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Questioning the Evidence: A Case for Best-practice Models of Interviewing in the Refugee Review Tribunal

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This article addresses the problem of eliciting accurate and reliable evidence when reviewing applications for refugee status. While cases reviewed in the AAT (Migration and Refugee Division) often lack hard evidence, Members are simultaneously disadvantaged by a lack of evidence-based interviewing protocols to guide their questioning practices. This research examines the practices and regulatory environment of such decision-making in light of international standards of ethical questioning of detainees and witnesses. It finds firstly that Members do not presently use the opening phase of the interview to maximise the applicant's recall and improve the quality of their responses and, secondly, that Members are not consistent in their use of questions to elicit information from applicants. This article concludes that the introduction of questioning protocols for the Migration and Refugee Division Members would improve efficiency in hearings and help to ensure that Members are not exposed to appeals based on random interviewing approaches.

INTRODUCTION

Across jurisdictions, the administration of justice in settings such as courts and tribunals is heavily reliant on statements made by ordinary people who find themselves in extraordinary circumstances. The problem of eliciting accurate and reliable evidence under such circumstances is compounded by a lack of systematic interviewing protocols. Judges, parole officers, immigration officers, mediators, and a host of other professionals are regularly required to sift through the statements to determine whether the individual is speaking the truth, whether their story is accurate and whether the evidence provided is reliable. Very often, these professionals are engaging in this difficult and time-consuming task without the benefit of evidence-based training or benchmarked standards of questioning. Furthermore, credibility assessment is considered a central concern of such decision-makers, yet there is robust evidence indicating that commonly used “lie signs” and lie detection training programs are of little to no value, and do not accurately or reliably distinguish truth-tellers from liars.1 This leaves these decision-makers in an invidious position: they are unable to apply tests for credibility, and yet, when the evidence cannot be otherwise validated or corroborated, they appear to have little else to guide them in their search for truth. This conundrum is especially acute in the Refugee Review Tribunal (RRT,}

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now known as the Administrative Appeals Tribunal – Migration and Refugee Division). Applicants to the RRT are rarely able to provide corroborating evidence for their stories of persecution, torture, flight and other hardships they endure, usually as a result of chaotic and undocumented conflict or victimisation. Therefore, Members of the RRT who preside over the hearings rely mostly on careful research and intelligence analysis, and their own experience and skills as interviewers to guide them through the process of reviewing the applicant’s version of events.

There is, however, some cause for optimism when using this approach because the general consensus in evidence-based studies of police investigative interviewing is that eliciting extensive and detailed free narratives and using strategic questioning are viable and ethical means of assessing credibility and obtaining reliable intelligence. Such narrative-based approaches to interviewing are known variously as “cognitive interviewing”, “enhanced cognitive interviewing”, “whole story interviewing” and “investigative interviewing”, and avoid the forced admissions and leading questions associated with confrontational, confession-focused interviewing styles. Crucially, narrative-based interviewing is designed to be sympathetic to the emotional needs of the witness, while still encompassing a range of strategies that support the elicitation of reliable evidence and detailed information. It is regarded as a best-practice model of ethical interviewing and since its inception in England and Wales in 1992, has been adopted by police forces and other government agencies in many countries, including Australia. Despite this, to the authors’ knowledge, there is no published research that explores the implications of utilising these best-practice standards of interviewing in the RRT.

In this article, we examine the current interviewing practices of Members in the RRT and the Migration Review Tribunal (MRT), which shares the same pool of Members, identify where present practices are inconsistent with established protocols of best practice police interviewing and explore the potential for applying the research findings from police investigative interviewing to RRT (and MRT) hearing processes. In doing so, we first consider the environment in which the RRT operates, its legislative and sociological framework, and the background of the RRT. Then we explore the various constraints and influences that this environment exerts on the interviewing practices of tribunal participants. Our analysis in this preliminary study is limited to observations made at public hearings of the MRT which will, with due caution, be applied to findings in the context of the RRT (see further explanation of the method below). We then conclude by analysing these findings through careful consideration of the relevant literature, guidelines, legislation and other research studies. Notwithstanding the challenges of considering this complex array of data, we conclude that this research makes a strong case for a review of the current questioning strategies used by Members in the RRT (and MRT) and resolve that this preliminary study provides the groundwork for a research and training program required to implement such changes.

