



All-Party Parliamentary Loan Charge Group

www.loanchargeappg.co.uk

Sir Jonathan Thompson
Chief Executive and Permanent Secretary
HM Revenue and Customs
100 Parliament Street
London
SW1A 2BQ

2nd April 2019

Dear Sir Jonathan,

HMRC and HM Treasury misinformation regarding the 2019 Loan Charge

We have serious concerns from the evidence we have seen that both HMRC and Treasury Ministers are consistently issuing misleading information in documents, letters and press statements regarding the Loan Charge. Partial and misleading answers are consistently given to written Parliamentary questions on the subject.

As you know, the All-Party Parliamentary Loan Charge Group invited both HMRC and the Treasury to an evidence session on Tuesday 5th March, which was declined.

We are therefore writing this open letter to you to challenge the claims that, from the evidence we have been sent as part of the Loan Charge Inquiry, are or appear to be misleading and misrepresentative. In many cases it seems clear deliberately so, to give a false impression regarding the policy, its legality and impact.

Given our concerns about this serious matter, as well as the devastating impact the Loan Charge is having on people's mental health, we hope you will reply fully and honestly to these questions and to do so as quickly as you are able to.

We would like you to address six areas of concern:

- i. HMRC's (and the Treasury's) statements regarding convictions on payroll loan arrangements
- ii. HMRC representation of the outcome of legal cases
- iii. HMRC claims regarding 'typical' liability
- iv. The fact that HMRC contractors are caught by the Loan Charge
- v. HMRC statements about bankruptcy and selling homes
- vi. HMRC claims that 75% of revenue related to the Loan Charge will come from "employers" and that 85% paid so far has come from "employers"

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i. **HMRC's record in prosecuting promoters of payroll loan arrangements**

HMRC and the Treasury continue to deliberately mispresent this in order to give the impression that there have been convictions against promoters of loan-based payroll arrangements for promoting such arrangements.

There is categorically no evidence of this occurring and lawyers have looked at cases in this area and have concluded that it is clear that convictions referred to by HMRC are not convictions for Loan Charge arrangements. To present them as such is deliberate misrepresentation and a clear attempt to mislead Parliamentarians and journalists, which is a serious matter.

To give one example (and there are many):

HMRC Director General, Customer Strategy and Tax Design, Ruth Stanier stated in her letter to Sir Ed Davey of March 6th that,

"Since April 2016, more than 20 individuals have been convicted for offences relating to the promotion and marketing of tax avoidance schemes. They have received over 100 years of custodial sentences, with an additional seven years of suspended sentences ordered."

We have been provided with information from a tax barrister and others about these claims that show that the convictions are not related to payroll loan arrangements.

We have been told specifically that ***none of the twenty convictions mentioned relates to a payroll loan arrangement, such as those to which the Loan Charge applies.*** To include this, as HMRC and the Treasury do, when asked about action against promoters of loan arrangements for promoting such arrangements, is deliberate misrepresentation, which as such breaches the Civil Service Code.

We also note that Mel Stride MP was asked by the financial journalist and presenter Paul Lewis on his BBC Radio 4 MoneyBox programme about this specific point three times. He refused to answer on each occasion the very simple question as to whether the prosecutions referred to were related to loan arrangements, because he knows that they are not.

HMRC responded to a Freedom of Information request asking about these prosecutions - previously described in the Guardian newspaper as "more than 15 individuals". The response shows that none of them relate to arrangements subject to the Loan Charge [Ref FOI2019/00534]:

"None of the convictions referred to in the statement above were therefore for offences directly related to arrangements that will be subject to the 2019 (DR) Loan Charge".

This directly contradicts the information provided by Ruth Stanier in her letter to us of 6th March.

