The Lord Morse KCB
House of Lords
London
SW1A 0PW

21st October 2021

Dear Lord Morse,

The Loan Charge Review in light of evidence not known at the time

We are writing to you – almost two years after the publication of your report on the Loan Charge – to share evidence which has emerged since then that we believe should have been disclosed at the time of your review. This compelling evidence, **had it been known at the time, could and indeed should have made a difference to your conclusions and therefore your recommendations.**

The purpose of this letter is to bring to your attention those facts which have now been revealed, in addition to recently decided case law, all of which have a direct bearing on the taxation of contractor loans.

It is also apparent that, despite the majority of your recommendations being accepted by the Government at the time, there remain serious concerns from Parliamentarians about the interpretation and implementation of those recommendations. Even more significant however, is the further evidence which has emerged in the interim, but which was not publicly known (and which may have been withheld from you during the course of the review), **that clearly renders your fundamental conclusion – that the law was clear from December 2010 – both flawed and unsound.**

It is well understood that the Terms of Reference laid out for the review by the Chancellor and HM Treasury provided both a narrow scope and limited objectives to you as the reviewer, so it is duly recognised that – beyond the specific remit you were granted - you could not make wider recommendations. It is also acknowledged that the allocated timeframe for the review to take evidence, and to properly scrutinise, examine and analyse that evidence before reporting to Government was tight – given the complexity of this issue and the life-changing impact(s) faced by those being targeted. Indeed, it was raised as a major concern following the announcement of the review's anticipated timeline by Government (as we are certain you will recall). With the disclosure of further important evidence from many different quarters – including numerous Freedom of Information requests – those concerns now seem even more well-founded than they were at the time.

One of the main conclusions you reached was that the clearly retrospective nature of the Loan Charge meant that it required serious deliberation and further scrutiny, and you have been widely commended for concluding that the reach of this policy – setting its initial scope back to 1999 - was therefore unjustified. However, you did not recommend the total repeal of the Charge (nor even the removal of its retrospective element).

Instead, you concluded – a conclusion upon which many of the associated recommendations relied – 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'.

This conclusion however has always been queried by many informed commentators, due to the fact (which was perhaps not shared as accurately as it should have been with you) that the legislation announced in December 2010 only affected employees - there was nothing on the statute book for another seven years suggesting they did not work for the self-employed. The 2011 legislation **only** applied to employer-employee loans paid from a third party. It did **not** apply to self-employed arrangements or employed arrangements where no third party was involved. This point was made by many experts, including the written evidence from tax barrister Keith Gordon which stated:

> "The legislation did change dramatically from the Finance Act 2011 (with the effective date being 9 December 2010). Those changes introduced a convoluted set of rules designed to ensure that funds transferred to third parties (e.g. trusts) on behalf of employees would be taxed on the employees…promoters were, I understand, quick to devise workarounds which were duly marketed to participants as compliant with the law. This was not particularly difficult because the FA 2011 legislation presumed that the workers would be employees; promoters tried therefore to tweak the arrangements so that the contractors were self-employed…Most contractors would generally consider themselves as self-employed – selling their own services to a series of clients. That is exactly the issue as to the potential (but contentious) relevance of the IR35 legislation."

Furthermore, the individuals who were being sold these schemes would have had no practical way of knowing of the FA 2011 changes, let alone their potential relevance or bearing.

In summary, the law was clear for *some* arrangements, but was demonstrably neither clear nor established for these self-employed arrangements. This is precisely why some advisers (including Chartered Accountants) continued to recommend that people use (and in some cases transfer to) arrangements that were ***not*** covered by the 2011 legislation. It is also why the Government and HMRC sought to legislate and announced that they would do so in 2016, because they knew *full well* that the law was still NOT clear for those types of arrangements that were not covered by the 2011 legislation. In fact, it was only in 2017 that Parliament changed the law to ensure that the self-employed would be caught by the use of loan-based schemes.

Thus, the law was manifestly (and more importantly, legally) **not clear** – and only finally became clear and established by the Supreme Court in 2017 (with their decision crucially determining 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). On this basis, any conclusion to 'fix' the Loan Charge to this date in 2010 and then claiming 'it was clear that these schemes did not work' is predicated on a misunderstanding of the legislation.