<div>BACKGROUND</div>

The Broader Social, Political, Legal and Institutional Context

Understanding the sociological, political and institutional context of seeking asylum is an important consideration for the decision-maker. Decisions are informed more broadly by, but are not limited to border security, domestic migration legislation and Australia’s responsibilities to the Refugee Convention. Research in this area confirms these complexities and challenges the independence of the

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2 Since the research for this article was carried out, the Refugee Review Tribunal has amalgamated with the Administrative Appeals Tribunal (on 1 July 2015) and is now known as the Administrative Appeals Tribunal – Migration and Refugee Division. However, at the time of writing it appears that this amalgamation has not substantially affected the way that Members conduct hearings, and thus the research presented here remains relevant despite the new name and structure. As the new name does not distinguish between refugee review hearings and migration review hearings, we have retained the original nomenclature and abbreviations (RRT and MRT).


process, describing it as a political “process of brutalisation”. In addition, rather than a preferred benefit of doubt, reviewing decisions for protection can risk an institutionally inspired lack of belief. Without this preferred benefit of doubt, refugee narratives risk being understood as a highly political and risk-driven exercise constrained by bureaucracy and political, legal and international agendas.

An understanding of the workplace environment and culture also forms part of the background for decision-making in the RRT. This is because what is and what is not deemed important and believable can be influenced by a combination of the culture of the institution and the decision-makers’ personal beliefs. More specifically, what is deemed valid information is not only influenced by what is used to measure the accuracy and consistency of the information elicited, but also by the structural tools employed, such as the sources and professionals used to guide knowledge and information about country of origin. From this perspective, the reputation of the decision-maker and the system continue to remain at risk of scrutiny. These critiques remind us of the need for further investigation into the applicability of evidence-based interviewing techniques to the RRT.

The Refugee Review Tribunal

The RRT was established in 1993 in order to provide an independent review of decisions previously made by the Department of Immigration and Border Protection (DIBP) about an asylum seeker’s application for protection. The RRT is structured, as are many tribunals, in a less formal manner than other areas of justice. The hearings themselves do not follow a strictly structured procedure and are non-adversarial by nature. Under s 420.2(a) of the Migration Act 1958 (Cth), the RRT “is not bound by technicalities, legal forms or rules of evidence”. This means that unlike the rules required in court proceedings, the RRT does not consider rules of evidence or other legal forms. This informality is designed to be both cost and time effective, while still providing a fair and equitable process. The structure of the RRT and its political context has been debated. Although an extensive discussion of this issue remains outside the scope of this article, the structure of the RRT remains a key aspect to informing the tribunal’s role, its responsibility and its policies and processes. The MRT/RRT also has a rigorous program for professional development of staff. As a part of this program, the MRT/RRT schedules regular training sessions covering the kinds of issues discussed in this article. This is consistent with McMillan, who advocates for the “systematic training of tribunal Members” and indicates that questioning and decision-making processes more generally constitute an area of ongoing concern for the tribunals. In light of the above, this article explores the extent to which the investigative processes of the RRT contribute to the consistency and quality of their reviews.

Assessing the Credibility of the Applicant

As already mentioned, there are significant problems relating to the assessment of credibility in the RRT and these problems have broader implications for the tribunal’s questioning process as a whole. The first problem that we identify is the exigencies of tribunal hearings that require Members to rely on the applicant’s version of events without recourse to strong, if any, supporting evidence when

