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Enforcing child-protection rights and finding healthcare providers unsuitable to work with children

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Background. A range of constitutional rights aimed at protecting children fall under the umbrella term 'children's protection rights.' Healthcare providers have a legal and ethical duty of care towards their patients. Those who work with children have constitutional obligations to act in the best interests of child patients and are expected to uphold children's protection rights. However, there are instances in which healthcare providers contravene professional ethics and legal obligations by harming children.
Objective. This article explores when and how a finding of unsuitability to work with children can be used to enforce child protection rights against healthcare providers.
Method. The contents of s120 of the Children's Act, related case law and pertinent health legislation were analysed to determine when, how and by whom, healthcare providers may be found unsuitable to work with children.
Results. A healthcare provider may be found unsuitable to work with children when the conditions of s 120 of the Children's Act are met. Such a finding can be made by, among others, disciplinary bodies such as Professional Conduct Committees (PCCs).
Conclusion. If forums such as PCCs effectively apply s120 of the Children's Act against unsuitable healthcare providers, this would further demonstrate the commitment of the health profession to advance the protection rights of all children.
Keywords. Unsuitable, working with children, child protection, Children's Act.

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Section 28(1)(d) of the Constitution guarantees every child the right to be protected from 'maltreatment, neglect, abuse or degradation.'[1] To this end, there are laws and policies in place aimed at giving effect to these (and other) child protection rights found in the Bill of Rights.[2] For example, the Children's Act 38 of 2005 contains provisions to enforce these rights. One of the ways to protect children from harm is to ensure that those who are a threat to them are not given opportunities to work with children. This article focuses on the provisions in the Children's Act which regulate finding people unsuitable to work with children and specifically examines section 120 of the Children's Act.[3] Central to the discussion is **when**, **how** and **by whom** healthcare providers[4] can be found unsuitable to work with child patients. For ease of reference, a finding that a person is unsuitable to work with children will also be referred to as 'a s120 finding', forthwith. Also note that the term 'working with children' for the purpose of this discussion is restricted to meaning being either formally or informally employed in a position where one has authority over or plays a supervisory role or takes care of children, in the course of such employment.[5]

Legislative framework on finding people unsuitable to work with children

The Children's Act defines a person unsuitable to work with children as someone whose name appears on Part B of the National Child Protection Register (NCPR).[6] This part of the NCPR lists people who have committed certain criminal offences against children. It also records those who have been found unsuitable to work with children (unsuitable persons), either by the courts or by legally established disciplinary forums (such as tribunals or panels)[7] which have considered a transgressor's actions in relation to a child.[3]

In criminal cases where a person has been convicted of, for example, murder, rape or assault of a child, possession of child pornography or human trafficking offences, the convicted person is regarded as unsuitable to work with children without a court first needing to determine such unsuitability.[3] In such instances, a s120 finding is prescribed by the Children's Act and is therefore peremptory. There is no discretion for a court not to make the finding in such cases.

Alternatively, a s120 finding can be made by a court or a forum after an application by an organ of state, a prosecutor or those who have an interest in the protection of children;[3] e.g., a child protection organisation. In addition, such a finding may be made on a court's or forum's own initiative (i.e. without being obliged by the Act to do so or without being prompted by an application).[3]

Importantly, the Act permits a court to make a s120 finding even in the absence of a conviction in the criminal trial of the wrongdoer.[3] The same would hold true for when a disciplinary forum makes a s120 finding. There is no requirement that such a finding be preceded by a criminal conviction nor is it precluded by an acquittal. However, a s120 finding must be supported by evidence.[3,7] Sections 121(a) and (b) of the Children's Act allow for such a finding to be appealed to a higher court or to be reviewed by a court if it was made by a disciplinary forum.

Case law examples of s120 findings

There have been several cases in which convicted criminals have been found unsuitable to work with children. In both *S v Klaushe*[8] and *S v PB,*[9] the sexual offenders convicted of child rape were declared unsuitable to work with children as per the Children's Act. Further, in *S v Jantjies,*[10] a s120 finding was made against a man convicted of child neglect in terms of the Children's Act. In *S v Masina*, the Mpumalanga High Court found a convicted child rapist unsuitable to work with children, correcting the magistrate's court's earlier failure to make a s120 finding.[11] Emphasising the gravity of child protection, the High Court remarked that '[w]hen it comes to protecting the children from people who have proved that they prey on the young ones, there is just no room for errors.'[11] This decision highlights the importance of consistently applying s120 whenever the circumstances warrant it, in line with the provisions of the Children's Act.

