All-Party Parliamentary Loan Charge & Taxpayer Fairness Group

www.loanchargeappg.co.uk

Lucy Frazer QC MP
Financial Secretary to the Treasury
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

3rd December 2021

Dear Lucy,

The Loan Charge - a series of questions which require your urgent attention

As Co-Chairs of the 245-strong All-Party Parliamentary Loan Charge and Taxpayer Fairness Group, we are writing to you with a number of very specific, extensively-researched questions which relate directly to the deeply controversial Loan Charge. These cover and incorporate the existing tax and employment laws which are on the UK statute book and the now demonstrably flawed conclusions of the Morse review, which the Government reluctantly commissioned to investigate and report upon this policy.

We ask that you consider these questions in your capacity not just as the Financial Secretary to the Treasury, but also in your very public role and status as a QC with a healthy and necessary respect for the law, alongside that of an elected Parliamentarian, upholding the rights of UK citizens. We note that you have taken a slightly more compassionate tone in recent answers to Parliamentary questions on the Loan Charge and we hope that this marks the start of a fundamental change in approach on this ongoing issue and scandal. We urge you to look at the evidence and not take at face value what you are told by senior HMRC officials, whose unacceptable conduct we have raised on numerous occasions.

The importance and significance of these questions which follow cannot be overstated, nor underestimated - the answers you give will be crucial in determining the validity of any subsequent position the government decides to maintain (or perhaps, with the benefit of clear hindsight, now alter) the Loan Charge.

There are ten important points and ten questions we wish to be answered.

1. The key conclusion of the Morse Review is fundamentally flawed

The primary conclusion of the Morse report was that 'the Loan Charge should not apply to loans entered into by either individuals or employers before 9 December 2010, being the point at which the law became clear'. That legislation, announced in December 2010, only affected **employees** - there was *nothing* on the statute book for another seven years (following the decision in the Rangers case) suggesting they did not work for the self-employed. The 2011 legislation only applied to employer-

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

employee loans paid from a third party. It did not apply to self-employed arrangements or employed arrangements where no third party was involved. The reality is that the law was categorically **not** clear until the decision of the Supreme Court in 2017, which of course is also why HMRC proposed the Loan Charge to the Government, who introduced it to Parliament in 2016. They would not have done so, *nor needed to do so*, had the law **actually** been clear from December 2010.

Question 1. As Financial Secretary to the Treasury and a QC, will you now make a public statement to both challenge and rectify that flawed and unsound conclusion, by confirming that the Loan Charge legislation will be amended to reflect the reality of the correct legal position, which was clearly misunderstood (presumably as a result of the incomplete and misleading advice he received from those appointed to assist him) by Lord Morse at the time of his review?

2. The reality of the Rangers Supreme Court Ruling

The Supreme Court decision in the Rangers case in 2017 crucially determined that employers, *not* employees, are liable for any tax deemed to be due, something which HMRC have admitted they cannot find any legal precedent to overturn yet continue to misrepresent as a basis for the retrospective Loan Charge. Freedom of Information requests have been submitted asking HMRC to supply the details of cases and precedents which provide any such legal basis that they believe justifies the Loan Charge legislation, but this information - which has been "proven" to exist after fully redacted briefing notes were actually disclosed in those FOI requests - continues to be withheld.

Question 2. As Financial Secretary to the Treasury and a QC, will you now disclose, in full, the detail of those legal cases and precedents which HMRC are withholding - the release of which has a clear and indisputable public interest - in order to allow the listed cases to be reviewed and analysed by tax experts, and to help determine whether this supposed claim has any proper or legal foundation?

