

‘Publicity v Privacy: finding the balance’

When and how to publish reports of mental health homicide independent investigations

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In 1994 the Department of Health published its guidance on the discharge of mentally disordered people and their continuing care in the community (HSG (94) 27) which established, for the first time, that when a mental health service user kills someone “*it will always be necessary to hold an Inquiry which is independent of the providers involved*”. The independent investigation (as these inquiries are now called) would take place after the completion of any legal proceedings and its purpose was stated to be: “*To learn lessons for the future*”. The independent investigation would be commissioned by the responsible strategic health authority, which would also decide on whether to publish it and, if so, in what form.

The guidance says “*Although it will not always be desirable for the final report to be made public, an undertaking should be given at the start of the Inquiry that its main findings will be made available to interested parties*”.

The guidance was updated in 2005, saying that independent investigations “*should facilitate openness, learning lessons and creating change*”, and, when dealing with the publication and distribution of the report:

“The SHA and, where appropriate, other organisations should devise a clear communication and media-handling plan for the investigation report’s findings and the actions to be taken in response to any recommendations made. When and how the findings are published should be clearly communicated to all stakeholders, including victim/s, perpetrator, families, carers and staff involved”.

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Most recently, in 2008, the National Patient Safety Agency, in Appendix 1 to its Good Practice Guidance on "Independent investigation of serious patient safety incidents in mental health services" said:

"As a general rule, the greater the degree of legitimate public interest in the outcome of the investigation, the stronger the argument that public accountability will require that professional staff be named in the report, unless there are particular factors such as police concerns about safety"

Openness and creating change, made explicit objectives in 2005, must have been implicit in the 1994 aim of learning lessons; after all, how can lessons be learnt without openness, and what is the point of learning lessons unless it leads to change? We know that there was much debate in the Department of Health about the continued value of these expensive investigations: some, such as the Royal College of Psychiatrists argued that they were not helpful, whereas others, such as the Zito Trust, strongly supported their continuation. The Department was concerned that they did not help learning as much as had been hoped, and we believe that the 2005 amendments were intended to give the guidance sharper focus on the manner in which investigations should be carried out and the use to which they should be put.

The arrival, between 1994 and 2005, of the *Data Protection Act 1998*, the *Human Rights Act 1998* and the *Freedom of Information Act 2000* (FoIA) may also have influenced the decision to give further guidance in this area.

However, despite the attempts at clarification, many organisations still do not accept that the need for openness means that reports of independent investigations should usually be published in full.

Problems have arisen in three main areas: where a report contains confidential personal information, such as in health and social services records; where professionals are seriously criticised in a high-profile case; and where others mentioned in the report may be at risk.

The purpose of this article is to explain the legal principles underlying the question of what and whether to publish, and to offer to commissioners suggestions on how to make decisions in a way that takes proper account of the competing interests of all concerned; victims, perpetrators, families, professionals, and the public (who, it must be remembered, pay those being investigated as well as those doing the investigation). The legal principles to be balanced in each case are the same, but the balance will differ according to the circumstances of the person or group being considered: the names and personal information of those who are more peripheral to the investigation, such as the relatives of victims, are likely to attract a greater right to privacy than the names and personal information of professionals whose activities are particularly under scrutiny.

Guiding principles

We start from the position that full publication is the expected outcome: commissioners of an independent investigation should make their decisions about the report, including what and whether to publish, in accordance with the agreed aims of the investigation. The latest guidance quoted above has created a presumption in favour of publishing the whole report, without anonymity for professionals.

Good grounds for rebutting the presumption would include:

- Confidentiality: that the report contains confidential information about individuals who have a legitimate expectation that their privacy would be respected. An example of this would be where the history of the contact between service user and service providers, which needs to be set out to provide context, is entangled with the contact that the service user's immediate family had with those services, and the family did not consent to the disclosure of their confidential information.