Can you please therefore answer the following:

- 1. Please explain to us why Ruth Stanier would seek to give the impression that the convictions relate to tax avoidance in connection with the Loan Charge when in fact this is not the case?***
- 2. Can you provide details of any convictions of promoters of payroll loan arrangements for promoting/selling such arrangements? Please provide relevant details for each and every case***

referenced in your answers, but only where convictions were against promoters of payroll loan arrangements for promoting/selling such arrangements.

ii. HMRC claim of legal precedent for the Loan Charge from cases it has won

We are also very concerned at the way HMRC and the Treasury have continually misrepresented the reality of the legal position regarding the Loan Charge and in particular the way the outcomes of court cases have been misrepresented, deliberately, to give the false impression that they are the legal justification for the Loan Charge, when they manifestly are not.

In your own letter to Stephen Lloyd MP of 27th June 2018, you clearly state that,

“DR loans were always taxable. In the Rangers FC case, the Supreme Court unanimously agreed that these amounts [and in this context “these amounts” can only mean “DR Loans”] were earnings, and were taxable.”

Lawyers have informed us that this statement is legally incorrect and actually false. DR loans have never been deemed taxable in the manner you describe, and, as you know, HMRC has never won a legal case to suggest they are – the Boyle case is not relevant as the loans were fraudulent.

Shortly before your letter to Stephen Lloyd of 27th of June 2018, Phil Gilbert, project lead on the DR Project within HMRC wrote to his colleagues indicating that:

“You may know about the Early Day Motion started by Stephen Lloyd MP which has the support of about 50 other MPs. We are working hard to correct perceptions put forward by the EDM and are considering a range of options to help us to do that. This will provide balance to some of the claims being made by customers and action groups.”

You will see that we have flagged the phrase “*we are working hard to correct perceptions*” when the reality is clearly that HMRC and the Treasury has repeatedly misrepresented the true legal position regarding the Loan Charge and tax cases.

Similarly, we are concerned about information which has been provided by the Treasury and Treasury ministers:

Mel Stride 29th January 2019 – Treasury Questions:

“These schemes have been taken through the courts on many occasions. A scheme used to the benefit of Rangers Football Club was taken to the Supreme Court - the highest court in the land - and was found to be defective.”

Mel Stride 8th January 2019 – NC26 debate

“These schemes have been taken through the courts on many occasions. A scheme used to the benefit of Rangers Football Club was taken to the Supreme Court - the highest court in the land - and was found to be defective.”

Mel Stride (exchange with Anneliese Dodds) Public Bill Committee 11th December 2018 –

“They were in many cases promoting schemes that did not work and were defective, and in many cases promoting schemes that had been taken through the courts by HMRC - and, in a case involving Rangers football club, through the Supreme Court. On each occasion, they have been found defective.

...

I am saying that the schemes were taken through the courts and were found defective; they were found not to work.”

Mel Stride - Topical Questions (11th December 2018):

“The arrangements entered into around disguised remuneration, for which the Loan Charge is being applied, were always defective at the time they were being used. They have been taken through the courts many times over many years by HMRC and been found to be defective. They also went through, in a particular case, the Supreme Court - the highest court in the land - and the scheme was found to be defective.”

Mel Stride told the House of Commons on 4th March 2019 (Urgent Question):

“These schemes have been taken through the courts, not just the general courts, but the Supreme Court, over a number of years and they have always been found to be defective and not to work.”

The reality of the relevant legal cases is as follows:

[Dextra Accessories Ltd v Macdonald \(Inspector of Taxes\) \[2002\] STC \(SCD\) 413 \('Dextra'\)](#)

- HMRC's interpretation that income tax should be applied in relation to payments of loans from EBT arrangements was deemed incorrect
- The First Tier Tax Tribunal ('FTT') in Dextra held that loans achieved the *“outcome promised when they were being marketed”*, to use HMRC's own words. HMRC did not appeal the income tax on earnings aspect of that decision

[Sempra Metals Ltd v Revenue and Customs Comrs \[2008\] STC \(SCD\) 1062 \('Sempra'\)](#)

