### 16. Prepare briefs and an opportunity to comment on the draft.

- Personally arrange brief to immediate family/whānau/affected personnel (where relevant) with a follow-up letter.
- Provide opportunity to comment on draft redacted Report and arrange a realistic time period.
- Arrange a follow-up meeting to discuss issues.

#### 17. Review comments and record fact of consultation before finalising the COI Report.

#### 18. Sign-off COI Report.

- President and members all sign the COI Report.
- Record any material difference of opinion.
- President adds COI Report to ROP on DDMS COI site and advises Assy Auth.

[AFDA s 200R](#) and [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.63–11.2.64.

## 19. Insert security classification.

- Give an appropriate security classification according to the nature of the inquiry and the evidence collected and recorded.
- If the ROP does not warrant a security classification, it must be given an appropriate 'in confidence' privacy marking.

[AFDA](#) s 200R and [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.65.

## 20. Assy Auth inserts comments.

- Assy Auth inserts comments after legal/staff advice and states whether they agree or do not agree with the findings and recommendations.
- Assy Auth adds comments to the DDMS COI site. Where appropriate, forwards completed ROP through command chain to Superior Commander for action.

[AFDA](#) s 200R and [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.64.

## 21. Recommendations recorded.

- Recorded in NZDF COI Recommendations Register for action and follow up (by IG).
- COI Office adds COI Report and Assy Auth comments to COI Register record and closes COI DDMS site.

## 22. Disclosure rules must be followed.

- **No** disclosure to personnel that are members of the NZDF unless required for Service duties or by law.
- **No** disclosure to people who are not members of the NZDF unless the disclosure is authorised by a Superior Commander of the Service concerned.
- The COI **cannot** be used in evidence in any other proceedings.
- Evidence and submissions to a COI are **not** official information.
- The Report is official information but **cannot** be released unless authorised by the Superior Commander under AFDA s 200T.

[AFDA](#) ss 200S, 200T; [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.66–11.2.74; [OIA](#); and [RP](#) 144.

## SECTION FOUR – COURTS OF INQUIRY

### Consider this scenario

While preparing the COI for a truck accident at the RNZAF Base Woodbourne, you neglect to account for schedule conflicts among some of the key witnesses. Therefore, the COI meets but CPL Collins doesn't show up.

Regardless of any legal right or wrong, the Court is delayed and, as media coverage around the incident continues, the NZDF is left without the ability to answer questions with facts.

Failure to plan, as they say, is planning to fail.

The importance of planning a COI cannot be over emphasised. You will need common sense and a good plan as you coordinate with external agencies and analyse the sources of evidence.

## **Module A: Plan a Court of Inquiry**

This module has six parts —

- **Part 1** – Assembling Authority.
- **Part 2** – General Planning Requirements.
- **Part 3** – Analyse Terms of Reference.
- **Part 4** – Analyse Sources of Evidence.
- **Part 5** – Sequence and Schedule Witnesses.
- **Part 6** – Review the Plan.

# PART 1 – ASSEMBLING AUTHORITY

## General requirements

Responsibilities start with the assembly of the Court on form [MD 634](#) *Order for the Assembly of a Court of Inquiry*, specifying the composition of the Court, appointment of Counsel Assisting where required, the place and time the Court is to assemble and directing TOR. The Assy Auth is also to state whether any report or comment is required. Further, the [MD 634](#) can be revoked, varied or suspended at any time.

The [MD 634](#) must also be forwarded to the COI Office as Assy Auths are required to notify the COI Office of each COI.<sup>2</sup> This includes restricted COIs, which will be held on the SIE site. The restricted COIs will be recorded in the COI database. They will be assigned a COI number and given a placeholder entry based on the [MD 634](#) details, with details of where the ROP is held.

The importance of the planning phase and sound decision-making at the outset of a COI cannot be overstated. This starts with the decision to assemble a COI under the [AFDA](#) s 200A. The Assy Auth for a COI is CDF or the officer in command of any part of the Armed Forces.

The Assy Auth must be alert to the fact that a COI has special rights and protections not available to lesser investigations. These include the ability to restrict access to and disclosure of the proceedings of a COI so that witnesses can provide frank evidence without fear that it can be used in any other proceedings, and it is only the evidence and submissions to a COI that are excluded from the requirements of the [Official Information Act 1982](#).

The Assy Auth has statutory responsibilities for COI under the [AFDA](#). These range from assembling a COI and some functions during a COI, to providing comments at the conclusion of the inquiry.

When preparing the TOR, note is to be made of any special requirements laid down in DFOs or single Service publications, and the Court should be alerted to these.

## Timeliness

As stated in Section Three [Appointment to a Court of Inquiry](#) it is essential that the Assy Auth and the Court appreciate the importance of timeliness in assembling and reporting a COI. All COIs are to be afforded a high priority and completed expeditiously. Before appointing personnel to a COI, the Assy Auth is to assess any competing priorities to ensure the COI is given due precedence.

It is expected that the Assy Auth and President will engage on realistic timeframes, without prescribing absolute time limits, and that these may be adjusted after the Court has conducted its initial planning phase. Similarly, with enhanced planning by the Court, Assy Auths should be open to issuing amended [MD 634](#) *Order for the Assembly of a Court of Inquiry* to reflect any amended TORs.

## Legal advice

The legal advisor, or Counsel Assisting where appointed, plays a key role throughout the COI process and greater use of Counsel Assisting is encouraged to improve the quality of COI.<sup>3</sup> This includes provision of advice on the requirements for the composition of the Court, any other special requirements, TOR and identifying those Level 2 module briefs that the Assy Auth should direct for the Court on form [MD 634](#). These briefs will generally be conducted by the legal advisor/Counsel Assisting once the Court assembles as the first part of the planning process, however, they can also be provided to ships or units pre-deployment. The NZDF COI Office can also provide support and guidance with technical legal advice and procedural direction through DLS.

<sup>2</sup> [CDF Directive 8/2015](#) paragraph 15.a.

<sup>3</sup> [CDF Directive 8/2015](#) *Establishment of a New Zealand Defence Force Court of Inquiry Office and Measures to Strengthen the New Zealand Defence Force Court of Inquiry System*, paragraph 21.c.



## Composition of the Court of Inquiry

Sound decision making by the Assy Auth in the appointment of a COI sets the scene for a successful COI, whereas, a failure to appoint a legally constituted Court can have serious consequences.

In brief, a Court must consist of not less than two members, of whom at least one must be an officer and the other(s) must be officers, warrant officers or members of NZDF Civil Staff of equivalent standing. The Assy Auth must appoint one of the members who is an officer to be the President.<sup>4</sup> The President should be the senior member and hold the rank of Captain (E) or above.<sup>5</sup>

If a COI is appointed to inquire into the conduct of an officer or warrant officer, every member must be of at least equal rank and seniority to that officer or warrant officer, and at least one member must be of superior rank.<sup>6</sup>

Should a President subsequently find that the conduct of an officer or warrant officer, who is senior or superior in rank to a member, is or is likely to be called into question, the Assy Auth will need to consider whether to dissolve the Court and to reassemble a new Court.<sup>7</sup>

Where the inquiry concerns a part of the NZDF other than the Regular Force, the Assy Auth should endeavour to appoint at least one member of the Court from that part of the Service, unless it is not reasonably practicable to do so.<sup>8</sup>

Wherever practicable, and having regard to suitability, expertise and security clearances, a cross-Service court is to be appointed to mitigate any perception of bias and promoted transparency. All commanders are to cooperate and support Assy Auths to appoint a cross-Service court.<sup>9</sup>

If it is decided that the NZDF will assemble a COI into the death of, or serious injury to, a member of a foreign force, best practice is to offer the parent Service of the deceased the opportunity to nominate a suitable officer to be appointed a member of the COI.<sup>10</sup> It is also possible that the foreign force will conduct its own inquiry.

In all cases of death or serious injury, the Assy Auth is to consider appointing a suitably ranked officer, warrant officer or NZDF Civil Staff member trained in health and safety. In addition, or alternatively, a health and safety representative is to be called to give evidence to the COI. If you do not have an NZDF health and safety expert as a member of your COI, you must summon/order a health and safety representative as an expert witness (see Section Five, [Module D: Death and Serious Injury Inquiries](#)).

The Directorate of Safety can offer health and safety expertise.

Further, special orders and some specialist requirements apply in circumstances involving death or serious injury (Section Five, [Module D: Death and Serious Injury Inquiries](#)), an aircraft accident (Section Five, [Module F: Aircraft Accident Inquiries](#)) or where detailed in single Service orders.

An Assy Auth should exercise care where appointing experts to the Court, to ensure that the Court collects all the evidence from the witnesses, as the risk is that the Court may unwittingly place undue reliance upon its assumed knowledge, rather than making findings based upon evidence.

Requirements including training prerequisites, availability and capacity to prioritise the COI, are at Section Three, [Appointment to a Court of Inquiry](#).

4 [AFDA s 200B](#) and [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.9–11.2.13.

5 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.9–11.2.10.

6 [AFDA s 200D](#) and [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.11.

7 [AFDA s 200M](#) and [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.49–11.2.51.

8 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.12–11.2.13.

9 [CDF Directive 8/2015](#) paragraph 21.d.

10 The NZDF has consistently taken the view that, with respect to the definition of 'officer' in [AFDA s 2\(1\)](#), 'unless the context otherwise requires', permits a foreign officer to be appointed a member of such a COI.

In summary, before appointing a COI, the Assy Auth should consider the legal requirements, ranks and seniority of the Court members, and their suitability given the nature and seriousness of the inquiry, its complexity, who may have been involved with the incident, what unit, and whose character or reputation is or is likely to be affected by the Court and their respective ranks.

The Assy Auth should also inform the President if at any time it appears to them, that an inquiry affects or is likely to affect the character or service reputation of any person (whether or not the person is subject to the AFDA) so that [AFDA](#) s 200N (natural justice rights) can be afforded.<sup>11</sup>

## **Directorate of Safety and Defence Health Directorate representatives**

When an Assy Auth is assembling a COI in relation to a safety event, they must either appoint a qualified Specialist Safety Investigator to sit on the COI or otherwise consult with a qualified Specialist Safety Investigator to assist the Court in the investigative process.<sup>12</sup>

Depending on the nature of the death or serious injury, the COI may benefit from having a representative from the Directorate of Safety or the Defence Health Directorate as a member of the COI or called as a witness.

Where a COI involves matters relating to health service delivery, including the possibility of serious mental health matters such as suicide, a representative from Defence Health Directorate could either be a member of the COI or called as a witness.

It is important to recognise that members of a COI cannot produce evidence. The purpose of having specialist representatives as members of COIs is to assist the COI to interpret the evidence that it is provided with. However, understanding of the issues can be provided to the COI by expert witnesses, if skillfully questioned. The priority is for experts to provide their guidance to the COI as witnesses rather than as members of the COI.

## **Training**

Before starting the COI, Court members must have successfully passed COI Level 1 e-learning training. The Assy Auth is then to direct, on [MD 634](#), which Level 2 module briefs are to be conducted by a legal advisor at the outset of the inquiry. Where required, these can be provided pre-deployment. Generally, it is expected that each COI will receive briefs on modules A–C, namely Plan, Conduct and Report. Modules D–G only apply when the topic is relevant.

## **Mandatory Court of Inquiry**

It is mandatory to assemble a COI, without delay, where there has been a death or serious injury to a member of the Armed Forces in the course of their duties. The exception is if the death occurred during armed combat operations or is referred to the CO of the person for a preliminary (disciplinary) inquiry, which may disclose an offence under the AFDA by a person subject to the Act.<sup>13</sup>

Assy Auths have additional responsibilities for inquiries concerning deaths or serious injuries ([Section Five – Topic-specific Modules](#)) and, in most cases, the Assy Auth will be a Superior Commander. In these circumstances, legal advice should always be sought. The NZDF COI Office can facilitate external liaison with next of kin, the coroner and other agencies.

11 [AFDA](#) s 200N.

12 [DFO 071](#) Defence Force Safety paragraph 3.7c.

13 [AFDA](#) Defence Force Safety s 102.

## Aircraft accidents

Special orders apply to air accident inquiries, the composition of the Court and procedures.<sup>14</sup> (Refer to Section Five, [Module F: Aircraft Accident Inquiries](#)).

## Counsel Assisting

Counsel Assisting is to be appointed where the character or reputation of any person may be affected by the inquiry, or if the inquiry is likely to involve complex or serious issues of fact of law or both (this includes death or serious injury).

## External Legal Review

The Assy Auth may consider that the circumstances of a COI are so serious and significant, and/or of such high public interest, that it warrants an external legal review to provide independent legal assurance. The protocol to be adopted to obtain an external legal review by the appointed Queen's Counsel on the external legal review panel, established under the Office of the JAG, is at [Section Seven – External Legal Review](#). Both the Assy Auth and the President of a COI have functions to perform when it is intended to seek an external legal review.

## Assembling Authority Comments

The ROP should be legally reviewed in advance of these comments to ensure it is legally sound. Once the Assy Auth receives the signed ROP from the President of the Court, the Assy Auth is to record their opinion of the findings, sign the record and add it to the Assy Auth library on the COI DDMS site and if necessary forward the Report to the Superior Commander.<sup>15</sup> The Assy Auth should record whether there is agreement with each of the findings and recommendations and, if not, the reasons for not accepting them.

Recommendations should be reviewed for clarity and tight construction as clear, workable recommendations are vital. Ideally, the Assy Auth should state an 'owner' and a 'no later than' date, so that they can be better managed.

## Reporting

The Assy Auth is to report the assembly of all COIs to the NZDF Inspector General, through the respective IG and NZDF COI Office. The COI DDMS site and NZDF COI database are to be used to record all relevant information. On completion of a COI, after inserting the Assy Auth Comments, the Assy Auth is to ensure that agreed recommendations are documented for action with assigned responsibility and expected time frame for completion, reasons for not agreeing with any recommendations are noted, and the signed and dated Assy Auth Comments have been added to the ROP on the DDMS COI site.

## Control of the Record of Proceedings

There are statutory constraints on the disclosure of COIs.<sup>16</sup> Superior Commanders are required to seek legal advice before deciding whether or not to disclose all, or part of, the ROP outside the NZDF.

The ROP of a COI (including the COI Report) can only be released and/or disclosed in accordance with [AFDA](#) s 200T, which provides that NZDF personnel are able to see the ROP if required in the course of their duties, and that it may be disclosed to other persons only with the approval of a Superior Commander of the Service concerned, namely CDF, VCDF, CN, CA, CAF or COMJFNZ.

<sup>14</sup> [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.19 and [NZAP 201](#) *Manual of Air Force Safety and Health*.

<sup>15</sup> [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.64 and [AFDA](#) s 200R(3).

<sup>16</sup> [AFDA](#) ss 200S and 200T, [RP](#) 144 and [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.68–11.2.74.

## PART 2 – GENERAL PLANNING REQUIREMENTS

Planning is essential for a successful and timely COI. Presidents and Courts should review the planning principles and tools guide at [Annex 4-A](#) and the summary of principles and best practice at [Annex 4-B](#). It may also be helpful, as soon as you are appointed to the Court, to refresh yourself on the Level 1 e-learning modules.

To be successful, it is vital that Presidents address the following concepts.

### Timeliness

As stated in [Section Three – The Role of the President](#), it is the responsibility of the President to ensure reports are delivered in a timely fashion. Progress reports should be sent to the Assy Auth if necessary, particularly if an agreed timeframe is not achievable. This can provide useful information to enable Command to manage interactions with, and the expectations of, interested parties.

### Resources

It is vital that a COI ensures it has appropriate resources. Experience shows that the absence of such support can derail the inquiry. [Annex 3-A](#) provides a helpful resource checklist. The NZDF COI Office can also provide guidance and support.

Experience shows that—

- (a) transcription arrangements need to be made at the earliest possible moment—delay in provision of transcripts is a key obstacle for inquiries; and
- (b) it is highly beneficial, and indeed vital in some cases, to have a non-commissioned officer or administration officer to provide administrative support.

### Evidence management

Some evidence is highly perishable—in such cases it is often useful for a COI, at the earliest opportunity, to have it secured or photographed in location by a witness. It is also important that the COI keeps a careful track of all the evidence, for example, through a witness schedule and exhibit list ([Annex 4-A](#)).

### Media enquiries

During the inquiry, a COI may be asked for information it has obtained by media and other agencies. Requests for information from outside the NZDF must be referred to [Defence Public Affairs](#) for action. COIs sit in private, which means that no person may attend a sitting of the Court except the members of the COI, the Counsel Assisting, a witness giving evidence and, if [AFDA](#) s 200N applies, the person who is affected or likely to be affected by the inquiry, and the person's legal representative, if the President approves the person being legally represented at the inquiry.

Evidence given or submissions made to a COI are not official information under the [OIA](#). To promote candour, which is essential to the integrity of the COI process, such evidence is not to be released outside the NZDF without Superior Commanders seeking legal advice.<sup>17</sup> Further, the Ombudsman has directed that information within the scope of the TOR can be withheld until completion of the COI, as it is only then that an accurate assessment can be made as to whether the information held is evidence that can legitimately be withheld.

17 [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.73.

However, Presidents do need to be alert to media interest, particularly in high profile inquiries. Presidents should engage with the Assy Auth on the requirement for any progress reports, to inform Command, and enable appropriate arrangements to be made for updates or briefings.

Presidents should be alert to any media approaches to witnesses.

## **Counsel Assisting**

A prudent President is well advised to use the skills of the appointed Counsel Assisting or legal advisor to their fullest extent throughout the COI, from the initial planning phases (where legal advisor or Counsel Assisting will be conducting briefs and on-the-job planning with the Court), throughout the inquiry and into the report writing phases.

Counsel Assisting can provide advice to ensure that the findings are supported by the evidence, that natural justice rights have been reflected and, where required, that families and external parties have been engaged. It is not the role of Counsel Assisting, however, to write the Report. That is the function of the Court, and all findings and recommendations are those of the Court.

## **External agencies**

The COI needs to engage early with interested external agencies and be aware of relevant MOU, for example, the [MOU](#) between the NZDF and WorkSafe New Zealand. The first step is to liaise with the NZDF COI Office in respect of this.

## PART 3 – ANALYSE TERMS OF REFERENCE

It is paramount that a COI understands and addresses all TOR directed by the Assy Auth. Additionally, as above, during the planning process the Court may identify additional TOR. These should be brought to the attention of the Assy Auth at the earliest opportunity, to ensure the Court and the Assy Auth are of the same mind, and so that an amended [MD 634](#) can be issued if necessary. It is expected that amendments to [MD 634](#) will become more frequent after the enhanced planning by the COI, so a Court or Assy Auth should not be reluctant to make amendments.

