The Loan Charge Propaganda Scandal:
The Treasury and HMRC are misleading Parliament

Introduction

Tens of thousands of freelance workers face bankruptcy, severe anxiety and family breakdown due to the draconian 2019 Loan Charge, a new piece of legislation that contravenes established legal convention and bypasses all taxpayer protections. Extraordinarily the Loan Charge enables HMRC to go back 20 years and demand huge tax bills for arrangements that were entirely legal - and remain legal even today.

The cynical campaign of misinformation

HMRC and the Treasury are waging a cynical campaign of misinformation to justify the hugely controversial Loan Charge, and to cover up two decades of inaction. They are deliberately misleading MPs, peers, journalists and the public over the reality and impact of the policy, as well as the manner in which it was enacted.

The catalogue of shame

1. ***The Chancellor (Philip Hammond) and the Financial Secretary to the Treasury (Mel Stride) have both made dangerously false statements with respect to the Loan Charge***

   The Chancellor's appalling false assertion that the arrangements involved were "tax evasion" and "not legal at the time", embarrassingly led him to have to correct this elementary falsehood to the Treasury Select Committee[i]. Mel Stride also falsely claimed that the arrangements were unlawful, yet he has refused to respond to several letters requesting that he correct the record.

2. ***The Treasury claim that the measure was properly introduced and scrutinised***

   Where is the evidence of this? The reality of the introduction of the Loan Charge is as follows:

   a. *Little or no parliamentary scrutiny was undertaken*
   b. *The legislation was pushed through a rushed session of the Finance Bill Committee, with evidence only made available late in the afternoon before the following early morning session*[ii]
   c. *No proper or honest explanation was given by the Minister as to its basis or justification*
   d. *A flawed impact assessment was undertaken which failed to predict the devastating impact on individuals*[iii]
   e. *HMRC stated that it would have no effect on family stability, yet families are already failing and people are suffering serious mental health issues*
   f. *FOI requests have exposed that no estimate was made as to the number of bankruptcies that would ensue, destroying lives, careers and severely impacting present and future tax revenues*[iv]

3. ***HMRC have claimed the typical liability is around £13,000***

   This claim, made by senior HMRC officials to the Treasury Select Committee, is absurd; Loan Charge victims and their advisers know that people are facing far greater sums. The APPG Survey[v] revealed only 3.6% of respondents were liable for less than £15,000.

4. ***HMRC claim they have always said these arrangements did not work***
HMRC did nothing to communicate that arrangements of this kind were not acceptable until 2016, and only then via an information sheet (Spotlight 33) on their website. If HMRC believed that these arrangements were unacceptable they could and should have said so at the time, but they failed to do so.

5. ***HMRC and the Treasury say these arrangements are 'defective' and have 'never worked'***
The Treasury's use of the term 'defective' is completely meaningless and has absolutely no basis in law. Furthermore, HMRC regularly declares that the arrangements 'never worked', but the law says otherwise: *MacDonald (HMIT) v Dextra Accessories Limited [2005]* held that the loans achieved the "outcome promised when they were being marketed".

6. ***The Treasury claim that it 'consulted' over the Loan Charge***
The consultation in question had 388 replies of which an **overwhelming 90% opposed the Loan Charge.** Serious concerns were raised about the clear retrospective nature of the Loan Charge and also of the disastrous effect it would have. **The consultation was only a formality and the respondents were ignored.**

7. ***HMRC and the Treasury say that the sums being demanded are those which have been proven to be owed and that the tax they are demanding was always due***
HMRC failed to deal with these arrangements at the time and did not follow the processes already available to them to challenge them. The sums HMRC are demanding are NOT legally proven and in many cases are based on estimates. Numerous cases include tax demands for years where people were not even employed. In cases of 'closed years', HMRC missed statutory time limits to challenge people's tax affairs, hence the tax demanded is NOT legally due and to say otherwise is legally wrong.

8. ***HMRC and the Treasury say they are going after promoters***
HMRC issued a **deliberately misleading statement** on the 16th Feb 2019 referring to over 15 tax related convictions that had resulted in penalties and custodial sentences. This statement was designed to give the impression that these arrangements were illegal, and that action had been taken. Almost all these cases were examples of fraud and tax evasion. Crucially, none of these cases related in any way to the kinds of arrangements that are affected by the Loan Charge.[vi] There is no record of any loan arrangement provider being prosecuted, despite HMRC and the Treasury claiming otherwise. A recent Freedom of Information Act response has evidenced this beyond doubt[vii].

