Review of Peter Shea, *Psychiatry in Court*, Sydney: The Institute of Criminology, 1993. pp i-xvii, 1-156. $25.00.

This book, written by a psychiatrist, is aimed primarily at judges and lawyers. The text runs to a little over 110 pages, though this is supplemented by a short Foreword, an introduction, notes, an index and a bibliography.

My first thought, on sighting the slender monograph, was that it would be hard for it to deal fully with all the myriad complexities suggested by its long title (*"Psychiatry in Court: The Use(fulness) of Psychiatric Reports and Psychiatric Evidence in Court Proceedings"*) in such a short space. However, I was reassured by the Foreword, written by Dr Robert Hayes, President of the NSW Mental Health Review Tribunal, which described the book as "comprehensive", "[a] reference", "illuminating", "provocative" and "long overdue".

Dr Hayes' Foreword also makes the point that there is now a vast array of courts and tribunals where psychiatric reports and psychiatric evidence may be called upon. This includes the criminal courts, equal opportunity tribunals, workers' compensation boards and parole boards. Psychiatrists may also be called upon to give evidence in the civil courts (eg, where the capacity of a will maker is in issue, or where the Family Court has to decide questions of custody, wardship or whether to order the sterilisation of a mentally handicapped girl[1]).

After reading Dr Hayes' Foreword, it comes as something of a disappointment to see that the focus of the monograph itself is almost entirely on the work of the criminal courts. Indeed the civil courts and inferior tribunals referred to in the Foreword barely rate a mention in the ensuing text.[2] This may well reduce the value of the book to those lawyers and judges who specialise in non-criminal work. It also calls into question one of Dr Shea's main conclusions, namely that the use of psychiatric evidence in courts should be "somewhat curtailed" (p 139). Does this conclusion apply to courts and quasi-judicial bodies generally, or only to the *criminal* courts? The reader is left in doubt.

The central thesis

According to Dr Shea, the book's main concern is with "the use and usefulness of the language of psychiatry itself" (p xv). He argues that many of the terms and labels which psychiatrists use in court have no settled meaning and that judges and juries are insufficiently aware of this. For example, common disorders like schizophrenia, psychosis and psychopathy receive quite different definitions in the two leading diagnostic manuals (the DSM-III-R and ICD-10). This raises the question, which definition is the psychiatrist relying upon when he testifies in court that the offender is, say, a psychopath? Is he applying the DSM-III-R or the ICD-10 definition or (as seems most often to be the case) is he simply applying some idiosyncratic classification of his own?

Quite apart from problems of terminology, there are at least two other factors which combine to make psychiatric diagnoses less than helpful in many court cases.

First, it may be difficult for the psychiatrist to obtain an accurate case history of an offender, given that it may suit the offender's purpose to be uncooperative or to lie. Secondly, the psychiatrist may overlook the fact that his primary duty is to the court (ie, he must be impartial) and may see himself simply as part of the defence or prosecution team. When this occurs, Dr Shea points out, the reliability of the diagnosis is inevitably impaired.

Whilst this part of Dr Shea's book is clearly and forcefully argued, two points may be made about it. First, although the Foreword perhaps suggests that the book is breaking new ground ("provocative" "challenging", "long overdue" etc), many of the views expressed by Dr Shea are far from new. The fact is that the limitations of psychiatric language and psychiatric evidence are well known and have been repeatedly documented in both legal and medical textbooks over the years.[3]

Secondly, given that the book is lauded as "comprehensive" and bang up-to-date, it is surprising to find that there is no detailed discussion of the so-called post-traumatic stress disorder (PTSD) in the text, though there is a brief reference to it in the Foreword (p v). The nebulous definition of PTSD, and the problems it poses for expert psychiatric testimony, perfectly illustrate Dr Shea's theme. The High Court has recently had to grapple with the complexities of PTSD in the case of a brutal murder,[4] and the disorder has also reared its head in the civil courts.[5] In light of the topicality of the issue, and its growing importance for lawyers, it would surely have been appropriate to give PTSD a much fuller treatment in the text — perhaps even a chapter of its own.

Causation and reform

Whilst the first half of the book is devoted to a consideration of the meaning of psychiatric terms, the second half discusses (amongst other things) the question of causation. Dr Shea argues that the courts are too ready to extend leniency towards criminals who are suffering from mental illness, even in cases where there is no evidence to show that the crime and illness were connected. In Dr Shea's view, leniency should follow only where a causal nexus can be clearly established, though he recognises that there will be difficulty in practice in linking the two in many cases.

The final part of the book deals with the topic of "dangerousness" (Dr Shea making the point that psychiatric predictions of dangerousness are often unreliable) and then concludes by listing five recommendations for improving the use of psychiatric evidence and psychiatric reports in court. They are (pp 139–140):

- Increased use of court-appointed experts
- Reintroduction of special juries
- Employment of expert assessors
- Giving of group expert evidence
- Pre-trial exchange of forensic psychiatric reports.

