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# Response to Clauses 94, 95, and Schedule 4 of the Criminal Justice Bill: An Offence of Cuckooing

Prepared by Dr Laura Bainbridge and Dr Amy Loughery

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## Introduction

The Cuckooing Research & Prevention Network welcomes the introduction of new legislation to combat the predatory and exploitative practice of ‘cuckooing’. However, having carefully reviewed Clauses 94, 95 and Article 4 of the Criminal Justice Bill, it is apparent that changes should be made to improve the precision of the legislation and to ensure that vulnerable people feel safe in their own homes.

The following response has been prepared by Dr Laura Bainbridge and Dr Amy Loughery, and draws heavily upon the existing research evidence base and insights provided by police and safeguarding professionals that belong to the Cuckooing Research & Prevention Network.

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## Response

### **NC94 1(a) “Exercising Control over the Dwelling of Another” and (b) “To Perpetrate Illegal Activity”**

*The Criminal Justice Bill NC94 (1) provides that “a person commits an offence if they (a) exercise control over the dwelling of another person, and (b) do so for the purpose of enabling the dwelling to be used in connection with the commission (by any person) of one or more offences listed in Schedule (Cuckooing: specified offences)”.*

This clause effectively defines cuckooing as an offence with two elements, both of which must be proven. This is problematic as a dwelling may be taken over without the consent of the resident prior to offences taking place.

The current wording of the legislation holds the potential to create a situation whereby a vulnerable person’s home has been taken over, but investigative agencies cannot intervene until there is evidence of criminal activity to satisfy subsection (1)(b) of the offence.

#### **Recommendation 1 -**

Cuckooing should be defined as exercising control over the dwelling of another person without their consent as outlined in NC94 (1)(a), without the requirement for section (1)(b) illegal activity to be proven.

**Recommendation 2 -**

Initial consent for a perpetrator to enter a dwelling should not be viewed as enduring consent. Perpetrators often gain access to dwellings via manipulation and charm, with threats and violence commencing after a perpetrator is asked to leave.

**NC94 5 (a) “Summary Conviction” and (b) “Conviction on Indictment”**

*Clause NC94 (5) states that “a person who commits an offence under this section is liable—(a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates’ court or a fine (or both); (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).”*

Research indicates that care leavers aged under 18 years are at significant risk of cuckooing victimisation. At present, the legislation does not differentiate between child and adult victims with regards to sentencing.

**Recommendation 3 -**

Exercising control of a dwelling that belongs to an individual aged under 18 years should result in imprisonment for a term not exceeding 8 years or a fine (or both).

**NC94 1(b) “To Perpetrate Illegal Activity” and NS4 Specified Offences**

*The Criminal Justice Bill Supplementary Delegated Powers Memorandum (dated the 10<sup>th</sup> of May 2024) defines cuckooing as “the practice of when criminals take over the property of another person, who is often vulnerable, to perpetrate illegal activity”. To this end, Schedule 4 of the Criminal Justice Bill provides a list of “specified offences” which constitute this “illegal activity”, which includes drug offences, firearms offences, and sexual offences amongst others.*

*The Criminal Justice Bill Supplementary Delegated Powers Memorandum (dated 10<sup>th</sup> of May 2024) gives the Secretary of State power to amend the list of specified offences*

Vulnerable peoples’ homes may be taken over to facilitate activity that is not illegal, yet is still unwanted by the resident, e.g. anti-social behaviour, house parties, storing of CCTV equipment.

**Recommendation 4 -**

The wording of clause NC94 subsection 1(b): “do so for the purpose of enabling the dwelling to be used in connection with the commission (by any person) of one or more offences listed in Schedule (Cuckooing: specified offences)” should be expanded to include “any other activity which is unwanted, or not consented to, by the resident”.

Similarly, The Criminal Justice Bill Supplementary Delegated Powers Memorandum (dated 10<sup>th</sup> of May 2024) notes that cuckooing “is a common tactic used by county lines gangs to facilitate their illicit drug supply operations”.

