Consultation on the CPS Interim Guidance on Perverting the Course of Justice - Charging in cases involving rape and/or domestic violence allegations

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What is this consultation about?

On 16 December 2010 Keir Starmer QC, Director of Public Prosecutions, announced a series of measures to strengthen rape prosecutions. One of the key elements was to seek the views of interested parties about the factors the Crown Prosecution Service should consider before charging a person involved in rape or domestic violence allegations with an offence of perverting the course of justice. We have drafted Interim Guidance designed to assist prosecutors making decisions in this type of case. We want to know what you think about it.

What is the Interim Guidance on Perverting the Course of Justice about?

Legal Guidance is central to how CPS makes decisions and is regularly updated to reflect changes in the law and procedure. As part of our commitment to open and transparent decision making, it is freely available on our website. The aim of the Interim Legal Guidance is to set out the issues we should consider when deciding whether or not to charge people involved in rape and/or domestic violence allegations with perverting the course of justice.
We want to make sure that the final version of our Legal Guidance is clear, fair and right.

To help us do this we would like you to read the Interim Guidance and answer some questions.

We would appreciate your comments and views on developing the final version of the Legal Guidance.

**What are the questions?**

1. Is the description of perverting the course of justice clear?

2. Do the observations on the evidential stage of the Full Code Test clearly set out the issues we should address when deciding whether there is sufficient evidence to justify a prosecution? If not, please suggest how this could be achieved.

3. Does the section on the public interest stage of the Full Code Test clearly set out factors which we should consider when deciding whether it is in the public interest to prosecute? If not, please suggest how this could be achieved.

4. Have we provided sufficient explanation of what we mean by "double retraction" and are the factors to be considered in such cases clearly set out? If not, please suggest how this could be achieved?

5. Any other comments about the document?

**How to respond to the consultation**

A response form is available at the end of this document. A Word version can be downloaded from the consultation homepage at [www.cps.gov.uk/consultations/pcj_index.html](http://www.cps.gov.uk/consultations/pcj_index.html).

Responding by email:

- Read the Interim Guidance on Perverting the Course of Justice - Charging in cases involving rape and/or domestic violence allegations
- Download the response form
- Answer the questions on the response form by typing in the spaces
• Please tell us your name, organisation (if applicable) and postal address

• Save the completed form on your computer

• Send an email to us (consultations@cps.gsi.gov.uk) and attach your response form

• Your response must get to us by 6 May 2011

Responding by post:

• Read the Interim Guidance on Perverting the Course of Justice - Charging in cases involving rape and/or domestic violence allegations

• Print the response form and fill it in. Use extra sheets if the form is not long enough

• Please tell us your name, organisation (if applicable), postal address and email address (if you have one)

• Send the completed form to us at the address below:

  Perverting the Course of Justice Consultation
  Strategy and Policy Directorate
  Crown Prosecution Service
  Rose Court
  2 Southwark Bridge
  London
  SE1 9HS

• Your response must get to us by 6 May 2011

Confidentiality of responses

The information you send us may be passed to colleagues within the CPS, the Government or related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information legislation including the Freedom of Information Act 2000 (FOIA).

If you want the information that you provide to be treated as confidential, please be aware that, under FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with
obligations of confidence. In view of this it would be helpful if you could briefly explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded as binding on the CPS.

Please ensure your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed. The CPS will process your personal data in accordance with the Data Protection Act 1998 - in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

What happens next?

Thank you for telling us what you think. We will read all responses and consider them when writing the final statement.

We will publish the results of this consultation on our website at www.cps.gov.uk/consultations/.

Government Consultation criteria

The Department for Business Innovation and Skills (DBIS) sets seven consultation criteria for running effective public consultations. These key consultation criteria are:

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.
Interim Guidance

Perverting the Course of Justice - Charging in cases involving rape and/or domestic violence allegations

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Introduction

1. This guidance applies to cases where a complainant of rape or domestic violence:
   - makes a false allegation,
   - retracts an allegation, or
   - withdraws a retraction.

2. It should be read with the:
   - CPS Policy on Prosecuting cases of Rape,
   - CPS Legal Guidance on the Sexual Offences Act 2003,
   - CPS Policy on Prosecuting cases of Domestic Violence, and
   - CPS Legal Guidance on Domestic Violence.