   The House of Lords Economic Affairs Committee concluded, "HMRC has a range of powers at its disposal to deal with promoters of tax avoidance schemes, but we have seen little evidence of action taken against those who promote disguised remuneration schemes. In the absence of publicised actions, **HMRC appears to be prioritising recovery of tax revenue over justice by targeting individuals, rather than promoters (who could be considered more culpable), so it can more easily recover liabilities.**" *(Paragraph 67)*

9. ***The Treasury and HMRC claim that the Loan Charge is not retrospective***
The 2019 Loan Charge is clearly retrospective: it changes the tax position of past years, back to 1999, and demands tax that HMRC would not otherwise be able to collect. It also reopens 'closed years', including instances where HMRC had opened tax inquiries and subsequently closed them saying no further tax was due. The Loan Charge legislation bypasses established taxpayer protections, undermining the tax system and the rule of law.

   Using existing powers, HMRC could have opened inquiries into loan arrangements, but failed to do so. Likewise they could have launched legal cases to prove tax was due, but they did not. ***The Government introduced the retrospective Loan Charge to enable them to go back and demand tax (with no right of appeal) when they failed to pursue it at the time.*** HMRC and HMT claim the Loan Charge is, "*a new charge on outstanding loan balances*". This is a contrived way of saying, "we have created a new legislation that allows us to go back and tax perfectly legal loan transactions since 1999 because we failed to change the law to prohibit these loan transactions".

Furthermore Lord Forsyth, Chair of the House of Lords Economic Affairs Committee, concluded that, ***"The charge is retrospective in its effect, claiming tax from years which should be closed to enquiry".*** [viii]

The current Chancellor, Philip Hammond, is on record in 2005 as stating that, *"...a taxpayer is entitled to know with certainty - be it an individual or a multinational corporation - what he may or may not do in planning his tax affairs [**...] a tax payer [...] is entitled to be protected from retrospective and retroactive legislation**"*.[ix] Similarly, David Gauke MP made similar points in 2008. The breath-taking hypocrisy of a Government in which Philip Hammond is now Chancellor, introducing this kind of retrospective legislation, is genuinely staggering.

10. HMRC and the Treasury are deliberately misrepresenting the outcome of the Supreme Court

The Supreme Court decision was with regard to the payment from Rangers FC into Employer Benefit Trusts (EBTs), it was NOT about contractor loan arrangements. HMRC's original argument was that loans were taxable as income: they lost repeatedly on this point. The Supreme Court confirmed that loans are loans, and are not taxable. Far from successfully litigating 'a number of cases', there have been only two. One went to First Tier Tribunal and HMRC won a case that was specific to its facts. The other was won only after some leniency permitted HMRC to change its argument at a late stage and found the EMPLOYER was liable to tax.

11. HMRC and the Treasury claim the arrangements were 'deliberate' and 'aggressive tax avoidance'

This is simply not true. The main reason people entered these arrangements was due to the chaos and confusion of the badly designed IR35 tax legislation which saw the risk of additional tax liabilities (Employers NI) landing on the freelancer, whose tax bill would therefore increase far above that of any 'normal employee'. People were told to get professional advice and they did so. Many people were pushed into these schemes by employers and contracting organisations, many had no choice but to take up these arrangements to be employed. Some employers actually forced people to end employment and take up self-employment using these arrangements.

12. The Treasury claim that loans are taxable and are 'clearly income' or the same as income

This is false, loans are not taxable by law. This has been proven numerous times including in *Dextra [2005], Sempra Metals Ltd [2008]* and indeed *Rangers [2015]*, in which HMRC finally dropped the 'loans are taxable' argument on the advice of their own barrister. The truth is that there was never any precedent in UK legislation that requires tax to be paid on the full amount of a loan, as if it were income. At the same time, the proper tax on these loans <u>*was*</u> paid. Contrary to the false impression being given, freelancers paid tax and National Insurance on the benefit in kind related to the loan, as required under the tax laws at the time. If the loans were always income as HMRC claim, then they legally are not subject to the Loan Charge. HMRC's own arguments are inconsistent.

