



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Exact Mobile
Information Provider (IP) (if applicable)	Blue Knights (BNT)
Service Type	Subscription Service and Suggestion of the Involvement of Children
Source of Complaints	Secretariat Referred from Complaint #0024
Complaint Number	#0091

Complaint

A complaint was received in respect of a service offered by the IP through the SP and such complaint was adjudicated under complaint #0024. A copy of such report has been made available to the SP and the IP.

During the course of the investigation and adjudication of complaint #0024, a number of additional issues were noted by the Adjudicator and referred to the Secretariat in order for a formal complaint to be instituted and so the SP and/or IP could respond thereto.

These additional issues relate to MMS & SMS messages the adjudicator received from the IP during the course of his investigation and adjudication of complaint #0024. The MMS & SMS messages received were labelled MMS1, MMS2, & SMS1 in complaint #0024 and such labels are used again in respect of this complaint. The additional issues which arose as a result of receipt of MMS1, MMS2, & SMS1 form the basis of complaint #0091 and this report in respect thereof.

The relevant sections of the report of the Adjudicator in respect of complaint #0024 provide:

- Only MMS2 indicates that the service is intended for adults as required in Clause 8.1.1 of the WASPA Code of Conduct, while neither MMS1 nor SMS1 appear to contain such an indication.

The process of obtaining MMS1 and MMS2 did not show any adult verification process as required by Clause 8.1.3 of the WASPA Code of Conduct.

The Secretariat furthermore took note of the possible contravention of Clause 8.2.1 of the WASPA Code of Conduct in the use of the phrase “our naughty School Girls” in MMS2.

[The references to MMS1 and MMS2 are to two MMS messages received during the course of the investigation of complaint #0024.]

- The Adjudicator considered there to be prima facie breaches of Clauses 8.1.3 and 8.2.1 of the WASPA Code of Conduct *[in respect of a promotional MMS received from the SP, acting on behalf of the IP, set out more fully below]*.

The Adjudicator regarded himself as not being empowered to make a finding or impose a sanction in respect thereof without giving the SP an opportunity to respond, in accordance with the *audi alteram partem* principle.

The Adjudicator accordingly instructed the Secretariat to institute a complaint against the SP in respect of Clauses 8.1.3 and 8.2.1 of the WASPA Code of Conduct. As this instruction is neither a decision nor a sanction of the Adjudicator, it is not subject to appeal by the SP.

- The Adjudicator further regarded the concern with the “membership” referred to in MMS1 and MMS2 being a subscription service as defined in the WASPA Code of Conduct as a possible contravention of one or more of the stipulations in Clause 11 of the WASPA Code of Conduct.

The Adjudicator regarded himself as not being empowered to make a finding or impose a sanction in respect thereof without giving the SP an opportunity to respond, in accordance with the *audi alteram partem* principle. The Adjudicator accordingly referred this issue to the Secretariat for further investigation and to obtain the response of the SP. As this referral is neither a decision nor a sanction of the Adjudicator, it is not subject to appeal by the SP.

Clause 11 of the WASPA Code of Conduct was considered in respect of the existence of a subscription service, while clauses 8.1.3. and 8.2.1. were considered in respect of the suggestion of the participation of minors in adult content. These clauses specifically provide:

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user’s age must be obtained prior to the delivery of an adult service.

8.2. Prohibited practices

8.2.1. Adult services must not contain references that suggest or imply the involvement of children.

The relevant SMS and MMS messages received by the Secretariat from the IP through the SP, during the course of the Secretariat’s investigation into complaint #0024, are set out below. It is these messages that give rise to this complaint #0091.

Messages giving rise to complaint in respect of Clause 8.1.3.

