

# LAW AND YOU IN THE AAC

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Law correct as at 11 Nov 2016

# SCOPE

- The purpose of this lecture is to give you a basic outline of how the law affects the AAC
- **We will look at:**
  - Relevant Commonwealth legislation
  - State Children's law
  - Risk Management

# Scope

- WHS law
- Privacy law
- VCDF Directive 06/2016

# References

- **LEGISLATION:**
- *Defence Force Act 1903*
- *Privacy Act 1988*
- *Public Interest Disclosure Act 2013*
- *Work Health and Safety Act 2011*

# References

- **OTHER DOCUMENTS:**
- Youth Policy Manual
- Campus Course: Defence Youth Safety Level 1 Awareness Training Package

# References

- **DIRECTIVES:**
- **VCDF Directive 06/2016 Relationships between Defence and Cadets Adults and Cadets and other Minors**
- **COMD AAC Directive 06/2016 Training on Age of Consent and Special Care Provisions**

# Who am I?

- A former solicitor who practiced for over 25 years in the ACT.
- A military lawyer WHO will be attached (full time) to the AAC from 2017.
- A youth leader for over 15 years.
- A specialist in children's law.
- Coach of Basketball referees.

# Legal basis of the AAC

- The legislative basis of the AAC is found in the *Defence Act 1903* (Sections 62 to 62E)
- These came into effect on 1 Jul 16:



# *Defence Act 1903*

- **62. Australian Defence Force Cadets**
- (1) The ***Australian Defence Force Cadets*** (or ***ADF Cadets*** or ***Cadets*** ) consists of the following:
  - (b) the Australian Army Cadets;
- (2) The ***Australian Army Cadets*** consists of persons who have volunteered and been accepted by the Chief of the Defence Force as officers, instructors or cadets in the Australian Army Cadets.

# *Defence Act 1903*

- **62A Direction and administration of the Cadets:**
- (1) The Chief of the Defence Force is to direct and administer the Cadets.
- (2) In directing and administering the Cadets, the Chief of the Defence Force must comply with any directions of the Minister.
- (3) The Chief of the Defence Force may direct the Vice Chief of the Defence Force, a service chief or any other member of the Defence Force to assist with the direction and administration of the Cadets.
- (4) The Chief of the Defence Force may use members of the Defence Force and the resources of the Defence Force for the purposes of administering, managing, supervising and training cadets.
- Note: The use and management of public resources must comply with the requirements of the *Public Governance, Performance and Accountability Act 2013* .

# *Defence Act 1903*

- **62 B: Chief of the Defence Force may make determinations:**
- (1) The Chief of the Defence Force may, by legislative instrument, make determinations providing for and in relation to the following:
  - (a) the payment of allowances or other pecuniary benefits to or for cadets;
  - (b) the payment of allowances or other pecuniary benefits to or in respect of members of the families of cadets;
  - (c) the provision of other benefits to or in respect of cadets, or to or in respect of members of the families of cadets.
- (2) A legislative instrument under subsection (1) may provide for an amount paid under a determination made under that subsection to be wholly or partly repaid to the Commonwealth if an event specified in the determination occurs.

# *Defence Act 1903*

- **62C: Relationship to the Defence Force:**
- (1) A cadet is not a member of the Defence Force.
- (2) A person with a role in administering, managing, supervising or training cadets does not become a member of the Defence Force because of that role.

## *Defence Act 1903*

- **62D: Acceptance is not a civil contract**
- No civil contract of any kind is created with the Crown or the Commonwealth in connection with the acceptance of a person as an officer, instructor or cadet in the Cadets.

# *Cadet Forces Regulations 2013*

- The second is the *Cadet Forces Regulations 2013*.
- And that folks is it.
- BUT there are other documents which deal with the practical implementation of the legislation. These are the Directives.

# *Cadet Forces Regulations 2013*

- These came into force on 13 June 2013 and are at present about to be revoked. BUT:
- They have had a major impact on how things are run especially in respect of what, we a leaders of cadets, have to do.
- Compliance with State child protection legislation became compulsory for all AAC leaders
- **National police check is compulsory**

# *Cadet Forces Regulations 2013*

- You also have an obligation in respect of any charges that may be laid against you by the police or other authority.
- These must be declared:
  - whether you are on duty or not; and
  - whether they occurred whilst on a AAC activity or in your own civilian life.



