

# "Names Can Never Hurt Me": Does Naming Suspects Help Children?

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The McClintock Lecture 2004, organised by SACRO and presented by Kathleen Marshall,  
Commissioner for Children and Young People in Scotland

## 5 Introduction

I would like to start by setting out the background to my selection of this topic and explaining the scope of what I am going to say. I will explain the catalyst for my thinking with reference to a specific example.

10 A few years ago, I addressed a church audience on the subject of "Facing Up to Child Abuse." I explored a number of different aspects of that issue, most of which are not relevant to my subject this evening. However, part of my text analysed some issues arising out of an article contributed to a Catholic periodical by a priest who had been accused of an incident of physical rather than sexual abuse, which was ultimately not prosecuted. He wrote of his experience and of the rumour mill that exaggerated the story into one of paedophilia, and the verbal abuse he received in the street as a  
15 result. He concluded:

"The imbalance of rights and power that now exists between children and adults who care for them is very dangerous ... Let the children have protection, but remember the innocent adults too. No one should have to go through the loss of character and confidence that I have suffered in these last few weeks. No one should be subjected to living in fear of reprisals by vigilantes simply because a child chooses to tell lies."  
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I took issue with a number of the comments made in the priest's article, so please do not assume that I support that perspective. What I want to pick up on are the issues of "rights and power" and the consequences that flow from them. In my lecture to the church group I said:

"The priest who wrote [this] ... thought it dangerous to give power to children. I have argued that they must have some power, for their own protection. The ability to make an accusation and have it taken seriously is a form of power."  
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I acknowledged that some children, like some adults, would use that power inappropriately. False accusations *do* happen, even if they are far from being the norm. I continued:

"The problem is that the public and media hysteria generated by child abuse, with the accompanying threat of vigilantism, seems to have made the power of accusation into a deadly weapon, and adults are very afraid of it. If a child does abuse that power, the consequences for the adult are grave indeed. But,"  
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I asked,

"who made the weapon deadly? Is it not we, the adults, who design the procedures, who identify the extremes of good and evil, who set up the legal processes, who buy the papers and watch the television programmes that sensationalise these matters, who organise vigilante groups and dragoon our children into them? Is it not we who have created the weapons that we most fear? It wasn't the children. Mostly, they just want to tell what happened, to be heard, and to be helped to get it stopped, or be helped to get over it. Children are not responsible for the overheated consequences of any allegations, true or false; we are."  
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We have made this situation and the children involved in it too hot to handle, just when caring handling, and affectionate and unthreatening embrace is what they most need. It's up to *us* to change the situation not them."



I have used that phrase, "Too hot to handle" in a number of presentations. What I mean by it is that the fear of false allegations is so widespread that it has made us afraid to interact with children; and they need interaction with us – they need relationships with us – they need recreational and sporting services provided by us - if they are to have a fulfilling childhood and adolescence, leading to a confident, mature and responsible adulthood.

I have tried in the past arguing logically that the proportion of allegations shown to be false and certainly malicious, is quite small. I have also pointed out that, for various reasons, including the nature of abuse, especially sexual abuse, and the rigour of our criminal justice system, few instances of alleged abuse are actually prosecuted. I have pointed out that suspension of a member of staff while allegations are being investigated carries no implication of guilt – but all to no avail. I would not be able to count the number of times I have spoken to groups of adults about child protection, only for them to turn quickly towards the need for adult protection. The fear of false allegations may be exaggerated, but the consequences are perceived as being so great that this outweighs any arguments based on frequency. The scale of the fear trumps the logic of the facts.

