SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2026] SC GLA 59

GG25008486

NOTE OF SHERIFF S REID

in the complaint

THE PROCURATOR FISCAL, GLASGOW

against

ROSE DOCHERTY

Act: Crown Office and Procurator Fiscal Service
Alt: McGowan, advocate; Lindsays LLP

GLASGOW, 29 April 2026

Summary

[1] The Abortion Services (Safe Access Zones) (Scotland) Act 2024 came into force on 24 September 2024. The Act makes provision for the designation of "safe access zones" around premises that provide "abortion services" (that is, any treatment for the termination of pregnancy authorised under the Abortion Act 1967). It then criminalises certain conduct within the safe access zone (or in specified private areas that are visible or audible from the safe access zone).

[2] At first blush, the new criminal offences seem straightforward. Section 4 prohibits the doing of an act within a safe access zone which, broadly speaking, is intended to influence a decision, prevent access, or cause harassment, in the zone. Section 5 creates similar offences related to conduct in defined private areas that are visible or audible from a safe access zone.

[3] But the devil is in the detail.

[4] On closer scrutiny, an offence is committed under section 4 only if the accused person (who is in the safe access zone) does an "act" with the intention of (or is reckless as to whether the act has the effect of) influencing the decision of "another person" (who is also in the safe access zone) to access, provide, or facilitate the provision of, abortion services at the protected premises. Critically, both the accused person and the "other person" must be physically within the safe access zone when the impugned act is carried out – and, in addition, the "other person" must be in the safe access zone for one of three specified purposes (namely, for the purpose of accessing, providing, or facilitating the provision of, abortion services at the protected premises).

[5] In contrast, interestingly, if the accused's impugned act is alleged to have "a continuing effect" it does not matter whether the "other person" is in the safe access zone at the time the accused does the act (2024 Act, section 4(2)). However, if the impugned act does not have "a continuing effect", the "other person" must be in the safe access zone at the time the act is carried out.

[6] This case is the first prosecution in Scotland under the 2024 Act.

[7] It is alleged that the accused, Rose Docherty, who is 75 years old, displayed various placards bearing text, whilst within a safe access zone for protected premises, "with the intention of influencing the decision of persons to access, provide and facilitate the provision of abortion services at the protected premises", contrary to the 2024 Act, section 4(1)(a).

[8] Objection was taken by the accused to the relevancy of the two charges against her. In addition, the accused challenged the compatibility of the prosecution (so far as proceeding upon the irrelevant charges) with the accused's convention right under Article 10, ECHR. The prosecutor sought to defend the current wording of the charges,

which failing, an amendment was proposed seeking to replicate certain statutory wording in section 4(1) of the 2024 Act.

[9] Having considered the parties' written and supplementary oral submissions at debate, I have (i) sustained the accused's preliminary plea to relevancy, (ii) sustained the first compatibility issue in the accused's compatibility minute, (iii) refused the prosecutor's alternative motion to allow the complaint to be amended, (iv) dismissed both charges on the complaint, and (v) deserted the proceedings *pro loco et tempore*.

[10] In summary, I reached these conclusions for the following reasons.

[11] First, the complaint fails to libel two necessary ingredients of the statutory offence, namely (i) that there was "another person" in the safe access zone *at the same time* as the accused did the impugned acts and (ii) that the "other person" was present within the safe access zone for one of the specified purposes (namely, for the purpose of accessing, providing, or facilitating the provision of abortion services at the protected premises) (*Tweedle* v *HM Advocate* (1967) JCL 261). Put another way, even if all of the alleged facts narrated in the charges were proven, the libelled statutory offence would not be established. To the same effect, specification of each of these omitted ingredients is necessary in order to give the accused fair notice of the charges against her (*Yeudall* v *William Baird & Co Ltd* 1925 JC 62, 64; *Blair* v *Keane* 1981 JC 19, 22). Accordingly, the charges, as presently libelled, are not relevant in law.

[12] Second, the acts of the procurator fiscal in commencing and pursuing this prosecution engage the accused's Article 10, ECHR convention right to freedom of expression, because the prosecution seeks to restrict and punish the exercise of the accused's right to express her views, and to impart information, ideas and opinions. Of course, Article 10 does not confer upon her an absolute right. It is a qualified right only. It can

properly be subjected to such restrictions and penalties as are *inter alia* "prescribed by law" (Article 10(2), ECHR). However, the present prosecution proceeds on criminal charges that are not "prescribed by law" at all, because the charges omit two necessary ingredients of the alleged crime. As libelled, the charges fail to disclose an offence known to the law of Scotland, under statute or at common law. Accordingly, insofar as it proceeds on *ex facie* irrelevant charges, the prosecutor's complaint constitutes an unlawful interference with the accused's Article 10 convention right (*R (Laporte)* v *Chief Constable of Gloucestershire* [2007] 2 AC 105; Human Rights Act 1998, section 6.)

[13] Third, the prosecutor's motion (in the alternative) to amend is refused. The grant or refusal of a motion for leave to amend a complaint is essentially a discretionary decision. I was not persuaded that it was in the interests of justice to exercise my discretion in favour of the prosecutor's motion. On the paltry information provided to the court in support of the motion, I was not satisfied that the proposed amendment had even a statable evidential foundation. In effect, all that the prosecutor sought to achieve by way of the proposed amendment was to introduce generic wording to the libel to replicate the statutory provision, rather than to aver actual facts and circumstances, founded in evidence, concerning the mode by which this particular offence was committed, by this particular accused, on the particular dates libelled. Specifically, the procurator fiscal depute was unable to satisfy me that he had an evidential basis to libel (i) that there was "another person" in the safe access zone *at the same time* as the accused did the impugned acts and (ii) that the "other person" was present within the safe access zone for one of the specified purposes (namely, for the purpose of accessing, providing, or facilitating the provision of abortion services at the protected premises). In any event, though the proposed amendment would have represented an improvement, of sorts, on the existing irrelevant libel, it would

have remained materially deficient in its specification of (i) the particular purpose for which each of the alleged "other persons" was within the safe access zone (that is, which of the libelled alternative purposes was said to apply to each person), and (ii) the time when each of those alleged "other persons" was present in the safe access zone (that is, whether their presence was simultaneous with the accused's impugned acts).