The two messages received and which gave rise to this complaint in respect of a possible breach of clause 8.1.3 of the WASPA Code of Conduct are referred to as "MMS1" and "SMS1" in the report on complaint #0024 and read:

MMS1

Date: Nov 18, 2005 3:15 PM
From: (82) 008 - 0060
To: (**) *** - ****

There is still a lot more sms ANG to 38581 to get the rest 6 sets. More of jolie next week Plus check out MAC3 Dont forget Paris on 37607 and stolen cell phone picks on 38581 also see halle berry by sending Halle to 38581 plus our hot blonds Yanna And Nikki and Cathy and Lexa and Salma and mac or want the Paris video on 37393 send paris1 to 37393 or ob1

To unsubscribe call 011 3729813 or to chat call 083 919 4949

This new service is for new service for members only. R10 per smsWant to subscribe sms the word MEM to 38581 this will be on invitation only and the images will be exclusive the foxii mobile club members. Plus there will also be great discounts and loads of free DVDs of your favorite stars. To stop sms stop to 38581 or 32226 stops at R1

SMS1

Date: Nov 22, 2005 10:31 AM
From: +27820070182

She has DD cups and loves to take it deep throat. See all the titi Fcuking (sic) you want sms SIMI to 38581 to c her beg for more.(R10 MMS 2 stop sms sp to 32391 R1)

Message giving rise to complaint in respect of Clause 8.2.1.

The message received and which gave rise to this complaint in respect of a possible breach of clause 8.2.1. of the WASPA Code of Conduct is referred to as "MMS2" in the report on complaint #0024 and reads:

MMS2

Date: Nov 21, 2005 9:09 PM
From: (82) 008 - 0060
To: (**) *** - ****

To see more you must be over 18 if not please stop.

To see more of ARIA sms ARIA to 38581 or to see Angelina Jollie sms ANG to 38581 There are 26 sets of this Italian Hottie.

To see more of Jessica Simpson sms JES to 38581 there are 9 sets. Next week.

There is still a lot more so if you want to see our naked celebrities like Angelina Jolie sms ANG to 38581 to get the rest 6 sets. More of Jolie next week Plus check out MAC3 Dont forget Paris on 37607 and her lost cell

phone picks on 38581 also see halle berry by sending Halle to 38581 plus our hot blonds Yanna And Nikki and Cathy and Lexa and Salma and Mac and our **naughty School Girls** or want the Paris video on 37393 send paris1 to 37393 or ob1

To unsubscribe call 011 3729813 or to chat call 083 919 4949

This new service is for new service for members only. R10 per sms

Want to subscribe sms the word MEM to 38581 this will be on invitation only and the images will be exclusive the foxii mobile club members. Plus there will also be great discounts and loads of free DVDs of your favorite stars. To stop sms stop to 38581 or 32226 stops at R1

So on 38581 you will find

Ang

Halle

Salma

Yanna

Nikki

Cathy

Lexa

School

Jenna

Debbie

List

For your viewing please we now have a list of porn stars starting with a sms to SOPHIE on 38581 or NIKKI or BANKS or BLOND or YANA or to become a member of the exclusive members only Celebes Porn in the country sms MEM to 38581 new girls daily check the list or subscribe you wont regret it. and new stars will be added every Friday or listen to her friends and moan on 0822347474 or chat to one of her sluttish friends on 083 919 4949 live... Yes live!!!

To see slide show of any one of the girls in the list just sms there name to 37607

Paris to 37607---- --- CUM to 37607--- Amber to 37607---Chrissy to 37607 and Faust to 37607 this list will be updated every Friday with the new girls.

So keep coming back every Friday for the latest action.

To see vid clips of Paris and other girls sms ob1 to ob6 or paris1 to paris7 to get hot clips of the girls doing it live to 37393 or sms list to 38581 for more.

The words of concern are highlighted in yellow by the Adjudicator.

At the time the complaint was lodged, the SP was (and remains) a member of the WASPA, while Wireless Warriors (Proprietary) Limited was not a member of the WASPA. In the period between the complaint being lodged and this report, Wireless Warriors (Proprietary) Limited has become a WASPA member and apparently is currently the SP responsible for providing services on behalf of the IP. The SP and IP are nevertheless cited as at the date the complaint was lodged.

SP Response

The SP forwarded an initial response of the IP, which is quoted below (in italics):

The service is not a subscription service as the user is not automatically billed now or at any stage unless he request more content. He is only a

member in the sense that he has used our system frequently and as such is entitled to specials and up date notifications. The user does not incur any costs unless the user actually sends an SMS from his handset.

