

## REGULATORY INTERVIEWS AND THE PEACE MODEL OF INTERVIEWING

### INTRODUCTION

After a serious incident or a fatal accident, interviews with various regulatory authorities including the Police, the HSE or the Environment Agency ("**Regulators**") will take place. All of these interviews are capable of being used as evidence, even if it is just a "quick word" or a friendly chat.

Many sites are treated as a crime scene after an incident has occurred and even friendly conversations may need to be recorded in the Regulators' notebooks for later review and reference. The Regulators will often use these notebooks for refreshing their mind as to what was said to them at the time of an incident.

There is little guidance available to most organisations and their employees on managing Regulators' investigations. At times of the greatest need, directors and senior managers are often deliberately isolated by the Regulator from their usual advisers and they may also be isolated from an organisation which wishes to know who to blame. Frequently these isolated people will also be swamped with internal requests for information from the organisation. Care should be taken to approach these requests with caution as discloseable email may be created which may admit a liability which has not been investigated. For the organisation and the individual, getting the right help for both is vital if a serious incident is to be well managed.

### TRAINED INTERVIEWERS

Police officers or Regulator-appointed inspectors are trained to conduct interviews in a particular way. Some interviewers are trained for years.

In order to give organisations some assistance in managing their response to incidents, this article seeks to open up some of the techniques employed by interviewers so that organisations and individuals can properly prepare their responses.

Different types of interviews may be requested by the Regulators. These include: Voluntary Interviews (friendly chats, a "quick word", "have you just got a few minutes" all fall into this category); Compelled Interviews where the right to silence is lost; and Interviews Under Caution (i.e. after a Caution has been read out). Each type of interview has different consequences and may mean that the individual being interviewed may be liable to self incriminate or to admit a liability that was not obvious before the interview.

After any serious incident, legal advice should be sought before attending any interview with a Regulator, especially voluntary interviews.

## PACE

Prior to the introduction of the Police and Criminal Evidence Act 1984 ("PACE") and the related Codes of Practice, concerns existed about the potential for the police to force interviewees or suspects to confess to crimes they had not committed. Following the Guilford Four and the Birmingham Six appeals, evidence of such coercion, threats, and the alleged mistreatment of suspects emerged.

PACE was developed in order to introduce stricter statutory controls over the acceptable conduct required of interviewers during interviews. Detention timescales, the tape recording of interviews with suspects and stricter controls on interviewer conduct were set out under PACE and with minor amendments, these rules are still being followed today.

Since 1984, it has been expected that other Regulators would also follow the PACE rules but it has been common for Regulators interviews to take place with inexperienced interviewers who are unfamiliar with the requirements of PACE.

In addition, it is common for breaches of PACE and other procedures to go unchallenged. Lay interviewees do not necessarily know when breaches have taken place. If interviewees are unrepresented or represented by inexperienced representatives or colleagues, then the opportunity to object to or prevent inappropriate behavior may be missed, and it may be much more difficult to have this evidence dismissed later.

Frequently interviewees attend interviews with the Police or other regulators without understanding the potential adverse consequences and without adequate representation.

Where serious incidents have arisen and the organisation is insured, then the costs of reasonable representation may be met by the Insurers under the terms of an employers liability or public liability policy. The choice of the solicitors representing the individual is the choice of the organisation, not the insurers<sup>1</sup>. Whilst the Insurers may compel the organisation to use a panel firm for the civil claim which they will be paying, they cannot force an organisation to accept their choice of firm for the criminal investigation/prosecution which they will be facing.

The legal representation of the organisation during this stage of an investigation needs to be separate from the representation of any individuals, in order to ensure that a conflict of interests is avoided<sup>2</sup>.

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<sup>1</sup> Under the provisions of the Insurance Companies (Legal Expenses Insurance) Regulations 1990.

<sup>2</sup> According to Law Society Guidance obtained by the Solicitor to the HSE.

## PACE INTERVIEWS

The PACE interview is an interview which should take place where the Police or other Regulator is confident that they have reasonable grounds for suspecting that an interviewee may have committed an offence. There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it. Frequently the interviews which the Police or other Regulators carry out are not carried out in this way, because there is no reason to suspect the individual of having committed an offence.