[14] Fourth, in light of the foregoing, the proper disposal is to dismiss the two charges and to desert the proceedings *pro loco et tempore*. Desertion *simpliciter* would not be appropriate because it cannot be said, at this stage, that a future trial would inevitably be unfair, if proceedings were ever to be re-commenced (*HM Advocate* v *Fleming* 2005 1 JC 291; *Paterson* v *HM Advocate* 2008 JC 230; *Francis Jude Donaldson* v *HM Advocate* 2017 SCL 672).

The legislation

[15] The avowed objective of the 2024 Act is to protect women who choose to access abortion services at protected premises, and the staff who provide such services there. Primarily, the legislation is aimed at curbing the activities of anti-abortion protestors in the close vicinity of abortion clinics. It seeks to achieve that objective by making provision for the designation of "safe access zones" adjacent to abortion clinics and by proscribing specified types of behaviour within those zones.

[16] "Protected premises" means a building that is, contains, or forms part of, a hospital and in which abortion services are provided (or which is otherwise an approved abortion clinic) (2024 Act, sections 1(a) and (b)).

[17] A "safe access zone" consists of the protected premises themselves, the *public* area of grounds adjacent to and associated with the protected premises (together referred to as the "protected site"), and a further *public* area of land within 200 metres of the boundary of the

protected site (2024 Act, sections 2(1) and (2)). The Scottish Ministers are enjoined to identify and publish a list of protected premises and the safe access zones pertaining thereto, and to identify the boundary of the safe access zone by reference to a map (section 2(4)).

[18] The Act then prohibits certain types of behaviour within a safe access zone. To be clear, it does not create an exclusion zone as such. Rather, it creates a zone within which certain particular types of behaviour, in respect of certain particular types of person, are prohibited.

[19] Section 4 of the 2024 Act reads as follows (my emphasis in bold):

> "4. Offence of influencing, preventing access or causing harassment etc in safe access zone
>
> (1) A person who is in a safe access zone for protected premises commits an offence if the person does an act with the intention of, or is reckless as to whether the act has the effect of –
> (a) influencing the decision of another person to access, provide or facilitate the provision of abortion services at the protected premises,
> (b) preventing or impeding another person from accessing, providing or facilitating the provision of abortion services at the protected premises, or
> (c) causing harassment, alarm or distress to another person in connection with the other person's decision to access, provide or facilitate the provision of abortion services at the protected premises,
>
> **where in each case the other person is in the safe access zone for the purpose of accessing, providing or facilitating the provision of abortion services at the protected premises.**
>
> (2) Where a person does an act in a safe access zone constituting an offence under subsection (1) and the act has a continuing effect, it does not matter for the purpose of that subsection whether the other person referred to in the subsection is in the safe access zone at the time the person does the act".

[20] Section 5 creates a similar offence of influencing, preventing access, or causing harassment in an area visible or audible directly from a safe access zone. The problem that section 5 seeks to address is that a "safe access zone" is defined as meaning only the "*public* area of land within 200 metres" of the boundary of the protected premises and grounds

(2024 Act, section 2(2)). As a result, *private* land within that 200 metre radius is, technically, not part of the safe access zone. The purpose of section 5 is to criminalise conduct even within such private property (otherwise located within the radius of safe access zone radius) provided the conduct on that private property is "capable of being seen or heard by another person who is within the safe access zone". So, for example, placing an anti-abortion poster in the garden of a private house, or silently praying at the window, may fall foul of section 5 if the act is capable of being seen or heard *directly* by "another person" who is in the safe access zone for the purpose of accessing, providing, or facilitating the provision of, abortion services at the protected premises. Acts which are capable of being seen or heard by the other person "only indirectly" (by seeing or hearing a recording or transmission by electronic means) are not caught by the section 5 prohibition.

[21] Section 6 list various exceptions. For example, a person does not commit an offence under the Act where the person does anything in a safe access zone in the course of peaceful picketing in connection with a trade dispute (that is, where the person is engaged in lawful conduct under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992). This final exception is pertinent to the second compatibility issue in the accused's compatibility minute, in which she submits that the 2024 Act unjustifiably discriminates between persons in the exercise of their Article 10 convention right on the basis of a protected characteristic or "status", contrary to Article 14, ECHR. However, submissions on that interesting second compatibility issue were expressly reserved and did not feature in the debate before me. Instead, the debate was confined to the accused's preliminary plea to relevancy and the first compatibility issue.

[22] A person who commits an offence under the 2024 Act is liable to a fine on summary conviction or conviction on indictment.