One problem with this "wish list" of possible reforms, however, is that Dr Shea does not explain how it would resolve the multifarious problems of forensic psychiatric evidence which he raises in the text. What, for example, is meant by "expert assessors" and "group expert evidence" (recommendations 3 & 4) and how would they overcome the problems which the psychiatrist now faces when testifying in court? No answer is given in the book and the reader is left to look elsewhere for

enlightenment.[6]

On the other hand, Dr Shea has some sound practical advice for those psychiatrists who are required to appear in the witness box. They should confine themselves, so far as possible, to "(a) a statement about whether or not the signs or symptoms of mental disorder were present at the time the psychiatrist examined the person and, if so, their nature and severity, and (b) if required, a statement about treatment options and their relative effectiveness" (p 139). They should also avoid making predictions about dangerousness and should avoid the temptation to be drawn into the defence or prosecution team. The difficulty with this, as Dr Shea clearly acknowledges, is that the adversarial system may simply not allow the psychiatrist to adopt this restricted and impartial role.

Conclusion

Whilst *Psychiatry in Court* has some weaknesses, it also has many strengths. It is well written, has a clear, practical focus, and holds the reader's attention from beginning to end. Though, in the reviewer's opinion, it does not really break new ground, it does nevertheless provide a clear and succinct overview of many of the problems which psychiatric reports and psychiatric evidence present for the courts. To bring these problems to the attention of lawyers and lay people (which is the book's aim) is certainly a worthwhile goal.

Finally, it should be mentioned that the book includes copious footnotes and an extensive bibliography, both of which are helpful to the reader. One point of criticism, however, is that Dr Shea tends to refer predominantly to the work of fellow psychiatrists and physicians and to neglect the many contributions to the field of psychiatry and the law that have been made by lawyers and law reform bodies in this country and abroad. To take one example: the WA Law Reform Commission has recently recommended the compulsory exchange of psychiatric reports before trial, but no mention is made of this in Dr Shea's account, notwithstanding that it is in line with recommendation 5 of his "wish list".[7] Since, according to the Foreword, the book is aimed primarily at judges and lawyers, it would surely have been appropriate to include references to the relevant legal literature as well as to the works of psychiatrists and others. This is a point which should be remedied if the book runs to a second edition.

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1. On the use of psychiatric evidence in sterilisation cases see: *Re Jane* (1988) 94 FLR 1; *Re B (a Minor)* [1988] AC 199; *Re Marion* [1992] FLC 79 165, 177, 181, 185, 208–209, 218–219.
2. But see pp 81–82 & 84, where civil litigation is touched on. It should be noted that some of the criticisms which Dr Shea makes of psychiatric evidence would apply equally to the use of that evidence in both civil and criminal proceedings: id p 84.
3. See eg R Bluglass & P Bowden (eds) *Principles & Practice of Forensic Psychiatry* (Edinburgh: Churchill Livingstone, 1990); I Freckelton & H Selby (eds) *Expert Evidence* (Sydney: Law Book Co, 1992) ¶¶ 50.10–53.450. Dr Shea points out that disputes regarding the usefulness of forensic psychiatric evidence have a long history, going back at least to 1874 (p xiv).
4. *Falconer* (1991) 171 CLR 30; cf *Radford* (1985) 42 SASR 274 (Sup Ct of SA); *Rabey*

[1980] 2 SCR 513 (Sup Ct of Canada). Dissociation and depersonalisation, which overlap with PTSD, are mentioned by Dr Shea (pp 92–93); but none of the foregoing cases on PTSD or "psychological blow" are referred to in the book.

5. See N J Mullany & P R Handford *Tort Liability for Psychiatric Damage* (Sydney: Law Book Co, 1993) 33–42; and the chapter by G Mendelson in Freckelton & Selby supra n 3, ¶¶ 51.720–51.820.
6. Dr Shea refers readers principally to Bluglass & Bowden supra n 3, 166, where a similar "wish list" appears. However, that work, like Dr Shea's, does not explain how implementation of the "wish list" would ameliorate present problems.
7. See WA Law Reform Commission *Report on the Criminal Process and Persons Suffering from Mental Disorder* (Perth, 1991), 104–107. Another example: Dr Shea calls for reform of the diminished responsiblity defence (p 139) but does not cite the recent reports of the WA and Victorian Law Reform Commissions which have come to different conclusions regarding the desirability of introducing a defence of diminished responsibility in those States.

Review of M A Stephenson & Suri Ratnapala (eds), *Mabo: A Judicial Revolution*, St Lucia: University of Queensland Press, 1993. pp 1-225. $29.95.

One of the best features of this volume is the foreword and one of the worst is the title. The volume consists of a collection of essays prepared, in the main, by members of the Law School of the University of Queensland. The essays seek to examine aspects of the High Court decision in *Mabo v State of Queensland (No 2)* (1992) 66 ALJR 408, which declared the concept of native title to be part of the common law of Australia. The title chosen for the volume is "Mabo: A Judicial Revolution". The title suggests that the decision was a dramatic change in the common law. Such was not the case. Prior to *Mabo* the common law of Australia was unsettled. And any examination of the only prior common law native title decision, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 14 and of the common law jurisprudence from everywhere else in the world, would have suggested the near inevitability of the High Court decision. The decision was in accord with established common law precedents, yet the expression "Judicial Revolution" suggests a departure from traditional common law reasoning and opens the Court to public attack.

The High Court is not immune from criticism in contributing to the impression of dramatic change. The emphasis upon the "rejection" of the doctrine of terra nullius certainly suggests change. The only problem is that the Court did not reject the doctrine of terra nullius — and, in any event, since when was terra nullius a doctrine of the common law? Former Chief Justice, Sir Harry Gibbs, rightly points out in the foreword that terra nullius was not a doctrine of the common law. He goes on to observe that "public understanding is not assisted when the principles are described