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### Seeking the views of children

Judicial and statutory developments

**Citation for published version:**

Black, G 2021, 'Seeking the views of children: Judicial and statutory developments', *Edinburgh Law Review*, vol. 25, no. 3, pp. 342-347. <https://doi.org/10.3366/elr.2021.0715>

**Digital Object Identifier (DOI):**

[10.3366/elr.2021.0715](https://doi.org/10.3366/elr.2021.0715)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Edinburgh Law Review

**Publisher Rights Statement:**

This article has been accepted for publication by Edinburgh University Press in the Edinburgh Law Review, and can be accessed at <https://www.eupublishing.com/doi/10.3366/elr.2021.0715>.

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# Seeking the views of children: judicial and statutory developments

## A. INTRODUCTION

What does the test of “practicable” mean, in the context of the court’s statutory duty to seek the views of the child “so far as practicable”? This was the question faced by the Inner House in *M v C*, a case concerning whether it was practicable for a child to be asked whether he wished to express a view about a matter which concerned him. The guidance from the Inner House is very helpful, and is entirely in keeping with the general direction of travel in this area. This note will set out the facts and decision of *M v C*, and reflect on how it sits with the forthcoming reform in the Children (Scotland) Act 2020 (the “2020 Act”).

## B. *M v C*: THE FACTS AND LAW

On an application for a contact order under section 11 of the Children (Scotland) Act 1995 (the “1995 Act”), a sheriff determined that it was not appropriate to seek the views of a child. As reported by the Inner House, his concern was that unsuitable information might be communicated to the child, who was just under five years old. However, his judgment did not expand on this: as the Inner House noted, “he did not explain the nature of the information or why it would not be practicable to ascertain the child’s views without it being divulged”.<sup>1</sup> The sheriff refused the contact order. On appeal to the Sheriff Appeal Court (“SAC”), the appeal sheriff found that the sheriff had erred, through the failure to seek the child’s views. The statutory test of practicability simply meant whether it was feasible to seek the child’s views. The decision was then appealed to the Inner House.

Before examining the decision of the Inner House, it is useful to set out briefly the relevant law. The three principles contained in section 11(7) of the 1995 Act (and replicated in other child-focused legislation) have become a pillar of judicial decision-making concerning children.<sup>2</sup> These three principles are: (i) that the court shall regard the welfare of

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<sup>1</sup> *M v C* [2021] CSIH 14, at para 2.

<sup>2</sup> Critically, these are statutory obligations placed on the court. Even if neither party to the litigation raises these three elements, the court must nevertheless address them explicitly in reaching its decision. This has recently been reiterated in *LRK v AG* [2021] SAC Civ 1; 2021 SLT (Sh Ct) 107, at para 8; *Woods v Pryce* [2019] SAC Civ 18; 2019 SLT (Sh Ct) 115, at para 13.

the child as its paramount consideration;<sup>3</sup> (ii) that the court shall not make any order unless it considers that it is better for the child for an order to be made than none at all;<sup>4</sup> and (iii) so far as practicable, taking account of the child's age and maturity, the court shall give the child an opportunity to say whether he wishes to express a view and, if he does so wish, give him an opportunity to do so and have regard to those views. Section 11(10) then introduces a statutory presumption that a child age twelve or over is of sufficient age and maturity to express a view; as with any presumption, this can of course be rebutted, to allow a child under twelve to express a view (or indeed, to prevent a child over twelve expressing a view).

After nearly thirty years, the courts are well versed in these three principles, and most published judgments address them explicitly, to demonstrate how they have been applied by the court in reaching its decision. The question of practicability often focuses on whether it is feasible to seek the views of a younger child, as was the case in *LRK v AG*,<sup>5</sup> decided the month before *M v C*. In *LRK*, the sheriff had not sought the views of a six year old child, on the basis that she was too young. In holding that the sheriff in *LRK* had erred, the SAC noted that he had not addressed the test of impracticability. Reiterating the approach taken in the leading case of *S v S*,<sup>6</sup> the SAC concluded that any decision not to seek the views of the child must be clearly justified:

The child was aged 6 years at the time and of an age where an opportunity to take views could, on the face of it, be given. As was said in *S v S*, there are many ways in which the views of the child can be obtained. Some may well be impracticable but others may not. It was the sheriff's duty to come to a view on that. In failing to do so he fell into error.<sup>7</sup>

The question that arose in *M v C* was however surprisingly rare. Rather than concerning the practicability of seeking views from a young child, this case related to the interaction between two of the section 11(7) principles: what happens if there is a route by which it is practicable to hear the views of the child – but doing so would manifestly be against the best interests of the child? Would this be practicable? In effect, the sheriff in *M v C* held that the

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<sup>3</sup> This principle has been in statutory form since the Guardianship of Infants Act 1925. The standard of paramountcy can be contrasted with the (slightly lower) standard in Article 3 of the UN Convention on the Rights of the Child, which requires that the best interests of the child are “a primary” consideration.