A key aspect in planning a COI is to approach the matter with an open mind and to recognise the importance of avoiding tunnel vision while addressing the relevant issues.

Courts will have various levels of learning and experience in planning. The tools in this guide are simply options designed to assist. They are not the only techniques to be adopted.

### **TOR can be analysed using a four step process—**

#### **Step 1**

Consider the purpose of your COI based on the [MD 634](#)—don't look at the TOR yet.

#### **Step 2**

Using the brainstorming guide, planning principles and tools at [Annex 4-A](#), brainstorm the questions that should be in the TOR.

#### **Step 3**

Compare the outcome of your brainstorming with the actual TOR.

#### **Step 4**

Do you need to clarify any points or propose any amendments to the Assy Auth? Note that the TOR will generally include 'comment on any other relevant matters'.

## PART 4 – ANALYSE SOURCES OF EVIDENCE

---

The planning principles and tools at [Annex 4-A](#) can be used to create a mind map that presents—

- A symbol or picture representing the whole inquiry at its centre.
- Each TOR in a bubble, projecting out from the centre like the spokes on a wheel.
- A brainstorm of evidence that needs to be collected in respect of each TOR, added to the mind map as the next layer.

Finally, brainstorm the possible sources of the evidence required and add that to the mind map as the final layer.

## PART 5 – SEQUENCE AND SCHEDULE WITNESSES

Review the evidence schedule tool in the planning principles and tools at [Annex 4-A](#). This can be used to produce a list of witnesses with columns for name, date, time and exhibits to be produced.

### **Witnesses should be ordered according to when the Court wants to call them, taking into account—**

- the intended start date;
- travel and logistics, including whether the Court members will conduct a site visit and which witness(es) are best suited to attend the site visit;
- the need to have expert witnesses hear the evidence as to fact;
- witnesses who may need to be given [AFDA s 200N](#) (natural justice rights), see [DM 69 \(2 ed\) Volume 1](#), Chapter 11 for orders relating to natural justice;
- availability or non-availability of witnesses; and
- coordination with other investigations.

The Court should contact the witnesses to inform them of the inquiry and notify them of the tentative schedule, ascertaining any periods of non-availability (and reasons).

It may be that the Court needs to travel to the witness or, when a witness is unavailable due to operational requirements, the Court should consider use of VTC. Note that arrangements will need to be made to record the evidence, provide access to exhibits and ensure evidence can be taken on oath and statements can be signed. The Court should take care to ensure the witness understands the gravity and seriousness of providing evidence to a Court, even if that evidence is provided through VTC.

The Court should then go through all the information collected and revise the witness schedule as a team.

Once the list is reviewed and finalised, it is the President's role to summons or order witnesses to attend.<sup>18</sup> Witnesses subject to the [AFDA](#) should be ordered to attend (using normal Service protocols) and civilian witnesses should be summoned using [MD 637](#).

The President can then complete [MD 637](#) *Summons to Civilian Witness to Attend a Court of Inquiry* or orders to attend for all witnesses.

It is highly recommended that personal contact is made before issuing any summons, to alleviate any unnecessary concern and explain the formality. The cooperation of the witness is paramount and the President needs to set the right tone from the outset. The benefit of the formal summons/order is that it provides a lawful basis for requiring the witness to attend and what exhibits to bring. It also assists with certainty about attendance and, indeed, may provide some confidence to a witness that it is their legal duty to participate. Alternatively, without communication in advance, a summons in the mail could potentially alienate an otherwise cooperative witness.

18 [AFDA s 200I](#).



## PART 6 – REVIEW THE PLAN

It is important to ensure there is sufficient flexibility in the plan to adjust to unforeseen developments.

### **Planning and coordination is particularly important in the following situations—**

- There is the possibility of an external agency requiring a witness to be interviewed at the same time they are to give evidence. Cooperation and coordination at the outset will mitigate ‘double booking’. Note however, that a COI can summons or order witnesses to attend.
- The NZDF COI Office should be approached at the outset of a COI to discuss inter-agency engagement and contact. Further guidance on cooperation with external agencies specific to death and disability or aircraft, maritime or munitions accidents are at [Section Five – Topic-specific Modules](#), modules D, E, F and/or G.
- Exigencies of the Service—a COI must recognise the primacy of operations for NZDF but outside that, may require witnesses to attend even if inconvenient.
- If a Counsel Assisting has not been appointed, and the planning suggests that someone’s character or reputation is likely to be affected by the inquiry, the COI needs to give the Assy Auth the option of appointing one. [AFDA](#) s 200B (3)(b) requires the Assy Auth to appoint a Counsel Assisting in those circumstances. This is something a COI will need to bear in mind as the inquiry unfolds—even if a Counsel Assisting is not appointed at the start, they may be needed later on.

## Annex 4-A

### Planning Principles and Tools

#### **The Australian Transport Safety Bureau reminds its investigators to—**

- focus on safety enhancement;
- be objective and fair;
- keep an open mind;
- use a team-based approach;
- analyse before writing analysis; and
- recognise their potential for decision-making biases.

These principles represent international best practice and should be followed by all NZDF COIs.

#### **The purpose of this aide-mémoire is to provide you with—**

- more information about the kinds of decision-making biases you need to guard against; and
- decision-making tools that you can use to harness the power of your team in conducting a COI.

### **Recognising and avoiding decision-making biases**

#### **Starting with the right mind set**

When you call a witness, they will not only hear what you say, but also read your thoughts and attitudes based on non-verbal communication. Psychologists refer to the ratio of 55/38/7. These numbers represent the percentages of importance of the various forms of communication. Although importance varies according to context, as a starting point it is claimed that 55% of communication is body language, 38% is tone of voice and 7% are words spoken.<sup>19</sup>

You will also need to bear this in mind when you assess witness testimony—if you have a ‘feeling’ that a witness is being less than candid, why is that? Are you picking up non-verbal communication from them? Or vice versa?

The fact is that a COI whose members present as open-minded, objective and fair, is more likely to obtain candid, full and frank evidence from witnesses. This is absolutely critical to the value that your COI can contribute to the culture of continuous improvement in the NZDF.

#### **So what does this look like?**

You will be attentive, curious and interested in what the witness is saying, because you care. It’s an attitude. One way to help you get into the mindset before hearing evidence, is to answer these two questions: ‘Am I curious?’ and ‘Do I care?’ When we are curious and caring, then we can expect to have more empathy, respect, genuineness and a sincere desire to hear—and it helps to suspend judgement.

19 Mehrabian, Albert. *Nonverbal Communication*. New Jersey, NY: Transaction Publishers, 1972.

## How do I develop the right mind set?

A crucial first step is to be aware of the ‘internal commentator’ in your head—that is being aware of what you are thinking but not saying, because leaving this unattended is a block to authenticity. The ‘internal commentator’ tends to manifest itself in the form of reactions and judgements—positive and/or negative, about the witness, about yourself, about others in the room and about the content of what is being said. It includes thoughts (‘What is he talking about?’), judgements (‘This is rubbish’, ‘This is really interesting’, ‘I can’t do this’) and feelings (‘I’m bored’). This internal dialogue is constant and can’t be turned off—so instead, listen to it and become aware. If we reset our purpose to be curious and understand, it will motivate our internal voice to ask different questions.

The reality is that we all have biases and prejudices. It is part of being human. The key to being a successful COI member is to identify those decision-making biases and endeavour to remove or minimise them. In the following sections we will look at common examples of this, so that you can recognise and endeavour to avoid them.

## Individual factors

### Human error

When we try to make sense of an incident, we can fall into the trap of seeking out the ‘bad apple’. That is, looking for wrong or erratic behaviour, bringing to light people’s bad decisions, poor assessments and deviations from orders, and of course singling out individuals who made mistakes.

In this model, there is an assumption that complex systems are basically safe and that these systems need protecting from people. It is *people* who are unreliable. However, like any assumption, it may be false. As a COI you need to test this by collecting and analysing evidence. If an individual did the wrong thing, why did he or she do so? There are plenty of examples where people have made catastrophic mistakes that were nevertheless reasonable mistakes based on the systems they had to use, or the training and experience they had. Sometimes an incident is caused by the negligence (or wilful misconduct) of an individual, but a COI should be slow to arrive at such a conclusion until it has eliminated other potential causes. Why? Because if we simply conclude that ‘it was John’s fault’ without taking proper account of flaws in our systems or training, we will not learn lessons as a Defence Force, and next week Jane may well make the same mistake.

### Hindsight bias

Inevitably, you will be conducting your inquiry after the event and you will have more information than individual participants in that event. From this perspective, it is easy to pinpoint what people missed and should not have missed, what they did not do but should have done. Hence the decisions, judgements and perceptions we form about what is bad or wrong are only bad or wrong from the perspective of hindsight. By saying this or that behaviour is a failure, we are judging it from a standard we impose from the present with our broader knowledge of the mishap. We haven’t explained a thing. Hindsight biases us to the things we now know were important, that those in the mishap did not or may not have appreciated. In order to understand errors, you need to investigate the larger system—the human error may be a symptom of deeper trouble inside that system.

### Confirmation bias

When we are faced with lots of information, it is natural to develop hypotheses to try to make sense of things. Ideally, our chosen hypothesis should be tested by collecting and analysing relevant evidence—however, it appears that we will often seek out evidence that supports our theory and fail to attend to that which does not. Hence, confirmation bias is the tendency to seek and, therefore, find evidence that confirms what one already believes to be true.

## **False analogy bias**

This is when we rely on comparisons with situations that are not directly comparable. Hence, we think that two things fit the same mental model, when they may not. ('It looks just like...so it must be the same'.) To manage this, it is helpful to ask yourself this question: 'It looks just like...but are there any differences that would tell me that this situation is different?'

## **Primacy and recency effect**

The primacy effect occurs because the first thing that we hear or see is likely to stick in our mind and may outweigh more important things that we see or hear later. Recency refers to the phenomenon where what we hear or see last is often what we remember. This is especially important when you have collected a lot of evidence, as the evidence you collected in the middle of your inquiry may be given less weight, but may in fact be more important. Laying all the evidence out and assessing the importance of different pieces is important. Ask yourself this question: 'Why does this piece of evidence stand out for me?'

## **Group factors**

### **Group think**

This is when the group becomes so cohesive that they strive more for unanimity than realistically appraising alternative explanations. This can be exacerbated if the group is isolated from outside expert opinions and when the leader promotes their preferred understanding of the event. What is striking about the psychological research in this area, is the extreme stated desire among group members, in most cases, to 'please one another', to be perceived as team players and to retain their membership in the group. To reduce the likelihood of 'group think', the President of a COI should foster open discussion of all alternatives and should avoid championing any one explanation early in discussion.

### **Group polarisation**

This is related to 'group think' and is the potential for members of a COI who broadly agree with a particular finding to 'go along' with a more extreme version of that finding to stay in tune with the group. This can be avoided by the President adopting the course of action mentioned above and also by moderating the strength with which he or she expresses views on the evidence.

### **Authority gradient**

If the President of a COI is perceived as not welcoming particular evidence or new/different perspectives, other participants in the inquiry may not volunteer such insights or opinions. Presidents need to be aware of the effect that their rank or position may have in stifling healthy debate. A more democratic style of leadership is likely to produce the best results in almost all COI situations.

## **Planning tools**

The following tools are not compulsory and you may choose to use some, all or none of them. However, you need to be aware of them. Experience suggests that high performing COIs use tools such as these and others to aid their planning and conduct of the inquiry.

## Brainstorming<sup>20</sup>

Brainstorming combines a relaxed and informal approach to problem solving with lateral thinking. It encourages people to come up with thoughts and ideas that can, at first, seem a bit crazy. Some of these ideas can be crafted into original, creative solutions to a problem, while others can spark even more ideas. This helps to get people unstuck by ‘jolting’ them out of their normal ways of thinking.

Therefore, during brainstorming sessions, people should avoid criticising or rewarding ideas. You’re trying to open up possibilities and break down incorrect assumptions about the limits of the problem or issue. Judgement and analysis at this stage stunts idea generation and limits creativity.

Evaluate ideas at the end of the brainstorming session—this is the time to explore matters further, using conventional approaches.

### Why use brainstorming?

Conventional group problem solving can often be undermined by unhelpful group behaviour. While a structured analytical process also has its place, it can lead a COI to adopt an overly ‘blinkered’ approach to analysing the causes of an incident and possible preventative measures.

Brainstorming provides a free and open environment that encourages everyone to participate. Quirky ideas are welcomed and built upon, and all members are encouraged to contribute fully, helping them develop a rich array of creative approaches, views or solutions. It will also bring the members’ diverse experiences into play. The findings and recommendations of a COI are likely to be strengthened in this way.

What’s more, because brainstorming is fun, it helps the members bond as a team, as they solve problems in a positive, rewarding environment.

While brainstorming can be effective, it’s important to approach it with an open mind and a spirit of non-judgement. If you don’t do this, people ‘clam up’, the number and quality of ideas plummets and morale can suffer. Unusual suggestions may appear to lack value at first sight—this is where the President needs to chair the session tightly, so that the group doesn’t crush these ideas and stifle creativity. Students of military history know that ideas initially scorned as ‘bizarre’ (eg submarines, tanks and aircraft) have often become the new orthodoxy over time.

### How to use this brainstorming

To run a brainstorming session effectively, the President of a COI should follow these steps—

#### 1. Prepare the group

First, set up a comfortable meeting environment for the session. Make sure that the space you are using is well-lit and that you have the resources you need.

When everyone is gathered, appoint a member (or Counsel Assisting) to record the ideas that come from the session. Post notes where everyone can see them, such as on flip charts or whiteboards, or use a computer with a data projector.

#### 2. Present the problem

Clearly define the problem or issue that the COI needs to resolve and lay out any criteria that must be met. Make it clear that the session’s objective is to generate as many ideas as possible.

---

20 This material has been adapted from material published on [mindtools.com](http://mindtools.com).

Give people plenty of quiet time at the start of the session to write down as many of their own ideas as they can. Then ask them to share their ideas, while giving everyone a fair opportunity to contribute.

### 3. Guide the discussion

Once everyone has shared their ideas, start a group discussion to develop other people's ideas and use them to create new ideas. Building on others' ideas is one of the most valuable aspects of brainstorming.

Encourage everyone to contribute and to develop ideas, including the quietest people, and discourage anyone from criticising ideas.

As the President, share ideas if you have them but spend your time and energy supporting your team and guiding the discussion. Stick to one conversation at a time and refocus the group if people become sidetracked.

Although you're guiding the discussion, remember to let everyone have fun while brainstorming. Welcome creativity and encourage your team to come up with as many ideas as possible, regardless of whether they're practical or impractical.

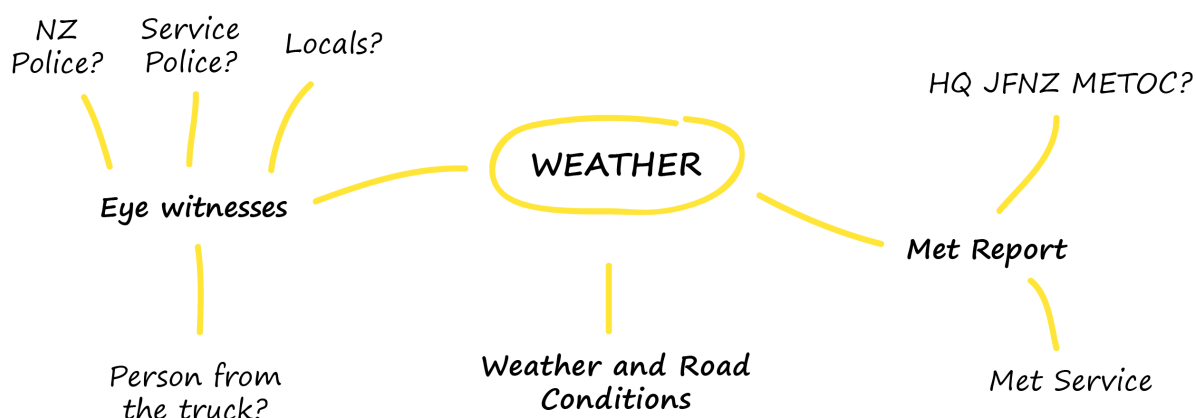
Don't follow one train of thought for too long. Make sure that you generate a good number of different ideas and explore individual ideas in detail. If a member needs to 'tune out' to explore an idea alone, allow them the freedom to do this.

If the brainstorming session is lengthy, take plenty of breaks so that people can continue to concentrate.

### Mind mapping

A mind map is a diagram used to visually organise information. It is often created around a single concept, drawn as an image in the centre of a blank landscape page, to which associated representations of ideas such as images, words and parts of words are added. Major ideas are connected directly to the central concept, and other ideas branch out from those. The British psychologist who is credited with inventing mind maps, Tony Buzan, recommends that you use colour, wavy lines and images in your mind maps because that fosters creative thinking. You should also keep the word picture for each element short.

Although they are deceptively simple, mind maps can be a powerful tool when planning a COI. You could put a representation of one TOR at the centre and then break it up into its component elements in the next layer. Those component elements may then have sub-components. Once you have broken the TOR down, you can brainstorm potential sources of evidence and link those to the relevant component. This method will allow you to visually depict relationships and record lines of inquiry that you might need to pursue. A partial example of how this might be done in respect of one of the TOR, from the scenario used in your e-learning, is depicted below.



## Evidence schedule

An evidence schedule is a tool that you can use to help you schedule your witnesses and make sure that you have collected the evidence you need to support findings on each of your TOR. It is simply a table with appropriate columns, as indicated in the example below. You may prefer another format.

An evidence schedule might be something that you would populate after brainstorming the evidence you need to collect and mind mapping the results of that brainstorming session.

As you collect the evidence, you can tick it off against the schedule. It is a good idea to maintain the schedule as an electronic document, because it will inevitably need to adapt as circumstances change, or you discover new lines of inquiry or evidence that you need to obtain. Alternatively, a whiteboard works well, especially if it can be used to generate an electronic document or printout. In effect, the evidence schedule can function as the 'dashboard' of your inquiry.

TOR	Fact/Issue	Witness	Exhibit	Date/Time
4	Weather Conditions	LTCDR Sunny	Met Report	22 June 14, 1400

## Dekker's five-step model

Human Factors specialist, Professor Sidney Dekker, has suggested the following five-step model for reconstructing an incident. This model is designed to reduce the effect of hindsight bias.

### 1. Sequence

Decide on the sequence of events you need to investigate. Bind the event with a start and a finish. Generally the start will be the first assessment, decision or action by people close to the mishap. Sometimes your TOR will give you some indication of this. Otherwise, it is a judgement call.