What I want to explore here is the extent to which the procedures supporting our concept of "open justice" feed that fear. They are not, of course, the only food. Rumour in a small community, the fact of suspension in a workplace, are also significant contributors, which are not easy to control. But our justice system is something that can be adjusted, and which should operate on the basis of fairness for all and the common good. So I am going to look at that aspect of the issue: about the extent to which our system of justice, which allows the naming of suspects and the open coverage of trials contributes to the fears that inhibit the protection and development of children and young people, and what, if anything, can be done to achieve a better result. In doing this, I hope to open a debate rather than reach firm conclusions. There are others who have studied the philosophy of justice more deeply than I; what I want to do is to inject another factor into the debate, which I believe to be of high importance – the welfare of our children and young people. Article 3 of the United Nations Convention on the Rights of the Child commits us to taking the best interests of children as a primary consideration in all matters that affect them. It specifically identifies "courts of law, administrative authorities or legislative bodies" as being amongst the bearers of this duty. It is therefore necessary to re-consider all of our procedures in the light of their impact, immediately or more remotely, upon the interests of our children.

## **What the System Allows**

My understanding of the law on naming suspects is as follows:

When an alleged crime is under investigation but no arrest has been made, there is no specific regulation of publication of the identity of suspects. Indeed, the media's help is sometimes engaged in helping the police with their enquiries. Nevertheless, journalists have been advised to think carefully before publicising details identifying a suspect in cases where identification itself may become a critical issue in the case. In these circumstances, a charge of contempt of court at common law (that is, traditional law, not set out in an Act of Parliament) may be a possibility if the media identification is regarded as having prejudiced the trial.

Once a suspect is arrested, specific rules about contempt of court come into play, forbidding publication of anything which creates a substantial risk of seriously prejudicing or impeding the course of justice. Thus details of the allegations and "trial by media" are forbidden at this stage.

When the trial begins, it is permitted to publish the identity of the accused (unless the accused is a child). As the trial progresses, any fair and accurate report of the proceedings can be published, even if it contains material that would otherwise be regarded as defamatory. [Thus, for example, during the trial in England of Neil and Christine Hamilton, the press reported widely the details of the very degrading abuse which they were said to have carried out, but were subsequently cleared of.] The thinking behind this is that justice should not only be done, but be seen to be done – a principle of "open justice." In pursuit of this principle, members of the public are, with a few qualifications, allowed to attend criminal trials. The freedom of the media to publish or broadcast details of the untested evidence is regarded as merely an extension of that public right, which is otherwise limited



by the size of the court room. The principle of open justice is widely prized, and for good reason. From the point of view of the accused, secret trials can open the door to oppression. From the point of view of the public, secret trials can undermine confidence in the administration of justice. We should not lightly discard or diminish a principle that has become entrenched as one supportive of human liberty and the common good; but neither should we fear to reassess it in the light of changing circumstances, if the individual and common good become significantly compromised by it.

As already indicated, there are some circumstances in which the identity of parties to various legal proceedings may be protected. Children (under 16) involved in criminal proceedings, whether as accused, victims or witnesses can have their identities protected by section 47 of the Criminal Procedure (Scotland) Act 1995, although there is some discretion to authorise publication. The identification of an adult accused may be forbidden where this would lead to identification of a child associated with the case. This is often the situation with cases of parental abuse of children. However, when an unassociated adult is accused of child abuse, for example a teacher, pastoral worker or professional carer, the identity of the child is withheld, but the name of the accused is made public.

Similarly, with rape cases involving adult victims, in order to encourage victims to come forward, the identity of the alleged victim is not made public, while the identity of the accused is. A difference between this and the anonymity afforded to children is that children's anonymity is protected by law, whilst that of adult victims of rape is protected by convention.

In the discussion that follows, you will note that the debates that I explore sometimes focus on anonymity for those suspected or accused of rape and sometimes relate to child abuse. I justify this on the basis that many of the principles involved are the same: the threat to "open justice"; the imbalance between the anonymity of the victims and the publicity given to the accused; and the proposition that the particularly heinous nature of the crime justifies special treatment. As a matter of fact, the debate within the Scottish Parliament that I will explore started off with a focus on rape but grew to embrace child abuse as well. Therefore, I make no apology for moving between the two debates where the principles appear to be similar. However, my conclusion will move back to my central concerns about children and young people, hopefully informed by the debates about the whole spectrum of "particularly heinous" crimes.