**Recommendation 5 -**

As vulnerable peoples' homes may be taken over for a broad range of purposes, which may not necessarily constitute illegal activity, cuckooing should instead be considered "a common tactic used by organised crime groups to facilitate illicit or unwanted activity".

**NC94(2) "Defence of Consent" and NC95(5) "Factors Determining Consent"**

*Clause NC94 (2) provides that "it is a defence for a person charged with an offence under this section to prove that the person mentioned in subsection (1)(a) consented to the exercise of control for the purpose mentioned in subsection (1)(b)".*

*Clause NC95(5) provides that "for the purposes of section (Cuckooing)(2), a person is regarded as "consenting" to the exercise of control for the purpose mentioned in section (Cuckooing)(1)(b) only if— (a) they are aged 18 or over, (b) they have capacity (within the meaning of the Mental Capacity Act 2005) to give consent to the exercise of control for that purpose, (c) they are given sufficient information to enable them to make an informed decision about whether to consent, (d) they give consent freely, and (e) the consent is not withdrawn."*

This suggests that the burden will be placed on a defendant to prove that a victim freely granted access to their dwelling. As an upshot, defendants may seek to coerce or pressure victims into reporting that they consented to their dwelling being occupied or utilised, thus increasing risk to victims.

**Recommendation 6 -**

Alternate wording of Clause NC95(2)(d) could state that "they give consent freely and not under coercion, threat of harm, intimidation, or debt bondage", thus outlining factors that may limit 'freedom to choose'.

**Recommendation 7 -**

Factors determining consent should include reference to the vulnerabilities of victims, such as having a learning difficulty, a mental health issue, and/or being dependent on drugs/alcohol.

It should be noted that it is likely to be difficult to challenge a defence of consent where the victim is unwilling to participate in the prosecution process. Evidence-led prosecutions may also prove challenging in situations where victims refuse to engage with the police and safeguarding agencies due to fear of reprisal from perpetrators.

**Recommendation 8 -**

In line with domestic abuse and human trafficking victims, cuckooing victims should be entitled to refuge and associated support should they wish to flee.

## **NC94(2.5) Defence of Coercion and NC95(5.5) Factors Influencing Coercion**

Research conducted with cuckooing victims and perpetrators confirms that children, young people and vulnerable adults may be forced, coerced, or intimidated into taking over peoples' homes to carry out illegal or unwanted activity. Such individuals are often termed 'alpha victims'.

In light of this evidence, a second defence to an offence committed under NC94(1) should be a defence of coercion.

### **Recommendation 9 -**

A subsection inserted after NC94(2), titled NC94(2.5) should read "it is a defence for a person charged with an offence under this section to prove that the exercise of control mentioned in subsection (1)(a) for the purpose mentioned in subsection (1)(b) was done so by force, or under threat or coercion by another".

### **Recommendation 10 -**

Inserted after NC95(5), a further subsection NC95 (5.5) could outline factors influencing coercion. For example, if the person has a learning difficulty, a mental health issue, drug dependence, and/or drug debt (to give some non-exhaustive examples) and has taken over the dwelling of another following threats of violence, blackmail, or debt bondage (to give some non-exhaustive examples) it might be considered that they have been coerced by another into committing an offence under NC94 (1).

### **Recommendation 11 -**

Alternatively, a subsection to this effect could borrow from the language of the Modern Slavery Act 2015 section 3(5) and 3(6), "consent would not be considered consent where ... (5) The person is subjected to force, threats or deception designed to induce him or her— (to consent)" or (6)"another person uses or attempts to use the person for a purpose within (Criminal Justice Act Section 1(a)) having chosen him or her for that purpose on the grounds that— (a)he or she is a child, is mentally or physically ill or disabled, or has a family relationship with a particular person, and (b)an adult, or a person without the illness, disability, or family relationship, would be likely to refuse to be used for that purpose.

