

Unlawful Sodomy: Of a Person Under 18 s 208(1)(a)

The prosecution must prove that:

1. The defendant penetrated the anus¹ of the complainant with his penis (or attempted to do so)²;

and

2. That the complainant was under 18 years of age at the time.

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.

In respect of a child who is 12 years or more it is a defence to prove that the defendant believed, on reasonable grounds, that the person in respect of whom the offence was committed was 18 years or more.

It is a circumstance of aggravation if the complainant was:

- (a) a child under 12 years; or
- (b) a child who is, to the knowledge of the defendant, -
 - (i) his lineal descendant; or
 - (ii) under his guardianship or care.

Except in relation to an attempt, it is a circumstance of aggravation if the offence is committed in respect of a child who is a person with an impairment of the mind (s 208 (2A)).³ It is a defence to the circumstance of aggravation to prove that the defendant believed on reasonable grounds that the child was not a person with an impairment of the mind (s 208 (5)).

¹ The term “sodomy” is not defined in the Criminal Code. However, in s 6 “carnal knowledge” is defined to include sodomy, 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* 12th Ed at 735.

² Since 1 December 2008, this offence includes an attempt: see s 208.

³ The circumstance of aggravation was introduced by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act* 2013, assent 29 April 2013. “A person with an impairment of the mind” is defined in s 1 *Criminal Code*.