3. HMRC failed to collect PAYE from agencies when they should have done

PAYE (Pay As You Earn) legislation means that employers are obliged to collect income tax and National Insurance from employees (and HMRC are obliged to ensure this) – however, in the case of those accused of using 'disguised remuneration' schemes, this did not happen. In many instances, the PAYE obligation fell on those agencies engaging and hiring out contractors, yet HMRC failed to enforce this – despite admitting in internal communications that they knew this should happen - and instead have now pursued the contractors. PAYE legislation, where it applies, is generally mandatory. The person classed as the employer must deduct PAYE. One such person classed as an employer is 'an agency' which arranges a post for a worker in circumstances where the worker, if directly engaged, would be an employee. The agency has to operate PAYE and pay NIC. The legislation is in s.44 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). It has been held that where the agency is UK based, s.44 takes precedence over other charges (Lancashire & Ors v HMRC [2020] UKFTT 407). Aware of this point, HMRC has attempted to use s.684(7A) ITEPA to disapply the PAYE legislation in contractors' cases. An Upper Tribunal decision - Stephen Hoey v The Commissioners for HM Revenue and Customs [2021] UKUT 82 (TCC) - has held this to be ineffective where the discretion to disapply PAYE is after the event, that is, after the agency has paid out. Thus, the agent remains liable to operate PAYE. Even if it fails to do so, the contractor has a tax credit which franks (offsets/negates) any Loan Charge tax.

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

Question 3. As Financial Secretary to the Treasury and a QC, will you now publicly acknowledge that these Agency Provisions (as published by Government under ESM2039 - Agency and temporary workers: agency legislation - provisions from 6 April 2014: the employer for tax purposes) confirm the legal position that, for income tax purposes, where the conditions in s44(1) ITEPA 2003 apply, the worker is treated as holding an employment with the agency. Please also confirm that the remuneration they receive in consequence of entering into the arrangements is treated for income tax purposes as earnings from that employment. Please also confirm that in these circumstances, s688(1) and (1A) of ITEPA 2003 prescribe that the agency is the employer who must deduct income tax, operate PAYE, and remit the payment to HMRC via RTI. Finally, please confirm that you will now instruct HMRC to cease the pursuit of individuals in all those circumstances where engagement for services was through an agency, and that the agency itself will now be deemed liable (as the prevailing legislation clearly states) for any tax which HMRC are claiming as due.

4. Liability for tax

You included a statement in a recent letter (dated 5 November 2021) that "liability for the tax is always that of the employee". This is not true. It is a consequence of the long-established policy in the UK that employees are not primarily responsible for their tax affairs and that such responsibility falls on the employers. The statutory duty to notify HMRC of a need to prepare a tax return is expressly relaxed in cases of PAYE employees (TMA 1970, section 7). The existence of the PAYE provisions, under section 684, sets out the scope of such regulations, stating "The Commissioners must make regulations ("PAYE regulations") with respect to the assessment, charge, **collection and recovery of income tax** in respect of all PAYE income". Even more critically, section 684(7) provides that PAYE regulations override everything else said about where the tax liability falls - in essence, PAYE regulations have effect despite anything in the Income Tax Acts - which themselves make it clear that 1) Where PAYE has not been paid, HMRC's primary course of action is against the employer (regulation 80); 2) Employees have a tax credit for the PAYE that should have been paid, even if it was not actually deducted from pay (regulations 185 and 188) and 3) HMRC have the power to remove that credit and to transfer liability from the employer back to the employee (principally regulations 72 and 81), but only in certain circumstances and with full power of appeal available to the employee.

Question 4. As Financial Secretary to the Treasury and a QC, will you now confirm that Government, HM Treasury and HMRC will publicly acknowledge the clear legal position and status of employees in relation to any supposed liability for tax, by ceasing to use the misleading statement that "liability for the tax is always that of the employee" and also to ensure that the PAYE regulations, which - as already explained - have effect despite anything in the Income Tax Acts, will be recognised as the legally binding set of rules surrounding the taxation of employees by HMRC, and in turn negate the claim made by HMRC that any tax remains due from those employees?

