

A critical analysis of selected interviewing techniques in commercial forensic investigations in South Africa

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Abstract:

With the increase in economic crime globally, the role of the Commercial Forensic Practitioner (FP) is becoming increasingly important since this person can assist in the detection, investigation and prevention of economic crime. In order to commit to these aforementioned responsibilities, FPs should master a variety of skills due to the transdisciplinary nature of the commercial forensic investigative environment. One of these skills is the conducting of successful forensic interviews with role players, third parties, witnesses and suspects in order to obtain relevant information.

Conducting successful interviews, however, requires intricate skills due to its interpersonal nature. Yet an assessment of the curricula of commercial forensic investigative programmes offered by South African tertiary institutions and professional bodies illustrates a distinctive lack of content on interviewing in a forensic context. Further to this, many forensic interviewing techniques appear not to be properly underpinned by theory.

In order to assess what technique(s) may be the most appropriate in the South African commercial forensic investigative setting, a search was conducted which identified five techniques that are applied in the global context, namely the Reid technique, kinesic interviewing, the PEACE model, cognitive interviewing and the person-centred approach. These were critically analysed in terms of relevant legal considerations and bearing the existing academic literature in mind.

Based on the literature reviewed (and the limited specific scientific and empirical evidence), it appears that certain apparent concerns can be raised against cognitive interviewing, kinesic interviewing and especially the Reid technique within the South African commercial forensic investigative setting. The person-centred approach and PEACE model, however, appear to be more appropriate for use within said context. Merging aspects of these two methods to form a new unique technique specifically designed for the South African commercial forensic investigative environment, should be considered. The person-centred approach may benefit from the comprehensive structure and empirical underpinnings of the PEACE model, and the PEACE model from the extensive interpersonal and humanistic approach of the person-centred interview. Subsequent to further research on this topic, the apparent lack of industry standards and proper training in forensic interviewing techniques in South Africa should be addressed.

Key terms:

Behavioural Analysis Interview; Cognitive interviewing; Economic crime; Forensic accounting; Commercial Forensic Practitioner; Forensic interviewing; Investigative interviewing; Kinesic interviewing; Person-centred approach; Police interrogation; Reid technique

List of abbreviations:

ACFE	Association of Certified Fraud Examiners
AICPA	American Institute of Certified Public Accountants
BAI	Behavioural Analysis Interview
BSA	Behavioural Symptom Analysis
CPA	Criminal Procedure Act 51 of 1977
ECI	Enhanced Cognitive Interview
FBI	Federal Bureau of Investigation
FEP	False Evidence Ploy
FP	Commercial Forensic Practitioner
GST	General Systems Theory
HUMINT	Human Intelligence
ICFP	Institute of Commercial Forensic Practitioners
LIP	Liverpool Interview Protocol
LRA	Labour Relations Act 66 of 1995
Reid	John E. Reid
RICA	Regulation of Interception and Communications and Provision of Communication-Related Information Act 70 of 2002
Rogers	Carl Rogers
SAPS	South African Police Service

SAQA	South African Qualifications Authority
SLT	Social Learning Theory
UK	United Kingdom
USA	United States of America

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CHAPTER 1: PURPOSE, SCOPE AND OUTLINE OF THE STUDY

1.1 Introduction and background

Economic crime is a major problem globally. The Association of Certified Fraud Examiners' (ACFE) 2016 Report to the Nation states that entities lose approximately 5% of their annual revenues to economic crime. Worldwide, this translates to an estimated cost of \$3.7 trillion (ACFE, 2016b). Not only globally, but also in South Africa, economic crime is a significant problem. Corruption Watch (2016) describes the wave of fraud and corruption as a "South African Pandemic", which is underlined by the fact that the South African respondents who participated in the survey reported the most economic crime (69% of respondents) in PwC's 2016 Global Economic Crime Survey (PwC, 2016b). Commercial crime and poor governance pose serious risks to organisations. Deceitful behaviour not only undermines profit, operating efficiencies and reliability, but can also damage an entity's reputation (PwC, 2008).

Economic crime has been observed for thousands of years. As early as 1800 B.C. in Hammurabi's Babylonian Code of Laws, mention is made and sanctions determined in cases where individuals were found guilty of committing fraudulent transactions concerning cattle and sheep (Prince, 1904; Wiseman, 1962). These criminal acts have evolved since the ancient era, presenting itself in a variety of forms from medieval Europe to colonial times, the latter of which is well illustrated by the case of Captain Samuel Argall, the deputy-governor of Jamestown, Virginia, who in 1616 looted the entire estate of local residents and investors and fled to England (Skalak *et al.*, 2011).

Within the South African context, the Dutch East India Company, who administered the Cape after 1652, applied Roman-Dutch law in growing cases of criminal activity, including that of economic crime such as the theft of livestock. From 1795 and onwards, English law was also introduced to the Cape, including a criminal code called Act 24 of 1886 of the Cape, which also specifically provided a definition for theft (section 179) (Snyman, 2014).

Since the 20th century it seems as though the occurrence of economic crime has increased due to the growth of mass markets and corresponding opportunities to commit fraud (CNN, 1999; Goldmann & Kaufman, 2009). This is supported by the findings of numerous fraud surveys and reports, such as the Association of Certified Fraud Examiners' (ACFE) 2016 Report to the Nation, which states that fraud is increasing globally (ACFE, 2016b). The occurrence and severity of the problem of commercial crime in the 21st century are only escalating: crime is growing faster than the global population (Belousova, 2016).

Prominent fraud cases in Europe and the USA from the 1970's onwards – such as Equity Funding, National Student Marketing, Mirror Group Newspapers, Bank of Credit and Commerce International and ZZZZ Best – put a renewed spotlight on the importance of forensic accounting, especially since all of these aforementioned entities received unqualified audit reports from auditors (Taylor, 2011). Various forensic accounting firms started to emerge during this time and the first global professional forensic body, the ACFE, was established in 1988 (ACFE, 2016a).

In South Africa, several well-known incidents of economic crime were also uncovered in the 1980's and 1990's, including various Ponzi schemes such as the Kubus scheme of Adriaan Nieuwoudt, the Krion scheme of Marietjie Prinsloo and the Miracle 2000 scheme of Sibusiso Radebe (Krige, 2009; Rose, 2013). These cases highlighted the extent of economic crime in South Africa, which was further emphasised by alleged state corruption scandals which surfaced later, such as the Strategic Defence Package (known as the Arms Deal) and *S v Shaik and Others* (2008) (Mattes, 2002; Dunne & Lamb, 2004; Slot, 2012). The recent allegations of the so-called “state capture” of South Africa, where several senior government officials and role players of state-owned entities have been implicated, has once again placed a renewed emphasis on the importance of forensic accounting (Cairns, 2017; Nicholson, 2017).

Crime is defined as “any conduct (act or omission) which is threatened with a penalty by criminal law” (Ortiz de Urbina & Ogus, 2009:344). Within the South African context, crime is defined by Snyman (2014:32) as “conduct which accords with the definitional elements of the crime in question, which is unlawful and culpable”. These “definitional elements” will depend on the specific crime in question. The definitional elements for fraud, for example, are unlawfulness, intention, misrepresentation and actual or potential prejudice. Economic crime is an umbrella term used for various crimes committed where money is involved (Bazley, 2008). For the purposes of this study, when the term “economic crime” is used, it may also refer to “commercial crime”, since there is no standard definition for either term, nor is there any supporting literature regarding the potential difference between the two terms (Vaughan, 2007; Snyman, 2014). Economic crime may include, *inter alia* (Snyman, 2014):

- Fraud;
- Theft;
- Removal of property for use;
- Receiving of stolen property;
- Inability to give account of possession of goods suspected of being stolen;
- Receiving of stolen property without reasonable cause;
- Embezzlement;

- Forgery and uttering;
- Theft by false pretences;
- Corruption;
- Extortion;
- Defeating or obstructing the course of justice;
- Perjury; and
- Organised crime.

Although there is no standard definition for economic crime, it is normally also used synonymously with white-collar crime. The latter is a term developed by sociologist Edwin H. Sutherland (Sutherland) and refined by criminologists Gilbert Geiss and Don C. Gibbons (Williams, 1997).

Although the initial definition of white-collar crime provided by Sutherland (1940:2) is restricted to a crime committed by a person of “respectability and high social status in the course of his occupation”, modern criminology rejects the limitation in terms of the social hierarchy set by this definition, and rather includes perpetrators of all types and from all levels within a financial entity – not only those in top management positions (Vaughan, 2007). White-collar crime, and therefore economic crime, can hence be defined as “financially motivated nonviolent crime committed by business and government professionals and includes the crime against property, involving the unlawful conversion of the ownership of property (belonging to one person) to one's own personal use and benefit” (FBI, 2016).

1.2 People committing economic crime

It is acknowledged that economic criminals have different motivations for what they do; they have varying profiles and *modi operandi* and it is therefore not possible to have a generic “one-size-fits-all” explanation for criminal behaviour (Kapardis & Kambria-Kapardis, 2016). This discussion merely serves to illustrate that offenders of economic crime differ from other criminals, such as murderers or so-called “street criminals”. The motivation for committing economic crime is explained by a myriad of psychological and criminal theories, but for purposes of illustration the so-called fraud triangle will be used, since it is the most well-known theory within said criminal field (Ramamoorti, 2013).

The fraud triangle, according to Cressey (1953), consists of three intertwined elements that offer a possible explanation (other more complicated and sophisticated models also exist) for the prevalence of economic crime, namely: opportunity, pressure and rationalisation. Each one of these elements is informed by theoretical frameworks, demonstrating the complex nature of

economic criminal behaviour. Pressure, for example, is informed by the strain theory which is made up of six multifaceted aspects (Fisher, 2015):

1. **Violation of assigned responsibilities** – A situation where an individual finds him/herself in financial difficulty due to reasons that are not socially acceptable to his/her peers. For example, in the case of a chartered accountant who experiences severe financial constraints due to his drug addiction, the social pressure for resorting to criminal behaviour is obvious.
2. **Personal failures** – Financial difficulty that emanates from poor judgment or inadequate financial planning drives criminal actions.
3. **Business reversals** – Financial pressure, such as the weakening of the economy, serves as an external force for criminal behaviour.
4. **Physical isolation** – This occurs when a person experiences financial pressure, but applies self-induced physical isolation by refraining from seeking advice or help from other people.
5. **Status acquisition** – The aspiration for an elevated social status and lifestyle with limited resources contributes to financial pressure.
6. **Employer-to-employee relationships** – Financial pressure due to employees' perception that they are not being rewarded in relation to their work performance.

The complex interplay between these various aspects contributes to the manifestation of different types of criminal behaviour. For example, the perpetrators who conduct serial pickpocketing (the stealing of money or other valuables from the victim without them noticing the theft at the time) (Troelson & Barr, 2012), are often motivated to sustain a continuous habit, such as serving a drug addiction on a day-to-day basis (Barbu, 2012).

The profile of a typical economic criminal also differs greatly from other criminals. Whereas so-called violent “street criminals”, for example, are normally poorly educated, unemployed (if not still at school), live in poor housing conditions, and are males between the ages of 13 and 27 (Salaam, 2011), economic crime is usually committed by people who are well-educated, hold executive or director-level positions and are males between the ages of 36 and 55 (KPMG, 2016; PwC, 2016b). Barret (2013) also adds that these economic criminals usually enjoy high social status and are respected in their community.

The *modi operandi* of economic criminals are also often more sophisticated than those of perpetrators of most other crimes. Whereas street gangs, for example, make use of physical intimidation and violence to achieve their objectives (Gibson *et al.*, 2012:497), economic perpetrators usually make use of non-violent and multifarious techniques, which may include complex methods of circumvention of internal controls of an entity, manipulation of financial statements and other source documents, and the use of technological tools such as computers and mobile phones to commit offenses (Sanusi *et al.*, 2015). The abovementioned extreme comparisons only serve to illustrate the vast contrasts in the different types of people who commit economic crime and exemplify the idiosyncratic nature of such criminals.

1.3 Investigation of crime

The investigation of crime has its roots within the English system of policing, specifically in the Anglo-Saxon period (400 – 1066 AD). This system consisted of communities having the mandate to regulate each other's conduct. Societies were divided into groups of 10 people, called "tythings", and each tything was guided by the assistance of a so-called "tythingman" – the forerunner of today's office of constable – who was an "unarmed able-bodied citizen" who policed criminal activity (Kirchengast, 2008:1). The tythingman, together with the so-called "hundred-man" (who was chosen from a group of 10 tythings and who had to report to the county's justice of the peace) formed a primitive version of today's police service (Critchley, 1967; Rawlings, 2008).

The tything system was further developed after the Norman Conquest of 1066 AD, but it was the 1166 Assize of Clarendon – an act promulgated by Henry II of England – that initiated the transformation of English law from primitive systems to one where emphasis was placed on evidence, investigation/inspection and inquiry under oath (Kirchengast, 2008). The previous primitive systems consisted of practices such as trial by ordeal (where an accused person was subjected to a test of life and death and the proof of innocence was survival), trial by battle (where two disputing parties fought in combat and the winner was declared as being in the right) and trial by compurgation (where an accused could prove his/her innocence by taking an oath which was supported by a number of other persons, normally twelve, who swore that they believed the accused's oath) (Rawlings, 2008; Joyce, 2011).

The 1285 Statute of Winchester developed the role of constables within tythings and compelled all community members to help arrest criminals (Critchley, 1967; Langbein, 2002). Edward III approved new legislation in 1361 which established early versions of today's magistrates and judges, who appointed the constables. The role of constables and sheriffs in communities grew throughout the subsequent centuries and eventually evolved into remunerated officials during the

late 18th century. The investigation of crime by these individuals also developed during this time (Rawlings, 2008). In 1842, the first detective branch was established in London and the 1842 Parish Constables Act instituted a superintending constable to regulate other officials, which was later expanded by numerous additional statutory legislations during the 19th century (Edwards, 1984). These policing and investigative norms spread to other areas in the world, including South Africa, during the colonial expansion of Europe in the 18th and 19th century (Joyce, 2011).

During the 20th century, pro-active practices and preventative measures were included in the fight against crime and required the assistance of private individuals (such as internal auditors and forensic accountants in the establishment of internal control measures in organisations), and a renewed emphasis was placed on the investigation of economic crime from the 1970's to 2000's due to the emergence of significant corporate scandals (Taylor, 2011). Due to the police's lack of resources and knowledge, private investigators – particularly in terms of the detection, investigation and prevention of economic crime – established the forensic accounting profession (S v Botha, 1995).

1.4 Forensic accounting

1.4.1 Background and history

In order to understand forensic accounting and how it is applied, it is important to assess how it originated. Forensic accounting's foundation is based on accounting/recordkeeping (Singleton *et al.*, 2006). Historians believe that recordkeeping originated about 4000 B.C. in the Near East due to the establishments of organised business and governments, particularly in terms of recordkeeping and receipting of disbursement payments, and collecting taxes from residents. Much later, in the 13th century, auditing practices developed in Europe and, with the spread of commerce in the 17th and 18th century, focus changed from ensuring the accountability of funds assigned to public or private individuals, to the calculation of profit and losses of businesses and the ownership of property (Carmona, 2004; Taylor, 2011).

However, it was only at the end of the 18th to the mid-19th century that auditing became imperative to commerce due to the rapid growth in infrastructure as part of the industrial revolution (Carmona, 2004). In Great Britain this was signified by the establishment of the Joint Stock Companies Act in 1844, the founding of the oldest professional body in the world, the Institute of Chartered Accountants in Scotland in 1854 and the establishment of the Companies Act in 1879, the aforementioned having set down regulations which forced companies to make their records available for scrutiny by shareholders – of which the accountant played a central role in setting

up the financial statements, and auditors in testing the statements to establish whether they were a true version of actual economic events (Murphy, 1955; Matthews, 2006). This was extended in the 20th century by the 1929 Companies Act, which required a balance sheet and profit and loss account to be offered to shareholders annually and the 1948 Act, which obligated increased disclosure of a company's economic situation and the activities of the directors. Further to this, the 1948 Act required auditors to have professional qualifications (Taylor, 2011). Similar developments were initiated by the rest of the industrialised world during the same time and generally accepted audit practices were established (Bennet, 2015).

Stevenson-Smith (2015) notes that the general view of academic writers and the public at the start of the 20th century was that the detection and even prevention of economic crime was the responsibility of the auditor. At this time, auditor independence from the client was not an important issue and subsequently the role of the auditor was essentially that of a fraud investigator.

It was only after the stock market crash that led to the Great Depression in the early 1930's that the limits of audits were stressed and a change in perception arose with regards to the role auditors play in the prevention, detection and investigation of economic crime. This was emphasised in the Codification of Statements on Auditing Procedure in 1951 which stated that "the issuance of an opinion respecting to financial statements is not designed and cannot be relied upon to disclose defalcations". It was also during this time that the term "forensic accounting" was first used (Skalak *et al.*, 2011:10).

After the financial scandals in the early 2000's, forensic accounting and subsequent commercial forensic investigations became a separate and prominent profession within commerce, especially with renewed emphasis placed on auditor independence through new and stringent laws such as the Sarbanes-Oxley Act (Stevenson-Smith, 2015). The Enron and WorldCom scandals highlighted the ineffectiveness of auditing firms in detecting fraud, whereas the central role played by Commercial Forensic Practitioners in investigating these financial crimes has led to an expansion of the forensic accounting profession (Sweeney, 2002).

Commercial Forensic Practitioners (FPs) are not only expected to identify potential incidents of manipulation of financial statements as part of the commercial forensic investigation, but also to provide accounting litigation support, where they determine the quantum of a dispute and present accounting evidence in legal proceedings (PwC, 2016a). In light of the above, a unique approach is required when attempting to prevent, detect and investigate this type of crime. In this regard, FPs play a pivotal role.

For the purposes of this study, when mention is made of an FP, this also refers to the more traditional term “forensic accountant” – an individual who prevents, detects and investigates economic crime (as mentioned above) in the South African context. The reason for using the term “FP” is due to the recent recognition of the Institute of Commercial Forensic Practitioners (ICFP) as a professional body by the South African Qualifications Authority (SAQA), which also enabled the professional designation of Commercial Forensic Practitioner – FP (SA) (ICFP, 2017; SAQA, 2017).

1.4.2 Forensic accounting and auditing

Forensic accounting is defined by Hopwood *et al.* (2008:3) as the “application of investigative and analytical skills for the purpose of resolving financial issues in a manner that meets standards required by courts of law”. According to Du Plessis (2001:4-6) forensic accounting entails “the application of financial skills and investigative mentality to unresolved issues, conducted within the rules of evidence. As a discipline it encompasses financial expertise, fraud knowledge and a strong knowledge and understanding of business reality and the working of the legal system”. Further to this, Zimbelman *et al.* (2012:xvi) state that forensic accounting consists of the “methodology for resolving allegations of fraud from inception to disposition. The process involves gathering evidence, taking statements, writing reports, and assisting in the detection and deterrence” of economic crime.

There are significant differences between auditing and forensic accounting. Auditing in South Africa refers to the work performed by the registered auditor (also known as the external auditor) and is regulated by the Auditing Profession Act (26 of 2005). The main responsibilities of registered auditors are contained in section 44 of the Act, namely: “the expression of an opinion of whether the financial statements fairly present all material respects, the financial position of the entity and the results of its operations and cash flow in all material respects in accordance with the basis of an accounting and financial reporting framework” (Van Romburgh, 2008:24). The registered auditor's responsibility is therefore an expression of an opinion regarding the financial statements of an entity, in accordance with an audit that was performed by him/her (Van Romburgh, 2008).

The primary aim in forensic accounting is to prevent, detect and investigate economic crime. Auditors normally do not prevent, detect or investigate economic crime since their work entails the examination of only a small part of financial accounts by way of sampling (Hopwood *et al.*, 2008). With regards to prevention, FPs play an important role in implementing preventative, detective or investigative measures. On a preventative level, they can provide organisations with

so-called fraud awareness training, set up guidelines for employee assistance programmes, assist in the implementation of internal controls, establish whistle-blowing mechanisms and provide overall support in the drafting of policies and procedures which aid fraud prevention (Albrecht *et al.*, 2012). In the detective role or so-called fraud risk assessments, FPs identify potential processes and systems that could be exploited by economic criminals, such as: accounting anomalies (e.g. inaccurate or irregular source documents, journal entries and ledgers), internal control weaknesses, analytical symptoms (such as significant changes in account balances, ratios and financial statement relationships – i.e. increased revenues with decreased inventory), employees who have extravagant lifestyles, and tips and complaints from employees and other role players (Albrecht *et al.*, 2012). In the investigative role, FPs' tasks comprise:

- Examining the abovementioned inadequate processes and systems during the detection phase;
- Identifying the role players, suspects, potential crime schemes, and the time period in which the offence took place;
- Determining the potential motivation for the offence;
- Gathering evidence; and
- Quantifying the losses.

1.4.3 Commercial Forensic Practitioners and the South African Police Service

It is important to distinguish between FPs who work in the private sector, and individuals employed or contracted by the Commercial Branch of the South African Police Service (SAPS). Members of the latter group have far greater powers that are entrenched in law, such as, *inter alia*, to perform searches and seizures, to obtain information that would normally be of a private nature such as obtaining bank statements or cell phone records of suspects, and to make arrests. In the case of FPs in private firms, the mandate to perform investigations is limited, except in the extraordinary circumstances where they are appointed as inspectors by the South African Reserve Bank, Financial Services Board and other investigative or regulatory bodies. FPs normally do not, for example, have the mandate to question suspects without the latter's consent and may not perform searches and seizures without the assistance of the SAPS (Van Romburgh, 2008:34-36). They thus have to adopt a different method of operation.

The difference between FPs who work in the private sector, and individuals employed or contracted by the Commercial Branch of the SAPS is significant for this study, because it determines the mandate and appropriate actions associated with forensic interviews in the various specific contexts in which they are conducted. In this dissertation, the focus is placed on FPs who are employed in the private sector and who are not appointed as inspectors of financial regulators and have to rely on their skills and limited powers to identify irregularities in the financial world (Crumbly, 2016). They are not police officers and do not act per police mandate.

1.4.4 The transdisciplinary nature of Commercial Forensic Practitioners

The subject field of forensic accounting is responsible for the training of FPs. It is, however, a relatively new field of study and the integrated theoretical framework and professional guidance are thus not yet well developed in South Africa (Slot, 2012). Additionally, the requirements expected of FPs are constantly changing due to the ever changing commercial environment (Van Romburgh, 2008). Finally, the nature of the work requires exposure to various forms and levels of expertise.

In order for FPs to be efficient in the execution of their duties, they require specific skills. The American Institute of Certified Public Accountants (AICPA) performed a study in 2010 to determine the most important attributes a forensic accountant should possess in order to perform his/her duties efficiently (Davis *et al.*, 2010). The following skills were identified and linked to the subject disciplines informing the actions according to the Classification of Educational Subject Matter (CESM, 2008):

1. Analysis and interpretation of financial statements and information: Accounting and information technology sciences;
2. Interviewing skills: Humanities and social sciences;
3. Expert witnessing: Law and humanities; as well as
4. Knowledge of law of evidence and civil procedure: Law.

FPs require expertise in a number of different subject disciplines, contributing to its transdisciplinary nature. Transdisciplinarity in this study refers to “the application of theories, concepts, or methods across disciplines with the intent of developing an overarching synthesis” (Lattuca, 2001:83). Transdisciplinarity transcends the narrow scope of interdisciplinary worldviews through an overarching synthesis. This means that individuals transcend their own

subject fields and “move” between subject fields in order to have a broader view for purposes of achieving a goal (Klein, 2010:24). Applied to this study, it means that FPs are expected to merge relevant knowledge and skills from accounting, law, information technology, and humanities and social sciences to achieve the goal of preventing, detecting and investigating economic crime (Crumbly, 2016). Forensic interviewing forms part of the fields of the humanities and social sciences, and is the focus of this study.

1.5 Forensic interviewing

Interviewing is a basic tool used to obtain information and is therefore central in the work of an FP. Interviewing skills are required to question witnesses and suspects, thereby obtaining oral evidence and acquiring potential confessions from perpetrators or at least the alleged perpetrator’s version of the subject matter (Vorster *et al.*, 2016). Little research, however, has thus far been conducted on forensic interviewing and specifically the different types of interviews used by FPs. Interviews are always conducted within an interpersonal framework (Vorster, 2007:1); and interviews are performed in diverse contexts, with the purpose of each interview differing according to a particular context (Keats, 2000:6-7). Therefore, an FP should be able to apply specific skills in relation to the interpersonal context and interview related parties who can potentially provide useful information.

During a commercial forensic investigation, the FP will be expected to conduct interviews with relevant role players who may include: witnesses to the crime, third parties who may provide insight into technical aspects of the investigation (e.g. in the case of transporting and storing fuel, specialists and experts such as chemical engineers might be consulted by the FP when investigating a petroleum company), or even the suspect himself, with the aim of gathering information that can assist in the investigative process (Davis *et al.*, 2010:14).

Even though interviewing skills form an important part of the FP’s work, an assessment of the curricula of commercial forensic investigative programmes offered by South African tertiary institutions and professional bodies has revealed lacking content on interviewing procedure in a forensic context. The content that is reflected in the programmes includes knowledge and skills in terms of legal aspects, information technology and accounting; not one of them including forensic interviewing as a critical knowledge or skill (UP, UJ, UNISA, UWC, UKZN, UCT, NWU, ICFP & ACFE, 2016). A rationale that is often used to exclude certain content in a particular curriculum is that programme developers assume that candidates develop critical skills in other programme offerings or acquire the skills as part of in-service training or through experience (Walsh & Bull, 2011).

Many FPs use interviewing techniques that they have acquired during their formal or informal training or prior experience (Ferraro, 2006:187). However, the literature indicates that there is a lacuna of interviewing techniques and very few documented techniques are presented with clear guidelines, or have been tested (Walsh & Bull, 2015; Slot, 2012). These techniques are also not always based on a theoretical framework which informs the rationale for performing specific actions that are aligned with the paradigmatic assumptions underpinning the FP's profession. Some of the techniques may even be in conflict with certain conventions (e.g. legal, social-cultural) (Walsh & Milne, 2007). Additionally, being a good communicator does not necessarily mean having good interviewing skills. This is in part due to the complex interpersonal skills required by the interviewer and the need to apply sophisticated techniques to "move" beyond one's own subjective reality (Vorster *et al.*, 2016).

Due to the fact that there is no universal consensus in terms of whether there is a difference between interviewing and interrogation (Walsh & Bull, 2011), no distinction between the two will be made for the purposes of this study.

1.5.1 Forensic interviewing techniques

An interview is defined by Gubrium and Holstein (2002:3) as a "conversation aimed at obtaining desired information from a respondent". There are many different types of interviewing techniques that are being used by FPs (Johnson & Rowlands, 2012). However, four techniques seem to feature most strongly in preliminary literature searches, using the search terms discussed in Chapter 3 of this study:

- **PEACE model** (Walsh & Bull, 2011) – This is a forensic interviewing technique where "PEACE" represents an acronym: P stands for "Preparation and Planning", E stands for the first phase of the interview (Engage & Explain). A refers to "Account, Clarify and Challenge" where the interviewer can challenge any discrepancies, C is the "Closure" of the interview; and E is the "Evaluation" of how the interview went according to the interviewer;
- **HUMINT** (Evans *et al.*, 2010) – Human Intelligence (HUMINT) is an interrogation method used mainly in military and intelligence environments in the United States of America (USA). It shows similarities with criminal interrogations such as the Reid technique (mentioned below), but is normally not limited to obtaining confessions and information about past events. The method is usually applied in respect of foreign national suspects

and sources, including individuals who might pose a threat to national security (Cleary & Warner, 2015);

- **The Reid technique** (Hueback, 2009) – The Reid technique is a forensic interviewing technique based on the nine steps of interrogation formulated by John E. Reid (Reid). It is mainly applied to criminal investigations and is used in situations where the interviewee's guilt is deemed "definite and reasonably certain" (Inbau, 2005:121); and
- **Person-centred interviewing** (Vorster *et al.*, 2016) – This forensic interviewing technique focuses on person-centeredness, where the interviewer conducts the interview by displaying empathy, unconditional acceptance and congruency towards the interviewee in order to establish rapport and obtain information (Vorster, 2007:55). This means that the interviewer "moves beyond his/her own subjective nature due to personal bias, needs, priorities, prejudices and expectations" (Vorster, 2007:50) to adopt the position of the other.

Each of these four techniques has its own style, routine, advantages and limitations. In forensic interviewing there is no standard interviewing technique that is followed universally (Cleary & Warner, 2015). According to Johnson and Rowlands (2012:99), each technique "uses our common cultural wisdom about people, places, manner and contexts".

Each technique will be discussed in more detail in the subsequent chapters.

1.6 Problem statement and motivation

To conduct a skilled interview in the context of commercial forensic investigations requires technical expertise, especially regarding the formulating of questions and the creation of an atmosphere conducive to open communication (Platt, 2012:2). Programme developers can also not make the assumption that FPs have the ability "to provide an environment conducive to the production of the range and complexity of meanings that address relevant issues and not be confined by predetermined agendas" (Holstein & Gubrium, 1995:17).