## **The Debate about Anonymity in Cases of Child Abuse and Rape**

In England, it was possible for some years to protect the identity of those accused of rape. The Sexual Offences (Amendment) Act 1976 made it an offence to identify an accused unless and until he was convicted. A number of consequences of this provision, identified as "absurd" by media commentators, resulted in that protection for the accused being taken away by the Criminal Justice Act 1988. For example, it was argued that it was absurd that an accused could be named in connection with an alleged murder, but that publicity had to cease when he was also charged with rape. It was also said that the police were hampered in circulating details of suspects whom they wished to interview. In Ireland, anonymity *is* extended to those accused of rape on the basis that it would be unfair not to do so when anonymity is extended to the complainer.<sup>1</sup>

In Scotland, the debate about anonymity for those suspected or accused of rape or child abuse is ongoing. The matter has been considered twice by the Petitions Committee of the Scottish Parliament, at the instigation of the UK Men's Movement. Unfortunately, the debate is peppered with hackle-raising comments, which, as you will hear, have affected the outcome. The first Petition, lodged in August 2000, headed, "A Petition For Measures to Protect Innocent Men Against False Rape Allegations", called for the Scottish Parliament to:

- (a) Protect innocent men against false rape allegations through anonymity when accused;
- (b) Introduce a new crime of False Rape Allegation;
- (c) Create a register of False Accusers; and

<sup>1</sup> Quoted by Gordon Jackson MSP in Justice Committee 1, 30/05/01.



- (d) Publish annually a neutral and objective study of all rape cases, noting the action taken in respect of false allegations.<sup>2</sup>

5 The second Petition, lodged in November, 2003 by the same Petitioner, called for the Scottish Parliament to introduce a range of measures related to the treatment by the justice system of those charged with rape or other sexual offences. It put forward proposals broadly similar to the first petition, including that of anonymity for persons charged with rape or other sexual offences.<sup>3</sup>

In between times, in 2002, the matter was raised by Phil Gallie MSP during the debates on the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

10 For reasons of clarity, I will explore the issues on a thematic basis rather than a chronological one. This means that I will be moving between the three discussions and, to an extent, conflating them.

In summary, the arguments for and against anonymity for suspects and/or accused in cases of rape and child abuse are as follows:

For anonymity:

- 15 1. It is a cardinal principle of our law that a person is **innocent until proven guilty**. The publicity accompanying the investigation and trial inappropriately names and shames a person before the case has been proven.
- 20 2. **Mud sticks**. Even if a person is ultimately found not guilty, suspicion may remain in the minds of the public on the grounds of "no smoke without fire." The fact that it is widely known that sexual crimes are difficult to prove because of their essentially private nature adds to this perception.
- 25 3. Rape and other **sexual crimes deserve special treatment** because, in the minds of the public, they are regarded as more heinous even than murder.
4. The **impact of the publicity on the innocent** suspect/ accused. The allegations that found these cases often relate to very degrading and abusive behaviour. The system justifiably protects alleged victims from further embarrassment or degradation by protecting their identity. It should do so also for the accused, who may be innocent. Cases have been cited of young men who have committed suicide after being found not guilty of such crimes.<sup>4</sup>
- 30 5. There is also an **impact on the family and associates of the accused**, which can be particularly hard for children. While the system tries to protect children associated with the case, the difficulties extend more widely than that. Any breakdowns in confidentiality can result in them being terrified by the mob rage, vigilantism and general shunning that can follow on from association with sexual crimes.
6. Sometimes, especially in small communities, extending anonymity to the suspect or accused is the only real way of **protecting the anonymity of the alleged victim**.