You may find that you need to move your 'start' and 'end' points to make sense of the inquiry once you have started to collect the evidence—this is something that the President may wish to discuss with the Assy Auth if in doubt. Having a sequence provides you with a base to organise your reconstruction around—it enables the second step.

### 2. Intersections

Identify the intersections or decision points where things took a different turn or could have taken a different turn. Locate the intersections where the important assessments, decisions, actions and changes in the process occurred and lay them out in order. You could use Post-It notes or draw a flowchart.

### 3. Reconstruct

Reconstruct each intersection. Looking at the intersection from an objective standpoint, what was going on at that time and in that place? Another way of describing this is as the parameters of the incident. Identify the connections between these parameters and the intersections. You can now start constructing a picture or mapping the parameters over time. However, the question remains—what parameters were people paying attention to?

#### **4. Identify**

Identify the tasks people were carrying out while crossing intersections. This is about what data was available, where was their attention focused? This phase is about discovering what goals people had. Operators are in the situation to get a job done, so they have goals, and it is these goals that determine where a person looks. Goals provide clues as to which cues were important and which operational demands would have received the most attention.

#### **5. Context**

Examine how features of people's tools and tasks, and their organisational and operational environment influenced their assessments and actions. This is about putting the picture you have built in its broader context. Consider organisational pressures, rules, policies, conflicting goals and the trade-offs they require, the resources available, supervision, culture, maintenance, roles and responsibilities, planning, morale, time of day, scheduling, training and selection, staffing, operating pressures etc. The list goes on.



## Annex 4-B

### Summary of Principles and Best Practice in Planning a Court of Inquiry

#### 1. Ensure you understand the TOR and seek clarification if you need to

The reality is that TOR have to be drafted without the insights that you will gain once you start collecting the evidence. If you think the TOR could be improved, the Assy Auth will want to hear from you. If you are not sure what a TOR is seeking, it's best to clarify that as soon as possible.

#### 2. Keep an open mind

Remember that “a COI whose members present as open-minded, objective and fair is more likely to obtain candid, full and frank evidence from witnesses. This is absolutely critical to the value your COI can contribute to the culture of continuous improvement in the NZDF”. Being aware of your own subconscious decision-making bias is the first step—the planning principles and tools guide in [Annex 4-A](#) of this module can help you with this.

#### 3. Use a team-based approach

There are some duties that the President must perform, such as summoning witnesses and complying with various formalities. However, a COI will be more efficient if all members (and Counsel Assisting) play the fullest role they can. Counsel Assisting or your regional legal advisor can provide invaluable advice and support and should be engaged at the outset.

#### 4. Use good planning tools

The planning principles and tools handout in [Annex 4-A](#) provides you with some examples of these. Using good planning tools will make your inquiry more effective. You may have your own tools. For example, you may want to adapt the Joint Military Appreciation Process to the task confronting you.

#### 5. Preserve the evidence

The scene of an incident will often be vulnerable to tampering, either intentional or accidental. It may be damaged by weather or other natural occurrences. Documentary or real evidence may be lost or destroyed. Unfortunately, experience suggests that this does happen. If it does, your ability to obtain the best evidence will be compromised. You, therefore, need to factor in measures to preserve the evidence at an early stage of your planning. This might include arranging for photographs to be taken for subsequent production in evidence or for certain exhibits to be taken into custody—the Service Police have experience with this and may be able to assist you.

#### 6. Call expert witnesses to sit in on relevant evidence about the facts

Expert evidence can be very powerful in helping you to resolve technical questions and interpret the significance of things that other witnesses tell you they saw or heard. However, an expert's evidence is only as good as the factual material on which it is based. This means you should ensure that, wherever practicable, any expert witnesses you think you might want to hear from sit in on the evidence of relevant witnesses as to fact.

#### 7. Use your powers under the law to ensure witnesses attend and produce the exhibits you need

Experience suggests that some witnesses (even initially cooperative ones) may try to back out or 'rearrange your schedule' at the last minute. The law gives the President power to order and summons witnesses for a reason; it is expected that they will use that power. If that doesn't happen, your schedule may become unmanageable and your plan may fail.

COIs are distinct from disciplinary investigations, where a suspect has a right to refrain from making a statement and to remain silent. Witnesses in a COI have no such right. Witnesses in a COI are compellable and can be charged or held in contempt if they refuse to answer a question<sup>21</sup> (except in the case of self-incrimination<sup>22</sup>) and can be charged with perjury if they lie.<sup>23</sup>

It is not the role of a COI to hunt around for exhibits that might be useful. If it occurs to you that you should have a particular document or thing, or that a report should be prepared for you or photographs taken, the law empowers the President to summons or order a witness to attend before a COI with that document or thing. Any real or documentary evidence you wish to rely on must be produced as an exhibit by a witness.

## **8. Make sure you have the right facilities, administrative support and resources to record and transcribe the evidence**

Failure to make arrangements for administrative support can easily derail your planning and impact on the timeliness of a COI. Initiate contact with the NZDF COI Office/Defence Shared Services at the outset to identify what support can be provided.

### **Recording**

Evidence must be obtained verbatim, therefore, you need to obtain a recording device(s) and batteries. Always test recording devices to check the quality of the recording before using them to record the evidence. If it is impossible to hear the recording due to background noise or for some other reason, you are unlikely to receive a very good transcript. If that happens, the whole process will take a lot longer and you may need to recall witnesses. Without a proper written record of their evidence, you will have nothing to base your findings on in your report. Another common error is failing to think about the potential for classified evidence to be heard. Once there is classified evidence on a digital recorder it must be kept in a secure container and is effectively unusable for other purposes. If you think classified evidence might be heard, you should have a separate classified digital recorder for that. Ask the witness to let you know if they intend to start giving evidence about matters that are classified.

### **Transcription**

Don't underestimate the time that transcribing documents and checks for accuracy against the recording can take. It is also vital that all the equipment used is compatible and meets security standards. It is helpful to provide the transcriber with all relevant material including the [MD 634](#), glossary and names and particulars of witnesses. Where an external agency is contracted, a confidentiality agreement should be signed. Finally, ensure the witness will be available to sign their statement once it has been transcribed.

### **Resources**

See [Annex 3-A](#)

21 [AFDA](#) s 150E.

22 [DM 69 \(2 ed\) Volume 1](#) Chapter 6, Section 4, Part C.

23 [Crimes Act 1961](#) s 108.

## **9. Watch out for situations where someone is being, or might be, criticised**

Failure to afford the [AFDA](#) s 200N (natural justice rights) is likely to be the principal reason for an inquiry to be reopened. Whenever you are listening to or looking at evidence, one of the questions you need to ask yourself is: 'Does this evidence affect, or is it likely to affect, anyone's character or reputation?' Remember that 'anyone' includes civilians and even companies. If you think the answer to that question is yes, [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.52–59 explains what you need to do in plain English. It is better to err on the side of caution and afford rights (generally at the earliest opportunity), rather than be required to reopen an inquiry or recall a number of witnesses.

## **10. Actively coordinate your inquiry with investigations by other agencies or the Service Police**

It is now quite common for COIs to be inquiring into matters that are also being investigated by the Service Police, New Zealand Police, WorkSafe New Zealand or another agency—whether of the New Zealand Government, a foreign government or an international organisation. This is unavoidable and, in some cases, is provided for in an MOU between the NZDF and the other agency. Each of these investigations will have its own TOR and/or legal framework, which will be different to yours.

Experience suggests that the best way to avoid conflicts with other investigations is to establish early liaison and actively seek to coordinate your activities with theirs. The NZDF COI Office/Counsel Assisting can assist with external agency management. Normally, you will not have any particular precedence with respect to these other investigations. Cooperation is the best course of action.

However, in cooperating with other investigations, you need to remember the legal constraint that applies to evidence you collect—it may not be used in evidence against any person in any proceedings, judicial or otherwise. You cannot share any part of your report without the approval of the relevant Superior Commander. If you are unsure of the parameters that apply to your relationship with another investigating agency, seek legal advice as soon as possible.

## **11. Actively engage with whānau and affected personnel where there has been a fatality or serious injury**

Counsel Assisting will be appointed where a COI is assembled if death or serious injury has occurred, and the Superior Commander may seek an external legal review. The importance of liaison with Command, and personal contact with the whānau and affected personnel, cannot be overstated. Specific guidance is provided in Level 2 briefs and at Section five, [Module D: Death and Serious Injury Inquiries](#).

## **12. Remain flexible**

This is a principle that applies to every aspect of Service life, but particularly so in the case of duty as a member of a COI. Even the best plan you make for the conduct of your inquiry is likely to require constant revision as new evidence comes in and new lines of inquiry open up. You need to remain focused on your TOR, however, if an issue comes to light that is not covered by the TOR, but is of significance for the NZDF, the Assy Auth needs to be advised at an early stage.

## Module B: Conduct a Court of Inquiry

Conducting a COI is a regulated process.

An overview of the COI process is in the checklist in [Annex 4-C](#).

**This module has eleven parts —**

- **Part 1** – Different Types of Witnesses.
- **Part 2** – Expert Witnesses.
- **Part 3** – Obtaining Evidence.
- **Part 4** – Calling a Witness and Administering the Oath and Caution.
- **Part 5** – Recording the Evidence.
- **Part 6** – Questioning Techniques.
- **Part 7** – Recognising Evidential Privilege.
- **Part 8** – Analysing the Evidence.
- **Part 9** – Criticism of Superior Officers.
- **Part 10** – Natural Justice Rights.
- **Part 11** – Legal Representation.

## PART 1 – DIFFERENT TYPES OF WITNESSES

### Consider this scenario

There's a fire on board a New Zealand warship.

To prevent future instances, NZDF assembled a COI to look into the causes and handling of the fire. Among the witnesses are two senior ratings. Petty Officer Wilkins was on duty on the ship and led the damage control efforts. Warrant Officer Damage is also called, as he is the Fleet Damage Control Instructor (FDCI). He knows a lot about fires on board ships.

### The two witnesses in the scenario represent two types—

Expert witnesses	Witnesses as to fact
<p>Expert witnesses who were not involved directly with the incident but, owing to their expertise and experience, have specialist knowledge about the relevant topic.</p> <p>For example, a trained air accident investigator, health and safety representative, technical investigator, qualified engineer in the relevant field, medical professional, psychologist, flight data analyst.</p>	<p>Witness as to fact are those witnesses who have relevant evidence and can tell you what they saw, heard, did in relation to a particular incident.</p>
<p>Warrant Officer Damage is the FDCI. He knows a lot about fires on board ships.</p>	<p>Petty Officer Wilkins was on duty on the ship and led the damage control efforts.</p>

Although the process of being called as a witness may be intimidating for those experiencing it for the first time, some witnesses do find it can be a cathartic or therapeutic process and find giving evidence to be beneficial. However, if the COI relates to a traumatic event/s or if the Court is concerned about the mental wellbeing of a witness, the President should consider the following —

1. Seeking guidance from an NZDF psychologist regarding appropriate measures to ensure the witnesses wellbeing during an interview. This may include advice on things to look out for, what tone to use and letting the witness know (before and after the interview has concluded) that there are support services available and providing a name of someone they could contact.
2. Consider whether you will allow a support person to be present with the witness (note the support person cannot speak on behalf of the witness and/or give any evidence).
3. Consider the environment in which you conduct the interview in order to make the witness more comfortable. Some practical steps you can take are—
  - (a) Conduct the interview in civilian attire/remove the formality of rank.
  - (b) Conduct the interview in a place that is familiar to the witness or if the event occurred in a particular place, conduct the interview away from that area.
  - (c) Allow regular breaks.

## PART 2 – EXPERT WITNESSES

It is important not to confuse the roles of a Court member appointed to the Court for their specialist knowledge, and the expert witness who provides testimony to the Court. Each has a distinct function.

Expert Court member	Expert witness
<p>Hears the evidence along with their fellow Court members and makes the findings, based upon this evidence, produced to the Court.</p> <p>The <b>benefit</b> of a specialist member is that it assists the Court with identifying and understanding relevant evidence produced by a witness.</p> <p>The <b>risk</b> is that undue reliance may be placed upon this member's knowledge, without a witness producing the evidence to the Court.</p> <p>The President in particular needs to be alert to ensure that all findings are based upon evidence that is produced to the Court by a witness, and not by the Court member.</p>	<p>The expert witness is not a Court member, therefore, has none of the rights of the Court, but all the protections of a witness.</p> <p>The role of the expert witness is simply to provide evidence to the Court for the Court's consideration.</p> <p>At the outset, an expert witness needs to identify their expertise and specialisation and the information upon which the evidence is based.</p> <p>An expert may either give oral evidence based on the evidence as to fact they have heard or, in some cases, may produce a report for presentation to the COI.</p> <p>A report would often be desirable where the witness has conducted investigations outside the COI, for example, for an air accident investigator.</p>

**It is important to recognise that the members of a COI cannot produce the evidence on which the COI relies to make its findings. That evidence must be produced by a witness, either an expert witness or a witness as to fact.**

It follows that, where there are insufficient experts in the particular discipline (for example, diving or tanker operations) to provide both a member of the COI and an expert witness, the priority is to provide an expert witness. Regardless of expert Court members or expert witnesses, the Court will need to make its own findings based on the evidence. The Court may draw a different conclusion than an expert, for example, by giving greater or lesser weight to a witness than the expert has.

**It is usually preferable for the expert witness to be called after all the witnesses as to fact. The expert testimony may prompt further questions for the Court and this may trigger a requirement to recall witnesses as to fact, or call additional witnesses.**

Further material on expert witnesses in specific cases is at [Section Five – Topic-specific Modules](#).

## PART 3 – OBTAINING EVIDENCE

As part of its inquiry, the Court will probably want to admit a lot of documentary evidence and possibly also some real evidence.

The COI can conduct site visits to try and better understand the causes of an incident. This can be useful in understanding factors such as distances, weather or steepness of ground. Remember that evidence must be produced by witnesses; it is most useful to take a witness to site visits that can explain the incident and produce documentary evidence such as photographs. Photographs taken by witnesses and produced as documentary evidence should be treated as original exhibits.

It is often useful to have plans/charts/photographs produced by a witness early on that can then be used as visual aids for subsequent witnesses. If the Court wants the witness to mark on the exhibit, that needs to become a new exhibit, so be prepared to have fresh copies available.<sup>24</sup>

In some cases, the Court might want an expert witness to prepare a report, for example, a crash investigation report, human factors/psychological report, engineering report etc, if such a report has not already been prepared.

### How do you get that material in front of your COI?

- Documentary/real evidence must be admitted as exhibits (including orders).
- All exhibits must be produced by witnesses.
- Check which witness can produce which exhibit. That is, does the witness have some responsibility for, or knowledge of, that exhibit?
- The value of admitting a certified copy of a document is so the document is not lost to the unit or to any other inquiry. It is the President's role in that case to certify a copy of the document in the requisite form. See the examples at [Annex 4-G](#) and [Annex 4-H](#) and in the proforma ROP format at [DM 69 \(2 ed\) Volume 1](#) Chapter 11, Annex A.

24 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.46–11.2.48.

## PART 4 – CALLING A WITNESS AND ADMINISTERING THE OATH AND CAUTION

It's very important that witnesses are properly sworn in and cautioned before they start to give evidence.<sup>25</sup> If this is not done, it may affect the reliance you can place on their evidence. Some notes and references follow—

- Special rules apply to a child witness.
- The President must give the oath/affirmation followed by the caution. Both are to be recorded in the ROP.
- If there is a short adjournment, the witness should be reminded that they remain under caution. A longer adjournment would warrant the process being repeated.
- It's also important that witnesses understand a bit about the process ([Annex 4-C](#) flowchart). This will put them at ease, which in turn tends to make them better witnesses.
- The President's aide-mémoire at [Annex 4-D](#) may assist you with calling a witness.
- The wording for the oath ([DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.34–11.2.37), affirmation (paragraph 11.2.38) and caution (paragraph 11.2.40) are at [Annex 4-D](#) and [Annex 4-E](#).
- Several example witness statements are at [Annex 4-F](#) and [Annex 4-G](#).
- An example witness statement where a photo is produced is at [Annex 4-H](#).
- An example of an exhibit certification of a photo of a large object that cannot be retained with the record is at [Annex 4-I](#).
- An example of a true copy of a document exhibit is at [Annex 4-J](#).

25 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.31 and 11.2.34–11.2.41.



## PART 5 – RECORDING THE EVIDENCE

A COI must record, or arrange to be recorded, in writing the evidence of every witness—<sup>26</sup>

- in a narrative form as nearly as possible using the words of the witness, or
- if the Court considers it expedient, in the form of questions and answers.

Each witness may read over the record of their evidence and may ask that any necessary corrections be made to it. They must initial all alterations and must then sign the record of their evidence at the end and initial each page of it.<sup>27</sup>

Before conducting an interview, it is prudent to conduct a few checks to ensure the interview is recorded and of a sound quality that will enable it to be accurately and quickly transcribed.

- Test the recorder in the environment you plan to use it. If outdoors, there will often be too much background noise.
- Speak slowly and clearly and encourage witnesses to do the same.
- Make sure that any classified evidence is recorded on a separate recorder that is classified at that level. The recorder must be secured in an appropriate container and the person transcribing it must hold an appropriate security clearance.
- If travelling or on deployment, ensure that you have the capacity to carry or transmit the recording/recorder, in accordance with its classification. You may require diplomatic clearances.
- Reference the checklist guide at [Annex 3-A](#), and the Summary of Principles and Best Practice in Planning at [Annex 4-B](#).

<sup>26</sup> [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.44–11.2.45.

<sup>27</sup> [AFDA](#) s 200K(5)(6).

## PART 6 – QUESTIONING TECHNIQUES

There are two different types of questions—

Open	Closed
<b>Open questions</b> tend to commence with words like ‘what’, ‘who’, ‘when’, ‘how’, ‘where’ and ‘why’. They do not suggest an answer.	<b>Closed questions</b> are much tighter in their construction and will often suggest an answer, for example, ‘Did you see the chicken cross the road?’ Compare this with an open question, ‘Who did you see crossing the road?’ or ‘What was the chicken doing when you saw it?’

### There are advantages and disadvantages to each question type—

**Open questions** give more space for the witness to give their version—they tend to produce more candid and complete evidence. However, witnesses may ‘ramble’ off the topic of most importance to the COI.

**Closed questions** allow a COI to focus the witness’s testimony. The danger is that the witness or the COI may lose sight of something that is relevant and/or the COI may suggest answers to the witness rather than getting the witness’s authentic perspective.

Best practice at the start of the evidence is to invite the witness to tell their story and then explore this before following up with more specific questions. These, along with all the witnesses’ testimony, should be recorded and transcribed verbatim.

