



End Violence Against Women International (EVAWI)

# Prosecution for Filing a False Report of Sexual Assault

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One of the most challenging issues in the field of sexual assault is false reporting. As professionals, we are often asked to respond to a variety of questions in this area, including:

*How many reports of sexual assault are false?*

*How can you tell which reports are false?*

*How should criminal justice professionals respond?*

There are many different aspects of this complicated issue, as covered in a variety of our training resources. However, we recently developed some new guidance in one particular area that we decided to send out as a training bulletin. This bulletin focuses on the often hotly contested question of whether or not it is appropriate to prosecute someone for filing a false report.

## Prosecutions for Filing a False Report

These issues are articulated in a study conducted by the English Crown Prosecution Service in 2013, to examine cases involving “allegedly false allegations of rape or domestic violence, or both” (p. 2). In that study, a total of 121 rape cases were examined where prosecution was considered for filing a false report.<sup>1</sup> Yet analysis revealed that many of those cases did not appear to be false reports – or even if they were false, they were not made with deliberate intent.

- For example, just over half (51%) of the cases involved young people, many of whom “showed a clear failure to think about (or even awareness of) the seriousness of making an allegation of rape” (p 26).
- Almost one in five (19%) of these individuals had “mental health difficulties.” In some of these cases, it was clear that the person “did not understand the legal definition of consent” (p. 31).
- Almost half (46%) of the cases were initially reported by a third party (more than half of which also involved a victim who was under 18 years old). In many of these cases, the person “later reported that the whole thing had spiraled out of control and he or she had felt unable to stop the investigation” (p. 14).

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<sup>1</sup> These 121 cases constituted all of the rape cases considered for prosecution by the Crown Prosecution Service during a 17-month period. Of these, 35 were ultimately charged with the felony crime of “perverting the course of justice,” whereas 10 were charged with the misdemeanor offense of “wasting police time.” The report begins by contrasting these numbers with the 5,651 prosecutions for rape in the same time frame.



- Alcohol and drug use was particularly common in these cases, including those where the person “might have been raped, but could not recall because s/he had drunk alcohol or taken drugs” (p. 32).

In fact, many of the cases included in the Crown Prosecution Service study involved no clear allegation of rape at all. This was particularly true when the person was young, where drugs or alcohol were involved, and/or when the report was made by a third party.

- For example, in some cases, the person “had undoubtedly been the victim of some kind of offence, even if not the one which he or she had reported (p. 4).
- In other cases, analysis revealed that there was no evidence to support the charge of a false allegation: “On close examination ... there was nothing to show that what she was saying was untrue” (p. 31).

In such cases, it doesn't make any sense to prosecute a person for filing a false report. As described by the researchers, some of these victims called police to report that they might have been raped, but they could not recall any details because of their drug or alcohol use.

When someone is not sure whether she/he was raped, the burden is on law enforcement to investigate and determine whether there is evidence to corroborate a sexual assault. The determination can only be made on the basis of the investigative findings – not the victim's initial statement. At that point, the report should typically be documented as an informational report and only scored as a crime report if and when the evidence establishes that the elements of a sexual assault offense have been met.

## Policy Guidance

It is difficult to understand why someone would be prosecuted for filing a false report if there is no evidence to corroborate the charge. This is clearly against policy guidance in this area. For example, the International Association of Chiefs of Police (IACP) states the following:

*The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. **This determination can be made only after a thorough investigation.***

*This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. **The determination that a report is false must be supported by evidence that the assault did not happen** (IACP, 2005, pp. 12-13, emphasis original).*

The FBI offers similar guidance for the Uniform Crime Reporting (UCR) Program, clarifying that a reported crime can only be unfounded as false or baseless “if the investigation shows that no offense occurred nor was attempted” [SRS User Manual](#) (2013, p. 111). It is therefore not surprising that the same point was made by the Crown Prosecution Service in the UK:

*In dealing with these cases, the prosecution must be able to prove to the criminal standard that the initial complaint was in fact false (2013, p. 27).*

This standard was not met in many of the cases included in the Crown Prosecution Service study.