You will be aware of the clear and evidence-based report of the All-Party Parliamentary Loan Charge Group (now the Loan Charge and Taxpayer Fairness Group) which explained why your conclusion was unsound. **Now, further to this, new evidence has emerged to demonstrate beyond doubt that (a) the law was NOT clear for many arrangements that were entered into - in good faith - on the basis of professional advice and (b) HMRC *knew* that the law was not clear, hence *them* proposing the Loan Charge to the Treasury (something that is**

not publicly or widely known that they did), rather than it being proposed by Treasury Ministers.

This letter deals with three overall issues:

(1) New evidence which further demonstrates that the conclusion that 'the law was clear' from December 2010 is flawed and unsound

(2) HMRC interference in the choice of supposedly 'independent' advisers to your Review

(3) Your recommendations are not being implemented as you envisaged

Taking each of these areas in turn:

1. **New evidence which further demonstrates that the conclusion that 'the law was clear' from December 2010 is flawed and unsound**

(a) The First Permanent Secretary and Chief Executive of HMRC admitted to colleagues that he/they had "repeatedly tried to obtain legal analysis to understand the strength of our claim with very little success" in relation to HMRC pursuing employees, as opposed to employers.

A response to a Freedom of Information request has revealed the contents of emails shared between senior officials at HMRC. On 31 January 2019, Jim Harra, First Permanent Secretary and Chief Executive of HMRC wrote to senior colleagues and stated - "*In recent months I have repeatedly tried to obtain legal analysis to understand the strength of our claim with very little success. For yesterday's hearing we were initially given a summary of avoidance wins, some of which seemed to have nothing to do with DR*".

This admission is clear and unambiguous (whatever deceitful attempts HMRC and the Treasury may try to make in order to claim otherwise). It is a clear admission that HMRC cannot find legal analysis to justify their claim (their 'view') that they can pursue individuals, as opposed to employers, for schemes subject to the Loan Charge.

This fundamentally undermines the main conclusion of your Review's report, which claimed that 'the law was always clear' from December 2010.

The reality is that the law was 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.

The Supreme Court judgment in the Glasgow Rangers' case in 2017, which did - at last - make the law clear, determined that *employers* were liable for any tax deemed to be avoided. **This decision did not give HMRC the right to directly pursue individual contractors.** We now know that HMRC have, internally and privately, tried to find legal justification for their actions in doing so – ***and have found none***.

When pressed on the legal basis for the Loan Charge, Jim Harra openly admitted to the House of Lords Economic Affairs Committee - in a recent oral evidence session held on 15 July 2021 - "*I am not claiming that the law was always clear*".

Consequently, it really cannot be credibly stated any longer that 'the law was clear from December 2010'. This means that your recommendation that the Loan Charge should retrospectively remain in place from that date is both flawed and unsound.

(b) HMRC have refused to share details of legal cases that they claim publicly justify the Loan Charge and their right to pursue individuals

This specific matter of the legal basis for the Loan Charge and HMRC pursuing individuals was raised – repeatedly – in the Loan Charge follow-up oral evidence session hosted by the Economic Affairs Committee (as mentioned above). Mr. Harra's response to the Committee was that his email had been "*overplayed*". He went on to state - "*I have to speak frankly and honestly to colleagues if I feel that we need to do better. Of course, I knew at the time that HMRC was clear about its legal arguments for taxing DR scheme users*". Yet what he also knew at the time – but failed to mention even **once** during the evidence session with the Economic Affairs Committee – was the fact that other senior colleagues in HMRC had supplied him with a briefing document for his appearance at a Treasury Select Committee hearing on 30 January 2019 – the very day before he sent the email quoted above.

This briefing document was entitled 'Treasury Select Committee Hearing - The conduct of tax enquiries and the resolution of tax disputes / Disguised Remuneration' and clearly forms the basis of HMRC's justification for the Loan Charge, and quite obviously lists the cases, reasoning and judges' comments which HMRC opine and believe validate their claim.

Looking at these dates, Mr. Harra plainly had this document long before the recent oral evidence session with the Economic Affairs Committee, yet did not once make reference to it, despite being asked several times and *continuously* pressed for answers on HMRC's supposed 'legal basis' for the Loan Charge by various members of the Committee.

Following the sequence of emails already disclosed, another Freedom of Information request was raised in an attempt to extract further evidence of the supposed legal basis which HMRC (and Mr. Harra) contend is justification for the Loan Charge. The ensuing response from HMRC was submitted for internal review after the aforementioned briefing document entitled 'Treasury Select Committee Hearing - The conduct of tax enquiries and the resolution of tax disputes / Disguised Remuneration' and dated Wednesday 30 January 2019 was supplied - but with **every single entry redacted**. HMRC have since refused to disclose an unredacted version, so this will now be escalated as a complaint to the Information Commissioner's Office.