<sup>4</sup> Known as the “no order” or “status quo” principle.

<sup>5</sup> [2021] SAC Civ 1; 2021 SLT (Sh Ct) 107.

<sup>6</sup> 2002 SC 246.

<sup>7</sup> *LRK v AG*, para 8.

consequences of seeking the views of the child would be to communicate inappropriate information and, as that would not be in the best interests of the child, it was therefore *not* practicable to give the child a chance to express a view. The critical factor therefore is the proper interpretation of “practicable”: should it be given its ordinary meaning of able to be accomplished, feasible;<sup>8</sup> or should it be read in light of the welfare principle, having regard to the best interests of the child? As the Inner House noted “the word ‘practicable’ is not a straightforward term”.<sup>9</sup>

### C. *M v C*: THE DECISION

Lord Malcolm, giving the judgment of the court, took as his starting point the fact that the two principles in contention are both in section 11(7) of the 1995 Act: “It seems inherently unlikely that Parliament intended that steps had to be taken to explore any views of the child no matter how harmful that would be for him or her”.<sup>10</sup> It is therefore important to read “practicable” in the context of section 11(7), and in particular to have regard to the requirement to treat the best interests of the child as paramount – describing this welfare principle as the court’s “primary duty”:<sup>11</sup>

If a court is ordered to treat the best interests of a child as paramount, and also to do something concerning the child if it is practicable, it does little if any violence to that wording to decide not to do that something if it violates the first instruction... It is not a feasible thing for the court to do because it conflicts with the duty to treat the child's best interests as its paramount consideration.<sup>12</sup>

Accordingly, “practicable” needs to be read as encompassing what is possible, while also upholding the welfare test. On this basis, Lords Malcolm, Woolman and Doherty reached the unanimous decision that it would *not* be practicable to seek the views of the child where harmful consequences would result:

We have no hesitation in reading the test in section 11(7)(b) as importing a consideration of any harmful consequences for the child in question and whether they render all and any steps to explore the child’s views not practicable. This follows from the shared context of the provisions in this part of the statute, namely the court’s

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<sup>8</sup> The Appeal Sheriff framed it in these terms, quoting from the Shorter Oxford Dictionary, 6<sup>th</sup> ed: *M v C*, para 2.

<sup>9</sup> *M v C*, para 10.

<sup>10</sup> *M v C*, para 8.

<sup>11</sup> *M v C*, para 10.

<sup>12</sup> *M v C*, para 10.

consideration of whether to make a section 11(1) order, and the paramountcy of the child's best interests. In *LRK*<sup>13</sup> the SAC expressed a concern about applying the practicability test in its strictest sense. By "strictest sense" it meant an approach whereby if particular steps to explore the child's position can be taken, they must be taken. *In our view "practicable" is a more nuanced term which need not exclude all consideration of consequences. If something can be done, but only at the cost of serious harm to the child at the heart of the proceedings, it can be said that it is not a practicable course of action.*<sup>14</sup>

But, having reached this conclusion, the Inner House also issued a stern warning: this decision is not to be interpreted as allowing courts to dispense with the views of the child on the basis of vague concerns about welfare. Only in the most clear-cut circumstances will welfare concerns lead to the conclusion that it is not practicable to take the views of the child:

It is necessary to warn that this does not replace the statutory test with a judicial discretion. Both section 11(7)(b) and article 12 of UNCRC place great weight on the right of a child to be heard in proceedings such as this. That right is not unqualified, but *it will rarely be correct to conclude that seeking the views of a child will cause unavoidable and material harm to the child. Vague concerns that inappropriate information might be communicated are not a good reason for not seeking a child's views. Such matters can be guarded against.* If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare considerations of sufficient gravity to supersede the default position. Careful thought as to how a child's position is to be ascertained will often resolve concerns. The court would require to be in a position to justify the proposition that the welfare issues are such as to render the exercise impracticable.<sup>15</sup>

It is very clear from this that, in the rare circumstances where the welfare of the child potentially raises concerns as to whether and if so how the views of the child might be heard, the court will need to give anxious thought to the question of whether any measures can be taken to facilitate this and, where appropriate, record the conclusion in its judgment.