The charges

[23] The charges against the accused read as follows:

> "(1) on a number of occasions between 24 September 2024 and 19 February 2025, both dates inclusive, at Hardgate Road, Glasgow at its junction with Langlands Drive, Glasgow, whilst within a safe access zone for protected premises in terms of sections 1 and 2 of the aftermentioned Act, you ROSE DOCHERTY did display various placards with text on it [*sic*] and did so with the intention of influencing the decision of persons to access, provide and facilitate the provision of abortion services at the protected premises;
> CONTRARY to the Abortion Services (Safe Access Zones) (Scotland) Act 2024, Section 4(1)(a)
>
> (2) on 24th September 2025 at Hardgate Road, Glasgow at its junction with Langlands Drive, Glasgow, whilst within a safe access zone for protected premises in terms of sections 1 and 2 of the aftermentioned Act, you ROSE DOCHERTY did display a placard with text on it and did so with the intention of influencing the decision of persons to access, provide and facilitate the provision of abortion services at the protected premises;
> CONTRARY to the Abortion Services (Safe Access Zones) (Scotland) Act 2024, Section 4(1)(a)".

Procedural summary

[24] On 19 December 2025, at a pleading diet, the case was continued without plea for the Crown to disclose "the key evidence" to the defence. The accused was released on bail.

[25] On 13 January 2026, at a continued pleading diet, the case was adjourned on joint motion for the defence to consider the key evidence and obtain instructions.

[26] On 3 and 26 February 2026, the case was again continued without plea, on each occasion on defence motion, for the accused to consult with counsel.

[27] On 24 March 2026, two minutes were lodged for the accused. The first minute gave notice of a preliminary plea to the relevancy of the charges on the complaint. The second minute gave notice of two compatibility issues raised by the accused, in terms of rule 40.3 of the Act of Adjournal (Criminal Procedure Rules) 1996. The first compatibility issue

challenged the compatibility of the prosecution with the accused's convention right under Article 10, ECHR. The second compatibility issue challenged the compatibility of the primary legislation itself (specifically, sections 4(1)(a) and 6(c) of the 2024 Act) with the accused's convention rights under Articles 14 and 10, ECHR.

[28] On 26 March 2026, on defence motion, a diet of debate was assigned on the accused's preliminary plea to relevancy and on the first compatibility issue only. The second compatibility issue was expressly reserved meantime. Parties were ordained to lodge, in advance, written notes of argument in support of their respective positions at debate, together with copies of all authorities founded upon.

[29] On 20 April 2026, the case called before at the diet of debate. I heard lengthy oral submissions in supplement of the parties' written submissions. I adjourned the diet of debate for 7 days (to 27 April 2026 at 9.45am) to consider and deliver my decision.

[30] On 27 April 2026, the case called before me at the adjourned diet of debate. Following a brief further submission, I delivered my decision.

Submissions at the debate

[31] At the diet of debate on 20 April 2026, it was submitted for the accused that the charges are not relevant in law because they fail to specify that there was any "other person" within the safe access zone at the time when the accused's impugned "acts" were done and that that "other person" was either accessing, providing, or facilitating the provision of, abortion services at the protected premises at that time. As regards the first compatibility issue, it was submitted that the act of the procurator fiscal in prosecuting the accused (on a complaint that fails relevantly to libel an offence known to Scots law) constituted an interference with her convention right under Article 10, ECHR. That is because the

interference with that convention right is not "prescribed by law", in terms of Article 10(2), ECHR. What was challenged at the debate was the prosecutor's acts, not the primary legislation. The second compatibility issue (which was directed at the legislation) had been reserved meantime.

[32] I was invited to dismiss both charges and to desert the proceedings *simpliciter*, which failing, to desert *pro loco et tempore*. Desertion *simpliciter* was urged upon me on the basis that the procurator fiscal had not offered and, it was submitted, could not offer, any evidence that there was "another person" within the safe access zone for any one of the stated purposes at the time of the impugned acts.

[33] For the procurator fiscal, I was invited to repel the preliminary plea to relevancy and the first compatibility issue. As regards relevancy, it was submitted that the charges correctly specified the necessary ingredients of the statutory offence, namely (i) the dates on which the offences were committed; (ii) the locus; (iii) the accused; (iv) the means by which the offences were committed (including the requisite intent); and, crucially, (v) the statutory provision that had been contravened. It was submitted that by libelling the correct enactment the accused (and her legal representatives) had been given fair notice of the alleged offence. That was all that was needed. Reference was made to paragraph 13 of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 to the effect that, in the case of a statutory offence, it shall be:

> "… sufficient to allege that the offence was committed contrary to the enactment and to refer to the enactment founded on without setting out the words of the enactment at length".

This statutory provision was said to supersede the decision in *Tweedle*, *supra*. Besides, the impugned omissions from the charges related, not to an act or omission of the accused herself, but instead merely to "an element of the enactment" (namely, the contemporaneous

presence of "another person" in the safe access zone) which it was not necessary to repeat at length in the libel.

[34] *Esto* the charges were held to be irrelevant (which was disputed), I was invited to allow the charges to be amended by allowing insertion of the following words after the word "premises" where that word appears at the end of the libel in each charge: "where those persons were in the safe access zone for the purpose of accessing, providing or facilitating the provision of abortion services at the protected premises". It was submitted that this proposed conditional amendment would not change the character of the offence but would simply add, at the behest of the accused, an additional element of specification. There was said to be no prejudice to the accused by the proposed amendment.

[35] I sought clarification from the fiscal depute regarding the basis of the proposed conditional amendment. The fiscal depute expressly conceded that he had no evidence, at present, that any "other person" was in the safe access zone for any of the stated purposes at the time of the accused's impugned acts. Indeed, he expressly conceded that, as presently advised, he did not even know if the protected premises were open at the time of any of the impugned acts. He could explain only that enquiries were "ongoing".