- HMRC's interpretation that income tax should be applied in relation to payments of loans from EBT arrangements was again deemed incorrect
- HMRC's PAYE arguments (that the loans were income) were again dismissed

[Rangers v AG for Scotland \[2017\] UKSC 45 \('Rangers'\)](#)

- The FTT (in October 2012) and Upper Tribunal (July 2014) both held in Rangers that the loans were not a sham and could not be regarded as earnings
- HMRC then changed their argument, as you know, having been advised to do so by senior tax counsel. The argument changed from whether the loans were taxable, to successfully argue that there had been a payment of earnings when employers paid monies into the EBT. It was on this basis that the Supreme Court (in July 2017) decided in favour of HMRC and NOT the argument that the loans paid to contractors were taxable
- The Rangers decision was thus that, in certain circumstances, the payment of a sum by an employer into an EBT may amount to a 'redirection' of the employee's earnings, in which case income tax

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should be deducted by the employer under the PAYE system from the sums paid into the EBT before the 'loan' is advanced to the taxpayer

- Following the decision of the Supreme Court in Rangers, HMRC issued 'Follower Notices' to other employers that had implemented similar structures. It is believed that this has yielded hundreds of millions of tax revenues which have been included by you in the figures purporting to have been raised from employers under the Loan Charge
- No 'Follower Notices' were issued to taxpayers/contractors because HMRC had no legal basis on which to do so

It is clear that both HMRC and HMT have deliberately misrepresented the reality of the outcomes of court cases. No court case has given the legal basis for the Loan Charge, which you have introduced instead to be able to collect tax that otherwise is not due. We are deeply concerned at this cynical and systematic misrepresentation to try to make MPs and journalists believe that court cases have deemed the loans taxable, when that is not the case.

Can you please therefore answer the following:

3. Please tell us any court case that has deemed that payroll loan arrangements are taxable?

4. Can you please explain why HMRC and you personally have so clearly misrepresented the outcome of the Rangers Supreme Court judgement, including to MPs, and how that is consistent with the Civil Service Code?

5. Can you please inform us why HMRC considers clear and demonstrable misrepresentation of the outcome of legal cases as a reasonable course of action?

iii. HMRC claims regarding 'typical' liability

The evidence we have been sent overwhelming shows that the vast of majority of people concerned about the Loan Charge are facing large sums which are, in many cases, life ruining (and couldn't possibly be repaid).

In our survey of individuals impacted by the Loan Charge, only 3.6% of respondents expected HMRC to hold them liable for less than £15,000. Over 50% of respondents expected HMRC to estimate their liability between £50,000 and £300,000.

Yet HMRC have claimed that the average liability is around £13,000.

Mary Aiston, Director Counter-Avoidance, HM Revenue and Customs, in giving evidence to the Treasury Select Committee on 30th January 2018, stated that HMRC thought that,

"...the typical settlement that an individual is facing is somewhere in the order of £13,000."

The evidence that the APPG has received, and the results of its Inquiry Survey, clearly show that the amounts in question are far greater. During the APPG inquiry evidence sessions we heard from a number of individuals who had larger disputed tax liabilities – often as a consequence of years of inactivity or unresponsiveness on behalf of HMRC in relation to enquiries. The witnesses explained that, even with

unlimited periods, the size of the settlement figure they faced was likely to lead to dire financial consequences.

Can you please therefore answer the following:

6. **Where does the figure of £13,000 originate from and how has it been calculated, on what basis?**
7. **What are the actual mean and the median figures of liabilities, from all the cases HMRC is aware of?**

iv. **The fact that HMRC contractors are caught by the Loan Charge**

HMRC have been notable in their refusal to properly answer questions as to whether or not any contractors working for HMRC used loan arrangements.