## Overview - Proposed Cuckooing Legislation

### Criminal Justice Bill, As Amended

(Report Stage: 15th May 2024)

#### **NC94 “Cuckooing**

- (1) A person commits an offence if they—
- (a) exercise control over the dwelling of another person, and
  - (b) do so for the purpose of enabling the dwelling to be used in connection with the commission (by any person) of one or more offences listed in Schedule (Cuckooing: specified offences).
- (2) It is a defence for a person charged with an offence under this section to prove that the person mentioned in subsection (1)(a) consented to the exercise of control for the purpose mentioned in subsection (1)(b).
- (3) Section (Cuckooing: interpretation) contains provisions about the interpretation of this section.
- (4) The Secretary of State may by regulations amend Schedule (Cuckooing: specified offences).
- (5) A person who commits an offence under this section is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding the general limit in a magistrates’ court or a fine (or both);
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).”

#### *Member's explanatory statement*

*This clause, together with NC95 and NS4, create an offence of exercising control over another person’s dwelling, for the purpose of enabling it to be used in connection with the commission of certain offences.*

#### **NC95 “Cuckooing: interpretation**

- (1) This section supplements section (Cuckooing).
- (2) A reference to “the dwelling of a person” is to any structure or part of a structure occupied by the person as their home or other living accommodation (whether the occupation is separate or shared with others), together with any yard, garden, grounds, garage or outhouse belonging to it or used with it.
- (3) In subsection (2) “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure.
- (4) The circumstances in which a person “exercises control over the dwelling of another person” (B) include circumstances where the person exercises control (whether temporarily or permanently) over any of the following—
- (a) who is able to enter, leave, occupy or otherwise use the dwelling or part of the dwelling;
  - (b) the delivery of things to, or the collection of things from, the dwelling;
  - (c) the way in which, or the purposes for which, the dwelling or part of the dwelling is used;
  - (d) the ability of B to use the dwelling or part of the dwelling for B’s own purposes.

(5) For the purposes of section (Cuckooing)(2), a person is regarded as “consenting” to the exercise of control for the purpose mentioned in section (Cuckooing)(1)(b) only if—

- (a) they are aged 18 or over,
- (b) they have capacity (within the meaning of the Mental Capacity Act 2005) to give consent to the exercise of control for that purpose,
- (c) they are given sufficient information to enable them to make an informed decision about whether to consent,
- (d) they give consent freely, and
- (e) the consent is not withdrawn.”

#### **NS4 “SCHEDULE Section (Cuckooing) CUCKOOING: SPECIFIED OFFENCES**

1 An offence under section 33 or 33A of the Sexual Offences Act 1956 (keeping a brothel).

2 An offence under section 1 of the Restriction of Offensive Weapons Act 1959 (offences relating to flick knives and gravity knives).

3 An offence under any of the following provisions of the Firearms Act 1968—

(a) section 1(1) (possession etc of firearms or ammunition without certificate);

(b) section 2(1) (possession etc of shotgun without licence);

(c) section 3(1) (dealing etc in firearms or ammunition without being registered);

(d) section 5(1), (1A) or (2A) (possession, manufacture etc of prohibited weapons).

4 An offence under section 1 of the Theft Act 1968 (theft).

5 An offence under any of the following provisions of the Misuse of Drugs Act 1971—

(a) section 4(2) or (3) (production and supply of controlled drugs);

(b) section 5(2) or (3) (possession of controlled drugs, including with intent to supply to another);

(c) section 6(2) (cultivation of cannabis plant).

6 An offence under section 1 of the Protection of Children Act 1978 (indecent photographs of children).

7 An offence under either of the following provisions of the Criminal Justice Act 1988—

(a) section 141 (offensive weapons);

(b) section 160 (possession of indecent image of child).

8 An offence under any of the following provisions of the Sexual Offences Act 2003—

(a) any of sections 1 to 15A (rape, sexual assault, child sex offences etc);

(b) any of sections 30 to 37 (offences against persons with mental disorder);

(c) any of sections 47 to 50 (sexual exploitation of children);

(d) any of sections 52 to 53A (offences relating to prostitution);

(e) section 61 (administering a substance with intent);

(f) any of sections 66 to 70 (exposure etc, offences relating to intimate images etc, voyeurism, intercourse with an animal, sexual penetration



of a corpse).