Despite numerous commercial forensic investigative courses presented by academic institutions and professional bodies, it seems as though not enough time and content are assigned to forensic interviewing in particular, which, according to Slot (2012:3), aggravates the lacuna in the profession.

The Constitution of South Africa (1996) (The Constitution) is the most important piece of legislation to equate human behaviour with the rights contained in its second chapter: the Bill of Rights. The law of evidence in turn provides the standards which are used to measure the admissibility of evidence obtained in accordance with the Bill of Rights. It is therefore imperative that an FP has detailed knowledge of these relevant areas or branches of the law so as to conduct interviews that are lawful and to ensure that evidence obtained during forensic interviewing is not considered inadmissible in a court of law (Slot, 2012:36).

There is thus the need to compile a clear outline of interviewing techniques available to FPs, specifically in the South African context. There is also a need to critically discuss these interviewing methods in terms of their limitations and advantages in relation to relevant legal aspects.

The question therefore arises: “What interviewing techniques are best suited when conducting legally compliant commercial forensic investigations in South Africa?”

The aim of this study is to offer a critical discussion of the different interviewing techniques for FPs in terms of theoretical underpinnings, limitations and advantages, informed by the South African legal context.

1.7 Research objectives

1.7.1 Main objective

The main objective of this study is to present a critical discussion of the interviewing techniques that FPs use which are specifically appropriate for the South African legal context. This will be achieved by presenting the theories underpinning the different interview techniques; highlighting each technique’s limitations and advantages against literature and scrutinising the different techniques against regulatory standards.

1.7.2 Secondary objectives

As part of the process of providing answers for the question raised above, the secondary objectives of this research are to:

1. Determine the importance of interviewing as part of a commercial forensic investigation in the South African context;

2. Describe the law that needs to be taken into consideration by the Commercial Forensic Practitioner when conducting an interview in South Africa;
3. Identify forensic interviewing techniques in terms of database searches conducted; and
4. Critically discuss and compare the forensic interviewing techniques in accordance with available academic literature and the law.

1.8 Research methodology

1.8.1 Literature study

This dissertation will consist of a literature study. A literature study allows the researcher to bring a new perspective on a certain topic while summarising existing literature (Boote & Belle, 2005:4). Furthermore, a literature study comprises a systematic method to identify and evaluate completed work produced in the past (Sawyer Library, 2012). The purpose of a literature study is to identify what is already known about the area in which the study will be conducted, as well as to show why further research is necessary (Harvard University, 2013).

The following sources were consulted for this literature study:

- Laws and regulations, law reports and other relevant sources of law pertaining to forensic interviewing;
- Publications in newspapers, magazines and academic journals;
- Academic books; and
- Internet sources.

1.8.2 Critical literature review

This study will also include a qualitative research component in the form of a critical literature review. A critical literature review is a type of systematic review, which in turn aims to “identify, evaluate and summarise the findings of all relevant individual studies, thereby making the available evidence more accessible to decision makers” (Centre for Reviews and Dissemination, 2009:v). Combining the results of numerous studies gives a more dependable and exact assessment than one study alone.

According to Grant and Booth (2009), a critical review aims to establish that the author has comprehensively researched the literature and assessed its quality. A successful critical review presents, examines and synthesises information from a variety of sources. The results from such a study usually comprise a hypothesis or a model and not an answer. This said model may contain a synthesis of existing models or frameworks, or it may be an entirely new interpretation of the existing information (Centre for Reviews and Dissemination, 2009).

In this dissertation, a critical literature review of established forensic interviewing techniques will be conducted with the aim to assess their potential application by FPs during the commercial forensic investigative process in the South African context.

1.9 Outline of the study

Chapter 1: Purpose, scope and outline of the study

This chapter describes the background and scope of the study. The motivation, research objectives, research methodology, problem statement and analysis of the proposed chapters are also discussed.

Chapter 2: Contextualising forensic interviewing in the South African legal framework

An explanation of the relationship between psychology and forensic interviewing, as well as how forensic interviewing originated and evolved over time will be provided in this chapter. Additionally, the role of interviewing in the commercial forensic investigative field will be discussed in order to establish its importance in conducting successful investigations. An overview of the fundamental legal principles of South Africa and its relevance in conducting lawful forensic interviews as part of the commercial forensic investigative process will also be provided.

Chapter 3: Methodology

This chapter will provide a discussion of the methodology applied in this study. An overview of the characteristics of a critical literature review will be supplied, as well as the subsequent criteria used in identifying the research material – in this case, the selected forensic interviewing techniques.

Chapter 4: A critical analysis of selected interviewing techniques

A critical discussion will be provided of specific interviewing techniques which were provisionally identified in a literature study (i.e. the PEACE model, HUMINT, the Reid technique, as well as the person-centred approach). Each interview technique will be discussed comprehensively in terms of its underpinning theory, method of application, as well as its limitations and advantages for a commercial forensic investigation guided by the relevant South African legal principles discussed in Chapter 2 and the role of the FP.

Chapter 5: Conclusion and recommendation

A conclusion will be drawn as to the potential successful application of each interview technique in the commercial forensic investigative field, specifically in the South African context, and the subsequent research question will therefore be answered. Recommendations in terms of the findings will be given.

1.10 Conclusion

This chapter provides an overview of the role of interviewing in commercial forensic investigations. Despite the recent establishment of regulatory bodies such as the ICFP and increased academic research outputs, the commercial forensic profession remains relatively new. A lack of guidance in the application of successful interviewing methods is one of the challenges. This chapter identified four interviewing techniques which could potentially be applied to forensic investigative interviews in order to obtain meaningful information.

The need of research regarding the effective implementation of one or more of these techniques in the South African context is evident. Relevant law, including the Constitution of South Africa, also needs to be taken into account when discussing interviewing methods using the South African legal context as the guiding norm.

CHAPTER 2: CONTEXTUALISING FORENSIC INTERVIEWING IN THE SOUTH AFRICAN LEGAL FRAMEWORK

2.1 Introduction to forensic interviewing

Interviews are methodological, rooted in the social sciences and first appeared in academic writings in Howard Odum and Katherine Jocher's 1929 *An Introduction to Social Research* and in Pauline Young's 1939 *Scientific Social Surveys and Research* (Platt, 2001). It is important to note that there are many different interview types, such as job interviews, mass media interviews, clinical interviews, research interviews, opinion polls, psychological assessment interviews and forensic interviews (Keats, 2000; Ready & Veague, 2014). Interviews differ from normal conversations in that they take place in a controlled environment. A forensic interview has a unique purpose which distinguishes it from most other types of interviews. It also differs, for example, from clinical interviews, which aim to assess, diagnose and improve an individual's psychological well-being (Vorster *et al.*, 2016). This study focuses solely on forensic interviewing, which has the unique aim of gathering relevant information as part of a commercial forensic investigation (Vorster *et al.*, 2016). According to Gubrium and Holstein (2002:3), an interviewer conducts a "conversation aimed at obtaining desired information from a respondent". The participants in a forensic interview have established roles: one person (the interviewer) asks a succession of questions to the respondent (the interviewee), who in turn is expected to answer or attempt to answer the enquiries (Keats, 2000).

Interviews are performed in a diverse set of contexts and the purpose of each interview will differ according to a particular context (Keats, 2000:6-7). Interviews are conducted with relevant role players who may include: witnesses to the crime, third parties who may provide insight into technical aspects of the investigation, or even the suspect (Davis *et al.*, 2010). Holstein and Gubrium (1995:17) state that it is the responsibility of the interviewer to "provide an environment conducive to the production of the range and complexity of meanings that address relevant issues and not be confined by predetermined agendas."

Apart from the practical experiences of some FPs, most of these interviewing guidelines originated from within the police environment as part of obtaining information from witnesses and getting admissions from suspects in criminal investigations (Zulawski & Wicklander, 2002), and have since been adopted and merged with the methods of some forensic accounting authors; initially in 2001 by polygraph examiners David E. Zulawski and Douglas E. Wicklander (Zulawski & Wicklander, 2002) – who based a lot of their methods on elements contained in the Reid

technique, and later by Hopwood *et al.* (2008), Kranacher *et al.* (2011), Skalak *et al.* (2011), as well as Zimbelman *et al.* (2012).

The current application of interviewing techniques within the commercial forensic investigative environment is vague (Walsh & Bull, 2011). Guidelines in conducting forensic interviews have only relatively recently been published by some FPs who have penned down their experiences in an informal manner, often without theoretical underpinnings (Walters, 2003). Commercial forensic investigations should, however, comply with the relevant legal framework used in South Africa. Therefore, forensic interviewing will be critically discussed against the backdrop of the legal framework applicable in the South African context. This guiding principle is relevant, because if interviewing techniques are incompatible with the South African legal framework, the information obtained during forensic interviews may be inadmissible in a court of law and therefore of no use (Nagel *et al.*, 2015).

2.2 Legal framework guiding forensic interviewing

Components that will form part of the critical discussion are:

- The Constitution of South Africa (1996) (The Constitution);
- The Criminal Procedure Act (51 of 1977) (CPA);
- Relevant principles of the law of evidence;
- Relevant labour law practices; and
- Civil procedure.

The South African Constitution is of specific importance since human behaviour is overtly measured against it (McConnell, 1997). Furthermore, the Constitution's second chapter, i.e. the Bill of Rights, is especially significant since it is the cornerstone of South African democracy and confirms the democratic values of human dignity, equality and freedom (McIntyre *et al.*, 2014:7-9). Section 10 contains the right to human dignity, section 12 the right to freedom and security of the person and section 14 the right to privacy – all of which should be upheld by the FP during interviewing.

Section 35 of the Bill of Rights – the rights of arrested, detained and accused persons – is of especial importance to the FP, seeing that fundamental aspects such as (i) the presumption of innocence, (ii) the right to remain silent, (iii) the right not to give self-incriminating evidence, and (iv) the right not to be compelled to make any confession or admission that could be used in evidence, may affect, *inter alia*, the admissibility of evidence obtained during a forensic interview

and therefore also influence the application of a specific forensic investigative interviewing technique (Constitution, 1996).

The Bill of Rights is indirectly applicable to the rules of criminal procedure according to section 39 (2) of the Constitution, which states that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” The CPA should thus be interpreted in unison with the Bill of Rights (Steytler, 1998). The CPA is also of great importance to FPs, particularly with regards to oral and written evidence originating from interviews with witnesses and other third parties (section 213 (1)) and specifically admissions and confessions made by an interviewee (section 217). This relates to the law of evidence, which also provides principles regarding the admissibility of admissions and confessions. An admission or confession is a “statement or conduct that is adverse to the person from whom it emanates” (Zeffertt *et al.*, 2003:429).

Section 39 (2) of the Constitution as discussed above also applies to the labour law and should therefore promote the Bill of Rights. Of particular importance is section 23 (1) of the Bill of Rights, which provides for fair labour practices, including the rights of an employee of a firm interviewed by an FP. As is the case with the Constitution, the labour law is founded on the principles of human dignity, equality and freedom (Van Niekerk *et al.*, 2015).

Concerning the admissibility of evidence in civil proceedings, the Constitution does not contain any specific provisions and therefore the courts have to develop their own guidelines (Veerasingh v Engen Refinery, 2000). The admissibility of evidence obtained during forensic interviews will therefore be influenced by whether it will be used in criminal or civil cases, thus warranting further discussion in this study.

FPs should have sufficient knowledge of relevant material law (i.e. law of evidence, criminal law and labour law), and procedural law (criminal and civil law), since they deal with specific legal and regulating requirements insofar as financial aspects are concerned, e.g. money laundering investigations. Additionally, they support legal teams in dispute services, where corporations and their legal teams are given assistance to manage and resolve complex financial disputes. Finally, they also provide expert witnessing in court and disciplinary proceedings based on the findings of their forensic reports after completion of an investigation (Deloitte, 2016).

Therefore, any legal proceeding has to take into consideration important human rights which are stipulated in the Constitution of South Africa. The Constitution overtly measures human behaviour

(McConnell, 1997) and when people are interviewed (suspects or informants) for forensic purposes, the Constitution and its guiding principles need to be adhered to.

2.2.1 Outline of South African law

South African law is not entirely codified, which means that it is based on numerous sources. The key sources of South African law are as follows:

1. Common law – This refers to the rules of law that are not contained in an act of parliament, but which are as binding as any other piece of legislation (Snyman, 2008:5). South Africa's common law contains a fusion of Roman-Dutch law and English law (Havenga *et al.*, 2012:3);
2. Legislation – This is the most important of all the sources of law, in particular the Constitution and how it influences the conducting of forensic interviews – which will be discussed later in this chapter;
3. Customary law – This denotes specific rules that have become customary to a certain group of people. These are not written rules, but have developed from customs and traditions within a community which are passed from generation to generation (Havenga *et al.*, 2012:6);
4. Court judgments – This is also known as case law and forms an integral part of South African law. It represents judgments of the Dutch courts before 1652, judgments of the Cape Council of Justice before 1827, judgments up until 1910 as part of the judgments of the courts of the four provinces in South Africa before the country became a union, as well as judgments of the South African courts after 1910 (Havenga *et al.*, 2012:7); and
5. Foreign law – In the case where no judgments can be assessed from any of the abovementioned sources, a judge will refer to the law of other modern countries for guidance. Foreign law is not an authoritative source of South African law and has persuasive authority only. However, it has been recognised in terms of the Constitution, since a court of law must consider international law and may consider foreign law when interpreting the Bill of Rights (Havenga *et al.*, 2012:8).

2.2.2 The Constitution

The most authoritative source of law in South Africa is the Constitution. All rules of law from all the different sources of law, whether they are based on statutes or common law, must be aligned with the rights contained in Chapter 2 of the Constitution – the Bill of Rights. The Bill of Rights is the foundation of the South African democratic system and endorses the democratic principles of human dignity, equality and freedom. According to Section 8(1) of the Constitution, the provisions of the Bill of Rights apply to all divisions of government – the executive, the judiciary and the legislature, as well as all structures of the state (McIntyre *et al.*, 2014).

Various rights are created by the Bill of Rights, of which the following are particularly important to FPs (McIntyre *et al.*, 2014):

- Section 10 – Human dignity;
- Section 12 – Freedom and security of the person;
- Section 14 – Privacy;
- Section 23 – Fair labour practices;
- Section 25 – Property;
- Section 32 – Access to information: Apart from the Promotion of Access of Information Act (2 of 2000) which gives effect to the constitutional right of access to information held by the state and any information that is held by another person which is required for the exercise or protection of any rights, the Protection of Personal Information Act (4 of 2013) (POPI) was also enacted in order to find a balance between the right to privacy and the right to access to information;
- Section 33 – Just administrative action;
- Section 34 – Access to courts;
- Section 35 – Arrested, detained and accused persons. These rights include:
 - i. the presumption of innocence;
 - ii. the right to remain silent;
 - iii. the right not to testify during proceedings and the right not to give self-incriminating evidence;

- iv. the right not to be compelled to make any confession or admission that could be used in evidence;
- v. the right to legal representation;
- vi. the right to information, time and facilities to prepare and present a defence, access to information, cross-examination and the right to adduce evidence;
- vii. the right to a public trial before an ordinary court; and
- viii. the right to have a trial begin and conclude without unreasonable delay.

Although knowledge of these abovementioned sections is imperative when conducting commercial forensic investigations, it is also important to be aware that these so-called “first-generation rights” are not absolute. These rights may be limited in certain circumstances, including in cases where the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (section 36 of the Bill of Rights):

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

A court will have to determine what purpose the limitation sets out to achieve, whether this purpose is sufficient to justify the limitation, whether the limitation will be able to successfully accomplish the purpose and whether the purpose might be accomplished in a different, less constricting manner (Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the RSA and Others, 2000).

It is important to note, however, that the general rule is that the rights contained in the Bill of Rights must be adhered to at all times and the limitations as set out in section 36 will only apply under exceptional circumstances (Joubert *et al.*, 2014).

2.2.3 The Bill of Rights and forensic interviewing

With regards to forensic investigative interviewing, the following sections of the Bill of Rights are particularly important (The Constitution, 1996):

Table 1
Relevant sections of the Bill of Rights

Section	Description	Application to forensic interviewing
10	Human dignity – “Everyone has inherent dignity and the right to have their dignity respected and protected.”	According to Currie and De Waal (2013:251), human dignity is “the source of a person’s innate rights to freedom and to physical integrity, from which a number of other rights flow.” Human dignity, equality and freedom underpin any open and democratic society and therefore forms the basis of the Constitution (Steytler, 1998). FPs should conduct interviews in such a manner that the interviewee’s dignity is respected. The interviewing method should therefore take place in a composed and humane manner, not threaten the interviewee’s right of being worthy of honour or respect, and be free from torture and degradation (S v Makwanyane, 1995).
12(1)	Freedom and security of the person – “(1) Everyone has the right to freedom and security of the person, which includes the right a. not to be deprived of freedom arbitrarily or without just cause; b. not to be detained without trial; c. to be free from all forms of violence from either public or private sources; d. not to be tortured in any way; and e. not to be treated or punished in a cruel, inhuman or degrading way.”	Currie and De Waal (2013:270) state that section 12(1) of the Bill of Rights aims to protect a person’s “physical integrity from invasion from public and private sources” including by means of “...arbitrary arrest, violence, torture or cruel treatment or punishment.” The physical detention of a person for the purposes of interviewing or interrogation is not acceptable in any open and democratic society (Bernstein v Bester NO and Others, 1996).

Section	Description	Application to forensic interviewing
		<p>FPIs should conduct interviews in such a manner that the interviewee's right to freedom is not infringed. The interviewing method should not be of such a nature that it denies the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated in an inhuman way by the interviewer (Steytler, 1998).</p>
14	<p>Privacy – "Everyone has the right to privacy, which includes the right not to have</p> <ul style="list-style-type: none"> a. their person or home searched; b. their property searched; c. their possessions seized; or d. the privacy of their communications infringed." 	<p>According to <i>Bernstein v Bester NO and Others</i> (1996), privacy is the "truly personal realm" of an individual that is the "inner sanctum of a person, such as his/her family life, sexual preferences and home environment." As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.</p> <p>In <i>R v Parker</i> (1966), the judge found that the obligation to be present at a specific place is not an intrusion of an individual's privacy. However, the compulsion to answer questions about private and confidential matters may do so.</p> <p>The POPI Act also protects a person against privacy infringements and states that consent is needed from said individual with regards to the sharing of personal information. This is emphasised by Currie and De Waal (2013:296) who refer to "informational privacy".</p> <p>The FPI therefore needs to take into account these abovementioned aspects so as not to infringe on the right to privacy of an individual, which also applies to the interviewing stage of the investigation. It is</p>

Section	Description	Application to forensic interviewing
		<p>evident from the abovementioned aspects, that it will normally not represent an infringement to expect an interviewee to be present during an interview, yet the sharing of his/her personal matters may (Steytler, 1998).</p> <p>The interviewee's right to privacy is, however, limited in accordance to the presentation of information which directly refers to his personal matters. As soon as the employee abandons the private sphere for the employer's realm, he/she loses the benefit of privacy (Protea Technology Ltd v Wainer, 1997). Sharing information that influences, for example, the entity he/she works for, will limit the right to privacy, since no legitimate expectation of privacy can be harboured from such public acts (National Media Ltd v Jooste, 1996).</p> <p>With regards to the surveillance of a communication, section 4 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) and Constitution applies. The recording of a conversation, including a forensic interview, will normally violate the right to privacy of an interviewee if such recording is conducted by a third party (S v Nkabinde, 1998). However, when a communication is recorded by a party to the conversation, such as the FP himself, the conversation will not infringe on the interviewee's right to privacy in terms of both RICA and section 14 (d) of the Constitution (S v Kidson, 1999).</p>

Section	Description	Application to forensic interviewing
35(1) & (5)	<p>Arrested, detained and accused persons – “(1) Everyone who is arrested for allegedly committing an offence has the right</p> <ul style="list-style-type: none"> a. to remain silent; b. to be informed promptly <ul style="list-style-type: none"> i. of the right to remain silent; and ii. of the consequences of not remaining silent; c. not to be compelled to make any confession or admission that could be used in evidence against that person; <p>(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.”</p>	<p>FPs in the private sector do not have the mandate to arrest or detain an individual (S v Botha, 1995), therefore, the interviewee in a forensic interview will not be an “arrested, detained or accused” person as per section 35 of the Bill of Rights.</p> <p>According to S v Sebejan and Others (1997), the rights contained within section 35 will still be relevant and applicable to an interviewee who is not arrested, detained or accused, where the judge held that a suspect was entitled to the same warnings contained in section 35. However, S v Langa (1998) and S v Mthethwa (2004) diverged from this argument and held that section 35 is irrelevant in respect of a suspect.</p> <p>In the light of absence of a Constitutional Court ruling on this matter, there is scope for argument. Closer consideration of the concept of “detention” might be of assistance (Currie & De Waal, 2013). In applying the position held by the Supreme Court of Canada (R v Therens, 1985) to a South African context, if a person reasonably believes that he/she is being detained, he/she should be informed of the rights contained in section 35. Further to this, if a person who is questioned is not aware that he/she is not obliged to answer and therefore feels forced to speak, the person will be deemed a “detained” person in terms of the Constitution, and the subsequent rights contained in section 35 will hence apply.</p>

Section	Description	Application to forensic interviewing
		<p>Since FPs in the private sector do not have the same authority as police officers to, amongst other things, detain individuals (McIntyre <i>et al.</i>, 2014), information obtained from a detained interviewee by an FP will by default be considered as being in violation of the Constitution and the evidence therefore inadmissible (section 35(5) of the Bill of Rights).</p> <p>Hence, there is no clear answer whether or not an FP is obliged to inform an interviewee of his/her rights according to section 35 (1). It might, however, be concluded from the abovementioned discussion that if the FP informs the interviewee from the outset: (1) the reason for the interview, (2) that the interviewee is not an arrested, detained or accused person, (3) that the interviewee does not have to answer the questions, (4) and that the interviewee is free to leave the conversation at any stage, there seems to be no reason why the interviewee's rights should be explicitly stated in accordance with section 35 (1) (b).</p> <p>The question regarding the admissibility of admissions and confessions during an interview is discussed in 2.2.4.</p>

Section 35 (5) mentioned above makes it clear that if any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is “detrimental to the administration of justice.” This may lead to the acquittal of the interviewee should he/she later be accused of any crime (Joubert *et al.*, 2014). Therefore, the interviewing method used by the FP should be of such a nature that it does not infringe on these said rights, otherwise it may deem the evidence inadmissible in a criminal court.

2.2.4 Admissions and confessions according to the law of evidence and forensic interviewing

The evidence “extracted” after being scrutinised by the abovementioned relevant aspects of the Bill of Rights, is in turn measured and directed by the law of evidence (Zeffertt *et al.*, 2003). The latter is thus also of great importance to the FP, in particular oral evidence that originates from interviews and specifically admissions made by an interviewee.

There is no indication in the law that there is a difference between an admission and confession – it is accepted that it is merely an artificial variance and that both should receive the same treatment (S v Agnew, 1996). According to Zeffertt *et al.* (2003:429) an admission (and therefore a confession as well) is a “statement or conduct that is adverse to the person from whom it emanates.”

Section 35 (1) (c) of the Bill of Rights, which states that an arrested person may not be “compelled to make any confession or admission that could be used in evidence against that person”, reflects an individual’s right against self-incrimination. The requirements for admissions and confessions according to section 35 (1) (c) of the Bill of Rights and section 217 of the CPA were summarised by the South African Law Commission, namely that they should be made (Currie & De Waal, 2013):

1. Freely and voluntarily;
2. In sound and sober senses; and
3. Without undue influence.

The requirement that a statement should be provided “freely and voluntarily” is derived from common law and can be regarded as a statement that is not “induced by a threat or a promise proceeding from a person in authority” (Van der Merwe & Du Plessis, 2004:501). Regarding the term “in sound and sober senses”, it is stated that a person will be deemed as not being in his sound and sober senses if he/she is unable to know what he/she is saying (R v Blythe, 1940). According to S v Pietersen (1987) “undue influence” refers to a practice that is “repugnant to the principles upon which the criminal law is based” and goes beyond violence and includes interviewing the interviewee for an unduly long period of time, subjecting the interviewee to fatigue, as well as exploiting the interviewee’s weaknesses, such as his lack of education or youthful age (Van der Merwe & Du Plessis, 2004).

Further to this, section 35 (5) of the Bill of Rights provides additional distinctive grounds for the exclusion of admissions and confessions obtained in violation of the various rights contained in section 35.

These admissions or confessions refer to “arrested, detained or accused” persons. As previously mentioned, the question arises whether these rules also apply to individuals who are not arrested, detained or accused, such as suspects in commercial forensic investigations conducted by private individuals (i.e. not police officers or investigators from law enforcement agencies). In *S v Sebejan and Others* (1997), the court emphasised the risk of pre-trial unfairness and called it “deceptive” to obtain information from a suspect as though he/she was purely a witness – specifically under false pretences from the interviewer so that he/she may advance the case against such a suspect – since it would compromise the right to a fair trial.

However, according to *Zeffertt et al.* (2003:440), where a person who is not arrested makes an admission “spontaneously, voluntarily, in the absence of undue influence, where he/she is aware of the pre-trial right to silence and there is no bad faith...” there is no reason to exclude the evidence. Although there is much debate regarding informing the suspect of his/her right to remain silent according to section 35 (1) (b) of the Bill of Rights (Currie & De Waal, 2013), it seems that confessions of an interviewee will be admissible in court, as long as they are made freely and voluntarily, in sound mind and sober senses, without undue influences, and the admission or confession does not violate any other rights of the suspect contained in the Bill of Rights according to section 35 (5).

The purpose of this study, however, is not to supply an answer as to whether or when a suspect should be informed of his/her rights. The abovementioned discussion merely illustrates the risk associated with admissions and confessions during forensic interviewing.

2.2.5 The Criminal Procedure Act and forensic interviewing

Criminal law and its procedure is relevant to commercial forensic investigations, because the state may institute charges against an individual if it suspects that the said individual may be responsible for committing a crime that is injurious to the broader public interest (Snyman, 2014) – which is different, for example, in the case of a delict in civil proceedings (refer to 2.2.7 below). Criminal procedure lays out the process by which suspected criminals are brought before a court of law and tried for their alleged crimes (Joubert *et al.*, 2017). This includes suspects of economic crime such as theft and fraud. According to Snyman (2014) the main remedy available to a victim of a crime where the guilty party is convicted in a criminal court, which includes instances of

economic crime, is social retribution through sanctions imposed on the offender. These sanctions include imprisonment, fines, correctional supervision and warnings.

As mentioned earlier, the term “economic crime” is an umbrella term used for several crimes involving money. The CPA is relevant to forensic interviewing, because it contains specific procedures that need to be taken into account by an FP in order to ensure that evidence obtained is admissible in a criminal case. The criminal law also provides several remedies to the victims of economic crime and the CPA ensures that the Bill of Rights, as supreme authority, applies to the rules of criminal procedure according to section 39 (2) thereof, which states that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. The CPA should thus be interpreted in unison with the Bill of Rights (Steytler, 1998).

According to section 213 (1) of the CPA, an oral and written statement by a person who is not the accused – which in forensic terms includes witnesses and other third parties – will be admissible as evidence, provided that the written statement is signed by such person and the statement contains a declaration by the individual stating that the content is “true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or which he did not believe to be true” (section 213 (2) (a)).

It is important to note that, according to the Regulations Governing the Administering of an Oath or Affirmation (1258 of 1972), a commissioner of oaths must administer an oath or affirmation as part of the written statement/affidavit, which includes asking the deponent (the person who has made the affidavit) the required questions according to said regulations, ensuring that the deponent signs the declaration in the commissioner’s presence, certifying that the deponent knows and understands the contents of the declaration, stating the manner, place and date of the taking of the declaration, signing the declaration, stating his/her designation and area, as well as conferring his/her business address.

Section 217 of the CPA supports section 35 (1) (c) of the Bill of Rights in respect of admissions and confessions by an accused person and states that a confession in relation to an offence, which is done freely and voluntarily by a person in his/her sober senses and without being unduly influenced, will be admissible as evidence in criminal proceedings.

2.2.6 The labour law and forensic interviewing

The labour law is of relevance to commercial forensic investigations and interviewing, because people who are being investigated and interviewed are often employees of an entity (Dickson, 2016). In order for the FP to ensure that the investigation remains within the confines of the law, it is important to consider the rights of the employees as set out by the labour law, particularly when interviewing such employees. Additionally, the labour law establishes certain remedies that are available to the victims of economic crime, such as the option available to the employer to discipline and/or end the service contract of the employee in cases where the guilty party is an employee of the entity. Appointing FPs to perform investigations and conduct forensic interviews in the workplace therefore flows from this right of the employer (Grogan, 2014).