Consequences of s120 findings in general

The Children's Act expressly creates several restrictions for people who are declared unsuitable to work with children. For example, they are prohibited from establishing or working at a creche (i.e. a partial care facility) or a child and youth care centre, and they cannot operate or work in an Early Childhood Development (ECD) programme.[12] They are also deemed not suitable to adopt or foster a child.[13]

The consequences of a s120 finding are not limited to the scenarios expressly provided for in the Children's Act. For example, education regulations across provinces indicate that unsuitable persons cannot be members of a school governing body.[14] Thus the reach of a s120 finding is broad and deems an unsuitable person unfit to work with children in any capacity. This approach corresponds with sections 40 and 41 of the Sexual Offences Act which contains a similar provision to s120 and holds that anyone convicted of a sexual offence against a child may not be employed to work with children 'in any circumstances.'[5]

S120 findings against healthcare providers and specific consequences

Healthcare providers may work with children in different capacities. The most common one is the patient and healthcare provider relationship. Children's protection rights require that they be protected against healthcare providers who might cause them harm. Therefore, it must be recognised that s120 findings can also be made against healthcare providers. This finding can be made if a healthcare provider has, for example, maltreated, neglected, abused or degraded a child patient in violation of that child's protection rights and in violation of the responsibilities of healthcare providers to act in the best interests of their patients.[15] In additional, a s120 finding can even be made against a healthcare provider where the unlawful acts against children took place in private settings, outside the professional or workplace environment. The s120 finding can then be made either by a court or a disciplinary forum authorised to consider the unprofessional conduct of healthcare providers (more on this in the next section). Once the s120 finding is made, the healthcare provider's name must be recorded in the NCPR. A s120 finding against a healthcare provider means they are prohibited from, for example, consulting, examining or treating child patients.

It is not only the placement of a healthcare provider's name on the NCPR that makes them unsuitable to work with children, but also the s120 finding that precedes the name placement. It is important to clarify this point because there might be problems (technical or otherwise) with the NCPR. The fact that a person's name is yet to appear on the register after a s120 finding has already been made, does not change the consequences of the finding. If, for example, a healthcare provider is found unsuitable to work with children, they may not work with children, pending the inclusion of their name on the register. Once the finding is made, all prescribed consequences apply immediately, even if the finding is being appealed or reviewed.

Who can make s120 findings in respect of healthcare providers?

As indicated earlier, courts can make s120 findings against anyone, including healthcare providers. Legally established disciplinary forums which have considered the conduct of a health professional in relation to a child can also make a s120 finding. Examples of disciplinary forums legally recognised and established to assess the conduct of healthcare providers include the Professional Boards established by the Health Professions Act 56 of 1974 (HPA) and the South African Nursing Council, operating in terms of the Nursing Act 33 of 2005 (NA). These bodies have disciplinary powers[16] and may establish Professional Conduct Committees (PCCs) to investigate the professional conduct of healthcare providers.[17] Although other legally established health professional forums may exist, the discussions below focus solely on the contents of the HPA and the NA and the disciplinary forums which fall under these laws.

Section 1 of the HPA defines 'unprofessional conduct' as 'improper or disgraceful or dishonourable or unworthy conduct, or conduct which, when regard is had to the profession of a person who is registered in terms of this Act, is improper or disgraceful or dishonourable or unworthy.'[18] The NA contains a similar definition for its purpose.[19] Any form of maltreatment, abuse, neglect or degradation of a child patient fits the description of unprofessional conduct found in these laws.

Although PCCs are empowered to find healthcare providers guilty of unprofessional conduct, there could be uncertainty as to whether they are also authorised to make s120 findings. A reason for such uncertainty might be due to the limited penalties the PPCs may impose on a healthcare provider found guilty of unprofessional conduct. Section 42(1) of the HPA and section 47(1) of the NA lists the penalties that may be imposed by PCCs. These penalties range from reprimands, suspensions and fines to removing healthcare providers' names from professional registers. However, these Acts prescribe a closed list of permissible penalties, meaning PPCs can only impose those penalties expressly provided for in the legislation. A s120 finding is not included in these lists of penalties

This leads to a pertinent question: is a s120 finding considered to be a penalty? Indeed, it can be viewed as a penalty. A s120 finding contains inherent restrictions against the wrongdoer (i.e. not being able to work with children). Viewed in this way, such a finding can be regarded as a penalty, 'albeit not a criminal penalty.'[7] However, viewing a s120 finding exclusively as a penalty is problematic owing to the closed list of penalties prescribed in the HPA and the NA. This would imply that PCCs (falling under the HPA and the NA) would not be able to impose a penalty of finding a healthcare provider unsuitable to work with children because such a finding is beyond the scope of penalties set out in the relevant laws.

This apparent conflict can be resolved through a broader understanding of the nature of a s120 finding. It is submitted by this author that a s120 finding can also be imposed as a type of declaratory order made by a court or a disciplinary body. The Constitutional Court has noted that a declaratory order is 'a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values.'[20] The court went on to say that '[d]eclaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own'.[20] Viewed in this light, a s120 finding (as a declaratory order) is considered to be a remedy (and is not merely a penalty). Therefore, when a PCC finds a health practitioner guilty of unprofessional conduct, that finding can also be accompanied (in appropriate cases) by a declaration that the practitioner is unsuitable to work with children in accordance with s120 of the Children's Act.