For instance, the authors are aware of a case where both the victim and perpetrator were mental health service-users, with the victim's vulnerability arising from the abuse that she had suffered within her family. It was relevant to speak of the abuse, but it was not part of the investigation's role to lay out the family dynamics in any detail, nor to encroach on the family's right of privacy, so the source of the abuse was not referred to in the report.

- Risk of harm: that publication of all or parts of the report would put certain people at risk of physical or mental harm. We are aware of a case where a perpetrator who had killed a close relative made threats against members of his family if they gave evidence to the subsequent investigation. Although the perpetrator was detained, the threats were taken seriously, and the strategic health authority decided to publish a redacted version of the report, so that the perpetrator would not realise that the threatened family members had given evidence to the investigation. There are also cases where professionals may be assessed as being at risk, as happened in the Stone investigation, discussed in more detail below.
- Discouraging co-operation; that publication of all or parts of the report would militate against the aims of learning lessons and creating change. There is a school of thought that professionals may be unwilling to co-operate with independent investigations if they anticipate that they will be publicly criticised, as they will be afraid of drawing down on their own heads the public vitriol and abuse that has been heaped on other individuals in these circumstances. The Department of Health and some strategic health authorities are also concerned that the learning/no blame culture they are trying to foster will be put at risk if criticised individuals are identified by name. We think these concerns are overrated – even individuals who must realise that they can expect to be criticised are remarkably open and frank in describing and discussing their activities, and most people who are invited to give evidence to inquiries do so without hesitation. Occasionally, potential witnesses are reluctant, but many of them decide in the end that they wish to tell their story. Few people fail to attend, or having attended, fail to speak openly.

In considering whether the presumption of full publication has been rebutted, the principles of Articles 8 and 10 of the *European Convention of Human Rights* (ECHR) will apply, as well as relevant domestic law including case law, the *Data Protection Act 1998* (DPA), and the *Freedom of Information Act 2000* (FoIA). Domestic law has to be interpreted in accordance with the ECHR, so for simplicity's sake we will focus on the ECHR.

Article 8:

- (1). *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- (2). *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

Article 10:

- (1) *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

- (2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

These articles create opposing rights, one to privacy (to withhold information from publication) and one to know (to receive and impart information). However there is no paradox here, as both are qualified by exceptions that, in certain circumstances, meet in the middle. So your right to privacy can be overridden by our right to know, and vice versa.

The exceptions apply only if they are 'necessary': in ECHR terms this means that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued. Deciding in any particular case whether the right to privacy trumps the right to know involves a balancing exercise in which all relevant information has to be identified and then given its correct weight so that the correct result will be achieved. The decision-making body must not only take into account all relevant matters, but also must not be influenced by irrelevant matters and must not fetter any discretion it may have by making decisions in advance with, or little regard for, the facts of the particular case.

For instance, the authors have frequently heard suggestions that the risk of media intrusion into the lives of named staff is automatically a sufficient justification for anonymisation. Whether or not anonymisation on this ground alone would be seen as a proportionate response to a pressing social need (we think not) the creation of a policy not to disclose amounts to the decision-maker fettering its discretion, thus rendering the decision legally flawed and open to challenge. Of course if media intrusion were (probably) likely to lead to risk of physical harm it would be another story, but media intrusion on its own, however unpleasant, is part and parcel of an open society and should not attract the protection of Article 10(2).

Article 8 will carry great weight when the issue relates to the withholding of sensitive confidential information, such as medical records, whereas Article 10 will probably have a head start where the issue relates to non-confidential information, such as the names of criticised professionals. However it will always be necessary to look at both articles.

The most pertinent case to offer guidance on Article 8 and confidentiality is that of Michael Stone.

