Mr Speaker, Sir,

I move that the Asset Recovery (Amendment) Bill (No. XXIV of 2012) be read a second time.

Mr Speaker, Sir,

As Members of the House are aware, the Asset Recovery Act, which was passed by this Assembly last year, provides for the framework and mechanism for the recovery of the proceeds and instrumentalities of crime. The Act in fact came into operation on 1 February of this year.

The objective behind this piece of legislation, Mr Speaker, Sir, was to provide the relevant authorities involved in the combatting of crime with the necessary framework and tools to, first and foremost, recover the proceeds of crime so that they may not be used for further criminal purposes and may, instead, be used to compensate victims, for instance, and secondly, to discourage crime.

Mr Speaker, Sir,

As pointed out in my speech when the Asset Recovery Bill was introduced in this Assembly last year, the Government Programme 2010-2015 provides for the establishment of “an independent law enforcement agency under the aegis of the Office of the Director of Public Prosecutions to reinforce the fight against transnational crime and to recover ill-gotten gains”. I am informed, Mr Speaker, Sir, that since the proclamation of the Asset recovery Act, a unit has indeed been set up in the Office of the Director of Public Prosecutions comprising mainly of investigators and lawyers, and that the recruitment of other staff to form part of the said unit is still ongoing.

I understand that the unit is, to date, fully operational and that there have, so far, been about 50 cases referred to the Enforcement Authority which, as per the Asset Recovery Act, is the Director of Public Prosecutions. These cases relate mostly to drug dealing, including the case of recent high profile cases. About 15 applications for Restraining Orders have been made by the Enforcement Authority and granted by the Court. Other applications made relate to Ancillary Orders. As regards the value of the assets and benefit that may be the subject matter of applications in the future, it is, so far, of approximately Rs 100 m.

I also understand that the Enforcement Authority has, on a regular basis, been organising meetings with other stakeholders such as the Financial Intelligence Unit, the Police Department, the Independent Commission Against Corruption, the Mauritius
Revenue Authority, the Financial Services Commission and the Registrar of Companies. Furthermore, with regard to important cases, taskforce meetings with law enforcement agencies have also been regularly held.

Consequently, in the light of experience gathered by the Enforcement Authority since the proclamation of the Asset Recovery Act and in view of certain problems encountered in its implementation, representations have recently been received from the Enforcement Authority for amendments to be brought to the Asset Recovery Act in order to, mainly, enable the Enforcement Authority to perform its role more effectively under the law and to allow the recovery of proceeds derived before the coming into operation of the Asset Recovery Act, thereby allowing a more efficient and effective implementation of the said Act. It is also to be noted that the Government Programme 2012-15 provides at paragraph 22 for the amendment of the Asset Recovery Act to cover all accumulated assets of persons convicted of specified offences.

The present Bill therefore, Mr Speaker, Sir, purports to give effect to the provision of the Government Programme referred to above and the various recommendations of the Enforcement Authority in order to, inter alia –

- firstly, give to the Enforcement Authority the power to confiscate or recover assets accumulated illegally up to a period of 10 years prior to the commencement of the Asset Recovery Act. I must here point out Mr Speaker, Sir, that as per the United Nations Convention against Corruption, provision should be made under the law of the member States for the recovery of all proceeds derived by an individual. Moreover, in countries like South Africa, the United Kingdom, Australia, New Zealand and many other jurisdictions, the recovery of proceeds which have been acquired before the enactment of their relevant law, is possible;

- secondly, broaden the definitions of “gift”, “interest” and “benefit”;