However, considering the seriousness of the complaint against the SP (and through it the IP) and having regard to the fact that the IP had only addressed one of the three grounds of the complaint in its response above, the SP was encouraged to supplement its initial response (quoted above).

The message sent by the Secretariat to the SP in this regard is set out below (in bold):

In your response to complaint #0091, you responded to the Adjudicator's questions regarding "membership" and subscription services, but you failed to address the alleged breaches of clauses 8.1.3. and 8.2.1. of the WASPA Code of Conduct:

**| 8.1.3. Members must take reasonable steps to ensure that only persons
| of 18 years of age or older have access to adult services. Explicit
| confirmation of a user's age must be obtained prior to the delivery
| of an adult service.
|
| 8.2.1. Adult services must not contain references that suggest or
| imply the involvement of children.**

Notwithstanding the fact that the five-working-day deadline for your response has passed, the WASPA Secretariat encourages you to supplement your existing response by addressing the possible breaches of these clauses identified in the Independent Adjudicator's report for complaint #0024.

Any supplemental response that you provide to the WASPA Secretariat will be passed on the Independent Adjudicator; however, in terms of the Code of Conduct procedure, the Adjudicator is not obliged to consider any late responses. We therefore encourage you to respond as soon as possible.

The IP chose to supplement its response and the SP forwarded such supplementary response on behalf of the IP¹. The IP's supplementary response is quoted below (in italics):

All advertising material complies to the ASA and FSB standards and as such does inform the client that this is an Adult service when they are

¹ The IP's response in respect of the possible breach of clauses 8.1.3. and 8.1.2. of the WASPA Code of Conduct, was contained in an electronic mail from the SP to the Secretariat as well as in a document setting out the IP's grounds for appeal against the Adjudicator's decision in complaint #0024. This is inexplicable as the Adjudicator made no finding in respect of a possible breach of either of clauses 8.1.3. and 8.1.2. of the WASPA Code of Conduct in complaint #0024. In addition, the Adjudicator does not consider appeals and as such did not consider the IP's grounds for appeal in respect of complaint #0024. A cursory examination of the grounds for appeal document revealed that the only paragraphs relevant to the possible breach of clauses 8.1.3. and 8.1.2. of the WASPA Code of Conduct are those set out above.

interacting DURING the watershed hours provided for ADULT advertising.

As such every reasonable step has been taken to ensure the people under the age of 18 do not have access to the content.

Decision

The Adjudicator decided to consider the supplementary response received from the IP, through the SP.

Possible Breach of Clause 11 of the WASPA Code of Conduct:

The Adjudicator accepted the submission of the IP in respect of the possible breach of clause 11 of the WASPA Code of Conduct. The complaint in respect of clause 11 was accordingly not upheld.

Possible Breach of Clause 8.1.3. of the WASPA Code of Conduct:

With regard the contravention of Clause 8.1.3 of the WASPA Code of Conduct, the Adjudicator considered the provisions of Clause 8.1.3. of the WASPA Code of Conduct, which has two separate and distinct components with concomitant obligations on members of the WASPA, namely:

- The obligation to take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services; and
- The obligation to obtain explicit confirmation of a user's age, prior to the delivery of an adult service.

Reasonable Steps

In response to the complaint that the IP had failed to take reasonable steps to ensure that only persons of 18 years of age or older have access to its adult services, the IP had submitted its supplementary response (quoted above).

The Adjudicator considered such response and noted:

- The primary compliance obligation to be considered by the Adjudicator is the WASPA Code of Conduct and the Advertising Guidelines. Compliance with standards set by other bodies is of interest but does not in any way exclude the requirement of compliance with the WASPA Code of Conduct. The Adjudicator followed the WASPA Appeals Panel in their report on Complaints #0004, #0012 and #0036, which held that "Members are accountable to WASPA for the rendering of services to customers in accordance with the Code of Conduct. The fact that the advertisements complied with the Policies and Procedures of Huisgenoot is irrelevant."
- Even were the "ASA and FSB standards" relevant (which as stated above is not the case):
 - The Adjudicator assumed that the IP's reference to "FSB" is not intended as a reference to the Financial Services Board, in respect of

which such abbreviation is generally used, but rather to the Film and Publications Board. The Film and Publications Board is a creation of statute, having been established in terms of the Film and Publications Act, Act 65 of 1996. The Board rates certain materials and acts on complaints, it does not set standards for advertising;