From the emails imparted alongside this fully redacted document, it was obviously intended to provide Mr. Harra with "*the legal cases HMRC can point to demonstrate the schemes never worked*" and the sub-heading on this document clearly reads 'Tax Avoidance - Examples of litigation cases which demonstrate tax avoidance schemes didn't work'. The internal review request was submitted to challenge the wholesale redaction and HMRC's misuse of certain 'exemptions' available under the Freedom of Information Act. They duly dismissed both.

The non-disclosure of the content of this document is of great significance to all those affected by the Loan Charge - if HMRC have complete confidence in their claim, then surely the legal cases which supposedly underpin, support and justify HMRC's pursuit of those people must be declared for all to see? Why would HMRC even wish to withhold evidence of this kind – unless it perhaps instead undermines and invalidates their public position? Was this document shared with you during the course of the Loan Charge review?

It is impossible not to deduce that the list of cases has been redacted because (as inferred by Jim Harra's comment in the original email - "some of which seemed to have nothing to do with DR") they do <u>not</u> provide a legal precedent for HMRC to pursue individuals.

All interested MPs and peers need to see this information – in the form of a **<u>fully unredacted version</u>**. This will 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.

(c) HMRC came up with the idea of the Loan Charge - not the Treasury - and they admit privately that they did so in order to stop people having the right to defend themselves in court

As referred to earlier, yet another Freedom of Information request sought evidence of whether it was HMRC *themselves* or the Government who originally devised the Loan Charge. The submission also sought to establish when the idea was first discussed and tabled, when the Government agreed to introduce the policy and when HMRC first started working on the legislation.

The APPG's recent letter to the Prime Minister and the Chancellor has already confirmed (based on the above FOI response) that HMRC developed the idea of the Loan Charge and proposed it in advice to Treasury ministers in September 2015.

It is also now demonstrated, through statements in internal communications, that HMRC proposed the Loan Charge as they had failed to win court cases allowing them to pursue individuals and that loans were income. As a result of this lack of success in the courts, HMRC began instructing the Office of Parliamentary Counsel to prepare legislation in October 2015.

The response to another Freedom of Information request supplied a copy of the guidance document produced by HMRC on 12 July 2019 for the Financial Secretary to the Treasury (Jesse Norman) entitled 'LOAN CHARGE AND POWERS AND SAFEGUARDS ANNOUNCEMENTS – FOR DECISION', alongside the minutes of a meeting between HMRC and the FST which was subsequently held on 15 July 2019.

HMRC's comments in this document state "*we would still be open to the accusation that we are denying scheme users their chance to have their case decided by a court. We would need to make clear that this is a deliberate choice as we are confident of winning the vast majority of cases and litigating all cases is not in the wider public interest*." However, this confidence is clearly misplaced, as shown by the recent result in the Hoey case, as well as the other cases that HMRC have previously failed to win.

The key point, however, is that for HMRC to simply concoct a proposed law to ensure they can demand legally unproven tax without allowing people the right to defend themselves in court is deeply sinister – and an absolute affront to the rule of law.

The response to another Freedom of Information request on 16 July 2021 includes an admission within HMRC that first of all, the Loan Charge not only takes away the right to challenge HMRC's 'view' in court, but also makes it clear that the Loan Charge was <u>specifically</u> designed to tax people, ***whether or not tax was actually due.***

In the 'Safeguards' section of the disclosed document, it states - "One particular criticism of the Loan Charge is that it is not giving those involved the chance to test in the Courts whether tax is really due on their particular loan. This is correct to the extent that the Loan Charge is

deliberately designed to bring into tax the loans made under the scheme, whether or not a tax charge arose at the time the scheme was used. However, HMRC's view is that a tax charge did arise at the time the loans were made."

This is a clear acknowledgement by HMRC that the Loan Charge effectively ensures that HMRC's '*views'* about a historical tax charge are now enshrined as a future and unchallengeable tax liability – whether or not tax was actually due. Once again, the exact opposite of the rhetoric from HMRC and from Ministers, who have given the false impression that 'tax was always due'.

