

S.233(1)(a) of the Communications and Multimedia Act 1998:

- Key Takeaways from Gov. of Malaysia v Heidi Quah



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INTRODUCTION

Section 233 of the Communications and Multimedia Act 1998 ("**CMA**") is one of the primary legislative tools governing online conduct in Malaysia, regulating the improper use of network facilities, network services, and applications services. Section 233(1)(a), in particular, creates a criminal offence in the following terms:

*"(1) A person who —
(a) by means of any network facilities or network service or applications service knowingly —
(i) makes, creates or solicits; and
(ii) initiates the transmission of
any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or grossly offensive in character with intent to annoy, abuse, threaten or harass another person...commits an offence."*

Despite its significance, the proper boundaries of this provision — and its relationship with the constitutional right to freedom of speech and expression under Article 10(1)(a) of the Federal Constitution ("**FC**") — had never been definitively settled, until now.

In a landmark judgment delivered on 6 February 2026, the Federal Court in **The Government of Malaysia v Heidy Quah Gaik Li [2026] MLJU 384** comprehensively addressed that question. In the course of this article, we distil the key takeaways from that judgment as a concise guide to the interpretation and application of s.233(1)(a) CMA.

THE GOVT OF MALAYSIA V HEIDY QUAH

Heidy Quah, a human rights activist, uploaded a Facebook post in June 2020 drawing attention to the conditions at Malaysian immigration detention centres during the Covid-19 pandemic. In her post, she attributed the state of those conditions to inadequate health and safety precautions and cramped living conditions. What followed involved two sets of parallel proceedings:

- In July 2021, she was charged in the Sessions Court under s.233(1)(a) CMA for transmitting a communication that was "offensive in character with intent to annoy." In April 2022, the Sessions Court granted her a Discharge Not Amounting to an Acquittal ("**DNAA**"), effectively bringing an end to the Sessions Court proceedings.
- Before the Sessions Court proceedings were resolved, Heidy Quah separately filed an originating summons in the High Court in August 2021, seeking to have the words "offensive" and "annoy" in s.233(1)(a) CMA declared unconstitutional. She ultimately succeeded before the Court of Appeal, which struck out both words for infringing the right to freedom of speech and expression under Article 10(1)(a) FC.

It is to be noted that whilst the appeal before the Court of Appeal was pending, s.233(1)(a) CMA was amended by the Communications and Multimedia (Amendment) Act 2025, which came into force on 11 February 2025, substituting the word "offensive" with "grossly offensive." The Court of Appeal took note of the amendment but declined to comment on the constitutionality of the amended term, confining its analysis to the pre-amendment position.

On 6 February 2026, the Federal Court partially overturned the Court of Appeal's decision, reinstating both words and holding that s.233(1)(a) CMA is constitutional. The Federal Court nevertheless affirmed that the prosecution against Heidi Quah was entirely unjustified and ought never to have been commenced.

Whilst the judgment involves a detailed constitutional analysis — encompassing the interplay between Articles 4(1), 4(2) and 10 of the Federal Constitution and the limits of judicial review in the context of fundamental liberties — that analysis is beyond the scope of this article. What follows instead are the key takeaways on the proper interpretation and application of s.233(1)(a) CMA.

Takeaway 1 — Freedom of Speech under Article 10 of the FC is not Absolute

Article 10(1)(a) FC guarantees every citizen the right to freedom of speech and expression. However, the Federal Court unequivocally affirmed that this right is not absolute — it carries inherent restrictions by definition. Communications whose dominant purpose is to cause harm or distress, hate speech, and communications that serve to attack the dignity of others fall outside the protection of Article 10(1)(a) FC entirely.

Takeaway 2 - Section 233(1)(a) CMA Complements and Protects the Right to Free Speech

Section 233(1)(a) of the Communications and Multimedia Act 1998 targets harmful online conduct carried out with the intent to annoy, abuse, threaten, or harass. Far from curtailing free speech, the Federal Court held that s.233(1)(a) CMA operates to complement and protect the right guaranteed under Article 10(1)(a) FC — not restrict it. This reading is reinforced by s.3(3) CMA, which expressly prohibits internet censorship, making plain that the CMA was never intended to intrude upon the sphere of free speech. What falls outside the inherent boundaries of Article 10(1)(a) FC falls squarely within the prohibition under s.233(1)(a) CMA.