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4 The Department of Immigration and Border Protection (DIBP) was known under the previous government as the Department of Immigration and Citizenship (DIAC).
5 Migration Act 1958 (Cth) s 420.2(a).
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attempting to document the facts of the case. In many hearings, there is no reliable evidence available from witnesses or from their country of origin to cross-reference with the applicant’s story. Additionally, if there is evidence from the applicant’s country of origin, the country of origin information might conflict with the applicant’s version, even if the applicant’s evidence is credible. This contrasts with a criminal case, where there is usually some physical or verbal evidence to challenge or corroborate the suspect’s version of events. As such, police investigators, and subsequently judges or juries, are less reliant on a credibility assessment of the accused than are Members of the RRT. The heavy reliance on credibility assessment in the RRT is problematic because such assessments are so notoriously inaccurate and do not improve with training or experience.12

However, research indicates that one reliable indicator of credibility is the amount of detail that is provided by the interviewee: truth-tellers can provide more details about an event than liars.13 Clearly even this indicator is difficult to apply systematically outside the laboratory: how much detail is “more” when your sample size is one? More detail compared with what? And what of the impact of the interpreter on the interaction?14 Nonetheless, maximising the details elicited from the applicant has another important function in assessing credibility: it provides the best opportunity to compare the information s/he provides with whatever other evidence has been gathered by the Tribunal.

Furthermore, prior research urges caution in assessing the internal consistency of asylum seekers’ narratives.15 The narratives produced under the circumstances of applying for asylum are likely to be affected by the upheaval of relocating under duress, the passage of time and the impact of trauma on the applicant. In addition, there are recognised variations in discourse patterns across languages, cultures, age and gender so that a story might be produced in what appears to the Member as disjointed or in a non-linear structure. Since the internal consistency might be difficult to assess, Members are more reliant on cross-checking the details of the applicant’s story with the available evidence. Thus, the amount of detail produced will impact on the capacity of the Member to conduct such enquiries. A report by the Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission16 recognises the value of “a free report of events in a narrative form” and that this approach to the evidence-gathering “may yield a significantly more accurate version”. This is also consistent with research on the strategic use of evidence17 when testing the credibility of an account given in an interview.

The second problem we observed in our research into RRT hearings and the pitfalls of credibility assessment is the difficulty for Members in defending their decision to draw an adverse finding. This adverse finding results from an applicant’s failure to provide information that supports their version of events in the face of contrary evidence from another source. A suspect’s right to silence in a police interview and the impact their non-response might have on subsequent court hearings has been well

14 One study showed that details decrease significantly when an interpreter mediates the interaction and that there is a corresponding decrease in the interviewer’s capacity to assess credibility when this is the case: Sarah Ewens et al, “The Effect of Interpreters on Eliciting Information, Cues to Deceit and Rapport” (2016) 21 Legal and Criminological Psychology 286.
16 Cited in Luker, n 15, 526.
covered in the literature, however, the circumstances that pertain in a RRT hearing are somewhat different. Under the specific requirements of the Act pertaining to adverse decisions based on evidence that challenges the applicant’s version, Members are often in the position of having to draw an adverse inference from an applicant’s failure to respond, or from a failure to provide adequate details. It is our contention that this leaves the Member vulnerable to criticism in an appeal, where the applicant might claim that they were not given adequate opportunity to provide the necessary detail that would have proved their case. Given the highly complex structure of an interpreter-mediated tribunal hearing, this creates something of a minefield for Members: how much of the applicant’s story might be lost through an inadvertent interruption, or simply a failure to ask the “right” question? What might be “lost in translation” in the heat of the moment, only to reappear accusingly when the record of the hearing is examined under appeal, and the nuances of the applicant’s version are drawn out through re-interpretation and careful examination? In some cases, the fault might be found to lie with the interpreter, but what evidence-based reasoning can the Members currently rely on to support their decision to ask specific questions? And can Members reliably claim to have given the applicant every reasonable opportunity to provide their version of events, to recall every possible detail, not just in response to a specific piece of evidence but throughout the interview? This problem is often faced by police investigators, and in England and Wales, where police are trained to interview suspects and witnesses according to evidence-based methods, police have a reliable defence for their choice of questions. By using a method of interviewing that focuses on maximising recall and details, suspects and witnesses are given the best possible chance to remember what happened, and to provide those details in their own words. A police investigator, using this method of interviewing, can confidently defend the resulting evidence as the most detailed and reliable account that the interviewee was willing and able to provide.