35 Against anonymity:

1. **Open justice**. It is a cardinal principle of our law that justice should not only be done, but be seen to be done.
2. Publicity **helps police enquiries**. It can help track a suspect and encourage other victims to come forward.

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<sup>2</sup> Petition Number 265 by Mr George McAulay on behalf of the UK Men's Movement.

<sup>3</sup> Petition Number 688 by Mr George McAulay on behalf of the UK Men's Movement.

<sup>4</sup> And, as I say this, I am also acutely aware of the cases of suicide by victims and, in particular, of 17-year-old Lindsay Armstrong two years ago. However, one tragic injustice does not justify another.

3. **Freedom of the press** would be unjustifiably compromised by extension of anonymity to the accused.
4. There is **no justification** for extending anonymity to the suspects/ accused in relation to rape and other sexual offences, including child abuse, and not to other serious crimes such as murder.
5. That being the case, conceding anonymity in cases of rape and child abuse would **open the floodgates** to anonymity for all offences.

While these considerations do, I believe, underlie the debates in the Scottish Parliament, that debate itself has often been conducted in quite emotive terms. This was partly due to the fact that anonymity was not the only issue at stake. The petitions called also for a more punitive approach towards those found to have made false allegations of rape. There was suspicion that the Petitioner was over-stating the extent of false allegations and implying that women were more likely to lie about rape than other complainers were about other crimes. The same suspicion surfaced in the debate on the Sexual Offences Bill, when Roseanna Cunningham announced that her party would not be voting in favour of Phil Gallie's amendment, partly because it had been introduced at such a late stage, but also:

"Not because Phil Gallie has no good, supporting arguments. ... I gently suggest to Phil Gallie, however, that the way in which he presented his argument did his cause no favours and probably made members shut their minds to what is a serious issue."

Response to some of the statements made by the Petitioner on behalf of the UK Men's Movement was far less gentle! When he appeared before the Public Petitions Committee, he criticised the:

"tenet of faith of Glasgow rape crisis centre ... that all men are potential rapists."

He described some cases of untrue allegations, including two that had resulted in the suicides of the suspects and pointed to:

"A persistent culture in society [that] insists that women should not be held to account."

Committee members appeared to be put off by their assessment of the Petitioner's motives; an aversion only compounded by his reference to:

"the feminist attempt to use rape as a tool to vilify all men,"

and his allegation about the "political correctness" of the prosecuting authorities who were said to pursue rape complaints "to the point of idiocy." The Petitioner pointed out that "the majority of the accused – though not all – are men", and expressed the view the "the situation is inspired by feminist venom."

The unhelpfulness of this approach and its tendency to contaminate a serious argument is evident in some of the comments made in support of, at least, exploring the case for anonymity.

During the debate on the first Petition, several contributions supported this further exploration. There was comment that the Petition raised:

"an interesting general issue relating to press regulation and the naming of people who are accused."<sup>5</sup>

Another MSP added that:

"The issue of anonymity could be considered. That would have to be extended to all accused persons who are innocent until proved guilty."<sup>6</sup>

<sup>5</sup> Christine Graham, MSP, Public Petitions Committee, 26/09/00, Col. 643, supported by Helen Eadie MSP.

<sup>6</sup> Pauline McNeill, *Ibid.*, Col. 643.



The matter was referred to the Parliament's Justice Committee, which undertook some consultation with relevant organisations, evoking both positive and negative responses to the suggestion of anonymity. A particularly positive response was made by the Law Society of Scotland, which said:

5 "Given the nature of the charge, the [Law Society's Criminal Law] Committee can see merit in providing anonymity to the accused in rape cases and those involving sexual offences against children. In Scots law, an accused person is presumed innocent until the conclusion of a trial, at which time a determination of guilt is made. It would seem appropriate, therefore, for the accused's identity to remain concealed, at least until that stage in proceedings."<sup>7</sup>

10 However, the Minister for Justice, Jim Wallace, did not favour a change in the law, citing his concern for the arguments about "open justice" and "opening the floodgates." There are also indications in the contribution of the Justice Department that they were unwilling to give in to what appeared to be an implication that false allegations of rape and other sexual offences were widespread.