Takeaway 3 — Two Critical Elements

The Federal Court acknowledged that the natural language of s.233(1)(a) CMA is broad — and that without proper construction, this risks unwarranted prosecutions being brought against commonplace conduct. To address this, the Court applied the vagueness avoidance doctrine to read down s.233(1)(a) CMA by focusing on the mens rea element as its constitutional core, thereby narrowing the provision's reach and setting the threshold for prosecution.

That exercise produced authoritative guidance on the proper construction of the two constitutive elements of the offence — **(a) the character of the communication** and, most critically, (b) **the intent of the sender** — with the latter serving as the determinative element that must be clearly established before s.233(1)(a) CMA is engaged.

Element 1 – Character of the Communication



This is an objective assessment determined by reference to the content and context of the communication. The Court acknowledged that "grossly offensive" is broad by nature and that it would be untenable to define it exhaustively. The Court did however, identify the following categories as falling within its meaning in the context of the CMA:

- (a) Communications that are indecent or obscene — meaning material that is sexually degrading or that violates behavioural standards;
- (b) Communications that threaten harm, encourage crime or incite public disorder;
- (c) Knowingly false or malicious communications — meaning the deliberate spread of false or distorted information with the intent of causing annoyance, distress or anxiety.

The Court further noted that in Malaysia's plural, multiracial and multi-religious society, communications targeting racial or religious sensitivities or attacking the institution of the constitutional monarchy would equally fall within this limb.

Whilst the Court's analysis was confined to "grossly offensive," it is reasonable to presume an objective and contextual analysis would apply equally to the remaining descriptors in s.233(1)(a), ie "obscene," "indecent," "false," and "menacing."

Element 2 – The Intent of the Sender

Was the sender's dominant purpose to cause actual emotional distress or psychological harm to the recipient? The mens rea of the offence lies in the sender's intent — specifically, whether the communication was made with intent to annoy, abuse, threaten or harass. These are not to be read in isolation but collectively, as they together define the spectrum of harmful intent that section 233(1)(a) CMA is designed to capture.

This intent must be the dominant purpose of the communication. Where a communication was made for a legitimate purpose — political discourse, public interest, education, satire, or the expression of opinion — the mens rea is absent and no offence is made out, however offensive the content may be to some. Intent cannot be inferred from the content alone. It must be clear, objective, and demonstrable from the surrounding circumstances.



CLOSING OBSERVATIONS

The reinstatement of the words "offensive" and "annoy" in section 233(1)(a) CMA does not curtail the right to freedom of speech and expression. The Federal Court's emphasis on mens rea ensures that the provision captures only communications made with the requisite intent to cause harm or distress. Genuine expression remains fully protected under Article 10(1)(a) FC and will not fall foul of section 233(1)(a) CMA.

The Federal Court's guidance is equally significant for applications service providers who, in the ordinary course of their operations, will inevitably encounter content flagged by regulators or their own users. The purposive interpretation established by the Federal Court provides a principled and workable framework for such providers to assess whether particular content crosses the threshold under section 233(1)(a) CMA, take the necessary steps to ensure their platforms remain safe and responsible, and cooperate effectively with regulators in the discharge of their obligations.

Before we close, we note that the Federal Court has directed the Attorney General to issue prosecutorial guidelines on the threshold for charges under section 233(1)(a) CMA. Such guidelines, when published, will further assist in delineating the ambit of section 233(1)(a) CMA and provide greater clarity for practitioners, regulators, and applications service providers alike. We will revisit and supplement this article once those guidelines are available.

OTHER STATUTORY PROVISIONS

Article 10 of the Federal Constitution - Freedom of speech, assembly and association

(1) *Subject to Clauses (2), (3), (3A) and (4) —*

a. *every citizen has the right to freedom of speech and expression;*

...

(2) *Parliament may by law impose —*

a. *on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence."*

Section 3 of the CMA - Objects

(3) *Nothing in this act shall be construed as permitting censorship on the internet*

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