**Investigative Interviewing Framework**

The two problems described above have in common the requirement to maximise the potential for the applicant to provide more details. This suggests the need for an interviewing or questioning method that privileges expansive responses from the interviewee (the applicant). We propose that a method that draws on the principles of cognitive interviewing (CI) is most appropriate because CI is evidence-based, and it has, as its most fundamental feature, the elicitation of a free narrative from the interviewee (the applicant). However, we are not necessarily advocating for a wholesale adoption of the CI method as it is currently taught to police, given the inherent difference in the inquiries of a police interview (typically about a specific, recent event) and the inquiries of the RRT (involving a series of events or circumstances over a long period, often occurring many years in the past). Nonetheless, the principles of ethical investigative interviewing appear relevant to the RRT context, and therefore this article will explore the extent to which RRT practices are consistent with, or challenge, best practice ethical interviewing standards.

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19 Migration Act 1958 (Cth) s 424A.


21 We use both the terms “interviewing” and “questioning” to refer to the process of eliciting information from applicants during a hearing. “Interviewing” is the term used most commonly in the literature in investigative interviewing to refer to the elicitation of information from detainees or witnesses, but we recognise that the process undertaken during a tribunal hearing, or indeed any court hearing, is more commonly described as “questioning” than “interviewing”.

<DIV>DATA COLLECTION AND ANALYTICAL METHOD</DIV>

The data for this study are drawn from several sources. Firstly, we have accessed the relevant legislation and guidelines that pertain to questioning techniques and the conduct of hearings in the MRT and RRT. Much of this has already been addressed in the previous section, and will be further discussed in the findings and discussion sections below. Secondly, our research is informed by professional practice, as both authors have been engaged as consultants to the MRT/RRT by providing tailored professional development in questioning and interviewing techniques. In preparing the materials for these sessions, the authors conducted interviews with Members and were granted permission to observe both MRT and RRT hearings. These observations are not included here as primary data because they were not obtained for the purposes of research. However, the authors’ knowledge and professional experience in this field is used broadly to inform the analysis of available data. Thirdly, the primary data for this study consists of observations of five MRT hearings yielding a total of around 12 hours of data. As mentioned earlier, our observational data set is necessarily limited to the public hearings in the MRT. While we recognise that in certain respects, the MRT hearings are vastly different to the RRT, we believe that the following points allow the generalisation of observational data to the RRT: firstly, the specific features of language and questioning that we are examining are human behaviours that are common to any interaction or memory task; secondly, the RRT and the MRT draw on a common pool of Members whose interviewing techniques are all based on the same training, guidelines and professional development workshops; thirdly, where there are significant differences in the procedures of each tribunal, these are dealt with in the analysis, and; fourthly, in some cases, applicants to the RRT have previously appeared before the MRT, so processes in that earlier tribunal will influence their behavior in the RRT. This is a strong argument for consistency in approach across both tribunals.

Throughout the analysis in this study, our underlying concern is the prioritisation of the free narrative response from the applicant, the value of which has been described above. The analysis is informed by theories of pragmatics, which is a form of linguistics dealing with the use of language in a social context. Within the field of pragmatics, this article primarily draws on concepts from conversation analysis. The necessary aspects of the theoretical frameworks will be explained as they become relevant to the analysis, since the focus of this article is judicial administrative practice and not linguistic theory.

<DIV>ANALYSIS</DIV>

<subdiv>Engage and Explain</subdiv>

As in any human interaction, the MRT/RRT hearing commences with an attempt by the participants to engage with each other through social interaction and establish or confirm a relationship appropriate to the circumstances. Yet unlike most human interactions, the institutional requirements of the MRT/RRT hearing provide a rigid structure within which this attempt takes place. The hearing is led by the Member and, as in other institutional interview settings, the Member has privileged access to the initiation of topics and turns at talk. Constraints of professionalism, ethics and legal requirements produce a highly stylised interaction, yet Members invariably attempt to establish some level of social connection with the applicant and other attendees at the hearing. At the beginning of the hearing all participants are introduced and seating arrangements are negotiated. There can be interactions relating to children present and other verbal interplay that is not strictly institutional and contributes to the creation of social identity for the participants. This process is most commonly referred to in the literature on interviewing as building rapport and is important because rapport is a significant factor in eliciting more reliable accounts. Building rapport has been found to have a positive influence on the interviewee’s capacity to recall details. On the available evidence, it is not particularly problematic in MRT hearings, at least.