- The Advertising Standards Authority of South Africa (“ASA”) has its own advertising code, which provides, inter alia, at Clause 14.3:

Portrayal of Children

Children should not be portrayed as sexually appealing, provocative or which involves any form of sexual innuendo.

and the IP gives no justification of its assertion of compliance of MMS2 with this and the other provisions of the ASA Advertising Code, nor does the IP indicate any other applicable standards of either the ASA or the Film and Publications Board and how its advertising complies therewith.

- The IP appears to ignore the fact that its various communications are advertising material and appears to only refer to television advertisements broadcast on its behalf.
- The IP refers to “watershed hours”, presumably a reference to the watershed period applied in respect of television broadcasting which allows for the broadcast of materials appropriate for more mature audiences. This is of limited relevance as the Secretariat did not access the IP’s adult services based on a television advertisement. The Adjudicator did not regard the time when an advertisement is televised as constituting “reasonable step” to ensure that that only persons of 18 years of age or older have access to the IP’s adult services. It further does not explain why MMS2 contains a warning of adult content, while MMS1 and SMS1 do not.

Explicit Confirmation

During the course of its investigation into complaint #0024 the Secretariat was able to obtain access to content of an adult nature and falling within the definition of an “adult service” in terms of the WASPA Code of Conduct, without once being asked for age confirmation, as required by the Code.

The IP did not respond at all to its failure to obtain explicit confirmation of a user’s age prior to the delivery of an adult service. Without any explanation by the IP as to the Secretariat’s ability to access adult service without any age verification and with overwhelming evidence of such ability to access adult service without any age verification or confirmation, the complaint in respect of this component of clause 8.1.3 of the WASPA Code of Conduct must be upheld.

As such, the Adjudicator upheld the complaint in respect of both components of clause 8.1.3. of the WASPA Code of Conduct.

Possible Breach of Clause 8.2.1. of the WASPA Code of Conduct:

With regard the possible contravention of Clause 8.2.1. of the WASPA Code of Conduct, the Adjudicator had regard to the use by the IP of the term “school girls”

and the keyword “school” in MMS2, in order to assess whether such use should be regarded as suggesting or implying the involvement of children.

Clause 2.5. of the WASPA Code of Conduct defines “A “**child**” refers to a natural person under 18 years of age.” As such, the IP advertising must refer to natural persons under 18 years of age and in order to do this the word “school” and particularly in the phrase “school girls” must refer to persons under 18 years of age.

As the WASPA Code of Conduct does not define (or in fact refer) to the term “school” the Adjudicator was required to consider external sources in order to assess the possible contravention of Clause 8.2.1. of the WASPA Code of Conduct.

Guidance can be found in the definition of the term “school” in the South African Schools Act, Act 84 of 1996 (as amended), which provides:

“school” means a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to twelve;

As the usage of the term “school” is used by the IP in a South African context, it is critical to evaluate this term in a South African context. As such, the Adjudicator referred to the definition in the South African Concise Oxford Dictionary (Oxford University Press, 2002), which indicates usage of the word “school” in South Africa, and which provides:

school¹ •**n.** **1** an institution for educating children. ➤a day’s work at school; lessons. **2** any institution at which instruction is given in a particular discipline: *a dancing school*. ➤N. Amer. informal a university. ➤a department or faculty of a university: *the School of Dental Medicine*. **3** a group of people sharing similar ideas, methods, or style. ➤a specified style, approach, or method. •**v.** **1** chiefly formal, or S. African & N. Amer. send to school; educate. **2** train in a particular skill or activity. ➤Riding train (a horse).
– PHRASES **school of thought** a particular way of thinking.
– **ORIGIN** Old English *scōl*, *scolu*, from Greek *skholē* ‘leisure, philosophy, lecture-place’, reinforced in Middle English by Old French *escole*.