In *Stone v South East Coast Strategic Health Authority & Ors* [2006] EWHC 1668 (*Admin*) (12 July 2006) Michael Stone, convicted of the murders of Lin and Megan Russell 10 years earlier, went to court to try and prevent the disclosure of his confidential records in the report of the independent investigation set up after his conviction³. The judgment, which went against him, focused on Article 8 of the ECHR, and in structuring the necessary balancing exercise between Mr Stone's right to have the confidentiality of his health and social work records respected and the public's right to have a full understanding of his involvement with services, Mr Justice Davis, said:

"... an ultimate balance has to be struck not only by weighing the considerations for and against a restriction on the right to privacy by reference to Article 8 itself but also by weighing the considerations for and against a restriction on publication by reference to Article 10;" (para 34)

³ Robert Francis QC, who chaired the inquiry, contributed 'The Michael Stone Inquiry- A Reflection' in the *Journal of Mental Health Law*, May 2007 @ pp 41-49. The 'Report of the independent inquiry into the care and treatment of Michael Stone' was commissioned by West Kent Health Authority, Kent County Council Social Services, and Kent Probation Service. It was published in September 2006.

and that the test for publication was high:

“... The protection of personal data, and the need for appropriate safeguards, is of fundamental importance to a person’s enjoyment of the right to respect for private and family life provided by Article 8: and that is particularly so in the case of medical data” (para 31),

and therefore:

“... a compelling case needs to exist to justify publication of this report in its present form” (para 32).

The judge gave great weight to the fact that Mr Stone was entitled to claim a right to privacy, particularly in relation to medical information, which is seen as one of the fundamental privacies to be protected by Article 8. He also recognised that it was in the public interest:

“... first, that persons may talk freely with their doctors, probation officers and other such persons without being deterred by risk of subsequent disclosure (although it has to be said such a risk in any case exists under English common law rules relating to confidentiality, where disclosure is necessary in the public interest); second, that such persons may give access to such information for the purposes of an inquiry without being deterred from doing so through fear of such matters later being released into the public domain” (para 44).

However, on balance, he decided that the public interest in publication outweighed Mr Stone’s right to privacy. The reasons were:

- There was a true public interest in the public at large knowing of the actual care and treatment supplied, or not supplied, to Mr Stone and being able to reach an informed assessment of the failures identified and the recommendations made.
- Such objectives were not met simply by releasing a full version of the report to relevant health professionals.
- Where individuals and agencies were, or were not, to be criticised, the public was legitimately entitled to know the reasons.
- The information was being disclosed solely to provide an informed view as to what went wrong with a view to lessons being learned for the future, both for the assistance of other service-users and for the protection and reassurance of the public.
- Mr Stone’s right to privacy was reduced because the investigation, and therefore the need to seek privacy, arose from his own criminal acts.
- A great deal of detailed information about Mr Stone’s background, treatment and mental health was already in the public domain, as shown by numerous newspaper articles. This did not extinguish Mr Stone’s right to privacy, but did diminish any possible adverse effect of publication.
- The surviving victim, Josie Russell, and her father supported publication.

Having decided against Mr Stone on the balancing act required within Article 8, where the initial premise is in favour of privacy, it was not necessary to spend much time on Article 10, where the initial premise is in favour of publication, and the judge decided in a few words that the balancing provisions required within Article 10 could only support the view he came to on Article 8.

The decision was based on the facts of the case, and involved the records of a perpetrator, but the considerations set out in the judgment are of general application and should also guide decision-makers if someone other than a perpetrator, for instance a surviving victim, or a family member of either victim

or perpetrator, seeks to prevent publication of confidential records.

There are many cases dealing with Article 10 and restrictions on the right to know. We consider the case of *In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47*, to be particularly helpful in showing how the balancing exercise between Articles 10 and 8 should take place where anonymity is being sought: the issue was whether, in the interests of protecting a child whose mother was to be tried for the murder of his brother, the identity of his mother should be kept out of media reports of the trial. Articles 8 and 10 were engaged, and Lord Steyn, who gave the leading judgement, commented:

“The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.”

Lord Steyn also agreed with the first instance judge, who described his approach thus:

“...in carrying out the balance required by the ECHR, to begin by acknowledging the force of the argument under article 10 before considering whether the right of the child under article 8 was sufficient to outweigh it”.