Section 39 (2) of the Constitution, as discussed above, also applies to the labour law and should therefore promote the Bill of Rights. Section 23 (1) of the Bill of Rights is particularly important in its statement that everyone has the right to fair labour practices – including employees. This section therefore also contains the rights of an employee of a firm who is interviewed by an FP. As is the case with the Constitution, the labour law is founded on the principles of human dignity, equality and freedom (Van Niekerk *et al.*, 2015). It is within these confines that fair labour practices should take place.

In *Council for Scientific and Industrial Research v Fijen* (1996), the Supreme Court of Appeal recognised that there is an implied duty on the employer to conduct itself in such a way that it does not destroy or damage the trust relationship with the employee. Particularly the Labour Relations Act (66 of 1995) (LRA) establishes protection for employees against unfair dismissals (section 186 (1) of the LRA) and unfair labour practices (section 186 (2) of the LRA).

The question therefore arises whether conducting a forensic interview with an employee represents an unfair labour practice and, additionally, whether such an interview may even lead to a person being unfairly dismissed (Van Niekerk *et al.*, 2015).

The LRA recognises the following particular types of unfair labour practices (section 186 (2) of the LRA):

“(2) ‘Unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving –

- (a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- (b) The unfair suspension of employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- (c) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
- (d) An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act (26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”

It is evident from the abovementioned extract that to conduct a forensic interview with an employee in itself does not qualify as an unfair labour practice according to the LRA, except perhaps in terms of an employee who makes a protected disclosure in terms of the Protected Disclosures Act (26 of 2000). This may be pertinent in cases where an employee acted as a whistleblower with respect to alleged irregularities of an entity and is now subjected to potential intimidation by means of a commercial forensic investigation and subsequent forensic interview, which may qualify as intimidation in terms of section 1 (c) of the definition of occupational detriment. However, in *Olivier v Imperial Bank Ltd* (2006), which is also referred to in the context of potential constructive dismissal in the paragraphs that follow, the court was of the opinion that the vigorous nature of a commercial forensic investigation and subsequent forensic interview will normally not mean that said employee has been subjected to intimidation and occupational detriment in terms of the Protected Disclosures Act (26 of 2000).

Additionally, a forensic interview might also represent an unfair labour practice in terms of section 23 (1) of the Bill of Rights, since the constitutional right to fair labour practice is wider in scope than that which is defined in the LRA. In certain circumstances, therefore, if a limitation exists in the LRA, it may be challenged constitutionally, particularly if it violates human dignity, equality and freedom. Yet, the relationship between the constitutional right in section 23 (1) and the provision in section 186 (2) of the LRA relating to unfair labour practices remains controversial (*Van Niekerk et al.*, 2015). *Cheadle* (2006) argues that there are sufficient remedies available to an employee in his employment contract, as well as the common law, that supports the notion that unfair labour practice should rather be kept within the statutory framework of the LRA and

not the Constitution. It seems, therefore, that forensic interviews are generally not deemed as unfair labour practice.

With regards to section 186 (1) – unfair dismissals – there might be an inherent risk of constructive dismissal when conducting a forensic interview, which is considered an unfair dismissal by the employer. Constructive dismissal refers to a situation where “an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee” (section 186 (1) (e) of the LRA).

An interviewee might argue that, due to the fact that he was interviewed by an FP, his/her continued employment has been made intolerable and that he/she is forced to resign – which results in an apparent act of constructive dismissal. Constructive dismissal is an extraordinary form of dismissal, and is therefore not easily accepted by the courts. The employee will have to prove to the court or arbitrator that exceptional circumstances and facts indicate that constructive dismissal is present (Capwest Mouldings & Components CC v Ely, 1999).

According to *Schana v Control Instruments (Pty) Ltd (1991)* and *Dyer v Nelspruit Industries (1994)*, important facts need to be present for constructive dismissal to succeed:

1. Continued employment must be intolerable;
2. The intolerability must be caused by the employer;
3. The employee ought to have submitted a grievance prior to his/her resignation;
4. The employee must have terminated the service agreement; and
5. The employee’s intention was not to terminate the service agreement, but resigning was his/her last resort.

In *Olivier v Imperial Bank Ltd (2006)* the applicant claimed that she was constructively dismissed due to a commercial forensic investigation and subsequent forensic interview into her workplace actions. The judge, however, found that her circumstances did not qualify as constructive dismissal, since it did not correspond with the requirements as set out above:

- The commercial forensic investigation and forensic interview did not constitute an intolerable situation; and

- Resigning was not the last resort.

Additionally, the judge found that commercial forensic investigations and subsequent forensic interviews are of a vigorous and forceful nature, which is “the nature of the beast”. Conducting forensic interviews therefore does not automatically lead to a situation where constructive dismissal is present, even though it may upset some employees.

Theoretically, it is possible for a claim of constructive dismissal due to a commercial forensic investigation and subsequent forensic interview to pass if the necessary facts, according to *Schana v Control Instruments (Pty) Ltd* (1991) and *Dyer v Nelspruit Industries* (1994), are present. The risk of such a claim should therefore not be ignored. However, the courts clearly accept the vigorousness of forensic interviewing (*Olivier v Imperial Bank Ltd*, 2006), which is an important aspect to consider in this study.

Labour law is founded on the principle of fairness. Since the phrase “unfair labour practice” is unknown to the common law, protection against unfair dismissal and other types of unfair labour practices first developed in the USA via collective bargaining and later spread to other parts of the world, including South Africa (Grogan, 2007). Included in the principle of fairness, is the consideration that it is also deemed “fair” for the employer to uphold discipline. This is imperative in order for the employer to maintain order within the business and to enable the entity to function normally (Grogan, 2014). It is from this inherent right to enforce discipline (within the parameters of fairness), that an FP also obtains the right to conduct interviews with employees as part of commercial forensic investigations (*Olivier v Imperial Bank Ltd*, 2006).

As part of this abovementioned principle of fairness, fair procedure also plays an imperative part in labour law. In instances of the disciplining, suspension or dismissal of an employee, substantive and procedural fairness should be present (Grogan, 2004). An important principle that flows from procedural fairness is entrenched in the Latin phrase “*audi alteram partem*”, meaning to “listen to the other side”, or “let the other side be heard as well” (Kelly, 1964:103). It is the fundamental principle in most legal systems, including that of South Africa, that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them (Levy *et al.*, 2010). In terms of forensic interviewing, there is therefore essentially an obligation on the employer to conduct a forensic interview with a witness or suspect, or at least offer an opportunity for such an interview. If the employer fails to do this, he/she would render the investigative process unfair according to the *audi alteram partem* principle.

The *audi alteram partem* rule is inherently also contained within section 188 (2) of the LRA – other unfair dismissals – where it states that when an individual wants to consider whether a dismissal was in accordance with fair procedure, he/she should take into account “any relevant code of good practice issued in terms of this Act.” The relevant code referred to in this case is Schedule 8 of the LRA – particularly item 4, which importantly states that “... the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations.”

Again, the obligation on the employer to firstly initiate an investigation, and secondly allow the employee the opportunity to state his/her case, is evident from the abovementioned extracts and concretises the FP’s role, particularly in terms of conducting forensic interviews in the workplace. Furthermore, it is evident from the abovementioned discussion that as long as the principle of fairness and the consequent underlying values of human dignity, equality and freedom according to the Bill of Rights are applied during a forensic interview, the interview will generally not infringe on the standards set by the labour law.

2.2.7 Admissibility of evidence in civil proceedings

The admissibility of evidence in civil proceedings is relevant to commercial forensic investigations, because not all cases are heard by a criminal court. In many instances, instead of the state formulating charges against a suspect, a private individual (the plaintiff) initiates an action against another individual (the defendant). The remedies available to a victim of economic crime (should the plaintiff be successful) are usually in the form of monetary compensation, including the payment of reparations through delict in the form of damages paid to the victim by the guilty party (Nagel *et al.*, 2015).

According to section 8 (2), the Bill of Rights applies to “all law, and binds the legislature, the executive, the judiciary and all organs of state”. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), “a court: (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”.

With regards to the admissibility of evidence in civil proceedings, the Constitution does not contain explicit provisions. Therefore, subsection (2) (a) mentioned above will apply, where common law has to be developed by the courts. Therefore, the courts have established guidelines with regards

to the admissibility of evidence in civil proceedings (*Veerasingam v Engen Refinery*, 2000). There are fundamental differences between a criminal and civil case, particularly regarding the fact that an accused enjoys the privilege against self-incrimination – the prosecution must, for instance, prove its case without any assistance from the accused, whereas the opposite is true with civil cases. Not only is the litigant compelled to disclose his/her case, but he/she also has an obligation to supply all relevant information, even if it is to his/her detriment (*Fedics Group (Pty) Ltd v Matus*, 1998).

The civil courts will consider the following factors when deciding whether or not to admit evidence that was obtained in a manner that violates the Bill of Rights (*Fedics Group (Pty) Ltd v Matus*, 1998):

1. The applicant, who obtained the evidence through a deliberate violation of the Constitution, needs to explain why he/she could not attain the said evidence by following ordinary procedure;
2. The courts will, on the other hand, take into account the type of evidence under consideration – whether it is evidence that could never be lawfully attained and/or introduced to a court without the respondent's co-operation, or whether it is evidence that the litigant could ultimately have obtained lawfully;
3. Whether it was reasonable for the applicant to assess that he/she would not have received justice if he/she stayed within the confines of the Constitution;
4. Whether the applicant was informed by his/her legal counsel that the manner in which the evidence was acquired is unlawful;
5. Whether the information is of a personal nature; and
6. The interest of society in exposing the truth about the unlawful conduct.

The same factors mentioned above will apply to information obtained unlawfully during a forensic interview and which is used as evidence in civil proceedings.

2.2.8 Scrutinising forensic interviewing techniques against the backdrop of South African legal aspects

A set of relevant law principles can be extracted from the abovementioned discussion and which may serve as a valuable “barometer” for the various forensic interviewing techniques in terms of their legality within the South African context. Here follows a summary of these relevant law aspects:

- The interviewee’s right to human dignity – governed by section 10 of the Bill of Rights and implies that interviews must be conducted in a composed and humane manner and not threaten the interviewee’s right to being worthy of honour or respect, and being free from torture and degradation;
- The freedom and security of the interviewee – directed by section 12 (1) of the Bill of Rights, which states that interviews should not be of such a nature that they deny the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated inhumanely by the interviewer;
- The interviewee’s right to privacy – section 14 of the Bill of Rights explains the interviewee’s right to privacy, including the right of the interviewee’s private realm not to be infringed upon – excluding the obtaining of information that directly influences the public sphere and workplace;
- The interviewee’s right not to be compelled to make any confession or admission that could be used in evidence against him/her – the requirements for admissions and confessions is governed by section 35 (1) (c) of the Bill of Rights and section 217 of the CPA and is summarised by the South African Law Commission – they should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence;
- The inadmissibility of evidence in terms of section 35 (5) of the Bill of Rights – if any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice. This may lead to the acquittal of the interviewee should he later be accused of any crime;
- Taking fair labour practices into account when conducting interviews – section 23 (1) of the Bill of Rights provides for fair labour practices, which are further alluded to in the LRA.

Although employers have the right to discipline their employees, such disciplinary measures should be conducted according to a fair procedure (section 188 of the LRA) which has specific relevance regarding how interviews should be conducted; and

- The principles applied in civil proceedings with regards to the admissibility of evidence – the Constitution does not contain any specific provisions in this regard and therefore the courts have developed their own guidelines, which must be applied in accordance with the merits of each case.

2.3 Conclusion

It is evident from the exposition above that forensic interviewing plays an important part in obtaining information during the commercial forensic investigation. Certain interviewing techniques have been identified which are used in practice, yet most of these techniques are not underpinned by theory. It is also clear from the abovementioned discussion that important legal aspects need to be considered when conducting forensic interviews in South Africa. Therefore, a full analysis is needed in terms of each technique's psychological foundation, as well as a critical analysis in terms of available literature and important legal aspects in order to assess whether said technique may be applied in commercial forensic investigations in South Africa.

CHAPTER 3: METHODOLOGY

3.1 Introduction

This study's methodological approach is that of a critical review. A critical review aims to demonstrate that the writer has extensively researched relevant literature and critically evaluated its quality. According to Grant and Booth (2009:93), an effective critical review "presents, analyses and synthesises material from diverse sources." The subsequent conclusion of a critical review consists of a hypothesis or a model – not an answer. A critical review offers the prospect to assess and evaluate what is of value from the preceding research conducted on a specific topic. It may also endeavour to resolve opposing schools of thought, whether by confirming existing theory or deriving new concepts (Petticrew & Roberts, 2006).

If a critical review is applied to a study, there is no formal requirement to present methods of the search, synthesis and analysis explicitly. The emphasis is on the theoretical contribution of each item of included literature, not on formal quality assessment (Grant & Booth, 2009:97).

3.2 Review protocol

The review protocol sets out the methods to be used in the review. Information regarding the review question, inclusion criteria, search strategy, study selection, data extraction, quality assessment, data synthesis and plans for dissemination should be addressed. Identifying the methods in advance reduces the risk of bringing partiality into the review (Centre for Reviews and Dissemination, 2009).

3.2.1 Review objective

The main objective of this review is to present a critical discussion of the interviewing techniques that FPs use and which are specifically relevant for the South African legal context. The theories underpinning the different interviewing techniques should therefore be presented, the different techniques should be scrutinised against regulatory standards and each technique's limitations and advantages should be highlighted against literature.

A review of the application of potential forensic interviewing techniques in the South African legal context is relevant, since interviewing is one of the most important sources of information for utilisation in commercial forensic investigations globally. An FP should be able to apply specific skills in relation to the interpersonal context and interview related parties who can potentially provide useful information (Vorster, 2012). Seeing that forensic accounting is a relatively new field

of study, there is an absence of theoretical and professional guidance within the field in South Africa, specifically regarding forensic interviewing (Oberholzer, 2002; Slot, 2012). Identifying potential interviewing techniques and scrutinising them against relevant literature and South African legal aspects will contribute to the South African forensic accounting profession by attempting to fill the current lacuna in the application of relevant and legal sustainable interviewing techniques in commercial forensic investigations.

The selected databases utilised for this review were EBSCOhost; JSTOR, Scopus and WorldCat. These databases were chosen because they are prominent databases with journals that publish articles on forensic interviewing methods. The study is guided by the following objectives:

- Determine the importance of interviewing as part of a commercial forensic investigation in the South African context;
- Describe the relevant law that needs to be taken into consideration by the Commercial Forensic Practitioner when conducting an interview in South Africa;
- Identify forensic interviewing techniques in terms of database searches conducted; and
- Critically discuss and compare the forensic interviewing techniques in accordance with available academic literature and the law.

3.2.2 Research settings and sampling methods

For the present study, the research is focused on the types of forensic interviewing techniques applied globally. All peer-reviewed academic articles published in English that form part of EBSCOhost, JSTOR, Scopus and WorldCat from 2000-2017 were reviewed and included in this study. Articles published prior to 2000 were not considered so as to ensure that outdated forensic interviewing techniques were not included in the search result. The following documents were excluded on the basis that they do not constitute empirical studies on the topic: editorials, book reviews, introductions, errata and notes. Studies with no clear description of forensic interviewing or interrogation were also excluded.

3.2.3 Data collection methods and recording

A systematic search was conducted to identify qualitative, quantitative and mixed-method articles within the selected databases. The search function on the respective databases was used for this study, and the following specific keywords were utilised: ('forensic', OR 'fraud', OR 'police', 'OR

'criminal') AND (interviewing OR interrogation) in the abstracts of published articles; and ('forensic interviewing', OR 'fraud interrogation', OR 'police interrogation', 'OR 'criminal interrogation') in subject terms. Searches were done during the period March 2017 and 53 articles were identified for the content analyses. This was done by applying specific inclusion criteria, such as the exclusive use of primary empirical research studies published from 2000 to 2017 with a focus on forensic interviewing or interrogation, limiting the search results to the English language, and only including peer-reviewed data.

After the abovementioned inclusion criteria had been applied, the preliminary search results were limited to the relevance and availability of each article. An article was deemed relevant if its content was deemed applicable to the commercial forensic investigative context. For example, articles involving the interviewing of children were not considered due to the fact that children will not normally be interviewed as part of a commercial forensic investigation.

In terms of availability: only articles that could be accessed and whose full content was available were included in the final search results. If an identified article could not be accessed after applying the following steps (in chronological order), then the article was deemed unavailable:

1. Perform a search on the relevant database (EBSCOhost, JSTOR, Scopus or WorldCat);
2. Perform a search on the NWU Library database;
3. Perform a search on Google Scholar; and
4. Perform a general search on Google.

The abovementioned collection methods were applied in order to ensure that the search results for this study are accurate and that the selected data is trustworthy and takes the relevant ethical considerations into account.

3.2.3.1 Data collection process

The following table illustrates the process that was followed in acquiring the study's total body of relevant articles:

Table 2**Article search results**

Database	Results based on specific keywords (N=)	Limited to years 2000 – 2017 (N=)	Limited to English language (N=)	Limited to peer-reviewed sources (N=)	Limited to relevance and availability of article (N=)	Total relevant articles (N=)
EBSCOhost	134	97	95	61	16	16
JSTOR	64	50	50	50	12	12
Scopus	65	60	58	58	15	15
WorldCat	93	92	69	60	10	10

The study led to a search result of a total of 53 relevant articles, but these include articles that appeared in more than one database and therefore include those that have been duplicated. The total number of unique articles that appeared in the search result was 34 (excluding duplicates).

3.2.4 Data analysis

The data extracted was broadly analysed in accordance with the three phases identified and discussed by Kahn *et al.* (2011) in their study on the application of critical reviews. This method in analysing data ensures that an in-depth assessment of potential bias takes place and allows the researcher to measure the data in a more refined manner, since the inclusion of biased data either exaggerates or underestimates the 'true' effect of the disclosed information (Kahn *et al.*, 2011).

Phase 1: A template was created in which specific elements of the articles found regarding the types of forensic interviewing techniques identified, were summarised (e.g. article title, sources, authors, publishing year, date of access, interviewing techniques identified). The researchers, Constant van Graan and Anneke Stols, completed the templates independently by using open coding for the various areas of interest (closely examining and analysing the content of each article).

Phase 2: Cross-checking the coding of Phase 1, until consensus was reached between the two researchers with regard to the identification of forensic interviewing techniques discussed within each article. In the case where the researchers could not find consensus, a third researcher, Sandra Steyn, would act as arbitrator and give the final decision.

Phase 3: In this phase the descriptions of forensic interviewing were analysed thematically – according to the methodology of a critical review – and by using the guidelines of Smith *et al.* (2011) in order to identify trends and the different elements of these definitions. Identifying these trends should be determined by data and not necessarily theory and is more than merely a summary of the data – it is the structuring of principles that underpin the academic sources (Braun & Clarke, 2006; Terre Blanche *et al.*, 2006). In this specific study, the thematic analysis was based on types of forensic interviewing techniques used during commercial forensic investigations – of which each technique was identifiable and distinguishable from the rest, in accordance with “researcher judgment” and without implementing rigid rules, but retaining some flexibility in the process, as advised by Braun and Clarke (2006:10).

3.3 Ethical consideration

Ethical approval for the research project was obtained from the North-West University, ethical number (NWU-EMSREK16/08/26-01/01). Seeing that this is a critical literature review, with no empirical research conducted (e.g. no questionnaires were used, nor were there any participants who provided feedback) the risk in terms of potential unethical conduct by the researcher is low.

However, specific ethical challenges emerge as part of critical reviews (Vergnes *et al.*, 2010). One of these challenges is the risk that not all relevant literature is included in the study (The Research Ethics Guidebook, 2017). In this dissertation, the whole process of selecting articles was of a rigorous nature which averted aforementioned ethical challenge. All the steps performed as part of the study were highlighted, which included an extensive data analysis procedure and cross-checking by the two researchers.

An additional ethical consideration is potential research bias, which may influence the researcher to ignore articles that do not support the hypothesis (Wager & Wiffen, 2011). In this study, however, all articles were included, including those that do not necessarily confirm the researcher’s findings. Such articles were extensively discussed, and in cases where the researcher did not agree, it was substantiated by referring to academic literature of peers and/or relevant South African legal aspects.

3.4 Trustworthiness of critical reviews

Researchers are encouraged to apply the latest and best research practice, and to guarantee that selected data are demonstrably embedded in this knowledge (Bullock *et al.*, 2001). However, this can be problematic, since the data collected may be subjective, methodologically inconsistent, time and context reliant, and therefore misconstrued. Further to this, individual studies may have

contradictory conclusions (Wilson & Petticrew, 2008). These discrepancies may be due to a variety of reasons, including subjectivity in the way the studies were conducted, or even due to errors by the researchers. In such instances, it is difficult to assess which data is the most trustworthy (Petticrew & Roberts, 2006).

This critical review is of a qualitative nature, therefore Guba and Lincoln (1982) advise that the four positivist criteria should be applied to ensure the trustworthiness of the research. These four criteria are:

- **Credibility:** Credibility is defined as “the confidence that can be placed in the truth of the research findings” (Anney, 2014:8). This is particularly achieved by performing peer debriefing and persistent observation (Guba, 1981). Peer debriefing refers to when a researcher receives guidance from other academics and professional peers during the research process in order to assist the researcher in improving the quality of the findings (Pitney & Parker, 2009). Persistent observation is when the researcher analyses the depth and context of the study throughout the research process (Bitsch, 2005). Regarding this study, peer debriefing was applied throughout in terms of the guidance supplied by the two supervisors, as well as the debriefing sessions that took place between the two researchers in terms of the data analysis (3.2.4). Additionally, persistent observation was also applied in terms of said data analysis (3.2.4);
- **Transferability:** Transferability refers to the extent to which researched data may be transferred to other frameworks or settings with other role players (Bitsch, 2005; Tobin & Begley, 2004). According to Bitsch (2005) this is achieved by applying thick (extensive) descriptions of the research process that was performed. In this study, the elaborate discussion regarding the research settings and sampling methods (3.2.2), data collection methods and recording (3.2.3), and data analysis (3.2.4) are indicative of the transferability of the study;
- **Dependability:** According to Bitsch (2005:86), dependability suggests “the stability of findings over time”. Dependability may be obtained by initiating an audit trail, applying a coding strategy, performing a stepwise replication of the process and executing a peer examination (Cohen *et al.*, 2011; Tobin & Begley, 2004). With regards to this study, it is evident that dependability has been achieved by referring to the extensive three phases that were performed in terms of the data analysis (3.2.4); and

- **Confirmability:** Confirmability refers to “the degree to which the results of the inquiry could be confirmed or corroborated by other researchers” (Anney, 2014:15). In this study, confirmability was achieved by the two researchers by cross-checking the coding explained in Phase 1 of the data analysis (3.2.4), until consensus was reached between them with regard to the identification of forensic interviewing techniques discussed within each article.

Further indications of the trustworthiness of this study may be assessed in terms of the nature of a critical review itself. Critical reviews identify, analyse and summarise the results of individual studies, and then combine these with the findings of numerous other studies. This consequently leads to a more trustworthy and precise analysis than one study alone. Critical reviews abide by stringent scientific processes which consist of clear, pre-determined and attested methods (Thacker, 1988; Oxman, 1993; Centre for Reviews and Dissemination, 2009). Due to this, when applied correctly, they provide trustworthy estimates and their corresponding conclusions are therefore defensible. Additionally, critical reviews can also determine where knowledge is absent, which can be used to provide direction for future studies (Brown *et al.*, 2006).

3.5 Conclusion

It seems from the abovementioned discussion that a critical review is an effective method in approaching a study of this nature. Furthermore, the rigorous nature of the steps taken as part of the sampling, data collection and data analysis of this study may render the data results (34 unique articles) trustworthy and ethical.

CHAPTER 4: A CRITICAL ANALYSIS OF SELECTED INTERVIEWING TECHNIQUES

4.1 Introduction

Based on the extensive searches conducted in Chapter 3 as part of the process of selecting applicable forensic interviewing techniques for this study, this chapter provides an overview of each identified interviewing technique, followed by a critical analysis thereof in relation to relevant literature and aforementioned relevant South African legal aspects which were discussed in Chapter 2. Critically analysing these forensic interviewing techniques will provide a clear understanding of which technique(s) might be best suited in the South African commercial forensic investigative context.

It is important to note that forensic interviewing's central focus should be the gathering of information which might support the overall investigation (Vorster, 2007; Walsh, 2011). However, investigators may also be aiming to identify deceptive behaviour of the interviewee based on so-called "untrustworthy behavioural indicators" (Walsh & Bull, 2011). In many cases, the investigator already suspects that the interviewee may be guilty of the crime (Walsh & Milne, 2007). This level of assumption of guilt and inherent subjectivity of the interviewer may, however, have highly negative consequences on the investigation itself (Vorster, 2012), and can subsequently lead to situations where investigators fail to follow-up on important lines of enquiry (Kassin, 2008).

Therefore, Ormerod *et al.* (2008) state that, unless a variety of possible theories are produced during an investigation, including the option that the suspect is innocent, a subjective and even distorted investigative mind-set may arise, leading to inaccurate findings, false confessions, inadmissible evidence and the overall "contamination" of the investigation (Ask & Granhag, 2005).

It is against this background that forensic interviewing techniques should not only be assessed in terms of their legal applicability in the South African commercial forensic investigative environment, but also critically analysed in terms of whether they have an impartial, objective and interpersonal approach which is free from assumptions of guilt that may taint the interview and the overall investigation (Vorster, 2007; Gudjonsson & Pearse, 2011).

4.2 Summary of search results

A prior informal search conducted as part of Chapter 1 (Purpose, scope and progress of study) resulted in only four forensic interviewing techniques being identified – of which the HUMINT technique was initially included and kinesic interviewing and cognitive interviewing not. As is evident from the table below, the search results conducted in terms of Chapter 3 produced slightly

different results from Chapter 1. The reason for this disparity is probably due to the effective data analysis procedure supporting a critical review (Centre for Reviews and Dissemination, 2009) – which was not used in the preliminary searches of Chapter 1.

The results from the extensive search performed as part of the critical review in this chapter will be used as the basis for the critical analysis of the different types of forensic interviewing techniques:

Table 3

Frequency of mentions of interviewing techniques in the study sample

Interviewing technique	Number of academic articles (of the total search result of 53 – including duplicates) mentioning the relevant interviewing technique	Number of academic articles (of the unique search result of 34 – excluding duplicates) mentioning the relevant interviewing technique
Reid technique	43	26
Kinesic interviewing	19	12
PEACE model	17	10
Cognitive interviewing	8	6
Person-centred approach	8	6
Other	2	2

The five most frequently mentioned forensic interviewing techniques are the Reid technique, kinesic interviewing, the PEACE model, cognitive interviewing and the person-centred approach, all of which will be discussed in this chapter. The techniques categorised as “Other” include the Liverpool Interview Protocol and hypnotic investigative interviewing respectively, both of which are closely linked to cognitive interviewing and will be analysed as part of the last mentioned technique’s discussion (4.4). There are also techniques applied in practice which are unnamed and have no empirical underpinning, such as informal techniques founded by Zulawski and Wicklander (2002) as well as Skalak *et al.* (2011). These techniques are applied within the American context and are broadly based on the Reid technique (Kranacher *et al.*, 2011).

4.3 PEACE model

4.3.1 Background

The PEACE model has its origins in the United Kingdom (UK) where it is routinely used in forensic investigations. Since its inception, it has also been adopted by several other countries, including New Zealand, Australia and Norway (Shawyer *et al.*, 2009).

Formal forensic interview training in the UK started around the early 1990's following some well-known miscarriages of justice involving confessions where the police's conduct, specifically regarding interviewing techniques, came under severe criticism (Gudjonsson & Pearse, 2011). This included practices where investigators manipulated suspects until they confessed to crimes by using false evidence, misleading suspects by minimising the seriousness of the offences and manipulating their self-esteem (Irving, 1980). Such tactics led to cases where several innocent individuals confessed to offences they never committed (Redlich & Meissner, 2009).

The response to this was the establishment of two Royal Commissions which initiated fundamental changes to relevant law and procedural aspects, including the way police conduct interviews (Gudjonsson, 2003). In 1993 an extensive forensic interviewing programme was launched based on the principles that are now employed in the PEACE model (Bull & Soukara, 2010).

PEACE's acronym represents: P - "Preparation and Planning", whereas E stands for the first phase of the interview (Engage and Explain). A refers to "Account, Clarify and Challenge" where the interviewer can challenge any discrepancies, C is the "Closure" of the interview; and E is the "Evaluation" of how the interview went according to the interviewer (Walsh & Bull, 2011). This can be elaborated on as follows:

- P – Preparation and Planning: This phase expects the forensic interviewer to be well-informed regarding the facts of the case before conducting the interview itself – including the background information of the interviewee as well as the obtaining and disseminating of other evidence – and requires the interviewer to prepare accordingly. This process usually includes taking into consideration refutations and defences an interviewee/suspect might offer during the interview, and if necessary, the gathering of additional evidence in order to address these. During this phase it is also important to take into account the relevant legal implications of the supposed offence (in the case where it is already evident that such a transgression has indeed taken place);

- E – Engage and Explain: This forms part of the initial phase of the interview and aims to set up an interactive relationship between the interviewer and interviewee, including informing the latter of the purpose of the interview and explaining his/her rights;
- A – Account, Clarify & Challenge: This phase essentially consists of two processes – firstly allowing the interviewee to freely give account of his/her side of the story, and secondly, ascertaining any inconsistencies and challenging the interviewee with the evidence;
- C – Closure: This stage refers to the process of concluding the interview; and
- E – Evaluation: This phase should be applied throughout the duration of the interview, as well as afterwards. The interviewers, together with relevant supervisors, should critically reflect on the outcome of the interview in order to strive for constant improvement.