Perverting the course of justice

3. Where a complainant of rape or domestic violence makes a false allegation, retracts an allegation or withdraws an earlier retraction, an offence of perverting the course of justice may be made out.
4. Perverting the course of justice is a serious offence. It is triable only on indictment and carries a maximum sentence of life imprisonment. The offence is committed where a person:

- does an act (a positive act or series of acts is required; mere inaction is insufficient)
- which has a tendency to pervert and
- which is intended to pervert
- the course of public justice.

5. It is not necessary for legal proceedings to have been instigated; a false allegation which risks the arrest or wrongful conviction of an innocent person is enough. All that is required is that there is a possibility that what the suspect has done “without more” might lead to injustice (Murray (1982) 75 Cr. App. R. 58).

6. Intention is not the same as motive. (However, the motive of the suspect is likely to be of importance if the public interest stage is reached.) The prosecution must prove either an intent to pervert the course of justice or an intent to do something which, if achieved, would pervert the course of justice. All that is necessary is proof of knowledge of all the circumstances, and the intentional doing of an act which has a tendency, when objectively viewed, to pervert the course of justice.

7. Where the prosecution case is that a false allegation has been made, all that is required is that the person making the false allegation intended that it should be taken seriously by the police. It is not necessary to prove that she/he intended that anyone should actually be arrested (Cotter [2002] 2 Cr. App. R. 762).

**The decision-making process**

8. As with all offences, prosecutors must apply the Full Code Test as set out in the Code for Crown Prosecutors. The Full Code Test has two stages: (1) the evidential stage; and (2) the public interest stage. The evidential stage must be considered before the public interest stage. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be. Where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.
Observations on the evidential stage of the Full Code Test

9. A person who deliberately makes a false allegation in the knowledge that there is a risk that the police will conduct an investigation may be guilty of perverting the course of justice. But the prosecution must prove that the allegation was in fact false. If there is any question as to whether the original allegation might in fact have been true, then there is not a realistic prospect of conviction, and no charge of perverting the course of justice should be brought.

10. Many rape or domestic violence cases will consist of one person's word against another's. Where this is the case, if the complainant retracts his or her allegation, it should not be assumed that the original allegation was made with the intention of perverting the course of justice. It follows that when the complainant no longer wishes to support the prosecution but maintains that the allegation is in fact true, this is unlikely to be sufficient in itself to found a case for perverting the course of justice. The prosecution will need additional evidence which is capable of establishing that the original allegation was false.

11. Particular care must be taken in so called "double retraction" cases (see also paragraph 26 below). These sometimes (although not exclusively) arise in situations where there is a background of domestic violence. In such cases:
   - the complainant makes an allegation,
   - she/he later retracts it saying it was false,
   - she/he then says that her/his original allegation was true, and it is the later retraction which is false (sometimes saying that she/he was pressurised into withdrawing the original allegation).

12. In such situations there may be little by way of evidence to indicate which version of events is true.

13. The prosecutor should be aware that victims of domestic violence may sometimes retract a true allegation: for example as a result of pressure, fear of violence, or intimidation, or because of other factors such as a desire to give the relationship another chance. It is known that in such cases a complainant who has been told that her refusal to give the prosecution her continued support will not necessarily mean that the case is not pursued, may say that she/he fabricated the original allegation. This on the face of it amounts to an admission to perverting the course of justice, but in such cases there is a risk that the complainant may have admitted to an offence she/he has not committed in an effort simply to bring the prosecution to an end.
14. When prosecutors are considering the case of complainants who have retracted allegations of rape or domestic violence, they should always ask themselves the following questions.

15. First, whether there is evidence which tends to suggest that the original allegation was or may have been true. Such evidence might include:

- medical evidence,
- the tape of any 999 call,
- any CCTV footage,
- any other evidence (e.g. witnesses, DNA, etc.).

16. Second, the prosecutor should always consider whether there is a background of domestic violence which may have influenced the complainant's decision to retract. Useful sources of information may include the specialist support services such as the Independent Domestic Violence Advisor (IDVA) or Independent Sexual Violence Advisor (ISVA) if involved in the case. Prosecutors might also consider the complainant's GP records, the Multi-agency Risk Assessment Conference (MARAC) notes, the Domestic Abuse, Stalking and Harassment and Honour-based and Forced Marriage (DASH) risk assessment, or whether there have been previous call-outs of the police to the address.

17. In double retraction cases, the prosecutor should be cautious about charging two alternative counts of perverting the course of justice. If the prosecution is unable to prove that the original allegation was false then there will not be a realistic prospect of conviction. It is not proper for the prosecution to charge two mutually inconsistent counts and then invite the jury to choose which one it prefers (Tsang Ping-Nam v R (1982) 74 Cr. App. R. 139).