5. Court judgement that HMRC cannot retrospectively transfer liability to employees

As already mentioned, above question 3, it is noted that HMRC have, in particular in relation to years no longer governed by the Loan Charge, tried to effect a different device to transfer the supposed liability retrospectively from employers to employees, bereft of the statutory safeguards built into the PAYE regulations. The effectiveness and lawfulness of that approach has been questioned in the tribunals, most recently by the Upper Tribunal in the case of Hoey (see previous entry). For completeness, it should be noted that, although the Upper Tribunal dismissed HMRC's attempts to

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

remove the PAYE credit retrospectively, it rejected Mr. Hoey's appeal because it held that the question as to whether the PAYE credit is available was not a question that could be considered in the course of a statutory appeal, but was a question to be asked only in the course of enforcement proceedings. For taxpayers, that is of course a distinction without a difference because what matters to them is whether the credit *exists*, not when it may be deployed. HMRC had simply missed the statutory deadline because they (like taxpayers) are subject to time limits as set out in the Taxes Management Act 1970. These time limits operate like a statute of limitations so as to give individuals a rightful sense of finality to their tax affairs.

Question 5. As Financial Secretary to the Treasury and a QC, will you now confirm that the 'approval' to exercise this supposed discretion in the PAYE legislation (s684(7A)(b) ITEPA 2003) - which, in HMRC's own words, "has not previously been used to remove a PAYE liability which has arguably already arisen", was a decision taken by the Contentious Issues Panel within HMRC, and whether this decision required sanction from any higher authority within Government? Please also confirm when this decision (and any subsequent sanction) was taken, whether qualified legal advice was sought as to its application in the context of the existing PAYE regulations (if so, please provide the full and unredacted details of that advice) and why precisely HMRC officials warned Mr. Harra that "it is highly likely we will be challenged on our use of the discretion in contractor loans cases" (as disclosed within yet another Freedom of Information request)?

6. The reality that no loan scheme promoters have been prosecuted for promoting loan schemes

You included another statement in the same recent letter (dated 5 November 2021) which claimed "existing regimes, such as the Disclosure of Tax Avoidance Schemes and the Promoters of Tax Avoidance Schemes, have had a positive impact in changing the behaviour of some promoters". During the course of various Parliamentary debates and committee meetings, many MPs and peers have sought answers as to the true numbers of prosecutions, penalties, convictions, arrests and fines of those involved in the marketing and promotion of tax avoidance schemes which are subject to the Loan Charge, and have consistently received unsatisfactory, incomplete and misleading answers from both ministers and HMRC officials.

Question 6. As Financial Secretary to the Treasury and a QC, will you confirm, as at today's date, 1) How many promoters of avoidance schemes/arrangements subject to the Loan Charge itself have been prosecuted, convicted, arrested, fined or faced financial (or any other) penalties? For the purpose of clarity, this question does **not** apply or relate to any schemes/arrangements which purport to circumvent or nullify the Loan Charge - just those schemes which are subject to the Loan Charge; 2) Since the Counter-Avoidance directorate was created in 2013, exactly how many penalties have been charged under the DOTAS regime, and how many of those relate specifically to promoters of those schemes which are subject to the Loan Charge; 3) Since the Counter-Avoidance directorate was created in 2013, exactly how many penalties have been charged under the POTAS regime, and how many of those relate specifically to promoters of those schemes which are subject to the Loan Charge; 4) What are the names of the promoters of schemes/arrangements (which have caused members of the public to be affected by the Loan Charge - not any schemes/arrangements which purport to circumvent or nullify the Loan Charge) that are currently being prosecuted and/or investigated, at what stage are these proceedings, and how many in total (on the basis of those proceedings/investigations) do you expect to result in criminal charges being applied or a successful prosecution being carried out; 5) Can you please confirm that only those who *used* the loan schemes

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

are being pursued to pay the tax which HMRC claim has been avoided and that those who promoted, enabled, operated, and profited from the loan schemes have not paid any of the disputed tax?