- thirdly, expressly provide for the reversal of the burden of proof with regard to criminal based seizure and confiscation so that the onus is not on the Enforcement Authority to prove the criminal nature of assets. Indeed, Mr Speaker, Sir, under our law as it presently stands, it is for the Enforcement Authority to satisfy the Court that property or benefit was not derived from an unlawful activity, which is in sharp contrast not only with the practice in other jurisdictions, but also with other pieces of our own legislation dealing with asset recovery, like the Dangerous Drug Act, the Financial Intelligence and Anti-Money Laundering Act and the Prevention of Corruption Act, which all provide for the reversal of the burden of proof. This does not, however, mean that the Enforcement Authority does not have to prove anything because it will still be for the EA to satisfy the Court that a Confiscation Order is justified on a balance of probabilities;
- fourthly, allow suspects themselves to manage their assets, in view of the exorbitant costs involved in the appointment of an Asset Manager;

- fifthly, provide that the Investigative Agency shall be headed by a Chief Investigating Officer with appropriate qualifications; and

- finally, make better provision for confidentiality and co-operation with public bodies.

Moreover, opportunity has also been taken to make certain minor corrections to the Act.

As far as the different provisions of the Bill are concerned, Mr Speaker, Sir, Clause 3 amends section 2 of the Asset Recovery Act (i.e the Interpretation Section) in order to, inter alia, amend the definitions of “benefit”, “gift”, “instrumentality”, “interest” and “proceeds”. It is here worth noting that the term “benefit” is being extended to apply to actual as well as potential advantage, gain, profit, benefit or payment that any person derives or obtains or is likely to derive or obtain. A few new definitions are also sought to be inserted in the Asset Recovery Act, including that of “unlawful activity”. I would here like to point out that I shall, at Committee Stage, move an amendment, as circulated, to clause 3 (i) of the Bill so as to delete, in paragraph (a) of the proposed definition of “unlawful activity”, the words “and which is done after the commencement of this Act” and I am thankful to the Hon. Second Member for Port Louis South and Port Louis Central for having brought the issue to my attention.

Clause 4, for its part, amends section 3 of the Asset Recovery Act so as to allow applications to be made under the Act in respect of unlawful activities (as now defined) carried out within 10 years before the commencement of the Act and thereby give to the Enforcement Authority the power to confiscate or recover assets accumulated illegally during the 10 years preceding the commencement of the Act. As for the new subsection (2A) which is sought to be inserted in section 3, it provides that for the purposes of sections 17 and 19, where it is found that a person was in possession of any property or has derived a benefit from an unlawful activity, and that he did not have a legitimate source of income sufficient to justify his interest in the property or the benefit derived by him, the onus shall, on a balance of probabilities, lie on that person to show that the property was not obtained, or the benefit was not derived, from an unlawful activity. Finally, the new subsection (5) that is sought to be inserted in section 3 clearly specifies that an application to the Court or a Judge under the Asset Recovery Act shall constitute civil proceedings and be determined on a balance of probabilities.

Clause 6 seeks to amend section 5 of the Asset Recovery Act mainly to provide that the Investigative Agency shall no longer comprise law officers. On the other hand, provision is made for one of the law enforcement agents forming part of the Investigative Agency to be designated as the Chief Investigating Officer who, following an Investigation has to submit the conclusions of the Investigative Agency to the Enforcement Authority.
As for Clause 7, it seeks to amend section 7 of the Asset Recovery Act to provide, *inter alia*, that the Enforcement Authority may authorise payments out of the Recovered Assets Fund to fund such training or other capacity-building activity as may be required by the said Authority for the purposes of the Act. As at now, such payments may only be authorised to compensate victims, transfer recovered property, pay expenses relating to the recovery and management of property (including fees of receivers, Trustees or Asset Managers), pay third parties and pay costs associated with the administration of the Fund.

Furthermore, Clause 10 seeks to amend section 17 of the Asset Recovery Act, in its subsection (1), so as to give to the Enforcement Authority the power to apply for a Confiscation Order, not only in respect of the benefit derived by a convicted person from the offence committed, but also from any other unlawful activity which the Court finds to be sufficiently related to that offence. Subsection (5) of section 17 is also sought to be amended to enable the Court to have regard to any other relevant evidence gathered in the course of an Investigation where there is an application for a Confiscation Order, in addition to any evidence received in the course of the proceedings against the person convicted before the trial Court. [Furthermore, section 17(7) which presently provides that a person shall be deemed to be convicted of an offence where he is charged with, and found guilty of, the offence but is found not to be criminally responsible, is repealed.]