The technique is not necessarily a linear one. If, for example, during the Closure stage, new evidence arises, the interviewer may recommence with questioning as part of the Engage & Explain and/or the Account, Clarify & Challenge stage (Walsh & Bull, 2011). Since its inception in the early 1990's, the PEACE model has also been stratified into five different tiers in order to "cater for ... different types of crimes" and to guide investigators accordingly (Griffiths & Milne, 2006:167). These five tiers are the following:

- Tier 1 – Introduction to interviewing for new officers;
- Tier 2 – Development of the basic skills attained in Tier 1 for officers interviewing suspects of everyday crime such as theft and assault (similar to the initial PEACE model);
- Tier 3 – Umbrella tier for several specific courses for officers interviewing suspects, witnesses, as well as witnesses who might be vulnerable to intimidation;
- Tier 4 – Monitoring and supervision of the quality of interviews; and
- Tier 5 – Introduction of an interview-coordinator for complex and serious crime (Griffiths & Milne, 2006).

4.3.2 Critical analysis of the PEACE model

4.3.2.1 The PEACE model and academic literature

The PEACE model was developed by several influential academics, psychologists, lawyers and police experts. Its main aim is to curb the risk of a potential false confession by the interviewee (Shawyer *et al.*, 2009). The PEACE model is advocated as an ethical and fair approach to interviewing, since it aims not to employ subjective presumptions of guilt, nor does it engage in explicit confrontation (Milne & Bull, 1999). This type of technique sees interviewing as investigative rather than accusatory (Mason, 2016). Gudjonsson and Pearse (2011:34) note that it is based on “fairness, openness, workability, accountability, and fact finding rather than merely obtaining a confession”. Closed-ended questions, undue influence and emotional manipulation are hence avoided, increasing the probability that the interview will be free from the risk of a false confession (Kassin *et al.*, 2010; Meissner *et al.*, 2010). When applied thoroughly, the PEACE model appears to yield positive results associated with outcomes that Walsh and Bull (2010a) deem more desirable for obtaining the true facts of a case, irrespective of whether an admission is obtained or not.

The PEACE model has its origins in extensive empirical research, specifically in the form of official inquiries into legislation and investigative processes (Dixon, 2010). Crucially, these inquiries have challenged the notion that forensic interviews consist of difficult encounters with suspects who resist confessing to crimes unless they are forced to do so by the interviewer. On the contrary, UK researchers have found that the majority of forensic interviews involve “relatively simple and straightforward interchanges with reasonably compliant suspects” and the interviewees were “such co-operative individuals that they should have presented no serious difficulties to a moderately competent interviewer” (Baldwin, 1993:331). Subsequent research in Australia and South Africa yielded similar results (Dixon, 2007; Pistorius, 2012).

The PEACE model is not without criticism. There are those exceptional cases where suspects are indeed hostile and non-cooperative. It has been found that the PEACE model struggles to deal with such individuals (Sanders & Young, 2003). Furthermore, due to the apparent eagerness to provide an alternative to the controversial Reid technique, an exaggerated emphasis may be placed on the importance of alternative methods such as the PEACE model (Meissner *et al.*, 2010).

Additionally, Clarke and Milne (2001) found that there was little difference in the performance between interviewers trained in the PEACE model and those who received no formal interviewing

training, a finding which is also reiterated by Griffiths and Milne (2006), who also state that the multifaceted (e.g. communication) skills of PEACE-trained individuals dissipated over time – usually within one year – and that only 25% of them actually performed better than untrained investigators. Yet, both studies pointed out that the chances were very slim that their sample of investigators who did not have any training had “not been influenced in some way by PEACE interviewing...” (Clarke & Milne, 2001:100) and therefore, they propose it would be more suitable to compare their sample as a whole with interviews conducted in the UK before the PEACE model’s introduction in the early 1990’s.

Such a comparison was in fact conducted by McGurk *et al.* (1993), who performed a thorough analysis of the results of the PEACE training initiative of the early 1990’s. They found that the investigators’ interviewing skills and knowledge improved significantly immediately after training, and was maintained six months thereafter. Further to this, subsequent research conducted by Walsh and Milne (2008) as well as Walsh and Bull (2011) indicates that there is clear evidence to suggest that PEACE-trained investigators are not only more ethical in their approach to forensic interviewing by asking open-ended questions in order to obtain the full account of the interviewee, but are also a lot more likely to be regarded as highly skilled interviewers by their peers and superiors than their untrained counterparts.

Further analyses, based on comparable methods of evaluating the PEACE model, found that although there is room for improvement by the investigators who have adopted this technique (including in preparing properly, initiating effective rapport, dealing with denials and challenging the interviewee at the right moment (Walsh & Bull, 2010b)), there is a general trend towards more successful interviewing since the introduction of the PEACE model (Soukara *et al.*, 2009). However, Walsh and Bull (2011) suggest that the option of applying the PEACE model in conjunction with other successful interviewing techniques should not be excluded.

4.3.2.2 The PEACE model and the South African legal context

Due to the fact that the PEACE model is an inherent product of aimed efforts in aligning forensic interviewing practices in the UK with lawful procedures, it is founded on principles that render the technique lawful in most legal contexts (Gudjonsson & Pearse, 2011). The two Royal Commissions which formulated its underlying ideology took special consideration to ensure that evidence obtained by this technique will be rendered admissible in a court of law (Irving, 1980; Bull & Soukara, 2010).

The PEACE model forms part of the so-called “investigative interviewing techniques” whose sole focus is to obtain relevant information – in contrast to methods previously applied in the UK that focused on the interviewee’s supposed guilt (Mason, 2016). It is rarely accusative in nature and generally respects the rights of the interviewee, especially against the background of research (Baldwin, 1993; Dixon, 2007) which confirmed that the majority of suspects are not hostile and are indeed willing to cooperate during forensic interviews.

It is imperative for the purposes of this study to assess whether the selected forensic interviewing techniques may be lawfully applied in the South African commercial forensic investigative context. Therefore, each technique should be tested against the relevant South African legal aspects identified in Chapter 2. Here follows an analysis of the PEACE model against said legal aspects:

Table 4
PEACE model analysis

Law	Details	Application
Section 10 of the Bill of Rights – Right to human dignity	Interviews must be conducted in a composed and humane manner and not threaten the interviewee’s right of being worthy of honour or respect, and should be free from torture and degradation.	Due to the investigative and non-guilt presumptive nature of the PEACE model, it falls within the ambit of respecting a person’s right to human dignity according to section 10. The technique is based on the assumption that the interviewee is not hostile and that treating him/her with respect and gaining his/her trust will yield the best results in obtaining relevant information.
Section 12 (1) of the Bill of Rights – The freedom and security of a person	Interviews should not be of such a nature that it denies the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated in an inhuman way by the interviewer.	In applying the PEACE model within a private commercial forensic investigative setting, the interview will be voluntary and the person will not be detained. Further to this, the PEACE model employs non-accusatory and information-seeking techniques that normally do not include any violence or inhumane tactics.

Law	Details	Application
Section 14 of the Bill of Rights – Right to privacy	Interviewees have the right to privacy, including the right that his/her private realm is not infringed upon – excluding the obtaining of information that directly influences the public sphere and workplace.	<p>Similar to the discussion above, the PEACE model essentially respects the basic human rights, including the right to privacy, in that it is not accusatory in nature and does not force an individual to provide information.</p> <p>The question whether an interview seeks to obtain information concerning a private matter which does not influence the public sphere or workplace, however, will depend on the facts of each case and cannot be evaluated in terms of the technique itself.</p>
Section 35 (1) (c) of the Bill of Rights and section 217 of the CPA – Right not to be compelled to make any confession/admission	Confessions/admissions should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence.	<p>The information-seeking nature of the PEACE model means that the interview is not forceful, nor are there any evident intimidation tactics associated with the engagement phase of the interview.</p> <p>Since the goal of the interview is simply to obtain information, confessions and admissions are voluntary according to this technique and therefore it will generally comply with the requirements of this section.</p>
Section 35 (5) of the Bill of Rights – The violation of any rights contained in the Bill of Rights	If any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice.	The PEACE model in essence purports not to violate any rights contained in the Bill of Rights, and therefore evidence obtained during the application of this technique should in theory be admissible in a court of law.

Law	Details	Application
	This may lead to the acquittal of the interviewee should he/she later be accused of any crime.	
Section 23 (1) of the Bill of Rights and the LRA – Unfair labour practices and unfair dismissal	Interviews should be conducted in a fair manner that will not qualify as unfair labour practices or lead to an unfair dismissal.	The investigative and information-seeking nature of the PEACE model means that it is considered a fair technique that will normally not lead to an unfair dismissal. Furthermore, seeing that the LRA is inherently based on human dignity, equality and freedom (which form the basis of the Bill of Rights) it can be accepted that if the technique complies with these three elements (which it does in this case), that it will normally be free from unfair labour practices.

An additional important aspect to take into consideration, is the fact that South African law of evidence is strongly rooted in English law (Schmidt & Rademeyer, 2000). The PEACE model, which originated in the UK, may therefore be in line with South African law of evidence, which is a significant factor in assessing the lawfulness of an interviewing technique in the South African context.

4.3.3 Conclusion

The PEACE model is regarded as effective and ethical. Regarding the legal considerations of the PEACE model, the abovementioned analysis illustrates that the PEACE model complies with the relevant South African legal aspects and may be considered to be applied within the South African commercial forensic investigative environment.

4.4 Cognitive interviewing

4.4.1 Background

The cognitive interview has been applied by several forensic investigative units throughout the world (Fisher & Geiselman, 2010; Stein & Memon, 2006). The science of cognition has been empirically studied for more than 100 years, which makes it one of the greatest subfields within forensic psychology (Hervé *et al.*, 2013). Cognition refers to the “acquisition and the use of knowledge” and involves the application of several mental skills (Reed, 2000:4). Cognitive psychology is concerned with “all processes by which the sensory input is transformed, reduced, elaborated, stored, recovered, and used” (Reed, 2000:4). Additionally, Neisser (1976) notes that an important aspect of cognitive psychology includes the latter part of the definition – after a person has had contact with the outside world and information is perceived, stored and recovered, it should be put to good use.

Cognitive interviewing is grounded in the theory of cognition – memory, perception, attention, speech and other psychological activities. It places emphasis on two significant factors: memory and communication. Cognitive interviewing in its simplest form consists of a set of guidelines and approaches directed at taking into account cognition, communication and social practices that are relevant during eyewitness interviews (Fisher & Geiselman, 2010; Fisher & Geiselman, 1992; Geiselman *et al.*, 1986).

According to Geiselman *et al.* (1984) numerous international studies were undertaken in the early 1980's to assist in the fine-tuning of interviews conducted with witnesses and victims of crimes, and in the process, a specific interest developed in cognitive interviewing. According to Fisher *et al.* (1987) as well as Ginet and Py (2001), initial results indicated that this technique initiates testimonies from interviewees with information that is more voluminous and meticulous than so-called standard interviewing procedure. Geiselman *et al.* (1984) state that these early assessments of its success within the scientific community were likely attributed to the methodical foundation of the cognitive interview itself, which relies on numerous scientific models on the functioning of the cognitive brain processes.

According to this method a successful interview is one where an interviewee relives a specific event, then communicates the information of the event to the interviewer. Both of these components should take place before a successful interview has been conducted, which places emphasis on Neisser's notion that the information should not only be retrieved, but also put to valuable use (Fisher & Geiselman, 1992).

Fisher and Geiselman (1992:15) state that the basic principle of cognitive interviewing is the concept of guided retrieval. The objective of the interview is for the interviewer to assist the interviewee in accessing and retrieving information. This method of interviewing enhances memory by (Fisher & Geiselman, 1992):

- a) Assisting the interviewee to convey a thorough and understandable response;
- b) Suggesting methods to guarantee that the interviewee becomes the central figure of the interview; and
- c) Providing recovery strategies to assist the interviewee in retrieving information of the past event.

Further to this, the cognitive interview enhances communication by (Fisher & Geiselman, 1992):

- a) Assisting the interviewee to convey a thorough and understandable response;
- b) Helping the interviewer understand and record the interviewee's response; and
- c) Assisting the interviewer to comprehend the interviewee's psychological needs, and contrariwise, to inform the interviewee of his/her investigative needs.

The authors of this technique, Fisher and Geiselman (2010), emphasise the vital importance of posing questions that are attuned to the interviewee's mental record – his/her cognitive experiences during an interview. Essentially, the interviewer should apply the so-called "witness vision" strategy during the interview, where he/she visualises the interviewee's experiences and adjusts his/her follow-up questions in relation to the interviewee's mental record (Hervé *et al.*, 2013). Furthermore, Fisher and Geiselman (2010) recommend that the interviewer should play a central part in assisting the interviewee to sustain concentration. This can be achieved by, for example, conducting the interview in a quiet room and verbally requesting that the interviewee maintains a high degree of concentration throughout the interviewing process.

Non-directive approaches – which are social instructions given by the interviewer to the interviewee – are also recommended by the authors of this technique in order to enable effective communication. This consists of the following process (Stein & Memon, 2006; Bensi *et al.*, 2011):

1. The interviewer provides the interviewee with an active role in the memory retrieval procedure. This is achieved by applying questions/instructions in such a manner that the interviewee produces answers with a lot of detail (e.g. asking open-ended questions);
2. The interviewer continually underlines the bond/rapport that has been established with the interviewee. This is done in order to encourage the interviewee to cooperate and provide information without fear, and is achieved by the interviewer by being truly emphatic and unequivocally indicating his/her unconditional acceptance towards the interviewee; and
3. The interviewer applies additional social instructions that decrease the impact that the interviewer may have on the interviewee's answers. This includes providing explicit instructions that if the interviewee is not completely sure of an answer, he/she must feel free to say "I don't understand", "I am unsure", "I don't know", "I don't remember", "I made a mistake" and/or any other similar answers.

A fine-tuned form of cognitive interviewing is known as the Enhanced Cognitive Interview (ECI) (Memon & Bull, 1991; Memon *et al.*, 2010). The ECI is similar to cognitive interviewing in that it aims to extract impartial information and enhance witness memory from interviewees by using cognitive retrieval strategies based on psychological research, but in a more organised way for commercial forensic investigative purposes. The ECI consists of the following structure (Fisher & Geiselman, 2010; Memon *et al.*, 2010):

- Interview outline – Explaining the outline and process of the interview to the interviewee;
- Time limitation – Emphasising that there is no time restriction in retrieving and communicating information;
- Focused retrieval – Directing the interviewee to focus on the essence of the event in order to ensure useful feedback;
- Reporting everything – Ensuring that the interviewee reports on every aspect of the event by asking open-ended questions;
- Context mental reinstatement – Facilitating the interviewee to provide the specific context of the witnessed event as he/she experienced it;

- Picture activation – Ensuring that the interviewee provides a detailed mental image of the circumstances surrounding the event;
- Variation in temporal recall order – Facilitating the ordering of the events in a logical and chronological timeframe;
- Changing the perspectives – Providing different contexts from different viewpoints on a singular event in order to obtain as much useful information as possible during the interviewee’s recalling of the event;
- Memory jogs – Using memory jogs (narratives from the interviewer, aiding the process of linking occurrences with each other) in order to help the person to retrieve information. An example of a typical memory jog during a forensic interview will be asking “did the person remind you of anyone you know?”; and
- Thanking the interviewee – Making the interviewee feel more at ease near the conclusion of the interview by thanking him/her for his/her cooperation.

As with cognitive interviewing, ECI consists of applying open, non-suggestive questions to the interviewee (Fisher & Geiselman, 2010). This technique explicitly describes appropriate and inappropriate questions to be asked by the interviewer (Milne, 2004). Appropriate questions begin with phrases such as “tell me”, “describe”, or similar words which are neutral and initiate an open and unhindered answer from the interviewee. Although open-ended questions are encouraged, specific closed questions are also allowed – those that inquire about specific detail and are designed to draw shorter answers – one/two words or a short sentence – and usually start with “who”, “what”, “where”, “when” and “how” (Wright & Powell, 2006; Heidt *et al.*, 2016).

Inappropriate question types include (Milne, 2004; Heidt *et al.*, 2016):

- Questions that lack objectivity – Questions that contain new information that the interviewee has not yet mentioned;
- Leading and misleading questions – Questions that manipulate the interviewee into answering in a specific manner. Leading questions steer the interviewee into providing a “correct” response according to the subjective framework of the interviewer, whereas misleading questions trigger “incorrect” responses;

- Multiple questions – Asking more than one question before the interviewee has the opportunity to give a response; and
- Forced-choice questions – These offer only a restricted number of answer options and occur mostly in the form of yes/no questions, as well as questions set up in multiple choice format.

The ECI is conducted in nine phases. Adherence to these nine phases, as well as the appropriate line of questioning, is imperative as part of its structured nature (Fisher & Geiselman, 2010). To omit a specific step or initiate a phase prematurely could render the interview unsuccessful, seeing that vital information might not be obtained in the process (Milne, 2004).

Table 5
The nine phases of the ECI (Heidt *et al.*, 2016)

Phase	Phase Name	Description
1	Establish rapport	Ensure that the interviewee is relaxed and build a social bond with the interviewee so that the interviewer gains his/her trust.
2	Explain the interview objectives	Explain the purpose and framework of the interview, as well as the fact that control will be transferred to the interviewee. Explain the fact that instructions will follow shortly concerning retrieval of information by focusing, and that there will be no restriction on time to retrieve and communicate information. Also explain the importance of the interviewee reporting on everything he/she remembers.
3	Initiate free report	Use an open-ended question to initiate the process whereby the interviewee starts with free reporting. Reinstatement his/her mental context by cuing senses, people, objects, layout and events. Ensure acceptable interviewer behaviour by applying active listening strategies (probing, querying and summarising throughout) and verbally/gesturing support for the free-flow of information (e.g. using “okay”, “mmhmm”, “yes”, etc.).
4	Questioning	Initiate appropriate question types (open-ended and specific-closed), and refrain from asking inappropriate question types (leading/misleading, forced-choice and multiple choice).
5	Varied and extensive retrieval	Employ memory facilitation techniques such as applying picture activation, varying temporal recall order, changing the

Phase	Phase Name	Description
		perspectives, and using memory jogs to obtain maximal information from the interviewee.
6	Important investigative questions	Ask follow-up questions which are necessary for the specific investigation but which do not necessarily pertain to the information provided in the free report phase.
7	Summary	Summarise the information provided by the interviewee and refer it back to the interviewee to affirm the correctness thereof.
8	Closure	Thank the interviewee for his/her time, ask whether he/she has any additional questions and leave the interviewee in a positive state of mind.
9	Evaluation	Evaluate the evidence acquired from the interviewee and critically assess the performance of the interviewer during the conducting of the structured interview.

Since the ECI is somewhat of a time-consuming and expensive process, researchers have recently developed alternative versions of the cognitive interview, one of which is the Liverpool Interview Protocol (LIP) (Wagstaff & Wheatcroft, 2012). The LIP is a “brief memory enhancement procedure that is designed to maximise the amount and accuracy of information a cooperative witness is capable of providing” (Wagstaff *et al.*, 2014:3). It has been developed by psychologists and policing experts and is considered a basic interviewing procedure aimed at making it simple for forensic interviewers to acquire and apply its principles, since the interviewer only has to read the instructions out to the interviewee or play a recorded version thereof (Brunas-Wagstaff *et al.*, 2004).

Similar to hypnotic investigative interviewing techniques, which are also discussed later in this chapter, the LIP consists of the following five components (Hibbard & Worrying, 1981; Wagstaff *et al.*, 2004; Wagstaff *et al.*, 2014):

1. A very brief introduction;
2. An optional instruction that the interviewee closes his/her eyes;
3. A brief (1.5 minute) meditation/relaxation exercise;
4. A brief session where the context is reinstated by the interviewer; and

5. An instruction to report everything and to recall freely.

The LIP is not purely based on hypnotic elements, but is also derived from psychological witness memory enhancing features, specifically mnemonic features, which also form part of the basis of cognitive interviewing. Reinstating the context for the interviewee and encouraging the interviewee to report on everything (step 4 and 5 above) are examples of these memory enhancing mnemonic techniques (Davis *et al.*, 2005; Hammond *et al.*, 2006).

As discussed above, hypnotic investigative interviewing is also a branch of cognitive interviewing. Hypnotic investigative interviewing refers to the application of hypnosis as a means of acquiring information from the interviewee (Coe & Sarbin, 1991; Green *et al.*, 2005). Hypnosis as a process is considered to consist of a certain set of procedures rather than earlier references to it being a special “state”, “condition” or “trance” (American Psychological Association, 1994; British Psychological Society, 2001). Instead it is thus defined as “a set of procedures in which an individual receives (more or less any) instructions or suggestions to imagine and think about certain ideas, set in a context defined or labelled as hypnosis” (Wagstaff, 2008:1278).

In a commercial forensic investigative context, hypnotic investigative interviewing consists of interaction between the interviewer and interviewee at the beginning of an interview, where the aforementioned party facilitates psychological processes with the interviewee – such as imagination, relaxation and role enactment – in order to facilitate mental focus of the interviewee, which in turn may aid the process of obtaining information relevant to the investigation (Wagstaff, 2008; Wagstaff *et al.*, 2014). It traditionally consists of the interviewer enabling relaxed and passive thinking by the interviewee by helping him/her to focus attention on neutral targets/objects or a set of objectives, such as designated parts of his/her body or his/her breathing pattern, subsequently eradicating thoughts that might be of a distracting nature (Benson & Klipper, 1976; Wagstaff, 2008). This may facilitate the enhancement of memories regarding persons’ faces and/or other emotional material (Benson & Klipper, 1976; Erdelyi, 1994; Wagstaff, 2008; Wagstaff *et al.*, 2014).

4.4.2 Critical analysis of cognitive interviewing

4.4.2.1 Cognitive interviewing and academic literature

According to Fisher and Geiselman (2010), cognitive interviewing is an effective instrument for obtaining information. Some studies claim that this technique is able to extract up to 40% more accurate information than other structured interviewing techniques (Memon *et al.*, 2010). Further to this, the modified version of the technique – ECI – is said to exhibit the same efficacy levels

(Colomb *et al.*, 2013). Several studies found that ECI can successfully be utilised on various types of witnesses – children, adults, older persons and people with learning disabilities (Wagstaff, 2008).

However, ECI is a complex procedure that demands significant training of interviewers, which is time consuming and expensive to apply in practice. Due to these constraints, many forensic investigators are not trained sufficiently, which results in several cases where interviewers digress from the specified phases of the technique (Dando *et al.*, 2009; Kebbell *et al.*, 2001; Wheatcroft & Wagstaff, 2010).

As noted earlier, the bulk of questions in ECI should be open-ended, yet research has shown that this rarely happens in practice. One study has found that, even after a full week of training, only 23% of interviewers were asking open-ended questions during interviews (Hughes-Scholes & Powell, 2008; Luther *et al.*, 2014). In the UK, for example, in spite of the extensive training in ECI, most forensic investigators do not methodically apply this technique, and when they do, it is often incomplete (Clarke & Milne, 2001; Dando *et al.*, 2009). In fact, studies have shown that many forensic investigators do not even consider implementing ECI in their forensic investigative structures, owing to the complexities, time stresses (in conducting the interviews themselves and training the investigators) and low cost-effectiveness in applying the technique (Milne & Bull, 2002; Davis *et al.*, 2005; Dando *et al.*, 2009).

Even in cases where ECI is used in forensic departments, implementation is often inadequate, seeing that an average of only about two days is used in training investigators, which may negatively affect the obtaining of relevant information from witnesses (Wells *et al.*, 2006; Snook *et al.*, 2010). This is supported by the theory of distributed learning which states that information is learned over a longer period of time, spread out over several days, and should be re-tested several weeks after the initial learning session. This is in contrast with the way ECI training is normally conducted – voluminous material is shared over a short period of time, without a follow-up revision session to re-test trainee knowledge (Cepeda *et al.*, 2006).

Due to these apparent shortcomings in the successful implementation of ECI, several studies have proposed alternative versions thereof in order to improve training approaches and its overall usability (Hammond *et al.*, 2006; Wagstaff, 2008; Wagstaff *et al.*, 2014). As discussed earlier in this chapter, two main branches of ECI have been identified as potential alternative versions of the aforementioned technique – the LIP and hypnotic investigative interviewing (Webert, 2003; Fisher & Geiselman, 2010; Wagstaff *et al.*, 2014).

Researchers have been particularly optimistic about the use of the LIP in the commercial forensic investigative context, citing several advantages of the technique in comparison with ECI in its original form. These advantages include (Wagstaff *et al.*, 2004, 2007, 2011, 2014; Wagstaff & Wheatcroft, 2012; Hammond *et al.*, 2006):

- The improvement of memory – Numerous studies have indicated that the use of focused breathing and eye-closure in the LIP may improve memory, specifically information regarding speech, visuals (including events experienced in the past) and person identification. These improvements have been noted particularly when meditation and eye-closure have been used in conjunction;
- No increase in false positive responses – Empirical evidence suggests that LIP does not lead to a rise in confabulations (where the interviewee provides false information that he/she believes is actually true). According to researchers, this is due to the focused approach of LIP, particularly in the form of the applied breathing exercise which leads to a decline in the presentation of misleading information;
- Effective application on a variety of interviewees – The LIP is found to have been successfully applied on a diverse group of individuals: adults of various ages and even young children;
- Favourable response from trainees – Surveys indicate that the LIP training has generally been positively received by police officers, who have also noted the favourable impact it has had on their investigative work in practice; and
- Time and practicality – The LIP is a much shorter alternative to forensic interviewing than other memory enhancing techniques, which also makes it more practical to implement.

Despite these positives, LIP has also received significant criticism, especially from senior police officials in the UK, regarding the lawfulness of its application in practice. These criticisms have been launched against the backdrop of its association with hypnosis, which may influence its legality in a court of law. Although once relatively prevalent, the use of hypnosis in forensic investigations to obtain information from witnesses has decreased substantially, citing the increasing evidence that suggests it leads to a considerable amount of cases where misleading information is obtained (Erdelyi, 1994; Lynn *et al.*, 1997; Webert, 2003; Wagstaff, 2008; Wagstaff *et al.*, 2014).

Studies have found that to label the forensic interview a “hypnosis”, may lead to interviewees adopting a more careless and sloppy approach when reporting back to the interviewer, thereby increasing the chances of giving responses that are perceived subconsciously as being true and presented to the interviewer accordingly, but which are in actual fact distorted – known as confabulations (Wagstaff, 2008). These cases have prompted courts in the UK to regard evidence obtained from memory enhancing investigative interviewing techniques such as ECI and the LIP with considerable scepticism (Semmens-Wheeler & Dienes, 2012).

Proponents of the LIP have attempted to dismiss these concerns by emphasising the difference between the traditional “hypnotic induction” – where a person is facilitated by the interviewer into entering a state of hypnosis – and the essence of the LIP, which focuses more on meditation and so-called “mindfulness” training. According to these authors, the latter does not increase susceptibility to false positive responses by interviewees at the same levels as traditional hypnosis (Whitehouse *et al.*, 2010; Wagstaff *et al.*, 2014).

One of the other branches of ECI, as discussed earlier in this chapter and mentioned in the previous paragraph, is hypnotic investigative interviewing. As is the case with the LIP, one of the significant advantages with this method is that it takes considerably less time to conduct than ECI. Another benefit of this technique is that, unlike traditional police interrogation methods, it allows for open-ended questions, which normally leads to more information being shared by the interviewee. It has been found that many police interviewers interrupt witnesses when they are giving information. These interruptions might unsettle the interviewee and discourage them from providing longer answers, which might lead to the exclusion of valuable information. Many police interviewers also make use of closed-ended questions (e.g. “Did he have green eyes?”), which forces the interviewee to answer in a short, condensed manner and also eradicates the possibility of elaborating on new facts not triggered by a specific question. This risk is averted with the open-ended questions of the hypnotic investigative interview technique (Milling *et al.*, 2002; Webert, 2003; Wagstaff, 2008; Wagstaff *et al.*, 2014).

However, there is also substantial critique against the hypnotic investigative interview. Similar to the LIP, there is considerable doubt as to whether evidence obtained from such an interview will be admissible in a court of law. Indeed – due to extensive research on the matter – in the majority of federal states in the USA where witnesses were subjected to the hypnotic investigative technique, these individuals were barred from giving evidence in a court of law (Wagstaff, 2012). Also, in the UK, there are specific protocols in police structures that discourage the use of hypnosis as an interviewing tool (UK Home Office, 1988; Webert, 2003; Wagstaff, 2008).