The truth as to *why* HMRC proposed the Loan Charge is clear – to avoid the bother of going to court and the risk they would lose more cases, having lost several key cases (including Rangers until they changed their argument in the Supreme Court). Jon Thompson, ex-CEO of HMRC, in a letter to the then MP Stephen Lloyd (as evidenced in the Loan Charge APPG report dated April 2019) made it clear that the Loan Charge would do away with any need for litigation – in effect, stating that as they had lost so consistently with their previous challenges under existing tax laws, they wanted something that would bypass and circumvent the whole process. In this letter, he states "***The Loan Charge has also supported our efforts to settle DR cases without the need to litigate***".

What he actually means here is that the introduction of this legislation removes standard, long-established taxpayer protections and ensures that a legally unproven 'debt' is laid at the feet of victims whilst denying them any access to a tax tribunal or court. With now approximately **161,000** open cases (as at end of March 2021) outstanding, the Loan Charge has done **nothing** to 'draw a line under usage of these schemes', which – as you made clear in your own report - was the stated objective of the Loan Charge when introduced.

The reality now is that there are still thousands of people who face the Loan Charge (and thousands who still face ongoing uncertainty due to having open enquiries), whilst many others have been pressured into paying unreasonably large and disproportionate settlements. Even many of those who were freed from facing the Loan Charge due to your halving the period of retrospection from 20 years to 10 years have not been refunded by HMRC. Alas, other than for a small minority of people who had not made voluntary payments to HMRC for loans no longer caught by the Loan Charge legislation, the nightmare of the Loan Charge continues.

What is crucial in relation to your Review is that the Loan Charge was tabled in draft form *before* the Rangers ruling in the Supreme Court – it was subsequently removed as there was a general election in June 2017. The Supreme Court decision which followed in July 2017 was a hugely inconvenient win for HMRC, **as it placed the PAYE liability firmly on the employer.** (Contractor loans, as consistent with lower tiers and previous tribunals, were not deemeed to be taxable –an argument that HMRC had consistently tried and failed to win). ***The Loan Charge was then redrafted with a retroactive effect that transferred the liability on to the individuals, thus working round the Rangers decision and making the loans taxable.***

(d) HMRC have admitted and sought to cover up the fact that they know that agencies were liable for the tax in many cases – and a court case decided that they couldn't instead pursue contractors retrospectively

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 – and instead have now pursued the contractors.

PAYE legislation, where it applies, is generally mandatory. The person classed as the employer has to 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 may be asked why agencies have not been subjected to claims for PAYE where contractors are involved. 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.

<u>It is assumed you were unaware of these facts, as they are not referred to within your report</u>.

An Upper Tribunal decision *Stephen Hoey v The Commissioners for HM Revenue and Customs* [2021] UKUT 82 (TCC) (discussed further below) 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 any Loan Charge tax.**

It would appear that HMRC were already aware of the risk that s.684(7A) would not work in the way they hoped. HMRC's novel (and now judicially-criticised) use of s684(7A) ITEPA 2003 has since been the subject of a Freedom of Information request. In the response, emails released indicate that HMRC's 'Contentious Issues Panel' was required to approve the use of this discretion in relation to some users of contractor loans tax avoidance schemes, precisely so that HMRC could then collect tax directly from contractors. It was also confirmed in those emails that this 'discretion' had only previously been used prospectively (so as to take an employer outside the need to operate PAYE) and had ***not*** previously been used to remove a PAYE liability which had already arisen.

When identifying the potential issues and risks associated with this unique (and first ever) use of this newfound 'discretion', HMRC officials warned Mr. Harra that "*it is highly likely we will be challenged on our use of the discretion in contractor loans cases*". An HMRC Press Office briefing, supplied as an attachment to these emails, contains further lines which confirm the position previously explained with those providers, agencies and suppliers which partner with HMRC to provide contract and freelance workers. The second of these 'lines' states – "*Where a contractor loans avoidance scheme involves an employer who is offshore, the end user of the contractor's services could be liable for tax in line with the PAYE regulations*". A notable and significant comment has been applied to this 'line', saying "*do we need to mention that since 2014, some agencies might be liable?*".

The 'lines' continue – "*Agencies and end users of services should be aware that they could be liable for tax and National Insurance contributions where they engage contractors who have used avoidance schemes. Agencies and end users of services are advised to review their procedures and ensure due diligence checks are carried out as appropriate*". The comment adjacent to this entry simply states "***do we want to say this?***". Other comments remain redacted, so it is quite clear that HMRC wish to withhold further important evidence on this subject, knowing that ***they*** are end users of these services themselves!