The Public Interest Stage

18. It has never been the rule that a prosecution will automatically follow where the evidential stage of the Full Code Test is satisfied. This was recognised by the House of Lords in Purdy (R (on the application of Purdy) v Director of Public Prosecutions [2009] UKHL 45) where Lord Hope stated that: "It has long been recognised that a prosecution does not follow automatically whenever an offence is believed to have been committed." He went on to endorse the approach adopted by Sir Hartley Shawcross, the Attorney General in 1951, when he stated in the House of Commons that: "It has never been the rule … that criminal offences must automatically be the subject of prosecution."
19. Accordingly, where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

20. In cases of perverting the course of justice, prosecutors must apply the public interest factors set out in the Code for Crown Prosecutors, having regard to this guidance. A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour.

21. Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed.

22. When applying the public interest stage of the Full Code Test, prosecutors should bear in mind the comments of the Lord Chief Justice in A (R v A [2010] EWCA Crim 2913) that "experience shows that the withdrawal of a truthful complaint of crime committed in a domestic environment usually stems from pressures, sometimes direct, sometimes indirect, sometimes immensely subtle, which are consequent on the nature of the individual relationship and the characters of the people who are involved in it."

23. On the other hand, prosecutors should bear in mind that a false allegation of rape or domestic violence can have a devastating effect upon the person who has been wrongly accused.

24. Applying the public interest factors set out in the Code, prosecutors should bear in mind that a prosecution for perverting the course of justice is more likely to be required where:

- a false complaint was motivated by malice,
- a false complaint was sustained over a period of time (particularly where there were opportunities to retract),
- the suspect in the original allegation was charged and remanded in custody,
- the suspect in the original allegation was tried, convicted and/or sentenced,
- the suspect has previous convictions or out-of-court disposals relevant to this offence, or a history of making demonstrably false complaints,
• the suspect in the original allegation was in a vulnerable position or had been taken advantage of,
• the suspect in the original allegation has sustained significant damage to his or her reputation.

25. Applying the public interest factors set out in the Code, prosecutors should bear in mind that a prosecution is less likely to be required where:

• the original allegation appears not to have been motivated by malice,
• the person retracting the allegation has been threatened or pressurised into doing so by the suspect of the original allegation, his or her family, friends or other persons,
• there is a history of abuse or domestic violence or intimidation which might offer mitigation such as to make it likely that a nominal penalty will be imposed,
• the suspect of the original allegation was not charged, detained or convicted and has not suffered damage to his or her reputation as a result of the original allegation,
• the suspect appears not fully to have understood the seriousness of making a false allegation (bearing in mind his or her age and maturity).

The public interest stage in relation to "double retractions"

26. If all the circumstances lead the prosecutor to believe that it was the original retraction which was false, then she/he will need to give very careful consideration to whether a prosecution for the "retraction of the retraction" is likely to be in the public interest. This is because as a matter of logic, if the original allegation was or may have been true, then it follows that the suspect may have been a victim of rape or domestic violence. (See also paragraphs 9 - 17, above.)

Making and recording the decision

27. In line with the Core Quality Standards, prosecutors should record and explain as fully as possible the evidential considerations and public interest factors they have taken into account when making their decisions. Prosecutors should also seek a second opinion from another prosecutor. That second opinion should itself be recorded.

28. If necessary, prosecutors should consult with their Chief Crown Prosecutor (or, from 1 April 2011, relevant Deputy Chief Crown Prosecutor), especially if a double retraction has occurred in the case.
The Principal Legal Advisor has made it clear that she is happy to help with these difficult and sensitive cases.

**Interim measure - Referral to Headquarters**

29. Until the final guidance is in place, prosecutors must refer to the Director of Public Prosecutions all cases involving an allegation of rape in which consideration is given to prosecuting the complainant for perverting the course of justice. All cases referred to the CPS by the police, including those which are not thought to pass the Full Code Test, must be sent with an MG3 form including an analysis of the evidence and any legal issues submitted.

30. Referrals will require the agreement of the relevant Head of Complex Casework Unit, or Chief Crown Prosecutor (or, from 1 April 2011, Deputy Chief Crown Prosecutor).

Crown Prosecution Service
February 2011
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February 2011

Response Form

To understand what may happen to your personal details and the responses you give, please read the "confidentiality of responses" information which can be accessed via the consultation home page at: www.cps.gov.uk/consultations/pcj_index.html

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Where to send your completed form

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Rose Court
2 Southwark Bridge
London, SE1 9HS

All replies must be received by
6 May 2011