In our experience, the careful, thorough and principled approach to decision-making described in these two judgements is the exception rather than the rule, particularly where anonymisation is sought: there is no consistent method of evaluating the need for anonymisation; decisions are made on widely different criteria, and decision-making processes range from robust to inadequate. Inconsistent decisions, decision-making processes and, indeed, legal advice, give an impression of arbitrariness which is undesirable in so important an area.

The decision-making process

The commissioners should prepare the ground by making it clear at the outset that it intends to publish in full unless the law requires otherwise.

Whether the law does require otherwise will depend on the limitation on publication that is being sought.

Withholding confidential information

The steps to be taken in reaching a decision on publication of confidential information should start from the position that those writing and commissioning the report must not publish any such information unless there is a strong public interest to do so. If they are satisfied that there is, they should:

- seek consent to publish;
- make every reasonable effort not to include information unnecessarily (for instance by précisising parts of the report if this would not damage its value);
- give the subject of the information an opportunity to make representations; and
- provide detailed justification for publishing the information, by reference to any representations made by the subject of the information and to the principles of Article 8 and, if necessary, Article 10.

Example

The judge was complimentary about the thorough and principled way the authors of the Stone report had gone about this exercise:

“The Panel had, in preparing its report, been well aware of issues of confidentiality and of the rights of Mr Stone under Article 8. Indeed, the Panel had been at pains to obtain Mr Stone’s written consent for the inquiry to have access to details about his treatment and care, which was given. (It was not, however, disputed at the trial before me that Mr Stone was subsequently free to refuse to give his consent to actual publication of the resulting report). It is notable that in a letter dated 9th July 2004 Mr Francis had explained that in preparing its report the Panel had considered whether the facts set out were (in the view of the Panel) necessary to be included in the public interest after taking account of Mr Stone’s rights in respect of his privacy and the confidentiality of his records. I unhesitatingly accept that as being the Panel’s approach. Specific examples are given of matters excluded from the final version of the report by the Panel as not satisfying this requirement”.

A version of the report with the confidential information removed was prepared, but was rejected by the commissioners. The judge accepted that they were right to do so because:

- The deletions of the details would have prevented the public from knowing precisely what facts had prompted the conclusions and comments of the Panel as set out in Chapter 8. The conclusions and comments were necessarily based on the preceding details.
- The actual details of what was in the medical and other records was crucial for assessing (and for forming an opinion on) what other professionals, dealing with Mr Stone, either at the time or subsequently, should have known or should have done – ie what did they know but not act upon, what did they not know but which they should have known, and what information and records were, or were not, passed on to other agencies?
- To the extent that individuals and procedures were criticised (or not criticised) in the report, the reader needed to know the details of what such individuals knew or could reasonably be expected to have known in order to assess such criticisms.

Consideration of the criteria in *Stone* will help decision-makers in future cases. Once the relevant elements (and only the relevant elements) have been identified and weighted, a decision can be made as to whether the right to know outweighs the right to privacy in the particular case.

Using these measures, set within the strong presumption in favour of respecting the confidentiality of health and social care records, it seems likely that a family member of a perpetrator or of a victim would be able to insist on their name being withheld and on the confidentiality of their records being respected. This issue arises only when the records of family members, particularly siblings, are inextricably entangled with those of the perpetrator or victim, and ingenuity may be necessary to protect the privacy of family members when their relationship with the perpetrator or victim is a matter of public knowledge.

Anonymisation

As mentioned previously, the commissioning strategic health authority is responsible for determining whether and how an investigation report is published. There is no doubt that reports can be anonymised; the National Patient Safety Agency guidance makes this clear, the Stone report and others have been anonymised without challenge, and the Information Commissioner, in a Decision Notice dated 2nd June 2008 concerning Hertfordshire Partnership NHS Trust (ref: FS50124800) has confirmed that, in

principle, names can be withheld even if an application is made under the FoIA for full publication.