[36] As regards the first compatibility issue, this was said to be misconceived because it focused upon the libel in the complaint, rather than upon the relevant statutory provision. It was submitted that alleged inadequacies in the drafting of a criminal charge are not relevant when determining whether a "restriction" on an accused's convention right is "prescribed by law", in terms of Article 10.2, ECHR. Rather, it was the content of the underlying statutory provision which was significant. In the present case, it was said that the underlying statutory provision was indeed "prescribed by law" (in the sense that it was clearly set out in the 2024 Act, in terms which were sufficiently precise to enable the accused,

with the benefit of legal advice, to foresee the criminal consequence of her own acts within the safe access zone). The fiscal depute also submitted that the first compatibility issue should be repelled because, in terms of section 57(3)(a) of the Scotland Act 1998, an act of the Lord Advocate "in prosecuting any offence" did not require to be compatible with ECHR convention rights.

[37] Lastly, in his written submissions, the fiscal depute had invited me to deal with the second compatibility issue. However, in supplementary oral submissions at the diet of debate, he withdrew from that position, acknowledging that the second compatibility issue had been expressly reserved *sine die*, and that the diet of debate had been restricted in the first instance to dealing with the relevancy minute and the first compatibility issue only. Accordingly, no argument was heard on the second compatibility issue.

[38] Reference was made by parties to the following authorities: *Yeudall* v *William Baird & Co Ltd* 2025 JC 62, 63; *Tweedle* v *HM Advocate* (1967) 31 JCL 261; *Coulthard & Maguire* v *Reeves* 1973 SLT (Notes) 34; *Wilson* v *Allied Breweries Ltd* 1986 JC 17, 20; *Blair* v *Keane* 1981 JC 19, 22; *R (Laporte)* v *Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paragraphs 45–56 and 137–142; *Kuznetsov & Others* v *Russia* (application number 184/02, unreported), 11 January 2007; *For Women Scotland Ltd* v *The Scottish Ministers* [2025] SC (UKSC) 1, paragraphs 9–14; *HM Advocate* v *Harris* 2011 JC 125, paragraph 18; *Annen* v *Germany* (application number 3690/10, unreported), 26 November 2015, ECtHR, paragraph 62; *Delfi AS* v *Estonia* (2016) 62 EHRR 6, paragraph 120; *Amann* v *Switzerland* (2000) 30 EHRR 843, paragraph 56; *Savva Terentyev* v *Russia*, application number 10692/09, unreported, 28 August 2018, paragraphs 75 and 84; *Reference by the Attorney General for Northern Ireland (Abortion Services) (Safe Access Zones) (Northern Ireland) Bill* 2023 AC 505; *Walker* v *Procurator Fiscal, Edinburgh* [2015] HCJAC 119; *HM Advocate* v *Fleming* 2005 1

JC 291; Renton & Brown, *Criminal Procedure* (6th Edition) Volume 1, Part I, A4-347 and Part III, 8-45 to 8-46.

Supplementary submissions

[39] At the adjourned diet of debate on 27 April 2026, the case called to allow me to deliver my decision.

[40] The procurator fiscal depute took the opportunity briefly to "clarify" his oral submission at the diet of debate as to whether the hospital was open on the dates libelled. He clarified that the Crown had indeed previously obtained (and disclosed) a statement from an individual "in a managerial position", the import of which was that "there were operations being carried on in the hospital at the time". More recently, a further statement had now been obtained which "describes the operational practices of the hospital at the time". Nothing more was said by the fiscal depute about the content of these disclosed statements and no further submission was made by him.

[41] In reply, counsel for the accused reiterated that the disclosed statements did not resolve the relevancy and specification deficiencies previously addressed.

Decision

[42] Having considered the parties' whole submissions, I made the following orders: (i) I sustained the accused's preliminary plea to relevancy, (ii) I sustained the first compatibility issue in the accused's compatibility minute, (iii) I refused the prosecutor's alternative motion to allow the complaint to be amended, (iv) I dismissed both charges on the complaint, and (v) I deserted the proceedings *pro loco et tempore*. I reached these conclusions for the following reasons.

Reasons for decision

[43] The 2024 Act has not previously been the subject of judicial scrutiny. However, the Supreme Court has considered and opined at length on the compatibility with human rights jurisprudence of broadly similar proposed legislation in Northern Ireland (*Reference by the Attorney General for Northern Ireland (Abortion Services (Safe Access Zones) (Northern Ireland) Bill* 2023 AC 505).

[44] In December 2022, in a unanimous judgment, the Supreme Court concluded that, to the extent that the Northern Irish Bill interfered with anti-abortion protestors' rights to freedom of expression, that interference was necessary in a democratic society to achieve a legitimate aim (namely, the protection of the rights and freedoms of others). Specifically, the Supreme Court held that a similar "safe access zone" of up to 250 metres (in the Northern Irish Bill) did not represent an unjustifiable restriction on the protestors' rights, when the rights of the patients and staff are also taken into consideration, because opponents of abortion remain free to protest anywhere else they please. They can do so in countless locations, in public forums or private venues, in person, on television, radio, or on social media. They can express their views in terms that are uninhibited, vehement and caustic. They can do so wherever they please, except within the immediate vicinity of abortion clinics. The right to freedom of expression or assembly does not include a right to force one's message on a "captive audience". So, restrictions on the location, timing, or manner of a protest or demonstration have been held to attract a wider margin of appreciation than outright bans because they do not destroy the essence of the rights protected. In contrast, "content-based restrictions" on freedom of expression or assembly are subjected to much greater scrutiny (*Lashmankin* v *Russia* (2017) 68 EHRR 1, paragraph 417). The restriction

imposed in "safe access zones" by the Northern Irish Bill was held to strike a fair balance between competing views and interests in a democratic society.

[45] To be clear, my decision in this case does not concern the compatibility issues addressed by the Supreme Court in the *Attorney General's Reference*.