Our observations of public MRT hearings suggest that Members have a high degree of discretion in deciding the level of formality in a hearing. For instance, they appeared comfortable in discussing inconsequential or somewhat personal matters to help the applicant feel at ease and to help establish the speaking pattern with the interpreter and begin to build rapport with the applicant. Where there are two or more applicants involved in a case, Members might choose to question them together or separately depending on their priorities in the hearing. Applicants might be questioned separately as a way of testing their stories for consistency, for instance. Although this is interesting to the extent that it demonstrates an evidence-based approach to credibility assessment, it is only relevant here to the extent that it indicates that Members are able to adjust their questioning and approach in order to accommodate the circumstances of the case. Notably, this discretionary power might also be used to incorporate a suitable rapport-building phase into the hearing without requiring any changes to the regulatory framework or legislation.

Given that the same pool of Members conduct RRT hearings, we can assume that their attempts to build rapport are similarly appropriate and professional in that context, although the greater anxiety typically experienced by RRT applicants no doubt makes the process more strained and less successful. Rapport building is important to eliciting reliable and detailed accounts, which is why we make a point of discussing it here, however it is the feature of the introductory part of the hearing that we are more concerned with in this analysis.

The “preamble” to the hearing is a process of explanation to the applicant and any other participants to explain how the hearing will proceed and the roles to be played by those present. This is partially scripted in order to comply with relevant sections of the relevant Act, but there are specific features of an MRT/RRT hearing explanation phase that are open to the Member’s interpretation, and can influence the subsequent interaction. Our observations found that: firstly, there was variation in the way that Members explained to applicants how much they already knew about the case material, and; secondly, it was not common for Members to explain the questioning format to be used (as distinct from explanations pertaining to the role of and interaction with the interpreter, which was always made clear).

In relation to the first point, Members sometimes referred to a large quantity of information at their disposal, some indicating a very tall stack of files on the bench, but were unclear about whether they had a detailed knowledge of the contents, or merely a familiarity with the key points covered therein. This simple and very understandable gesture can have serious ramifications for the applicant. Being unsure of how much information is known to the Member already, but being assured that something is known – perhaps everything in the case files – applicants will find it almost impossible to know how much detail to provide in their responses to questions.

Pragmatics

This can be explained by reference to the field of linguistic study known as pragmatics. Pragmatics describes the ways in which speakers use language in real life to convey a meaning to others. The underlying premise of pragmatics is that people do not speak literally, and that much of the meaning speakers are trying to convey is implied meaning. As a result, when we are listening to a speaker, we must make certain assumptions about how conversations work. Pragmatics attempts to describe and codify these unwritten assumptions, or shared rules of communication, rules that we rely on in order to understand each other. Most of these rules are so taken for granted that they are invisible to speakers. For instance, we assume that people will always tell us as much as we need to know about a given topic; no more, no less. If a colleague tells us that she has two sisters, we assume that she means she has only two sisters, not three or four or any number that includes two. If a friend describes in detail the plot of a movie that we saw together, we assume that he has forgotten that we saw the movie together, because its plot is shared knowledge and therefore describing it in detail is superfluous to the needs of the conversation.

These rules might seem trivial, but they are central to communication and they determine not only what we say ourselves in any interaction, but how we interpret what others say. Thus when we are presented with a very lengthy explanation by a speaker, much of which is shared information, we will seek some justification for this flouting of conversational norms. Perhaps the speaker is speaking for the benefit of some other party, as in a radio interview, or perhaps they have incomplete knowledge of
the rules of conversation, for example, children or those with a cognitive impairment. Conversely, if we find ourselves providing a detailed description of an event and we begin to suspect that we are retelling a known story, we will quickly seek clarification (“have I told you this before?”), or provide an explanation for this odd behaviour (“sorry, I know you’ve heard this before, but Jenny hasn’t heard it”).