The risk with starting with questions is that it can inadvertently inhibit witnesses from raising relevant information, as the witness may incorrectly conclude that they need simply respond to your questions rather than volunteering information.

At all costs, avoid the outcome where you hear later that a witness with valuable information says, ‘*They didn’t ask me about it, so I didn’t think to tell them*’ or ‘*I didn’t think that’s what they wanted to hear*’, as they felt influenced or guided by questions from the Court.

It is also helpful at the end of the statement to ask the witness if they have anything else to state.

Good practice is then to ask the witness to step out, and for the Court to review the testimony and ensure all relevant evidence and exhibits have been produced, before releasing the witness. If further evidence is required, remind the witness they are still under oath and caution—or if there is a delay in recalling any witness, reissue the standard oath and caution.

## PART 7 – RECOGNISING EVIDENTIAL PRIVILEGE

Although a COI is not bound by the ordinary rules of evidence, it must comply with the law of evidence concerning privilege.<sup>28</sup>

The law of privilege is complex. Therefore, the safest course is for the President to seek legal advice whenever a question of privilege is recognised by the COI or is raised by a witness.

As a guide, the issue of privilege most commonly arises in COIs in the following types of situations, where a witness claims—

- the right against self-incrimination;
- medical privilege; or
- privilege on the basis that the information was given in confidence.

### Consider this scenario

You are inquiring into a loss of valuable and attractive stores. An earlier witness says he thinks he saw some of the items in Able Stores Accountant T. Leaf's cabin in PHILOMEL, but they are not there now. You call ASA Leaf and ask him what he knows about the stores. He clams up and claims the privilege against incrimination. What should you do?

Witnesses have the privilege against self-incrimination and this is specifically brought to their attention in the caution given by a COI. However, that privilege only arises if their answer 'would be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment' ([Evidence Act 2006](#) s 60).

In this case, the evidence raises a possibility that ASA Leaf has committed an offence in relation to the lost stores. The privilege should be granted and the COI should not press Leaf to answer the question. However, the COI would be entitled to note the earlier evidence and Leaf's claim of privilege in its report. It can be expected that the COI would recommend the matter be investigated by the Joint Policing Unit.

### NOTE

- The Court should alert the Assy Auth to any apparent offending at the earliest opportunity and not wait until the completion of the inquiry.
- Any evidence given by ASA Leaf to the COI cannot be used in evidence against him in any proceedings, refer to the [AFDA](#) s 200S.

28 [DM 69 \(2 ed\) Volume 1](#) Chapter 6, Section 4 on evidential privilege.

### Consider this scenario

One of your TOR requires you to determine where Airman A was on the night before an incident. There is a suggestion that he was drinking with a crowd at the Junior Ranks' Club. You call Airwoman B as a witness. She tells you that she does know where Airman A was, but she does not want to say because it is embarrassing. Does a question of privilege arise?

**Embarrassment does not of itself give rise to privilege of self-incrimination.**

You call a military doctor to give evidence about the injuries suffered by a soldier in an incident. The doctor refuses to answer your questions on that subject, claiming doctor-patient privilege. Is that privilege available in a COI?

Medical privilege under the [Evidence Act 2006](#) s 59, only applies in criminal proceedings. It does not apply to a COI. In a COI, a doctor would have to rely on the overriding discretion to exclude confidential information in the [Evidence Act](#) s 69. However, the [Health Act 1956](#) s 22C(2), provides that a doctor may disclose health information to any member of the NZDF for the purposes of administering the [AFDA](#) or the [Defence Act 1990](#).

In *Chief Executive of Department of Child, Youth and Family Service v W* [2001] NZFLR 389, Judge Adams held that, where the information is sought within the terms of the particular paragraph of section 22C(2), it 'can be supplied regardless of any medical privilege'. It follows that the President has legal authority to require the doctor to answer the questions mentioned in the scenario and no question of privilege arises.

However, specific advice would need to be sought from Counsel Assisting or another NZDF legal officer.

### Consider this scenario

Your inquiry is looking into sexual harassment and bullying in a particular unit. You call Lieutenant Aroha who is an anti-harassment advisor (AHA) in the unit. You ask her whether she has received any complaints of sexual harassment or bullying. She says that she has, but she doesn't want to give you details because she received the information in confidence. Does a question of privilege arise here? What should you do?

The COI should consider the application of the [Evidence Act 2006](#) s 69. The President would need to consider whether the interest in the disclosure of the information is outweighed by the interest in preventing harm to the relationship of trust and confidence between AHAs and members of the NZDF.

When considering whether to give a direction under s 69, the President must have regard to the—

- likely extent of harm that may result from the disclosure of the information;
- nature of the information and its likely importance to the inquiry;
- nature of the inquiry;
- availability or possible availability of other means of obtaining evidence of the information;
- fact that evidence before a COI is protected from public disclosure by law; and

- sensitivity of the evidence, having regard to—
  - » the time that has elapsed since the information was received;
  - » the extent to which the information has already been disclosed to other persons; and
  - » society's interest in protecting the privacy of victims of offences, in particular, victims of sexual offences.

#### **NOTE**

Specific legal advice should be sought from Counsel Assisting or another NZDF legal officer.

## PART 8 – ANALYSING THE EVIDENCE

A COI is not bound by the ordinary rules relating to the admissibility of evidence and, therefore, may admit as evidence any matter of hearsay or any other matter that would be inadmissible in law.<sup>29</sup> If the Court admits evidence of that kind, it is for the Court to determine the weight to be attached to that evidence.

A COI must put any questions to a witness that it considers desirable to—

- Test the truth or accuracy of any evidence given by the witness.
- Elicit any further information that may be necessary to determine the truth.<sup>30</sup>

**In all cases, when analysing evidence, the Court should also assess—**

### Weight of evidence

- Value of real evidence, for example, an object (which is usually the most reliable), versus the oral testimony of a witness.
- Value of documentary evidence (provided it is not fabricated after the event).
- What reasons might there be not to find a witness reliable? Recall the four testimonial infirmities mentioned in Level 1 e-learning, Module 3—
  - » **Insincerity** — is the witness lying?
  - » **Ambiguity** — is what the witness is telling you open to different interpretations?
  - » **Faulty perception** — could the person be mistaken, for example, was the light bad?
  - » **Faulty memory** — has the witness forgotten what they saw, and is telling you what they think here?

To test for reliability, the Court can ask questions of this, or other witnesses, and look for consistency between witnesses and with real evidence. Unreliable evidence can generally be disregarded in favour of the more reliable evidence, however, you need to be clear in the report why you favoured one over the other.

### Sufficiency of evidence

Is the evidence obtained sufficient to make a solid finding on each TOR?

Or does more evidence need to be gathered before there is an evidential basis for a finding?

The finding needs to be established on the balance of probabilities—ie more likely than not.

29 [AFDA s200K\(1\)](#).

30 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.42–11.2.43.

## PART 9 – CRITICISM OF SUPERIOR OFFICERS

**AFDA s 200M states—**

### **Procedure if conduct of superior officer may be in question**

1. The president must adjourn the court of inquiry and report to the assembling authority if at any time it appears to the court that the conduct of an officer or a warrant officer who is senior or superior in rank to a member is, or is likely to be, called into question in the course of the inquiry.
2. On receiving the president's report, the assembling authority must consider the matter and, if satisfied that the conduct of the person is or is likely to be called into question, may dissolve the court and assemble a new court, having regard to the requirements of section 200D.
3. If the assembling authority does not dissolve the court, the assembling authority must direct it to continue its inquiry even though the conduct of an officer or a warrant officer senior or superior in rank to a member is, or is likely to be, called into question.
4. Subsection (3) does not affect the power of the President to make a further report under subsection (1) if the evidence justifies that course of action.

Assy Auths can mitigate the risk of this situation occurring by anticipating who may likely be affected by a COI during the pre-planning stage, particularly concerning the junior member's rank and seniority. This will assist with determining the ranks required for the composition of the Court.

The Court should also consider this aspect during the initial planning phase, and identify to the Assy Auth, at the earliest stage, any potential witnesses that may be senior or superior in rank to the Court.

**Throughout the conduct of the inquiry, the Court, and in particular the President, must be alert to the seniority of witnesses, particularly in relation to the more junior members of the Court.**

Where a report is made to the Assy Auth, the President should record in the ROP the fact of the report and the Assy Auth's direction.<sup>31</sup>

31 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.49–11.2.51.

## PART 10 – NATURAL JUSTICE RIGHTS

**AFDA s 200N states—**

### **Rights of a person who may be affected by inquiry**

1. If at any time it appears to an assembling authority or to a court of inquiry that an inquiry affects or is likely to affect the character or the reputation of any person (whether or not the person is subject to this Act), the president must—
  - a. ensure that the person is given adequate notice of the time, place, date, and nature of the inquiry; and
  - b. give the person a reasonable opportunity to exercise the rights set out in subsection (2).
2. The rights referred to in subsection (1) are as follows:
  - a. The person may read or have read or played back to him or her any evidence that has already been given:
  - b. The person may require any witness who has already given evidence to be recalled to enable him or her to question the witness:
  - c. The person may be present during the proceedings or the remainder of the proceedings (as the case may be) while the court is hearing evidence, and may question any witness who gives evidence that he or she considers affects his or her character or reputation:
  - d. The person may give evidence himself or herself, or call any witness to give evidence, to rebut or explain any evidence that has been given that he or she considers affects his or her character or reputation:
  - e. The person may seek and, if the exigencies of the case permit, must be granted an adjournment to enable him or her to obtain advice:
  - f. The person may be legally represented at the inquiry if the president approves.
3. If the person notifies the court that he or she does not wish to exercise the rights set out in subsection (2), the president must note the record of proceedings to that effect.
4. This section does not apply to an inquiry under section 201 into the absence of a member of the Armed Forces.

The person with s 200N rights does not need to exercise those rights immediately. In providing a reasonable opportunity to exercise those rights, the COI should notify individuals with 200N rights when their opportunity to exercise those rights may soon end (ie the COI is drawing to a close).

Ensuring that [AFDA s 200N](#) (natural justice rights) are afforded is a critical feature of COI. Any failure to observe the rules of natural justice can have serious consequences and, therefore, Presidents and members must be watchful of this issue when conducting COIs.



## The President must afford AFDA s 200N (natural justice rights)—

- If, at any time, it appears to the Assy Auth or the Court that the inquiry affects or is likely to affect the character or reputation of any person (whether or not that person is subject to the [AFDA](#)).
- These [AFDA](#) s 200N rights are set out in the above reference<sup>32</sup> and at [Annex 4-L](#). They comprise two parts. The President must—
  - » Ensure that the person is given adequate notice of the time, place, date and nature of the inquiry.
  - » Give the person a reasonable opportunity to exercise the rights set out in subsection (2).

The President should read out the rights verbatim and may also wish to provide a written copy to the witness to read and consider.

### Regardless, the President must take care to note in the ROP—

- that the rights have been afforded to the specified person (in the statement of compliance with AFDA s 200N);
- the rights, in detail, that the person has decided to exercise and how those rights were afforded; and
- if the person notifies the Court that they do not wish to exercise those rights.

The transcript of the witness testimony should record the detail of the affording of the rights and the response. Where any adverse finding or comment is made, the report should reflect that the rights were afforded.

The requirement to afford these rights may be identified by the Assy Auth or by the Court at any time. However, most frequently it will occur—

- at the outset by the Assy Auth, given the apparent circumstances;
- by the Court, in the planning stages, or during the conduct of the inquiry (either through evidence of another witness or during the evidence of the affected witness).

In some cases, however, it may not become apparent to the Court until it is preparing its findings and about to draft the report. Even so, the Court should call or recall the relevant witness and ensure that the [AFDA](#) s 200N rights have been afforded.

### Regardless of the stage of the proceedings, the key is to ensure the rights are afforded.

Failure to do so could result in a COI having to be reopened to rectify the omission or, in extreme cases, it could result in a judicial review.

#### NOTE

Legal advice should be sought in all cases concerning deaths or serious injury, as there are frequently complex legal considerations (Section Five, [Module D: Death and Serious Injury Inquiries](#)).

32 [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.54.

## PART 11 – LEGAL REPRESENTATION

### There is no right to legal representation.<sup>33</sup>

Legal representation is only permitted upon request, and if the President approves, to personnel who are affected or may be affected by the inquiry and who are, therefore, afforded [AFDA](#) s 200N (natural justice rights).

In making this decision under [AFDA](#) s 200O as to whether a person affected by the inquiry may be legally represented, the President **must** take into account the following matters, which are attached at [Annex 4-L](#)—

- The seriousness of any allegations made against, or any potential penalty that may be imposed on, that person.
- Whether any questions of law are likely to arise.
- The capacity of that person to present their own case.
- Any procedural difficulties that are likely to arise.
- The need for reasonable speed in completing the inquiry.
- The need for fairness as between that person and all persons who may appear before the Court.

A decision not to grant legal representation may be subject to judicial review by the High Court. It should be taken after receiving legal advice from Counsel Assisting or a NZDF legal advisor. If in doubt, the President should err in favour of granting legal representation.

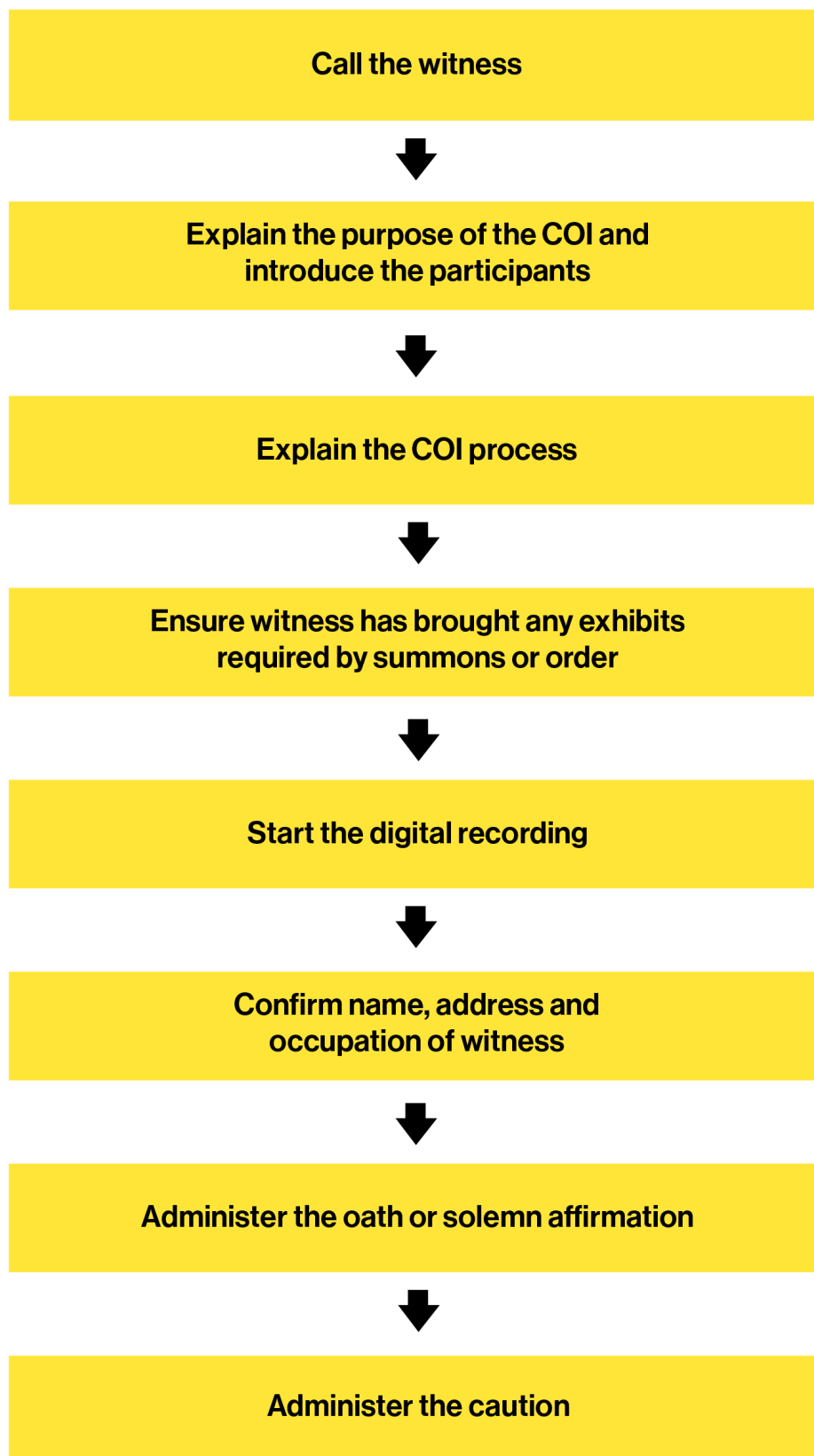
If a party before a COI is legally represented, Counsel Assisting **must** be appointed, and the Counsel Assisting will need to take more of a leading role (subject to the authority of the President) to ensure that the proper procedure is followed and that the external counsel does not dominate the COI.

The appointment of counsel to represent a party is a clear warning signal that the Report of a COI may be legally challenged; it follows that Counsel Assisting, the President and members will need to be particularly scrupulous in complying with procedural rules, especially natural justice.

33 [DM 69 \(2 ed\) Volume 1](#) paragraph 11.2.56.

## **Annex 4-C**

### **Flowchart for Conduct of a Court of Inquiry**



## Annex 4-D

### President's Aide-mémoire for Calling a Witness

#### **Invite witness to be seated before the Court.**

**President:** 'We are assembled as a Court of Inquiry to collect evidence relating to *[insert subject of inquiry]*. There are some formalities that we need to go through, but before I do that, I will explain to you how the process works.'

#### **President introduces themselves and the other members of the COI.**

**President:** 'It is our job to hear all the evidence and answer the terms of reference that we have been given. That means we need to ask you some questions. The evidence has to be given under oath, or you can make a solemn affirmation instead if you prefer.'

*[If Counsel Assisting has been appointed.]* 'We are assisted by *[name of Counsel Assisting]*. They are a lawyer and it is their role to advise us on law and procedure. They may also ask you questions to help clarify things for us.'

#### **President confirms witness' understanding.**

**President:** 'It is important that you realise that this Court of Inquiry is focused on finding out what happened so we can try to prevent a repeat. It is not a disciplinary body. The evidence you give cannot be used against anyone in any subsequent proceedings. It is not official information and, therefore, is not subject to release under the [Official Information Act 1982](#). It can only be released under explicit provisions of the [Armed Forces Discipline Act 1971](#). I will also give you a caution that you do not have to answer questions that might incriminate you. Do you understand that?'