An additional critical aspect of the hypnotic investigative interview includes the fact that, contrary to popular belief, interviewees are capable of lying when they are under hypnosis. Further to this, there is general consensus among researchers that the vast amount of evidence indicates hypnosis does not enhance memories to a level superior than individuals who are not hypnotised (McConkey & Sheehan, 1996; Webert, 2003; Wagstaff, 2012; Wagstaff *et al.*, 2014).

Research also suggests that interviewees who are hypnotised are more likely to include false facts when reporting on past events, and normally have exaggerated levels of confidence when sharing information, irrespective of the accuracy thereof (Wagstaff *et al.*, 2004). This is due to the psychological pressure placed on the interviewee by the interviewer to remember great volumes of information as part of the hypnotic procedure, which results in the interviewee relaxing his/her criteria when assessing what information is true and what is not during reporting. In such cases, he/she may subconsciously feel obligated to provide additional details, some of which might be fictional (McConkey & Sheehan, 1996; Scoboria *et al.*, 2002; Webert, 2003; Wagstaff, 2008).

4.4.2.2 Cognitive interviewing and the South African legal context

The foundation of cognitive interviewing is similar to the PEACE model and the person-centred approach in that it forms part of the group of investigative interviewing techniques whose sole purpose is to obtain relevant information – and not gain a confession (guilt-presumptive interviews) (Fisher & Geiselman, 2010; Gudjonsson & Pearse, 2011). This is an important aspect, seeing that the majority of forensic interviewing techniques that have been found to violate human rights and other legal aspects are not underpinned by investigative interviewing principles, but by guilt presumption (Kassin, 2008; Gudjonsson & Pearse, 2011; Mason, 2016).

In essence, cognitive interviewing, as well as its fine-tuned versions – ECI, LIP and hypnotic interviewing – aim to extract impartial information and enhance witness memory from interviewees by using cognitive retrieval strategies based on psychological research (Memon *et al.*, 2010). Therefore, its attempted impartial and objective approach to obtaining information should render it in line with most legal principles. However, a significant critical aspect arises in its legality in terms of increasing evidence that suggests it leads to a considerable amount of cases where misleading information is obtained (Wagstaff *et al.*, 2014).

Especially its connection with hypnotic interviewing creates doubt as to whether evidence obtained from such an interview will be admissible in a court of law, which has already been the case in courts in both the USA and the UK (Webert, 2003; Wagstaff, 2008). This is underlined by the fact that interviewees are capable and more likely to lie when under hypnosis, and that they

normally have exaggerated levels of confidence when sharing information (irrespective of its accuracy) (McConkey & Sheehan, 1996; Kebbel & Wagstaff, 1998; Scoboria *et al.*, 2002; Webert, 2003; Wagstaff, 2008).

Therefore, it is necessary to assess whether the abovementioned aspect might render the application of the cognitive interview within the South African context ineffective, citing the potential inadmissibility of evidence obtained during the interviewing phase during commercial forensic investigations.

Here follows an analysis of cognitive interviewing against the relevant South African legal aspects identified in Chapter 2:

Table 6
Cognitive interviewing analysis

Law	Details	Application
Section 10 of the Bill of Rights – Right to human dignity	Interviews must be conducted in a composed and humane manner and not threaten the interviewee's right of being worthy of honour or respect, and should be free from torture and degradation.	The non-guilt presumptive nature of cognitive interviewing, which is free from intimidation and violence, renders the technique compliant with the interviewee's right to human dignity.
Section 12 (1) of the Bill of Rights – The freedom and security of a person	Interviews should not be of such a nature that it denies the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated in an inhuman way by the interviewer.	As is the case with other investigative interviewing techniques – such as the PEACE model and the person-centred approach – the cognitive interview needs the full cooperation of the interviewee in a harmonious setting in order to retrieve relevant information. This means that violence, torture and detaining the interviewee against his/her will is highly unlikely.
Section 14 of the Bill of Rights – Right to privacy	Interviewees have the right to privacy, including the right that his/her private realm is	Cognitive interviewing in essence respects the basic human rights, including the right to privacy, in that it

Law	Details	Application
	<p>not infringed upon – excluding the obtaining of information that directly influences the public sphere and workplace.</p>	<p>is not accusatory in nature and does not force an individual to provide information.</p> <p>Research also suggests that interviewees who are under hypnosis will not share private information that they normally also would not share in a fully conscious state (Fisher & Geiselman, 2010).</p> <p>The question as to whether an interview seeks to obtain information of a private matter which does not influence the public sphere or workplace, however, will depend on the facts of each case and cannot be evaluated in terms of the technique itself.</p>
<p>Section 35 (1) (c) of the Bill of Rights and section 217 of the CPA – Right not to be compelled to make any confession/admission</p>	<p>Confessions/admissions should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence.</p>	<p>It is in terms of this section that cognitive interviewing has received its greatest criticism, especially with regards to the unreliability of evidence obtained in the cognitive retrieval process and its links to hypnosis.</p> <p>As discussed in Chapter 2, a “free and voluntary” statement is derived from common law and can be regarded as a statement that is not induced by a threat or a promise proceeding from a person in authority.</p> <p>Research indicates that an inherent promise may arise in the form of a tacit expectation created by the interviewer (Wagstaff, 2008). This expectation consists of the</p>

Law	Details	Application
		<p>interviewer wanting as much information as possible from the interviewee, which may cause a cloud of judgment by the interviewee in subconsciously wanting to add information that is not true during the retrieval process. As research suggests, this may lead to unreliable evidence being submitted by the interviewee that is not free and voluntary (Wagstaff <i>et al.</i>, 2014).</p> <p>Regarding the term “in sound and sober senses”, a person will be deemed as not being in his sound and sober senses if he/she is unable to know what he/she is saying (R v Blythe, 1940).</p> <p>Serious concerns exist with regards to the cognitive interview’s connection with hypnosis, which have been proved to be unreliable and in some cases may lead to confabulations (facts that are shared by interviewees that seem subconsciously true, but are in fact false). This may result in interviewees making statements when they are not in their sound and sober senses.</p> <p>According to S v Pietersen (1987) “undue influence” refers to a practice that is “repugnant to the principles upon which the criminal law is based” and goes beyond violence and includes interviewing the interviewee for an unduly long period of time, subjecting the interviewee to fatigue,</p>

Law	Details	Application
		<p>as well as exploiting the interviewee's weaknesses, such as his lack of education or youthful age.</p> <p>Due to the investigative nature of cognitive interviewing that purely aims to obtain information, applying it in the commercial forensic investigative context will normally not lead to violent or intimidating behaviour. However, the cognitive interview is known to take considerable time to conduct, and therein lies a risk that the interviewee might experience fatigue, which might in turn result in undue influence exerted by the interviewer.</p>
<p>Section 35 (5) of the Bill of Rights – The violation of any rights contained in the Bill of Rights</p>	<p>If any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice. This may lead to the acquittal of the interviewee should he/she later be accused of any crime.</p>	<p>Serious doubt exists whether cognitive interviewing will comply with the Bill of Rights in terms of section 35 (1) (c) and section 217 of the CPA, as discussed above. It is clear that evidence obtained via this technique might face severe scrutiny based on the fact that its link with hypnosis renders it vulnerable to confessions being made that are not free and voluntary, are not made in sober senses and/or without undue influence being exerted.</p> <p>The risk is especially evident in similar cases in the USA and the UK (Webert, 2003; Wagstaff, 2008) where the courts deemed evidence obtained from cognitive interviews inadmissible – which is also a</p>

Law	Details	Application
		concern in terms of section 35 (5) within the South African context.
Section 23 (1) of the Bill of Rights and the LRA – Unfair labour practices and unfair dismissal	Interviews should be conducted in a fair manner that will not qualify as unfair labour practice or lead to an unfair dismissal.	The investigative and information-seeking nature of cognitive interviewing means that it is considered a fair technique that will normally not lead to an unfair dismissal. Furthermore, seeing that the LRA is inherently based on human dignity, equality and freedom (which form the basis of the Bill of Rights), it can be accepted that if the technique complies with these three elements (which it does in this case), that it will normally be free from unfair labour practices.

4.4.3 Conclusion

Cognitive interviewing has a strong empirical and historical foundation. However, its close relationship with hypnosis creates concern and influences its potential application within the commercial forensic investigative context. Hypnosis and its related aspects are deemed unreliable by experts, which may influence the quality of the information obtained from an interviewee.

It is evident from the abovementioned analysis that due to the investigative and non-accusative nature of cognitive interviewing, this interviewing technique falls within the general ambit of the relevant legal aspects of South Africa. However, there is significant concern regarding its application in terms of section 35 (1) (c) of the Bill of Rights and section 217 of the CPA, which influences the legality of confessions obtained in circumstances where this technique was used. There is evidence to suggest that confessions in terms of the cognitive interview might not: (1) be free and voluntary, (2) be made in sound and sober senses, and (3) be made without undue influence. The fact that section 35 (1) (c) of the Bill of Rights may not be abided by also means that the cognitive interview inherently risks being in breach of section 35 (5) and that any evidence

obtained from the interview, not only confessions, might be deemed inadmissible by a court of law.

Further to this, the fact that several American and UK courts have deemed evidence obtained from cognitive interviews as inadmissible, gives credence to the suggestion that it is an unreliable manner for obtaining information, and that South African courts will reach the same conclusion.

4.5 Kinesic interviewing

4.5.1 Background

Kinesic interviewing refers to the technique of observing and assessing an interviewee's words and body movements. Certain words and movements of the interviewee can indicate potential deception when he/she answers questions during a forensic interview (Manning, 2015). According to Walters (2003), an interviewer can utilise these verbal and non-verbal signals of dishonesty of an interviewee and "decode" it.

Walters (2003) states that human beings respond on two levels: emotionally and cognitively. The basis of these responses is due to past experiences. Therefore, should a person be subjected to a similar situation as in the past, or circumstances which only remind him/her of a past event, the person will automatically apply learned behaviour and defences in the search for a positive outcome. This forms part of the Social Learning Theory (SLT) in psychology (Maisto *et al.*, 1999). SLT is defined as "an approach that synthesises principles of learning with those of cognitive psychology. It is a systematic effort to explain how the social and personal competencies that are often referred to as 'personality' developed from the social context in which such learning occurs" (Hilgard & Bower, 1975:599).

Based on Bandura's (1969, 1977, 1986) four main constructs – differential reinforcement, vicarious learning, cognitive processes and reciprocal determinism – the SLT differs from traditional psychological theories in that it does not interpret human behaviour as being solely formed as a result of psychological, biological or external environmental drives (Maisto *et al.*, 1999). Instead, it claims that "human functioning...involves interrelated control systems in which behaviour is determined by external stimulus events, by internal processing systems and regulatory codes, and by reinforcing response-feedback systems" (Bandura, 1969:19). It simply means that human behaviour is a combination of two factors – external experiences (such as interaction with other humans) and internal cognitive factors (e.g. how a person experiences and reacts to past memories) – which leads to certain traits and characteristics that can be assigned to individuals (Henning, 2004).

In the case of deception, there is an attempt to qualify, subdue, edit or even manipulate our true emotional and cognitive reaction when confronted with a specific situation. The mere attempt to achieve the aforementioned creates certain signals which the interviewer can utilise to “decode” potential dishonesty. These include both verbal content and non-verbal behaviour of the interviewee (Walters, 2003). DePaulo *et al.* (2003) identified about 100 different cues, including visual (smiles, gazes, posture, body movements) and vocal (pauses, stutters, voice pitch) behaviours.

Regarding forensic investigative interviews, two types of behaviours have received special emphasis by scholars as being indicative of deception – eye movements and so-called “self-adaptors”. People who lie when asked a question, are believed to respond by, *inter alia*, avoiding eye contact and fidgeting with their hands (Strömwall *et al.*, 2004; Taylor & Hick, 2007; Vrij, 2008). Liars also tend to apply fewer gestures to illustrate their points and therefore move their hands, arms and feet less than people who tell the truth. Further to this, people who lie are inclined to speak in a higher tone than truth tellers (Sporer & Schwandt, 2007; DePaulo *et al.*, 2003; Vrij, 2008).

According to a study conducted by Strömwall *et al.* (2006), liars tend to elaborate less when asked questions by the interviewer, especially when they are uncertain of the extent of the evidence against them. They are therefore prone to keeping their responses very simple, whereas truth tellers are normally more talkative and provide a more in-depth analysis of an experience (Strömwall *et al.*, 2006; Hartwig *et al.*, 2006).

Additionally, Newman *et al.* (2003) found that people who lie use fewer first person pronouns, fewer so-called “exclusive” words (such as “without”, “except”, “but”) and fewer words of cognitive intricacy which necessitates effort. Walczyk *et al.* (2003) also state that spontaneous lying results in interviewees using more cognitive effort and therefore there is usually an increase in the answering time (Kassin & Gudjonsson, 2004).

The visual and vocal cues of liars and truth tellers do not constitute an exact science, and are influenced by numerous factors, including (De Paulo *et al.*, 2003; Strömwall *et al.*, 2006; Vrij, 2008; Vorster, 2012):

- the content and the nature of the lie;
- the level of motivation of a person to lie or tell the truth;

- whether the stakes are high or not for the interviewee;
- the context of the interviewee – whether, for example, it is very interactive or non-interactive (engagement with the interviewer);
- whether the interviewee has been given time to prepare their stories or not;
- the length of the interview; and
- the cultural and historical background of the interviewee.

4.5.2 Kinesic interviewing and the Reid technique

For over 30 years researchers have been trying to establish to what extent verbal and non-verbal behaviours might be indicators of deceit, yet these assessments have been of a purely academic nature and within a psychological framework (Zuckerman *et al.*, 1981; Ekman, 2001; Deslauriers-Varin *et al.*, 2011). Within the commercial forensic investigative context, however, kinesic interviewing has rarely been viewed or applied as a stand-alone concept. Studies indicate that it is broadly researched and applied in practice in accordance with forensic interviewing in the USA – primarily as part of the Reid technique (Vrij, 2008; Inbau *et al.*, 2013).

The Reid technique, which is thoroughly discussed later in this study, consists of nine steps of interrogation, which are applied in circumstances where the interviewer is certain “the suspect is guilty” (Inbau *et al.*, 2013:6). Prior to establishing the supposed guilt of the interviewee, a preceding Behavioural Analysis Interview (BAI) is conducted by the interviewer. The BAI is fundamentally based on the central concepts of kinesic interviewing – interpreting the verbal and non-verbal responses of an interviewee in order to detect deception (Vrij, 2008; Brinke & Porter, 2012; Inbau *et al.*, 2013).

As such, kinesic interviewing should be evaluated in accordance with the BAI, and in particular the Reid technique. Therefore, the critical analysis of kinesic interviewing against relevant literature, as well as its assessment in terms of the South African legal context, will be discussed as part of the Reid technique in 4.6.

4.6 The Reid technique

4.6.1 Background

The Reid technique is a forensic interviewing technique commonly used in the USA (Kassin *et al.*, 2003). It is mainly applied to criminal investigations and in situations where the interviewee's guilt is deemed "definite and reasonably certain" (Inbau *et al.*, 2013:121). A central objective of this type of interviewing technique involves interrupting the suspect's denials and presenting false evidence, followed by "the offering of sympathy, understanding, and an alternative 'theme' that minimises the moral seriousness of the act" (Kassin *et al.*, 2003:188) so as to break down the suspect's resistance and encourage him/her to confess to a crime.

The Criminal Interrogation and Confessions handbook by Inbau *et al.* (2013), which explains the Reid technique in depth, is one of the most influential interviewing manuals in the forensic investigative context, specifically in the USA, and was first published in 1962 (Kassin & Gudjonsson, 2004; Gudjonsson & Pearse, 2011). It entails nine steps or structural components of interrogation formulated by John E. Reid, which consists of the following (Inbau *et al.*, 2005, 2013):

- Step 1: Confronting the interviewee with an unwavering accusation that he/she committed the specific offense. The interviewer tells the suspect that the evidence proves without a doubt that he/she committed the crime. During this stage, it may also yield positive results to use fictitious evidence in order to emphasise the pointlessness in trying to claim innocence. According to Inbau *et al.* (2013), the suspect will closely analyse the interviewer's level of confidence with regards to the claimed guilt, and if the suspect identifies any doubt in the interviewer, he/she will likely not confess;
- Step 2: Introducing a theme by establishing a hypothesis regarding the motive and justification for the crime (also known as the moral excuse). During this phase, the interviewer rationalises the reason why the suspect committed the crime, and adapts the narrative to fit in with the suspect's cognitive characteristics. The reason for this is that Inbau *et al.* (2013) believe that interviewees respond uniquely to different situations, and therefore they divide them into two groups: those that respond emotionally and those that do not. Some themes might appeal more to emotional criminals than those that are non-emotional and vice versa. The authors have created a list containing numerous relevant themes for these two groupings. Examples of these include: informing emotional interviewees that most other people in a similar situation would have done the same (even

the interviewer him/herself), offering sympathy to emotional offenders by blaming someone else for their conduct – such as the victim (e.g. that his/her employer actually deserved to get defrauded, since they make lots of money from the labour of underpaid blue-collar workers), and in the case of non-emotional offenders, reassuring the suspect that his criminal conduct was probably non-intentional;

- Step 3: Discouraging the interviewee's denial of guilt by interrupting and ignoring him/her, and repeating the moral excuse mentioned in Step 2. According to Inbau *et al.* (2013), denials should be discouraged, since they place an investigator in a "disadvantaged position", since the chances of a suspect confessing decreases every time he/she denies guilt. Therefore, denials should be negated before they are even verbalised by the interviewee. The authors provide an extensive list of non-verbal cues which indicate when an interviewee is about to deny an offence, which interviewers should study and annul before denials are uttered. Additionally, Inbau *et al.* (2013) state that an innocent and a false denial will differ significantly – the latter is usually done in a very defensive and somewhat hesitant manner, whereas innocent people will be more direct and vigorous with their denials;
- Step 4: Overcoming the interviewee's additional reasons, after initial denial, for being innocent. According to the authors, innocent people will continue to voice their innocence throughout the interview, whereas guilty persons will alter their approach after a while. A guilty person will become more offensive and develop details why he/she cannot be guilty. During this stage, the interviewer should absorb this offensive approach from the suspect and use it to encourage the person to admit to the offence. Once the interviewer successfully overcomes these objections, the interviewee will likely feel helpless and emotionally withdrawn from the interview;
- Step 5: Displaying sincerity towards the interviewee, which assures that a passive suspect does not become withdrawn. Once there are signs that the interviewee is likely to withdraw from the conversation, the interviewer should act immediately and eradicate the emotional divide between him/herself and the suspect. This is done by physically moving closer to the interviewee, talking in a more emphatic tone and making eye contact;
- Step 6: Recognising the interviewee's potential passiveness and demonstrating sympathy and understanding, which will encourage the suspect to cooperate. During this phase, the interviewer should re-establish rapport by showing sympathy and underlining the reason why the crime was committed in accordance with Step 2 again. Any objections that arise

from the suspect should still be negated as in the steps mentioned above by placing emphasis on the theme of the crime;

- Step 7: Using an alternative question – a suggestion concerning an aspect of the crime that leads to an admission. During this phase, the interviewee is given two reasons why the crime was committed, of which the one reason is more acceptable. For example, the interviewer might ask: “Did you steal the money in order to buy new things, or to help your struggling family?” These suggestions offer the interviewee an underlining motive for committing the offence in a rationalised fashion and provide the first step for him/her to fully confess to the crime. In order for this step to be successful, the interviewer should channel the suspect’s thoughts so that he/she can only choose between the two options provided. The authors believe that innocent suspects would never confess to either of these two alternatives, since confession is based on an underlying psychological need to admit the truth;
- Step 8: Promoting a discussion where the suspect verbally describes details of the offense to establish guilt. According to the Reid technique, the interviewer generally dictates the conversation, yet after step 7 it is imperative that the suspect gets the opportunity to provide his/her account of the events regarding the committing of the offence. Ample time should be provided during this phase, since the suspect might initially be reluctant to provide details regarding the crime; and
- Step 9: Converting a verbal confession into a written one. Due to the inherent risk of the suspect denying guilt later, it is important that the oral confession be documented as soon as possible. A written confession normally carries more evidential weight than a verbal one. Moreover, the authors believe that the confession should be documented in a question-and-answer format rather than a typical narration, since specific questions may cover more information than if the suspect simply gives account of what happened in a narrative format.

The Reid technique has been characterised by two elements – maximisation and minimisation strategies (Inbau *et al.*, 2013; Kassin, 2008; Dixon, 2010). Maximisation strategies have been developed in order to intimidate interviewees and accuse them of committing a crime (Steps 1 – 4), which may include the presenting of fictitious evidence to support these allegations. Minimisation strategies, on the other hand, reduce the apparent consequences of admitting to an offence and consist of acquiring an interviewee’s trust (Steps 5 – 9). This is achieved by showing sympathy, acceptance, offering diplomatic excuses for alleged offences committed, and applying

hypotheses regarding the reasons for committing said crimes in order to minimise the seriousness of the offence (Kostelnik & Reppucci, 2009; Mason, 2016).

Conceptually, these abovementioned elements can be reduced to an interaction of three factors (Kassin & Gudjonsson, 2004):

- a) Custody and isolation – Increases anxiety and creates the urge to remove oneself from the situation;
- b) Confrontation – Where the interviewer accuses the interviewee of committing the said offence, states his/her conviction regarding the accusation, supports allegations with real or false evidence, and discourages any denials by the interviewee; and
- c) Minimisation – Where the interviewer becomes sympathetic and morally justifies the offence, which leads the interviewee to believe that his/her only option to escape the situation is to confess, and also creates the perception that he/she will be treated in a lenient manner by the prosecuting authorities.

It is important to note, however, that before the nine steps of this technique are applied to an interview with a suspect, a so-called Behavioural Analysis Interview (BAI) is conducted as part of the greater interviewing process (Inbau *et al.*, 2013). As mentioned earlier, the BAI – also referred to as the Behaviour Symptom Analysis (BSA) – is conducted in order to take into account the role that “observing behaviour symptoms play in detecting deception” (Inbau *et al.*, 2005:80), and should be none-accusatory in nature in order to establish rapport and gather personal information of the interviewee which might be used later in the interviewing process.

According to Inbau *et al.* (2005, 2013), this is an imperative step to undertake before applying the traditional Reid technique, since the aforementioned nine steps are only effective if the interviewee is “guilty” of committing the crime. The BAI therefore aims to identify innocent and guilty individuals, the latter of which will be subjected to the Reid Nine Steps of Interrogation so that they can confess to the crime.

Similar, if not identical, to kinesic interviewing, the BAI consists of the evaluation of verbal (including paralinguistic – verbal characteristics that do not include the use of words) and non-verbal cues of the interviewee. According to this technique, these cues or “channels” can work together to form inferences which the interviewer may use to analyse whether a person is being honest or not (Sporer & Schwandt, 2006; Vrij, 2008).

The basic principles adopted by the BAI are the following (Inbau *et al.*, 2013):

1. The analysis of paralinguistic and non-verbal indicators in relation to the interviewee's verbal message – In order to assess a person's emotional state, the paralinguistic and non-verbal cues should be evaluated in context with the person's spoken words, e.g. crossing one's legs while looking down at the floor and dusting one's shirt when asked about money that has been stolen, might be indicative of deceptive behaviour, seeing that the subject's verbal response does not correlate with his/her non-verbal behaviour;
2. The evaluation of the multitude of behaviours that arise during the interview – Interviewers should not only evaluate individual answers and cues, but rather take into consideration behaviours that are evident throughout the interview, since the chance of correctly evaluating a person's behaviour from an individual answer will likely be lower than if the analysis takes place over 40 minutes;
3. The assessment of all three kinesic cues simultaneously – The verbal, paralinguistic and non-verbal behaviours should be assessed in unison, since the presence of any inconsistencies between these three cues normally warrants further investigation of the subject's behaviour, e.g. if an interviewee is asked whether the relevant investigation will indicate that he/she has done nothing wrong, and he/she answers "yes", but simultaneously looks down and scratches his/her sleeve, an inconsistent message is conveyed and therefore might indicate potential deception;
4. The evaluation of the interviewee's usual pattern of behaviour – Each interviewee will have his/her unique peculiarities, characteristics and habits, including their way of gesturing, their use of language and how often they make eye contact. Due to this, the interviewer should use the time to converse in a casual and non-accusative manner to establish the interviewee's standard pattern of behaviour. Should there be a deviation from the usual behaviour later in the interview, it should be taken into consideration by the interviewer so as to ensure that potential deceptive behaviour is identified; and
5. The acknowledgement that analysing a person's behaviour cannot specifically indicate whether someone is truthful or deceptive – Verbal, paralinguistic and non-verbal cues only reveal a person's emotional state, such as fear, sadness, joy, anger, embarrassment and anxiety. Some emotions are, however, closely linked to deceit (e.g. anxiety, guilt, fretfulness) and other to honesty (e.g. poise, conviction, self-assurance). Analysing a

person's behaviour therefore only consists of making inferences about these cues and not stating it as fact that a person is telling the truth or lying.

Within the framework of these abovementioned factors, verbal, paralinguistic and non-verbal behaviours of a person are evaluated individually as part of the BAI. These evaluations are summarised as follows (Walters, 2003; Mann *et al.*, 2004; Strömwall *et al.*, 2006; Vrij, 2008; Inbau *et al.*, 2013; Naidoo, 2015):

- Verbal cues – An interviewee's answers can broadly be divided into four categories:
 1. Truthful responses – Answers that represent the truth and do not cause internal nervousness due to deceit;
 2. Omissive responses – Answers where the interviewee admits to the committing of a specific act, but he/she denies any criminality as a result of said act;
 3. Evasive responses – Answers that infer innocence without affirming it in words; and
 4. Deceptive responses – Answers that represent dishonesty and which are related to extreme internal apprehension.

Examining verbal behaviour is generally focused on identifying potential deceit. Therefore, emphasis is placed on the analysis of the last three categories mentioned above:

- Omissive, evasive and deceptive responses – Interviewees who respond honestly give clear and assertive answers, while deceptive interviewees offer qualified ones. Qualified phrases are statements which are added to an answer in order to decrease its veracity, and comprises of four different categories:
 1. Generalisation statements – These are statements which generalise an answer in order to avoid ownership of a certain act. Examples of such statements include: “Normally”, “Generally”, and “The production process demands”;
 2. Memory qualifiers – Phrases that attempt to evade responsibility by claiming that the interviewee cannot remember the facts well, and include

statements such as “As far as I know”, “If I remember correctly”, and “If my memory serves me right”;

3. Omission qualifiers – Statements that exclude information as part of an answer. Examples include phrases such as “Not quite”, “Rarely” and “Not always”; and
4. Estimation phrases – Statements that do not contain exact information, but predictions and estimations.

Some dishonest individuals will aim to make their false statements credible by underlining certain facts or using bolstered phrases such as “I swear by my mother’s grave” or “As God is my witness”. Additionally, some deceptive interviewees may make use of phrases that claim selflessness in order to manipulate the interviewer into thinking that they have too much empathy to have committed the said offence. Examples include using words like “I cannot judge, but...”, or “I don’t want to incriminate anyone, but...”.

Although truthful individuals will answer questions definitively, it will be done in a spontaneous way, whereas people who lie tend to give rehearsed answers. One of the ways that answers are rehearsed is through so-called “non-contracted denials”. Normally, when a person answers truthfully, he/she contracts verbs (e.g. “I didn’t” or “I wasn’t”). Deceptive individuals normally do not make use of verb contractions (e.g. “I did not” or “I was not”).

Another way of rehearsing an answer is through listing. When asked a question and a person answers with a variety of different options or possibilities (e.g. a, b or c), it indicates that he/she has prepared for the question beforehand which might be a strong indicator of deception.