In the instance of an applicant being told that a potentially large and comprehensive amount of information is already known to the Member about the case, these rules have clear implications for the features of the MRT/RRT hearing preamble described above. This means that as the hearing progresses and the Member asks various questions about the case, it is very difficult for the applicant to assess what the Member already knows. When the applicant is unclear about what the Member knows, it then becomes problematic for them to try to frame their response as “new” information.

<group>Report Everything
The power of pragmatic restrictions regarding the way speakers interact should not be underestimated in this circumstance: applicants are vulnerable, lacking authority in the interaction, often speaking through an interpreter and desperately concerned to make a good impression on the Member. It is partly for this reason that the guidelines for best practice interviewing, which is based on principles of cognitive psychology, state that interviewers should clearly state their expectations about the interaction. In other words, the Member would be best to state to the applicant the “rules of engagement”.

More specifically, one of the four techniques of the original CI is to instruct the interviewee to “report everything”. Although this technique was based on research into memory and recall and not linguistics or pragmatics, it recognises the power of pragmatic constraints over what speakers will or will not say during an interview. Geiselman and Fisher discovered that interviewees provide more detailed responses when they are explicitly instructed by the interviewer to “tell me everything, even the little details that you think are not important; remember, I was not there and I don’t know what happened so just tell me everything in your own words, when you’re ready.” This instruction is effective because it helps to overcome the social inhibition that is set in place by the pragmatic injunction to avoid telling a listener something they already know.

The practice of the Member indicating to the applicant that a non-specified but potentially large amount of information is already known about the case is directly contrary to this technique of CI and the linguistic and psychological principles underlying it. As a result, applicants are likely to provide less detail in their responses than they might otherwise, or to provide circumlocutory answers as they seek to ascertain the boundaries of the Member’s knowledge. The CI technique known as “report everything” would seem to have an obvious application in this circumstance, and might well go some way to avoiding the difficult questioning sequences that were observed in some MRT hearings, where the Member and the applicant spent a considerable number of exchanges circling around a topic when they were apparently unable to approach it directly. We will continue the discussion of question types in the section, “Data collection and analytical method” in this article, where we will consider the issue of directness and specificity in requests for information.

The second point raised above was the general lack of explanation to the applicant about the format of the questioning. Although Members were very clear about the purpose of the hearing, and the legal obligations of both parties, and were also very competent in facilitating communication through the interpreter, only one of the Members included an explanation to the applicant about their expectation regarding the interaction itself. While the observations made by the researchers were not a valid sample such that a generalisation is possible, later examination of training materials and guidelines confirmed that explaining the expectations of the interview to the applicant is not typically given specific consideration.

The training guidelines for best-practice investigative interviewing are again useful here to provide some indication of how this might be done better in MRT/RRT hearings. In addition to the “report everything” instruction, best-practice interviewing encourages interviewers to be very clear with interviewees about the expectation to provide detailed responses, to say when they do not know the

26 Bull and Milne, n 4.
27 Fisher and Geiselman, n 21.
answer, to provide a partial answer if possible, and to ask for any clarification of a question. Especially important in the MRT/RRT context of multi-lingual hearings, interviewees are also encouraged to continue speaking after the interpreter has finished rendering their speech if they have more to say.

Finally, the best-practice interviewing guidelines used in investigative interviewing indicates that it is helpful to explain to interviewees that remembering events in detail is hard work. Interviewees need to be told that they might find it difficult to remember, but to persevere and expect to be asked about the same things more than once as the interviewer tries to help them remember more details. Repeating questions is an indicator of distrust in ordinary conversation, so it is particularly important for Members to explain to vulnerable applicants that they are not repeating a question because they did not believe the applicant the first time. Rather, repeated questions need to be framed as attempts to elicit more details.