## Prior Reports

One factor that appeared to be especially important in the minds of Crown Prosecutors was whether or not the person had made a previous report of sexual assault. It is clear that a prior report was often seen as a “strike” against the person, raising questions about the legitimacy of the new report. Some of these cases even involved people who had previously been *prosecuted* for filing a false report. Yet the study highlighted that a lack of prosecution in a prior case was often confused with the report actually being false. In other words, prosecutors in these cases saw that the person had reported another sexual assault in the past – which was not prosecuted. However, rather than viewing the prior report as one of the vast majority that are not successfully prosecuted, many apparently made the logical leap to decide that it had actually been false.

*There was a lack of appreciation that the earlier allegation had no probative value unless it could be shown not merely that there had been no prosecution but that it was also provably false (Crown Prosecution Service, 2013, p. 32).*

This raised concern that there was a “self-fulfilling prophecy” operating for people who report being sexually assaulted more than once. The concern is particularly distressing, because the single best predictor of who will be sexually assaulted in the future is whether or not the person was sexually assaulted in the past, particularly during childhood (for review, see Breitenbecher, 2001). The cycle was poignantly described in the Crown Prosecution Service study:

*Each time she complained, investigators or prosecutors would see that this was perhaps the third or fourth time she had reported that she had been raped and would regard that as evidence of unreliability thereby ensuring that the present allegation would not be prosecuted either (2013, p. 33).*

Based on this analysis, Keir Starmer, Director of the Crown Prosecution Service concluded:

*From the cases we have analyzed, the indication is that it is therefore extremely rare that a [person] deliberately makes a false allegation of rape or domestic violence purely out of malice. It is within this context that the issue should be viewed, so that myths and stereotypes around these cases are not able to take hold.<sup>2</sup>*

There is every reason to believe the same conclusions would be justified in the US context.

### **First Stage: Evidence Phase**

With these findings in hand, the Crown Prosecution Service went on to offer guidance regarding when to consider prosecuting someone for filing a false report of rape or domestic violence. The same guidance can be used by law enforcement, because investigators often play a significant role in determining when prosecution will be considered against someone filing a false report.

The guidance suggests that the decision should be made as part of a two-stage process. First is the *evidence phase*, where investigators and prosecutors decide whether there is any evidence to support the charge – or if it is simply based on suspicion, doubt, or stereotypic assumptions.

*It is, for example, well known that many rape cases will result in no visible physical injuries to the victim. The lack of injuries should not, therefore, be taken into account as a factor which tends to support the falsity of the allegation unless there is a clear evidential basis such as the [person] saying that s/he was repeatedly punched and kicked (Crown Prosecution Service, 2013, p. 30).*

Further complicating matters, the report highlighted some cases where evidence appeared to be fabricated – but the report still may not have been false.

*It became clear in some cases there was at least a possibility that the [person] may have been trying to bolster a true allegation out of fear that s/he wouldn't be believed (Crown Prosecution Service, 2013, p. 31).*

Therefore, prosecution for filing a report is only justified when there is evidence to corroborate the charge. If there is no such evidence, no charge should be brought for filing a false report. This conclusion is offered in rather clear terms within the Crown Prosecution Service report:

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<sup>2</sup> *Under the Spotlight: Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*. Crown Prosecution Service, England, UK, dated March 13, 2013. [http://www.cps.gov.uk/news/latest\\_news/under\\_the\\_spotlight/](http://www.cps.gov.uk/news/latest_news/under_the_spotlight/) (accessed September 24, 2014).