The extraordinary refusal by HMRC to answer the House of Lords Economic Affairs Committee's simple question of whether or not HMRC contractors were using 'disguised remuneration' arrangements is as follows:

- The question, as to whether any current or former HMRC contractors have used disguised remuneration schemes, was first asked by the Economic Affairs Committee/Sub-committee in the oral evidence session on 22nd October 2019 (Q.55), when it was put to Ruth Stanier, HMRC Director-General, Customer Strategy and Tax Design. Ruth Stanier had previously confirmed, when questioned, that HMRC on occasion engage independent contractors. She was subsequently asked by Lord Hollick, with regard to loan arrangements, as to whether,
"would it not be incumbent on HMRC to say to people, après fact, that they should not do this, including people who presumably are contracted by HMRC itself?"

Her reply did not answer the question, and indeed the Chair, Lord Forsyth, noted as much, stating that,

"[...] if you thought that the schemes were wrong, why did you not tell the taxpayer?"

- Following this the Clerk of the Sub-Committee wrote to HMRC asking, amongst other things, for an answer to the unanswered question **(the second time of asking it)**
- HMRC replied to the Committee, **but entirely ignoring, yet again, this question** (Letter from HMRC to the HoL EA Committee, 31st October 2018)
<https://www.parliament.uk/documents/lords-committees/economic-affairs-finance-bill/draft-finance-bill-2018/8%2031%20Oct%20Stanier%20to%20Chairman%20letter%20.pdf>
- The Committee wrote back to point out that HMRC had failed to answer, demanding an answer **(the third time of asking)**. The letter from the HoL EA Committee to HMRC (1st November 2018) included the request

“I note that you have omitted the Sub-Committee’s question, communicated in writing by the Clerk after the meeting, on whether any current or former HMRC contractors have used disguised remuneration schemes. I request an answer to this as a matter of urgency.”

See <https://www.parliament.uk/documents/lords-committees/economic-affairs-finance-bill/draft-finance-bill-2018/8%201%20Nov%20Letter%20from%20Chairman%20to%20Stanier%20.pdf>

- HMRC acknowledged the question, **but then evaded actually answering it.** The Letter from HMRC to the HoL EA Committee (5th November 2018) included the following:

“The Sub-Committee have asked whether any current or former HMRC contractors have used disguised remuneration schemes. HMRC has never participated in disguised remuneration schemes when paying its employees or contractors, and carries out diligently the checks required by both specific central government guidance and the law.”

Which of course actually ignored the question as to,

“whether any current or former HMRC contractors have used disguised remuneration schemes.”

See <https://www.parliament.uk/documents/lords-committees/economic-affairs-finance-bill/draft-finance-bill-2018/Letter%20from%20Ruth%20Stanier%20to%20the%20Chairman%20051118.PDF>

- Due to this clear attempt to avoid the question asked, the EA Committee wrote again to HMRC on 13th November, **the FOURTH time of asking.** The letter (13th November 2018) stated,

“In your 5 November letter, you stated, “HMRC has never participated in disguised remuneration schemes when paying its employees or contractors, and carries out diligently the checks required by both specific government guidance and the law.” The Sub-Committee noted in its meeting on 12 November that you did not say directly that no current or former HMRC contractors have used disguised remuneration schemes. Could you please confirm whether this is the case?”

- Letter from HMRC to the HoL EA Committee (19th November 2018) responds by saying,

“As set out in my letter of 5 November, HMRC has never participated in disguised remuneration tax avoidance schemes, for example by remunerating contractors through loans or payments to trusts. It is possible for contractors to use disguised remuneration without the participation or knowledge of their engager. Any HMRC contractor identified in the course of our compliance work as using a disguised remuneration scheme would be investigated in the same way as any other contractor.”

<https://www.parliament.uk/documents/lords-committees/economic-affairs-finance-bill/draft-finance-bill-2018/181119%20letter%20to%20Lord%20Forsyth.pdf>

HMRC still did not properly or honestly answer the question as to whether HMRC contractors were using such arrangements. This merely infers that it is possible that HMRC contractors could have used loan-

based arrangements without HMRC being aware. They have still not answered the question asked as to whether or not HMRC contractors were using any 'disguised remuneration' arrangements, including loan based arrangements (which they were).