**If witness was required to bring one or more exhibits by the summons, or order requiring attendance, the President confirms that the witness has brought those exhibits before the Court. The President then indicates to witness that they will now start the digital recording and does so.**

**President:** 'Will you please state your full name, address and occupation.'

**President:** 'Do you wish to take the oath or affirmation?'

**President administers the oath or affirmation in the proper form, as prescribed by [DM 69 \(1\)](#) paragraphs 11.2.34–11.2.39. The standard Christian oath or affirmation procedure is on following page. Different procedures apply for persons of Jewish faith, those who wish to take the Scots form of the oath, and children.<sup>34</sup>**

34 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.34–11.2.39.

	Oath	Affirmation
<b>Preliminary</b>	Witness removes headdress, unless religious objection to this. Witness takes the Bible, Old Testament or New, in their right hand.	Witness raises their right hand.
<b>President</b>	'Do you swear by Almighty God, that the evidence you will give before this Court of Inquiry will be the truth, the whole truth and nothing but the truth?'	'Do you solemnly, sincerely and truly declare and affirm that the evidence you will give before this Court of Inquiry, will be the truth, the whole truth and nothing but the truth?'
<b>Witness</b>	'I do.'	'I do.'

**President confirms the witness' understanding.**

## Annex 4-E

### Witness Caution

**After a witness has been sworn or affirmed, the President is to caution the witness as follows—<sup>35</sup>**

‘Before you give evidence, I must inform you that you may refuse to answer any question the answer to which may tend to incriminate you or to expose you to any penalty or forfeiture. It is for you to raise the objection and for the Court to decide whether your objection is well-founded and whether you may therefore refuse to answer the question.’

The President is to ensure the witness understands the caution and is to record that the caution has been given.

The giving of the caution is to be recorded in the ROP in the format prescribed in [DM 69 \(2 ed\) Volume 1](#) Chapter 11, Annex A as follows—

#### **WITNESS 1**

[state name, address, occupation and service particulars] having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

[Followed by text of statement].

35 [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraphs 11.2.40–11.2.41

## Annex 4-F

### Example Format for Witness Interview

#### WITNESS 1

*Leading Seaman Combat Specialist William Rocky Te Vaka C1107896 of HMNZS WELLINGTON, naval rating*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

**Q1:** Leading Seaman Te Vaka, what was your job on the RHIB on the day of the collision?

**A1:** I was the coxswain, sir.

**Q2:** Can you tell the Court what happened leading up to the collision?

**A2:** Well sir, Dinger Bell and me—that is, I mean Able Communications Operator Bell and me—were detailed off to do a stores run to shore to pick up some spare parts for the Engineer. As I say, I was the coxswain and Dinger was the bowman. It was a bit of a rush job, because the stokers needed these parts to fix some part of the main engines that was going to stop us sailing the next day. Anyway, we headed away from the ship towards town at about 0900...

**Q3:** What speed would you say you were doing through the water?

**A3:** Ah, once we got clear of the ship, probably about 20 knots, sir.

**Q4:** Thank you. So what happened next?

**A4:** Umm, we were just coming round the point heading into the main channel into the port. Everything looked good. I couldn't see any obstructions. Then, smack, we hit something pretty hard. It felt like whatever it was had hit us on the starboard bow, because it pushed me right off course and we almost stopped dead. I thought 'shit, what the f... was that?'. Excuse me sir. I looked over the side and I could just see this big white thing floating just under the surface of the water. It looked like a shipping container like you get sometimes. That's what I think it was.

**Q5:** What happened to ACO Bell?

**A5:** Ah, sir, he got thrown aft by the impact. Not too hard though. He was OK. Just a bit 'what the f...', you know sir.

**Q6:** What was the weather like?

**A6:** Typical day in the tropics, sir. It was fine and sunny, about 28 degrees I think. There was no swell to speak of.

...

**Q21:** Thank you, Leader. Is there anything else that you think this COI should be aware of in relation to this incident?

**A21:** Ah, no sir.

**[Signature of witness]**

**[Date]**

## Annex 4-G

### Example Witness Statement

#### WITNESS 2

*Able Communications Operator Matthew Graham Bell W1120823 of HMNZS WELLINGTON, naval rating*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

**Q1:** ACO Bell, what was your job on the RHIB on the day of the collision?

**A1:** I was the bowman, sir.

**Q2:** Had you done that duty before?

**A2:** Yes sir. Three or four times.

**Q3:** Can you tell the Court what happened leading up to the collision?

**A3:** Sir, I got in the boat with Rocky, I mean LSCS Te Vaka. We had to do a stores task, so we had to take the RHIB into port. Rocky was in a real hurry to get away...

**Q4:** What time was that?

**A4:** I don't know sir. It was a while after colours, but...probably around 9 o'clock thereabouts.

**Q5:** And what happened?

**A5:** Well sir, we had to go round a point to enter the port. We were going pretty quickly I thought. And we went really close to the land. I could see some breakers on the reef nearby. Next thing I knew we hit and I got thrown backwards. I think we hit the reef.

**Q6:** What speed would you say you were doing through the water?

**A6:** Ah, once we got clear of the ship, probably about 30-40 knots, sir.

**Q7:** Anything else you can tell us?

**A7:** Ah, not really sir.

**Q8:** What was the weather like?

**A8:** It was a nice day, sir. Warm and sunny. The sea was very smooth.

...

**Q15:** Thanks ACO. Is there anything else you think we need to be aware of relating to this incident?

**A15:** Umm, well I don't want anyone to think that I don't have confidence in Leading Seaman Te Vaka as a coxswain, cos I do.

**Q16:** OK, thank you ACO Bell. That's all for now.

**[Signature of witness]**

**[Date]**



## Annex 4-H

### Example Witness Statement Where a Photograph is Produced

#### WITNESS 3

*Chief Petty Officer Marine Technician Alison Mary Spanner R9997823 of HMNZS WELLINGTON, naval rating*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

**Q1:** Petty Officer Spanner, what is your appointment in HMNZS WELLINGTON?

**A1:** I am the Deputy Engineering Officer, sir. I am responsible for the maintenance of the ship's boats.

...

**Q6:** Did you take a photograph of the damaged RHIB once it had been hoisted back inboard?

**A6:** Yes sir.

**Q7:** Could you now produce that as an exhibit?

**A7:** Sir.

**Q8:** That is admitted as Exhibit 4-I.

...

**[Signature of witness]**

**[Date]**

## Annex 4-I

### Exhibit Certification of an Object that has Been Photographed for Production as an Exhibit

#### EXHIBIT 4-I



*I have certified that I have compared the exhibit  
with this photograph and that it is a true likeness.*

*ABC  
LTCDR, RNZN  
President*

"G"

UNCLASSIFIED

Page 1 of 3

File No. 5555

Copy No. of MAY 14

JOIC

RNZAF BASE WOODBOURNE

OPORD JOIC EX VINTNER'S LUCK

REF:

A. CO JOIC Briefing 30 Jan 14

Time Zone Used throughout this OPORD: Mike/NZDT

1. Situation.

a. Joint Officer Induction Course (JOIC) will conduct an unwarmed navigation exercise for OFFCDTS and MIDS commencing at a location TBD within 50km of BLENHEIM, IOT develop and test land navigation skills acquired during formal classroom training and promote leadership and resilience among the OFFCDTS and MIDS.

2. Mission.

3. Execution.

a. JOIC OFFCDTs and MIDS are to participate in EX VINTNER'S LUCK IOT develop and test land navigation skills.

a. Intent.

(1) Purpose. To conduct EX VINTNER'S LUCK land navigation exercise, developing and testing OFFCDT and MID skills.

(2) Key Tasks.

(a) Estb JOIC planning team, arrange accommodation, facilities and travel.

(b) Med spt to be sought from WB MTC.

(c) Training staff BPT provide supervision of OFFCDTs and MIDS.

(3) Endstate. Land navigation exercise safely completed with all OFFCDTs and MIDS returned to JOIC base loc.

1. LINTON b. Concept of Ops. This activity will be conducted in 3 phases including a prelim and sequel.

MAJ President

(1) Prelim Planning Now - 10 Jun 14

(a) Estb JOIC planning team.

(b) Conduct recce IVO BLENHEIM and surrounding vineyards.

(c) Coord accom/rats/ travel from WB to loc for commencement of EX VINTNER'S LUCK.

(d) Req med spt from WB MTC.

(e) Develop health and safety plan.

(2) Phase 1. Admin Move to start location for EX.

(a) All OFFCDTs and MIDS assemble for loading on to JOIC truck NLT 0700 hrs 19

UNCLASSIFIED

## Annex 4-K

### Rights of Person Who May be Affected by Inquiry

The following applies at any time it appears to an Assy Auth or to a COI that an inquiry affects, or is likely to affect, the character or the reputation of any person (whether or not the person is subject to the AFDA)—<sup>36</sup>

The President must	Exception
Ensure that the person is given adequate notice of the time, place, date and nature of the inquiry, and a reasonable opportunity to exercise the rights set out below.	The inquiry is under the AFDA s 201, into the absence of a member of the Armed Forces.

The rights of a person who may be affected by inquiry are as follows—

- The person may read, have read or played back to them any evidence that has already been given.
- The person may require any witness who has already given evidence to be recalled to enable them to question the witness.
- The person may be present during the proceedings, or the remainder of the proceedings (as the case may be), while the Court is hearing evidence and may question any witness who gives evidence that they consider affects their character or reputation.
- The person may give evidence themselves, or call any witness to give evidence, to rebut or explain any evidence that has been given that they consider affects their character or reputation.
- The person may seek and, if the exigencies of the case permit, must be granted an adjournment to enable them to obtain advice.
- The person may be legally represented at the inquiry if the President approves.

The President is to note in the ROP which rights the person has decided to exercise and how those rights were afforded. If the person notifies the Court that they do not wish to exercise their right, the President must also note the ROP to that effect.

36 [DM 69 \(2 ed\) Volume 1](#) paragraphs 11.2.52–11.2.55.

## Annex 4-L

### Legal Representation by a Person Affected by Inquiry

When a person is likely to be affected by the inquiry, the person may apply for the President's approval to be legally represented at the inquiry.

When this happens, the President must take into account the following matters in determining whether that person should be legally represented at the inquiry<sup>37</sup>—

- The seriousness of any allegations made against, or any potential penalty that may be imposed on, that person.
- Whether any questions of law are likely to arise.
- The capacity of that person to present their own case.
- Any procedural difficulties that are likely to arise.
- The need for reasonable speed in completing the inquiry.
- The need for fairness between that person and all persons who may appear before the Court.

### Calling of witness by person affected by inquiry<sup>38</sup>

If a person who is affected or likely to be affected by an inquiry tells the President that they wish to call a witness, the President must—

- direct that witness to attend under [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.29 unless it is impracticable to do so; and
- make any necessary arrangements for that witness to attend the proceedings of the COI, unless it is impracticable to secure the witness's attendance.

If it is impracticable to secure the attendance of a witness, the President must note that fact in the ROP.

If the attendance of a witness is requested under [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.54d and the COI is satisfied that the attendance of that witness is not properly required by that person, any cost incurred by the Crown in procuring the attendance of the witness may be charged to, and recovered as a debt due by, the person affected or likely to be affected.

<sup>37</sup> [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.56.

<sup>38</sup> [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.57–11.2.59

## Module C: Write a Court of Inquiry Report

In the [MD 634](#), the Assy Auth directs a Court to collect and record evidence. In general, the Assy Auth will also direct the Court to report and comment.<sup>39</sup>

The format for the Courts Report is at [DM 69 \(2 ed\) Volume 1](#) Chapter 11, Annex A.

### This module has three parts —

- **Part 1** – Why is Good Writing Important?
- **Part 2** – What Does Good Writing Mean?
- **Part 3** – Examples of Bad and Good Report Writing.

---

39 [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraphs 11.2.62–11.2.75.

# PART 1 – WHY IS GOOD WRITING IMPORTANT?

## It strengthens your findings and recommendations

A well-written report is likely to be more persuasive. This is a question of form and substance. This means your findings must be supported by evidence cited in the report. If your draft findings adversely affect anyone's reputation or character, you must give them a chance to make a submission on those findings and take it into account before you finalise the report. Submissions can be invaluable in correcting an unintended mistake. A well-written report will document that process—it can save a lot of time and angst later on.

## It demonstrates your professionalism

For most officers, the Report of a COI is the most important document you will ever write. The findings must be sound and supported by evidence, and the report must be accurate, logical and easily understood by a broader audience. A poor quality report will reflect badly on the NZDF. It could result in the inquiry being challenged or reopened and may jeopardise the expeditious implementation of remedial action.

**A COI Report is a piece of formal writing—it must be written like an official letter, not a minute or an operations order (OPORD).**

## PART 2 – WHAT DOES GOOD WRITING MEAN?

### Plain English

- Write for your audience. A wider audience than military personnel may read your report—therefore, you need to avoid military jargon. Your report also needs to be comprehensible in the future.
- Use active, rather than passive, verbs whenever possible, for example, ‘he did it’ rather than ‘it was done by him’.
- Keep sentences as short as possible, with one idea per sentence.
- Do not use acronyms unless they have been defined.
- If you are using a lot of acronyms, provide a glossary at the start of the report.
- The report should follow a logical structure. This will often be chronological, but not always.

- » What weight did you give to different pieces of evidence?
- » Are you sure of your finding, or is it ‘on the balance of probabilities’?

**Passive, informal voice:** *‘It is considered that the evidence is reliable. So we think that...’*

**Active, formal voice:** *‘The Court finds the evidence reliable. We find that...’*

### Evidence-based

Make sure your findings are supported by the evidence. If you have had to resolve a conflict in the evidence, indicate that and how you’ve resolved it.

- If members of the Court disagree on the finding to be made, make note of it.
- Every finding must be accompanied by a footnote, which pinpoints the evidence supporting that finding (for example, Witness 23, Q34).
- If you call a witness more than once, differentiate between their statements by adding the date (for example, Witness 23, 24 June 2014, Q34).

This is supported by the evidence of Lieutenant M.E. Black, RNZN, who stated that he saw Corporal McLaren in the driver’s seat of the truck when it left the unit that morning.<sup>1</sup>

<sup>1</sup> Witness 23, Q34.



## Comprehensive

Your headings should address each TOR.

- This does not mean you need to copy the TOR exactly. Sometimes one heading can sum up your findings for two or more TOR. The heading should be concise and clear—it should not be a sentence.
- Many COIs have begun to use diagrams and images within their reports in recent years. This is best practice—a picture really can ‘paint a thousand words’.
- You should identify key recommendations under a sub-heading.

These are recommendations that require priority attention to prevent an incident from reoccurring. Other lower priority recommendations should follow these under a separate sub-heading.

- If your report must contain classified information, consider whether that information can be isolated in a classified annex. An alternative is to record, at the commencement of each paragraph, the relevant security classification. This will assist with any subsequent redactions.
- If your report is more than five pages long, you should prepare an Executive Summary.

## Where can I get help?

[DM 69 \(2 ed\) Volume 1](#) Chapter 11, Annex A, provides a proforma that you can follow for your report.

Counsel Assisting does not sign the report and is not responsible for the findings, but can provide significant help in structuring and writing the report.

## PART 3 – EXAMPLES OF BAD AND GOOD REPORT WRITING

### The bad —

**TOR 1: When, where and at what time did the incident occur (enclose maps and photographs if available)?** 1

1. The incident took place at approx 1045 hrs on 19 Jun 14 2 at Old Renwick Road near 3 BLENHEIM. 4

**TOR 5: Who was driving the truck?**

15. On balance, we think 5 that the truck was being driven 6 by CPL MCLAREN 2 3, but some evidence suggested it was SGT GUNNY. 7

**TOR 6: Describe the driver's activity in the 24 hours prior to the incident.**

16. The Court was told by one of the witnesses, CPL A.F. FRAME T1109998 AVMECH, that he was pretty sure CPL MCLAREN had an early night the night before doing the driving task, but 'the lads' were at the pub and CPL FRAME was 'hammered', although when the Court considered the other evidence such as the ROs 8 issued by the OC JIOT Det and the oral evidence given by the OC, SQNLDR BOSSMANN, the Court came to the view that it was more likely that CPL MCLAREN was not at the pub that night. 9

- 1 The headings need to reflect the TOR, but should be concise and do not need to follow the wording of the TOR exactly.
- 2 Use of abbreviations is inappropriate in a COI report—this is a piece of formal writing.
- 3 Full capitalisation is the written equivalent of shouting. It is not necessary here.
- 4 There is no footnote indicating the evidence on which this finding is based.
- 5 Not formal—'The COI finds' or 'we find', not 'we think'.
- 6 Passive verb—the active form would be better plain English.
- 7 There is insufficient explanation and evidence on how the Court came to its finding. This leaves the finding vulnerable to challenge.
- 8 These abbreviations are undefined.
- 9 This sentence is far too long. It should be broken up into a series of sentences. No evidence has been indicated to support the findings.

## General

1. The inquiry was carried out over the period 21 June to 4 July 2014. Evidence from 15 witnesses was considered. **1**

## Circumstances of the incident **2**

2. The incident took place at approximately 1045 hours on 19 June 2014 at Old Renwick Road near Blenheim.<sup>1</sup> **3**

## The Driver of the Truck

15. The Court heard conflicting evidence on the identity of the driver of the truck at the time of the accident. The Court finds that Sergeant Gunny and Corporal McLaren **4** were both in the cab at the time of the crash. Sergeant Gunny gave evidence that he was in the cab and that Corporal McLaren was driving.<sup>2</sup> This is supported by the evidence of Lieutenant M.E. Black, RNZN, who stated that she saw Corporal McLaren in the driver's seat of the truck when it left the unit that morning.<sup>3</sup> This evidence was corroborated by the Operational Order (OPORD) issued for the activity by the Officer Commanding, Squadron Leader Bossmann.<sup>4</sup> The OPORD stated that Corporal McLaren was duty driver for the task. Corporal McLaren is still unconscious and, therefore, was unavailable to give evidence.