***If there is any question as to whether the original allegation might in fact have been true ... then no charge... should be brought (emphasis added).***<sup>3</sup>

## Second Stage: Public Interest Phase

Only when there is evidence to support the charge should investigators and prosecutors move on to the second stage of decision making: the *public interest phase*. The question at this stage is whether prosecution is *the right thing to do*, not just whether *it can be done*. Any such decision must be made on a case-by-case basis, taking into account factors such as the following:

- Was the investigative process prolonged over a period of time?
- Was the suspect arrested, charged, or even prosecuted?
- Was any evidence fabricated to support the false report?
- Was the person filing the false report the victim of another related crime (especially intimate partner violence perpetrated by the person named in the false report)?
- Is the person making the false report young, or does she/he have mental health issues?
- Was the false report motivated by malicious intent?

It is particularly important to consider whether there is a background of intimate partner violence that may have led to a retraction or recantation of the report (Crown Prosecution Service, 2013).

## Making a Decision

We believe these factors operate in fundamentally similar ways here in the US. The general guidance would also be the same, because the same factors should be weighed by investigators and prosecutors when making a decision about prosecuting someone for filing a false report. We thus offer this discussion to guide police and prosecutors regardless of their home countries.

When prosecution appears to be warranted – both on the basis of the evidence as well as the public interest – it is important to keep in mind that it may be perceived by the public (including victims, both past and future), as yet another example of a sexual assault report that was not believed by law enforcement, with the victim and not the

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<sup>3</sup> *Guidance Perverting the Course of Justice – Charging in Cases Involving Rape and/or Domestic Violence Allegations*. Crown Prosecution Service, England, UK, undated.

[http://www.cps.gov.uk/legal/p\\_to\\_r/perverting\\_the\\_course\\_of\\_justice\\_-\\_rape\\_and\\_dv\\_allegations/](http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/) (accessed September 24, 2014).



perpetrator being the one who is punished. This will almost inevitably have a negative effect on the likelihood of sexual assault victims reporting to law enforcement. For this reason, we recommend making such decisions as part of a **multidisciplinary process**. This can help ensure that the various advantages and disadvantages of the specific courses of action are carefully considered in each particular case.

For example, some of the possible **advantages** of prosecution for filing a false report include:

- Vindicating an innocent person who may have been arrested, booked, subjected to a forensic examination, and possibly even charged with sexual assault.
- Informing communities about the outcome of high profile cases and the fear that might have been generated, especially since many actual false reports involve strangers.
- Seeking restitution from the person filing the false report, for agency expenditures (including time spent responding to the report and conducting an investigation, as well as costs for DNA analysis, etc.).

Potential **disadvantages** include the fact that criminal justice professionals are so frequently *wrong* in the determination that a report is false. Based on this study by the Crown Prosecution Service as well as a considerable body of prior literature, we know that many cases are determined to be a false report when there is no evidence to support such a classification (for review, see Lisak, Gardinier, Nicksa, & Cote, 2010). In fact, the opposite is often true.

Upon examination, many of the “false” reports in these studies could have actually yielded evidence to corroborate the sexual assault. However, once the victim’s statement was seen as a false report, investigative steps that could have been taken to prove the sexual assault were not taken (e.g., conducting witness interviews, processing evidence, taking suspect statements, gathering electronic evidence, conducting a pretext phone call, obtaining a forensic examination of the suspect, etc.). The risk of prosecuting someone for filing a false report can therefore be devastating. If the judgment is wrong, the person is first traumatized by the sexual assault and then by the criminal prosecution for allegedly lying about it. This also means that the perpetrator is given a “free pass” for the crime and is likely to go on and commit additional sexual assaults.