[46] In addition, my decision in this case does not concern the compatibility of the Scottish legislation with convention rights.

[47] Instead, my decision deals with a much narrower issue, namely the legal relevancy of the criminal charges laid against the accused by the prosecutor and the compatibility of those charges with Ms Docherty's convention right under Article 10, ECHR.

Relevancy

[48] The general principle is that a criminal charge on a complaint or indictment should give fair notice to an accused of the time and place of the alleged offence, and of the mode by which it was allegedly committed, in such terms as disclose a crime known to the law of Scotland, under statute or at common law.

[49] Prior to 1887, indictments were "long and sonorous", with lengthy narration of the alleged facts and explicit recitation of all alternatives (Renton & Brown, *Criminal Procedure*, 6th Edition, Volume I, 8-01). Since then, Parliament has intervened repeatedly to shorten and simplify indictments and complaints by stripping away verbiage, implying content, and providing brief standard forms of charges for the more common offences (Criminal Procedure (Scotland) Act 1887; Summary Jurisdiction (Scotland) Acts 1908 and 1954). These abbreviated statutory forms of charges under solemn and summary procedure are now found in Schedules 2 and 5, respectively, of the Criminal Procedure (Scotland) Act 1995.

[50] There is no statutory form of charge for the new offences under the 2024 Act. Instead, the fiscal depute submitted that by merely libelling the correct enactment the accused (and her legal representatives) had been given sufficient notice of the offence alleged against her. Reference was made to the 1995 Act, Schedule 3, paragraph 13.

[51] It is correct that since the 1887 Act (in respect of indictments) and the 1908 Act (in respect of summary complaints), the necessity of specifying the mode by which an offence is committed has "suffered… a material modification" (*Yeudal* v *William Baird & Co* 1925 JC 62, 64). However, this statutory trend towards simplification is subject to two significant caveats.

[52] First, in the case of a statutory offence, if some further specification is necessary in order to provide fair notice to the accused of the charge against him, the court has the right to insist on that further specification as a "condition of relevancy" (*Yeudall*, *supra*, 64, per the Lord Justice General (Clyde)). Each case will turn on its own facts. But, overall, what is required is adequate specification, sufficient to give fair notice, of the alleged facts and circumstances that are said to constitute the essential ingredients of the statutory offence. The *modus*, being the operative and crucial part of the indictment or complaint, is where such specification should be set forth.

[53] Second, ECHR jurisprudence tempers the statutory drift towards minimalism. Some of the simplified statutory forms of charges have been described as "laconic in the extreme" such that it is "more than doubtful" (per Renton & Brown, *supra*) if they would comply with the ECHR guarantee that a person charged with a criminal offence must be informed promptly and "in detail" of "the nature and cause of the accusation against him" (Article 6(3)(a), ECHR). This specific guarantee has been held to require that an accused must be informed not only of the nature of the charge against him but of "the material facts

upon which it is based" (*Brozichek* v *Italy* (1989) 12 EHRR 371, paragraphs 38 to 42). (The State's obligation to disclose the evidence in support of a criminal charge is governed by the separate rights to equality of arms and to adequate time and facilities for the preparation of a defence: Articles 6(1) and 6(3)(b)). The Article 6(3)(a) guarantee (to be informed "in detail" of the "nature and cause" of the accusation) is recognised as being more onerous than the lesser requirement under Article 5(2), ECHR to inform an arrestee or detainee of the "reasons" for his arrest. Yet, even in the context of that lesser Article 5(2) requirement, the mere reference to an applicable statutory provision is generally insufficient (*Ireland* v *United Kingdom* (1978) 2 EHRR 25, [198]; *Fox, Campbell & Hartley* v *United Kingdom* (1990) 13 EHRR 157, [41]; *Murray* v *United Kingdom* (1994) 19 EHRR 193, [76]). While the precise extent of the information to be provided will depend on the circumstances (*Fox, Campbell & Hartley*, *supra*, paragraph 40), even an arrestee must be informed of "the essential legal and factual grounds for his arrest", specifically "the facts which are the foundation of the decision to detain" (Lester and Pannick, *Human Rights Law and Practice*, 2nd Edition, 4.5.34 and 4.5.36). Logically, the criminal charge against an accused should contain no less specification.

[54] Renton & Brown (*supra*, paragraph 8-45), summarises the obligation thus:

> "Charges libelling statutory offences must, like those charging common law crimes, fulfil two requirements, viz:
> (1) they must relevantly aver facts sufficient to constitute the offence, and
> (2) they must give the accused person fair notice of the case which he has to meet".

It continues (*supra*, paragraph 8-46.2):

> "It is necessary to specify all such acts and circumstances as form an essential part of the statutory offence; it is not enough to aver only some facts or circumstances and leave the rest to be inferred from a knowledge of the contents of the statutory provision referred to."

[55] In short, in a charge involving a statutory offence, it is necessary in each case to identify the essential ingredients of the statutory offence. The libel should then narrate the facts and circumstances that are said to establish those essential ingredients (in particular, the mode by which the statutory offence was committed), in order to give the accused fair notice of the allegation against him (*Tweedle* v *HM Advocate* (1967) 31 Journal of Criminal Law 261; *Blair* v *Keane* 1981 JC 19).