The Caution to be read out to suspects is:

*“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”*

The Caution must be given to a person suspected of an offence before any questions about an offence, or further questions (if the answers provide the grounds for suspicion), are put to them. Then, either the suspect's answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. Otherwise the evidence gathered may be inadmissible in a trial for that offence.

It is common in Police and other Regulatory interviews for some conversations to take place before the Caution has been read. This can create evidential problems for the prosecutor.

In workplace incidents, the PACE interview is required to be offered to any suspect, before charges are laid against that individual or organisation. The PACE interview and the increasing regulation of Regulators' performance has led to the development of more highly skilled interviewing techniques. One of these techniques is the PEACE Model.

## THE DEVELOPMENT OF THE PEACE MODEL

In 1991 the Home Office set up a steering group to investigate interviewing techniques. This group developed the PEACE model. PEACE stands for: **P**lanning and Preparation, **E**ngage and Explain, **A**ccount, **C**losure and **E**valuation. These stages are described in more detail below as this model is becoming commonplace in many regulatory interviews:

## **P - PLANNING AND PREPARATION**

Planning involves the thought processes in getting ready to interview; and Preparation involves getting the location, the environment and the admin ready.

The planning process involves gathering information so as to allow the interviewer to remain in control of the interview, to ensure that it goes in the right direction and that sufficient time is available .

The maxim - "Proper preparation prevents poor performance" or other colloquial versions are highly relevant here. In addition, the interviewer should understand the purpose of the interview, the previous background circumstances, and have a profile of the interviewee. Not every interview is well planned but the more significant the offence, the more likely the Police and other Regulators will invest in time for preparation.

Preparation may involve simply defining the purpose of the interview but it can also involve the set up of the interview space. The points to be proved for an offence to have been committed should be set out by the interviewer before he or she interviews a witness or a suspect, as well as any aggravating or mitigating features. An assessment of available evidence might also be carried out in advance in order to understand what evidence is required. Understanding what is required may go some way towards understanding how it can be obtained.

The mechanics of the interview space may involve seating, logistics and venue, however they will also involve making any exhibits available for examination during questioning,

Good interviewers are investigative whereas poor investigators are merely interviewers. Unless preparation takes place an interviewer may overlook important evidence or miss inconsistencies in the interview evidence. Unnecessary breaks may then be taken in order to obtain further information.

## **E - ENGAGE AND EXPLAIN**

The opening phase of an interview can be crucial to the interviewer's success. If the interviewer can engage the interviewee for a few minutes, this can then "warm up" the interviewee and assist that person to engage with the interviewer in a relaxed relationship which may then be continued throughout the interview.

Engaging the interviewee is sometimes described as the Rapport stage of the interview. Courtesy, politeness, and understanding cost nothing to the interviewer but can make all the difference between his/her success and failure as an interviewer. Successful interviewers may take time to find out what motivates the interviewees. Once these drivers are understood then it may be possible to take steps to use them.

In addition, the formalities of the interview may need explanation. The tape recording, and other procedures, once understood, can help the interviewee to empathise with the interviewer. If this happens then the interviewer will have much greater success.

The format of the interview may then be explained - in order to demystify the process and to give the interviewee the impression that he is not going to be tricked. This sense of security may later be challenged by an interviewer who wishes to ask supplementary questions, or to clarify an earlier account.

The interviewee may be asked to comment on matters which have not already been described in the interview or to repeat an earlier explanation in their own words. The interviewer is likely to use the interviewee's words and repeat them back to him where he is checking for a correct interpretation

Frequently interviewers will take a great deal of time and put themselves out in order to show consideration for the interviewee. Frequently the interviewee will be asked if he wants a drink or to use the toilet or how he or she wants to be addressed in the interview. Successful interviewers often ask whether there are any time restraints on the interviewee as these concerns may be used to increase the interviewee's tension later on.

Next, the Interviewer will set the scene by saying that the interview is very important and that everything the interviewee says is important. As a result they should not leave anything out, even if they believe it is of no relevance. The interviewee may even be given the impression that they will have to work hard because they have all the information. This creates the impression that there is something that the interviewee needs to say to the interviewer.