9 An offence under any of the following provisions of the Fraud Act 2006—

(a) section 1 (fraud);

(b) section 6 (possession etc of article for use in fraud);

(c) section 7 (making or supplying article for use in fraud).

10 An offence under section 63 of the Criminal Justice and Immigration Act 2008 (possession of extreme pornographic image).

11 An offence under section 62 of the Coroners and Justice Act 2009 (possession of prohibited image of child).

12 An offence under either of the following provisions of the Modern Slavery Act 2015—

(a) section 1 (slavery, servitude or forced or compulsory labour);

(b) section 2 (human trafficking).

13 An offence under either of the following provisions of the Serious Crime Act 2015—

(a) section 45 (participating in activities of organised crime group);

(b) section 69 (possession of paedophile manual).

14 An offence under any of the following provisions of the Psychoactive Substances Act 2016—

(a) section 4 (producing psychoactive substance);

(b) section 5 (supplying etc psychoactive substance);

(c) section 7 (possession of psychoactive substance with intent to supply).

15 An offence under section 1 of this Act (possession etc of article for use in serious crime).

16 An inchoate offence (within the meaning of section 398(3) of the Sentencing Code) in relation to an offence mentioned in a preceding paragraph.”

### **Criminal Justice Bill: Supplementary Delegated Powers Memorandum** **(10<sup>th</sup> May 2024)**

New clause “Cuckooing” (4): Power to amend list of cuckooing specified offences in new Schedule “Cuckooing: specified offences”

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by statutory instrument*

*Parliamentary procedure: Draft affirmative resolution procedure*

#### **Context and purpose**

1. New clause “Cuckooing”, together with new clause “Cuckooing: interpretation” and new Schedule “Cuckooing: specified offences”, provides for a “cuckooing” offence.

“Cuckooing” refers to the practice of when criminals take over the property of another person, who is often vulnerable, to perpetrate illegal activity. It is a common tactic used by county lines gangs to facilitate their illicit drug supply operations.

2. Subsection (1) provides that a person commits an offence if (a) they exercise control over the dwelling of another person, and (b) they do so for the purpose of enabling the dwelling to be used in connection with the commission of one or more specified offences listed in the new Schedule (by any person). The list of specified offences includes sexual offences, firearms offences and drug-related offences,

among others. Subsection (2) provides for a defence for a person charged with the cuckooing offence in subsection (1) to prove that the occupant of the dwelling consented to the exercise of control for the purposes mentioned in subsection (1)(b). The maximum penalty for the offence, on conviction on indictment, is five years' imprisonment, a fine, or both (subsection (5)). Subsection (4) confers a power on the Secretary of State, by regulations, to amend new Schedule "Cuckooing: specified offences" which contains the list of specified offences.

### **Justification for taking the power**

3. New clause "Cuckooing" itself provides for the cuckooing offence and contains, in new Schedule "Cuckooing: specified offences", a list of specified criminal offences which the control over the dwelling is to be for the purpose of enabling. This list of specified offences reflects the Government's current understanding of the context in which cuckooing occurs. However, the contexts in which cuckooing occurs is still evolving and criminals may adapt their models. In order to respond quickly to tackle any cuckooing activity which emerges in future, the Government considers it appropriate to take a power for the Secretary of State to amend the list of specified offences, where appropriate. This is considered justified due to the need to respond to the emerging threat of cuckooing-related activity quickly, and on the basis that any newly created criminal offences which may be added to the Schedule will already have been scrutinised by Parliament when being made into law. While it is the case that it could be expected that any new Bill creating a new cuckooing-related offence could itself amend Schedule "Cuckooing: specified offences", the link to cuckooing activity may only emerge at a later date. The regulation-making power will also enable existing criminal offences to be added to the Schedule to reflect the expansion of cuckooing activity into new areas of criminality.

### **Justification for the procedure**

4. By virtue of clause of clause 86(3)(a), regulations made under new clause "Cuckooing" (4) are subject to the draft affirmative procedure. This is considered appropriate as any such regulations would have the effect of expanding the application of the cuckooing offence in new clause "Cuckooing" (1). It is also befitting the Henry VIII nature of this power.