[56] Mere reference to (or regurgitation of the wording of) the statutory enactment that is said to have been contravened is unlikely to be sufficient to discharge the obligation of fair notice, at common law or in ECHR jurisprudence. Paragraph 13 of Schedule 3 to the 1995 Act serves a different purpose entirely. It is aimed at eliminating the previous archaic practice of narrating in full, within the libel, the whole wording of the statutory offence allegedly contravened. Instead, a simple reference to the enactment is sufficient for that limited purpose. Paragraph 13 does not address the separate question of whether, in any particular case, further specification is required in a charge in order to give fair notice of the particular facts and circumstances that are said to establish the essential ingredients of the offence. In *Tweedle, supra*, the Crown also sought refuge in the Criminal Procedure (Scotland) Act 1887 (the statutory predecessor to the 1995 Act, Schedule 3, paragraph 13), as a justification for not libelling the "necessary ingredients" of a statutory offence, but to no avail.

[57] What then are the essential ingredients of the offence in section 4 of the 2024 Act?

[58] The essential ingredients can be stated as follows. There must be averred:

(1) an "act" by the accused,

(2) done within a safe access zone to protected premises,

(3) done:

a. with an intention to influence or

b. reckless as to the effect of it influencing,

"another person",

(4) that "other person" was also present within the safe access zone, at the same time as the accused, when the impugned act was done, and

(5) that "other person" was present in the safe access zone at that time for one of three specific purposes, namely, for the purpose of:

a. accessing, or

b. providing, or

c. facilitating the provision of,

abortion services at the protected premises.

[59] Ingredient (3) is the *mens rea*.

[60] Ingredients (1), (2), (4) and (5) comprise the *actus reus*.

[61] To provide fair notice to the accused of the allegation against her, the charge must specify the alleged facts and circumstances in the present case that are said to constitute these essential ingredients of the statutory offence.

[62] In the event, the charges in the complaint fail to specify ingredients (4) and (5). They fail to specify that both the accused and "another person" were present within the safe access zone, at the same time, when the impugned "act" was allegedly done; and that the "other person" was present, at that time, for one of the specified purposes (namely, for the purpose of accessing, providing, or facilitating the provision of, abortion services at the protected premises).

[63] That the Scottish Parliament intended that ingredients (4) and (5) were essential ingredients of the new statutory offence can be discerned from both the context and purpose of the legislative provision.

[64] In terms of context, section 4(1) unambiguously requires not only that the "other person is in the safe access zone" when the impugned acts (of intending to influence, prevent access, or harass) are done, but that this is true "in each case". The emphasis is significant.

[65] Further, section 4(2) provides that where anyone does an "act" under section 4(1) which has a "continuing effect" then the "other person" (ie the person accessing, providing, or facilitating the provision of abortion services) does not need to be present in the zone at the same time as the act is done by the accused. The logical converse of section 4(2) must also be true, namely, that where an act (such as holding up a placard) does not have "a continuing effect", then the accused and the "other person" do need to be present in the safe access zone at the same time as the act is done by the accused. Otherwise, the offence is not constituted.

[66] In short, there is a patent distinction between the ingredients of the two offences under sections 4(1) and 4(2) and that distinction turns on the simultaneous presence of the accused and the "other person" within the safe access zone. It is evident, from an ordinary reading of sections 4 and 5 that, other than in situations where an impugned act is said to have "continuing effect", it is a necessary ingredient of the offences that both the accused and the "other person" are physically present within the safe access zone at the time the impugned act is done by the accused.

[67] In the present case, there is no suggestion that the impugned act had any "continuing effect". Therefore, as a matter of basic relevancy (and fair notice), the charges must libel the

simultaneous presence of the accused and the "other person" in the safe access zone at the time when the impugned acts were done.

[68] In terms of purpose, the same conclusion is disclosed by the explanatory notes to the 2024 Act. Explanatory notes are an "external aid to interpretation", though they play a secondary role to the words of the statute (*R(O)* v *Secretary of State for the Home Department* [2023] AC 255, [30]). When discussing the effect of section 4(2) of the 2024 Act, the explanatory notes (paragraph 16) state:

> "In certain circumstances, the accused and the affected person do not need to be in the safe access zone at the same time. Subsection (2) provides that where a person does an act that has a continuing effect, it does not matter if the other person affected was not in the safe access zone at the time the act was carried out. For example, a person who chains the doors of a protected premises shut in the middle of the night could commit an offence if it impedes another person's ability to access the protected premises the next morning."

[69] In any event, there is no real ambiguity in the legislation. It is incontrovertible that, absent a libelled "act" having "continuing effect" (which does not apply here), both the accused and the "other person" must be in the safe access zone at the same time when the impugned act is done. Otherwise, no offence is committed.

[70] In the present case, neither charge alleges that the accused did anything with a "continuing effect" in terms of section 4(2) of the 2024 Act. As a result, both charges, as libelled, are fatally irrelevant and deficient because an essential ingredient is omitted, namely, the presence of "another person" in the safe access zone at the same time as the accused's impugned "act" was done.

[71] A further related ingredient of the offence under section 4(1)(a) is that the "other person" who is within the safe access zone must be there for one of three specific statutory purposes, namely for the purpose of accessing, providing, or facilitating the provision of, abortion services at the protected premises. In order that the accused has fair notice of the

protected person against whom the offence was allegedly committed, the charge must set out that the "other person" (who was physically within the safe access zone at the same time as the impugned act was done) was either accessing abortion services, or providing the abortion services, or facilitating the provision of abortion services. Logically, any such person could only be doing one of these three things; no person would be doing all three.

[72] In the event, the charges do not specify whether any "other person" was in the safe access zone when the impugned act was done. The charges do not specify the purpose for which any such "other person" was in the safe access zone. Instead, the charges make reference only to "persons", without libelling whether they were ever in the safe access zone, or why, or when.