# AAC Standing Orders

- As of 1 May 15 the AAC began issuing Standing Orders
- These Orders are the basis upon which the AAC operates on a day to day basis
- They are on Cadet Net and as Unit Commanders it is your responsibility to know what is in them

# AAC Standing Orders

- When I provide advice to the Commander I always look up the relevant Order and read it to ensure that I have the up-to-date issue of the Order
- I then provide advice on the matter that is at hand
- *Tip: Read the Standing Orders, learn and apply them*

# Legislative Summary

- The hierarchy of legislation, regulations and policy applicable to the AAC is as follows:
  - A. *Defence Act 1903*
  - B. *Cadet Force Regulations 2013*
  - C. Directives issued by VCDF and Commander AAC
  - D. AAC Standing Orders

# VCDF Directive 06/2016

- This Directive was issued on 7 Jul 16 and deals with the issue of Relationships between Defence and Cadets Adults and Cadets and other Minors.
- *(A copy of that Directive is attached.)*
- The Commander AAC has also issued a Directive implementing the VCDF's Directive.
- **This subject is to be taken seriously**

# VCDF Directive 06/2016

- This Directive came about as a result of the Royal Commission into Institutional Responses to Child Sexual Abuse
- The hearing in June 16 revealed a number of deficiencies in the way Defence has dealt with these issues in the past

# VCDF Directive 06/2016

- The main points were:
- There needs to be a better awareness of Australian age of consent legislation
- The need to better understand the legal liabilities as a result of the 'Special Care' provisions
- Ensure blame is not attributed to ADF Cadets in an intimate relationship with an adult

# VCDF Directive 06/2016

## Age of Consent

- Attachment A gives the ages of consent which vary from State to State
- It is important to understand what this means with respect to sexual interactions
- From an AAC perspective this simply means that there is to be **NO SEXUAL INTERACTIONS BETWEEN DEFENCE AND CADET ADULTS AND CADETS AND OTHER MINORS**

# VCDF Directive 06/2016

## “Special care” provisions

- In some States the relevant legislation includes sections known as the ‘special care’ provisions
- This means that for people in supervisory roles, such as teachers, there is a total prohibition from engaging sexually with a person who is under the age of 18, **whether or not they are above the age of consent**



# VCDF Directive 06/201625

- **“Special care” provisions**
- Defence has adopted the policy that all Defence and Cadet Adults are to be regarded as Special Carers
- So again there is a total prohibition of sexual relations between Defence and Cadet Adults and Cadets and other Minors

# VCDF Directive 06/2016

- **Attribution of Blame**
- Defence has adopted the policy that Cadets and Other Minors are to be made aware that they are entirely without blame with respect to sexual interaction with Defence and Cadet Adults

# VCDF Directive 06/2016

- **What is sexual interaction?**
- At this stage this has not been defined BUT the new Campus Course has given some indicators
- This may include physical interaction and physiological interaction such as abuse and the use of inappropriate words and actions

# VCDF Directive 06/2016

- As a result of this it is important to be aware of the need to be careful in all interactions with Cadets and Other Minors
- Physical contact should be extremely limited -- basically for medical emergencies
- The issue is what the cadet perceives the contact to be – not what the person intended it to be

# VCDF Directive 06/2016

- All these changes will be reflected in the ACC Code of Conduct and it will be assumed that by signing the document you have read and understood the implications of breaching the Code of Conduct
- As Unit Commanders it becomes your responsibility to monitor your Cadets and other Minors and to implement this policy

# VCDF Directive 06/2016

- **To summarize:**
- Cadets and other minors are blameless
- A no touching policy is to be implemented with certain exceptions
- The activities described in the Directive are prohibited
- Know your State law with respect to the age of consent

# VCDF Directive 06/2016

- Know your State/Territory Protection of Children contacts and requirements
- **Risk Management** is all important.

# VCDF Directive 06/2016

QUESTIONS ON THE VCDF  
DIRECTIVE



# The State Laws

- Each State and Territory has different laws when it comes to dealing with organisations that run Youth orientated programs.
- You need to be aware of what that law means for you and your team of assistants.

# The State Laws

- Is the AAC exempt from State laws because it is a Federal Organisation?
- **Answer: We don't know** as that has never been tested but the CFR's and the recent Directive from VCDF clearly indicate a willingness to follow the State laws
- As a result of this Directive the approach that the AAC has adopted is one of commonsense and **there is now an obligation to conform** to the relevant State or Territory law.