Article 10(2) provides that publication can be restricted if full publication would put an individual or the public at risk of harm. The most likely scenario is where professionals in a high-profile case are strongly criticised and it is feared that they may become the targets of vigilantes. Article 10(2) is also relevant when the question is whether publication of the names of criticised professionals will damage the effectiveness of future investigations through reducing the willingness of professionals to speak freely about their involvement in the events under investigation. Here the test is whether publication should be withheld on the grounds of “*public safety, for the prevention of disorder or crime, or for the protection of health or morals*”, on the basis that if investigations become less effective as a result of professional reticence, the likelihood of lessons being learned and change occurring will be reduced, and violent crimes may take place that otherwise might not have. However solid evidence would be needed that this was a likely consequence of publication, and the evidence available so far is to the contrary.

Many of the same matters must be weighed in the balance as in decisions on whether or not to publish confidential information, but the emphasis is different where the information is not confidential. Many types of investigation take place in the public sector, and it is often clear from the outset that the information obtained from staff in these investigations will not be published. Therefore, to avoid the risk of misunderstanding, it is crucially important that people giving evidence to an independent homicide investigation are told in advance that what they say may be published in the final report, and that they may be identified as the source of that material unless there are legitimate public interest reasons why this should not be the case.

Once this has been done, the question of anonymisation can be dealt with, by following the procedure set out in *In re S (A Child)* (2004) (referred to earlier in this article). The commissioners should establish the justification for publication under Article 10, starting with the official guidance quoted above, and considering the various matters mentioned Mr Justice Davis in the *Stone* case. They should bear in mind that the greater the significance of the case, and the greater the public concern, the stronger the case for publication with names. This will be the case whether the case is of local or national importance, as the courts accept that people get their information from local media as much, or more, than from the national media.

They would then need to consider whether there was any justification for anonymity under Article 10(2): public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of the reputation or rights of others.

Concerns might be that:

- Staff may be at risk from a perpetrator.
- Staff may be less willing to co-operate with investigations if they know what they say may be published.
- If individual staff members are at fault this should be dealt with by their employing agency and they should not be pilloried in public.
- Individual staff members have no effective means after publication of defending themselves.
- Other reports do not name staff so this one should not.
- Where a report is critical of individuals, publication can only lead to the ‘name and shame’ culture which increasingly stigmatises public services and individuals and is inconsistent with a learning organisation.

- Naming individuals adds nothing to the report's value in identifying and commenting on issues of concern which the organisations involved should address.
- Naming clinical staff can adversely affect their relationships with other patients/service-users.

Some of these concerns will attract the protection of Article 10(2), and some will not. If the concern does not fall within one of the pressing social needs identified in Article 10(2) then there is no protection, and even if it does, it is also necessary to establish that anonymisation is proportionate to the legitimate aim being pursued.

Someone who had a well-founded belief that he or she would be harassed, victimised or attacked or made ill if details of his or her involvement were published, would certainly have a case that public safety, the prevention of crime, the protection of health and the protection of their rights and reputation would be engaged. Therefore if a professional seeks anonymity on any of these grounds, the employer would have to undertake a proper risk assessment, involving, if necessary, police and medical assessments. If it is thought that a realistic risk exists, the nature, seriousness, extent and duration of the risk should be quantified, so that proper weight can be given to this in the subsequent balancing exercise. It should be remembered that even if a risk of harm is identified, publication may still be justified if the risk is thought to be manageable and acceptable. Whatever the outcome, the employer would have a responsibility to seek to mitigate any risk to the employee.

It is also important to see whether the feared undesirable outcomes will occur whether or not professionals are named. For instance, the perpetrator will be entitled to copies of his medical and other records, and it would not be difficult for the names of criticised staff to be identified in this way. Neither the perpetrator nor his/her family have any duty of confidentiality towards the professionals, and if they believe that professionals are being unfairly protected from public criticism, they could easily rectify the situation.

Similarly, the involvement of individual members of staff is likely to be well known within the service, and criticism will be accurately attached to the right person, whether or not their name is published.

If the case is of sufficient public interest (and such cases are likely to throw up these issues) it is also likely that an application for full publication will be made under the FoIA. The process of applying is cheap and simple, and the Information Commissioner is bound to order publication unless one of the limited exceptions apply.