[73] Put another way, sections 4 and 5 have been drafted so as to require a real victim or complainer (or, more neutrally, a real "protected person") who is physically present in the safe access zone, for one or other of three specified purposes, at the same time as the accused does the impugned act. To be clear, I do not suggest that the protected person must be named or even give evidence. Understandably, that may not be desirable. But their existence, presence, and specific purpose within the safe access zone, simultaneously with the impugned act, must be averred and proved. Put another way, this is not an offence which can be committed against a hypothetical person, such as the offence of threatening and abusive conduct in terms of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, where criminality attaches to behaviour that is perceived to be threatening by any hypothetical "reasonable person". Instead, a specific ingredient of the 2024 offences is that a real "person" must be physically within the zone with the accused for one of three specified purposes, unless the accused's "act" is libelled to have continuing effect (which it is not). The mere reference to "persons" in the current charges is insufficient; it is irrelevant; it fails

to libel two essential ingredients of the offence; and it fails to give fair notice of where, why, and when the "persons" were present.

[74] The importance of specification about the presence of the "other person", and the specific purpose for their presence, within the safe access zone when the impugned act is done there by the accused cannot be diminished. By way of illustration, an offence is not committed by an act of an accused within the safe access zone which is seen (or heard) by "another person" who is outwith the safe access zone, even if that person was on their way to the facility for the purpose of accessing, providing or facilitating the provision of abortion services. Likewise, the offence is not committed if the other person, who is within the safe access zone, has merely seen (or heard) an accused's act through social media posts, or on television, or radio, or otherwise by watching from afar, while the accused was physically outwith the safe access zone. Likewise, if the "other person" is physically within the safe access zone, but *not* for the specific purpose of accessing, providing or facilitating the provision of abortion services, then no offence is committed. So, if the "other person" is in the safe access zone at the same time as the accused's impugned act but for the purpose of, say, delivering mail to the protected premises, or delivering pizzas to staff there, or to purchase a sandwich from the hospital café, or for knee surgery or a hip replacement or a caesarean delivery operation in the hospital, the section 4 offence is not constituted because an essential element of the *actus reas* is absent. In short, for the offence to constituted, and relevantly libelled, it requires to narrate facts disclosing the physical presence of an "other person" in the safe access zone at the same time as the impugned act and that the other person was there for one of the specified abortion-related purposes. In other words, there requires to be a real (not a hypothetical) statutorily-protected "other person".

[75] In ordinary circumstances a charge involving such a real complainer would name the complainer. However, the actual identification of the protected person in the present case may not be desirable for understandable reasons. Nevertheless, specification of the existence, location, and purpose of that "other person" within the safe access zone at the same time as the accused's impugned act must be averred and proved in order to satisfy the essential ingredients of the statutory offence. Here, the charges do not offer to prove such facts or circumstances. Therefore, the libelled *modus* does not correspond to, or constitute, the essential ingredients of the statutory offence.

[76] Lastly, the prosecutor cannot find refuge in paragraph 13 of Schedule 3 to the 1995 Act, by merely parroting the terms of the statutory provision. What is required is specification of the *modus* of this particular offence, by narrating the alleged facts and circumstances pertaining to this particular case that establish the essential ingredients of the statutory offence.

[77] For the foregoing reasons, the two charges on the complaint are irrelevant.

The first compatibility issue

[78] It is unlawful for a public authority to act in a way which is incompatible with a convention right (Human Rights Act 1998, section 6(1)). The court and the procurator fiscal are "public authorities" for this purpose (1998 Act, sections 6(1) and (3)).

[79] Article 10 provides that everyone has the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by a public authority. Of course, the convention right is not absolute. It is qualified. Since the right carries with it duties and responsibilities, it may be subject to such formalities, conditions, restrictions or penalties as are "prescribed by law" and are necessary

in a democratic society in the pursuit of various interests (such as national security, the prevention of disorder or crime, the protection of health, or the protection of the rights of others).

[80] The averred acts of the accused engage Article 10, ECHR. The accused is said to have displayed placards bearing text, and to have done so with a view to influencing a person's decision. It is uncontroversial that such alleged acts involve an expression of opinion about abortion. Such an expression of opinion concerns a moral or ethical issue which, incontrovertibly, engages Article 10, ECHR (*Annen* v *Germany* (application number 3690/10, unreported, 26 November 2015, ECtHR, paragraph 62).

[81] Section 4(1)(a) of the 2024 Act restricts freedom of expression in certain circumstances. That restriction is "prescribed by law". It is "prescribed by law" because it has a "legal basis in domestic law" the quality of which is sufficient to ensure that it is "accessible to the person concerned and foreseeable as to its effects" (*Delfi AS* v *Estonia* (2015) 62 EHRR 6, paragraph 120). In short, the necessary ingredients of the statutory offence under section 4(1)(a) of the 2024 Act are clear in domestic law. Those ingredients are set out in para [58], above.

[82] The problem for the procurator fiscal is that, while the statutory offence under section 4(1)(a) is sufficiently "prescribed by law" to justify interference with the accused's Article 10, ECHR right, the prosecutor's act in so doing (by commencing and insisting upon this prosecution on the basis of these charges) is not "prescribed by law", because, for the reasons explained above, the complaint fails relevantly to libel a crime known to Scots law. The prosecutor's "act" (the prosecution of the accused on the basis of *ex facie* irrelevant charges) is not "prescribed by law"; it has no "legal basis in domestic law" (per *Delfi AS, supra*); it therefore falls outwith the qualification and protection afforded by Article 10(2),

ECHR; and it thereby constitutes an unlawful interference with the accused's Article 10, ECHR convention right (*R (Laporte)* v *Chief Constable of Gloucestershire* [2007] 2 AC 105).