There are also various dictionary definitions and reference material which was considered by the Adjudicator in respect of the terms “school”, “girl”, “schoolgirl” and “school girl”. These provide, inter alia, the following:

Definition or Reference	Source
<p>School:</p> <ul style="list-style-type: none"> • noun 1 an institution for educating children. 2 a day’s work at school; lessons. 3 any institution at which instruction is given in a particular discipline. 4 a department or faculty of a university. 5 N. Amer. informal a university. 6 a group of artists, philosophers, etc. sharing similar ideas, methods, or style. 7 Brit. a group of people gambling together. 	Compact Oxford English Dictionary
<p>School:</p> <ul style="list-style-type: none"> 1. An institution for the instruction of children or people under college age. 2. An institution for instruction in a skill or 	The American Heritage® Dictionary of the English Language:

<p>business: <i>a secretarial school; a karate school.</i> 3a. A college or university. b. An institution within or associated with a college or university that gives instruction in a specialized field and recommends candidates for degrees. c. A division of an educational institution constituting several grades or classes: <i>advanced to the upper school.</i> d. The student body of an educational institution. e. The building or group of buildings housing an educational institution. 4. The process of being educated formally, especially education constituting a planned series of courses over a number of years: <i>The children were put to school at home. What do you plan to do when you finish school?</i> 5. A session of instruction: <i>School will start in three weeks. He had to stay after school today.</i> 6a. A group of people, especially philosophers, artists, or writers, whose thought, work, or style demonstrates a common origin or influence or unifying belief: <i>the school of Aristotle; the Venetian school of painters.</i> b. A group of people distinguished by similar manners, customs, or opinions: <i>aristocrats of the old school.</i> 7. Close-order drill instructions or exercises for military units or personnel. 8. <i>Australian</i> A group of people gathered together for gambling.</p>	<p>Fourth Edition. 2000</p>
<p>School: term commonly referring to institutions of pre-college formal education.</p>	<p>The Columbia Encyclopedia, Sixth Edition. 2001-05.</p>
<p>School: A school is most commonly a place designated for learning. The range of institutions covered by the term varies from country to country.</p> <p>In the United Kingdom, the term <i>school</i> refers primarily to pre-university institutions, and these can, for the most part, be divided into primary schools (sometimes further divided into infant school and junior school), and secondary schools</p> <p>In North America, the term <i>school</i> can refer to any institute of education, at any level and covers all of the following: preschool (for toddlers), kindergarten, elementary school, middle school (also called intermediate school or junior high school, depending on specific age groups and geographic region), high school, college, university, and graduate school.</p> <p>In both, a <i>school</i> may also be a partially autonomous or indeed entirely separate institution, not necessarily a part of a system of compulsory public education at all, dedicated to learning within one particular field, such as a school of economics (e.g. the London School of Economics), a school of dance, or a school of journalism.</p> <p>In much of continental Europe, the term <i>school</i> usually applies to primary education, with primary schools that last between six and nine years, depending on the country. It also applies to secondary education The term school is rarely used for tertiary education, except for some <i>upper</i> or <i>high</i> schools (German: Hochschule) which are more accurately</p>	<p>Wikipedia</p>

translated as colleges.	
<p>Schoolgirl: A schoolgirl is a girl attending either primary or secondary school. They are generally aged between five and eighteen years old.</p> <p>In popular culture Schoolgirls are often discussed in books, films and the media in general, usually by older men. Often in fiction, they are portrayed as giggly, immature and flip-flopping in their opinions. Occasionally they are portrayed as nymphets, as in the book Lolita and on various commercial websites ...</p> <p>In pornography Schoolgirls are a common genre of pornography The schoolgirl genre generally focuses on the schoolgirl uniform fetish or cheerleaders in combination with an interest in youthful women ranging from ephebophilia to Pedophilia (referred to as child pornography) ...</p>	Wikipedia
<p>Schoolgirl: 1. (2) schoolgirl -- (a girl attending school) Synonym - female child, girl, little girl -- (a youthful female person)</p>	WordNet 2.1
<p>School-girl: noun (<i>plural</i> school-girls)Definition: young girl school student: a girl who attends school adjective Definition: of the maturity of a schoolgirl: at a level of maturity regarded as characteristic of, or designed to appeal to, girls of school age</p>	Encarta® World English Dictionary, North American Edition
<p>Girl: Girl - Etymology: Middle English <i>gurle, girle</i> young person of either sex a : a female child b : a young unmarried woman c <i>sometimes offensive</i> : a single or married woman of any age 2 a : SWEETHEART b <i>sometimes offensive</i> : a female servant or employee c : DAUGHTER</p>	Merriam-Webster's Online Dictionary, 10th Edition
<p>Girl: 1 [C] a female child or young woman, especially one still at school: 2 [C] a daughter: 3 [C usually plural] a woman worker, especially when seen as one of a group:</p>	Cambridge International Dictionary of English
<p>Girl: • noun 1 a female child. 2 a young or relatively young woman. 3 a person's girlfriend. 4 dated a female servant.</p>	Compact Oxford English Dictionary