13. HMRC and the Treasury claim this is about people paying their "fair share" of tax

Those who fall foul of the Loan Charge will have to pay far MORE tax than if they had operated through a Limited Company or been employed, without any of the benefits of employment. People are facing 80%+ back tax by rolling all liability under the Loan Charge into one tax year and combining with the effects of Income Tax, Employers/Employees NI, IHT and interest. This is not fair tax, this is punitive tax. **HMRC are also threatening that they will claim tax due on amounts charged by the payroll solution providers as fees if people do not agree to settle now - this would be tax on money that the individuals NEVER had.**

14. HMRC say they will agree manageable repayment plans

The claim that HMRC will agree a manageable payment plan does not reflect reality: expecting taxpayers to meet many years of liability over 5 or even 7 years is unrealistic. Attempts to extend those periods have been met with resistance and refusal. HMRC are knowingly misleading MPs, giving the false impression they are offering terms that will allow people to afford to pay. HMRC's rhetoric states that they have `a very good record' of helping people with time-to-pay arrangements, but there is no evidence of this. Known cases have ended up in the courts being prosecuted by HMRCs debt collection arm.

Worst of all HMRC are asking people, in writing, to take out commercial loans to pay their tax bill. This is akin to the actions of a loan shark. They know people can't afford to pay and therefore can't afford to pay off an additional loan. It is grossly irresponsible for HMRC to be pushing people into yet more debt they cannot afford to pay.

15. ***HMRC give the impression there will be few if any bankruptcies:***
From the APPG Inquiry survey into the Loan Charge a staggering 51% of respondents said they will be in danger of bankruptcy, and 55% said they would chose bankruptcy over extended time to pay arrangements. Even based on the HMRC's estimate of 50,000 people facing the Loan Charge, this means **over 25,500 people – and their families – face bankruptcy**. Due to the sheer magnitude of the sums being demanded, repayment is impossible, leaving some with no choice but to go bankrupt. In some cases, bankruptcy would be a much more affordable option than HMRC's unrealistic payment plans. **HMRC's figures detailing how much 'revenue' the Loan Charge will collect are also deeply flawed: bankrupting thousands will cause a significant loss to the economy and a loss of ongoing tax revenue to the public purse.** Many of those facing the Loan Charge who work in finance or registered healthcare will not be able to work again due to bankruptcy. Those who can't work will not be able to pay taxes, a bitter irony to HMRC's aggressive pursuit of revenue.

16. ***HMRC claim that they have never been involved in disguised remuneration schemes***
The truth is that HMRC contractors, contracted through HMRC approved supplier agencies, openly used arrangements that HMRC now claim are unacceptable and are facing the Loan Charge.

Conclusion

To try to justify an unjustifiable policy, the Treasury and HMRC have been consistently and cynically misleading MPs over the Loan Charge, to cover up the complete failure of HMRC to tackle these kind of arrangements when they already had the powers to do so.

The Solution

The obvious and fair solution would be for the Loan Charge to take effect from the date of Royal Assent of the 2017 Finance Act. This would avoid the disastrous consequences of the retrospective element and would give clarity and certainty from this point onwards regarding loan arrangements.

It would also avoid the disastrous consequences that will otherwise occur should this ill-considered policy be allowed to continue without being amended.

Loan Charge Action Group
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[i] http://data.parliament.uk/DepositedPapers/Files/DEP2018-1144/Letter_Philip_Hammond_to_Nicky_Morgan.pdf
[ii] https://hansard.parliament.uk/Commons/2018-01-09/debates/63d31d09-b11f-45b1-b7d1-221ddf493310/Finance(No2)Bill(FirstSitting)
[iii] https://www.gov.uk/government/publications/disguised-remuneration-further-update/disguised-remuneration-further-update
[iv] https://www.whatdotheyknow.com/request/487899/response/1176411/attach/html/2/FOI2018%2001109%20Wright.pdf.html
[v] http://www.loanchargeappg.co.uk/wp-content/uploads/2019/03/Loan-Charge-APPG-Loan-Charge-Inquiry-Survey-Report-March-2019.pdf
[vi] https://twitter.com/keithmgordon/status/1097041029386129408
[vii] https://www.whatdotheyknow.com/request/553089/response/1336224/attach/2/FOI2019%2000534.pdf?cookie_passthrough=1
[viii] https://www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-finance-bill-sub-committee/news-parliament-2017/powers-report/
[ix] https://publications.parliament.uk/pa/cm200506/cmhansrd/vo050607/debtext/50607-08.htm