7. Selection of experts to advise the Morse Review

Returning to the Morse review and the selection of 'experts' who were enlisted to assist Lord Morse with his understanding of the tax law in relation to the implementation of the Loan Charge, it might be expected that, as an apparently independent reviewer, he would have had a choice as to which witnesses and experts might (or indeed should) be engaged. However, it is clear from Freedom of Information disclosures that this process was influenced by both HMRC and the Treasury, counselling (as has been proven) who might be suitable or unsuitable experts. In her evidence to the House of Lords earlier this year, Mary Aiston from HMRC suggested that the restrictions were at Lord Morse's request, but the contemporaneous evidence shows that that is incorrect, as outlined in a letter from the House of Lords Economic Affairs Committee to the previous Financial Secretary to the Treasury (dated 22 January 2021). It is also readily apparent that other advisers duly appointed and engaged by the review had previously expressed views on the Loan Charge or disguised remuneration schemes in the past, thereby contradicting Mary Aiston's statement that people who had taken a public view on the Loan Charge were excluded from such advisory roles. Indeed, one such appointee worked within HMRC alongside officers who were responsible for the introduction of the Finance Act 2011 legislation.

Question 7. As Financial Secretary to the Treasury and a QC, will you now confirm exactly what criteria and conditions were applied to those candidates being considered to assist Lord Morse with his review, and please also provide evidence of the conflicts of interest which were 'accounted for' (as referenced in your letter dated 5 November 2021) as a result of Lord Morse accepting their opinion and expertise for the review. On the basis of what appears to be incorrect legal advice from these supposed experts as to the actual effect(s) of the legislation introduced by the Finance Act 2011, it is clear that Lord Morse must have been badly let down by the choice of advisers in forming the inaccurate conclusion that the 'law was clear from 2010' - please therefore now confirm that the Government will finally reflect on the flawed logic of the Morse review, as viewed in light of the information which has since been exposed - and which HMRC would have known at the time of the Morse review but failed to disclose?

8. The fact that the Loan Charge denies citizens the right to go to court to challenge it

Historically, participants of tax avoidance schemes (typically wealthy individuals trying to save an element of their charge to tax) have had the unfettered right to argue the viability of their schemes and to also make procedural arguments in the course of an appeal before the Tribunal. The Loan Charge effectively denies this right (by making any such appeals academic) to a group of taxpayers who are traditionally less wealthy, less informed and less financially astute than the typical avoider and, furthermore, were not the instigators (or even the principal beneficiaries) of the avoidance schemes being used. The promoters of the loan arrangements marketed themselves as offering a complete service which dealt with all the necessary paperwork and as one of the Tribunal decisions covering these schemes noted - "His (Mr. Hoey's) motivation in entering into these schemes was solely to avoid the complexities of running his own company or his own business". Indeed, far from trying to save tax, these individuals were seeking to ensure that their tax affairs were properly compliant. They were sold an administrative solution - what they did not know *then* was that it would come at a huge cost many years down the line. Lord Kerr, in a debate on 29 April 2019, stated - "Only in November

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

2017 - 18 years in - did HMRC start writing systematically to the 50,000 individuals who might be affected by the Loan Charge. I understand the reason for that - the legal position will have become clear *only* when the Supreme Court reached its judgment in 2017 - but surely HMRC should all along have been warning those who were signalling on their tax returns that they were using such schemes that HMRC clearance was not certain and that there was a legal uncertainty here".

Question 8. As Financial Secretary to the Treasury and a QC, please confirm why *these* contractors have been singled out for worse treatment than the more deliberate and wealthier tax avoiders? Please also confirm why the statutory time limits which Parliament has laid out and which apply to all taxpayers, whatever they might have done wrong, will continue to apply for all participants of the typical avoidance schemes which were entered into knowingly by wealthy individuals, but which have now been sidestepped by the Loan Charge? Please also explain why the legal rights conferred by Parliament have been suspended so far as one subset of the population, especially when that subset is made up of individuals who did not particularly profit from the tax savings that the schemes were seeking to achieve, and with the tax now being charged far in excess of the minimal financial benefit that was actually passed onto those individuals?