This brings us to the important consideration of the types of questions used in hearings and how these compare with the findings published in investigative interviewing literature about question types. **<subgroup>Question Types**

Following the preamble by the Member, which can take a variety of forms but always included a clear indication of the matters under consideration, the Member led the main evidential phase of the hearing. Our observational research in the MRT indicates that the questioning is typically designed to elicit from the applicant information that allows the Member to test the evidence they have collected and collated in the case file. The questioning is directed towards specific topic areas and people, to places or events of interest. Almost invariably, Members led this phase of the hearing with direct, closed questions in the form of yes/no requests for confirmation or wh-questions (who, what, when, where, why). These were usually “form-filling” questions about names, relationships, ages, dates of marriage and so on. In one case however, the Member led with an open invitation to provide a narrative (“can you tell me how you came to Australia?”) and used prompts such as “go on”, to encourage the applicants to provide further details after an initially short response. This was a successful strategy and the applicants (a husband and wife) clearly felt comfortable in proceeding to tell their story to the Member using considerable detail.

In other cases, Members provided lengthy and detailed descriptions of an event, location or person before asking a specific question. Some also tended to follow up an initial response from the applicant with further information from the case file and then another specific question. In the course of a hearing, Members tended to fluctuate in their use of open-ended questions, which allowed applicants to become more or less fluent and detailed in their responses accordingly. Notably, it is possible that as applicants became more confident about what the Member did or did not know, they were able to assess more precisely the need for detail on a given topic (see the section, “Data collection and analytical method” above in this article).

On balance, there was little consistency in the questioning used by Members. While every Member observed was competent and thoughtful in their approach to the hearing, and very well-prepared with a set of topics, supporting evidence and case notes, there was no discernible strategy being deployed across the whole of the hearing, such as a deliberate shift from open to closed questions, or the use of specific questions or other speech acts to achieve the goals of the hearing. This is consistent with the findings of similar research into RRT hearings in Sydney. The study by Luker included seven Members, and reports that Members ask for a free narrative “at some stage in the hearing”. Similar to the observations discussed above, this suggests an unstructured approach to the questioning strategy. However, neither Luker’s study nor the present study used a representative sample, and so conclusions must be tentative.

Considering the centrality of narrative described earlier (see the section “Investigative interviewing framework” above in this article), the approach to questioning observed in these hearings is clearly contrary to the guidelines for best-practice interviewing, such as the enhanced cognitive interview or

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28 Luker, n 15, 527.
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the whole story method. All of the existing protocols for investigative interviewing (as opposed to coercive or confession-focused interrogation) advise that the interviewer must commence questioning with open-ended questions that provide maximum opportunities for the interviewee to provide a long, detailed, free narrative response. This is usually exemplified by the request types referred to by the mnemonic TED: tell, explain, describe. These TED requests are designed to elicit a response whose content or length is not dictated by the wording of the question, so that the interviewee can choose how best to respond to the request. Once the interviewee has shared an initial free narrative, the interviewer might then move onto more directed questioning. However, even then the questions should remain open-ended in form, but more specific in topic. For instance, interviewers are advised to pick a topic from the interviewee’s narrative and make that the focus of the subsequent TED request (“you mentioned a car – tell me more about the car”). Finally, once all avenues for free-form responses have been exhausted, the interviewee should move onto fact-checking who-questions and yes/no confirmations. The systematic approach described above contrasts with the unstructured approach to questioning identified in our observations, as well as the approach reported in the study by Luker, where Members described eliciting free narratives at what appeared to be random points in the hearing.

Challenges and Limitations for the RRT

Given the circumstances of the MRT and RRT hearings, it is not hard to see why the police interview questioning protocol might be difficult for Members to adopt. When a case comes before the MRT or the RRT, it does not relate to a specific incident like a criminal case does. The focus of an MRT or RRT hearing is perhaps better characterised as a kind of curriculum vitae. The hearing requires Members to examine the evidence supporting events or circumstances drawn from the applicant’s life story. These can be linked but might not be; they can be close or distant in time; they can involve external events, or cultural knowledge, or traditional ceremonies. In short, Members must obtain information from applicants across a vast array of topics, topics of which do not constitute a single narrative.