Having regard to the usage of the word "school" in South Africa and that the predominant definition and usage of such word in both South African and internationally refers to children or persons under 18 years of age, the Adjudicator found that the phrase "naughty School Girls" and the keyword "School" are both references that suggest or imply the involvement of persons under 18 years of age. In addition, the service offered by the IP through the SP is an "adult service" as defined in the WASPA Code of Conduct.

The Adjudicator noted that Clause 8.2.1. of the WASPA Code of Conduct does not require that an adult service actually contains images or other references to persons under 18 years of age in order to be prohibited. What is prohibited is the suggestion or implication of the involvement of children in an adult service. The Adjudicator took particular note of the fact that the definition of “adult service” in the WASPA Code of Conduct includes “any service where the content or product is of a clearly sexual nature, or any service for which **the associated promotional material** is of a clearly sexual nature, or **indicates directly, or implies that the service is of a sexual nature**”. *[The relevant phrase being highlighted in yellow by the Adjudicator.]*

This follows the provisions of the Film and Publications Act, Act 65 of 1996 and more specifically the 1999 amendment thereto (Films and Publications Amendment Act, Act 34 of 1999), which provides:

‘child pornography’ includes any image, real **or simulated**, however created, depicting a person who is **or who is shown as being under the age of 18 years**, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children”

[The relevant phrase being highlighted in yellow by the Adjudicator.]

Reference to such statute in no way suggests that the Adjudicator is of the view that the IP provides child pornography! It is referenced to show that the WASPA Code of Conduct follows national law in that it applies not only to the participation of persons under the age of 18 years but also the simulation, suggestion or implication of the involvement of such persons.

As such, the complaint is upheld in respect of clause 8.2.1 of the WASPA Code of Conduct.

Sanctions

In respect of the breaches of the WASPA Code of Conduct that have been identified, the Adjudicator imposed the following sanctions:

- In respect of the breach of clause 8.1.3. of the WASPA Code of Conduct, the SP is ordered to pay a fine of R25 000,00.
- In respect of the breach of clause 8.2,1. of the WASPA Code of Conduct, the SP is ordered to:
 - Terminate all services of the IP provided through the SP, in accordance with Clause 3.9.2 of the WASPA Code of Conduct, for a period of one calendar month from the date of receipt of this report. Such order shall similarly apply in respect of all other WASPA members who shall similarly terminate all services of the IP provided through them during such calendar month period and shall not commence any new service on behalf of the IP during such calendar month period. The Secretariat shall advise all WASPA members in this regard.

- Notify the Secretariat of all other numbers used by the IP and which currently are provided, or previously were provided, by the SP.
- Pay a fine of R100 000,00.
- WASPA will advise the three network operators to block the SP's access to the short code 38581 for a period of one calendar year from the date of receipt of this report by the SP.
- WASPA will further advise the three network operators to block the access of the SP, or any other WASPA member, to those numbers provided to the Secretariat by the SP, for a period of one calendar month from the date of receipt of such numbers from the SP.

The fine is payable to the WASPA within five (5) working days of notification of this sanction. Should an appeal be lodged, the fine will be suspended until the determination of the appeal. Should the fine be upheld (in whole or in part, or increased) the fine will be payable within five (5) working days of notification of the appeal finding.