At any stage of the interview - in order to ensure fairness, the interviewee may be encouraged to:

- ask a question of the interviewer if there is something which they do not understand
- ask a question if there is something they do not know
- ask a question if they do not understand the interviewer

However, it is unlikely that an interviewee will be encouraged to:

- remain silent if the reasons for their being suspected of having committed an offence are unclear
- ask a question for clarification where there is more than one possible meaning for a question
- ask the interviewer to explain something which was inappropriate or leading
- say that they do not feel that it is appropriate for them to answer a question
- refuse to speculate or give their opinion as to hypothetical circumstances i.e. - what might have happened if...

Once this engagement stage has passed, the witness will be asked to give his account. The interviewer may then ask questions to clarify the account or to interrupt where additional information is required.

The interviewer may also use the engagement stage as training for later in the interview. The interviewer will be establishing their control and getting the interviewee ready for the next stage of the interview. The interviewee will be encouraged to answer simpler questions (with yes or

no answers) and the interviewer will be assessing the interviewee's language and communication abilities.

## **A - ACCOUNT**

At this stage an interviewer obtains the interviewee's full account of events. The three main steps are-

1. obtaining the interviewee's account of events
2. expanding and clarifying that account
3. challenging the interviewee's account with information from other interviewees (if necessary)

Good questioning and listening skills are required to produce an accurate and reliable account. During the Account process an interviewee may change from being cooperative to uncooperative so it is important for the interviewer to be fully alert during the interview. The interviewer should be able to detect changes in the interviewee's language and behaviour.

For cooperative interviewees such as victims and eye witnesses, the interviewer may use additional techniques of free recall to begin with and perhaps move on to cognitive interviewing for more advanced interviews. For uncooperative interviewees the interviewer will normally rely on conversation management as a technique.

Interviewers are recommended to ask all their relevant questions - even in the face of a 'No comment' response. This is so as not to leave any gaps that the interviewee (or their organisation) might later seek to fill in as part of a defence.

After allowing the interviewee to begin to give their account of the facts, the interviewee may use questioning techniques such as:

- summarising
- empathising
- repeating questions
- leading questions
- accusing questions
- varying the questions to ask about the same circumstances
- varying the interviewee's previous responses to suggest that they have already said something
- encouraging different ways or repeated attempts to recall the same or related facts

The interviewer may need to clarify or challenge the interviewee's account. This could be because the interviewer is unclear about something the interviewee has said, or because the information is inconsistent with other evidence.

This "Challenge Phase" of the Account may include challenges to inconsistencies in the Account or it may also include pre-planned challenges. Information may be held back in order to test what the person might say in the absence of certain key facts.

The actual practice of interviews rarely reflects the ethical philosophy of the PEACE model, in terms of being open minded during the questioning process. Instead, the interviewers are likely to be approach the interviews in a dominant way thereby constraining the questioning process and attempting to coerce the interviewee. This may be motivated by the desire to revert to pre-PEACE questioning techniques which relied on pressurised situations to produce a confession or a genuinely held preconception that the interviewee is guilty of an offence.

Features of interviews can be challenged under sections 76 and 78 of PACE including interviewers who restrict the suspect's ability to respond by suggestive questioning, by using interrogative assertions, or reframing the suspect's answers to fit with the interviewer's beliefs as to how particular circumstances have arisen, and misrepresenting a belief as a fact.

In criminal courts, the fact that some interview evidence is ruled as inadmissible suggests that such tactics are used and that this sort of pressure can and does happen. The fact that the inadmissibility of evidence in regulatory matters suggests that the same evidence to support challenges under Section 76 and 78 of PACE is not obtained at the time of questioning. Without the right representation during interviews, frequently the only record which is obtained is the statement drafted by the interviewer and signed by the interviewee. Whether this is obtained as a voluntary statement or a statement which takes the form of a compelled statement may depend on whether the interviewee has had any advice before, during or after the interview.