We also know that these people were including these arrangements on their tax returns. HMRC's suggestion that they would not have known is therefore false. Indeed the reality is that HMRC must know full well that some people who contracted to them were using such arrangements and are subject to the Loan Charge. They are evading questions and refusing to admit this, for obvious reasons.

The APPG heard first-hand testimony from a witness at the inquiry sessions who was a contractor working for HMRC and engaged via an umbrella company. Their remuneration was via a loan arrangement. At no time, despite the due diligence undertaken for this individual to be offered the contract, was the nature of the engagement brought into question.

Numerous other submissions have also been received, as part of the APPG call for evidence, from contractors and freelancers who have worked across a number of government and public service departments under similar arrangements – including at HMRC. The evidence also confirms that loan arrangements were declared on tax returns and never queried at the time.

This would point to HMRC senior management officials having given clearly misleading and evasive answers to the House of Lords Economic Affairs Committee during their testimony in 22nd October 2018.

Can you please therefore answer the following:

8. How many contractors who worked for HMRC are now facing the Loan Charge in respect of periods spent actually working for HMRC?

9. How many contractors working for HMRC did HMRC write to at the time (when they were working for HMRC), warning them not to use these arrangements?

v. HMRC reassurances over bankruptcy and selling homes

HMRC and the Treasury have consistently given the impression that few if any people will end up going bankrupt or having to sell their homes as a result of the Loan Charge and the sums being demanded from them.

It is notable that when asked about this, instead of answering how many people they estimate will go bankrupt or sell their homes, they instead, very deliberately, say that HMRC "do not want" to make anyone bankrupt or that they will not "force" people to go bankrupt. This is, of course, not what they were asked. It seems clear that this is a deliberate and planned strategy to deflect from the reality that many people will (and will have no choice) but to go bankrupt and/or to sell their home or have a charge on their home.

From Ms Stanier's letter of 6th March:

"HMRC has committed not to make anyone sell their main home to pay their DR tax bills. Fears that people will be made homeless because of HMRC debt enforcement activity in relation to the charge on DR loans are unfounded. It is also the case that HMRC does not want to make anyone bankrupt".

The Loan APPG heard evidence at its oral inquiry sessions to suggest that many taxpayers believe they are at risk of bankruptcy as a result of the Loan Charge. The APPG Inquiry's Survey indicated that 32% of individuals affected by the Loan Charge see no possible means to settle what HMRC claims they owe. Separately, 45% of the respondents indicated that they would rather go for voluntary bankruptcy over signing up to a long (5+ year) Time to Pay agreement. Based on the estimates of from independent tax experts of 100,000 individuals known to be impacted, this would indicate somewhere between 30,000 and 50,000 bankruptcies will occur over the next 12 months. Given that the run rate of personal insolvencies in the UK is around 10,000 per month, this would represent an enormous increase. The costs that this represents to future economic growth are likely to be substantial.

Written evidence submitted by taxpayers, barristers and tax accountants to the inquiry has suggested that many individuals will indeed go bankrupt and have to sell/have a charge on their homes.

Again, quoting from another communication issued by HMRC project lead, Phil Gilbert:

"The policy change aims to bring in around £2.5 billion in additional yield for the Exchequer."

The corollary of this is there an acknowledgement that approximately £700 million will not or cannot be collected. Clearly, unless HMRC waives the Loan Charge, individual taxpayers will require certainty and bankruptcy will result – this will necessarily result in the sale of family homes.

The APPG Loan Charge Inquiry has received numerous submissions of evidence, with a substantial number of individuals who are affected by the Loan Charge who have already been forced to sell their homes to pay tax bills for amounts that are not legally owed.