The other primary disadvantage has already been mentioned, which is the deterrent effect for other victims of sexual assault who might decide not to report the crime to the authorities. Whenever someone is prosecuted for filing a false report of sexual assault, this is likely to be covered by the media. If investigators and prosecutors are wrong, it is almost impossible to imagine the additional devastation this will cause for the victim. Moreover, this media coverage will fuel public skepticism regarding all sexual assault



reports. This skepticism is already seen in our jury pools; it is extremely difficult to overcome all of the myths and misconceptions about sexual assault that are held by the average citizen. These same myths and misconceptions also impact family members and friends, however, and this can be critical when they need to serve as support people for a victim who chooses to disclose that she/he was sexually assaulted. For all of these reasons, the decision to prosecute someone for filing a false report of sexual assault should be made carefully, with multidisciplinary input, weighing these and other critical factors.

### **RESOURCE: Training Module on False Reports**

For detailed information on false reports and unfounded allegations, including appropriate responses for law enforcement agencies and other community professionals, please see the OnLine Training Institute (OLTI) module entitled, [\*False Reports: Moving Beyond the Issue to Successfully Investigate Sexual Assault\*](#).

### **A Better Approach**

Rather than prosecuting someone for filling a false report, a better approach in many cases is to ensure that investigators are **recognized and rewarded for high quality work** rather than case outcomes such as arrests and prosecution. When an investigation establishes that a report of sexual assault is false, the investigator often ends up feeling betrayed. However, if a suspect was identified and perhaps arrested for an allegation that was later determined to be false, the results of a competent investigation can be used to exonerate a suspect rather than leave doubt in the minds of others. This must be viewed as an investigative success, not a failure, and the officer who conducted the investigation should be recognized for his/her investigative efforts.

These and other issues should be addressed in **training for multidisciplinary professionals** in the area of false reports. Such training should be provided not only with law enforcement but also the other professionals involved in responding to sexual assault. Training can cover the realistic dynamics of sexual assault, as well as common myths and misconceptions, current information on false reporting, and appropriate procedures for unbounding.

Leaders within the law enforcement agency and other community partners can also establish a **multidisciplinary review panel**, to discuss unfounded sexual assault cases within a specific time period. Such a review panel might consist of victim advocates, forensic examiners, prosecutors, and others (including representatives from the crime laboratory, sex offender treatment program, and probation/parole). The purpose is to determine whether the conclusions in these unfounded cases were supported by the investigative findings. The multidisciplinary panel can also seek to identify community resources that might be helpful when evaluating these investigations. In some cases, the



person may have critical needs that can be met with community intervention and resources (e.g., victims who are homeless, runaways, engaged in the sex industry, and/or have some form of mental illness). Often such factors can result in repeated victimization.

Finally, communities can help friends and family members, as well as responding professionals, prepare to respond appropriately to disclosures of sexual assault victimization by launching a **Start by Believing public awareness campaign**. Start by Believing is focused on the public response to sexual assault, because research demonstrates that the first person a victim confides in after an assault is not typically a police officer or other professional, but a friend or family member (Filipas & Ullman, 2001; Starzynski et al., 2005; for review, see Ménard, 2005). Their reaction is therefore the first step in a victim's long path toward justice and healing.

If friends, family members, and professionals do not respond appropriately, their negative reactions will only worsen the victim's trauma and decrease the likelihood that the victim will access community services and report the assault to police. In fact, the relationship is a direct one: the more negative reactions a victim receives from friends and family members, the worse that victim's physical and emotional health (Campbell et al., 2001). On the other hand, a positive reaction will not only improve their health and well-being, but also increase the chance that victims will reach out for help from other sources (Campbell et al., 2001; Feldman-Summers & Norris, 1984; Filipas & Ullman, 2001; Ullman, 2006; for review, see Ménard, 2005). The two positive behaviors that stand out for victims are having someone to talk to and being believed.

All of these initiatives can help communities respond in a comprehensive way to the challenge of false reporting – as well as addressing the myths and misconceptions surrounding the topic.

#### **RESOURCE: Start by Believing Public Awareness Campaign**

For more information about the Start by Believing public awareness campaign, including the underlying rationale, empirical support, and local examples, see [www.startbybelieving.org](http://www.startbybelieving.org).

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