

## **Unlawful Sodomy: A Person with an Impairment of the Mind s 208(1)(c)**

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**The prosecution must prove that:**

- 1. The complainant was a person with an impairment of the mind at the relevant time.**

**A person with an impairment of the mind means a person with a disability that -**

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and**
- (b) results in –**
  - (i) a substantial reduction of the person’s capacity for communication, social interaction or learning; and**
  - (ii) the person needing support.<sup>1</sup>**
- 2. The defendant with his penis actually penetrated the anal orifice<sup>2</sup> of the complainant.**

**There is no need for ejaculation to occur or for the penetration to be of any particular depth or to last any particular time.**

**Consent is irrelevant.**

**It is a defence to prove –**

- (a) that the defendant believed, on reasonable grounds, that the person was not “a person with an impairment of the mind”; or**
- (b) that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the “person with an impairment of the mind” .**

**It is a circumstance of aggravation if the person with an impairment of the mind is, to the knowledge of the defendant:**

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<sup>1</sup> See s 1 for the meaning of a person with an impairment of the mind.

<sup>2</sup> The term “sodomy” is not defined in the Criminal Code. However, in s 1 “carnal knowledge” is defined to include sodomy. Section 6 defined one aspect of “carnal knowledge” but the section is limited to circumstances in which “carnal knowledge” is used in defining an offence. The ordinary meaning of the term “sodomy” is sexual intercourse per the anal orifice. *Russell on Crime* 12<sup>th</sup> Ed at 735.

- (i) his lineal descendant; or**
- (ii) under his guardianship or care.**