It seems likely that if anonymisation will not be effective in protecting people mentioned in the report, it will not be seen as a proportionate response to a pressing social need.

A number of the concerns mentioned are not generated by the anticipation of harm, but rather by the upset that criticism of named individuals will have on those criticised, on their colleagues, and on specialist mental health services generally. These concerns are sincerely held, but nonetheless they need to be robustly interrogated, and mere assertions that certain consequences will flow from publishing names should never be accepted without supporting evidence. The fact that individuals may feel vulnerable and frightened is not, in itself, a good reason for withholding their identities from a published report, although it would be an good reason to offer them support before, during, and after publication.

Example⁴

The commissioners of the Stone report provide an example of an excellent decision-making process. The justification for anonymisation was measured against agreed legal principles, and was required to be supported with robust evidence with commissioners instructing lawyers to guide them through the process

At a joint meeting in 2001 of the three agencies that commissioned the inquiry into the care and treatment of Michael Stone (West Kent Health Authority, Kent County Council and Kent Probation Service), concerns were expressed that given the horrific nature of the original crime and Mr Stone's continued denial of the offence, naming staff in the report might place them at risk. In recognition of the seriousness of this concern, the agencies sought the advice of Kent Police. A detective superintendent who was well acquainted with the case but who had not been part of the criminal investigation was nominated to conduct a formal risk assessment. The assessment was commissioned in April 2001. It found evidence to suggest that certain individuals would be at risk if named in the report. In July 2002 the assistant chief constable wrote to the commissioning agencies recommending that all names should be removed from the report before publication.

The commissioning agencies discussed the implications of the risk assessment with their lawyers and with the authors of the report. The chairman said that the panel's role was to conduct the inquiry and present their report to the commissioners and that it was for the commissioners to decide what form publication might take. He said the panel felt, however, that the report should be published in full.

The legal advice was that the commissioning agencies had a duty to satisfy themselves as to the strength of the evidence upon which the police risk assessment was based. Accordingly, in October 2002 representatives of the commissioning agencies met Kent Police to review the evidence. The meeting decided that certain members of staff were entitled to anonymity and the commissioners then considered the possible effect of granting anonymity only to them and not to the others directly involved in Mr Stone's care. They decided that, in the interests of all the staff directly involved with Mr Stone's care, all should be anonymised so that none stood out and none could be identified by a process of elimination. However the commissioners did not agree to anonymise the whole report, and published the names of managers in senior positions of responsibility.

In deciding partially to anonymise the report the commissioning agencies had to balance the public interest of protecting care staff and others against the public interest in open and transparent publication. During this process suggestions had been made that the risk of media intrusion against named and criticised staff justified anonymity, but leading counsel advising the commissioners indicated that he did not consider that this alone was a justification for anonymity.

Conclusion

The framework for decision-making in public services is long established and well-known to those who have to use it: the purposes of independent investigations are clearly articulated, and authoritative judicial guidance on the matters to be taken into consideration when balancing rights protected by Articles 8 and 10 is now readily available.

⁴ *The source of many of the statements of fact which are set out in the paragraphs which follow, is the 'Report of the independent inquiry into the care and treatment of Michael Stone' (September 2006). See n. 3 above.*

In the interests of the credibility of the public services concerned, decision-making must demonstrably be both consistent and transparent.

To build on existing good practice, the decision-making processes in the Stone case should be replicated, proportionately, in other independent homicide investigations involving a challenge to full publication. In most cases it will not be necessary to obtain external legal advice, but decisions should always be evidence-based, in accordance with the law, and made by the strategic health authority board or one of its delegated committees.

We hope that greater consistency in publication, coupled with the proposals for a structured independent post-review process to track the implementation of recommendations, (as proposed in *Learning Lessons: Using Inquiries for Change* (2009) by Gillian Downham and Richard Lingham⁵) will boost the value of homicide investigations to all stakeholders.

5 *Journal of Mental Health Law*, Spring 2009 pp 57–69.