The result was that the Petition was, in both cases, rejected, and the attempt to introduce an anonymity measure into the Sexual Offences Bill failed.

15 However, it must be noted that there were several expressions of concern that this was indeed a serious matter that deserved further, more objective and sustained reflection. I share that concern. There are a whole host of competing principles and rights that need to be teased out; not least the oft-quoted provisions of the European Convention on Human Rights. Article 6 says that everyone has a right to "fair and public hearing". It is expressed as a right of the accused – not of the public to  
20 know or the press to report. The question is, is it legitimate to allow the accused to surrender an aspect of that right by claiming anonymity until the point of conviction? Article 10 sets out the right to freedom of expression, but this can be qualified out of respect for the protection of reputation or of the rights of others. Would extending anonymity to the accused fall into this or one of the other categories of exception?

25 The Press have been divided on the question of anonymity for those accused of rape and other sexual offences. The issue has come into the spotlight particularly where celebrities have been involved. The trial of Neil and Christine Hamilton was accompanied by particularly lurid accounts of the sexual assaults subsequently found not to have taken place. The case of John Leslie achieved widespread coverage; and particular sympathy was meted out to Matthew Kelly whose case attracted  
30 widespread publicity, despite the fact that he was never charged. In cases where popular public figures are at the centre of allegations, public anger can be redirected quite suddenly away from the suspect and onto the complainer.

If "open justice" is our mantra, we must ask – justice for whom? Is the overriding consideration the public right to know? The accused's right not to be tried in secret? The criminal justice system's right  
35 to engage the press and public in furthering its investigations? Are we really talking here about public accountability, or can it descend into public entertainment? Is it "open justice" or is it really "open season" on anyone suspected? We have Acts of Parliament dealing with the rehabilitation of the offender. What about the rehabilitation of the non-offender, who might have been named and, for all practical purposes, shamed, even if they are never charged or brought to trial or found guilty? Non-  
40 celebrities are unlikely to have the public "clearing" afforded to game show presenters and pop stars.

Is it true that "names can never hurt me?" Across the centuries, the tomes of ancient writers have prized reputation and honour. Surely, for all but the psychopath, these remain important? Surely they should not be unduly besmirched?

45 But the core of my argument is not this concern, important and relevant as it is. The title of my lecture asks whether naming suspects helps children. And it is here that I wish to return to that central concern.

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<sup>7</sup> Letter from Anne Keenan, Deputy Director of the Law Society of Scotland, to the Justice 1 Committee, 22 March, 2001.



## Does Naming Suspects Help Children?

I do not have a particular, authoritative piece of research to demonstrate my proposition that naming suspects potentially harms children. But I can point to a number of indications that this is the case. And I would ask you to reflect upon your own experience, reading and conversation in that connection.

Many sets of child protection guidelines advise adults not to be alone with children, but to ensure that, even if they cannot be heard, they can be seen. I heard of one school where the room used for guidance was referred to as the "goldfish bowl" because of its visibility; a description unlikely to entice children to use it to talk about painful or difficult matters. I have heard priests express their fear of hearing children's sacramental confessions, because a degree of privacy is required. I have fairly frequently discussed with volunteers whether they would give a lift home to a child they found alone and afraid in a dark street, perhaps at the end of a voluntary activity. Now, in most situations today, someone would have a mobile phone to contact the parent or carer but, in the absence of that possibility, it has amazed me when people have said they would leave the child alone because it would be too risky for them to take the child home in their car with no other person present.