# Working with Children Checks

- All States and Territories require that an individual working with children undergo a working with children check **BEFORE** you can start with any child orientated activity.
- The AAC requires this to be undertaken
- The 30 day rule

# What does this all mean?

- In dealing with youth there is a higher standard set by the law to get it right.
- We must ensure that all activities are properly planned and that the risk assessments are undertaken and **IMPLEMENTED.**
- The AAC has its risk assessment tool for activities so use it.

# What does this all mean?

- Be thorough in all preparations and check and re-check everything.
- Do the paperwork.
- **DON'T HIDE ANYTHING!**
- **REPORT EVERYTHING!** The guidelines are there for a reason.

# THE KEY WORD!!!

## • COMMONSENSE

- If it doesn't feel right – then it probably isn't.
- Implement the necessary checks and test your gut feeling.
- The safety of the cadets is your primary responsibility.

# AND IF YOU DON'T??

- There could be a number of consequences for you.
  - You could be sued.
  - You could face criminal charges.

# Am I being serious?

- Yes I am.
- **BUT**
- **If you take the precautions that are necessary and follow the rules the likelihood of such things happening will be reduced almost to nil.**



# What does this all mean?

- Accidents do happen especially with teenagers.
- The object is to ensure that the risk is minimised.
- By minimising the risk you minimise your exposure.

# Work Health and Safety Legislation

- On 1 January 2012 the new Commonwealth Work Health and Safety Laws came into force.
- They are applicable to all AAC activities where ever they are held.
- They contain criminal penalties for negligence which could be aimed at you!

# WHS Legislation

- Comcare is the Commonwealth's Work Health and Safety watchdog.
- They watch over the activities of the AAC.
- They are into maximising risk management.
- If an accident does happen and they investigate you are obliged to speak with them.

# WHS Legislation

- If they do want to speak with you get in touch with your Chain of Command asap especially if you want legal assistance.
- The Department of Defence has a system called “LACE” which may provide paid legal assistance to you.
- You have a responsibility to protect the site of where the accident happened.

# *Privacy Act 1988*

- This Act has been around since 1988.
- Its aim is to regulate the way Australian Government Agencies collect, use, disclose, secure, provide access to and correct personal information.
- The Department of Defence is an “agency” and the AAC is determined to be part of the Department in respect of the Act.

# *Privacy Act 1988*

- Major amendments came into force on 14 March 2014.
- These will have an affect on the way we do business.
- The most important change deals with information gathered on “secondary” parties ie NOK. Defence has an obligation to inform them of the fact we have information and how we use it.
- But it also deals with a person’s right to privacy.

# *Privacy Act 1988*

- Just to give you an example of what the Privacy Act may mean for you and how difficult it will be to implement. These comments are taken from the Office of the Australian Information Commissioner – Australian Privacy Principles Guidelines.
- **Children and Young People**
- B.56 The Privacy Act does not specify an age after which individuals can make their own privacy decisions. An APP entity will need to determine on a case-by-case basis whether an individual under the age of 18 has the capacity to consent.

## *Privacy Act 1988*

- B.57 As a general principle, an individual under the age of 18 has the capacity to consent when they have sufficient understanding and maturity to understand what is being proposed. In some circumstances, it may be appropriate for a parent or guardian to consent on behalf of the young person, for example, if the child is young or lacks the maturity or understanding to do so themselves



## *Privacy Act 1988*

- B.58 If it is not practical or reasonable for an APP entity to assess the capacity of individuals under the age of 18 on a case by case basis, the entity may presume that an individual aged 15 or over has the capacity to consent, unless there is something to suggest otherwise. A individual aged under 15 is presumed not to have the capacity to consent.

# *Privacy Act 1988*

- How are we going to deal with this?

**Watch this space!!!**

# *Public Interest Disclosure Act 2013*

- This Act commenced on 15 Jan 2014 and replaced the former Defence Whistle Blower Scheme.
- It applies to all activities of the AAC.
- This means that a parent, cadet, volunteer, Officer etc. can make a report on any activity undertaken by the AAC.
- There is a mechanism for a formal investigation to take place.

## *Public Interest Disclosure Act 2013*

- Unlike other “investigations” where AAC members are not required to participate you are required to participate in this process whatever position you may hold in the organisation.
- The good news is that it is unlikely that there will be many of these taking place in the early days of the scheme.

## *Public Interest Disclosure Act 2013*

- You need to be aware of this as ACS members as there are specific obligations on you.
- There are time frames listed in the legislation.
- Again if faced with an issue go to your State HQ or refer straight to HQAAC.