Interviewees who answer truthfully respond directly to questions, while those who are dishonest respond in an evasive way. This type of evasion can additionally be divided into three categories (Walters, 2003; Mann *et al.*, 2004; Strömwall *et al.*, 2006; Vrij, 2008; Inbau *et al.*, 2013):

- a) Implicating responses – Truthful respondents answer definitively and precisely and leave no room for implication, whereas deceptive individuals rely greatly on implication as a means to avoid the truth. For example, a

truthful answer will include the fact that A transported B to his house at 10h00, as well as the fact that 10h00 was also the last time A had seen B. A deceptive answer will just mention the time A transported B to his house, but will not expressly state the last time A saw B;

- b) Answering a question with a question – This is a tactic which aims to create doubt in the interviewer by depreciating a valid argument and evading the answering of a question in an honest manner. It often includes, but is not limited to, the use of rhetorical questions. Typical examples include “Why on earth would I do such a stupid thing?” and “Would any normal person do such a thing?”; and
 - c) Lying by referral – This is an answer where the interviewee refers to a previous communication so as to evade being explicitly dishonest. For example, if the interviewer asks the suspect whether he committed the offence, and the suspect answers: “I told the other officer I don’t know anything about it”, he is actually simply saying what he told the other officer and is in fact evading the current question.
- Paralinguistic cues – When assessing verbal responses that do not contain words, several aspects have to be taken into account. These include:
 - Response latency – This refers to the time taken by the interviewee to answer a question – measured from the interviewer’s last word of his/her question to the interviewee’s first word of his/her response. According to research (Vrij, 2008), dishonest individuals normally have delayed responses when asked basic questions (usually 1.5 seconds or longer) due to the fact they need more time to invoke fictitious facts;
 - Early responses – This is when the interviewee already starts answering a question while the question is being asked. Honest individuals who feel nervous may respond early, but tend to do this at the beginning of the interview while they still feel unfamiliar with the setting and they also tend to repeat their answers immediately in order to confirm the facts. When interviewees lie, however, they normally do not repeat their answers, since they subconsciously fear it might activate follow-up questions. If early responses occur in the middle or at the end

of the interview – when the interviewee should already be at ease with answering questions – it is an additional red flag for deceit;

- Response length – Truthful people normally give longer answers than deceptive ones when being interviewed, since the risk of contradicting one's earlier statements becomes greater with longer answers. Additionally, although their answers are more voluminous, honest individuals normally do not stray from the theme of the question, whereas deceitful persons may attempt to distract the interviewer by subtly changing the subject;
 - Response delivery – An interviewee's tone, word-speed and lucidity can be assessed in accordance with his/her verbal responses to give an indication of truthfulness. Generally, when re-experiencing a past event, an honest account will be delivered by the interviewee using a higher tone and at an increased rate, whereas the opposite is true in the case of deception (e.g. sharing information about a traumatic house robbery will seem deceitful when expressed in a slow, unemotional and monotone voice by the victim);
 - Response continuity – Answers that are truthful will flow in a natural manner – spontaneously and unforced. Dishonest responses, however, are full of so-called “stop-and-start” features, where the interviewee begins with one answer, but interrupts him/herself with another answer which differs in content from the first response. This is done in order to reduce the internal anxiety levels of the interviewee, by carefully assessing and redirecting his answers to prevent contradictions and/or incrimination; and
 - Erasure of behaviour – This refers to certain paralinguistic cues that “erase” or “delete” specific verbal responses to give them alternative/opposite meanings. For example, smiling wryly and then coughing after admitting to a crime might actually mean the opposite and that the suspect actually denies guilt. Similar cues might be exhibited, such as the clearing of the throat or even sighing, which can also be indications of sarcasm.
- Non-verbal cues – As is the case with speech, the facial expressions and body language of a person are indicators of a person's emotional state and can therefore be evaluated. These non-verbal cues include:

- Posture – A person who is honest will normally sit upright and will position himself in an open-faced way – toward the interviewer – in order to communicate directly. The opposite is normally the case with people who lie – they tend to slouch in their chairs and align their upper bodies away from the interviewer, which unconsciously signals their intent to withdraw from the interviewing environment;
- Hands – There are usually three ways in which an interviewee can apply his/her hands. Firstly, they can stay motionless, which is an indication of a lack of self-assurance, or the interviewee might be talking about something that he/she feels is unimportant. Secondly, the hands may be moved away from the body, which is called “illustrating” and is usually a sign of truthfulness, seeing that it normally testifies of a person reliving the events and communicating it accordingly. Lastly, the hands may touch another part of the body, known as behaviour adaption, which consists of numerous types of gestures, including grooming gestures (e.g. dusting one’s shirt clean) and personal gestures (e.g. scratching one’s arm), both of which is normal behaviour, unless associated directly with a certain verbal cue. The final grouping, however, called protective/supporting gestures (when the hands touch the person’s face) that “block” individuals off from supposed danger, is of particular interest to an interviewer, since it normally conveys emotional disinterest and anxiety and may indicate discomfort and deceptive behaviour;
- Feet – Hopping or bouncing one’s feet is a usual symptom of someone experiencing apprehension. If an interviewee does this, together with certain verbal responses, it might indicate deceit;
- Facial expressions – If an interviewee responds with a variety of facial expressions to basic questions, it generally means that he/she is subconsciously attempting to manoeuvre him/herself out of the difficult situation, which is a strong indication of deception; and
- Eye contact – The degree to which eye contact is maintained by the interviewee is a strong indicator of truthfulness and dishonesty. Maintaining eye contact is a sign of honesty, directness and sincerity, whereas avoiding eye contact represents the opposite.

Once the BAI phase is completed and the honesty of an interviewee is assessed, the investigator will either close off the interview and thank the person for his/her time (in the case where the

individual is considered to be innocent) or initiate the Reid technique if the interviewee is thought to be guilty. If the latter is the case, the Reid Nine Steps of Interrogation – as discussed earlier in this chapter – will be applied (Gudjonsson & Pearse, 2011; Inbau *et al.*, 2013).

Inbau *et al.* (2013) not only set out the relevant steps of the BAI and the Reid Nine Steps of Interrogation as part of the interviewing process, but also provide details regarding the ideal environment to conduct this type of interview. The ideal setting is a small, minimalistically furnished and soundproofed room. According to the authors, this is done to ensure that the interviewee is denied any familiar surroundings and as a result feels isolated and uncertain. This, in turn, increases the anxiety levels of the interviewee. In order to intensify this distress, it is advised that the physical aspects of the décor should also cause discomfort – the chair of the interviewee should be hard, armless and unable to retract.

Other environmental features include that the light switch, air-conditioning monitor and other devices should be out of reach for the interviewee, and ideally a one-way mirror should be present so that other interviewers can witness the interview. Further to this, the authors emphasise the importance of intruding upon the suspect's personal space over the course of the interview (Inbau *et al.*, 2013; Kassin, 2008; Madon *et al.*, 2012).

Essentially, this technique is formulated to encourage interviewees to incriminate themselves by increasing their level of anxiety, which reduces them to a general state of hopelessness. It also minimises the perception that there will be serious consequences in confessing to a crime (Kassin, 2008).

4.6.2 Critical analysis of the Reid technique

4.6.2.1 The Reid technique and academic literature

There has been extensive criticism raised against the Reid technique by various researchers, forensic investigators and psychologists (Vrij, 2008; Kassin, 2008; Shawyer *et al.*, 2009; Gudjonsson & Pearse, 2011). One of the myriad of critiques constitutes the fact that a significant aspect of this method rests on the ability of the interviewer to accurately distinguish between truth and deception as part of the BAI, since the authors of the method declare that only guilty suspects should be exposed to the nine steps of the technique – this despite the fact that researchers have pointed out that people are generally inaccurate in judging truth and deception (Kassin, 2012).

4.6.2.1.1 Verbal and non-verbal cues of the BAI

Studies consistently indicate that verbal and non-verbal cues are very unreliable in detecting deception, as well as the fact that trained interviewers are often unable to successfully identify dishonest individuals, regardless of their levels of confidence in uncovering the truth (Brinke & Porter, 2008; Vrij, 2008; Gudjonsson & Pearse, 2011). Hartwig *et al.* (2006) and Kassin (2012) support this finding and state that people, including police interrogators and law officials, are mediocre at best in determining deceit, and when they do, it is normally per chance.

The unreliability of the kinesic signs, which are assessed as part of the BAI, is evident in the comprehensive studies undertaken by DePaulo *et al.* (2003), Sporer and Schwandt (2006) as well as Vrij (2008). The authors found that especially non-verbal cues do not seem to be connected to deception. For example, in research carried out by Vrij (2008), there was no difference in the amount of eye contact maintained between honest and lying individuals in 34 of the 45 samples. Similarly, 37 of 49 samples indicated no difference in self-adapting behaviour – such as fidgeting with one's hands – between truthful and dishonest interviewees.

Vrij (2008) found that the link between deceit and anxious behaviour is not as strong as many people believe. Further to this, interviewees tend to control their emotions well and tend to focus their attentions on exhibiting behaviour that will not demonstrate any signs of anxiety, such as fidgeting or eye-contact avoidance. Only a few cues have been moderately indicative of deceit – the fact that liars sometimes tend to use fewer hand gestures when talking and speak in a higher tone than people who tell the truth (Sporer & Schwandt, 2006; Vrij, 2008).

Yet, generally, the kinesic results are unpromising and ambiguous. There is no empirical evidence to suggest that forensic interviewers are able to accurately differentiate between truthfulness and dishonesty (Kassin, 2008). The verbal and non-verbal behaviours of suspects are significantly influenced by several factors: the nature of the lie, the level of motivation of the interviewee, whether the risk factor is high or low, the context of the interview, the amount of time the suspect has to prepare for the interview, the length of the questioning procedure, and the characteristics of the sample group. All these influences will differ from interview to interview, and therefore attempting to establish truthfulness based on the abovementioned cues will normally be futile (Bond & DePaulo, 2006; Strömwall *et al.*, 2006; Leo & Davis, 2010).

Attempting to assess truthfulness by examining non-verbal and paralinguistic cues is not only generally inaccurate, but also renders the interviewer biased and in a lot of instances unable to objectively conduct the interview (Mann *et al.*, 2004; Leo & Davis, 2010). According to Kassin

(2008) and Walsh and Bull (2011), even the initial decision to interview a suspect may well be based on an erroneous pre-conceived idea that the interviewee is guilty. Laboratory experiments have shown that inaccurate behavioural assessments occur in three sequential steps: 1. the interviewer forms a wrongful opinion about the interviewee; 2. the interviewer unknowingly behaves in a manner that conforms to this opinion; and 3. the interviewer identifies behaviour from the interviewee that supports his/her opinion (Snyder, 1992; Nickerson, 1998; Snyder & Stukas, 1999; Kassin & Gudjonsson, 2004; Kassin, 2008; Kassin *et al.*, 2010; Gudjonsson & Pearse, 2011).

Kassin and Gudjonsson (2004) argue that the Reid technique's use of the BAI to identify dishonesty is integrally flawed.

4.6.2.1.2 Presumption of guilt and false confessions

Another criticism raised against the Reid technique is the way that the suspect's guilt is pre-supposed by the interviewer when applying the Reid Nine Steps (Kassin, 2008), which is illustrated by Step 1: Confronting the interviewee with an unwavering accusation that he/she committed the specific offense (Inbau *et al.*, 2013). Studies indicate that guilt presumption may result in interviewers blocking out any doubts regarding potential innocence and asking subjective questions that will confirm his/her guilt hypothesis (Shawyer *et al.*, 2009; Hill *et al.*, 2008).

According to Gudjonsson and Pearse (2011), this subjective approach of guilt leads to the interviewer being partial and subsequently creates a blatant emphasis to obtain a confession at all cost.

Accepting that the interviewee is guilty of said offence before the interview even takes place, is a typical example of committing to a specific subjective hypothesis, which can lead to possible inaccurate assessments (Ask & Granhag, 2005) and have highly negative consequences on the subsequent investigation, such as the investigator failing to follow up on specific clues, or pursuing ineffective lines of enquiry (Ormerod *et al.*, 2008).

Kassin (1997, 2008) notes that this tactic of focusing on acquiring confessions rather than determining the facts raises some serious concerns. The authors of the technique assert that 80% of suspects confess to the relevant crime when being interrogated by the Reid Nine Steps (Inbau *et al.*, 2013), yet this claim has never been empirically substantiated, and subsequently there is concern that many of these confessions might in fact be false confessions (Gudjonsson & Pearse, 2011).

The fact that interviewers are not able to distinguish between truthful and deceptive behaviour aggravates premature judgments of guilt, and therefore credible denials are commonly ignored or misconstrued (Kassin *et al.*, 2003; Kassin, 2008). This misinformation can distort the way the interviewer perceives, views, remembers and behaves, but can also lead to the subconscious manipulation of the interviewee, which is illustrated in Kassin and Kiechel's (1996) study, where 94% of the student respondents confessed to an offence they did not commit due to the forceful and guilt-presuming interviewing tactics applied by the interviewers (Kassin, 2008).

The Reid technique contains dominant inducement tools that encourage interviewees to confess. However, as illustrated above, it may also cause innocent persons to confess. The fact that the Reid technique might result in false confessions has been studied extensively (Conti, 1999; Kassin, 1997, 2008; Kassin *et al.*, 2003; Vrij, 2003, 2008; Gudjonsson, 2003; Gudjonsson & Pearse, 2011; Leo & Davis, 2010). It is very difficult to assess the prevalence of innocent people who confess, yet there is enough evidence to suggest that numerous suspects from various parts of the world have indeed confessed to crimes they did not commit (Gudjonsson, 2003; Gudjonsson & Pearse, 2011). In studies conducted by Leo and Ofshe (1998, 2001) as well as Leo and Davis (2010), hundreds of interviews and transcripts were analysed and over 100 likely cases of false confessions were identified.

Further to this, additional studies have shown that the Reid technique's approach regarding maximisation (Steps 1 to 4) and minimisation (Steps 5 to 8) manipulate interviewees into confessing (Kassin & McNall, 1991; Hartwig *et al.*, 2006). Perillo and Kassin (2011:327) assert that the (1) maximisation and (2) minimisation element of the Reid technique "(1) increases the anxiety associated with denial (2) while reducing the anxiety of confession" which may lead to false confessions.

Maximisation consists of so-called "scare tactics" which have been developed to coerce interviewees: accusing them of committing an offence, disqualifying their denials, overstating the seriousness of the offence and claiming that the consequences of not confessing are severe. This method may also include the use of fictitious evidence to strengthen the investigator's case. Minimisation, on the other hand, refers to the interviewer's act of justifying the crime, depicting the interviewee's supposed offence in a sympathetic light and minimising the seriousness and consequences of the alleged offence (Russano *et al.*, 2005; Madon *et al.*, 2017).

In the USA alone, where the Reid technique is used as the main method of interviewing, a study in 2001 found that 24% of the wrongly convicted individuals – who were acquitted due to DNA evidence – confessed to committing the crime (Leo, 2001; Gudjonsson, 2003). This corresponds

with The Innocence Project's assessment of a false confession rate of between 20% and 25% in the USA (Scheck *et al.*, 2001; Russano *et al.*, 2005; Kassin, 2008).

In other parts of the world – where investigative interviewing techniques (e.g. the PEACE model) are primarily used – research regarding false confessions is scarce and gives no clear indication of the scope and frequency thereof, therefore a clear comparison with the Reid technique cannot necessarily be drawn (Hartwig *et al.*, 2006).

Important research fields and theories within psychology may provide a clearer picture on the extent of potential false confessions due to the Reid technique (Madon *et al.*, 2017). One of these aspects is the fact that proximal (immediate) factors influence a person's behaviour more than distal (delayed) ones (Madon *et al.*, 2012). According to decision theory, people place a higher value on immediate consequences than future ones, which results in them discounting future consequences (Björkman, 1984). Social learning theory supports this and indicates that people will delay punishment instead of experiencing it immediately (Tarpay & Sawabini, 1974).

Moreover, the research of social influence states that people are more likely to submit to the commands of a person of authority if the negative effects of their actions are distal (Milgram, 1974). In addition to this, prospect theory states that people will give more consideration to certain/assured consequences than those that are only probable (Kahneman & Tversky, 1979). Seeing that studies indicate that people regard immediate/proximal outcomes as being more certain than future/distal ones (Kalenscher & Pennartz, 2008; Madon *et al.*, 2012), researchers agree that interviewees prioritise short-term objectives over long-term ones (Follette *et al.*, 2007; Kassin *et al.*, 2010).

This may increase the risk of false confessions during forensic interviewing, particularly in cases where the Reid technique is applied, since the technique focuses on aspects such as isolation, anxiety, physical distress, the distortion of information, confrontation, the use of false evidence and the underplaying of the seriousness of an offence – all of which have proximal/immediate consequences, whereas the potential criminal conviction of the person is relatively distal – and therefore may encourage a person to confess (Hasel & Kassin, 2009; Madon *et al.*, 2012).

A central aspect of the Reid technique includes the risk of interviewee fatigue due to lengthy interrogations. In a study concerning 125 proven false confessions in the USA, the average interview time was 16.3 hours, and 34% of interviewees were interviewed for between 12 – 24 hours (Gudjonsson, 2003). According to Kassin *et al.* (2007), although such observational studies are only conducted on a sample basis and additional future research should be undertaken to

understand the comprehensive effect of lengthy interviews on confessions, there seems to be a link between long interviews and false confessions.

By exposing the interviewee to elements such as fear, hopelessness and fatigue, the Reid technique may exacerbate the subconscious inclination of people to submit to proximal factors and confess to crimes they did not commit, simply to escape the distal factors (Gudjonsson, 2003; Madon *et al.*, 2012). Additionally, Garrett (2010) states that the pressure applied and reiteration of the presumption of guilt by the interviewer might even cause the innocent interviewee to become convinced of his own guilt.

Madon *et al.* (2017) elaborate on this aspect by referring to the process as self-regulatory decline. As the steps of the Reid technique are applied by the interviewer, the intimidation and pressure escalate and therefore the mechanisms that must be used by the interviewee in order to cope must also increase. As part of the coping process, the person must continuously overrule his/her long-term interests in favour of the short-term ones (Davis & Leo, 2012). This process causes emotional strain in the interviewee and leads to self-regulatory decline – an induced state where the interviewee experiences extreme fatigue, perceptive impairment and emotional anxiety which weakens his/her overall resistance and may increase the occurrence of false confessions (Muraven & Baumeister, 2000; Madon *et al.*, 2017).

According to Leo (2008), the central flaw in the Reid technique is its authors' misconception that confessions only happen due to pressure applied by the interviewer. The empirical evidence concerning the investigative interviewing techniques in England, Wales and Australia, however, suggests that suspects generally do not resist questioning and will confess to a crime if they are guilty without the need for pressure tactics or psychological intimidation by the interviewer (Dixon, 2010).

4.6.2.1.3 Ethical considerations and the use of False Evidence Ploys

The misleading and manipulative nature of the Reid technique – including the use of False Evidence Ploys (FEPs) and the apparent false leniency regarding the consequences of the offence – raises important moral and social issues, specifically regarding its use in a professional environment in modern society (Skerker, 2010). American authorities are allowed to support their allegations by informing the interviewee that there is irrefutable evidence of their guilt, even though such evidence might not even exist – known as an FEP (Bull & Soukara, 2010). An FEP is therefore a “claim to have non-existent evidence implicating the suspect, such as eyewitness testimony or DNA evidence” (Woody *et al.*, 2014:604).

Perillo and Kassin (2011:327) note that FEPs are “perhaps the most controversial tactic permissible (within the Reid technique of interrogation)”. Walsh and Bull (2011) argue that the use of this type of trickery and deception, characteristic of the Reid technique, is immoral and also makes false confessions more likely. This notion is supported by several studies (Redlich & Goodman, 2003; Kassin & Gudjonsson, 2004; Leo, 2008; Woody & Forrest, 2009; Woody *et al.*, 2014), and a meta-analysis of experimental interviewing research by Stewart *et al.* (2012) unequivocally concludes that FEPs increase the possibility of false confessions. Kassin *et al.* (2010:12) elaborate on this in stating that FEPs “have been implicated in the vast majority of documented false confession cases”.

Research indicates that people submit and surrender when they are under the impression that there is strong evidence against them for committing a crime, irrespective of whether the person is guilty or not (Moston *et al.*, 1992; Kassin & Gudjonsson, 2004). This relates to the degradation of self-control as mentioned in 4.6.2.1.2 above as part of false confessions. Moreover, FEPs raise serious legal and human rights questions (Woody *et al.*, 2014), which will be discussed in 4.6.2.2 as part of the Reid technique in the South African legal context.

In contrast with the USA, other countries such as England, Wales and Australia, who use investigative interviewing techniques (e.g. the PEACE model), have banned the use of FEPs during forensic investigations (Khasin, 2009), citing its ethical shortcomings and inherent risk of causing miscarriages of justice as the main reason. Woody *et al.* (2014), Kassin *et al.* (2010) and Leo (2008) have all called for the eradication of the use of any form of deception in forensic interviewing in the USA, including the use of FEPs as part of the Reid technique.

Further to this, the use of minimisation tactics represents a problematic ethical approach. In essence, being considerate and “warm” towards the interviewee is not incorrect. However, when such courteous behaviour is merely conveyed in order to achieve a particular goal, such as attaining an admission – as seems to be the case in this instance – the interviewer is deemed as not being congruent and therefore it might negatively influence the successful establishing of rapport and cause the interviewee to distrust the interviewer (DePaulo & Bell, 1990). According to Vorster (2007:38), congruency refers to “the ability...to be truly and honestly oneself without any traces of...false pretence.” Congruency, together with empathy and unconditional acceptance, forms the cornerstone of establishing rapport with an interviewee (Rogers, 1987). There is a growing consensus among academics and practitioners that rapport-building is the foundation of a successful forensic interview, and therefore incongruency might discourage the sharing of valuable information (Abbe & Brandon, 2013; Vallano & Schreiber Compo, 2015).

4.6.2.1.4 Lack of scientific foundation

The authors of the Reid technique assert that it is authenticated by years of operational application and success (Inbau *et al.*, 2013). Yet critics argue that there is no scientific foundation that supports the Reid technique, and any claims of scientific underpinnings by its authors refer to a type of “lay psychology which infiltrated everyday thinking in the 20th century” (Buckley, 2006:18; Kassin, 2008; Dixon, 2010).

Borum *et al.* (2009) found that the effectiveness of interviewing in American literature has generally been lacking and that, although there are indications that the Reid technique elicits confessions, there is no empirical evidence to suggest that these confessions are reliable and free from falsehoods. Additionally, in cases where studies have in fact been undertaken, it has been in the form of law journal articles and experiments on students – no sociological or criminological fieldwork (Leo, 2008; Kassin, 2008; Kassin *et al.*, 2010; Walsh & Bull, 2011).

The BAI, which is conducted before the Reid Nine Steps is applied in order to identify deceitful behaviour, has received considerable critique regarding its lack of empirical underpinnings (Masip *et al.*, 2005; Gudjonsson & Pearse, 2011). Moreover, according to Inbau *et al.* (2013) the interviewer should make it clear to the suspect that he/she is certain that the offence was committed by said suspect as part of Step 1 of the Reid Nine Steps. The authors argue that should any doubt exist with the interviewee regarding this fact, the person will not confess. Gudjonsson (2003) as well as Gudjonsson and Pearse (2011), however, state that there is no empirical evidence to support this statement. The opposite is in fact argued by Holmberg and Christianson (2002) who found that interviewing techniques that exert pressure and intimidation and whose main aim is to obtain a confession – such as the Reid technique – result in more denials in relation to techniques that are conducted in a respectful and humane manner, such as the investigative interviewing techniques (e.g. PEACE model and the person-centred approach).

Furthermore, Step 3 of the Reid technique claims that an innocent and a false denial will differ significantly – the latter is usually done in a very defensive manner and somewhat hesitant, whereas innocent people will be more direct and vigorous with their denials (Inbau *et al.*, 2013). Again, however, there is no scientific basis for these claims; neither is there for Step 7, where the authors of the Reid technique assert that there is no risk of false confessions when an alternative question is provided to the suspect (Gudjonsson, 2003; Gudjonsson & Pearse, 2011).

It is against this background that it is important to note that in England, Wales and Australia there have been collaborative efforts between academia, psychologists and investigators for decades

regarding the use and effects of interviewing techniques (Gudjonsson, 2003). This has been lacking considerably in the USA in terms of the Reid technique, and therefore there is a call for more collaboration between the abovementioned groups in order to have a more ethical approach to interviewing and minimise the risk of false confessions (Meissner *et al.*, 2010; Gudjonsson *et al.*, 2014).

4.6.2.1.5 The Reid technique and vulnerable interviewees

An important aspect to take into consideration is that roughly one third of suspects who are interviewed as part of a forensic investigation may be intellectually disadvantaged (Gudjonsson, 2003). Researchers concur that these individuals, as well as those:

- with cognitive disabilities;
- with psychological illness;
- who are dependent on substances;
- who are susceptible to suggestibility; and
- minors

are all overrepresented in studies concerning false confessors (Drizin & Leo, 2004; Redlich, 2007; Redlich & Drizin, 2007; Madon *et al.*, 2012).

The abovementioned fact, together with the robustness of the Reid technique which easily causes anxiety in suspects, may exacerbate the problem of false confessions by such vulnerable groups. According to Redlich and Drizin (2007), Kassin (2008), Kostelnik and Reppucci (2009) as well as Pimentel *et al.* (2015) these individuals are especially susceptible to confess to crimes they did not commit due to the proximal factors that are present which may decrease their resistance. They may simply confess in order to escape the interviewer's immediate aggressive accusations as part of the maximisation element of the Reid technique, not taking into account the distal consequences of their decision (Madon *et al.*, 2017).

Interviewers trained in the Reid technique exhibit less empathy for the cognitive maturity of adolescents, specifically with regards to their intellectual competencies and the effect that intimidating interviewing practices may have on them (Kostelnik & Reppucci, 2009). The Reid manual (Inbau *et al.*, 2013:94) expressly states that the same steps should be used with minors

as with adults – the only difference is that the authors should “urge caution” when the suspect is a youth.

4.6.2.1.6 The timing of evidence presentation

There is concern from some critics of the Reid technique regarding the disclosure of evidence at the beginning of the interview (Hartwig *et al.*, 2006). According to Hartwig *et al.* (2006), Strömwall *et al.* (2006) and Vrij (2008), revealing the evidence to the suspect late in the interview results in greater levels of identification of deceit than when the evidence is disclosed at the outset of the interview. The reason for this is that the tactical revealing of evidence – by withholding the evidence and testing the interviewee with detailed questions about it – delivers an improved foundation to test the authenticity of the interviewee’s facts than revealing it early in the interview (Hartwig *et al.*, 2006).

4.6.2.1.7 The Reid technique and calls for reform

Kassin *et al.* (2010) have urged that forensic interviewing in the USA, specifically the use of the Reid technique, should be significantly reformed. This reformation includes:

- The prohibition in applying techniques that are deceptive and which intimidate interviewees psychologically;
- A greater consciousness of the inherent risk of false confessions, including the training of interviewers regarding this risk;
- The protection of interviewees who are vulnerable, especially adolescents and those that are cognitively impaired; and
- Better knowledge and application of interviewees’ basic human rights.

Several other authors (Bull & Soukara, 2010; Meissner & Lassiter, 2010; Snook *et al.*, 2010) argue that, due to the controversies associated with the Reid technique, it should be replaced by an investigative interviewing technique that is not confrontational nor guilt-presumptive (e.g. PEACE model and the person-centred approach). Despite these calls for reform, the American authorities have been less receptive than the UK in identifying and addressing the critique and risks related to the Reid technique and other confrontational interviewing methods, especially in terms of the potential breakdown of justice that they may cause (Gudjonsson *et al.*, 2014).

4.6.2.2 The Reid technique and the South African legal context

The Reid technique forms part of a group of interviewing techniques that are guilt-presumptive and accusative in nature (Shawyer *et al.*, 2009). This is illustrated by its Step 1: Confronting the interviewee with an unwavering accusation that he/she committed the specific offense (Inbau *et al.*, 2013). Studies indicate that guilt presumption may result in interviewers blocking out any doubts regarding potential innocence and asking subjective questions that will confirm his/her guilt hypothesis (Hill *et al.*, 2008).

According to Gudjonsson and Pearse (2011), this subjective approach of guilt leads to the interviewer being partial and subsequently creates a blatant emphasis to obtain a confession at all cost. Leo (2008:23) states that the Reid technique's main aim is "not necessarily to determine the truth", but to obtain a confession.

Accepting that the interviewee is guilty of said offence before the interview even takes place, is a typical example of committing to a specific subjective hypothesis, which can lead to possible inaccurate assessments (Ask & Granhag, 2005). If the courts are of the opinion that evidence obtained might contain inaccuracies due to the interviewing technique applied, it will deem the evidence inadmissible, which has happened on numerous occasions in England, Wales and Australia (Kassin, 2008; Gudjonsson & Pearse, 2011).

Notwithstanding the potential false evidence that might arise, there is a significant concern regarding the Reid technique's potential basic human rights violations. One of these includes the use of FEPs, which studies have found to be misleading and manipulative, and which raises important moral and social questions, particularly in terms of its use in a modern society (Skerker, 2010). The way in which FEPs make use of misinformation not only distorts the way the interviewer perceives, views, remembers and behaves, but can also lead to the subconscious manipulation of the interviewee (Kassin & Kiechel, 1996; Kassin, 2008). Due to this risk of causing a miscarriage of justice, countries such as England, Wales and Australia have banned the use of FEPs during forensic investigations (Khasin, 2009).

Further to this, the use of maximisation (Steps 1 to 4) and minimisation (Steps 5 to 8) elements may also be in breach of the basic rights of the interviewee, since researchers have found them to deliberately impose factors to manipulate the suspect into confessing (Hartwig *et al.*, 2006; Perillo & Kassin, 2011).