Whilst HMRC do have a discretion that allows them to relieve employers of the strict PAYE obligations (and then demand the tax from the employee, the contractor), this is only in certain circumstances, most of which contain a right of appeal by the employee to the Tribunal

(specifically because of the retrospective effect of such discretion being exercised). There is one provision found in section 684(7A)(b) of the Income Tax (Earnings and Pensions) Act 2003 where no such appeal right exists. However, most tax professionals consider that that discretion (which was introduced by the Finance Act 2003) was designed to prevent certain employers (for example overseas countries' embassies who engaged UK-resident staff) from having to operate PAYE and not to forgive previous non-compliance; hence, there is no need for a statutory right of appeal by the employee. Yet, HMRC have since started to deploy it as a further weapon to use against contractors, by asserting that it can be used in their cases, so as to allow historical PAYE that should have been paid by the employer to be demanded from the employee - when that is clearly *not* the intention of the 'discretion' and yet another case of HMRC wrongly interpreting the rules to suit themselves.

Accordingly, HMRC's 'view' has been rejected in (Hoey v HMRC [2021] UKUT 0082), which **made it clear that HMRC do not have the discretion to remove these strict PAYE obligations retrospectively**. It is understood that the case is now being taken to the Court of Appeal on 28 March 2022. However, most tax professionals consider that the Upper Tribunal was completely right on this particular point. Indeed, when the contrary view was taken by the First-tier Tribunal, former Inspector of Taxes and now-retired Tribunal Judge Richard Thomas, wrote an excoriating article in the *British Tax Review* making it clear that HMRC had wrongly exercised their powers under section 684(7A)(b) in that case: '*Stephen Hoey v HMRC and Philip Higgs and others v HMRC*: section 684(7A) ITEPA - a load of Hoey?'.

What is abundantly clear from these revelations is that, despite claiming publicly that they always pursue employers, in actual fact HMRC <u>failed</u> to pursue agencies, who were classed as employers - and indeed deliberately chose not to do so - but instead took the easier option of making the contractors liable.

(e) HMRC themselves engaged contractors using schemes (and signed off their tax returns) despite claiming they 'were always clear' these schemes were unacceptable

Since your Review was conducted and the report published, Freedom of Information requests have exposed the fact that HMRC themselves used contractors. The Loan Charge APPG published a report on this and the links to the various FOI requests and responses are contained within.

In October 2020, HMRC finally acknowledged that they <u>did</u> use contractors using DR schemes, having previously evaded numerous questions on the subject, including from the House of Lords Economic Affairs (EAC) Finance Bill Sub-Committee. As a result of those FOI requests and responses, it is now known that:

- In November 2018, over a year before you published your report, HMRC discovered that five contractors had been identified as having a history of using DR schemes and that one of those five was still engaged by HMRC at the time. This was not shared with the Economic Affairs Committee, despite corresponding on this very matter at this same time.
- HMRC conducted further analysis in November 2019 which found that HMRC (and RCDTS) had indeed used contractors who were using DR schemes <u>concurrent with the provision of their services to the department</u>. Once again, HMRC failed to inform the EAC/Sub-Committee. From the wording of emails, it appears that a decision was taken within HMRC to withhold this information, because HMRC knew it was 'sensitive' - i.e., that it was embarrassing to HMRC.

Clearly, this is key information and the fear is that, as well as withholding this information from the EAC, ***HMRC may also have withheld this information from you.***

Were *you* informed about this analysis during your review into the Loan Charge?

HMRC have continually given the false impression that they 'were always clear' that these schemes 'did not work' and that they communicated this effectively, thus warning people of any perceived risk. Yet the fact that HMRC itself was using contractors who were using such arrangements – and were signing off their tax returns – exposes this as simply not the case.

Although there were fifteen contractors identified in this instance, there are known to have been many more than this number, as what HMRC terms 'service contractors' – those working via a third-party provider (such as Capgemini and Fujitsu) - often used these arrangements.

If HMRC *themselves* were using contractors using these arrangements, and doing so well after December 2010 – in fact, right up until July 2020 - it is simply not credible to argue that the law was clear (when legally, it was not - until the Supreme Court ruling in 2017) or that HMRC were 'clear' in their communications.

