

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 - Criminal Law**

##### ***Section 34 – Articles banned in prison***

158. This section amends section 41 of the Prisons (Scotland) Act 1989 (“the 1989 Act”) to create additional specific offences in relation to the introduction, use and possession of a personal communication device (including a mobile telephone and any component part of a mobile telephone) in prisons. In addition, it provides a definition of “proscribed article” and “personal communication device”, for the purpose of this section, and inserts further provisions which define the maximum penalty that can be imposed for the introduction, use or possession of personal communication device in a prison, and provide limited circumstances where it is not an offence to have a committed such an act.
159. Subsection (1)(a) substitutes section 41(1) of the 1989 Act, and provides that it is an offence for a person to introduce or attempt to introduce a “proscribed article” in a prison, without a reasonable excuse. It also provides that the maximum penalty that can be imposed for introducing or attempting to introduce a proscribed article (other than a personal communication device) into a prison is, on summary conviction, a period of imprisonment not exceeding 30 days, or a fine not exceeding level 3 on the standard scale (or both).
160. Subsections (1)(b)-(e) make minor consequential amendments to sections 41(2), 41(2A), 41(2B) and 41(3) of the 1989 Act.
161. Subsection (1)(f) inserts two new subsections after section 41(9). The new subsection (9A) provides a definition of “proscribed article” and the new subsection (9B) provides a definition of what a personal communication device includes.
162. Subsection (1)(g) updates the definition of “offensive weapon” in section 41(10) of the 1989 Act, by substituting the reference to the Prevention of Crime Act 1953 with a reference to the definition contained in section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995.
163. Subsection (2) inserts two new sections after section 41 of the 1989 Act in relation to personal communication devices; sections 41ZA and 41ZB.
164. The new sections 41ZA(1)-(3) provides that it is an offence for a person to: Give a personal communication device to a prisoner while the prisoner is inside a prison; transmit or intentionally receive any communication by means of a personal communication device in a prison; or be in possession of a personal communication device while inside a prison.

*These notes relate to the Criminal Justice and Licensing (Scotland)  
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

165. Offences in section 41ZA(1)-(3) are, on indictment, a period of imprisonment not exceeding two years, or a fine, or both; or, in summary proceedings, a period of imprisonment not exceeding 12 months, or to a fine not exceeding the statutory maximum, or both.
166. The new section 41ZB provides a number of exceptions in relation to communication devices. In particular, subsections (1) and (2) of section 41AB provide that it will not be an offence to introduce, use or possess a personal communication device in a designated area of a prison, or where the person has received written authorisation from the governor, director of a prison, or the Scottish Ministers.
167. Subsections (3) and (4) of section 41ZB provide that it will not be an offence for a prison officer (or other prison official) to introduce, use or possess a personal communication device if the device is one supplied to the person specifically for use in the course of the person's official duties at the prison, or the person is acting in accordance with those duties.
168. Subsection (5) of section 41ZB provides that no offence is committed by a person, other than a prisoner, where there is a reasonable excuse for the possession. A prisoner would not have a reasonable excuse, given that personal communication devices are not permitted in prisons and they are asked as part of the reception process whether or not they have any proscribed articles on their possession.
169. Subsections (6) and (7) of section 41ZB provide that it is a defence for a person accused of introducing, using or possessing a personal communication device in a prison to show that the person reasonably believed that the person was acting with authorisation or in circumstances where there was an overriding public interest which justified the person's actions. For example, where an individual from the emergency service had to access the prison with a communication device, in an emergency situation, and there was insufficient time for the individual to receive written authorisation.
170. Subsection (8) of section 41ZB provides the circumstances where written authorisation is given. In particular it provides that written authorisation should be provided in favour of a specified person (or person of a specified description), or for a specified purpose. Written authorisation is given either by the governor or director of the prison (in relation to activities at that prison), or the Scottish Ministers (in relation to activities at a prison specified in the authorisation).
171. Subsection (9) of section 41ZB provides the definition of a designated part of a prison, where it is not an offence to introduce, use or possess a personal communication device. This is necessary because it is not illegal to use or possess a personal communication device in the community. It is not the intention to penalise a person for entering an administrative area or other designated area of a prison with a personal communication device. It should only be an offence to introduce, use or possess a personal communication device beyond the designated part of a prison i.e. in the secure part of the establishment.
172. Subsection (10) of section 41ZB provides that prison officers or other prison officials who are crown servants or agents do not benefit from Crown immunity in relation to an offence of introducing, using or possessing a personal communication device in a prison. This is to ensure that the personal communication devices are only permitted in prisons in limited circumstances e.g. with authorisation.