Can you please therefore answer the following:

- 10. How many people have already had to sell their homes to meet settlement payment terms set out by HMRC as an alternative to facing the Loan Charge?**
 - 11. How many people now have a charge on their home resulting from the sums demanded by HMRC/agreed in settlement with HMRC?**
 - 12. What is the estimated number of people facing the Loan Charge who will go bankrupt for any and all reasons, i.e. not forced to go bankrupt nor made bankrupt by HMRC?**
 - 13. Costs of bankruptcy:**
 - a. What is the current total average cost to the Exchequer per each bankruptcy of an individual citizen?**
 - b. What is the total projected cost to the Exchequer of the estimated number of bankruptcies to individuals facing the Loan Charge?**
- vi. HMRC claims that 75% of revenue related to the Loan Charge will come from "employers" and that 85% paid so far has come from "employers"**

HMRC have frequently cited that 75% of the revenue collected will come from "employers", and that "employers" have paid that 85% of the revenue collected so far.

No information has been provided on the composition of these figures. Specifically, no distinction is made between revenue collected from "employers" that are owner-managed businesses that implemented their own corporate EBTs and "employers" that promoted contractor loan arrangements.

It is believed that significant proportion of the revenue collected from owner-managed businesses would have been collected even if the Loan Charge legislation were not in place.

By conflating the two within documents and communications which clearly relate to contractors and freelance workers, it gives the false impression that the revenue collected relates to employers that promoted contractor loan structures. That is not the case because most of those latter employers no longer exist or are offshore.

Ruth Stanier's letter of March 6th states:

"Since the DR Loan Charge was announced, HMRC has agreed settlements on DR schemes with employers and individuals worth over £1 billion. So far, around 85% of tax secured has come from employers, and less than 15% from individuals."

It also states:

"The majority (75%) of the yield from the DR Loan Charge measure is expected to come from employers rather than individuals."

We have seen no credible evidence to substantiate either of these claims.

The APPG has been sent evidence to suggest that, in actual fact, what HMRC is referring to in terms of the 85% figure is money collected as a result of follower notices issued after the Supreme Court ruling in the Rangers case, which, as you are well aware, declared that the payment from employers into the Employee Benefit Trusts was in fact taxable. This is legally entirely distinct from loans advanced to contractors.

We believe that HMRC may be deliberately conflating the two in an attempt to give the misleading impression that the majority of money collected under the DR has (and will) come from employers that promoted contractor loan structures, when this is simply not the case. The money they are referring to includes (or is entirely) money that is not related to contractor loan arrangements.

The APPG has seen no credible evidence that large client companies are paying liabilities with regard to payroll loan arrangements, as opposed to payments relating to the Rangers judgment above.

This leads us to draw a possible inference that the use of "employers", referred to by HMRC in their communications, gives the impression that they are referring to employers that promoted contractor loan structures when this does relate to owner-managed businesses that implemented EBT arrangements for their own company.

Can you please therefore answer the following:

- 14. What proportion of the 85% of the payments already paid, that HMRC refers to, have been:**
- a. payments from employers into EBTs, and;**
 - b. payroll loans to contractors and freelance workers?**

15. How do you define 'employers' and do you include small limited companies and Personal Service Companies run by contractors/freelance workers?

Conclusion

We trust that you will address each of the questions above with pertinent and relevant answers and will not attempt to do what HMRC and the Treasury have done consistently with regards to the Loan Charge, which is to regurgitate the same arguments in response to all challenges. That is not acceptable and would be a clear refusal to answer these important questions, each and every one requiring a factual answer.

We remind you of the Civil Service Code to which you and all HMRC officers are bound, which includes that you must not "deceive or knowingly mislead ministers, Parliament or others", and must not "ignore inconvenient facts or relevant considerations when providing advice or making decisions".

We now require specific and factual answers to these questions as a matter of urgency. Please also ensure when you reply to this letter, you reply in one letter to only this letter and deal with all other correspondence separately.

We look forward to hearing from you.

Yours sincerely,



Sir Ed Davey MP
Chair



Ruth Cadbury MP
Vice Chair



Ross Thomson MP
Vice Chair

On behalf of the Loan Charge APPG