

December 2023



Overview of the New Criminal Laws

Background

Three new criminal law statutes which are aimed at reforming the existing criminal laws of India, i.e the Indian Penal Code, 1860 (“**IPC**”), the Code of Criminal Procedure, 1973 (“**CrPC**”), and the Indian Evidence Act, 1872 (“**IEA**”) were assented by the Hon’ble President on December 25, 2023. The bills were passed by the Lower House of Parliament on December 20, 2023 and by the Upper House of Parliament on December 21, 2023. These laws are: (i) the Bharatiya Nyaya (Second) Sanhita, 2023 (“**BNS**”); (ii) the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 (“**BNSS**”); and (iii) the Bharatiya Sakshya (Second) Adhinyam, 2023 (“**BSA**”) (collectively “**New Criminal Laws**”).

This update captures the key highlights of each of the Criminal Laws as relevant for the information technology sector.

Bharatiya Nyaya (Second) Sanhita, 2023

Key Highlights	Description
<i>Inclusion of electronic communication as a means for committing offences</i>	<ul style="list-style-type: none"> Taking note of the evolving mediums through which offences are being committed, the BNS specifically recognises “<i>electronic communication</i>” as a means for committing certain offences. For example, the BNS states that “<i>electronic communication</i>” can be used as a medium for: (i) committing acts which endanger the sovereignty, unity and integrity of India; (ii) promoting enmity between different groups on grounds of religion, race, place of birth etc.; or (iii) making imputations or assertions that are prejudicial to national integration. While the term “<i>electronic communication</i>” has not been defined under the BNS, it will be assigned the same meaning as provided in the BNSS. The BNSS defines “<i>electronic communication</i>” as the “<i>communication of any written, verbal, pictorial information or video content transmitted</i>” through an electronic device or in electronic form, as may be specified by the Central Government.
<i>Creation of new offences</i>	<ul style="list-style-type: none"> While the BNS introduces several new offences, the addition of “<i>organised crime</i>” which includes cybercrime is a significant inclusion. Organised crime has been defined under the BNS to mean any continuing unlawful activity, such as robbery, kidnapping, or cyber-crime, which has severe consequences, and is committed by a group of individuals operating as an organised crime syndicate by use of violence, coercion or “<i>other unlawful means to obtain direct or indirect material benefit including a financial benefit</i>”. A separate category called “<i>petty organised crime</i>” has also been created for punishing acts such as theft, unauthorised betting or gambling, and shoplifting, when done by someone as a member of a group or a gang.





Key Highlights	Description
<i>Offence of sedition reframed</i>	<ul style="list-style-type: none"> While it has been claimed by the Central Government that the BNS does away with the offence of sedition, a parallel can be drawn between the offence of sedition as found in the IPC and Clause 152 of the BNS which deals with “acts endangering the sovereignty, unity and integrity of India.” BNS criminalises: (i) anything which excites or attempts to excite secession, armed rebellion, subversive activities, feelings of separatist activities; or (ii) acts that endanger the sovereignty or unity and integrity of India. A notable difference when compared to the offence of sedition as found in the IPC is that the BNS makes no mention of words such as instigating “hatred”, “contempt”, or “disaffection” (which includes disloyalty and all feelings of enmity) against the Government of India. Another difference is with respect to the term of punishment. While a person can be punished for sedition under the IPC with imprisonment for life, or imprisonment which may extend up to three years, the BNS prescribes an increased punishment i.e. imprisonment for life, or imprisonment which may extend up to seven years for committing acts that endanger the sovereignty, unity and integrity of India.
<i>Scope of abetment expanded</i>	While the provisions relating to abetment largely remain unchanged, a new provision has been introduced which states that a person can abet the commission of an offence from a place even outside India. Therefore, any online platform operating outside India may now be held liable for abetting any offence (such as, defamation, cyber crime, obscenity, etc.) that is being committed on its platform.
<i>Community service as punishment for defamation</i>	BNS introduces community service as a form of punishment for certain offences such as unlawful engagement in trade by a public servant, theft, defamation, etc.
<i>Scope of voyeurism expanded</i>	Under the provisions of the IPC, only a man could be punished for committing voyeurism. However, the BNS takes a step towards gender inclusion by clarifying that any person (i.e. of any gender) who watches, captures or disseminates the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed will be held liable for voyeurism.

Bharatiya Sakshya (Second) Adhinyam, 2023

Key Highlights	Description
<i>“Document” to include electronic and digital records</i>	The scope of the term “document” has been expanded to include electronic and digital records. Consequently, mails, messages, locational evidence, and documents stored on digital devices will be treated as documentary evidence
<i>Evidentiary value of electronic or digital records</i>	The BSA clarifies that electronic or digital records, when produced from proper custody, will be treated as primary evidence (i.e. original evidence). Additionally, when electronic or digital evidence is stored in: (i) multiple files; or (ii) storage spaces, each such storage file or space will qualify as primary evidence.
<i>Admissibility of electronic records</i>	<ul style="list-style-type: none"> The BSA clarifies that electronic evidence stored or copied in a “computer output” (such as semiconductor memory of a computer, communication device, any electronic form) will be admissible in law. Additionally, it is clarified that, if electronic evidence is obtained from more than one computer /communication device which were involved in the commission of any unlawful activity through an “intermediary”, then all such computers/communication devices used for the purpose of the unlawful activity will be considered as <u>one computer/communication device unit only</u>. [Note: The term “intermediary” will have the same meaning as defined under the IT Act.



Bharatiya Nagarik Suraksha (Second) Sanhita, 2023

Key Highlights	Description
Definition of “electronic communication” introduced	<p>The BNSS has introduced new terms, such as:</p> <ul style="list-style-type: none"> • “audio-video electronic” which includes communication devices used for various purposes including transmission of electronic communication; and • “electronic communication” which means communication: (i) through an electronic device; or (ii) in an electronic form. <p>The BNSS also clarifies that for the purposes of investigation, if a special law is in conflict with the provisions of the BNSS Bill 2023, the former shall prevail.</p>
Trials, inquiries, and criminal proceedings may be conducted through electronic mode	<p>In a very important step towards digitising India’s legal ecosystem, the BNSS states that all trials, inquiries, and proceedings, including:</p> <ul style="list-style-type: none"> • issuance, service and execution of summons and warrants; • examination of complainant and witnesses; • trial, appellate and any other proceedings; and • recording of evidence in inquiries and trials, may be done through: (i) electronic communication; or (ii) audio-video electronic means.
Summoning powers to produce documents extended to electronic communication	<p>The BNSS clarifies that a Court or any officer in charge of a police station may direct the production of “electronic communication, including communication devices which is likely to contain digital evidence or other thing”, if they believe it is necessary or desirable for the purposes of an investigation or judicial proceeding.</p>
Audio-video recording during search and seizure investigation by police	<p>The BNSS explicitly states that the police shall record:</p> <ul style="list-style-type: none"> • the process of conducting a search of a place; and/or • taking possession of property, including preparing the the list of all things seized during search and seizure, through audio-video electronic means, preferably through mobile-phones.

Please get in touch with the SAM & Co. attorney you regularly work with if you would like to discuss any aspect of the new criminal laws in more detail.

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