The HPA and the NA do not operate in isolation and must be read with other laws which regulate people's behaviour, including the criminal law and laws such as the Children's Act. PCCs are thus not only bound by the provisions of, for example, the HPA and the NA, but also by other laws, including the Children's Act. What this means is that after an enquiry into the unprofessional conduct of a healthcare provider in a matter involving a child, the PCC would be authorised to make a s120 finding and would also be able to impose the penalties prescribed in the HPA and the NA respectively.

Instances where a s120 finding may be made by a PCC

PCCs may only make a s120 finding in accordance with the Children's Act, following an enquiry into the professional conduct of the healthcare provider. Unfortunately, this author was unable to find any instances in which a PCC operating through the HPCSA or the Nursing Council has made a s120 finding. Judgments published by the HPCSA and Government Gazettes naming unprofessional practitioners in terms of the NA revealed no s120 findings.

In 2023, a PCC found a health practitioner guilty of professional misconduct as a result of sexually abusing a minor. The transgressor was removed from the register of the Psychology Board.[21] It is unclear if the minor was his patient. However, that does not matter. In this case, the health practitioner clearly violated the protection rights of the child. Such a case would have warranted a s120 finding by the PCC. The consequences of the s120 finding as set out in the Children's Act could have followed in tandem with the penalties imposed by the PCC.

Given the extreme consequences of a s120 finding, PCCs should only make such a finding in cases that involved major transgressions which constituted unprofessional conduct involving children (whether they were patients or not). The courts have held that unprofessional conduct which is regarded as 'disgraceful' (as opposed to 'improper') is deemed more reprehensible and would attract heavier penalties.[22] For example, unprofessional conduct which warrants complete removal from the applicable professional registry is generally regarded as severe misconduct and thus such cases (where they also involve the accused healthcare provider's violation of the protection rights of a child) would be prudent for the imposition of a s120 finding.

Conclusion

Healthcare providers who work with children must respect the constitutionally guaranteed protection rights of the child. When the unprofessional conduct of a healthcare provider violates a child's protection rights (whether during their employment or in private settings), then the relevant disciplinary forum which is considering misconduct charges against the healthcare provider must also consider imposing a s120 finding in appropriate cases. Disciplinary forums, such as PCCs, must have adequate processes in place to ensure that such a finding is made fairly. Once such a finding is made, its consequences apply immediately and it is not stalled by the subsequent process of placing the wrongdoer's name on the NCPR. A healthcare provider faced with a s120 finding imposed by a PCC will have the option of reviewing and setting aside the decision. What is important is that the option to make a s120 finding must be taken seriously by those in a position to make it. Such a finding could also serve as an additional deterrent for healthcare providers who violate professional ethics and flout child protection laws through unprofessional conduct that is harmful to children. The health profession should always be seen as taking child protection seriously and this can also be achieved by constantly and consistently removing child predators operating within the profession. Making s120 findings against offending healthcare providers further demonstrates the profession's commitment to respecting and promoting the protection rights of child patients and children in general.

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1. Constitution of the Republic of South Africa, 1996.
2. Constitution of the Republic of South Africa, 1996. Sections 9 - 14. The rights to equality, life, dignity, privacy, physical integrity and not to be subjected to slavery or forced labour are also examples of child protection rights.
3. The Children's Act 38 of 2005. Section 120.
4. National Health Act 61 of 2003 (NHA). Section 1 of the NHA defines a healthcare provider as someone who provides health services according to any law.
5. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Section 41.
6. Children's Act 38 of 2005. Sections 1, 118 and 119.
7. Sloth-Nielsen J. Protection of children. In: Davel and Skelton, editors. Commentary on the Children's Act (Revision Service 8, 2018). Chapter 7.
8. S v Klaushe 2024 JDR 2735 (ECMA) (unreported).
9. S v PB (Sentence) 2023 JDR 1506 (ECMA) (unreported).
10. S v Jantjies 2022 JDR 3134 (WCC) (unreported).
11. S v Masina 2021 JDR 0777 (MN) (unreported), para 23.
12. Children's Act 38 of 2005. Sections 82(3), 97(3), 200(3)209(3) and 123(1).
13. Children's Act 38 of 2005. Sections 231(6) and 182(3).
14. Gauteng Governing Body Regulations for Public Schools, 1997. GenN 786 of 1997 (PG 331 of 28 February 1997). Regulation 16. Regulations for the Constitution and Election of Governing Bodies in Public Schools in the Mpumalanga Province. GenN 21 of 2012 (PG 2003 of 27 January 2012). Regulation 10. Regulations Relating to the Election of School Governing Bodies and Governance of Schools in the Northwest Province, 2024. GN R4446 in GG 50206 of 28 February 2024. Regulation 3.
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17. Minister of Health. Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the [Health Professions] Act. Government Gazette 31859 of 2009. Nursing Act 33 of 2005. Sections 15 and 47.
18. Health Professions Act 56 of 1974. Section 1.
19. Nursing Act 33 of 2005. Section 1.

20. Rail Commuters Action Group and Others v Transnet Ltd T/A Metrorail and Others 2005 (2) SA 359 (CC), para107.
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22. Visagie v Health Professions Council of South Africa and Others 2023 (2) SA 626 (GP), paras 44 - 45.

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