In 1997, the Scottish Office-funded Kent Report known officially as the Children's Safeguards Review looked at the situation of children living away from home and noted:

"A positive result of heightened awareness of the dangers of sexual abuse for looked after children, and of the large number who have suffered abuse at some time in their lives, has been that agencies and their staff have become more careful about the ways in which they use touch, and handle issues of affection, sex and sexuality. Children and young people can feel safer because their needs for some distance are recognised. There is a negative side to this, however, if staff become so wary of touch and emotion, and so defensive about them, that they create a sterile care climate."<sup>8</sup>

And indeed in the course of my own involvement in the Edinburgh Inquiry into Abuse and Protection of Children in Care, which reported in 1999, a young woman told me how things had changed since all the talk about abuse started. Before that she said, staff used to give you a cuddle. Now they would put one arm around you, but not two; and sometimes all you really needed was a cuddle. It is perhaps a sign of the times that some of you may be sitting here thinking that any suggestion that it is OK to give child in care a two-armed cuddle may be just taking things too far.

So I do believe that we are more afraid of children than we used to be, not because we have bad motives or guilty consciences about our interaction with them, but because we fear that others may think that we have. We may fear that any accusation or suggestion of impropriety would bring in its train consequences too awful to contemplate. And this is where I return to the question of who is responsible for these consequences.

I started this lecture with the following propositions:

- ❑ The ability to make an accusation involves the exercise of a power.
- ❑ The impact of that power upon the person accused is determined by our system of law and justice.
- ❑ The damning and shaming publicity that can be associated with the investigation and the trial exaggerates the intensity of that power.
- ❑ Adults fear that power and therefore they increasingly fear the children and young people who can exercise it.
- ❑ This has resulted in adults being afraid to interact with children.
- ❑ Logical reasoning based upon the likelihood of a false allegation being made does not work. The scale of the fear trumps the logic of the facts.

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<sup>8</sup> Kent 2.21.

- One way to address it is to reduce the scale of the fear by lessening the intensity of the power; that is, by extending anonymity to suspects and accused until the charge is proven.

5 I have shown that the main arguments against this approach are based upon a concern for open justice and a fear that allowing anonymity in these cases would "open the floodgates" to extension to all cases, thus radically changing the character of our criminal justice system.

## Conclusion

10 My own view is that there *is* a case for regarding rape and child abuse as special cases because of the particular public emotion that attaches to them. Some might argue that murder is equally, if not more serious, but I ask you to reflect upon whether that is the *public* perception, evidenced by public reaction. One might possibly be able to argue it in respect of the murder of children but, I think, not more generally. But perhaps the debate *should* be extended more widely. Perhaps there is a case for exploring the tension between the two cardinal principles of "innocent until proven guilty" and "open justice" as they apply to *all* cases. This would at least have the effect of overriding what were  
15 identified as some of the "absurd" consequences of the earlier English rule on anonymity for those accused of rape. But whether one takes the narrower or broader view, I would suggest, as hinted earlier, that the time *has* come to reassess the principles underpinning our system of open justice.

20 We should acknowledge, but then set aside, the more emotive dimensions of the argument based upon the suspicion that proponents of reform are proceeding on the premise that those alleging child abuse (or rape) are more likely to be lying than other complainers. The case for special treatment – if that is what is required – is based not upon that but upon the actual consequences of an allegation relating to these crimes. The stakes in rape and child abuse are very high for both complainers and accused. In the case of child abuse, public outrage is magnified if a child's perceived "lie" is seen to be the cause of unjustified destruction of a valued adult's reputation.

25 To date, the debate about anonymity has focused on the consequences for those individuals suspected or accused. My intention this evening is to present another perspective. I suggest that the publicity associated with child abuse cases actually works to the detriment of the whole body of children and young people in this country, because it creates a climate of fear, conducive to a sterile environment, in which our children have become the new Untouchables. If we want to help our  
30 children to lead whole and healthy lives, we must hold fast to their power of accusation, but lessen the threat that it is experienced as presenting to those caring adults who truly want to help them move through a loving childhood to a fulfilling and well-rounded maturity.

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