Another critical aspect of the Reid technique includes the risk of interviewee fatigue due to lengthy interrogations. Studies indicate that the average length of an interview according to the Reid

technique is over 16 hours (Gudjonsson, 2003), which raises questions as to whether the technique complies with basic human rights such as human dignity and freedom. Moreover, there may especially be concern regarding confessions that are not free and voluntary, that are made when the interviewee is not in his/her sound and sober senses, and where the interviewee is unduly influenced to confess due to extensive interviewing time.

An additional factor to take into consideration is that roughly one third of suspects who are interviewed as part of a forensic investigation may be intellectually disadvantaged (Gudjonsson, 2003; Redlich & Drizin, 2007). These include people with cognitive disabilities, psychological illnesses, people who are dependent on substances and minors (Madon *et al.*, 2012). The Reid technique's official manual does not make any provision for such individuals and therefore the risk of intimidation against these vulnerable interviewees poses a major risk that their basic human rights might be violated.

Studies have also found that interviewers of the Reid technique exhibit less empathy for the cognitive maturity of people with intellectual impairments, especially adolescents (Kostelnik & Reppucci, 2009). This increases the risk of breaching the abovementioned human rights, which in turn also poses the risk of rendering confessions and other evidence obtained from such interviews inadmissible in a court of law – similar to the discussion above regarding lengthy interviews.

Several other authors (Bull & Soukara, 2010; Meissner & Lassiter, 2010; Snook *et al.*, 2010) argue that, due to the controversies associated with the Reid technique, it should be replaced by an investigative interviewing technique that is not confrontational nor guilt-presumptive (e.g. PEACE model and the person-centred approach).

The mere fact that the UK transformed its entire forensic interviewing process due to the illegal aspects of previously used guilt-presumptive techniques similar to the Reid technique, may serve as an important indicator of the high risk involved in applying the Reid technique in commercial forensic investigations in South Africa, specifically with regards to the inadmissibility of evidence obtained during the interviewing process (Bull & Soukara, 2010; Gudjonsson & Pearse, 2011).

These abovementioned aspects raise serious concerns regarding the legality of the Reid technique within the South African commercial forensic investigative context. In order to determine this, here follows an analysis of the Reid technique juxtaposed against the relevant South African legal aspects identified in Chapter 2:

Table 7**Reid technique analysis**

Law	Details	Application
Section 10 of the Bill of Rights – Right to human dignity	Interviews must be conducted in a composed and humane manner and not threaten the interviewee’s right of being worthy of honour or respect, and should be free from torture and degradation.	<p>The Reid technique’s inherent accusative and guilt-presumptive nature, including its use of maximisation tactics (Steps 1 – 4), renders it in potential violation of section 10. This includes the use of so-called “scare tactics” which have been developed to coerce interviewees: accusing them of committing an offence, disqualifying their denials, overstating the seriousness of the offence, using FEPs and claiming that the consequences of not confessing are severe.</p> <p>Additionally, the fact that the Reid technique encourages exceptionally long interviews without any breaks in an uncomfortable environment for the interviewee (e.g. a small room with no windows) also renders it in potential violation of section 10. All these abovementioned factors may well threaten the interviewee’s right of being worthy of honour/respect, which may render it in breach of section 10.</p>
Section 12 (1) of the Bill of Rights – The freedom and security of a person	Interviews should not be of such a nature that it denies the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to	The Reid technique supports strongly the fact that the interviewer will detain the interviewee till a confession is obtained. Within the private commercial forensic investigative context, this will violate the basic

Law	Details	Application
	<p>violence, torture or be treated in an inhuman way by the interviewer.</p>	<p>human rights of the interviewee, especially in terms of section 12 (1) of the Bill of Rights. The Reid technique has its roots in the policing environment where an arrested person may be detained by the police. However, FPs do not have the same broad mandate as police, and may not detain a person.</p> <p>Additionally, due to the Reid technique's aggressive and accusative nature, it may render the interview inhuman in certain circumstances, particularly during the maximisation phase of the interview (Steps 1 – 4). This includes overstating the seriousness of the offence and claiming that the consequences of not confessing are severe, which, if accompanied by threats to confess, may qualify as torture. Furthermore, the deceitful nature of FEPs during this phase may also be deemed inhuman by a court.</p>
<p>Section 14 of the Bill of Rights – Right to privacy</p>	<p>Interviewees have the right to privacy, including the right that his/her private realm is not infringed upon – excluding the obtaining of information that directly influences the public sphere and workplace.</p>	<p>Although the Reid technique is guilt-presumptive and may intimidate interviewees, the question of whether it will infringe on a person's right to privacy is not clear from the use of the technique itself. Both the maximisation and minimisation phases of the technique do not elaborate on the way in which evidence is obtained during the investigation phase itself and whether</p>

Law	Details	Application
		<p>it renders the investigation in breach of a person's privacy.</p> <p>If the technique is used to obtain personal information which exists outside of the public sphere and workplace, then there may be merits for claiming that an individual's right to privacy in terms of section 14 is violated.</p> <p>As is the case with the other selected interviewing techniques, the question as to whether an interview seeks to obtain information of a private matter which does not influence the public sphere or workplace, however, will depend on the facts of each case and cannot necessarily be evaluated in terms of the technique itself.</p> <p>It is important to note, however, that the authors of the Reid technique encourage the "encroaching upon the suspect's personal space" (Kassin & Gudjonsson, 2004:43) which may well be in contravention of section 14.</p>
<p>Section 35 (1) (c) of the Bill of Rights and section 217 of the CPA – Right not to be compelled to make any confession/admission</p>	<p>Confessions/admissions should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence.</p>	<p>The Reid technique's central aim is to obtain a confession, seeing that it is based on the presumption that the suspect is guilty of a crime. Therefore, section 35 (1) (c) and section 217 of the CPA are very relevant in assessing the legal implications of potentially applying the technique in the South African commercial forensic investigative context.</p>

Law	Details	Application
		<p>Firstly, it should be analysed whether confessions made during the application of the Reid technique will be rendered not being free and voluntary. As discussed in Chapter 2, a “free and voluntary” statement is derived from common law and can be regarded as a statement that is not induced by a threat or a promise proceeding from a person in authority.</p> <p>The maximisation and minimisation factors may have an influence on whether a confession is done freely and voluntarily. As discussed under section 12 (1), maximisation entails accusing the interviewee of committing the offence, exaggerating the seriousness of the crime, disqualifying any denials, informing the interviewee that the consequences of not confessing are severe and establishing anxiety in the interviewee in order to confess to a crime.</p> <p>These actions may be experienced as threats by the interviewee, especially if he/she considers the interviewer’s conduct as intimidating to such an extent that the only option to “escape” from the interview, is confessing. If this is the case, then the courts may possibly find that these maximisation tactics qualify as threats and thus may result in the confession not being elicited in a free</p>

Law	Details	Application
		<p>and voluntary manner, which in turn may mean that it is in breach of this specific section.</p> <p>Minimisation, on the other hand, refers to an interviewer's act of justifying the crime, depicting the interviewee's supposed offence in a sympathetic light, minimising the seriousness of the alleged offence and the consequences of confessing. Especially this last fact may prove problematic within the South African legal context, because minimising the consequences of confessing may be interpreted as being a promise – in this case a promise of a lighter sanction for the interviewee should he/she confess. This promise is in violation of section 35 (1) (c), since it prevents the confession from being free and voluntary.</p> <p>The second factor to take into consideration is whether the interviewee confessed when he/she was in sound and sober senses. A person will be deemed as not being in his sound and sober senses if he/she is unable to know what he/she is saying (R v Blythe, 1940).</p> <p>In this sense, two aspects are relevant: Firstly, the fact that the Reid technique is known to elicit false confessions. And secondly, the effect of the Reid technique on vulnerable interviewees, especially those with</p>

Law	Details	Application
		<p>psychological and intellectual impairments.</p> <p>Researchers have found that in several cases, persons confess to crimes they did not commit (Scheck <i>et al.</i>, 2001; Russano <i>et al.</i>, 2005; Kassin, 2008). In the critical analysis earlier in this study, it is assessed that there are a variety of reasons for this. One of these reasons includes the fact that the pressure applied and reiteration of the presumption of guilt by the interviewer might cause the innocent interviewee to become convinced of his own guilt. In such cases, the interviewee would not be deemed to be in his/her sound and sober senses, which will result in a violation of section 35 (1) (c).</p> <p>With regards to vulnerable interviewees, in certain circumstances individuals with psychological and intellectual impairments might confess to committing a crime without understanding what they are saying. This is aggravated by the problem that the Reid technique does not apply any precautionary measures in assuring that such individuals are firstly identified and then handled in a specially mitigated manner. Instead, the Reid manual has a “one size fits all” approach, which creates the risk that these interviewees confess to crimes without them being in a sound</p>

Law	Details	Application
		<p>state of mind and in breach of this relevant section of the Bill of Rights.</p> <p>The third factor is that confessions should be made without undue influencing the interviewee. According to S v Pietersen (1987) “undue influence” refers to a practice that is “repugnant to the principles upon which the criminal law is based” and goes beyond violence and includes interviewing the interviewee for an unduly long period of time, subjecting the interviewee to fatigue, as well exploiting the interviewee’s weaknesses, such as his lack of education or youthful age.</p> <p>The intimidating nature of the Reid technique may itself be a point of contention regarding possible undue influence exerted on the interviewee. Yet the strongest indication of such a practice lies in the length of the interview and the effect of the technique on vulnerable individuals.</p> <p>The fact that the average Reid interview takes longer than 16 hours to conduct may result in the interview being unduly long and almost certainly causes the interviewee to be fatigued by the time he/she confesses. Thus, there are merits in claiming that a confession in terms of the Reid technique may be due to undue influence and therefore in breach of section 35 (1) (c).</p>

Law	Details	Application
		<p>Furthermore, the Reid technique's intimidating nature may exploit vulnerable interviewees' weaknesses in obtaining a confession, which may also qualify as undue influence. Studies have found that people with psychological and intellectual impairments, as well as adolescents, may be exceptionally vulnerable when the maximisation and minimisation factors of the Reid technique are applied by the interviewer.</p> <p>As mentioned above, the fact that the Reid technique creates no exception or provides no alternative moderate application when such individuals are interviewed, gives additional credence to the argument that confessions from these vulnerable interviewees will be deemed as unlawful and inadmissible due to the presence of undue influence in accordance with section 35 (1) (c).</p>
<p>Section 35 (5) of the Bill of Rights – The violation of any rights contained in the Bill of Rights</p>	<p>If any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice. This may lead to the acquittal of the interviewee</p>	<p>It is apparent from the relevant legal aspects identified and applied above, that the Reid technique may be in violation of several sections of the Bill of Rights – sections 10, 12 (1), and 35 (1) (c).</p> <p>As a result of these violations, the Reid technique is also in breach of section 35 (5), which means that, due to the fact that rights contained in the Bill of Rights have been breached, any evidence obtained that flows from</p>

Law	Details	Application
	should he/she later be accused of any crime.	these violations will in all probability be inadmissible in a court of law. This is significant for commercial forensic investigations, since confessions and other evidence obtained during the application of the Reid technique, will in all likelihood be regarded as inadmissible by South African courts of law – potentially rendering the whole investigation fruitless.
Section 23 (1) of the Bill of Rights and the LRA – Unfair labour practices and unfair dismissal	Interviews should be conducted in a fair manner that will not qualify as unfair labour practices or lead to an unfair dismissal.	Applying the Reid technique in the workplace as part of a commercial forensic investigation may create concerns in terms of potential unfair labour practices. This is due to the fact that the LRA is inherently based on fairness, human dignity, equality and freedom (which also form the basis of the Bill of Rights). Since the discussions above make it clear that serious concerns exist regarding the potential violation of all these three elements by the implementation of the Reid technique, it is evident that the same concerns are present in terms of unfair labour practices.

4.6.3 Conclusion

There is significant concern in relation to the Reid technique regarding its practical, ethical and lawful application within the commercial forensic investigative sphere. Specifically, there is apprehension in its use of unreliable verbal and non-verbal cues to assess guilt, its subjective approach of presumption of guilt, the connection between its application and false confessions, its lack of theoretical underpinning, the unethical use of FEPs, the potential intimidation and abuse

of vulnerable interviewees, and its ineffectiveness in revealing evidence at the beginning of the interview.

Furthermore, in terms of lawfulness, it is evident from the abovementioned analysis that the Reid technique may be in breach of section 10, 12 (1), 23 (1), 35 (1) (c) and 35 (5) of the Bill of Rights, as well as section 217 of the CPA and possibly also the LRA, which renders its application within the South African commercial forensic investigative environment impractical and unlawful.

4.7 Person-centred interviewing

4.7.1 Background

The person-centred approach was developed by Carl Rogers (Rogers) within a psychotherapeutic context. Rogers emphasised the importance of “seeing” the true self through the eyes of another. He explained that “... to see one’s own attitudes, confusions, ambivalences, feelings and perceptions accurately expressed by another ... paves the way for acceptance into the self ... in order for experiences to be more clearly perceived”. To achieve this form of self-actualisation, the variables of empathy, congruency and unconditional positive regard are employed by the therapist (in the abovementioned psychotherapeutic context) (Rogers, 1987:40).

The person-centred approach has since been extended to include more than just psychotherapy. In its present context, it is also utilised in circumstances where reliable and accurate information is required from subjects, such as a forensic investigative interview. The person-centred approach is a very effective tool in obtaining reliable information from interviewees (Vorster *et al.*, 2016).

In order to successfully obtain accurate information according to this technique, the interviewer should acknowledge and "move beyond" his own subjective nature due to personal bias, needs, priorities, prejudices and expectations (Vorster, 2007:50). These traits are one of the biggest barriers to effective interviewing which may contaminate the investigation and/or the interview (Vrij, 2004, 2008). To accurately address these impediments, an interviewer should be aware of the effect of the interviewee on him/herself and vice versa, and apply certain basic principles (or manoeuvres) when conducting the interview. This includes not asking questions initially when building rapport, but rather observing and allowing the interviewee to reflect and communicate, thereby assessing the emotions and feelings of said interviewee and confirming these with him/her in order to gain trust (Vorster *et al.*, 2016). Three elements play a central role in establishing this trust, which the interviewer should continuously portray while conducting the interview (Vorster, 2007):

- Congruency: Being true and honest without any suggestion of false pretence;
- Empathy: Effectively understanding an individual's experience, as well as accurately expressing this understanding to the said individual; and
- Unconditional positive regard: Accepting the interviewee without condition and applying absence of judgment.

4.7.1.1 Congruency

The term congruency – or being “genuine” – refers to the ability of an interviewer to be truly and honestly him/herself, without any signs of false pretence (Vorster, 2007). In practical terms, a person is congruent when there is no disparity between his/her verbal and non-verbal messages – i.e. the verbal and non-verbal behaviours compliment and confirm each other perfectly. Especially the non-verbal cues of the interviewer should be of such a nature that it supports the content of a conversation (Keats, 2000).

An experienced interviewer who has congruency will be able to contain him/herself in each and every situation and be content, and will not express aggression, anger or find it necessary to display defensive behaviour. Instead, he/she will illustrate genuine, true, consistent and reliable behaviour (Vorster, 2007). According to Cohen and Wiener (2007), an interviewer should be transparent and honest, since the same way that interviewers observe the interviewee for certain cues, the interviewee will do the same to the interviewer. Therefore, he/she should not only be congruent with regards to the content of a question or statement, but also in the tone and body language he/she showcases.

Found below are two examples of congruent and non-congruent behaviour of the interviewer (Vorster, 2007, 2011, 2012):

First example:

Interviewee: “Are you saying I stole the money! (Aggressive tone)

Interviewer: “No, of course not, Mr Pringle ... not at all ... I was just wondering ...” (Starts giggling)

This is a typical example of incongruence. In his response, the interviewer does not display genuine behaviour. His verbal and non-verbal cues do not match and in the process he creates distrust which may activate hostility from the interviewee, which ultimately may result in the interviewee not being willing to share any additional information – rendering the interview potentially fruitless.

Second example:

Interviewee: “I find this whole situation very humiliating. You’re insinuating that I’m a criminal ... And I’ve done nothing wrong. Nothing!” (Hurt tone)

Interviewer: “This interview is really upsetting you.” (Sincere tone)

Interviewee: “Of course it is. How would you feel if you were me!”

Interviewer: “Probably just as hurt and dismayed as you ... I’m sorry.” (Sincere, warm tone)

Interviewee: (Pause.) “It’s not your fault. Let’s just go on with the interview ...” (More at ease)

In this example, the interviewer assesses the situation and the emotions of the interviewee well and responds in an open and congruent manner. The interviewee responds positively and is willing to continue with the interview and potentially share information.

4.7.1.2 Unconditional positive regard

Unconditional positive regard within the person-centred approach means that the interviewee will experience complete acceptance from the interviewer, irrespective of the interviewer’s own values and moral convictions (Vorster, 2012). Every person has his/her own set of values, moral convictions and ethical standards which is honed by personal experiences in relation to the immediate social and biological environment (Gillon, 2007). The manner in which these values and morals are expressed within interpersonal relationships may have a significant influence on other individuals, including in a forensic investigative interview (Vorster, 2012).

To be “judged” by others is an unpleasant experience for most people and is not conducive to establishing a viable relationship, therefore an effective interviewer will be someone who does not demonstrate judgmental behaviour (Vorster, 2007). An accepting interviewer will not exhibit shock, disgust or any other similar emotion that will reveal judgment of the interviewee when the latter is sharing information that is not in accordance with the interviewer’s set of values. Instead, an interviewer with unconditional positive regard will put aside his/her subjective values and unconditionally accept the interviewer’s views and moral actions. This will lead to the interviewee feeling accepted and worthy (Gillon, 2007; Kranacher *et al.*, 2011).

The following examples illustrate unconditional positive regard or the lack thereof (Vorster, 2007, 2011, 2012):

First example:

Interviewee: “Let me be honest. I have done some bad things in my life. And the truth is, 10 years ago I was convicted of theft. I didn’t tell my boss, because I knew I wouldn’t get the job if I told him.” (Distraught)

Interviewer: “You lied to your employer? You know that’s against the code of conduct, right?” (Accusative)

This is a typical example of the interviewer displaying a lack of unconditional positive regard. The interviewee’s conduct is inherently rejected by the interviewer, who answers from a subjective frame of reference of obeying rules and procedures, and in the process disregards the other person’s experiences/feelings. The result is that the interviewee probably feels judged and will most likely be unwilling to elaborate further.

Second example:

Interviewee: “Let me be honest. I have done some bad things in my life. And the truth is, 10 years ago I was convicted of theft. I didn’t tell my boss, because I knew I wouldn’t get the job if I told him.” (Distraught)

Interviewer: “You were in a desperate situation.” (Sincere and warm tone)

Interviewee: “Exactly! I knew it was wrong, but I had no choice.”

Expressing sincere empathy, such as in the abovementioned example, will immediately establish trust and demonstrate unconditional positive regard. By acknowledging the interviewee’s feelings, without necessarily condoning his/her behaviour, the interviewer creates a setting where the interviewee will not feel judged and will be willing to share additional information.

4.7.1.3 Empathy

The third aspect of the person-centred approach is demonstrating empathy. Empathy can be described as (1) the accurate understanding of a person’s subjective circumstances and (2) the accurate understanding of a person’s concerns (Roos & Wheeler, 2016). Further to this, empathy also entails the reflecting/communicating back of aforementioned understanding to the said person (Vorster, 2007). Within the commercial forensic investigative context, initiating effective empathy requires of the interviewer to be able to free him/herself from his/her own subjective frame of reference and enter the interviewee’s emotional realm. The objective is to “move” into the interviewee’s human essence, without becoming part of his/her emotional troubles which could impair the interviewer’s judgment (Lister-Ford, 2002; Vorster, 2012).

According to Gillon (2007), empathy is established by accurately observing, assessing and reflecting the interviewee’s emotions back to him/her. Active listening and observation forms an integral part in this regard (Cooper & McLeod, 2011; Ekman, 2009). By “active”, it is meant that effort is made by the interviewer to assess what and how an interviewee is responding. This process relies on kinesic manoeuvres in order to identify emotions based on verbal and non-verbal cues demonstrated by the interviewee (Walters, 2003; Vorster, 2007; Manning, 2015).

In order to form a clearer picture of what empathy and active listening entail, a few examples are illustrated below (Vorster, 2007, 2011, 2012):

First example:

Interviewee: "I was standing behind the pillar, so they couldn't see me. The next moment, Dennis gave the bribe money to Henry!"

Interviewer: "The two bastards! They should be behind bars for this!" (Upset)

This is a clear example of an interviewer who reacts with sympathy towards the interviewee (and not empathy). In assessing what the interviewee is saying, the interviewer becomes involved in the situation and adopts the emotions of the interviewee. As part of a sympathetic reply, as in this case, the listener is actually replying in accordance to his own subjective feelings of being angry and upset.

Second example:

Interviewee: "I have never felt so disappointed in my entire life! I don't think I will ever feel passionate about anything ever again." (Starts sobbing)

Interviewer: "Something inside you died at that moment." (Warm, sincere tone)

Interviewee: Yes, that's precisely it. I'm just dead inside, man ... dead ..."

In this scenario, the scope of the emotions experienced by the interviewee has been perfectly analysed and reflected from the interviewer back to the interviewee. The way in which the interviewee affirms and accepts the interviewer's response, is an indication of the empathy portrayed.

Murphy and Dillon (1998) underline three important aspects regarding empathy:

1. Empathy is not sympathy – Sympathy is what the interviewer feels for the interviewee, whereas empathy is what the interviewer would feel if he would have been the interviewee;
2. Empathy is more than simply placing oneself in another's "shoes" – Accurate empathy requires a change of perspective. It therefore encompasses more than merely the

emotions an interviewer would have experienced should he have been in the interviewee's situation, but rather an understanding of what the interviewee is currently experiencing; and

3. Empathy relies on an interaction between the interviewer and interviewee – The interviewee should communicate (verbally and non-verbally) what he/she is feeling, and the interviewer should have the ability to make sense of the interviewee's experience and reflect his/her understanding back to the interviewee.

Gillon (2007) and Vorster (2012) emphasise the importance of integrating the three abovementioned elements and applying them in unison in order to illustrate empathy effectively.

4.7.1.4 The person-centred approach and the humanistic psychological perspective

The person-centred approach is based on the humanistic psychological perspective. This is a system of thought in which human interests and ethics are of main importance, including the study of human strengths and qualities in order to explore human behaviour (Nolen-Hoeksema *et al.*, 2009). Humans have changeability in hereditary expression, life experiences, and sociocultural upbringings that impact thinking, feeling, and conduct (Cooper & McLeod, 2009). These aspects are important to consider in a person-centred forensic interview due to its interpersonal nature, which establishes an active role-playing system between both the interviewee and interviewer (Vorster, 2007).

As part of this interpersonal nature of the forensic interview, it is also important to note that the interviewer and interviewee influence each other and how they react and provide feedback – the interviewer is not merely an observer, but an active participant and what he/she says and how he/she reacts has a direct influence on the interviewee and his/her behaviour, and vice versa. This leads to subconscious actions which are exerted on each other, called manoeuvring (Vorster *et al.*, 2016).

4.7.1.5 Manoeuvring

An important aspect to take into account in terms of the person-centred approach is the fact that the interviewer and interviewee will use constant manoeuvres and counter-manoevres as part of the interpersonal context of the forensic interview (Vorster *et al.*, 2016). Vorster (2007:54) provides an analogy to illustrate this circular process in the form of a “dance during which the participants co-determine each other's emotions and behaviour”.

An example of such manoeuvring could be an interviewee who manoeuvres aggression in order to gain control of the interpersonal relationship and render the interviewer incapable in obtaining valuable information. The skilful interviewer will not only be able to identify this manoeuvring tactic by the interviewee, but also be able to effectively apply counter-manoevres, such as leading the conversation back to a theme that will dislodge his/her anger, in order to re-establish control of the interview (Rogers, 2003).

It is therefore evident that an interview does not only have one party (the interviewee) to consider, but that the direct and inherent manoeuvres of the interviewer should also be taken into account (Phipps, 2004). The interviewer who is trained in the person-centred approach will thus accurately register his/her impact on the interviewee and include this in his/her overall assessment.

4.7.1.6 Structure and approach of person-centred interviewing

The person-centred approach, as supported by Keats (2000) and Kranacher *et al.* (2011), consists of three phases (Vorster, 2007; Vorster *et al.*, 2016):

1. The beginning phase – This phase is concerned with establishing trust/rapport with the interviewee, as well as in providing the context of the interview;
2. The middle phase – This section has two purposes – Obtaining relevant information from the interviewee and testing whether it is reliable or not; and
3. The end phase – This phase entails the reflection on the interview itself and the emotional state of the interviewee, before closing off the interview.

4.7.1.6.1 The beginning phase

As part of establishing rapport, the three elements discussed earlier – congruency, unconditional positive regard and empathy – play an imperative role during this phase. To start off the conversation, the interviewer should introduce him/herself, provide the reason for the interviewee and assess what the interviewee's feeling/attitude is with regards to the investigation/interview (Fontana & Prokos, 2007).

During this phase, the conversation is kept optimally open-ended, without pertinent questions being asked. The interviewer makes statements which reflect the interviewee's feelings/emotions. This is central to the person-centred approach by making the interviewee feel as if he/she is understood, which in turn clears any doubts and concerns (Vorster *et al.*, 2016). When applied

correctly, this approach will result in the interviewee trusting the interviewer and giving his/her full cooperation in sharing any relevant information, which forms part of the next phase (Rogers, 2003).

The following example illustrates this step (Vorster, 2007):

Interviewer: “Good morning, Mr Jones. I’m Gloria Smith. Please, take a seat.”

Interviewee: “Thank you.” (Sits down)

Interviewer: “Thank you for your time. As you know, our firm has been asked to look into some of the transactions in the Creditors’ Department. How do you feel about all of this?”

Interviewee: “Hmmm...I...well, I guess it’s a good thing.”

Interviewer: “You seem a bit unsure...”

Interviewee: “No...no...not really...maybe a bit uncertain.”

Interviewer: “Why is that?” (Warm tone of voice)

Interviewee: “I guess it’s a good thing, but you know, it’s going to cause...a lot of ructions in the department.”

Interviewer: “You sound concerned.”

Interviewee: “Yes, yes...I am concerned...actually, I’m very worried. This is going to cause some people to be very, very unhappy.”

In this example it is clear that the interviewer is applying the three elements of the person-centred approach, which means she is able to effectively assess and reflect the feelings of the interviewee. If this process continues during the current phase, she will be able to effectively initiate rapport, which will help her to move onto the next phase to obtain information which can help with the investigation.

4.7.1.6.2 The middle phase

As mentioned earlier, this phase contains two main objectives: 1. Obtaining information, and 2. Testing this information for trustworthiness. To reach these objectives, the middle phase is divided into two parts: 1. A non-directive part, and 2. A directive part. The non-directive part is applied first, and entails the interviewer not asking specific questions, but rather letting him/her be guided by the interviewee in a person-centred manner (Vorster, 2007). This is the opportunity for the interviewee to feel completely free to share information without restriction, and therefore he/she should not be discouraged from elaborating in any way. This might include the use of open-ended questions such as: “Why do you say that” or “How did you come to that conclusion” (Hawtrey, 2007).

In the case where the interviewee is not susceptible to taking the lead, the interviewer may adjust his/her approach and mix open-ended questions with specific ones, but it is important to note that the interviewee should still have the opportunity to elaborate extensively on questions without being interrupted, so as to ensure the free-flow of information (Vorster, 2012).

Once it is clear that the interviewee has shared all relevant information during the non-directive part of the interview, which normally is evident when he/she becomes reluctant to direct the conversation any further, it normally indicates that the second part of the middle phase should be initiated (Vorster *et al.*, 2016). The second part – which is directive of nature – consists of the interviewer taking the lead and asking pertinent questions. This directive part can in turn be divided into two categories: 1. Questions based on prior knowledge and constructed before the interview, and 2. Follow-up questions based on information received as part of the non-directive section of the middle phase.

Both these abovementioned categories’ questions should be constructed based on the following seven principles (Vorster, 2007):

1. **Questions should be formulated in such a way that evidence is not exposed to the interviewee** – There is an inherent advantage in the interviewer knowing certain facts without the interviewee being aware of it – it makes it more difficult for the interviewee to supply false information without being confronted by the true facts later in the interview. This is a central component of investigative interviewing techniques such as the person-centred approach, where the information according to the interviewee should first be obtained, before being tested against contradictory facts;

2. **The context of the question should be taken into account and applied accordingly**
 - In order to avoid inaccurate and incorrect interpretations of what the interviewee is answering, the context of the question is of great importance;
3. **Questions should initially be posed in the general and move towards more specific questions** – This is in line with the elements contained in the person-centred approach. Allowing the interviewee “space” to answer general questions before moving to specific ones facilitates the flow of information and grants the interviewer an enhanced perspective to assess the whole picture;
4. **Only relevant questions should be asked to initiate relevant answers** – This is especially the case when follow-up questions are posed, or when answers have already been obtained during Part 1 of the middle phase, but are re-asked according to Part 2’s prior-structured questions. It is also important not to ask questions out of pure curiosity, but to keep the objective of the interview in mind at all times;
5. **Questions should be short and concise** – Complicated and long questions will be more difficult to answer and may render the information-gathering process futile;
6. **It should be possible to answer the questions** – Questions should not be statements or posed in such a way that it is impossible to answer; and
7. **Generally, leading questions should be avoided** – When asking leading questions, the interviewer will receive answers which are suggested by the questions themselves and which will be subjective.