#### **D. FUTURE REFORM: THE CHILDREN (SCOTLAND) ACT 2020**

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<sup>13</sup> *LRK v AG*.

<sup>14</sup> *M v C*, para 11, emphasis added.

<sup>15</sup> *M v C*, para 12, emphasis added.

This decision is a very welcome clarification, which recognises welfare as at the heart of child law, but its relevance may be short-lived. Change is imminent, as a result of section 1 of the 2020 Act. This repeals section 11(7) and the current section 11(7) principles will be split into different sections: the welfare principle and the no order principle are replicated in what will be the new section 11ZA of the 1995 Act, while the duty to seek the views of the child will be contained in section 11ZB of the 1995 Act. These are not yet in force,<sup>16</sup> but when they are enacted there will be two critical changes in relation to seeking the views of the child, both in section 11ZB.

The first is that the age twelve presumption will be repealed and replaced with section 11ZB(3), which states that “the child is presumed to be capable of forming a view unless the contrary is shown”. Thus, no matter the age of the child, the court must ensure that the child has had the opportunity to express a view and, if this has not happened, record carefully how the presumption has been rebutted. Even more critically, the second change of note is that the test of practicability has gone: there is now no reference to seeking the views of the child “so far as practicable”. The duty on the court to give the child the opportunity to express a view will be absolute, expressed in section 11ZB(1) as the “court must”:

- (1) In deciding whether or not to make an order under section 11(1)... the court must—
  - a. give the child concerned an opportunity to express the child’s views...  
[and]
  - b. have regard to any views expressed by the child, taking into account the child’s age and maturity.
- (2) But the court is not required to comply with subsection (1) if satisfied that—
  - a. the child is not capable of forming a view, or
  - b. the location of the child is not known.
- (3) The child is to be presumed to be capable of forming a view unless the contrary is shown.

There is no reference here to issues of practicability. The only two qualifications are set out in section 11ZB(2) and are narrowly drawn, absolving the court of this duty only where the child is not capable of forming a view or cannot be found. Moreover, in the Inner House, Lord Malcolm placed some weight on the fact that the test of practicability was in the same section (indeed, the same subsection) as the welfare test – but that is also no longer the case, with welfare appearing in section 11ZA and the views of the child in section 11ZB.

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<sup>16</sup> Current indications are that they will not be in force until 2023.

Cumulatively, these reforms mean that the duty to seek the views of the child is now absolute and is no longer connected to the best interests principle. While the court must still treat the child's best interests as paramount when making a section 11 order concerning the child, seeking the views of the child is not in itself a section 11 order. What will happen under these new statutory provisions if this absolute duty on the court clashes with the welfare principle? Can the welfare principle still be regarded as the court's "primary duty" under the new statutory structure?

It seems counterintuitive that the court would take any steps which would compromise the best interests of the child, but the absolute duty to seek views does not allow much room for manoeuvre. One possible answer lies in the forthcoming incorporation of the UN Convention on the Rights of the Child into Scots law,<sup>17</sup> where Article 3 enshrines the best interests of the child as a primary consideration in *all* actions concerning children. Whereas the welfare principle in section 11ZA is limited to the court's decision to make (or not) an order under section 11, the Article 3 formulation is clearly much wider. Thus, section 11ZB must be read subject to Article 3, which would mean the process of seeking the views of the child must ensure that the best interests of the child are factored in as a primary – but not paramount – consideration. Nevertheless, the court is faced with an absolute duty in section 11ZB: arguably, in attempting to entrench the views of the child, the new Act may have undermined an invaluable protection for children.

*Gillian Black*  
*University of Edinburgh*

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<sup>17</sup> The UNCRC (Incorporation) Bill was passed unanimously by the Scottish Parliament on 16 March 2021. It is now the subject of a reference to the Advocate General under s 33 of the Scotland Act 1998, as being (in parts) beyond the competence of the Scottish Parliament.