## **C - CLOSURE**

The Closure of an interview is frequently rushed. A short term feeling of anticipated relief on the part of the interviewee can sometimes lead to an inadvertent admission. The interviewer can increase the tension in an interview with the careful use of "just one more question" or other similar phrases. A previously cautious interviewee may then be persuaded to believe that if he/she cooperates and answers this question as fully as possible then the whole interview will be over. In fact, the interview is often prolonged beyond this point as the interviewee may inadvertently make an unguarded or ill considered response.

In practice, careful thought is rarely given to the planning of the Closure of the interview, even if careful thought has gone into the opening. Amongst other issues, the Closure stage should:

- ensure there is an understanding on the part of the interviewee as to what has happened during the interview
- ensure that the interviewee is certain that the evidence which they have given is accurate in all material respects or that any grey areas have been sufficiently highlighted

- confirm that all aspects of the Account have been covered
- allow the interviewee to give any additional information which they think may be relevant and are willing to provide
- allow the interviewee to be able to give further information in future
- explain what will happen in the next phase of the interview process

A positive close to the interview may mean that witness availability is continually monitored in future, or that an interviewee is able to give any new and relevant information to the correct interviewer in the future (either through recall or as new information comes to light).

The closure may also assist in facilitating future interviews with other interviewees, whether they are suspects, witnesses of fact, expert witnesses or fellow employees.

## **E - EVALUATION**

This stage concludes the PEACE interview but not necessarily the interviewing process.

In addition, the interviewer will, in this section of the interview, often suggest a short break for them to re-review their notes to see if the aims and objectives for the interview have been achieved. In addition, the interviewer will also review the investigation in the light of information obtained during the interview and may reflect upon how well he or she conducted the interview.

## **CONCLUSION**

Some legal advisers have been used to the PEACE model of interviewing for years. Others, unused to representing clients during these interviews (or handling breaches of PACE 1984 and the Codes of Practice), have not intervened as well as they might in regulatory interviews.

Roger Smith, a director of the law reform and human rights organisation Justice describes in an article in the Law Society Gazette (on 17 April 2009) that Mr Miller, one of the recently dubbed "Cardiff Three" confessed to the murder whilst still a juvenile. He admitted to murder after five days of interviews and having denied the charge on more than 300 occasions. The only trouble was that he did not commit the murder, Jeffrey Gafoor did.

Mr Smith says in his 2009 article that:

*"15 people were formally charged for conspiracy to pervert the course of justice in relation to the Cardiff Three.... Thirteen of them were retired or serving police officers."*

Lord Taylor, the Lord Chief Justice listened to the tape of the Cardiff Three's interview and commented (according to Roger Smith) that:

*"Short of physical violence, it is hard to conceive of a more hostile and intimidating approach".*

Some commentators have suggested that legal representatives should consider intervening if the interviewer attempted to build any rapport with a suspect - by asking questions about the person's welfare, interests, family etc. The officer/s may be reminded that the interview is for the purpose of questioning a suspect about an offence, not questioning him about his welfare, home life or his interests. Should the officer continue to use such tactics, the legal adviser may wish to consider whether it is appropriate to advise their clients not to answer any questions.

On some occasions the interview might breach sections 76 or 78 of PACE; for example instances of oppressive behaviour may take place, or there may be a failure to show the appropriate consideration for the interviewee's mental health or vulnerabilities, or even on occasion a failure to caution the suspect or explain their legal rights. It has been estimated that as many as 10% of all interviews are in breach of PACE for one reason or another.

The PACE interview is only one example of where the PEACE model is (or may be) used. Voluntary interviews and also the compelled interviews of the HSE (or the Environment Agency and other regulators) may also use this technique. If the PEACE model is better understood by the interviewee as well as the interviewer then it can sometimes lead to a more productive use of the interview by both parties.

If you are due to attend an interview with a Regulator, seek legal advice. This article does not constitute legal advice. Before acting on any of the matters discussed in this article please consult a solicitor.

For further information contact Stuart Armstrong at [stuart.armstrong@svarmstrong.com](mailto:stuart.armstrong@svarmstrong.com) or telephone him on 0113 265 5205 or on 07983 391141.