With these five key revelations – none of which were publicly known at the time you conducted your review – it is apparent that the primary conclusion of your report must be revisited.

2. <u>HMRC interference in the choice of supposedly 'independent' advisers to your Review</u>

It is also apparent that there remain deep and serious concerns about the independence of the appointment process for advisers to the Loan Charge Review. Keith Gordon told the Economic Affairs Finance Bill Sub-Committee that the Government:

> "*strongly counselled against [the Morse Review] taking anyone who had given advice to a parliamentary committee because, to use the words in the Treasury email, they were compromised*".

When challenged on this during the evidence session, HMRC's Mary Aiston asserted that:

> "*it was [Sir Amyas Morse's] ask that they were people who had not had a public position in relation to the Loan Charge. I would agree that being a witness at a committee hearing should not per se exclude people from getting involved in an independent review*".

However, email disclosures from a separate Freedom of Information request clearly demonstrate that a Government official *had* in fact expressed reservations about the appointment of individuals who had appeared before a Select Committee. 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 FA 2011 legislation.

We would therefore request that you clarify the position on these appointments and offer an explanation as to why Keith Gordon was initially identified as a potential adviser, and then inexplicably removed from the list of appointees. It would be helpful if Keith could be afforded an opportunity to speak with you directly on this matter (and the many others contained within this letter) at your earliest convenience. Indeed, we understand that Keith's prime concern is

that the appointees would simply not have been aware of how the promoters adjusted the structure of the schemes after 2010 and therefore that you would have been left with the understandable (but incorrect) view that the law was 'clear' at that time.

3. Your recommendations are not being implemented as you envisaged

Moving on to the series of recommendations you made (in addition to the one already covered at the start of this letter), it is apparent that a number of these are not being treated in the 'spirit' you clearly intended and some are not being implemented in the way you intended at all.

On 22 January 2021, the House of Lords Economic Affairs Finance Bill Sub-Committee wrote a letter to Jesse Norman regarding their follow-up inquiry into the Loan Charge and confirming that they had looked at this subject in further detail.

As an example, you recommended that taxpayers who made *reasonable* disclosure of their scheme usage, but for whom the relevant year was unprotected, should not have that Unprotected Year included in the scope of the Loan Charge. What the Government did here was to alter the defined 'reasonable disclosure' to in effect mean 'full disclosure' - when 'reasonable disclosure' *should* mean that people did what was required at the time, not what HMRC would like to now say they *should* have done in hindsight.

Similarly, HMRC have arbitrarily determined that if they were within the time frames to issue an enquiry, but hadn't actually done so to protect the year, then this also does not qualify. Therefore, taxpayers who volunteered the information out of threat of the Loan Charge - but whom HMRC had not previously contacted and who are no longer impacted by the Loan Charge - remain subject to the contract settlement, contrary to your recommendation.

This is yet more retrospective rewriting of the rules – the evidence of Keith Gordon, barrister, to the Committee is quoted in the aforementioned letter as stating:

> "*…the statutory wording will not help taxpayers who had been taken out of self-assessment by HMRC, nor where disclosure was made in other forms; nor even where HMRC were given details of a DOTAS Scheme Reference Number on a taxpayer's tax return*".

Also quoted in the letter is evidence from Glyn Fullelove, Immediate Past President of the Chartered Institute of Taxation:

> "*More discussion may be needed with HMRC about the interpretation of [reasonable] disclosure. HMRC may currently feel bound by certain precedent and think that it cannot relax the meaning of the term further*".

As far as we are aware, very few people (if any at all) have been a beneficiary of this recommendation.

Also, where taxpayers had made 'voluntary restitution' payments for liabilities which were subsequently excluded from the scope of the Loan Charge, you rightly proposed – and the Government accepted – that HMRC should repay this money to taxpayers. However, the report on implementation said that no refunds of such 'voluntary restitution' payments had been made at the time of writing. HMRC estimated that around 1,000 individuals and 1,000 employers would be eligible to receive either a refund or a 'waiver of tax' and (according to Mary Aiston's evidence at the EAC session on 15 July) of the claims received thus far via the process implemented to enable those refunds (which was on an exclusively 'application-only' basis),

HMRC had only paid out **200** – with (apparently) the 'vast majority to be completed by the end of the calendar year'. We understand that the latest figure released via FOI is now around 440.