Nonetheless the need for reliable and detailed responses is still as critical here as it is in other investigative contexts. The psychology literature on suggestibility makes it very clear that human memory and recall are highly vulnerable to contamination through questioning. Questions that suggest a response, or are otherwise obviously leading questions, are likely to be avoided by Members. However many Members might not be aware that they are potentially diminishing the reliability of the applicant’s memory by requiring that a story be told chronologically; or that by stopping to clarify items in the applicant’s semantic memory (a date or place name) while the applicant is relating information from their episodic or autobiographical memory, this can also diminish the reliability of the applicant’s memory. Training materials provided to police in England and Wales instruct interviewers that the more a question specifies the type or content of an answer, the less reliable that answer becomes. So a very non-specific statement or TED request for information like, “tell me about coming to Australia”, is likely to produce more reliable information than a specific question such as, “who did you know when you arrived in Australia?” This research underlies the interviewing protocols discussed throughout this article. In the conclusion to this article we will discuss the potential for adapting the police investigative interview protocol for use by Members during hearings.

Discussion and Conclusion

Implications of the Findings for Interviewing Practices in the RRT

In part two of this article, we outlined the contextual factors that apply to interviewing in the RRT. To reiterate, a lack of physical evidence or reliable information from the country of origin makes it very difficult for the RRT to assess the applicant’s claim against provable facts. Instead, Members are often

30 Luker, n 15.
required to judge the validity of a claim by assessing the credibility of the applicant and the story that they present. In accordance with the research on deception and lie detection (see the section, “Assessing the credibility of the applicant” above in this article), Members are advised against using behavioural indicators of deception or the applicant’s demeanour as a measure of credibility. However, this leaves Members with little guidance about the interviewing practices likely to support valid credibility assessment and reliable responses from applicants.

Based on the available data, including prior studies of RRT hearings, this research finds that:
(1) Members do not presently use the opening phase of the interview to prepare the applicant for the hearing in such as way as to maximise recall and improve the quality of responses from applicants; and
(2) Members are not consistent in their use of questions to elicit information from applicants.

A comparison between current practices and guidelines used in the MRT/RRT and the training materials used in police investigative interviewing reveals a gap between these two approaches to interviewing. Whereas best-practice police interviewing protocols are based on research findings that are translated into skills and techniques for practitioners, the approach to questioning in the MRT/RRT is left largely to the discretion of the Member, and the outcome is therefore reliant on the skills, knowledge and experience the individual brings to the role.

Finally, the absence of an interviewing protocol in the MRT/RRT leaves Members no basis to claim that a line of questioning was appropriate, evidence-based or that it was in accordance with practice guidelines. This is particularly problematic in the case of an appeal, where the grounds of the appeal relate to the manner or approach of the Member in his or her questioning of the applicant during the tribunal hearing. In such cases, Members would be unable to support their decision to have questioned an applicant in a particular way because they had no evidence on which to base such decisions.

<subdiv>FUTURE DIRECTIONS FOR RESEARCH AND PRACTICE</subdiv>

There is no doubt that Members are diligent and capable professionals and highly competent in their roles to the extent that they are trained. But the lack of an empirically-tested model of questioning for tribunal Members means that there can be no certainty of the effectiveness of their various approaches to the task, and as a result, practice varies considerably, and in some cases is in conflict with research findings in psychology and linguistics.

This article concludes that an evidence-based approach to questioning in the RRT is required for a number of reasons: firstly, applicants have a right to a fair hearing and every effort needs to be made to protect that right; secondly, Members need to be given access to the most effective means of interviewing in order to assess the validity and reliability of applicants’ stories; and thirdly, Members need to be given practice guidelines that provide a firm basis for their decision to question an applicant in a given way, helping to support them in the case of an appeal.

As we have demonstrated in this article, there is a wealth of research findings to support specific interviewing techniques that will assist Members to assess the validity and reliability of applicants’ stories. A central element of these techniques is the elicitation of reliable and detailed narrative responses. These techniques can be adapted for use by Members through further empirical research and testing, and the results can be incorporated into the current training and guidelines.