

Permitting Sodomy by a Male Person Under 18 s 208(1)(b)

The prosecution must prove that:

1. **that the complainant at the relevant time was a male person under 18 years of age;**
2. **that the complainant penetrated the anal orifice¹ of the defendant with his penis (or attempted to do so)²; and**
3. **that the defendant knowingly and willingly allowed this to happen.**

Ejaculation is not necessary to complete the offence. (In cases alleging actual penetration), penetration of the anus to any extent is sufficient.

If the offence is alleged to have been committed 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 complainant was 18 years or more.

It is a circumstance of aggravation –

- (a) **if the complainant was a child under 12 years; or**
- (b) **was, 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 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* 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 Section 1 *Criminal Code*.