16. The Court also heard evidence from Corporal A.F. Frame T1109998 AVMECH, who is a friend of Corporal McLaren. Corporal Frame gave evidence that Corporal McLaren had told him that, although McLaren was duty driver for the truck in the OPORD, Sergeant Gunny had told him he was going to drive the truck because he was 'going to give the officer cadets a few bumps to harden them up'.<sup>5</sup> The suggestion that Sergeant Gunny was driving is supported by the evidence of V998765 Sergeant P.T. Fitness, NZAPTC, who stated that he saw Sergeant Gunny driving the truck. Sergeant Fitness was out for a run when the truck passed him on Old Renwick Road at about 50 kilometres per hour.<sup>6</sup>

17. Having heard this evidence, the Court afforded Sergeant Gunny natural justice rights under AFDA s 200N. Sergeant Gunny decided to give further evidence. He did not deny saying what Corporal Frame alleged, but stated that he was joking when he said it.<sup>7</sup>

18. On the balance of probabilities, the Court finds that Sergeant Fitness was mistaken in his identification of Sergeant Gunny as the driver and accepts the explanation given by Sergeant Gunny. The Court finds that Corporal McLaren was driving the truck when it crashed. **5**

**1** This first section complies with the proforma in DM 69 (2 ed) Volume 1, Chapter 11, Annex A.

**2** This heading will permit a COI to blend in its findings on TOR 1 with TOR 2, 'What activity was the truck being used for at the relevant time?', and TOR 3 'How many personnel were in the back of the truck?'

**3** The footnote indicates the evidence supporting this finding.

**4** These two personnel would be identified by their full Service descriptions earlier in the report.

**5** Explanation of how the COI has resolved the conflict of evidence and arrived at its finding.

**6** The footnote uses a date for the witness evidence, because the witness was called more than once.

---

<sup>1</sup> Witness 4, Q8–10; Exhibits C, D and E.

<sup>2</sup> Witness 5, 24 June 2014, Q3–7. **6**

<sup>3</sup> Witness 8, Q4–6.

<sup>4</sup> Exhibit G.

<sup>5</sup> Witness 2, Q5–9.

<sup>6</sup> Witness 9, Q4–12.

<sup>7</sup> Witness 5, 28 June 2014, Q2–6.

## SECTION FIVE – TOPIC-SPECIFIC MODULES

---

### Consider this scenario

A fire on a vessel results in the death of a sailor. His family, stricken with grief, wants to know how it happened. What caused the fire? Can action be taken to reduce risk in the future? This section deals with specific topics concerning death and serious injury, incidents involving vessels, aircraft and munitions, and the engagement with affected personnel and external agencies.

## Module D: Death and Serious Injury Inquiries

### Introduction

Module D provides guidance on some particular considerations for COIs into deaths or serious injuries.

It is mandatory to assemble a COI, without delay, in every case where a member of the Armed Forces dies or is seriously injured in the course of their duties, unless—<sup>40</sup>

- the death or injury occurred while serving in a war or taking part in armed combat operations; or
- the CO of any person subject to the [AFDA](#) considers the death or serious injury may disclose an offence under the AFDA by a person subject to that Act, and action is taken pursuant to [AFDA](#) s 102.

When a COI is assembled, the TOR are to be drafted by a legal officer and Counsel Assisting is to be appointed.

It is beneficial to consider whether it is appropriate to appoint a representative from Defence Health Directorate or the Directorate of Safety, depending on the circumstances of the death or serious injury.

In all cases, the NZDF COI Office is to be involved from the outset and legal advice is to be obtained.

### This module has three parts —

- **Part 1** – Engagement with External Agencies.
- **Part 2** – Engagement with Whānau/Family.
- **Part 3** – Miscellaneous.

---

40 [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraphs 11.2.20–11.2.22.

# PART 1 – ENGAGEMENT WITH EXTERNAL AGENCIES

Commanders are responsible for reporting and notification of death and injuries, through the command chain, to WorkSafe New Zealand<sup>41</sup> and other relevant agencies. In the case of deployed forces, the duty of immediate notification of coalition command elements, and/or United Nations (UN) agencies, will fall on the New Zealand Senior National Officer.

It is important for COIs to realise that, in cases of this type, there will inevitably be several different investigating agencies with a legitimate interest in the matter. The President should be alert to the need to coordinate investigations. The parameters of other agencies will often be quite different to those of a COI. For example –

- **The Joint Policing Unit or local Police** are responsible for investigating whether anyone is criminally responsible for the death or serious injury.<sup>42</sup> That is not a role for a COI.
- **Coalition, UN boards or COIs** are commonly assembled by the coalition or UN Force Commander in the event of the death of, or serious injury to, a member of the Force. If such an inquiry concerns the death of, or serious injury to, a member of the New Zealand contingent and NZDF attendance and/or participation is requested, this request is to be forwarded to HQNZDF through HQ JFNZ for prior approval.<sup>43</sup>
- **WorkSafe New Zealand** is responsible for investigating whether the NZDF is criminally responsible for the death or serious injury under New Zealand health and safety law. This is not a role for a COI. The COI should, however, be familiar with the [MOU](#) between WorkSafe and the NZDF.
- **The coroner** is a judicial officer<sup>44</sup> who is empowered by law to make an independent determination as to the circumstances of a death, and other matters provided for by the [Coroners Act 2006](#) s 4. By its nature, a COI is not independent of the NZDF. However, experience shows that a thorough and well-conducted COI into a death can significantly assist the coroner when making decisions about the nature and scope of the Coronal Inquiry.<sup>45</sup>

41 [MOU](#) between Worksafe and the NZDF.

42 The only exception to this is where the death or serious injury occurs in a foreign State and the deployed force is operating under a Status of Forces Agreement or Arrangement that excludes local jurisdiction, or such jurisdiction is precluded under customary international law (for example, where a death occurs on board a warship alongside a foreign port). If immunity exists, it will not be waived without specific direction from CDF/COMJFNZ. However, NZDF Service Police will still have jurisdiction in such cases.

43 [HQ JFNZ SOP 433 Deceased Personnel – Repatriation of Remains to New Zealand](#), paragraph 433.163.

44 [Coroners Act 2006](#) s 113(1).

45 [Coroners Act 2006](#) ss 69–70.

## Best practice when dealing with a coroner

When dealing with a coroner, the best practice is to provide them with a copy of the COI Report, if it is requested. This is simply to inform the coroner of the inquiry undertaken and may assist with any decision as to what further action the coroner wishes to take. This aspect will be handled by the NZDF COI Office, in consultation with Command as there is a requirement to get separate authorisation under the [AFDA](#) s 200T every time a COI is released to the coroner.

### It is subject to the following considerations —

- Disclosure to the coroner requires the prior approval of the relevant Superior Commander.<sup>46</sup>
- The Report cannot be disclosed to any other person by the coroner without the approval of that Superior Commander.
- The Report cannot be used in evidence against any person. If the coroner decides to make a finding on the papers, instead of proceeding to an inquest, NZDF can provide an additional statement that can be relied upon. Alternatively, if an inquest is conducted, witnesses may be called afresh.
- The copy to be disclosed must be examined to ensure that any information requiring redaction on the grounds of national security is redacted, unless security arrangements are in place with the coroner's office.
- The version disclosed to the family should also be provided.
- If the person who has died is a member of a visiting force, special rules apply to cooperation with the coroner, and specific legal advice will need to be sought in every case.<sup>47</sup>

---

46 [AFDA](#) ss 200S and 200T.

47 [Visiting Forces Act 2004](#) s 19 and 20.

## PART 2 – ENGAGEMENT WITH WHĀNAU/FAMILY

If a person is seriously injured, it may be helpful to engage with their whānau or family. However, the permission of the injured person must be obtained before doing so, unless that would not be practicable due to their injuries. In a case of doubt, in respect of the person's capacity to make this decision, the opinion of the medical practitioner treating the person should be sought, as should specific legal advice.

In the case of a deceased person, the COI must seek the direction of the Assy Auth in respect of engagement with the whānau/family, during its planning process.

### Who provides advice to the Assy Auth?

- Court of Inquiry Office.
- Defence Legal Services.
- Defence Public Affairs.
- Casualty Liason Officer (CLO).
- Family Liason Officer (FLO).
- Chaplaincy.

Proper consultation with the whānau/family is a very time-consuming process—it cannot be rushed. All engagement with the whānau/family must be approached with empathy; if this is not done well, the outcome is likely to be even more time-consuming, hurtful to the whānau and damaging to the NZDF's reputation.<sup>48</sup>

Consistently with this, all approaches to the whānau/family, even if necessarily in writing, must be preceded or accompanied by empathetic personal contact.<sup>49</sup>

It is also important to communicate equally with all immediate whānau/family members (where an agreed representative has not been appointed) and across all whānau/families in cases of multiple casualties. COIs should not limit engagement with whānau/family solely to the primary next of kin or other single point of whānau/family contact.

Experience has shown how important it is to maintain continuity of contact with the whānau/family. A small team approach has proven most successful, so the President can focus on the inquiry and withdraw on completion, yet continuity is maintained. While it is recommended that the President and Assy Auth take an active part in briefings during the inquiry, if this aspect is to be handled by the CLO or FLO, it is vital that they are well briefed on the inquiry and provided with specialist support.

<sup>48</sup> For the application of empathy and other principles to COIs into death, see [DFO 3](#) Part 12, Chapter 8.

<sup>49</sup> It is important to be alert to and sensitive to important dates for the whānau/family, including the anniversary of the death, birthdays, holidays etc. If possible avoid them, or at least acknowledge the timing.



## Who is the whānau/family?

In determining who comes within the definition of whānau/family for the purpose of this engagement, the starting point is the definition of immediate whānau/family in the [Victims' Rights Act 2002](#) s 4—

### *Immediate whānau/family, in relation to a victim—*

- (a) Means a member of the victim's whānau/family, or other culturally recognised family group, who is in a close relationship with the victim at the time of the incident.
- (b) To avoid doubt, includes a person who is—
  - i. the victim's spouse, civil union partner, or de facto partner; or
  - ii. the victim's child or step-child; or
  - iii. the victim's sister or brother, step-sister or step-brother; or
  - iv. a parent or step-parent of the victim; or
  - v. a grandparent of the victim.

Lessons learnt indicate that reliance on next of kin records alone is dangerous. Careful and thorough enquiries need to be made to ascertain the key members in the deceased person's whānau/family—this can be a complex matrix in modern New Zealand.

The whānau/family should be invited to appoint one person to represent them in this engagement, however, that may not always be practicable or appropriate, so a degree of flexibility is necessary.

## What rights do the whānau/family have?

The President of a COI should give the whānau/family an initial brief following the planning of the COI (the intent to assemble a COI is generally headlined in initial communication with the whānau/family). This brief should address the purpose of the COI, including—

1. what it will not do;
2. the inquiry process;
3. the Court's responsibilities; and
4. guidance on what rights they have to participate in the process, namely—
  - (a) **Give evidence.** The COI should always call the whānau/family representative as a witness, if the whānau/family wants that to occur, even if it is not immediately clear what value they can add to the inquiry. Being heard can be an important step in the grieving process and towards reconciliation. The COI should consider the most appropriate way for the evidence to be given, and may wish to travel to the witness.
  - (b) **Be kept informed.** The President has a continuing obligation to ensure that the whānau/family are kept up-to-date on the progress of the inquiry. This information may usefully be relayed through the CLO or FLO,<sup>50</sup> noting the recommendation for a team approach.

50 [DFO 3](#) Part 12, Chapter 8.

- (c) **Receive and consider a copy of the draft report.** Ordinarily, the whānau/family representative will be given a copy of the draft report to take away and consider. Best practice is for the President to give an oral brief in person to the whānau/family on the contents of the draft report, before handing it over, with a letter specifying the constraints on use and disclosure. An example letter is at [Annex 5-A](#). The whānau/family will usually be permitted to keep the draft. However, these are not invariable rules if there are compelling reasons (for example, national security) for another approach to be taken. Many concerns associated with providing the whānau/family with a draft report can be allayed by applying redactions to remove—
- » personal information in respect of other persons (particularly in cases of multiple casualties);
  - » national security information; and
  - » commercially sensitive information.
- (d) **Make a written submission.** If the whānau/family makes a written submission in respect of the draft report, the COI must make sure that its report mentions that submission and indicates the COI's response. For example, in one COI into a death, a whānau/family submission raised concern about a feature of an injury that was not indicated by the draft report. The COI noted this and sought further expert opinion evidence from a pathologist. This process, and the COI's finding after considering the additional evidence, was all carefully recorded in the report. Taking these steps is important, not only for transparency and accuracy, but also to demonstrate to the whānau/family that the NZDF has considered and valued their input.

It is important that the Assy Auth is aware of, and comfortable with, whatever steps a COI proposes to take in engaging with the whānau/family of a deceased or seriously injured person. The reason for this, based on lessons learned, is that a misstep in this area can cause unintended strategic consequences, including reputational damage.

The initial contact sets the tone for the relationship and it is vital that the immediate whānau/family are engaged consistently throughout, on an equal basis, that they are regularly updated and that all practicable steps are taken to inform them in advance of any media engagement.

## Findings

Noting that the purpose of a COI is not to attribute blame or make a finding of guilt, nevertheless, the fundamental purpose of the inquiry is to establish the facts. It may be that the facts, as found, have clear and adverse implications for one or more persons, including a deceased person. For example, it may be a finding of the Court that a crash occurred because the driver was going more quickly than was safe for prevailing weather conditions. Where such a finding can properly be reached, it is important that it is stated clearly.

The Court should, however, avoid language that is emotive or judgmental beyond what is necessary to establish the relevant events and causes. The Court must ensure that [AFDA](#) s 200N (natural justice rights) are afforded to living personnel, in their own right. The Court must ensure that the rights listed in this module are afforded to the family of a deceased person.

## Publication of a Court of Inquiry Report

In many, if not most COIs into death or serious injury, there will be pressure to publish the Report of the COI in order to demonstrate transparency. With this in mind, the consultation with the whānau/family should include discussion on their views about such publication. These views must be forwarded to the Assy Auth. However, the whānau/family's view will not necessarily determine whether or not the Report is published—they need to be made aware of this.

The President, acting through the CLO or FLO, is to ensure that the whānau/family are assisted to attend any release of the COI findings, if they wish to do so.<sup>51</sup> The whānau/family should also be offered the support of a media liaison representative. Similarly, the Court should plan for and address with the Assy Auth, timeframes and requirements for internal communication, and an external legal review before the release of the Report.

## PART 3 – MISCELLANEOUS

### Wellbeing of a Court, witnesses and affected personnel

The President should seek a brief from a NZDF psychologist at the outset of the inquiry on issues to be alert to. A similar debrief at the conclusion is also desirable and should be offered to the Court members and witnesses.

### Cultural and religious factors

A COI into a death must always be conscious that the customs, protocols and beliefs of the deceased person's whānau/family with respect to death may not be the same as those of the COI members.

To avoid this trap, a COI needs to obtain as much information as it can regarding any such customs, protocols and beliefs as part of the planning process. Both the cultural and religious background of the deceased person and their whānau/family need to be considered. Assistance may be sought in this respect from the NZDF Manager Equity and Diversity in HQNZDF.<sup>52</sup>

NZDF is committed to biculturalism under the Treaty of Waitangi. NZDF Māori Cultural Advisors can assist with advice and support on tikanga Māori.

#### Example of cultural awareness

In many Pasifika cultures, there is such a strong tradition of respect and deference to *palagi* authority figures, that family members may appear unwilling to contribute even though they may wish to. The danger is that feelings may be hurt without the COI even realising it, if the cultural context is not properly taken into account.

## Annex 5-A

### Example Letter to Whānau of a Deceased, Releasing Draft Report for Comment

[Include appropriate letterhead]  
(Contact details must be included in the relevant letterhead)

[File ref]

Mr and Mrs B. Nelson  
40 Trafalgar Square  
LONDON

Dear Mr and Mrs Nelson, *(If the family has not identified a representative, ensure that letters are written to each of the key members of the immediate family, for example, parents (both, where separated), partner etc).*

#### **COURT OF INQUIRY INTO DEATH OF HORATIO NELSON**

I wish to take this opportunity to pass on my sincere condolences for the loss of your son, Horatio.

I would also like to offer you the opportunity to participate in the efforts that the Navy is making to learn whatever lessons we can from his tragic death.

A few weeks after Horatio's death, I assembled *[If the President sends the letter, after consulting with the Assembling Authority, amend the content accordingly.]* a Court of Inquiry to get to the bottom of what happened. The Court conducted its proceedings over a four month period, and has recently produced a draft report for my consideration. The Court interviewed a total of 20 witnesses, including yourselves.

Under the law, it is my duty to comment on the findings of the Court. Before I do that, I think it is important to consult with you *[Identify if letters have been sent to other members of immediate family.]* and seek your input. Accordingly, I have decided to release the draft report to you, less the statements of evidence and exhibits (which must be protected by law). The purpose of this is to allow you an opportunity to comment on the findings of the Court and to enable you to provide any additional evidence that may be relevant to the inquiry.

As the report is still in draft, it is important that you treat the draft findings as confidential until I advise otherwise. Under section 200T of the Armed Forces Discipline Act 1971, this document must not be disclosed to anyone outside the New Zealand Defence Force without my permission.

Although Horatio was only with us in the Navy for a relatively short period of time, he made many friends and was part of our military family. In this way we share your loss and our thoughts and sympathy are with you, especially at this time of the year. *[It is important to be alert to, and sensitive to, important dates for the whānau/family including the anniversary of the death, birthdays, holidays, etc, and if possible avoid them or at least acknowledge the timing. The Family Liason Officer can assist].*

If you have any queries in relation to this letter, please do not hesitate to contact me.  
*[Contact details must be included in the relevant letterhead].*

Yours sincerely,

**C. LORD**  
**Captain, RNZN**  
**Assembling Authority**

**Enclosure:**

1. Draft copy of Court of Inquiry Report into the death of E106563 Midshipman H. Nelson, Royal New Zealand Navy dated 31 November 20xx.

## Module E: Maritime Safety Events

### Introduction

Module E builds on the preceding sections and provides guidance on some particular considerations for COIs into maritime accidents.

Where death or serious injury occurs, this module should be read in conjunction with [Module D: Death and Serious Injury Inquiries](#).

### This module has four parts —

- **Part 1** – Expert Witnesses in an Inquiry into a Maritime Safety Event.
- **Part 2** – Securing and Obtaining Evidence.
- **Part 3** – Event Chronology and Causative Factors.
- **Part 4** – Interim Reporting.

# PART 1 – EXPERT WITNESSES IN AN INQUIRY INTO A MARITIME SAFETY EVENT

Notwithstanding the requirement to appoint a cross-Service court where practicable, it is beneficial for one or more members of a COI into a maritime safety event to have sound knowledge of sea safety.

However, it is important to recognise that the members of a COI cannot produce the evidence on which the COI relies to make its findings. That evidence must be produced by witnesses as to fact and expert witnesses (Section Four, Module B, [Part 1 – Different Types of Witnesses](#)). It follows that, where there are insufficient experts in the particular maritime discipline (for example, diving, tanker operations) to provide both a member of the COI and an expert witness, the priority is to provide an expert witness. The COI must ensure that the expert witness has expertise in the particular field, and that they detail the evidence or material upon which their evidence is based. Therefore, the President may allow an expert witness to view or read all relevant evidence before preparing a report and giving evidence. It remains, however, the role of a COI to make its findings—this is not the role of the expert witness.