9. The reality of HMRC's implementation of the voluntary restitution Morse Review recommendation

HMRC's report on the implementation of the Loan Charge (published on 3 December 2020) estimated that around 1,000 individuals and 1,000 employers would benefit either by receiving a refund of voluntary restitution paid, or from a waiver of future instalment payments if voluntary restitution was included in a settlement paid through an instalment payment plan. They estimated that about £380m of voluntary restitution could be refunded as a result of this change, with the majority of this amount estimated to be due to employers. HMRC, in the same report, also estimated that a total of 11,000 individuals and 1,000 employers were removed from the Loan Charge as a result of the Loan Charge not applying to loans taken out before 2010, nor to loans where a taxpayer made a 'reasonable' disclosure between 9 December 2010 and 5 April 2016 and where HMRC failed to protect their position. Recent Freedom of Information requests have confirmed that, as at 18 October 2021 and having processed around 940 applications, only 740 had received a refund or waiver (or both), with the value of those refunds and waivers amounting to £66m. In addition, approximately **10** customers have been found to meet the criteria for 'reasonable' disclosure.

Question 9. As Financial Secretary to the Treasury and a QC, please provide an explanation as to the widely inaccurate estimates produced by HMRC following the changes to the Loan Charge (as recommended by Lord Morse), particularly with the shortfalls evident in the value of the voluntary restitution element (approximately £314m) of the refunds / waivers subsequently applied. Please also provide an explanation as to why only TEN taxpayers have been considered as meeting the criteria for 'reasonable' disclosure and what exact criteria and evidence was used by HMRC to determine that outcome.

10. The need for a fresh and fully independent review of the Loan Charge

It is increasingly evident, from the ever-growing cross-party opposition to both the Government's handling of the Loan Charge 'debacle' (to repeat the phrase Jim Harra used in internal emails), the amplified nature of the attritional debate and the very serious concern about the unacceptable

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk

behaviour and attitude of HMRC themselves, that support for victims from across the House expands on an almost daily basis as more MPs and peers finally start to understand the facts and evidence already available, alongside that which continues to materialise through the submission of Freedom of Information requests. 145 Parliamentarians have now also signed an open letter to the Prime Minister and the Chancellor that refers to some of these revelations and the new (and damning) evidence which has emerged since the Morse review, calling on them to revisit the subject and to come up with a fair and final resolution.

Question 10. As Financial Secretary to the Treasury and a QC, will you now engage with external experts, *fully independent of HMRC and the Treasury*, in order to meet that call? There are tens of thousands of individuals and families waiting for you to demonstrate that this Government is willing to *listen* to evidence, has a capacity to *see* the truth and the requisite humility to *understand* - and act upon - the facts. If not, then why not?

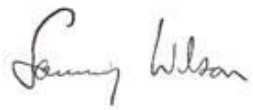
In conclusion, we hope that you can now see, as a Minister, a Parliamentarian and a lawyer, that the Loan Charge is not only a deeply controversial policy that undermines the rule of law, but also that it is a flawed policy brought in without proper understanding and with misleading rationale.

We urge you to fully and properly address and respond to all ten questions. We also, in addition to a written response, we are happy to facilitate a meeting with you and with us and independent experts who have corrected - and clarified - the law as it stands, which it would appear is at distinct odds with HMRC's misguided 'view'.

The Loan Charge was not properly scrutinised by Parliament when introduced, nor does it have any relevant or justified legal basis - it should never have been passed and the Government must now rectify this by announcing legislative change, as well as instructing HMRC to pause any enforcement of the Loan Charge and associated Accelerated Payment Notices.

We look forward to hearing with you, we hope with engaging with you and most of all, we hope hearing that you the Government does now accept that this highly contentious policy, linked to bankruptcies and suicides, will now be properly and independently reviewed.

Yours sincerely,



Sammy Wilson MP
Co-Chair

Greg Smith MP
Co-Chair

Mohammad Yasin MP
Co-Chair

cc: House of Lords Economic Affairs Committee
Treasury Select Commitee

Office of Sammy Wilson MP, House of Commons, London, SW1A 0AA
contact@loanchargeappg.co.uk