There was also a deadline (30 September 2021) for applying – for any application that had been made in time, HMRC would supposedly advise if it had been accepted or rejected and would specify the refund value its officials have calculated. If any applicant disagrees with this decision, then he/she is able to ask for a review – however, there is no right of appeal against the outcome of that review. Would that be considered as 'in the spirit of the recommendation'?

Another potential (but perhaps deliberate) 'catch' by HMRC which is causing difficulty is that the tax authority will only accept an application for repayment from the person or entity that was party to the original settlement. This means that where the settlement was executed by a company that no longer exists, it will first need to be restored to the Companies House register, which may involve getting a court order at some considerable expense. Again, the 'high bar' being set for what should be straightforward refunds is preventing individuals from receiving rightful restitution – is that really what you intended?

Your recommendation that *'affected taxpayers should be able to choose to unstack their outstanding loan balance, and elect to spread their balance over three years'* has also encountered impediments and has failed to meet expectations. The Low-Income Tax Reform Group's Meredith McCammond stated in her evidence to the Economic Affairs Committee (also quoted in the letter to Jesse Norman):

> "*I think HMRC envisaged about 21,000 people might benefit from making the spreading election but actually less than 2,000 [did]*".

She went on to call the numbers "*disturbing*". She concluded:

> "*There's something not right. First, the form is online, and the paper version is quite tricky to get hold of. But [secondly either] form asks you a whole raft of other questions. And the people we represent just don't have enough information or insight about their situation to be able to complete that form, and so because they can't complete the form, they can't make the election. There's also the problem that HMRC made the election 'irrevocable' and that [term is] going to really scare you*".

We would ask again – is that what you intended and do you consider this to be 'in the spirit of the recommendation'? Considering how HMRC have interpreted this recommendation and the outcomes now produced as a direct consequence of that interpretation, it seems clearly *not*.

Overall, it is evident that HMRC have not implemented your recommendations as you intended, which is unacceptable, if alas entirely expected. As a result, this whole issue must be looked at again in order to rectify this situation.

A fair resolution is urgently needed

All the evidence presented in this letter and taken together means that regrettably, your review has failed to deliver what you intended and has most certainly not resolved the Loan Charge issue and the scandal associated with it.

Based on the disclosure of all this evidence, some of which was clearly withheld at the time of the review, your key conclusion - that 'the law was clear from 9 December 2010' cannot now be reasonably justified or defended.

We therefore urge you to now make a public call to revisit this issue - knowing how many lives depend on it, knowing how many people are on the verge of mental breakdown and knowing that it is likely there will be more suicides if HMRC enforce the Loan Charge as it stands.

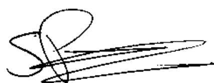
There has been a constant - and ever-growing cross-party opposition to both the Government's handling of the Loan Charge 'debacle' (to repeat the phrase Jim Harra used in internal emails) and also serious concern about the unacceptable behaviour and attitude of HMRC themselves, with support for victims from across the House expanding 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 FOI requests.

142 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 evidence which has emerged since your review, calling on them to revisit the subject and to come up with a fair resolution to the whole issue (which is essentially what you tried to call for). It would show great courage if you would also sign this letter – as a Parliamentarian yourself - and back the urgent calls for a further look at all these concerns, before yet more lives are ruined.

The Loan Charge – and the devastating consequences if it is now enforced - remains a serious problem which is not going away for the Government – as the amplified nature of the debate undoubtedly proves. You have been publicly quoted as saying "citizens pay the price for politicians' bravado". That can also be applied to the bravado – and sheer dishonesty – of those within HMRC who have misrepresented the Loan Charge, misrepresented the veracity of its legal basis and misrepresented the inevitable reality of its disastrous impact. There remain tens of thousands of citizens whose Loan Charge nightmare has not changed one iota as a result of your review.

Whilst we believe that you acted with the best of intentions, and with the information you had available at the time, we strongly urge you now - as a Parliamentarian - to have the courage to say that the Loan Charge must be looked at again and a resolution urgently found that, reasonably and fairly, finally ends this ongoing nightmare for many thousands of UK families.

Yours sincerely,



Steve Packham
Spokesman & Executive Director

Andrew Earnshaw
Executive Director

On behalf of the Loan Charge Action Group

Cc The Loan Charge and Taxpayers APPG
All members of the House of Lords Economic Affairs Committee
All members of the House of Commons Treasury Select Committee
James Murray MP, Shadow Financial Secretary (Treasury)