In addition to experts from within the NZDF,<sup>53</sup> a COI should consider whether it is prudent to call an external expert witness to examine the evidence collected by the COI, to provide an assessment of the likely cause(s) of the accident. This may be useful in areas where other Services or agencies have particular expertise, and has the advantage of demonstrating independence.

External expert witnesses could be sought from agencies such as the Transport Accident Investigation Commission (TAIC), Maritime New Zealand (MNZ), an allied sea service<sup>54</sup> or the Merchant Service, in appropriate cases. In all cases, the Court should ensure there is no conflict of interest, and identify that the evidence of the COI is solely being disclosed for the purposes of informing an expert opinion and cannot be used in evidence in any other proceedings. The Court should also be alert to variations in equipment, training and resources.

If the maritime safety event involves a civilian vessel or craft as well as a warship or naval boat, TAIC will be involved pursuant to the [MOU](#) between NZDF and TAIC, and the Court must familiarise itself with the terms of this [MOU](#).

When determining an appropriate person to be called as an expert witness on the causes of a maritime safety event, a COI should ensure that the expert selected has relevant qualifications, experience and current knowledge in the specific field. For example, it would be expected that an expert on navigation or ship-handling would have significant sea service in command or as a head of department. Equally, it may be the Chief Bosuns Mate of another ship who has the expertise on the relevant seamanship issue. The COI may need to call expert witnesses in a range of disciplines. A non-exhaustive list of examples would include experts in—

- marine engineering systems;
- electronics, weapons and control systems;
- human factors, that is, psychology;
- naval, including diving, medicine;
- meteorology; and
- hydrography and cartography.

<sup>53</sup> Including, for example, the Defence Technology Agency (DTA).

<sup>54</sup> This could include, for example, an experienced officer of the Royal Marines or the United States Marine Corps (USMC) in an inquiry touching on the conduct of amphibious operations.



When recording the evidence of an expert witness, it is important that an evidential foundation is laid to substantiate that witness's expertise. An example of how such evidence might be recorded is indicated below—

## WITNESS 1

*Commander Bram Stoker, RNZN of Wellington, Director Marine Engineering*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

I am currently serving in Capability Branch at Headquarters New Zealand Defence Force as Director Marine Engineering. In this role I am responsible for...

I hold a Bachelor of Engineering (Mechanical) with first class honours from the University of Auckland. I have completed marine engineering application courses in the Royal Navy and have qualified as a charge Marine Engineering Officer on both Anzac Class frigates and the fleet tanker. I have completed two periods as Marine Engineering Officer, one in HMNZS TE KAHA, and one in HMNZS ENDEAVOUR, making a total of six years as a head of department at sea, over the past eight years. I have also held various marine engineering appointments ashore at Devonport Naval Base.

At the request of the Court of Inquiry, I have examined all the evidence collected by the Court into the failure of propulsion systems on board.

Based on this evidence, in my opinion...

## PART 2 – SECURING AND OBTAINING EVIDENCE

### Securing evidence at the scene

Experience indicates that real and documentary evidence at the scene of a maritime safety event is particularly vulnerable to unwitting tampering, destruction or loss. It is vitally important to the integrity of the process that the COI ensures all such evidence is secured and/or recorded (for example, by making a photographic record) as soon as possible after the event. Service Police have experience in preserving incident sites and evidence, and they have facilities for securing the evidence.

**Service Police represent an invaluable resource that the COI may be able to use to preserve evidence until the COI is able to take control of it.**

### Obtaining evidence remotely

If a witness required by a COI is a member of the Armed Forces who is deployed overseas, the witness can still be ordered to give evidence. The COI has the power to sit overseas. However, a COI may be able to receive the evidence by VTC, Skype or teleconference, provided that it can be sure—

- the formalities for swearing the oath, etc, have been complied with properly;
- the gravity and seriousness of providing evidence to a COI is understood by the witness, even if that evidence is provided through a VTC; and
- the method of communications used does not violate NZDF security orders with regards to the type of evidence to be received.

There may be circumstances where a COI needs to call evidence from a civilian who is located overseas. An example might be the representative of a manufacturer of naval ordnance or equipment parts. In such cases, while the aforementioned technology can be used to obtain the evidence, the COI cannot serve a summons on a person who is outside New Zealand and is, therefore, reliant on the witness's cooperation.

## PART 3 – EVENT CHRONOLOGY AND CAUSATIVE FACTORS

Subject to the TOR, a COI into a maritime safety event can usefully consider each step in the accident using the event chronology provided below. The President may wish to discuss this with the Assy Auth. As the COI examines each step in the chronology, it should identify the causative factors that may have a bearing on that step. A non-exhaustive list of causative factors is also provided.

### Event chronology

- Tasking.
- Context of the ship's deployment/training cycle.
- Last port call.
- Other ship's activities being conducted contemporaneously.
- Ship's preparation to conduct the task, including hazard/risk identification and management.
- Relevant circumstances leading up to the event, including those immediately before the event.
- The event.
- Post-event actions.
- Seaworthiness.<sup>55</sup>
- Any other relevant steps.

## Possible causative factors<sup>56</sup>

### Human Factors

- Training.
- Experience.
- Medical factors (eg fitness for sea).
- Currency in relevant maritime skills/recency.
- Competence.
- Psychological factors.

### External Factors

- Environment.
- Weather.
- Sea conditions (eg sea state, temperature).
- Other environmental constraints (eg rocks, reefs, shoals).
- Adequacy of charts and other nautical information.
- Other marine traffic.

### Technical Factors<sup>57</sup>

- Design flaws.
- Maintenance record.

### Organisational factors

- Command oversight.
- On board supervision.
- Training and experience level of department/ship's company.
- Level of audit and inspection at fleet level.
- Orders, instructions and procedures—
  - » Fitness for purpose.
  - » Ambiguity.
- Organisational processes, expectations and pressures.
- Culture of the ship or unit, and the fleet in general.

---

<sup>56</sup> This list is not intended to be exhaustive; there may be other causative factors of which a COI may become aware.

<sup>57</sup> These factors need to be examined in the context of related examples on that and other platforms.

## PART 4 – INTERIM REPORTING

A maritime safety event will sometimes raise the prospect of a technical factor that could require one or more ships, or a unit like the Operational Dive Team, to cease operations pending rectification. This may have huge implications for the Navy's ability to deliver its outputs.

It is, therefore, not surprising that COIs of this nature typically produce a tension between Command's need to obtain critical information as quickly as possible and the time that is required to conduct a complex inquiry in a thorough and responsible manner.

The solution to this tension lies in interim reporting. As soon as the COI has completed its initial planning, the President should make an appointment to speak with the Assy Auth about a timeframe for interim reporting. It is quite likely that the Assy Auth will require successive interim reports on a regular basis as the inquiry proceeds. The Assy Auth will undoubtedly require immediate notification if the COI receives evidence suggesting an imminent risk to the safety of any operations still being conducted by the Navy.

Interim reports do not need to be formatted in a formal manner like the final report. They can be provided in any format that meets the Assy Auth's requirements, including dot-point briefs or PowerPoint presentations.

### **Every interim report should address—**

- factors that have been discounted and the reasons for doing so;
- the current focus of the inquiry; and
- key activities for the next period.

If necessary, the interim report may also address the adequacy of resources currently devoted to the inquiry. The ROP, however, must address all issues and reference interim reporting.

## Module F: Aircraft Accident Inquiries

### Introduction

Module F builds on the preceding sections and provides guidance on particular considerations for COIs into aircraft accidents.

Where death or serious injury occurs, this module should be read in conjunction with [Module D: Death and Serious Injury Inquiries](#).

Special orders apply to inquiries into aircraft accidents that must be followed. These are contained in [DM 69 \(2ed\) Volume 1](#) Chapter 11, paragraph 11.2.19, and [NZAP 201](#) *Manual of Air Force Safety and Health*, Chapter 6.

Ideally, the COI will receive a brief from a Defence Aviation Safety Bureau (DASB) representative at the outset of the COI, in tandem with a legal briefing. This should also address safety guidelines when accessing sites.

### This module has five parts—

- **Part 1** – Relationship with Accident Investigation Team and Transport Accident Investigation Commission.
- **Part 2** – Composition of the Court and Expert Witnesses in an Aircraft Accident Inquiry.
- **Part 3** – Obtaining Evidence Remotely.
- **Part 4** – Event Chronology, Causes and Factors.
- **Part 5** – Interim Reporting.

## PART 1 – RELATIONSHIP WITH THE ACCIDENT INVESTIGATION TEAM AND THE TRANSPORT ACCIDENT INVESTIGATION COMMISSION

In the immediate aftermath of an aircraft accident, DASB will dispatch an AIT to the crash site. The AIT will be led by a qualified air accident investigator. The AIT investigation will be one of possibly several investigations that occur in tandem with the COI.

**The AIT investigation does not, however, have the legal powers and protections of a COI. The AIT must make that clear to any witnesses it interviews.**

It is, therefore, highly desirable that the COI into the accident is assembled expeditiously so statutory rights and protections can be afforded to the witnesses and the evidence. This should encourage witnesses to be forthcoming, mitigate any operational impact and ensure that safety lessons are addressed.

It is also important, however, that from the outset the President of the COI closely liaises with the AIT leader to coordinate the investigations and discuss the balance to be struck between the work of the AIT and that of the COI; noting that the COI must collect all relevant evidence.

**Consequently, ideally the first witness to be called after the COI has assembled should be the AIT leader.** At their first appearance before the COI, after being sworn in and cautioned in the normal manner, the AIT leader should give the COI a brief on the progress of the accident investigation to date.

**Subsequent to this initial call the following should occur—**

- The President should indicate a schedule for the AIT leader to give further evidence to the COI. This evidence will take the form of further updates that will allow the COI to coordinate the overall inquiry.
- The President should make it clear to the AIT leader that they are invited to contact the COI at any time to arrange a time to be recalled to give evidence as to important updates.

Noting that the AIT may be conducting its investigation at a site that is remote from the location where the COI is sitting, the President should ensure that suitable telecommunication facilities are in place to enable the regular recall of the AIT leader through virtual means. A good method of doing this, is for the COI to have a telephone with a speaker capability as part of its administrative set-up. This will allow the AIT leader to give evidence by telephone that all members of the COI can hear and that can be recorded using a digital recording device.

As a general rule, once the AIT has completed its report, that report will be produced in evidence to the COI by the AIT leader.

If the aircraft accident involves a civil aircraft as well as a military aircraft, TAIC will be involved pursuant to the [MOU](#) between NZDF and TAIC. The COI will need to be familiar with the application of the [MOU](#).

## PART 2 – COMPOSITION OF A COURT OF INQUIRY AND EXPERT WITNESSES IN AN AIRCRAFT ACCIDENT INQUIRY

Notwithstanding the requirement for a cross-Service court where practicable, the Assy Auth is to request that the Air Component Commander nominates a member who has expertise in aircraft investigations, and it is mandatory for the President to be a qualified aircrew officer. Further, if the inquiry involves a fatal aircraft accident, the President is to be an officer not below the rank of Lieutenant Colonel (equivalent) unless an officer of that rank cannot be made available without delay.<sup>58</sup>

It is important, however, to recognise that the members of a COI cannot produce any of the evidence that the COI relies on to make its findings. That evidence must be produced by witnesses as to fact and expert witnesses (Section Four, Module B, [Part 1 – Different Types of Witnesses](#)). It follows that, where there are insufficient experts on an aircraft accident investigation to provide both a member of the COI and an expert witness, the priority is to provide the expert witness.

The COI must ensure that expert witnesses are able to view or read all relevant evidence before preparing their reports and giving evidence.

In each case, the COI should consider whether it is prudent to call an external air accident investigator, additional to the AIT leader, as an expert witness, to provide expert opinion/assessment on the likely cause(s) of the accident.

Expert witnesses of this type may be sought from the TAIC, the Civil Aviation Authority of New Zealand (CAA NZ) or an allied force, providing there is no conflict of evidence and it is made clear the evidence provided is solely for the COI and cannot be used in evidence in any other proceedings. The President should consult with the Assy Auth in advance of any such approach.

When determining an appropriate person to be called as an expert witness on the causes of aircraft accidents, the COI should take into account the following DASB guidelines as to the qualifications for such a witness—

- They must be a graduate of an aircraft accident investigation course or a course that covers air accident investigation as a component.
- They must have at least 1500 hours of military aircrew experience, preferably as a pilot. Where the aircraft involved in the accident is also used in civil aviation, civil hours may qualify under this criterion.
- Experience conducting aircraft accident investigations with TAIC, CAA NZ or an equivalent overseas authority would be desirable.

---

58 [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.19.



In addition to aircraft accident investigation experts, the COI may need to call expert witnesses in a range of other disciplines. Such experts may be available within the NZDF, for example the Defence Technology Agency, or may need to be sourced externally. A non-exhaustive list of examples would include experts in—

- Aeronautical engineering.
- Flight data recorder, volatile memory and non-volatile memory data recovery, analysis and reconstruction.<sup>59</sup>
- Human factors, that is, psychology.
- Aviation medicine.
- Meteorology.

When recording the evidence of an expert witness, it is important that an evidential foundation is laid to substantiate that witness's expertise. An example of how such evidence might be recorded is indicated below.

## WITNESS 1

*Mr James Bigglesworth of Auckland, Aircraft Accident Investigator*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

I am currently employed by the Transport Accident Investigation Commission (TAIC) as a senior aircraft accident investigator. In 2009, I completed the six-week Aircraft Accident Investigation Course at Cranfield University in the UK. Since then I have been employed full-time by TAIC as an aircraft accident investigator and have investigated about 20 aircraft accidents.

Before joining TAIC, I was a P3 Orion pilot in the Royal New Zealand Air Force. I have about 3000 hours on type.

At the request of the Court of Inquiry, I have examined all the evidence collected by the Accident Investigation Team and also by the Court itself. Based on this evidence, in my opinion...

While expert testimony can be collected by the COI, it is important that the COI ensures that the COI makes the findings based on all the evidence it collects, affording appropriate weight to the witness evidence as it sees fit.

---

59 The Australian Transport Safety Bureau (ATSB) has significant capability in this area.

## PART 3 – OBTAINING EVIDENCE REMOTELY

There may be circumstances where a COI into an aircraft accident may need to call evidence from a person who is located overseas. An example might be the representative of a manufacturer of aircraft or aircraft parts. In such cases, it is useful to note that—

- The COI cannot serve a summons on a person who is outside New Zealand and is, therefore, reliant on the witness's cooperation.
- The COI can receive the evidence by VTC, Skype or teleconference, provided that it can be sure that—
  - » the formalities for swearing the oath etc, have been complied with properly;
  - » the method of communications used does not violate NZDF security orders with regards to the type of evidence to be received;
  - » the gravity and seriousness of providing evidence to a COI is understood by the witness, even if that evidence is provided through VTC.

## PART 4 – EVENT CHRONOLOGY, CAUSES AND FACTORS

The RNZAF uses the James Reason model of organisational accidents as a framework to assess and investigate an incident or accident.<sup>60</sup> This is a model that describes an accident in terms of a 'trajectory', and describes two types of failure or conditions. Active failures are those at the 'sharp end' of the system, in other words at the human-system interface. Their effects are immediate and relatively short-lived. They are often what, at first glance, precipitate the accident.

Latent conditions, on the other hand, may be present for many years before they combine with local circumstances and active failures to penetrate the system's many layers of defences. They arise from supervisory, managerial and top level strategic decisions made within the organisation. However, they may also arise as a result of decisions made in agencies that have an interaction with the RNZAF, for example government and related agencies, regulators, manufacturers and designers.

The role of the AIT is to investigate the accident in an effort to expose both the active and latent failures responsible for the accident.

It is recommended that an aircraft accident COI considers each step in the accident using the event chronology provided below. If the TOR for a COI constrain this in a manner that undermines the robustness of the inquiry, it may warrant a discussion between the President and the Assy Auth. As the COI examines each step in the chronology, it should identify the factors that may have a bearing on that step. A non-exhaustive list of factors is provided below.

[NZAP 201](#) provides that once a factor has been identified, the COI is to determine which of the following categories it falls into—<sup>61</sup>

- **Cause.** Actions or omissions, events, conditions or a combination of those factors, but for which the accident would not have occurred.
- **Contributing factor.** A factor that made the accident more likely.
- **Aggravating factor.** A factor that made the outcome worse.
- **Other factor.** A factor that was none of the above, but was noteworthy in that it may cause or contribute to future accidents.

The cause(s) are the trigger(s) on the day for the resultant accident, whereas the factors are considered to be issues that collectively resulted in defensive weaknesses. If there is any doubt about whether an issue is a factor then it should be described as a probable factor or possible factor. A factor may be assessed as a probable factor by analysis of precedents, trends or other data sources. If the COI cannot positively exclude a factor then it should be referred to as a possible factor.

60 Reason, James. *Managing the Risks of Organizational Accidents*. Detroit, MA: Ashgate, 1997.

61 [NZAP 201](#) *Manual of Air Force Safety and Health* Chapter 6.

## Event chronology

- Tasking
- Squadron preparation to conduct the task, including preparation by the operations and maintenance flights.
- Specific mission planning.
- Authorisation of the task.
- Pre-flight.
- Engine start through to departure.
- En route prior to the event.
- Specific circumstances immediately prior to the event.
- Event.
- Post-event actions.
- Crashworthiness.<sup>62</sup>
- Any other relevant steps.

## Possible causative factors<sup>63</sup>

### Human factors

- Training.
- Experience.
- Medical factors.
- Currency and recency.
- Competence.
- Psychological factors.

### External factors

- Air traffic control.
- Meteorology.
- Environment/terrain.
- Bird strike.
- Other air traffic.
- Adequacy of charts and other navigational information.

### Technical factors<sup>64</sup>

- Design flaws.
- Maintenance record.

### Organisational factors

- Command oversight.
- Supervision on the squadron.
- Orders, instructions and procedures—
  - » Fitness for purpose.
  - » Ambiguity.
- Organisational processes and pressures.
- Squadron culture.

---

63 This list is not intended to be exhaustive; there may be other causative factors of which the COI may become aware.

64 These factors need to be examined in the context of related examples on that and other platforms.

## PART 5 – INTERIM REPORTING

An aircraft accident will often raise the prospect of a technical factor that could require the grounding of all aircraft of that type pending rectification. Such a grounding may have huge implications for NZDF or other forces' operations. Therefore, it is not surprising that aircraft accident COIs typically produce a tension between Command's need to obtain critical information as quickly as possible, and the time that is required to conduct such a complex inquiry in a thorough and responsible manner.