Under Clause 11, section 19 (which deals with Confiscation Orders) is sought to be amended in its subsection (1) so as to mainly make provision for a time limit within which a defendant, who is considered to have benefitted from an offence or any other unlawful activity which the Court finds to be sufficiently related to that offence, should pay to the State an amount equal to the value of his benefit.

As for Clause 12, it seeks to amend section 20(1) of the Asset Recovery Act to provide that the value of the benefit derived from an offence may now include the value of any dangerous drug found in the possession of the defendant or of another person on behalf of the defendant.

Clause 15 seeks to amend section 27 (which deals with Restriction Orders) so as to enable a Judge to make a Restriction Order where a person is not in Mauritius. Moreover, by virtue of the proposed new section 27(3A), the Enforcement Authority may apply to a Judge for an order to the effect that, instead of appointing an Asset Manager, the person in whose possession the property is found shall exercise the powers referred to in section 27(2)(b). Furthermore, the application of section 14 is also sought to be extended to a Restriction Order, with necessary modifications, as it applies to Restraining Orders.

Clause 16, for its part, seeks to amend section 35(3) of the Act to enable the Court to make a Recovery Order where a person is not in Mauritius.

Clause 18 seeks to repeal and replace section 45 (which presently deals with Production Orders) by a new section 45 which provides for the exercise of Ancillary Powers by the Enforcement Authority which may thus, by virtue of the proposed new sections 47 and 48, under clauses 20 and 21 respectively, require a person to produce or disclose
information or material, or a financial institution to provide customer information, in the circumstances set out in the said new sections.

Clause 22, for its part, seeks to amend section 50 to render refusal or failure to comply with a requirement under section 47 or 48 an offence.

As regards Clause 24, it seeks to amend section 59 (which deals with domestic co-operation agreements) to provide that every public body (including the Commissioner of Police, the Financial Intelligence Unit, the Financial Services Commission, the Independent Commission against Corruption, the Mauritius Revenue Authority and the Registrar of Companies) which has been notified by the Enforcement Authority of the start of an Investigation shall provide the latter with such information as it may require for the exercise of its functions and powers under the Asset Recovery Act.

Clause 25 of the Bill seeks to amend section 63 to mainly provide that the Community Service Order Act shall not apply to a conviction for an offence specified in section 63(1)(a).

Finally, clause 26 seeks to amend section 66(1) of the Asset Recovery Act in order to enable the Dangerous Drugs Commissioner under the Dangerous Drugs Act to complete any matter pending before him at the commencement of the Asset Recovery Act, in accordance with section 64(3)(k) of the Banking Act, in addition to the repealed provisions of the Dangerous Drugs Act, while Clause 27 makes a consequential amendment to section 64(3)(k) of the Banking Act.

Mr Speaker, Sir,

I am sure Members of the House will agree that the amendments being proposed, which are meant to ensure that offenders cannot benefit from their crimes and which are in line with the objective of Government not only to combat but also discourage criminality, will no doubt improve the existing asset recovery mechanism provided for in the Asset Recovery Act. It is also to be noted, Mr Speaker, Sir, that the amendments being proposed will also serve to bring the Asset Recovery Act much more in line with the current trend and practice obtained in other jurisdictions such as South Africa, the United Kingdom and Scotland, where the asset recovery mechanism has proved to be successful – which is precisely, Mr Speaker, Sir, the ultimate aim and objective of Government behind the present piece of legislation, and also the end result which, I am sure, not only this Government but also every citizen of this country, wishes to see.

With these words, Mr Speaker, Sir, I commend the Bill to the House.