[83] For these reasons, the first compatibility issue in the accused's compatibility minute is sustained.

The proposed amendment

[84] For the procurator fiscal, the depute advanced an *esto* position. He stated that if the complaint, as presently libelled, was found to be irrelevant, leave was sought to amend it by adding the following words after the word "premises" in each charge:

> "where those persons were in the safe access zone for the purpose of accessing, providing, or facilitating the provision of abortion services at the protected premises."

[85] To be clear, the prosecutor's primary position was to defend the existing terms of the charges. His motion to amend was strictly conditional, advanced only in the event that the charges as libelled were found to be irrelevant. While competent and common enough, it is not an entirely comfortable stance to adopt. It has the flavour of taking multiple bites at the cherry. Be that as it may, the practical consequence is that the court is, first, compelled to assess the relevancy of the charges as they stand, without regard to the amendment. If the charges as libelled are found to be irrelevant, the court must then go on consider whether to exercise its discretion to allow the proposed amendment. In the course of that second exercise, the court is entitled (indeed required) to consider, among other things, the relevancy and specification of the charge as prospectively amended. If the proposed amendment would not remedy the relevancy or specification deficiencies in the charges, that consideration may influence the exercise of the court's discretion.

[86] Having turned to consider whether to exercise my discretion to allow the amendment, I was faced with an unsatisfactory situation. At the close of the diet of debate on 20 April 2026, the depute had conceded, fairly and properly, that he had no evidence, at present, that any "other person" was actually present within the safe access zone for any one or more of the stated purposes at the time of the accused's impugned act. Indeed, as then advised, he did not even know if the protected premises were open at the time. All he could say was that enquiries were "ongoing".

[87] A libel in a complaint or indictment (and an amendment to a libel) must have a stateable evidential basis. On the basis of the fiscal depute's candid concessions, I was not satisfied that the prosecutor had any stateable evidential basis to justify the proposed amendment. Such information as was disclosed in support of the proposed amendment was paltry.

[88] Specifically, the fiscal depute was unable to state that there was an evidential basis to libel (i) that there was "another person" present in the safe access zone *at the same time* as the impugned acts were done there by the accused, and (ii) that the "other person" was so present within the safe access zone for one of the specified purposes (namely, for the purpose of accessing, providing, or facilitating the provision of abortion services at the protected premises).

[89] Instead, I interpreted the proposed amendment as broadly reflecting the prosecutor's (ultimately unsuccessful) primary submission at debate that all that was required, for the purpose of relevancy, was a repetition of the generic statutory wording of the offence. For the reasons explained above, in my judgment it is not sufficient merely to parrot the wording of the statute. It is necessary to go further. The prosecutor must provide specification of the *modus* of the alleged offence in the instant case, by narrating the material

alleged facts and circumstances pertaining to the case in hand which establish the essential ingredients of the offence. Only then is the statutory offence relevantly pled. Only then is fair notice given of the charge against the accused, consistent with common law principles of fair notice and the convention right guarantee under Article 6(3), ECHR.

[90] In any event, though the proposed amendment appeared to be an improvement, of sorts, on the existing irrelevant libel, it would have remained materially deficient in its specification of ingredients (4) and (5) of the offence. First, the proposed amendment failed to specify the particular purpose for which each of the alleged "other persons" was within the safe access zone. Instead, it merely listed a series of alternative purposes for which the "other persons" were in the safe access zone, without specifying which particular purpose applied to each person. Second, the proposed amendment failed to specify whether each of those "other persons" was present in the safe access zone simultaneously with the accused's impugned acts.

[91] For completeness, I record that, at the adjourned diet of debate on 27 April 2026, just prior to delivering my decision, the fiscal depute took the opportunity briefly to "clarify" his oral submission at the debate, specifically as to whether the hospital was open on the dates libelled. He clarified that the prosecutor had previously obtained (and disclosed) a statement from an individual "in a managerial position", the import of which was that "there were operations being carried on in the hospital at the time". More recently, a further statement had been obtained which "describes the operational practices of the hospital at the time". Nothing more was said about the content of these disclosed statements.

[92] In my judgment, this supplementary information did not materially assist the procurator fiscal. An assertion that the prosecutor has evidence of the "operational practices of the hospital at the time" is vague and meaningless. It leaves me none the wiser as to

whether those "operational practices" (whatever that phrase actually means) have any bearing upon ingredients (4) or (5) of the offence. Likewise, an assertion that the prosecutor has evidence that "there were operations being carried on in the hospital at the time" does not advance matters one iota. The carrying on of "operations" in a hospital is unremarkable. It is irrelevant to this offence. It does not amount to stateable evidence that an "other person" was in the safe access zone for *an abortion-related purpose* simultaneously with the accused when the impugned act was done.

[93] For the foregoing reasons, I concluded that it was not appropriate to exercise my discretion to allow the proposed amendment. Using the language of section 159(1) of the 1995 Act, there was "just cause" to refuse the prosecutor's motion to amend. To allow the amendment would be to acquiesce in the libelling of charges for which there was, at present, no stateable evidential basis. In any event, the proposed amendment did not remedy the relevancy and specification deficiencies in the charges.

Disposal

[94] In the circumstances, the proper disposal is to dismiss the two charges and to desert the proceedings *pro loco et tempore*.

[95] Desertion *simpliciter* would not be appropriate because it cannot be said, at this stage, that a future trial would inevitably be unfair, if proceedings were ever to be re-commenced (*HM Advocate* v *Fleming* 2005 1 JC 291; *Paterson* v *HM Advocate* 2008 JC 230; *Francis Jude Donaldson* v *HM Advocate* 2017 SCL 672).