The solution to this tension lies in interim reporting. As soon as the COI has completed its initial planning, the President should make an appointment to speak with the Assy Auth about a timeframe for interim reporting. It is quite likely that the Assy Auth will require successive interim reports on a regular basis as the inquiry proceeds. The Assy Auth will require immediate notification if the COI receives evidence suggesting an imminent risk to the safety of any aircraft being operated by the NZDF or any other organisation operating that type of aircraft (that is, not including any type that has been grounded already).

Interim reports do not need to be formatted in a formal manner like the final report. They can be provided in any format that meets the Assy Auth's requirements, including dot-point briefs or PowerPoint presentations.

### **Every interim report should address—**

- factors that have been discounted and the reasons for doing so;
- the current focus of the inquiry; and
- key activities for the next period.

If necessary, the interim report may also address the adequacy of resources currently devoted to the inquiry. The ROP, however, must address all issues and reference interim reporting.

When the COI begins writing its final report, it needs to bear in mind that that report must comply with [NZAP 201](#), Chapter 6, Annex A.<sup>65</sup>

65 [DM 69 \(2 ed\) Volume 1](#) Chapter 11, paragraph 11.2.19d.

## Module G: Inquiries Relating to Munitions

### Introduction

Module G builds on the preceding sections and provides guidance on some particular considerations for COIs relating to munitions.

Where death or serious injury occurs, this module should be read in conjunction with [Module D: Death and Serious Injury Inquiries](#).

**This module has four parts —**

- **Part 1** – The Accident Investigation Team and Expert Witnesses in an Inquiry Relating to Munitions.
- **Part 2** – Obtaining Evidence Remotely.
- **Part 3** – Event/Munition Chronologies and Causative Factors.
- **Part 4** – Interim Reporting.

# **PART 1 – THE AMMUNITION TECHNICAL INVESTIGATION AND EXPERT WITNESSES IN AN INQUIRY RELATING TO MUNITIONS**

---

Notwithstanding the requirement to appoint a cross-Service court where practicable, it is beneficial for one or more members of a COI relating to munitions to have a sound knowledge of such munitions.

However, it is important to recognise that the members of a COI cannot produce the evidence on which the COI relies to make its findings. That evidence must be produced by witnesses as to fact and expert witnesses (Section Four, Module B, [Part 1 – Different Types of Witnesses](#)).

It follows that, where there are insufficient ammunition technical experts to provide both a member of the COI and an expert witness, the priority is to provide the expert witness.<sup>66</sup> It is the COI, however, that remains responsible for making its findings—this is not the role of the expert witness.

In the immediate aftermath of an incident or accident involving munitions, SO1 Ammunitions and Explosives (SO1 Ammo & Expl) at Defence Munitions Management Group will appoint an Ammunitions Technical Officer (ATO) or a SNCO to conduct an Ammunition Technical Investigation (ATI) in respect of the particular munition(s). The purpose of the ATI is to determine whether that munition type and batch was and is safe for use by the NZDF. In most cases, it is likely that the ATI will be completed before the COI is able to assemble.

**Therefore, the ATO/SNCO who has conducted or is conducting the ATI should be called as the first witness to provide the COI with a good starting point for its inquiry. The ATO or SNCO will be an expert witness.**

In cases involving specialist munitions, such as missiles, the COI should consider whether it is prudent to call an external expert witness to examine the evidence collected by the ATI and the COI collectively, and provide an assessment of the likely cause(s) of the accident /incident.

Expert witnesses of this type may be sought from allied forces or manufacturers of munitions. When determining an appropriate person to be called as an expert witness on the causes of a munitions accident/incident, the COI should consider whether the person has appropriate qualifications and experience. For example, for an ATO or SNCO to be considered sufficiently 'expert', SO1 Ammo & Expl would normally require them to have—

- completed the ATO course or equivalent training in ammunition technical matters; and
- at least two years experience in an ammunition technical role.

The President should enable the expert witness to view or read all relevant evidence before preparing their reports and giving this evidence.



When recording the evidence of an expert witness, it is important that an evidential foundation is laid to substantiate that witness's expertise. An example of how such evidence might be recorded is indicated below.

## WITNESS 1

*Captain Guy Fawkes, RNZALR of Trentham Defence Area, Ammunition Technical Officer*

having been duly cautioned in accordance with DM 69 (2 ed) Volume 1, Chapter 11, paragraph 11.2.40, states on oath:

I am an Ammunition Technical Officer and currently hold the appointment of SO3 Ammunition in Defence Logistics Command.

I joined the Army as a soldier in the Royal New Zealand Army Logistics Regiment (RNZALR) in...specialising as an ammunition technician. I completed all professional courses in the ammunition technician trade up to the rank of sergeant. In...I was commissioned in the rank of lieutenant and successfully undertook the Ammunition Technical Officers' Course with the British Army. Since returning to New Zealand in...I have been continuously employed in ammunition technical appointments, both at 1st (NZ) Explosive Ordnance Disposal Squadron and at Defence Logistics Command.

On...SO1 Ammunition appointed me to conduct an Ammunition Technical Investigation (ATI) into...

At the request of the Court of Inquiry, I have re-examined the evidence collected by my ATI and examined the evidence produced to the Court. Based on this evidence, in my opinion...

## PART 2 – OBTAINING EVIDENCE REMOTELY

If a witness required by a COI is a member of the Armed Forces who is deployed overseas, the witness can still be ordered to give evidence. The COI has the power to sit overseas. However, the COI may be able to receive the evidence by VTC, Skype or a teleconference, provided that it can be sure that—

- the formalities for swearing the oath, etc, have been complied with properly;
- the method of communications used does not violate NZDF security orders with regards to the type of evidence to be received;
- the gravity and seriousness of providing evidence to a COI is understood by the witness, even if that evidence is provided through VTC.

There may be circumstances where the COI needs to call evidence from a civilian who is located overseas. An example might be the representative of a specialist munitions manufacturer. In such cases, while the aforementioned technology can be used to obtain the evidence, the COI cannot serve a summons on a person who is outside New Zealand and is, therefore, reliant on the witness's cooperation.

# PART 3 – EVENT/MUNITION CHRONOLOGIES AND CAUSATIVE FACTORS

Subject to the TOR, a COI relating to munitions can usefully consider each step in the accident/incident using the event chronology and the relevant munition chronology provided below. The President may wish to discuss this with the Assy Auth.

Chronologies			
Event Chronology		Munition Chronology (found in the field)	Munition Chronology (issued)
<ul style="list-style-type: none"><li>Tasking</li><li>Unit preparation to conduct the task.</li></ul>		<ul style="list-style-type: none"><li>Circumstances of the find.</li></ul>	<ul style="list-style-type: none"><li>Issue from depot.</li><li>Transport.</li><li>Preparation for use.</li><li>Use.</li></ul>
<ul style="list-style-type: none"><li>Specific circumstances immediately before the event.</li><li>The event.</li><li>Post-event actions.</li><li>Any other relevant steps.</li></ul>			

As the COI examines each step in the chronology, it should identify the causative factors that may have a bearing on that step. A non-exhaustive list of causative factors is provided below.

## Causative factors

In conducting an inquiry into a munitions accident/incident, a COI must always bear in mind that all munitions accidents/incidents will normally fall into one of the following two categories—

- Misuse.** In this case, the munition has functioned as designed. The accident/incident has been caused by a user or safety personnel not following the proper drills.
- Malfunction.** In this case, the munition has not functioned as designed.

The factors that may be causative of **misuse** or **malfunction** are many and varied. They include the following.

### **Possible causative factors<sup>67</sup>**

#### **Human Factors**

- Training.
- Experience.
- Currency.
- Competence.
- Psychological factors.

#### **External factors**

- Weather, climate and humidity.
- Terrain.

#### **Technical factors<sup>68</sup>**

- Design flaws.
- Storage procedures and inspection programmes.

#### **Organisational factors**

- Command oversight (eg OIC of the activity).
- Supervision (eg by the Range Conducting Officer).
- Orders, instructions and procedures—
  - » Fitness for purpose.
  - » Ambiguity.
- Organisational processes and pressures.
- Unit culture.

---

67 This list is not intended to be exhaustive; there may be other causative factors of which the COI may become aware.

68 These factors need to be examined in the context of related examples on the same or similar munitions.

## PART 4 – INTERIM REPORTING

An accident/incident involving munitions will sometimes raise the prospect of a technical factor that could compel the NZDF, or other forces, to withdraw that munition type from service pending rectification. This may have implications for the NZDF's ability to deliver its outputs. In most cases, a COI regarding munitions can be completed quickly. However, occasionally the complexity of the inquiry will result in tension between Command's need to obtain critical information as quickly as possible, and the time that is required to conduct such an inquiry in a thorough and responsible manner.

As a reflection of this tension, COIs assembled by Army into a munitions accident/incident are required to forward their reports through normal command channels to Army General Staff, Defence Technology Committee (DTC), LCC and SO1 Ammunition and Explosives within 28 days of the accident/incident.<sup>69</sup>

The solution to this tension lies in interim reporting. As soon as the COI has completed its initial planning, if it is apparent that the inquiry may take longer than might be anticipated by command, the President should make an appointment to speak with the Assy Auth about a timeframe for interim reporting. It is quite likely that the Assy Auth will require successive interim reports, on a regular basis, as the inquiry proceeds. The Assy Auth will undoubtedly require immediate notification if the COI receives evidence suggesting an imminent risk to the safety of personnel using particular munitions.<sup>70</sup>

Even if no requirement for interim reporting is identified at the outset, the President should always consider seeking direction from the Assy Auth on this point, if the inquiry starts to take longer than first thought.

The ROP, however, must address all issues and reference interim reporting.

### **Every interim report should address—**

- factors that have been discounted and the reasons for doing so;
- the current focus of the inquiry; and
- key activities for the next period.

If necessary, the interim report may also address the adequacy of resources currently devoted to the inquiry.

69 [DFO\(A\) vol 2](#), book 1, part 4, chapter 1, section 2, paragraph 4013d.

70 [DFO\(A\) vol 2](#), book 1, part 4, chapter 1, section 2, paragraph 4013c; also requires immediate notification to SO1 Ammo & Expl in such a case.

# SECTION SIX – COMMON CONCERNS IN COURTS OF INQUIRY

## Take care of the common concerns

Most COIs are conducted to a high standard. Those that weren't were derailed by some of the areas below. They are common. It's easy to forget a legal detail or have a piece of recording equipment breakdown. Take care with these matters and you will have a much better chance of a smooth, robust COI.

## Checklist of common concerns

### Planning

- Delays between event and assembly of a COI.
- Not appointing Court members of appropriate rank and seniority.
- Delays arising from failure to plan, arrange administrative support, and schedule witnesses and briefs to affected personnel.
- Not giving priority to the COI.
- Not making best use of the skills of the Counsel Assisting.

### Conduct

- Not approaching the inquiry with an open mind.
- Not adequately explaining the purpose of a COI and that it cannot be used in evidence.
- Not calling material witnesses or looking behind the direct cause.
- Not calling an expert witness and specifying the expertise when the nature of the inquiry calls for specialist knowledge.
- Leading witnesses from the outset.
- Not affording [AFDA](#) s 200N (natural justice rights).
- Not ensuring the witness produces the evidence.
- Not making clear exactly where an eye witness was at the time to which their evidence relates. Producing individual drawings or maps of the scene for the witness to mark their position is useful.
- Not ensuring that the relevant documents are produced and certifying copies.
- Not ensuring that 'original' exhibits or documentation are secured, after copies or photographs have been produced in evidence.

### Findings and writing the Report

- Findings and conclusions drawn are not supported by evidence and appropriately cross-referenced. **This is the most common fault.**
- Not addressing all TOR.

- Reliance upon the knowledge of Court members without obtaining evidence.
- Reliance on documents that have not been produced by a witness during questioning.
- Not explaining technical information.
- Using call signs or assuming operating terminology is universally understood.
- Not taking action with regards to [AFDA](#) s 200N (natural justice rights).
- Not pointing out and addressing conflicting evidence in the report, including the weight given to the evidence and the rationale for the conclusion.
- Not recording a report to the Assy Auth on the conduct of a superior officer and the decision made.
- Not recording where [AFDA](#) s 200N (natural justice rights) have been given and action taken.
- Not recording where there has been a material difference of view by the members.
- Not clearly distinguishing recommendations material to the cause of the incident from more general recommendations.
- Explicitly attributing blame or recommending disciplinary action. Apparent breaches can and should, however, be drawn to the Assy Auth's attention at the earliest opportunity.
- Not following the format of the ROP.
- Not specifying a security classification for the ROP.

## **Concepts to improve your Court of Inquiry**

### **1. Planning**

Assy Auths and Courts are to place greater emphasis on planning at the outset of an inquiry, together with the Counsel Assisting, if appointed.

### **2. Timeliness**

Timeliness is essential if a COI is to achieve its purpose. COIs are to be afforded a high priority, with the inquiry as the principal focus, to enable them to be completed expeditiously. Before appointing suitable personnel to the Court, an Assy Auth is to assess any competing priorities, so that the Court can focus on the inquiry. Witnesses are to be made available as a priority, as required by the Court.

### **3. External Legal Review**

In cases involving unexpected death or serious injury or any other serious accident/incident that exposes the NZDF to serious reputational risk, the Assy Auth is to consider obtaining an independent legal review from the panel of Queen's Counsel appointed to the External Legal Review Panel. The matter is to be reported at the outset of the incident to the Office of the JAG and DLS.

### **4. Transparency and independence**

Wherever it is practicable, having regard to the seriousness of the particular COI, the environment, security and available levels of expertise, an Assy Auth is to appoint a Court comprising personnel from more than one service. All commanders are to cooperate, to facilitate cross-Service courts.

### **5. Counsel Assisting**

Assy Auths are to consider appointing Counsel Assisting more frequently than simply those mandatory cases prescribed in [DM 69 \(2 ed\) Volume 1](#) Chapter 11. Courts are also encouraged to make greater use of Counsel Assisting from the outset of the COI, particularly in the planning and design, as well as during the COI.

# SECTION SEVEN – EXTERNAL LEGAL REVIEW

## Consider this scenario

An RNZAF aircraft crashes. For reasons unknown, it entered civilian airspace at low altitude and collided with a windmill. There was a loss of life and instant media attention. Transparency is important, particularly given the seriousness of the incident and public interest. In this incident, it is even more important to seek an external legal review (ELR).

An ELR is to be sought when it is considered that an independent legal assurance review of a significant COI is desirable. The ELR will consist of a review by one of the external counsel (QC) appointed to the panel established for that purpose by the Office of the JAG.

This ELR will constitute legal advice and will be subject to legal professional privilege.

## Circumstances warranting a Court of Inquiry Report review

The circumstances warranting this review will depend upon the particular case, and will largely need to be assessed on a case-by-case basis. The following circumstances are examples of when an ELR may be appropriate—

- The occurrence of an unexpected death or serious injury, particularly following an accident which is the subject of an external inquiry.
- The occurrence of a serious and significant incident.
- Where the reputation of the NZDF may be significantly adversely affected.
- Where there has been some allegation of serious wrongdoing, where liability and/or any offer of amends or compensation of significant value may arise.
- Where there is high public or political interest.

In most cases, the ELR will be conducted after the ROP has been signed by the Court, but in advance of the Assy Auth comments.

**In exceptional circumstances CDF can direct an ELR of a draft report.**

**The protocol to be adopted is as follows—**

1. If the Assy Auth is a Superior Commander, the first step is to notify DLS and the Executive Officer to the Judge Advocate General (EO JAG) at the time of the COI assembly that an ELR may be sought.
2. If the Assy Auth is not a Superior Commander, the Superior Commander's approval must be obtained before approaching DLS and EO JAG. The notification must include a copy of the TOR and comment on the likely security classification of the report, to assist EO JAG in identifying the most suitable external counsel panel member.



3. In cases of this type, in addition to the President's usual obligation to keep the Assy Auth apprised of progress in the inquiry, the President is also to provide the same information to the EO JAG. This *communiqué* is to include an indication of the likely timeframe for completion once the planning of the COI has been finalised. The COI will not be bound by this indication, but every effort should be made to be as accurate as possible.
4. Any ELR will be sought after the Court has signed and forwarded its ROP to the Assy Auth for comment, but before the Assy Auth records their comments.
5. Before the Assy Auth seeks an ELR, however, they are to seek DLS advice on whether the COI ROP should be sent for ELR. If so, DLS conducts a 'gross error' legal review, with any remedial action, before the Assy Auth seeks an ELR.
6. If the Assy Auth decides to proceed with an ELR, the Assy Auth is to either seek the approval of their Superior Commander to release the COI, or alternatively, the Superior Commander grants approval. Any grant of approval is to be recorded.
7. The Assy Auth is to then request the EO JAG (through DLS) to obtain an ELR.
8. On receipt of the ELR, and after engagement with DLS, the Assy Auth will either record their Assy Auth Comments and sign the record, or re-assemble the COI for any remedial action, and then record and sign their final comments once the amended and completed COI is referred back by the President of the Court.

This protocol ensures the ELR is independent of the COI and is not actively contributing to the COI while the COI is in session, and preserves the absolute integrity of both the COI and the ELR process.

If there are any substantive issues to address, however, the Court will need to be reassembled and this may impact on timeliness.

## SECTION EIGHT – FORMS AND LINKS

### NOTE

Some of these links are only accessible from within the NZDF intranet. They will not function otherwise. Their text is available within this document as well.

### Acts and Regulations

[Armed Forces Discipline Act 1971](#) (AFDA)

[Armed Forces Discipline Rules of Procedure](#) (RP)

### New Zealand Defence Force publications

[DM 69 \(2 ed\) Volume 1](#) *Manual of Armed Forces Law, Volume 1: Commander's Handbook on Military Law*

[DM 69 \(2 ed\) Volume 3](#) *Manual of Armed Forces Law, Volume 3: Legislation*

[MOU between WorkSafe and NZDF](#)

[MOU between TAIC and NZDF](#)

### Forms

The following forms apply to a COI, and are found as part of [DM 69 \(2 ed\) Volume 1](#) Chapter 13, paragraph 13.2.1—

[MD 634](#) *Order for the Assembly of a Court of Inquiry*

[MD 635](#) *Declaration by Court of Inquiry on Absence of a Member of the Armed Forces*

[MD 637](#) *Summons to Civilian Witness to Attend a Court of Inquiry*

*Format for Record of Proceedings of a Court of Inquiry*, DM 69 (2 ed) Volume 1, Chapter 11, Annex A