4.7.1.6.3 The end phase

This phase has been reached when the prepared questions, as well as follow-up questions, have been adequately answered by the interviewee. Normally, especially within the commercial forensic investigative context, such an interview will lead to “emotional exposure and emotional vulnerability” and should be thoroughly dealt with by the interviewer (Vorster, 2007:71). Therefore, spending time with the interviewee and talking about the interview and its effect on him/her is important, and should specifically be approached in terms of the person-centred approach and its three elements. Especially emphatic responses by the interviewer will consolidate the whole process (Cohen & Wiener, 2007).

4.7.2 Critical analysis of person-centred interviewing

4.7.2.1 Person-centred interviewing and academic literature

Academic literature in respect of the person-centred approach, specifically in terms of the commercial forensic investigative context, is limited due to its emerging status. Vorster has only recently introduced and formalised it in the South African context and its application in the broader international forensic environment is lesser known (Vorster, 2007, 2011). However, other information-gathering techniques (e.g. the PEACE model), which are similar to the person-centred approach – specifically in terms of their non-accusative nature – are supported by extensive empirical evidence regarding their legality and investigative processes (Dixon, 2010).

Furthermore, the person-centred approach can be analysed against the characteristics that experts deem to be an effective way to conduct forensic interviews. Several researchers suggest that an effective interview is one where the interviewer is open-minded and approaches the interview with fairness towards the suspect (Holmberg & Christianson, 2002; Memon *et al.*, 2003; Vrij, 2003; Hartwig *et al.*, 2006). Due to the person-centred approach's non-accusative nature (Vorster *et al.*, 2016) and the fact that it forms part of the group of investigative interviews whose main aim is to obtain relevant information (and not a confession) (Gudjonsson & Pearse, 2011), its foundation is built on this said fairness and open-mindedness.

The person-centred approach's main objective, as part of the group of investigative interviewing techniques, is to obtain relevant information in order to establish the truth (Vorster, 2007). Many researchers, namely Soukara *et al.* (2002), Hartwig *et al.* (2006), Gudjonsson (2003), Gudjonsson and Pearse (2011), Vrij (2003, 2008), Kassin (2008), as well as Memon *et al.* (2010), regard this approach as the most effective way to gather reliable information and argue for a shift to truth-finding as the main objective, rather than obtaining a confession. Gudjonsson (2003) found that when truth is the main goal of an interview, the risk of false confessions decreases.

However, there are some researchers who argue that, since no pressure is exerted on the interviewee, techniques such as the person-centred approach might be too "soft" to elicit confessions (Sear & Williamson, 1999; Hartwig *et al.*, 2006; Inbau *et al.*, 2013). However, research indicates that the understanding that forensic interviews consist of difficult encounters with suspects who resist confessing to crimes unless they are forced to do so by the interviewer, are misplaced (Dixon, 2007). On the contrary, UK and Australian researchers have found that the majority of interviewees are co-operative and willing to share information if they are treated with respect (Baldwin, 1993; Dixon, 2007). This notion is supported within the South African context

by criminologists Micki Pistorius, Irma Labuschagne and detective Piet Byleveld (Labuschagne, 2009; Retief, 2011; Pistorius, 2012).

Further to this, even though the general perception is that guilt-presumptive interviewing techniques (such as the Reid technique) are very successful in obtaining confessions, research suggests that information-gathering interviews (such as the person-centred approach) might be just as effective (Hartwig *et al.*, 2006). Empirical evidence by Gudjonsson (2006) supports this notion and suggests that when interviewees are respected by the interviewers, their confidence grows and they feel more comfortable to speak the truth and confess to the crime.

Another aspect to take into consideration is the emphasis placed by the person-centred approach on establishing congruency and respect (Vorster, 2007), which Hartwig *et al.* (2006) as well as Milne and Bull (2002) conclude may create a constructive environment where the interviewee confides in the interviewer. According to Holmberg and Christianson (2002), this is also the ethical approach in conducting interviews.

The person-centred approach has its roots in General Systems Theory (GST). GST entails the observation of the part-whole or interdependent relations of a system (Bertalanffy, 1968). GST involves the supposition that a system exhibits part-whole relationships that are subject to a number of principles, including self-regulation or “feedback” (Phipps & Vorster, 2011).

Within a commercial forensic investigative context, the interview itself – conducted between an interviewer and interviewee – can be seen as a system according to GST (Phipps, 2004; Phipps & Vorster, 2011). Being active role players within this system, the interviewer and interviewee subconsciously establish a relationship where each person has a role (Greeff *et al.*, 2011). As part of the interpersonal nature of the forensic interview, it is also important to note that the interviewer and interviewee influence each other, which can be observed in how they act and react. In this approach, the interviewer is not merely an observer, but an active participant and what he/she says and how he/she reacts has a direct influence on the interviewee and his/her behaviour, and vice versa. Neither the interviewer nor the interviewee can therefore be seen in isolation and each individual’s effect on the other should be taken into account (Vorster *et al.*, 2016).

These abovementioned effects are known as reactional responses within an interpersonal interview and are subjective in nature for both the interviewer and the interviewee (Hill *et al.*, 2008). These responses will eventually escalate into a series of patterns, called interpersonal manoeuvres which attempt to achieve certain outcomes, depending on what is needed by the

people who engage in the interview (Vorster, 2011). The interviewer will, for example, apply manoeuvres to identify the feelings of the interviewee and communicate his/her assessment back to the interviewee in order to gain the latter's trust. Establishing trust may make the interviewee more willing to share information, which is the prime objective of the interviewer. The interviewee, in turn, will apply manoeuvres in accordance with his/her emotions and in relation to the conduct of the interviewer in order to "escape" from the interview without any negative proximal (immediate) or distal (long-term) consequences (Vorster, 2011; Madon *et al.*, 2012; Vorster *et al.*, 2017).

The person-centred approach also makes use of open-ended questions during the beginning and middle phases, which Soukara *et al.* (2002) and Memon *et al.* (2003, 2010) commend as an effective way in obtaining more detailed answers from the interviewee. Additionally, such open-ended questions also underline the central theme of empathy and respect which is conveyed in accordance to the humanistic perspective of the person-centred approach. These two aforementioned factors may lead to the interviewee feeling more valued, which plays a central role in gaining his/her trust (Hartwig *et al.*, 2006).

Another positive aspect of the person-centred approach is that the suspect is only confronted with evidence close to the end of the interview (Vorster, 2012; Inbau *et al.*, 2013). In a person-centred interview, the role and responsibilities of the interviewee, as well as the facts according to him/her, are first established, before the evidence is revealed during the end of the middle phase and attested against the information (Vorster, 2007). Hartwig *et al.* (2006), Strömwall *et al.* (2006) and Vrij (2008) state that it is more effective to reveal evidence later in the interview, since withholding the evidence and testing the interviewee with detailed questions about it delivers a better foundation to test the authenticity of the interviewee's facts than revealing it early in the interview.

The person-centred approach's reliance on kinesic cues to establish the feelings and emotions of the interviewee, may, however, be of concern. An essential part of the technique is establishing congruency, empathy and unconditional positive regard, all of which can only be instituted if the interviewer is able to gain the trust of the interviewee by correctly assessing his/her verbal and non-verbal cues which illustrate his/her feelings (Vorster, 2007, 2011). As discussed earlier in the study, verbal and non-verbal behaviour of people are unreliable, especially in determining truth and deception (Brinke & Porter, 2008; Vrij, 2008).

However, studies are only clear regarding the unreliability in terms of assessing deceit (Kassin, 2008), not whether people are able to correctly analyse another person's feelings. Moreover, research indicates that analysing verbal and non-verbal cues for anxiety is mostly accurate (Vrij,

2008). Seeing that anxiety is an emotion, indications are that the observation of kinesic cues in order to establish feelings (and not deception) may render positive results. This is supported by empirical evidence conducted by Greeff *et al.* (2011), which found that interviewers trained in the person-centred approach in South Africa are able to accurately detect the emotions of interviewees, which in turn results in gained trust and respect and overall interviewing effectiveness.

These positive aspects concerning the application of the person-centred approach are emphasised by the overall notion by researchers that effective interviewing practices are connected to investigative interviewing instead of traditional accusative techniques (Soukara *et al.*, 2009).

4.7.2.2 Person-centred interviewing and the South African legal context

The person-centred approach has a non-guilt presumptive nature and generally complies with legal principles. Vorster (2007, 2011, 2012) fine-tuned the technique from its psychotherapeutic origins to the commercial forensic investigative context through, *inter alia*, considering the importance of presenting the information obtained from an interview in a court of law.

The basis of any fair legal procedure in a democratic society, including the manner in which forensic interviews should be conducted, consists of respect, opinion (the degree to which an individual is given the chance to tell his/her side of the story) and the absence of subjectivity (Ambrose & Arnaud, 2005; De Mesmaecker, 2014). The person-centred approach, in correlation with its central humanistic elements – congruency, empathy and unconditional positive regard (Vorster, 2007) – may enable these central concepts to take effect.

The fact that the person-centred approach allows the interviewee to speak freely, especially at the start of the interview during the rapport-building phase and the open-ended questions as part of the middle phase (Vorster, 2007), are indicators of the technique's fair manner of allowing the interviewee's opinion to be heard. The absence of subjectivity forms the core of the person-centred approach. The essence of the technique rests on the fact that the interviewer should consider his/her own subjective frame of reference, as well as the impact it has on the interviewee (Phipps & Vorster, 2011). This is also supported by the initiating of unconditional positive regard, where the interviewee and his/her actions should be accepted without bias (Vorster, 2012). Furthermore, "empathy" and "congruency" are used interchangeably with "respect" and "trust" (Vorster, 2007, 2012). All these abovementioned facts render the person-centred approach in line with fair legal practices.

As with the other identified interviewing techniques, the legality of implementing the person-centred approach in commercial forensic investigations should not only be assessed in general, but also in the South African context. Therefore, it should be tested against the relevant South African legal aspects identified in Chapter 2. Here follows an analysis of the person-centred approach against said legal aspects:

Table 8
Person-centred approach analysis

Law	Details	Application
Section 10 of the Bill of Rights – Right to human dignity	Interviews must be conducted in a composed and humane manner and not threaten the interviewee's right of being worthy of honour or respect, and should be free from torture and degradation.	Due to the investigative and non-guilt presumptive nature of the person-centred approach, it falls within the ambit of respecting a person's right to human dignity according to section 10. This is emphasised by the technique's three central elements – congruency, unconditional positive regard and empathy – all of which are applied in order to consider the human nature of the interviewee, as well as uphold the rights and dignity associated with this human aspect.
Section 12 (1) of the Bill of Rights – The freedom and security of a person	Interviews should not be of such a nature that it denies the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated in an inhuman way by the interviewer.	It can be assumed that, when applying the person-centred approach within a private commercial forensic investigative setting, that the interview will be voluntary and that the person will not be detained. Further to this, the person-centred approach employs non-accusatory and information-seeking techniques that normally do not include any violence or inhumane tactics.
Section 14 of the Bill of Rights – Right to privacy	Interviewees have the right to privacy, including the right that his/her private realm is not infringed upon –	Similar to the discussion above, the person-centred approach in essence respects the basic human rights, including the right to privacy, in that it

Law	Details	Application
	<p>excluding the obtaining of information that directly influences the public sphere and workplace.</p>	<p>is not accusatory in nature and does not force an individual to provide information.</p> <p>The question of whether an interview seeks to obtain information of a private matter which does not influence the public sphere or workplace, however, will depend on the facts of each case and cannot be evaluated in terms of the technique itself.</p>
<p>Section 35 (1) (c) of the Bill of Rights and section 217 of the CPA – Right not to be compelled to make any confession/admission</p>	<p>Confessions/admissions should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence.</p>	<p>The information-seeking nature of the person-centred approach means that the interview is not forceful, nor are there any evident intimidation tactics associated with the engagement phase of the interview. Instead, the person-centred approach's three central elements – congruency, unconditional positive regard and empathy – ensure that confessions are made freely and voluntarily. Since the goal of this technique is simply to obtain information, confessions and admissions will generally comply with the requirements of this section.</p>
<p>Section 35 (5) of the Bill of Rights – The violation of any rights contained in the Bill of Rights</p>	<p>If any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice. This may lead to the</p>	<p>As discussed and applied above, the person-centred approach does not violate any rights contained in the Bill of Rights, and therefore evidence obtained during the application of this technique should in theory be admissible in a court of law.</p>

Law	Details	Application
	acquittal of the interviewee should he/she later be accused of any crime.	
Section 23 (1) of the Bill of Rights and the LRA – Unfair labour practices and unfair dismissal	Interviews should be conducted in a fair manner that will not qualify as unfair labour practices or lead to an unfair dismissal.	The investigative and information-seeking nature of the person-centred approach, underlined by its approach of establishing trust through congruency, empathy and unconditional positive regard, means that it is considered a fair technique that will normally not lead to an unfair dismissal. Furthermore, seeing that the LRA is inherently based on human dignity, equality and freedom (which form the basis of the Bill of Rights), it can be accepted that if the technique complies with these three elements (which it does in this case), it will normally be free from unfair labour practices.

4.7.3 Conclusion

The non-accusative nature of the person-centred approach is more ethical than guilt-presumptive techniques, but it is accepted that its application also may increase the prevalence of confessions in general, without increasing those confessions that are deemed false. Furthermore, its use of evidence at a later stage during the interview process is considered highly effective.

Taking into consideration the abovementioned legal analysis, it is evident that the person-centred approach appears to comply with the relevant South African legal aspects. Since it is already being applied in certain sectors of the South African commercial forensic investigative environment, consideration should be given to extending its use even further and/or merging it with other successful techniques and formalising it in practice.

4.8 Overall conclusion

This chapter critically analysed the five selected forensic interviewing techniques against the backdrop of the South African legal context and academic literature. It is apparent that the Reid technique was described or referred to in the greatest number of articles according to the search conducted (43 articles), which is possibly due to its wide use in the USA (Gudjonsson & Pearse, 2011). The cognitive interview and person-centred approach, on the other hand, were mentioned least frequently (8 articles each). The latter technique's limited results are of particular significance, seeing that it is relatively well-known within the South African commercial forensic context (Greeff *et al.*, 2011). A possible reason for this might be due to its developing status in South Africa, as well as the country's limited academic output on the subject (Van Romburgh, 2008; Vorster, 2011; Greeff *et al.*, 2011).

It is also clear from the abovementioned discussion that there may be concern regarding the application of guilt-seeking interviewing techniques such as the Reid technique and the related BAI in terms of South African law. Further to this, it seems that these aforementioned techniques have received significant criticism from academic writers regarding their guilt-presumptive nature and potential ineffective results.

This is in contrast with the analysis of those techniques that fall within the ambit of investigative or information-seeking interviewing techniques, such as the person-centred approach and the PEACE model. These techniques may contain practices that are more in line with the principles contained in South African law and seem to be generally accepted by researchers and forensic peers.

A clearer indication of these techniques' potential application within the South African context may be observable in the critical comparison in Chapter 5.

CHAPTER 5: CONCLUSION AND RECOMMENDATION

5.1 Introduction

With the increase in economic crime globally, the role of the Commercial Forensic Practitioner (FP) is becoming increasingly important since this person can assist in the detection, investigation and prevention of economic crime. In order to commit to these aforementioned responsibilities, FPs should master a variety of skills due to the transdisciplinary nature of the commercial forensic investigative environment. One of these skills is the conducting of successful forensic interviews with role players, third parties, witnesses and suspects in order to obtain relevant information.

Conducting successful interviews, however, requires intricate skills due to its interpersonal nature. Yet an assessment of the curricula of commercial forensic investigative programmes offered by South African tertiary institutions and professional bodies illustrates a distinctive lack of content on interviewing in a forensic context. Further to this, forensic interviewing techniques appear not to be properly underpinned by theory, rendering the assessment as to what technique(s) may be the most appropriate in the South African commercial forensic investigative context challenging.

It is important to note that this study focuses on FPs in private firms – excluding those individuals who are appointed as inspectors by financial regulators or execute mandates obtained from investigative authorities – where the mandate to perform investigations is limited. FPs do not, for example, have the mandate to question suspects without the latter's consent and may not perform searches and seizures without the assistance of the South African Police Service (SAPS). They thus have to adopt a unique method of operation.

The problem statement and main objective of this study, as outlined in 1.6 and 1.7, is to present a critical discussion of some of the most prevalent interviewing techniques FPs make use of which are specifically appropriate for the South African legal context. In order to address the main objective, the study elaborates on and clarifies the remaining secondary objectives of the dissertation, being to determine the importance of interviewing as part of a commercial forensic investigation in the South African context (as outlined in Chapter 1), to describe the law that needs to be taken into consideration by the FP when conducting an interview in South Africa (in accordance with Chapter 2), to identify forensic interviewing techniques in terms of database searches conducted (as part of Chapter 3), and to critically discuss and compare the forensic interviewing techniques in accordance with available academic literature and the law (Chapter 4).

This chapter concludes on the main and secondary objectives and provides an overall recommendation regarding the use of appropriate forensic techniques for the South African legal context.

5.2 The importance of interviewing as part of a commercial forensic investigation in the South African context

Conclusion on secondary research objective 1

It is apparent from Chapter 1 that forensic interviewing forms an integral part of the commercial forensic investigative process in South Africa. Detecting, investigating and preventing economic crime requires an intricate set of skills due to the often complex nature of economic crime and the motivation of the economic offender. Due to this complexity, a transdisciplinary approach is required by the FP, where he/she should be able to demonstrate a variety of skills, including forensic interviewing as part of the humanities and social science discipline.

The forensic interview is a valuable tool in obtaining reliable and relevant information from a variety of role players during the commercial forensic process. These role players include clients, third parties, witnesses and suspects.

5.3 The law that needs to be taken into account when conducting a forensic interview

Conclusion on secondary research objective 2

Chapter 2 extracts a set of relevant principles in law which may serve as a “barometer” for the different forensic interviewing techniques in terms of their legality within the South African context. Here follows a summary of said principles (refer to 2.3):

- The interviewee’s right to human dignity – Governed by section 10 of the Bill of Rights and implies that interviews must be conducted in a composed and humane manner and not threaten the interviewee’s right of being worthy of honour or respect, and should be free from torture and degradation;
- The freedom and security of the interviewee – Directed by section 12 (1) of the Bill of Rights, which states that interviews should not be of such a nature that it restricts the interviewee’s freedom of movement by, for example, refusing the interviewee the option to leave the interview. The interviewee may never be detained, nor be exposed to violence, torture or be treated inhumanely by the interviewer;

- The interviewee's right to privacy – Section 14 of the Bill of Rights explains the interviewee's right to privacy, including the right of the interviewee not to have his/her private realm infringed upon – excluding the obtaining of information that directly influences the public sphere and workplace;
- The interviewee's right not to be compelled to make any confessions or admissions that could be used as evidence against him/her – The requirements for admissions and confessions is governed by section 35 (1) (c) of the Bill of Rights and section 217 of the CPA and is summarised by the South African Law Commission – they should be made (1) freely and voluntarily, (2) in sound and sober senses, and (3) without undue influence;
- The inadmissibility of evidence in terms of section 35 (5) of the Bill of Rights – If any of the rights contained in the Bill of Rights are violated, the evidence obtained during such action may be excluded during court processes, specifically if these will lead to an unfair trial or if it is detrimental to the administration of justice. This may lead to the acquittal of the interviewee should he later be accused of any crime;
- Taking fair labour practices into account when conducting interviews – Although forensic interviews will not *per se* lead to unfair labour practice or unfair dismissal, it can be derived from section 23 (1) of the Bill of Rights and the LRA that interviews should be conducted in a fair manner as part of a fair disciplinary procedure; and
- The principles applied in civil proceedings with regards to the admissibility of evidence – The Constitution does not contain any specific provisions in this regard and therefore the courts have developed their own guidelines, which must be applied in accordance with the circumstances of each case.

5.4 Forensic interviewing techniques identified in terms of the database searches

Conclusion on secondary research objective 3

Five forensic interviewing techniques were identified as part of the abovementioned search (refer to 4.2), where specific keywords were used and the inclusion criteria consisted of the exclusive use of primary empirical research studies published from 2000 to 2017 with a focus on forensic interviewing or interrogation. These results were limited to the English language, and only included peer-reviewed data. The five forensic interviewing techniques identified are the Reid

technique, kinesic interviewing, the PEACE model, cognitive interviewing and the person-centred approach.

5.5 Critical analysis of forensic interviewing techniques

Conclusion on secondary research objective 4

Chapter 4 critically analyses the selected forensic interviewing techniques against relevant academic literature and South African legal aspects and forms a conclusion with regards to each technique's potential application within the South African commercial forensic investigative setting.

5.5.1 PEACE model (cf. section 4.3)

Researchers regard the PEACE model as an effective and ethical technique to apply within the commercial forensic investigative environment. Moreover, they propose the PEACE model as a viable alternative to the guilt-presumptive Reid technique and other similar methods. Regarding the legal considerations of the PEACE model, it appears to comply with the relevant South African legal aspects and may be considered to be applied within the South African commercial forensic investigative environment.

5.5.2 Cognitive interviewing (cf. section 4.4)

The analysed academic literature finds cognitive interviewing as having a strong empirical and historical foundation. However, its close relationship with hypnosis creates concern and influences its potential application within the commercial forensic investigative context. Hypnosis and its related aspects are deemed unreliable by experts, which may influence the quality of the information obtained from an interviewee.

It is evident that due to the investigative and non-accusative nature of cognitive interviewing, it falls within the general ambit of the relevant legal considerations of South Africa. However, there is concern regarding its application in terms of section 35 (1) (c) of the Bill of Rights and section 217 of the CPA, which influences the legality of confessions obtained in circumstances where this technique was used. There is evidence to suggest that confessions in terms of the cognitive interview might not indeed be: (1) free and voluntary, (2) made in sound and sober senses, and (3) made without undue influence. The fact that section 35 (1) (c) of the Bill of Rights may not be adhered to also means that the cognitive interview inherently risks being in breach of section 35

(5) and that any evidence obtained from the interview, not only confessions, might be deemed inadmissible in a court of law.

Further to this, the fact that several American and UK courts have deemed evidence obtained from cognitive interviews as inadmissible, gives credence to the suggestion that it is an unreliable manner for obtaining information, and that South African courts will reach the same conclusion.

5.5.3 Kinesic interviewing (cf. section 4.5)

Due to the fact that kinesic interviewing is incorporated as part of the Behavioural Analysis Interview (BAI) of the Reid technique, it is critically analysed as part of the latter.

5.5.4 The Reid technique (cf. section 4.6)

According to the analysis of the Reid technique in relation to academic literature, it is apparent that significant concern exists regarding its practical, ethical and lawful application within the commercial forensic investigative sphere. Specifically, there is apprehension concerning its use of unreliable verbal and non-verbal cues to assess guilt, its subjective approach of presumption of guilt, the apparent connection between its application and false confessions, its apparent lack of theoretical underpinning, the alleged unethical use of False Evidence Ploys (FEPs), the potential intimidation and abuse of vulnerable interviewees, and its ineffectiveness due to the revealing of evidence at the beginning of the interview.

Furthermore, in terms of lawfulness, it appears that the application of the Reid technique may pose a risk of possible breaches of section 10, 12 (1), 23 (1), 35 (1) (c) and 35 (5) of the Bill of Rights, as well as section 217 of the CPA and possibly also the LRA, which may render its application within the South African commercial forensic investigative environment impractical and unlawful.

5.5.5 The person-centred approach (cf. section 4.7)

Comparing the person-centred approach with relevant academic literature indicates its effectiveness in commercial forensic investigations – in line with other information-gathering techniques such as the PEACE model. Not only do researchers agree that its non-accusative nature is more ethical than guilt-presumptive techniques, but it is accepted that its application also may lead to a general increase in the prevalence of confessions, without increasing those confessions that are deemed false. Furthermore, its use of evidence at a later stage during the interview process is considered highly effective.

Taking into consideration the legal analysis, it is evident that the person-centred approach appears to comply with the relevant South African law. Since it is already being applied in certain sectors of the South African commercial forensic investigative environment, consideration should be given to extending its use even further and/or merging it with other successful techniques and formalising it in practice.

5.6 Integrated comparison

The PEACE model is often proposed as an alternative to the guilt-presumptive and confrontational processes associated with the Reid technique (which is discussed later in this chapter) (Bull & Soukara, 2010; Meissner & Lassiter, 2010; Snook *et al.*, 2010). Dixon (2010:429) notes similarly that there is a critical divide in emphasis between so-called “investigative interviews” such as the PEACE model and “accusatory interviews” such as the Reid technique, in that the aforementioned technique “rather than setting out to gain a confession which confirms a case theory to which the officer is firmly committed, the interrogating officer is encouraged to get the suspect’s account and then to check its authenticity by questioning and testing it against other evidence.”

Kassin (2008), Vrij (2008) as well as Gudjonsson and Pearse (2011) found that investigative interviewing techniques such as the PEACE model and the person-centred approach, are very careful in assessing potentially deceptive interviewee behaviour due to its unreliable nature. In contrast, American interviewing techniques, such as the Reid technique, appear to take the fact that deception can be identified from kinesic cues for granted.

Leo (2008:23) states that, unlike the PEACE model and person-centred approach, the Reid technique’s main aim is “not necessarily to determine the truth”, but to obtain a confession. This approach is problematic, especially against the backdrop of the interpersonal nature of the forensic interview, which emphasises the significant influence an interviewer has on the interview and that he/she is not merely an observer, but an active participant (Vorster, 2007). In various instances, the interviewer risks “contaminating the process to such a degree that the obtained information will be rendered all but valueless” (Vorster, 2007:2), especially in the case where he/she allows personal bias and subjectivity to cloud his/her judgment.

However, due to the fact that investigative interviewing techniques such as the PEACE model and the person-centred approach are neither blatantly confrontational nor guilt-presumptive, it is broadly accepted that they are less likely to produce false confessions (Kassin *et al.*, 2010; Meissner *et al.*, 2010).

The person-centred approach also makes use of open-ended questions during the beginning and middle phases, which Soukara *et al.* (2002) as well as Memon *et al.* (2003, 2010) commend as an effective method for obtaining more detailed answers from the interviewee. Additionally, such open-ended questions also underline the central theme of empathy and respect which is conveyed in accordance to the humanistic perspective of the person-centred approach. These two aforementioned factors may lead to the interviewee feeling more valued, which plays a central role in gaining his/her trust. This is in stark contrast to the Reid technique's use of trickery and deception, which normally results in the opposite effect – distrust and reluctance to share information (Hartwig *et al.*, 2006).

Holmberg and Christianson (2002) conclude that the person-centred approach and other information-gathering techniques are actually associated with yielding a greater number of confessions than the Reid technique and similar domineering interviewing styles. These information-gathering techniques have been formulated specifically as a viable alternative to the Reid technique and the apparent unlawful nature of other similarly accusative techniques (Gudjonsson & Pearse, 2011).

It is imperative to view all of the abovementioned aspects against the backdrop of the central argument used by several authors (Bull & Soukara, 2010; Meissner & Lassiter, 2010; Snook *et al.*, 2010), i.e. to move away from the Reid technique towards information-gathering techniques such as the person-centred approach and the PEACE model. Again, it remains important to consider Walsh and Bull's (2011) stance that it could be especially effective to merge successful investigative interviewing techniques as part of the commercial forensic investigative process.

5.7 Limitations and recommendations

Based on the literature reviewed (and the limited specific scientific and empirical evidence), it appears that certain apparent concerns can be raised against cognitive interviewing, kinesic interviewing and especially the Reid technique within the South African commercial forensic investigative setting. The person-centred approach and PEACE model, however, appear to be more appropriate for use within said context. Merging aspects of these two methods to form a new unique technique specifically designed for the South African commercial forensic investigative environment, is also recommended. The person-centred approach may benefit from the comprehensive structure and empirical underpinnings of the PEACE model, and the PEACE model from the extensive interpersonal and humanistic approach of the person-centred interview. Subsequent to further research on this topic, the apparent lack of industry standards and proper training in forensic interviewing techniques in South Africa should be addressed.

5.8 Conclusion

With the global increase in economic crime, forensic interviewing has become a crucial element of the commercial forensic investigative process. Five potential forensic interviewing techniques were identified and critically analysed in terms of relevant legal considerations and bearing the existing academic literature in mind. Having done this, it was found that the PEACE model and person-centred approach may be the most suitable within the South African context. However, further research needs to be conducted, specifically regarding the fine-tuning and/or merging of aforementioned techniques in order to formulate a new forensic interviewing technique that is specifically designed for the South African commercial forensic environment.

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